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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1915—JANUARY TERM, 1916.

VOLUME XCIX.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

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COLUMBIA, MISSOURI.
PRESS OF E. W. STEPHENS PUBLISHING COMPANY,
1916.

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73317

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1915.

SALEM GENHO, APPELLEE, V. GEORGE R. JACKSON, APPELLANT.

FILED NOVEMBER 13, 1915. No. 18289.

1. **Pleading:** DEMURRER: WAIVER. Where a party demurs to a petition because several causes of action are improperly joined, but answers over after an adverse ruling thereon, and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in such ruling.

2. ———: ———. When a petition purports to set out several causes of action, it will be held good against a general demurrer, if one, or more, cause of action is well pleaded.

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

Dravo & Dilworth, for appellant.

H. M. Sinclair and *A. J. Shafer, contra.*

MORRISSEY, C. J.

Action for libel and slander and damages flowing therefrom. November 8, 1911, plaintiff consigned a car-load of cattle to Wood Brothers Commission Company of South Omaha. The cattle had been penned in the railroad stock-yards at Holdrege. Defendant also had cattle in these stock-yards, and claims that four head of his fat cattle were taken out of his pen and four head of smaller cattle substituted. Discovering the exchange of cattle, he left Holdrege to follow plaintiff's shipment to South Omaha,

and, when passing through Lincoln, sent the following telegram:

"Lincoln, Neb., Nov. 8, 1911.

"Wood Bros. Commission Co. Hold cattle and proceeds consigned to you by Salem Genho, Bertrand. Way-bill No. 20, Nov. 8, car C., M. & St. P. 1253. Part contents stolen. Am replevying same. Have officer arrest party in charge. Am following car. George R. Jackson."

It is alleged that this telegram was intended to, and did, charge the plaintiff with the crime of larceny. There is also an allegation that because of this telegram the sale of plaintiff's cattle was delayed and they were subsequently sold on a falling market, etc. Items of damage on this cause of action aggregating $124.69 are set out. There is a further allegation of slander because of words spoken to the sheriff of Phelps county, wherein defendant charged plaintiff with the larceny of his cattle. There is a prayer for judgment in the sum of $1,124.69. By general demurrer to the petition it was alleged that several causes of action were improperly joined, and that the petition did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant answered, denying certain of the allegations of the petition, pleading specially to others, and finally asking an affirmative judgment against plaintiff for what he alleged to be the difference in the value of his cattle and of those substituted. There was a verdict and judgment in favor of plaintiff for $275.

It is insisted that several causes of action are improperly joined, and therefore the court erred in overruling the demurrer. A like question was presented in *Worrall Grain Co. v. Johnson*, 83 Neb. 349; but the court held that in answering over after the ruling on the demurrer, alleging that several causes of action were improperly joined, defendant waived his right to complain, citing with approval *Becker v. Simonds*, 33 Neb. 680; *Buck & Greenwood v. Reed*, 27 Neb. 67; *Pottinger v. Garrison*, 3 Neb. 221; *Lederer v. Union Savings Bank*, 52 Neb. 133; and

Dorrington v. Minnick, 15 Neb. 397. In *Dinges v. Riggs*, 43 Neb. 710, plaintiff pleaded three causes of action, namely, malicious prosecution, damage to plantiff's business by arresting occupants of her place, and slander. The court said: "Dinges assigns here that the district court erred in overruling his motion to compel the plaintiff below to elect upon which one of the three causes of action stated in her petition she would rely. There was no error in this ruling of the court. The causes of action, and each of them, stated in the petition sounded in tort, and they all grew out of and were connected with the same transaction, and were therefore properly joined."

As to the contention that the petition did not state a cause of action, it is sufficient to say that as to one of the causes of action there is no complaint. The demurrer went to the sufficiency of the petition as a whole, and, if any cause of action was well pleaded, no error can be predicated on the ruling thereon.

The succeeding assignments of error are aimed at the instructions of the court; but, when the instructions are considered in connection with the pleadings and the proof, no ground of criticism appears.

The cause was fairly tried and the judgment is

AFFIRMED.

SYLVIA KISER, APPELLEE V. CHARLES B. DENNEY, APPELLANT.

FILED NOVEMBER 13, 1915. No. 18347.

Contracts: TIME FOR PERFORMANCE: QUESTION FOR COURT. In the construction of an executory contract, which does not by its terms fix a time for its performance, when there is no fact in dispute, the question of reasonable time for its performance is one of law to be determined by the court.

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

Weaver & Giller, for appellant.

James B. Kelkenney and *John E. Quinn, contra.*

MORRISSEY, C. J.

March 8, 1909, plaintiff paid defendant $100 on a contract for the purchase of certain real estate at the agreed price of $5,000. The contract, which was in writing, provided: "A complete abstract of title, brought down to date, is to be furnished. Should any defect be found in the title and insisted upon, this agreement shall be null and void, unless otherwise agreed, and all moneys paid over by said Kiser shall be returned to her." A few days later an abstract was furnished plaintiff which disclosed a suit pending, in the district court for the county where the real estate was situated, against the holder of the record title. It is conceded that the suit constituted at least a contingent defect in the title. Plaintiff demanded a return of the money, and March 23, 1909, commenced this action to recover the amount paid. April 1 following, defendant secured the dismissal of the suit in the district court, and made a tender of the deed and abstract. The tender was not accepted. On the trial of this cause the jury was requested to determine whether or not defendant tendered the deed and abstract within a reasonable time. The jury found that he did not, and returned a verdict in favor of plaintiff for the amount paid on the contract.

We are called upon to decide whether there was a question of fact to submit to a jury, or merely a question of law to be determined by the court. There is no dispute in the evidence. But 23 or 24 days elapsed between the making of the contract and the tender of a sufficient deed and an abstract showing a clear title. There is nothing in the language of the contract to indicate that time is of its essence. It provided for the usual formalities in the

transfer of the title to real estate. The contract contemplated the preparation of the deed and abstract, and their submission for examination, but did not fix a time within which this should be done. An abstract was prepared, counsel for plaintiff made objection because of the pending suit, steps were taken to secure its dismissal, it was dismissed, and on April 2 a complete tender was made.

In *Spoor* v. *Spooner,* 12 Met. (Mass.) 281, in the body of the opinion, it is said: "As to contracts where something is to be performed, and the contract is silent on the subject, what is a reasonable time for its performance is held to be matter of law. And so, where the facts are agreed, reasonable time is matter of law. But where the facts are controverted, and the motives of the parties are involved in the question, there reasonable time is a question for the jury." This is cited with approval in *Williams v. Powell,* 101 Mass. 467, 3 Am. Rep. 396. To the same effect is *Pratt v. Farrar,* 10 Allen (Mass.) 519. The court said: "The facts not being in dispute, what was reasonable time was rightly treated as a question of law." And the same doctrine is reiterated in *Lewis v. Worrell,* 185 Mass. 572. In *Chicago, R. I. & P. R. Co. v. Boyce,* 73 Ill. 510, an action by a passenger for loss of his baggage while in the warehouse of the railroad company, the question was what constituted a reasonable time or opportunity for the passenger to claim and take away his baggage. There the court said: "What constitutes such reasonable time and opportunity is a mixed question of law and fact, depending very much upon the peculiar facts of each individual case; but when the facts are undisputed it is purely a question of law, and the court should decide it."

In the case at bar there was no controverted question, and it follows that there was nothing to submit to the jury. The facts not being in dispute, the question of reasonable time was purely a question of law. The briefs of parties are silent as to what constitutes reasonable time under the circumstances in this case, and we are not asked to offer a suggestion on the question. However, in order that

the litigation may be ended, we think it is well to say that, taking the record as it stands, and construing the contract in accordance with the usual rules of business, a tender was made within a reasonable time.

REVERSED AND REMANDED.

SEDGWICK and HAMER, JJ., not sitting.

ERNEST J. FLUCKIGER, APPELLANT, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLEE.

FILED NOVEMBER 13, 1915. No. 18196.

Carriers: NEGLECT OF LIVE STOCK: LIABILITY OF CARRIER. A shipper of live stock, furnished by an interstate carrier with transportation under a contract to care for, feed, water and unload his own stock when necessary, who actually accompanies his shipment on the train in which they are transported, and consents to and participates with the carrier in a violation of the federal statutes relating to such shipment, is not in a position to maintain a civil action for damages against such carrier, alleged to have been caused by such violation.

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

M. F. Harrington and *Hugh J. Boyle,* for appellant.

Lyle Hubbard, Wymer Dressler and *A. A. McLaughlin, contra.*

BARNES, J.

Action in the district court for Holt county to recover damages to an interstate shipment of live stock from Atkinson, Nebraska, to Chicago, Illinois, by reason of a failure to comply with the provisions of chapter 3594, 34 U. S. St. at Large, p. 607.

It was alleged in the petition, in substance, that the defendant company wrongfully and unlawfully kept 67 head of plaintiff's cattle, which constituted three carloads of the shipment in question, in the cars for 54 hours

without unloading and feeding them, and without water and food during all of said time; that they were thereby caused to shrink in weight, to plaintiff's damage and loss in the sum of $659.49, for which amount he prayed judgment.

The defendant, by its answer, denied specifically and generally every allegation contained in the petition except those expressly admitted. It admitted that, on or about the time complained of, it was a carrier organized under the laws of the state of Illinois, and owned and operated a line of railway from Atkinson, in Nebraska, to Chicago, in Illinois, and was at that time, and is now, a common carrier for hire of freight and passengers over its said line of railway. It was further admitted that, on or about September 9, 1911, it received from plaintiff at Atkinson, Nebraska, for transportation to Chicago, Illinois, four carloads of cattle, and alleged that it forwarded the same to destination with all due haste and dispatch, and was without fault or negligence in handling or forwarding the shipment. Defendant further stated that it received said cattle under and by virtue of the terms of a written contract by which plaintiff agreed to load, feed, water, and take care of said stock in transit at his own expense and risk, and in consideration of such agreement, and to enable plaintiff to comply therewith, he was given transportation on the train in which said stock was transported to Chicago, Illinois; that he actually accompanied said stock in compliance with the agreement and assumed the duty of feeding, watering, looking after, and caring for the stock in transit; that if said cattle, or any of them, were injured in transit, the same was caused by reason of the failure or negligence of the plaintiff, and not by reason of the fault or negligence of the defendant. A copy of the contract was attached to and made a part of defendant's answer.

The cause was tried to a jury, and resulted in a verdict and judgment for the defendant. The plaintiff has appealed.

The act of congress cited by appellant (34 U. S. St. at Large, ch. 3594, p. 607) provides that a railroad company engaged in carrying or transporting cattle from one state to another shall not "confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight: Provided, that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours," and imposes a penalty upon the railroad company if the act is violated. These animals were confined for more than 36 hours, which constituted a violation of the act. The question presented is whether this plaintiff is in a position to recover damages from the defendant. The plaintiff accompanied this stock as caretaker under a written contract with the defendant, whereby he assumed the duty of feeding, watering, and caring for the stock in transit. He made no request of the company to unload the stock for feeding and watering, but testified upon the trial that the cattle were fed in racks provided for that purpose, and that he preferred to have the cattle taken through to the place of destination as rapidly as possible without unloading. It seems clear that where the shipper, as a caretaker, participates with the company in the course pursued, connives with and helps bring it about, he should not be permitted to recover damages thus occasioned to which he himself contributed. This was the view taken by the trial court, and the jury was so instructed.

The judgment of the district court is therefore

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

MARY E. MCNAMARA, APPELLEE, v. WILLIAM C. MCNAMARA ET AL., APPELLANTS.

FILED NOVEMBER 13, 1915. No. 18349.

1. **Witnesses:** CONFIDENTIAL COMMUNICATIONS. Threatening letters by a husband to his wife while they are living apart in contemplation for a suit for divorce are not confidential communications.
2. ———: ———. Statements by one contemplating marriage, to his intended wife, as to the nature and extent of his property interests, are admissible in evidence in a proceeding to subject his property to the payment of a judgment rendered in an action for a divorce.
3. **Divorce:** CREDITORS' SUIT: SUFFICIENCY OF EVIDENCE. Evidence examined and found sufficient to sustain the judgment of the district court.

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

H. G. McIntire, E. C. Page and *Alfred Pizey,* for appellants.

R. E. Evans and *M. F. Harrington, contra.*

BARNES, J.

This was an action in the nature of a creditor's bill to subject the land of the defendant William C. McNamara to the payment of a judgment for permanent alimony and an allowance for the support of his infant children, rendered by the district court for Dakota county on January 4, 1912. The judgment was transcripted to the district court for Brown county, where the defendant's land was situated. Execution was issued thereon on the 17th day of June, 1912, and returned wholly unsatisfied. The action was commenced on the 8th day of July, 1912.

It was alleged in the petition that the judgment of the district court for Dakota county was in full force and effect, and had never been reversed, modified, superseded or appealed from; that there was due from William C. McNamara, to his wife, the sum of $6,000 and interest,

and in addition instalment sums aggregating $300 and interest; that on June 17, 1912, for want of goods and chattels, execution was levied on the land in suit; that the decree is a valid lien on the defendant's land, subject to a first mortgage lien of $10,000 and interest; that the mortgage for $12,888.80, executed to defendant's brother, Cornelius, is fraudulent, void, and without consideration; that William C. McNamara and his brother, Cornelius J. McNamara, connived and conspired together to cheat and defraud the plaintiff out of the alimony which he, William C. McNamara, then owed her, and which had been allowed by the district court for Dakota county, Nebraska. Separate answers were filed by the defendants, admitting the entry of the decree of divorce of January 4, 1912, the filing of a transcript thereof in Brown county, Nebraska, the issuance of an execution thereon, but denied that the decree had not been appealed from, or that there was any fraud in the execution of the mortgage in question; alleged the *bona fides* of the indebtedness of William C. McNamara to his brother, Cornelius, resulting in the execution of the mortgage claimed to be fraudulent. Separate denials were filed by the plaintiff to the answers of the defendants. The cause was tried to the district court for Brown county, Nebraska, without the intervention of a jury, and resulted in findings and a judgment for the plaintiff. The defendants have appealed.

Appellants contend that the court erred in permitting the plaintiff, Mary E. McNamara, to testify against the defendant, who was her former husband, for the reason that the conversations in question constituted confidential communications between husband and wife.

The record discloses that plaintiff left her husband some considerable time before she commenced her action for divorce; that she resided at that time at her father's home in Dakota county, Nebraska. Plaintiff had informed her husband that she was about to commence her action. In response he wrote a letter to her, in which he stated, in substance, that if she commenced the action he would beat

her out of every dollar; that he would arrange it so that it would be lawed through the courts of Dakota county, and that she would be hauled into the United States courts. This was the letter which the trial court was asked to exclude. It appears that when this letter was written the parties were living apart, and were dealing with each other at arm's length. It cannot be claimed that this was a confidential communication between husband and wife. The court, therefore, did not err in refusing to exclude this letter. *Reed v. Reed,* 70 Neb. 779.

The other evidence to which objection was made was a statement to plaintiff by her husband, before they were married, that the ranch in Plymouth county, Iowa, was owned by himself and brother and he had a half interest therein. The evidence discloses that at the time they were residing on the Plymouth county ranch they were visited by defendant's brother, Cornelius, who lived in Montana, and in a conversation with plaintiff Cornelius told her that her husband owned an interest in the Plymouth county ranch. He said: "He does really own the place, but it was put in my name for protection, and I am willing to deed it back to him any time he wants it." He further said that if the ranch was sold he "would give my husband his share of it." We think this evidence was properly received.

It is next contended that this action was prematurely brought, and in support of this contention appellants cite section 47, ch. 25, Comp. St. 1911, which reads in part as follows: "A decree of divorce shall not become final or operative until six months after trial and decision except for the purpose of review, by proceedings in error or by appeal and for such purposes only, the decree shall be treated as a final order as soon as rendered." It will be observed that the decree was rendered on the 4th day of January, 1912, and this action was not commenced until the 8th day of July of that year. It follows that, so far as the rights of the parties were concerned, the decree at the time of the commencement of this action had become

final, and was subject only to review or modification by appeal. It is true that the defendant William C. McNamara had appealed to the supreme court of this state, but no supersedeas was ever filed or allowed. The judgment was finally modified as to the amount of alimony, and it therefore cannot be successfully contended that the action was prematurely brought.

Finally, it is contended that the evidence does not support the decree. The testimony shows that when the Plymouth county ranch was sold it brought at least $45,000. The plaintiff testified that she was told that it brought $75,000, and there was evidence tending to show that William received $5,100 from his brother, with which he settled a claim with his former wife; that he received $10,000 from his brother, which was used in part payment of the purchase price of the land now in controversy, but as to any subsequent sums paid him by his brother the evidence is such that the trial court was justified in the conclusion that the mortgage executed by him to his brother on March 26, 1907, was without consideration, and was made and received with the intent to prevent the plaintiff from obtaining anything as the avails of her divorce suit, which as above stated, was commenced on March 7 of that year.

After a careful review of all of the testimony, we have reached the independent conclusion that the findings of the trial court are fully supported by the evidence, and we fail to see how a court of conscience could have rendered any different decree than the one here complained of. The judgment of the district court is therefore

AFFIRMED.

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

FRANK HOOKER, ADMINISTRATOR, APPELLEE, V. WABASH RAILROAD COMPANY, APPELLANT.

FILED NOVEMBER 13, 1915. No. 18373.

1. **Railroads:** TRESPASSER ON TRACK: CARE REQUIRED. A person walking upon a railroad track at a point where there is no public crossing, and where pedestrians have no right to the use of the track, is a trespasser; and, if he is deaf, he is required to use extraordinary care and exercise his sense of sight to learn of the approach of trains.
2. ———: ———: CONTRIBUTORY NEGLIGENCE. In such a case, if the trespasser fails to use his remaining senses and is struck by an approaching train, he is guilty of contributory negligence, and, unless it is shown by a preponderance of the evidence that the engineer in charge of the train carelessly ran him down, the company is not liable for his injury or death.
3. ———: ———: NEGLIGENCE. Where the undisputed evidence shows that none of the train crew had any knowledge that an adult person walking upon the track was deaf, or was afflicted with any other infirmity, that the engineer used all proper signals to warn him of the approach of the train up to the instant when it appeared that he was not going to step off of the track, and at that instant did everything possible to stop the train and avoid a collision, it cannot be said that the engineer carelessly ran the pedestrian down.
4. ———: ———: LAST CLEAR CHANCE. The facts shown by the evidence set out in the opinion are not sufficient to warrant the application of the rule of the last clear chance.

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

John L. Webster and *James L. Minnis,* for appellant.

Earl R. Ferguson, C. R. Barnes and *Harry W. Shackelford, contra.*

BARNES, J.

Appeal from a judgment awarding the administrator of the estate of William Davies $15,000 against the Wabash Railroad Company for alleged negligence in the killing of plaintiff's intestate.

It appears that the accident which caused the death of Davies occurred in Page county, in the state of Iowa, where the plaintiff was appointed administrator of the estate of the decedent. Thereafter the administrator commenced an action in the district court for Douglas county, in this state, and on the trial had a verdict and the judgment complained of.

It is appellant's first contention that because the statute of the state of Iowa was neither pleaded nor proved, authorizing a recovery for death by alleged wrongful act, no recovery could be had in this action. In other words, appellant contends that the courts of this state should not presume that the statute law of a sister state, in derogation of the common law, and which alone gives a right of recovery, is the same as the statute of this state. There is much force in this contention and there are respectable authorities which support it, but we prefer to base our judgment on another ground, and therefore decline to decide this question.

It appears that William Davies, on the 16th day of October, 1910, at about 3 o'clock in the afternoon, started from Coin, a little town in Page county, Iowa, to go to Blanchard, which was about six miles distant; both towns being situated on the line of the Wabash railroad. Decedent, without permission, license or invitation, started to walk along the railroad track on his way to the last-named town. After he had proceeded some distance, the second section of freight train No. 62, running from Council Bluffs to Stenberry, Iowa, approached him from the north, and, when distant about half a mile, the engineer sounded the whistle of the locomotive for a road crossing, to which Davies paid no attention. There is no dispute in this evidence.

H. E. Wilson, the conductor of the train, testified, in substance, that his train was made up of a locomotive and 10 or 12 cars; that the scheduled running time was from 10 to 12 miles an hour; that the train was behind time from one to one and a half hours; that he was riding

in the cupola of the caboose; that, after the freight train had passed around the curve at a point about a mile east of Coin, he noticed a man on the track ahead of the engine; that the engineer gave a road crossing whistle at a distance of about half or quarter of a mile before the engine reached the place where the accident occurred; that afterwards the engineer gave successive short blasts of the whistle; that from his position he could not see the man after the time when the engineer began giving these short blasts; that the engine struck the man and knocked him to the west side of the track; the train was backed up; the man was picked up by the brakeman and "myself" and put in the caboose; his arm and leg were broken, but he was still alive. The accident occurred between 3 and 4 o'clock in the afternoon on a bright, sunny day. The train proceeded to Blanchard, where Davies was taken into the waiting room of the depot, placed on a cot, and a doctor sent for. On cross-examination the witness testified that, when he saw Davies walking upon the railroad track, there was nothing about his appearance to indicate that he could not or would not get off of the track. The witness also testified that he applied the air by working an appliance in the caboose, after the engineer had applied the emergency stop.

J. G. Kinslow, the engineer, testified, in substance, that he first saw Davies when the engine had rounded the curve east of Coin, at which time he was about half a mile ahead of the train; that when he first saw him he whistled for the road crossing, and when he came close he gave what is known as the "stock whistle," consisting of short, sharp blasts of the whistle. When he ceased giving the whistles, the locomotive was probably from 50 to 100 feet away from Davies. He did not observe Davies pay any attention to the signals, and when he became aware of that fact he reversed the engine, applied the air and did all in his power to stop the train, but failed to bring it to a stop until after Davies had been struck. On cross-examination the witness testified that the train was equipped

with Westinghouse automatic air brakes, and that all the appliances of the locomotive and train for stopping were suitable and in proper condition; that there was nothing on either side of the right of way to have prevented Davies from stepping from the railroad track in time, and nothing to prevent him from seeing the train if he had looked; that the whistle which was blown could have been heard for a mile and a half; that, after he ceased giving the short blasts of the whistle, he instantly applied the air brakes; that from his experience in the railroad business he would say the stop made was a good one; that, when he observed Davies upon the track, he did not notice anything in his manner of walking to indicate that he was physically disabled, nor to indicate that he would not step off the track in time to avoid an accident; that Davies did not look back, but that there was nothing peculiar about him to arouse any suspicion as to his inability to avoid an accident; that at the time he applied the air brakes he put the engine in emergency.

A. V. Hughes, the locomotive fireman, testified, in substance, that he remembered the giving of the whistles, and that when they were stopped the brakes were applied. On cross-examination he further stated, in substance, that he was looking ahead as the train approached Davies and observed him until the time when the pilot of the engine struck him. There was nothing about his appearance which indicated that he was not aware of the approach of the train or that he did not know the train was coming. What the engineer, Mr. Kinslow, did, by way of setting the brakes and applying the air and using the sand, was the proper thing for him to do; that after he quit whistling he endeavored to stop the train as fast as he could.

W. L. Dunmire testified, in substance, that he was acquainted with Davies and saw him on the day of the accident; that they dined together that day, and after dinner they walked down to the Wabash railroad to a point where there was a dredge boat used in digging a ditch; that they remained there for 15 or 20 minutes, and from that point

Davies started to go to Blanchard on foot; that he went south to the railroad track, and after he got on the track he started south to the town of Blanchard; that he (Dunmire) heard the whistle of the locomotive, but was not where he could see the accident. The testimony shows that Dunmire cautioned Davies to be careful, as there were a great many trains passing along the railroad track about that time; that Davies said he "would have to keep a lookout for the train, keep his peepers open, because he had to use his eyes instead of his ears."

G. W. Means, a resident of Coin, who had been acquainted with Davies for 10 or 12 years, testified that he talked with him on the afternoon of the day he was killed; that Davies understood the lip language, or that, in other words, a man he was well acquainted with could talk to him in ordinary conversation, and he could generally repeat right after you what you said, and if it wasn't correct you shook your head and repeated it over, and then he would repeat it over right after you; that Davies said he came down on the morning train, and that he was going to Pan Dunmire's for dinner, and was going from there to the dredge boat, and was going to walk from there down to Blanchard. The witness testified that he said to Davies, "Billy, you want to be careful on the railroad track, for they are running a good many extras on the Wabash now, they might pick you up," and that Davies replied, "O, I am not afraid. I will be careful."

W. L. Annan testified that he saw Davies at Coin at the time when Means was present, and heard part of their conversation; that he had known Davies for 20 or 25 years and talked with him frequently; that Davies would watch one's lips when they were talking to him, and if he did not understand them he would so indicate, and if they would tell him over he would repeat it. The witness stated that Davies said: "I am going to Blanchard, by way of the dredge boat which was working near the tracks;" that Means had spoken to him about the extra

trains, and had said: "You had better be careful;" and that witness himself had said, "Billy, you want to be awful careful;" that, after Means had called his attention to Davies being deaf, he (Annan) told him he wanted to be awful careful, and that Davies had replied, "All right, I hain't afraid."

W. L. Dunmire, on being recalled, further testified that Davies had said he "would have to keep his eyes open for that train, because he had to depend on his eyes for his ears."

It was conceded that none of the train crew had any acquaintance with Davies or knowledge of his infirmity.

At the close of the evidence the defendant requested the court to direct a verdict in its favor, which request was refused. Defendant contends that this was prejudicial error, for the reason that plaintiff was not entitled to a verdict in his favor on the law and the facts of this case.

It clearly appears that plaintiff's decedent was totally deaf, and that he knew the necessity of using his sense of sight to protect himself from danger. Before he went upon the railroad track, he was cautioned by two of his friends and acquaintances to look out for the approach of trains. He responded that he would look out, because he had to use his eyes instead of his ears. He said: "O, I am not afraid. I will be careful." It therefore devolved upon Davies to use extraordinary care and exercise his sense of sight to learn of the approach of the train. *Toledo, P. & W. R. Co. v. Hammett,* 220 Ill. 9; *McIver v. Georgia S. & F. R. Co.,* 108 Ga. 306.

Davies was a trespasser upon the track, was deaf, and, having failed to use his remaining senses in order to ascertain the approach of the train, was clearly guilty of contributory negligence. Unless it was shown by a preponderance of the evidence that the defendant's engineer carelessly ran him down, no recovery could be had in this case. *Chicago, B. & Q. R. Co. v. Wymore,* 40 Neb. 645; *Chicago, B. & Q. R. Co. v. Grablin,* 38 Neb. 90; *Chicago,*

B. & Q. R. Co. v. Wilgus, 40 Neb. 660; *Omaha & R. V. R. Co. v. Cook,* 42 Neb. 577.

We are of opinion that the evidence in this case does not sustain the contention of the appellee that the defendant's engineer wilfully ran decedent down. It clearly appears that none of the agents or servants of the railroad company had any reason to suppose that Davies was deaf, and that he would not get off the track in time to avoid being struck by the engine; that, as soon as the engineer became aware of the fact that Davies would not get off the track, he immediately applied the air brakes, reversed his engine and sanded the track, in order to stop the train and avoid the collision. Therefore, it cannot be said that the engineer was guilty of a want of reasonable care. It must be remembered that the railroad company was entitled to have its track clear in order that it might operate its trains for the benefit of the public. The safety of the traveling public also demands that the right of way of the railroad company should be unobstructed. If the company owed a duty to run its trains with reference to trespassers upon the track, look out for them, slacken speed and promptly stop whenever they had reason to expect them to be upon the track, the public would suffer thereby. The railroad company, as a public servant, owes a duty to the public to give prompt and rapid transit to its patrons as carriers of both passengers and freight. An individual who is a trespasser cannot justly claim that the railroad company shall forget, even for any moment of time, its duty to the general public and look out for him who shall be, first, guilty as a trespasser, and, second, guilty of gross negligence in not looking out for himself. *Illinois C. R. Co. v. Eicher,* 202 Ill. 556. The rule of law is that, where a man walking upon the track is a trespasser, and is negligent in failing to keep a lookout for approaching trains up to the time of the accident, and there is nothing to prevent him from getting out of the place of danger by stepping off of the railroad track, the defendant company is not liable, unless its engineer

is guilty of a want of reasonable care under all the circumstances.

Appellee contends, however, that the right of recovery in this case depends upon the doctrine of the last clear chance. It is clear, however, from the great weight of authority, that in the case at bar the facts are not sufficient to invoke that doctrine. There was no time after Davies was discovered upon the track, up to the very minute when he was struck by defendant's engine, that he could not have avoided the injury to himself by merely stepping off the railroad track, and we think it cannot be said that he was discovered to be in a state of peril at any point of time before the engineer used his utmost endeavor to stop the train. *French v. Grand Trunk R. Co.*, 76 Vt. 441; *Carrier v. Missouri P. R. Co.*, 175 Mo. 470; *Green v. Los Angeles T. R. Co.*, 143 Cal. 31; *Holwerson v. St. Louis & S. R. Co.*, 157 Mo., 216; *Merritt v. Foote*, 128 Mich. 367; *Gilbert v. Erie R. Co.*, 97 Fed. 747; *Drown v. Northern O. T. Co.*, 76 Ohio St. 234; *Dyerson v. Union P. R. Co.*, 74 Kan. 528; *Dunlap v. Chicago, R. I. & P. R. Co.*, 87 Kan. 197; *Missouri P. R. Co. v. Prewitt*, 59 Kan. 734.

As we view the record, the district court erred in refusing to direct a verdict for the defendant. The judgment of the district court is therefore reversed, and the cause dismissed.

REVERSED AND DISMISSED.

SEDGWICK and HAMER, JJ., not sitting.

LUTHER C. WORLEY ET AL., APPELLEES, V. MATILDA INEZ WIMBERLY ET AL., APPELLEES; HENRIETTA GRIM ET AL., APPELLANTS.

FILED NOVEMBER 13, 1915. No. 18413.

1. **Wills:** CONSTRUCTION. In the construction of a will the intention of the testator, if it can be ascertained, must govern. Such intention

should be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will.

2. ———: ———. Under provisions of the testator's will set out in the opinion, *held*, that he intended to convey to his widow only a life estate.

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

R. D. Fuller, for appellants.

Hastings & Coufal, C. M. Skiles, F. H. Mizera, J. J. Thomas and *N. Dwight Ford, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Butler county. The purpose of the appeal is to obtain a construction of the will of one Joshua Worley, who was a resident of that county at the time of his death. The trial court construed the will in question to devise to the widow of the testator a life estate in his property. The appeal is prosecuted by the guardian *ad litem* of certain minor heirs of the testator who were made defendants in the action. The will, so far as it relates to the disposition of testator's property, after the introductory declaration, reads as follows:

"Second 2. I give and bequeath to my beloved wife, Eliza Jane Worley, all of my real estate (describing it).

"Third 3. And all the personal property of every description whatsoever moneys notes bankable paper of every description belonging to me at my death.

"Fourth 4th. And the said Eliza Jane Worley my beloved wife is to have the use of all lands and personal property so long as she lives or remains my widow but if she should marry then all property both real and personal shall be divided up equally between the children and at any time the property is divided and each child shall choose one man each and they shall divide the property equally and if the said Eliza Jane Worley wants to help any one of the children she can do so and it be charged up to their estate and taken out at final settlement — and

this settlement must be final and if any one of the children become dissatisfied and go to law he or she shall only be allowed one dollar as it is my will that there be no law suit in the settling up my estate.

"Fifth 5. And the said Eliza J. Worley my beloved wife is to let my son Luther have the farms on the same terms that he now has them or had them in the past years as long as he sees fit or till the final settlement is made.

"6 sixth. All houses and lots belonging to me at this time or in the future at my death shall belong to my beloved wife Eliza Jane Worley on the above conditions."

It is the contention of the appellants that this will devised to Eliza Jane Worley all of the estate of the testator in fee simple, and it is argued that the district court erred in construing it to devise to her only a life estate. It is argued by the appellants that the widow took the estate in fee simple, for the reason that it does not clearly appear that the testator intended to convey to her a lesser estate. In arriving at a satisfactory solution of the question, it must be observed that the notary public employed by the testator to draft the will was an inexperienced scrivener; that, notwithstanding that fact, the writer of the will was anxious to clothe it with all necessary formalities. Neither he nor the testator had a careful regard as to the rules of technical construction. It is argued, however, that by the terms of the first paragraphs in the will the testator devises all of his real and personal property to his wife, and that the same is not qualified by the clause which reads as follows: "And the said Eliza Jane Worley my beloved wife is to have the use of all lands and personal property so long as she lives or remains my widow." Several cases are cited from other jurisdictions in support of this contention. We think this court, however, has settled the question in the case of *Loosing v. Loosing,* 85 Neb. 66. It was there said: "The rule does not of necessity apply merely for the reason that the first clause considered by itself might be construed as conveying a fee simple. The later clause, or clauses, may be read in connection with

the first one for the purpose of advising the court whether it actually did transfer the fee, and if it does not in itself clearly and unequivocally do so, and by a comparison thereof with the remaining parts of the instrument the court is convinced that the testator did not in fact intend to vest the greater title in the first taker, the instrument will be construed accordingly. In other words, quoting Mr. Justice Strong in *Sheets' Estate,* 52 Pa. St. 257: 'Subsequent provisions will not avail to take from an estate previously given qualities that the law regards as inseparable from it, as, for example, alienability; but they are operative to define the estate given, and to show that what without them might be a fee, was intended to be a lesser right.' "

It is further contended by appellants that the intention to invest the widow with a fee simple is further evidenced by the clause by which it is stated by the testator that "if the said Eliza Jane Worley wants to help any one of the children she can do so and it be charged up to their estate and taken out at final settlement." We think this contention is unsound.

The sole and controlling question in the case is: What was the intention of the testator and by what method may it be determined? In *Clarke v. Boorman's* Exr's, 18 Wall. (U. S.) 493, Mr. Justice Miller said: "To these considerations it is to be added that of all legal instruments wills are the most inartificial, the least to be governed in their construction by the settled use of technical legal terms, the will itself being often the production of persons not only ignorant of law but of the correct use of the language in which it is written. Under this state of the science of the law, as applicable to the construction of wills, it may well be doubted if any other source of enlightenment in the construction of a will is of much assistance than the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and

the property devised with the testator and with the instrument itself."

The testator, when the will in question was drawn, and at his death, had a wife and three children, the objects of his bounty. He also had a half section of land and some personal property. He bequeathed his personal property and devised his real estate to his wife, in conclusion of which bequest and devise he declared: "And the said Eliza Jane Worley my beloved wife is to have the use of all lands and personal property so long as she lives or remains my widow." This seems to be clearly a limitation upon the extent of her estate in the real and personal property, and is a valid and effective limitation defining the extent of her estate.

There is some evidence in the record which tends to show that the widow had recognized that she was devised a life estate only.

Considering the evident intention of the testator, we are of the opinion that the district court correctly construed the will, and the judgment is therefore

AFFIRMED.

LETTON, J., I concur for the reason that, in addition to the portions of the will discussed in the opinion, there are other expressions which clearly indicate the testator's intention to give the wife a life estate only.

FAWCETT and HAMER, JJ., not sitting.

SAM BAILEN, APPELLANT, V. E. P. BADGER IMPORT COMPANY ET AL., APPELLEES.

FILED NOVEMBER 13, 1915. No. 18231.

1. **Appeal:** MOTION FOR NEW TRIAL: SUFFICIENCY OF EVIDENCE. This court will not, upon appeal, determine questions that were not fairly presented to the trial court. Ordinarily an assignment in the motion for new trial that "the judgment was erroneous because it was con-

trary to law" will not be considered sufficient to challenge the attention of the trial court to the question of the sufficiency of the evidence to support the judgment. But when there is no substantial conflict in the evidence, and the sole question is whether upon the conceded facts the law will support the judgment, so that the court must have considered the sufficiency of the evidence in passing upon the motion for new trial, this court upon appeal should also consider that question and determine the case accordingly.

2. **Fraudulent Conveyances:** SALES IN BULK. The bulk sales law (Rev. St. 1913, sec. 2651) does not prohibit the transfer of an entire stock of goods to a creditor in payment of a pre-existing debt, or to a trustee for the benefit of certain creditors, but, in order to be valid, such a sale or transfer must comply with the requirements of that law.

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

W. K. Hodgkin, J. F. Power and *Sears & Snyder,* for appellant.

J. J. Harrington, contra.

LETTON, J.

On July 9, 1912, Chambers & Company, who for some years prior thereto had been in the retail merchandise business at Atkinson, finding themselves unable to meet their liabilities, executed and delivered to their principal creditor, C. Shenkberg Company, a corporation of Sioux City, Iowa, an instrument reciting that they "hereby sell, grant, convey and assign" unto the second party their stock of merchandise, consisting of dry goods, groceries, boots and shoes, etc.; also the furniture and fixtures used in connection with the stock. The instrument also transferred and assigned to the second party all their book accounts, bills receivable, and evidences of indebtedness. They constituted the second party their "agent, trustee, and attorney in fact, and in their place and stead, to take over, manage, run, and to continue said business, or to sell at public or private sale" all or part of the stock, fixtures and personal property conveyed. It was provided that, if the second party deem it advisable, they may keep up the stock by the purchase of new goods. The instru-

ment recites that suits at law are pending to recover debts for goods, and that it is deemed best, for the purpose of keeping the assets together, "to place the business in such shape that all creditors of the same class will receive the same treatment with reference to the payment of their debt." It was further agreed that the second party, after disposing of the property, should pay all the expenses of carrying out the trust, including a charge for his services and for the services of his attorney, pay for new goods purchased, pay all taxes, rents and clerk hire now due, pay and discharge in full, if the residue of the funds is sufficient, all the debts, liabilities due and owing "to wholesalers, or other unsecured creditors of the same class, or such creditors as shall become parties hereto and file their claims or demands with the party of the second part." It is further recited that one of the considerations for the execution of this instrument is that the party of the first part shall be released and absolved from liability on any unpaid portion of the claims against them as to claims of creditors who accept this trust deed and indicate their acceptance thereof in the manner provided for, and that creditors who file their claims "shall execute an instrument in writing agreeing that the first party and the individual members of the firm shall be and stand released on any unpaid portion of the claims filed with the second party." The second party took possession of the stock and sent letters to the creditors inclosing a copy of the instrument and a blank form of acceptance and release. The defendant, the E. P. Badger Import Company, one of the creditors, paid no attention to this communication, but proceeded with an action which it had already begun and obtained judgment against Chambers & Company for the amount of its claim. The assignee concluded it would be advisable to sell the property at public sale, and this was done on August 8, 1912. On the next day the defendant obtained judgment for the sum of $399.10 and costs. Execution was issued three days later and placed in the hands of defendant Grady, as sheriff of Holt county, who on the same

day levied the execution upon the goods as the property of Chambers & Company and took possession of the same. On August 15 plaintiff commenced the present action and retook the merchandise under a writ of replevin. The case was tried without the intervention of a jury, and from the findings and judgment in favor of defendant, plaintiff appeals.

Defendant insists that plaintiff is not in a position to question the judgment on appeal, for the reason that in his motion for a new trial his only assignment was that the judgment "was erroneous because it was contrary to law." The office of a motion for new trial is to give the trial court an opportunity to correct errors. When the record is complicated and many questions are presented and decided upon the trial, an assignment in the motion for new trial that the judgment is contrary to law may not challenge the attention of the court to the errors relied upon and give opportunity to correct them. It is generally held that such assignment is not sufficient to call attention to the sufficiency of the evidence to support the judgment. When, however, the record shows that there is no substantial conflict in the evidence, and that the sole question is whether upon the conceded facts the law will support the judgment, and that the court must have considered the sufficiency of the evidence in passing upon the motion for new trial, this court upon appeal should also consider that question and determine the case accordingly. Technical rules intended to secure the substantial rights of the parties are not to be strictly enforced when it is manifest that their application would defeat, rather than promote, justice. This matter is more fully discussed in the opinion in *Waxham v. Fink*, 86 Neb. 180.

Defendant also contends the assignment constitutes a sale in bulk and is void as to creditors, for the reason that it was made without compliance with the provisions of section 2651, Rev. St. 1913. This section provides: "The sale, trade or other disposition in bulk of any part or the whole of a stock of merchandise, otherwise than in the

ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be void as against the creditors of the seller," unless certain provisions with respect to the making of an inventory of the goods and a list of the creditors and the giving of notice to such creditors be complied with. It is conceded that the requirements of this statute were not followed, and it is contended by the appellant that such a transfer for the benefit of creditors who release their claims is not embraced within the prohibition of the statute. It will be noticed that the statute specifically prohibits a disposition in bulk "otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business." The appellant contends that in this state it is lawful for a debtor to prefer any one or more of his creditors, that the assignment was made in good faith, with no intention of evading the provisions of the law, and was not in violation of its spirit or intent. By the terms of the assignment no creditor was entitled to share in the proceeds unless he accepted, or agreed to accept, a possible *pro rata* payment in full of his demand, and released the individual members of the partnership from liability for any balance that might exist. A creditor who refused these terms could receive nothing, and thus would be prevented from receiving the benefits the legislature intended by the passage of the bulk sales law. The debtor sought to compel each creditor to accept a share of the proceeds of the firm assets, and to release a valid claim against the individual members of the partnership.

A similar question was considered by the supreme court of Massachusetts (in which state, as in this, debtors may lawfully prefer creditors) in a case where an insolvent debtor in that state transferred his stock in bulk to a *bona fide* creditor without compliance with the bulk sales law of that state, which is substantially the same as that of this. After holding that the transfer might be valid by way of accord and satisfaction as between the debtor and creditor themselves, the court say:

"But the transaction had another phase, so far at least as respected Kopec's other creditors. There was a change in the ownership of the property, which, if valid as against them, freed from liability property which theretofore could have been attached by them; and thus their security was impaired. While it is true that in its strictest sense a sale is a transfer of personal property in consideration of money paid or to be paid, still in the interpretation of statutes it is often held to include barter and any transfer of personal property for a valuable consideration. * * * We are of the opinion that the statute in question was intended to prevent a trader from disposing of his stock of merchandise in a manner outside his usual course of business, so that the same should be taken away from his creditors in general, and that the transfer under the circumstances disclosed in this case was a sale, although made to a creditor." *Gallus v. Elmer*, 193 Mass. 106.

Construing a similar statute, the supreme court of Georgia, in *Sampson v. Brandon Grocery Co.*, 127 Ga. 454, said: "Construing the act of 1903 and section 2697 together, we may easily reach the conclusion that sales of stock in bulk by a debtor to a creditor, in extinguishment of his debt, in whole or in part, are still permissable, but that such sales are null and void unless there be compliance with the terms of the act of 1903." (Bulk sales law.) In discussing the matter the court suggested that, if the value of the goods exceeded the amount of the debt and the excess was paid in cash or by the giving of a promissory note, could it be said that such a transaction would not be within the statute? And that, if such a sale for acquittance of the debt and an additional consideration comes within the act, why should a sale in extinguishment of the debt be excluded?

To the same effect are the cases of *Humphrey v. Coquillard Wagon Works*, 37 Okla. 714, and *Youghiogheny & Ohio Coal Co. v. Anderson*, 152 N. W. (Mich.) 1025. The object of the statute is pointed out in the cases followed,

which is the protection and benefit of all creditors. The legislature was of the opinion that a disposition of a stock of goods otherwise than in the usual course of business interferes with the just rights of creditors. If the provisions of the law are followed, the end attained will be to put creditors more nearly upon an equality than before with respect to the collection of claims, in cases of a disposition of a whole stock. The supreme court of Washington seem to take a contrary view, but we believe the rule adopted by other courts is more in accordance with the purpose and intention of the legislature.

It has been suggested that by remaining silent and making no objections to the assignment and sale the defendant was estopped to proceed against the goods. But there could be no estoppel, because by the very terms of the assignment no creditor could be bound by it unless he filed a claim with the trustee, and, in addition, filed a release of the debtor for all liability for his debt in excess of any dividend received. Under such a provision notice by a creditor that he did not or would not agree to the assignment was unnecessary. His silence could not give consent. On the contrary, it clearly indicated his nonassent and his purpose to rely on the legal proceedings he had instituted. The purchaser at the trustees sale was bound to take notice of the title he was buying and of the limitations of the instrument. He could not be an innocent purchaser under the circumstances.

The judgment of the district court is

AFFIRMED.

HAMER, J., concurring.

The dissent of Judges Fawcett and Sedgwick might be supported without doing any great violence to the principles of law applicable to the facts. The justice of the plaintiff's claim has much to commend it. This is one of those cases where arguments may be found on either side. When Chambers & Company found themselves unable to meet their liabilities, they executed and delivered to one of

their creditors, a corporation, C. Shenkberg Company, an instrument reciting the sale and conveyance of their stock of merchandise, and also their furniture and fixtures and all book accounts and bills receivable, together with other evidences of indebtedness. They undertook to create the corporation mentioned their agent, trustee, and attorney in fact to manage and continue the said business or to sell all the property conveyed. The purpose appears to have been that all creditors of the same class might receive the same treatment with reference to the payment of their debts. It was one of the considerations for the execution of the instrument made that said Chambers & Company be released from liability on any unpaid portion of the claims against them as to the claims of such creditors as accepted the trust deed and indicated acceptance thereof. Such of the creditors as accepted the trust deed were by the terms of the said instrument to execute a release on any unpaid portion of the claims filed with the trustee. The corporation to which transfer was made took possession of the stock, sent letters to the creditors notifying them of the transfer, and including a blank form of acceptance and release. The E. P. Badger Import Company, one of the creditors, disregarded the communication and prosecuted an action, which it had already commenced, and obtained a judgment against Chambers & Company for the amount of its claim. The assignee sold the property at public sale August 8, 1912. The defendant, the E. P. Badger Import Company obtained its judgment for $399.10 and costs, and then issued an execution and placed it in the hands of the sheriff of Holt county. He levied the execution upon the goods sold as the property of Chambers & Company and took possession of the same, and then the plaintiff commenced this action and retook the merchandise under a writ of replevin. The court made findings and rendered a judgment in favor of the defendant, the E. P. Badger Import Company. The plaintiff appeals from this judgment.

It is claimed by the defendant that the plaintiff is not in position to question the judgment on appeal, for that in his motion for a new trial his only assignment was that the judgment was erroneous because it was contrary to law. The dissenting opinions contend that the office of a motion for a new trial is to give the trial court an opportunity to correct errors; that an assignment in the motion for a new trial alleging that the judgment is contrary to law may not challenge the attention of the court to the error relied upon, and so may give no opportunity to correct them; that such an assignment would not be sufficient to call the attention of the court to the sufficiency of the evidence to support the judgment. It is said in the majority opinion: "When, however, the record shows that there is no substantial conflict in the evidence, and that the sole question is whether upon the conceded facts the law will support the judgment, and that the court must have considered the sufficiency of the evidence in passing upon the motion for new trial, this court upon appeal should also consider that question and determine the case accordingly." It is also said in the majority opinion that technical rules are not to be strictly enforced when it is manifest that their application would defeat justice rather than promote it. An authority is cited, and this view would seem to be correct.

It is further said in the majority opinion that the assignment constitutes a sale in bulk, and is void as to creditors, for the reason that it was made without compliance with the provisions of section 2651, Rev. St. 1913. The act in question provides for an inventory of the goods and a list of the creditors and the giving of notice to such creditors. The statute prohibits a disposition in bulk "otherwise than in the ordinary course of trade." The appellant claims that in this state it is lawful for a debtor to prefer any one or more of his creditors; that in this case the assignment was made in good faith, with no intention of evading the provisions of the law; and that it is not in violation of the spirit of the law. It will be noticed that

no creditor was entitled by the terms of the assignment to share in the proceeds of the the sale unless he accepted, or agreed to accept, a *pro rata* share in full of his demand. He was also required to release the individual members of the partnership from any liability for any balance.

It is said in the majority opinion that the statute in question was intended to prevent a trader from disposing of his stock of merchandise in a manner outside of his usual course of business. I do not think the bulk sales law is in any way applicable to this case. I do not think it is required that it should be considered. If the property was sold and the defendant stood by while the trustee sold it and made no objection, it is in no condition to levy on the stock of goods for the satisfaction of his judgment, unless it in some way indicated that the arrangement made was not acceptable to it. If it did that, and executed no release, and did not indicate in any other way that it accepted the manner of settlement proposed, then it was at liberty to take its judgment and cause a levy to be made upon the property. It did that, and the property was taken away from the sheriff by a writ of replevin and by one who was a party to the execution of the transfer. As the defendant did not acquiesce in the arrangement made and did not release the debtors or agree to release them, it is not bound. The defendant could not be estopped, because it could not be bound unless it agreed to the contract made. When the defendant did nothing tending to show its consent to the agreement, it thereby indicated that it did not assent. Something affirmative was required of it before it could be bound.

The purchaser at the trustee's sale could only take such title as his grantor had to give him. In this case the grantor had no title because of the infirmity of the proceedings and the failure of all of the creditors to come into the arrangement and join in the contract. The purchaser therefore is without title. He cannot claim to be an innocent purchaser. He knew that there was a defect in the title.

He knew that he was only getting such title as the trustee had to convey to him. It is therefore proper to affirm the judgment of the district court.

SEDGWICK, J., dissenting.

A debtor cannot compel his creditors "to accept a share of the proceeds of the firm assets." The majority opinion ably and laboriously establishes that proposition. A debtor may induce his creditors to agree to a fair and equitable distribution of all the assets. If a creditor consents to a sale of all of the assets of his debtor at public auction, and a purchaser at such sale has reason to believe and does believe that the creditor has consented to the sale, and so pays full value for the assets, such creditor ought not afterwards to be allowed to assert any claim against the goods so purchased. There is apparently no controversy as to the facts in the case. The business of the debtor was in a very bad condition. There were about 40 creditors, one of whom had a claim more than the total value of the assets. Some of the creditors, including this defendant, had begun litigation on their claims. The debtor could take advantage of the bankruptcy law, and so compel all creditors to take a *pro rata* portion of the assets and cancel their claims. The expenses of such proceedings would exhaust substantially all of the assets and leave little or nothing for any creditor. It was thought that the creditors would, under the circumstances, agree to a more reasonable remedy; whether they had suits pending or had judgments or had taken no action on their claims could make no difference. Every other creditor was fully notified of every step in the proceedings. Other creditors who had suits pending also consented to the sale at auction by making no objection to the proceedings. When they learned of the transfer in trust for all creditors, they might at once have attached the goods, or if they remained silent with full notice of the contemplated sale, and so estopped themselves to claim the property itself, instead of the proceeds thereof, they might still have attached the proceeds in the

hands of the trustee. Either of these courses would have raised the question of the application of the bulk sales law, and would have made its discussion necessary. Not having taken either of these remedies, they could have presented their claims to the trustee in accordance with the arrangement. It was clearly intended by all parties that the creditors would present their claims to the trustee for the *pro rata* share when the property was sold and the money in the hands of the trustee for distribution. The assignment to the trustee for the benefit of the creditors is clear upon this point. About 39 creditors took that course, and after this plaintiff had paid full value for the goods, and while the money was in the hands of the trustee, one undertook to take the goods from the purchaser at the sale. But the majority opinion says: "There could be no estoppel because by the very terms of the assignment no creditor could be bound by it unless he filed a claim with the trustee, and, in addition, filed a release of the debtor for all liability for his debt in excess of any dividend received." That is, a creditor could remain silent and make no objection to the sale, because he did not file his claim with the trustee before there were any funds in his hands to distribute. When should he "release the debtor for all liability?" When the goods were turned over to the trustee to be sold for all the creditors, it devolved upon the creditors to consent or object to the proposed sale and distribution. If they consented, there was nothing for them to do until the proceeds of the sale were in the hands of their trustee, when they could present their claim and release.

In Nebraska a man can assign his property for his creditors without complying with the assignment act. If he does, it will be valid, unless it is fraudulent. That is, unless he attempts directly or indirectly to keep some of the property for himself. If he does that it is fraudulent and void. If it is all to go to his creditors, it makes no difference whether he treats them all alike or not, since he has the right to prefer creditors. If he assigns to one creditor

more than enough to pay his claim, and expects to get some advantage to himself by so doing, such assignment would be void. All of the above propositions are decided in *Meyer v. Union Bag & Paper Co.*, 41 Neb. 67, and the many cases there cited.

The questions in our case are: (1) Can the creditors and the debtor agree to sell the debtor's property and divide the proceeds prorated among the creditors? (2) If the debtor proposes to do so, and asks the creditors to agree that he may, and 39 out of 40 creditors agree to it, do the common rules of estoppel apply to the fortieth creditor who allows the others to suppose that he consents also? (3) Will a purchaser at the sale who pays full value for the property, supposing that the creditors are selling it, be protected in his title, as against a creditor who purposely allows the purchaser to suppose that as one of the creditors he is making such sale?

FAWCETT, J., dissenting.

In addition to what is said by Judge Sedgwick in his dissenting opinion, I desire to suggest the following: The bulk sales law was designed to prevent the fraudulent secret selling of a stock of merchandise by a failing debtor, for a consideration paid to the debtor, and thus fraudulently taken from his creditors. The purpose of the statute was to require notice to the creditors before any transfer could be made outside of the regular course of business. The transaction by Chambers & Company, in turning their stock and business over to C. Shenkberg Company, was not a sale, nor a mortgage, nor an assignment for the benefit of creditors under the statute. It amounted to nothing more than the constituting of C. Shenkberg Company as their trustee for the purpose of making a sale and distributing the proceeds thereof among their creditors. There never was a sale of the stock of Chambers & Company until the public sale made by C. Shenkberg Company to plaintiff. Of this sale all of the creditors of Chambers & Company had received due notice

in writing and had been fully advised of the precise capacity in which C. Shenkberg Company was assuming to sell the property of Chambers & Company. While in some technical respects the bulk sales law was not literally complied with, there was a substantial compliance therewith. Everything was done openly and upon due notice. There was not even a semblance of secrecy or fraud in the actions of either Chambers & Company or C. Shenkberg Company. To put such a construction upon the bulk sales law as is given in the majority opinion, will be to defeat the beneficent purpose of that law. Such a construction will prevent an honest merchant who finds that his business enterprise has not been a success and that failure is inevitable, and who earnestly desires that his creditors shall receive as much as possible on their just claims, from turning his property over to one of them with instructions to take charge of it, and, without the heavy cost and long delay of a court proceeding, sell it and distribute the proceeds among all of his creditors, *pro rata,* imposing only the condition which the bankruptcy court would give him without request, that those who participate in the distribution of the money arising from the sale of his stock shall release him from further liability. The majority opinion will prevent such honorable and inexpensive procedure. This leaves no alternative for the honest failing debtor except to either turn his stock over to the court of bankruptcy, or by a statutory assignment apply it as far as it will go, and go out into the world burdened with debts which will forever stand as a barrier to his resuming business. This was not the intention of the legislature, and is not a proper construction of the bulk sales law.

BARNES, J., concurs in above dissent.

THOMAS B. STOCKER, APPELLANT, V. NEMAHA VALLEY DRAINAGE DISTRICT NO. 2, APPELLEE.

FILED NOVEMBER 13, 1915. No. 18315.

Eminent Domain: DRAINS: ASSESSMENT OF DAMAGES: SPECIAL BENEFITS. In determining whether property not taken for the excavation of a drainage ditch is damaged by the construction of the ditch, it is improper to consider general benefits affecting the community. If the property not taken is enhanced in value by reason of the construction of the ditch, such increase in value is a special benefit as to the particular property, and not a general benefit, notwithstanding the value of other property within the drainage district is also enhanced by reason of the improvement.

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

T. R. P. Stocker, for appellant.

Kelligar & Ferneau, contra.

LETTON, J.

This is an appeal from an assessment of damages in condemnation proceedings brought for the location of a drainage ditch. The plaintiff is the owner of a large tract of land in the valley of the Nemaha river, a little over 300 acres of which is within the limits of the drainage district. In the construction of the ditch it became necessary to run the main channel and a lateral ditch through the plaintiff's land. There was a general verdict and judgment for plaintiff for $1,151.96. Plaintiff has appealed. The jury made special findings of fact to the effect that 21.38 acres of land had actually been taken for the ditches, that this land was worth $45 an acre, and that there were no consequential damages to the land not taken. No complaint is made as to the findings as to the number of acres actually taken or the amount allowed as the value of the same, but the appeal is concerned with the right to recover for consequential damages to the remainder of the tract.

The first error assigned is that the court erroneously instructed the jury as to the measure of damages. Evidence with respect to the cost of bridges over the ditches had been received. Speaking of this evidence, the court said: "This evidence is proper to be considered by you, but you are not to take it or consider it as a basis or ground upon which to award damages. Such evidence is competent to be considered along with all the other evidence in deciding whether or not the market value of the plaintiff's land not taken has been depreciated by the construction of the channel or ditch. * * * If the residue of the plaintiff's land has not been depreciated, but would sell on the market for as much, or more, than the same land would have sold for, prior to the construction of the ditch, the plaintiff has suffered no consequential damages, and he would be entitled to recover only for the value of land actually taken and used in the construction of the ditch." The jury were told by other instructions given at plaintiff's request that in determining whether the land had been damaged they might consider the size of the farm, the purpose for which it was used, the improvements and how they were located, the location of the ditch and embankments and how they cut the land, the inconvenience of having the land cut into tracts, and in crossing the ditches, the size and depth of the ditches, and whether the location of the drainage improvements will render the farm more or less attractive to buyers, etc. It is also complained that the jury were erroneously instructed that the value of special benefits to the tract in excess of the amount plaintiff had paid as assessed for the cost of construction might be set off against consequential damages; that the court refused to instruct, "All general benefits are excluded from your consideration, and by a general benefit is meant one which is enjoyed, not alone by the plaintiff, but by the property owners along the line of the drainage district;" refused to instruct that, if the ditch intersected any way by which the plaintiff had access to a part of his farm, they should allow

plaintiff as part of his damages the reasonable cost of construction of a suitable bridge; and refused to instruct that, as a matter of law, the duty devolved upon the defendant to make and maintain suitable bridges and crossings over any private roads upon the land.

There is a radical difference between the conception of plaintiff and defendant regarding the law covering the recovery of consequential damages where land has been taken for a drainage ditch. The view of the district, which was adopted by the court, is that, where the land has been benefited by the construction of the ditch to an amount in excess of its assessment for the cost of construction, these excess benefits may be set off against consequential damages, and that, since the market value of his land was increased by the enterprise more than the consequential damages sustained, plaintiff suffered no pecuniary loss for which damages can be recovered. Plaintiff takes the position that, in the case of a drainage district, general benefits are those which are enjoyed, not alone by the landowner through whose premises the ditch is run, but those which are enjoyed in common by all the proprietors of the land within the district.

The court was right in refusing to charge that "general benefits" are those which are enjoyed, not alone by the plaintiff, but by the property owners along the line of the ditch. Proprietors along the line of the ditch have received substantial benefit by its excavation draining the land of surplus water, preventing overflows, and permitting crops to be grown where it was impracticable to do so before. These are special benefits. They share, in common with other landed proprietors along or near the boundaries of the district, general benefits, in the increased healthfulness and salubrity of the surroundings, the ability to use the public roads at a time when, if undrained, the roads would be impassable, the removal of swamps or low and wet places, fit breeding ground for malaria-carrying mosquitoes and other pests, and in the general desirability of the vicinity as an abiding place.

Such benefits are not subject to set-off under the rule in this state. We said in *Kirkendall v. City of Omaha,* 39 Neb. 1: "The term 'special benefits' implies benefits such as are conferred specially upon private property by public improvement, as distinguished from such benefits as the general public is entitled to receive therefrom. In common with the general public, the owner of adjacent property is entitled to travel upon an improved highway, and although by reason of the improvement such travel may be rendered easier or more pleasant, yet the benefit is general, because it is enjoyed by the public in common with the owners of adjacent property. If the improvement should result in an increase in the value to adjacent property, which increase is enjoyed by other adjacent property owners as to the property of each exclusively, the benefit is special, and it is none the less so because several adjacent lot owners derive in like manner special benefits each to his own individual property. Such fact, if it exists, in no respect decreases the increment in value enjoyed by any one of the adjacent property owners, and by way of offset such increment should therefore be treated as a special benefit in favor of whomsoever it may arise." See, also, *Chicago, K. & N. R. Co. v. Wiebe,* 25 Neb. 542; *Lowe v. City of Omaha,* 33 Neb. 587; *Omaha Southern R. Co. v. Todd,* 39 Neb. 818; *Martin v. Fillmore County,* 44 Neb. 719; 4 Words and Phrases (1st ed.) p. 3056. After consideration of the cases cited by plaintiff and a search for others, the writer has been unable to find that any court has ever differentiated the nature of general and special benefits in condemnation proceedings by a drainage district from those in proceedings instituted for railway, irrigation or highway purposes. The district court properly followed the established rule.

The complaint that the court erred in refusing to instruct that, if the ditch intersected any way by which the plaintiff had access to his farm, they should allow as part of his damages the reasonable cost of construction of a suitable bridge, is not well taken. The court expressly

told the jury that such evidence is proper to be considered in deciding whether or not the market value of the land not taken has been depreciated by the construction of the channel, and, as plaintiff admits, treated the cost of building bridges as an element of damages. It would have been better to have omitted the statement that the evidence as to the cost of the bridge is proper to be considered, "but you are not to take it or consider it as a basis or ground upon which to award damages;" but, since they were also told that the inconvenience of reaching the land cut off by the ditch was an element of damages for them to consider, we think no prejudice could result.

As to the complaint that the court erred in refusing to instruct that, as a matter of law, the duty devolved upon the defendant to make and maintain suitable bridges over any private roads upon the land, the requested instruction was foreign to the issues, and inconsistent with that just mentioned tendered by the plaintiff.

The evidence clearly shows that the value of the land has been increased from an average value of about $40 an acre to a value of from $85 to $100 an acre; that in some years before the ditch was dug the farm was almost entirely overflowed, in others the water covered large portions of it; and that the general effect of the drainage improvements has been to render the land much more valuable. It appears, however, that the excavation of the ditches has necessitated lengthy detours in order to reach portions of the land lying on the other side of the ditches from the two dwellings on the farm, and that a small tract of two or three acres is practically inaccessible without a small bridge. The evidence as to the cost of bridges varies from $75 to $200 for a bridge across the lateral and from $500 to $1,600 for the cost of a bridge across the main ditch, the difference being owing to the material and manner of construction. There is testimony that there are about 200 wooden bridges in the county over similar openings constructed according to the lower estimate. The higher estimates are for steel bridges set upon steel piling.

The inconvenience of access seems to constitute the only consequential damages suffered. Technically speaking, the jury should have found that damages had occurred to some amount, and should have offset the excess special benefits against the damages found (*Gutschow v. Washington County,* 74 Neb. 794,800); but, since the evidence shows that the special benefits in excess of what the plaintiff paid as his share of construction very largely exceed the damages proved, no prejudice to the plaintiff has resulted, and the case will not be reversed for that reason alone.

Plaintiff argues that since, in order to render his land more readily accessible, he will be compelled to build these bridges, while his neighbor within the drainage district, whose land is not intersected by the ditch, receives the same benefits in the increased value of his land but is not subject to this expense or the alternative inconveniences of access, the benefits are unequally apportioned and the rule which allows such a result is unjust. This is true to some extent, but in the construction of public improvements it is impossible to adjust damages or benefits with mathematical exactness so that each landowner within the district may be treated exactly alike. A farmer whose land lies outside of but adjoins the boundary of the district may be largely benefited by the drainage of the valley, and yet he is not compelled to pay any part of the cost of the improvement. A railroad may make cuts and fills on one man's land and practically spoil his farm, while it may not touch the land of his neighbor, and yet, by the location of a station close by, the value of the neighbor's land may be quadrupled. And so with a street; when a new street is opened the adjoining owners usually receive a large increase in the value of the land abutting upon the street, while other proprietors equally meritorious receive no benefit whatever. Human machinery for administering justice does not work infallibly, and it is impossible to make a rule that will do equal and exact justice in all cases. The principles which have been

adopted by the courts with regard to the ascertainment of consequential damages seem to furnish the best general rules for doing justice that experience has devised. What is said, however, does not apply to the apportionment of special benefits in the first instance.

It is clear that the plaintiff has suffered no pecuniary damage to the land not actually taken by the ditch.

We find no prejudicial error. The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

ALDEN MERCANTILE COMPANY, APPELLEE, V. JOHN A. RANDALL, RECEIVER, APPELLANT.

FILED NOVEMBER 13, 1915. No. 18369.

Judgment: ENFORCEMENT: INJUNCTION: PETITION. To justify the interposition of a court of equity to enjoin a judgment in a case in which it is claimed that there was a defective service of process, it must appear that a valid defense exists to the merits of the original suit, and the plea to be good in this respect must state the facts so that the court can determine whether, if proved, they constitute a defense.

APPEAL from the district court for Grant county: JAMES N. PAUL, JUDGE. *Reversed.*

Burkett, Wilson & Brown, for appellant.

D. F. Osgood, contra.

LETTON, J.

This action was brought to restrain the defendant, who is the receiver of an insolvent insurance company, from procuring an execution to be issued and levied upon the property of plaintiff on the ground that the judgment upon which the execution is based is void, being rendered with-

out jurisdiction. Defendant filed a general demurrer to the petition, which was overruled. He elected to stand upon the demurrer. Judgment was rendered upon the pleadings granting the relief sought. Defendant appeals.

In substance, the petition alleges that the plaintiff is a resident of Grant county; that the defendant, acting as receiver for the Nebraska Mercantile Mutual Insurance Company, brought suit against the plaintiff in the district court for Lancaster county and caused a pretended summons to be issued and served upon the defendant in Grant county; that plaintiff never appeared in the action; that the action was upon a claimed liability as a policy holder of the insurance company, and "there was no joint liability averred, claimed or existing between this plaintiff and the other defendants named in said action, nor between any of the defendants in said action, but a several liability was averred, and a several judgment asked against this plaintiff and each and all of the defendants;" that the service of summons in Grant county conferred no jurisdiction upon the district court for Lancaster county; that the district court for Lancaster county rendered a several judgment against the plaintiff; that the pretended judgment is a cloud upon the title to his real estate; that he has no adequate remedy at law; "that said pretended judgment is absolutely null and void; and that plaintiff was at no time indebted to the defendant in any sum whatsoever."

The demurrer admits all the material facts stated in the petition to be true. These are: That in the original action no joint liability between plaintiff and any other defendant was averred or was existing; that no summons was served upon him in Lancaster county; that he never appeared in the action; and that he was at no time indebted to defendant in any sum whatsoever. It is argued by defendant that there is no allegation in the petition that plaintiff had any defense upon the merits of the case in Lancaster county, and that therefore, under the rule in *Fickes v. Vick Bros.*, 50 Neb. 401, "In an action to enjoin the enforcement of a judgment, relief should not be

granted because of the service of an unauthorized summons upon which such judgment was rendered, in the absence of a showing of the existence of a defense to the cause of action which formed the basis of the judgment assailed," it does not state a cause of action.

The question presented is whether the closing allegation, "that plaintiff was at no time indebted to defendant in any sum whatsoever," states a defense to the original action. The cause of action is alleged to have been "upon a claimed liability as a policy holder of the Nebraska Mercantile Mutual Insurance Company." In an action brought by the receiver of the mutual insurance company, does such an answer state a defense? It might be true that plaintiff was not indebted to the receiver, and yet all the facts set forth in the petition might also be true. Moreover, the allegation is a mere conclusion without disclosing in any way what the real defense was that plaintiff had in mind. He might defend on the ground that he was not indebted to the receiver because there were no outstanding debts of the corporation for which it was necessary to assess the policy holders, or on the ground that the appointment of Mr. Randall was defective or made without jurisdiction, and therefore he was not indebted to him. A defense upon the merits of the original suit is not alleged, and therefore no cause of action is set forth in the petition. We have repeatedly held that, in order to authorize the enjoining of a judgment, it must appear that there is a valid defense to the cause of action on which the judgment was based. *Wilson v. Shipman,* 34 Neb. 573; *Janes v. Howell,* 37 Neb. 320; *Woodward v. Pike,* 43 Neb. 777; *McBride v. Wakefield,* 58 Neb. 442. This is the general rule. *Brandt v. Little,* 47 Wash. 194, 14 L. R. A. n. s. 213, and note.

No such defense has been pleaded, and the court erred in overruling the demurrer. Its judgment is therefore

REVERSED.

SEDGWICK and HAMER, JJ., not sitting.

T. L. MARRIN, APPELLEE, v. JOHN A. RANDALL, RECEIVER, APPELLANT.

R. N. HAYWARD, APPELLEE, v. JOHN A. RANDALL, RECEIVER, APPELLANT.

E. G. MARTZ, APPELLEE, v. JOHN A. RANDALL, RECEIVER, APPELLANT.

FILED NOVEMBER 13, 1915. Nos. 18368, 18370, 18371.

APPEAL from the district court for Grant county: JAMES N. PAUL, JUDGE. *Reversed.*

Burkett, Wilson & Brown, for appellant.

D. F. Osgood, contra.

LETTON, J.

These cases involve the same question decided in *Alden Mercantile Co. v. Randall, ante,* p. 44, and for the reasons set forth in that opinion the judgment of the district court is

REVERSED.

WISE MEMORIAL HOSPITAL ASSOCIATION, APPELLANT, V. LACEY E. PEYTON, APPELLEE.

FILED NOVEMBER 13, 1915. No. 18416.

Husband and Wife: NECESSARIES: LIABILITY OF HUSBAND. A husband who is living apart from his wife and is paying temporary alimony awarded to her by the court in a suit for divorce is not liable to a third person for necessaries furnished to her, the former being chargeable with knowledge of those facts, and the adequacy of the temporary alimony not being subject to question by a stranger.

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

John M. Macfarland and *A. J. Kinnersley*, for appellant.

Brome & Brome, W. J. Connell and *J. E. von Dorn, contra.*

ROSE, J.

Between May 21, 1912, and June 4, 1912, Cordelia Peyton was a patient in plaintiff's hospital, and this is an action against her husband to recover a balance of $85 for hospital services and medicines. The case was dismissed, and plaintiff has appealed.

The substance of the defense pleaded is: Though defendant was the husband of the patient, she was living apart from him. A suit on her behalf for a divorce and for alimony was pending. She had been awarded a temporary allowance of $75 a month which he had paid regularly. He never obligated himself to pay his wife's indebtedness to the hospital. The defense thus outlined is fully established by the evidence and justifies the dismissal of the action. A husband who is living apart from his wife and is paying temporary alimony awarded to her by the court in a suit for divorce is not liable to a third person for necessaries furnished to her, the former being

chargeable with knowledge of those facts, and the adequacy of the temporary alimony not being subject to question by a stranger. *Hare v. Gibson,* 32 Ohio St. 33.

The judgment is right and is

AFFIRMED.

FAWCETT, J., not sitting.

BERNARD MORFELD, APPELLEE, V. A. M. WEIDNER, APPELLANT.

FILED NOVEMBER 13, 1915. No. 18309.

1. **Appeal:** RULINGS: HARMLESS ERROR. "To warrant the reversal of a judgment it must affirmatively appear from the record that the ruling with respect to which error is alleged was prejudicial to the rights of the party complaining." *Cronin v. Cronin,* 94 Neb. 353.

2. **Trial:** INSTRUCTIONS: DECLARATIONS. Instruction No. 3, requested by defendant and refused by the court, set out in the opinion, and *held* properly refused.

3. **Appeal:** VERDICT: SETTING ASIDE: PREJUDICE. To warrant the setting aside of a verdict on appeal, on the ground of passion and prejudice on the part of the jury, the record must affirmatively show that the verdict probably resulted therefrom.

4. **Assault and Battery:** PERMANENT INJURY: SUBMISSION TO JURY: EVIDENCE. In order to warrant the submission of the question of permanent impairment of the sexual powers to the jury, it is not necessary that there should be direct evidence that there will be such permanent impairment. Even though no witness testifies in express terms to such permanent impairment, yet, if physicians who treated plaintiff at the time and immediately after he received his injury and who examined him at the time of the trial, testify that the sexual organs are still abnormal, that there still exists malformation or hardening of the parts, and all the other evidence and circumstances in evidence are such as to warrant reasonable minds to conclude that the injury will result in permanent impairment of the sexual powers, the submission of such question to the jury is not in conflict with the rule that requires evidence which shows that there is a reasonable certainty that such permanent impairment will result.

5. **Damages:** PERSONAL INJURY: PLEADING AND PROOF. In an action to recover for injuries caused by an assault, evidence of the loss of sexual powers, resulting directly and proximately from the nature of the injury, may be received and considered by the jury, although the petition does not specify such loss as one of the results of such assault.

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

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

A. M. Post and *C. N. McElfresh, contra.*

FAWCETT, J.

From a judgment of the district court for Platte county, awarding plaintiff damages in the sum of $3,000, for assault, defendant appeals.

The evidence shows that plaintiff had been working for defendant as a farm hand. Early in the morning of the day of the assault, plaintiff notified defendant that he was going to "quit." After breakfast plaintiff attended church, and later in the forenoon he and two companions drove in a buggy to defendant's farm. The purpose of the visit was to obtain settlement of plaintiff's account for wages. On arrival they found defendant in the field cultivating corn. A disagreement arose over the sum of $2. Plaintiff insisted that he must have the $2, and defendant told him he would not get it. Thereupon plaintiff called defendant a vile name. After being told not to do so, plaintiff repeated the offense, whereupon defendant rushed at him and administered a severe kick in his private parts. While it is not certain that defendant intended to kick him in that part of his person, it is fairly deducible from the evidence that at least the heel of his shoe, as he kicked upward, reached such part. Plaintiff then seized a whip and defendant a wrench. Each assumed a threatening attitude, but actual hostilities proceeded no further. After each had dropped his weapon, defendant drew a check for the amount due, less the $2 in dispute, and gave

it to plaintiff. Plaintiff then got into the buggy with his two companions and they drove away. The above is the substance of the testimony of the plaintiff and defendant and the two other young men present, as the jury must have found the facts to be. At the time he received the kick, plaintiff made no outcry and did not say that he had been kicked in the parts above indicated. On the trial, the young man who was driving the buggy was permitted to testify in behalf of plaintiff that on leaving the farm, and right after the altercation took place, plaintiff said that defendant had "kicked him here," indicating the parts above mentioned.

By defendant's second assignment of error it is urged that this was an attempt to introduce a self-serving declaration which was no part of the *res gestæ*. We do not deem it necessary to decide whether or not the statement was so intimately connected with the assault as to make it a part of the *res gestæ*, for the reason that, even if it were too remote, it could not have prejudiced the defendant. Defendant's own testimony is that he kicked at him. The young man standing nearby testified that he saw him administer the kick, but wavered somewhat as to where the blow landed, stating at one time that the foot struck plaintiff in the breast too high up for even the heel to reach the parts indicated, and in another place admitting that the blow might have been low enough for the heel to have done so. Plaintiff testified that the kick was upon the part of his person indicated. This testimony, supported as it is by the uncontradicted evidence as to plaintiff's condition for weeks and months thereafter, is of such a character that, if the testimony of the driver of the buggy had not been admitted, the jury could not have found otherwise than that the plaintiff's injury resulted from the kick administered by defendant.

About seven or eight days after plaintiff's injury, his mother arrived at Humphrey, where plaintiff was being treated by Doctor Lemar. She was interrogated at some length as to the condition in which she found plaintiff,

and was permitted to state what he said as to his pain and suffering and about the parts which were causing the same. No objection was interposed to that line of questioning, but she also testified to some statements made by her to a man who was taking care of Doctor Lemar's office, to the effect that she intended to take plaintiff away. We have examined this part of Mrs. Morfeld's testimony very carefully, and find nothing in the statements made by her to Doctor Lemar, or by the doctor to her, which could have affected the result.

Defendant's third assignment of error is that the court erred in refusing to give his requested instruction No. 3, as follows: "You are instructed that while the court has admitted certain statements and declarations made by the plaintiff to other persons some time after the injury is claimed by the plaintiff to have been received, as to the manner in which his alleged injury was received, you should consider such statements and declarations with caution, and should subject them to a close scrutiny before giving them weight in your deliberations." This instruction could not properly be applied to the testimony of Mrs. Morfeld, or to the statements and declarations made by plaintiff to her. The statements made to her were not as to who had administered the blow, but simply statements as to his then physical condition—statements made at a time when he was either in bed, or confined to the house, or incapacitated for doing any work—and, while the jury might have been told that they would have a right to take into consideration the circumstances under which such statements and allegations were made, we do not think the court would have been justified in telling them that they should consider such statements and declarations "with caution" and should "subject them to a close scrutiny" before "giving them weight" in their deliberations. If the evidence was proper, and we think it was, the court would not have been warranted in so discrediting it. As applied to the testimony of the witness Rupert, the young man who was driving the buggy, it

could not have prejudiced the jury, for the same reasons above given in considering assignment No. 2.

The fourth assignment is that the court erred in permitting Mrs. Morfeld to testify as to statements made by plaintiff at various times, about a year after the alleged injury, at which times he complained about his left side, and stated that standing on his feet while he was clerking had hurt him; that, if he wanted to stoop, it was all right, but as soon as he straightened up it hurt him. None of these statements related to the cause of the injury or to who made the assault. They related simply to plaintiff's then condition. Plaintiff had himself testified to this condition, and the testimony of his mother that he had, at the time designated, made statements to her in reference thereto was improper; but, when taken together with all of the other evidence in the case, we cannot say that it was probably prejudicial. We think it would be extending the rule too far to hold that its admission was error for which the judgment should be reversed.

By the fifth assignment it is urged that the verdict was the result of passion and prejudice on the part of the jury. After a careful reading of all the evidence in the case, we do not think this charge is well founded.

We will now consider the first assignment of error, which is really the important question in the case. This assignment assails instruction No. 7, given by the court on its own motion, and the refusal of the court to give instructon No. 1, requested by defendant. Instruction No. 7 is as follows: "If you find the injury to be permanent, then, in fixing the amount of damages, you should take into consideration the nature and extent of the injury in all its fair and reasonable consequences, including the impairment of his faculties of generation, if any you shall find, and include future as well as past and present disability, physical pain and suffering." The part of the instruction assailed is the clause, "including the impairment of his faculties of generation, if any you shall find." It is argued in the brief that "there was not a syllable of

testimony anywhere in the case to the effect that any of the plaintiff's sexual powers were diminished, as a result of the alleged assault." It is evidently upon that theory that counsel requested the giving of instruction No. 1, the refusal of which is complained of, and which is as follows: "You are instructed that there is no direct evidence in this case that the plaintiff has sustained any injury impairing his sexual powers or his powers of procreation, and, if you find for the plaintiff, you should not take into consideration any such injury in assessing the amount of the plaintiff's recovery." This instruction does not correctly state the rule. In order to warrant the submission of the question of impairment of his sexual powers to the jury, it was not necessary that there should be "direct evidence" that the plaintiff has sustained such an injury. Even though no witness has testified in express terms that a party seeking damages for an assault has sustained a permanent impairment of his sexual powers, yet if physicians, who treated plaintiff at the time and immediately after he received his injury, and who examined him at the time of the trial, testify that the sexual organs are still abnormal, that there still exists some malformation or hardening of the parts, and all of the other evidence, facts and circumstances in evidence are such as to warrant reasonable minds to conclude that the injury will result in impairment of those powers, the jury would be warranted in finding that there is a reasonable certainty that such permanent impairment *will* result. 13 Cyc. 217*h*, and cases cited in note 43, p. 218. After a very careful consideration of the evidence, we feel that this is that kind of a case, and that, if the jury in assessing the plaintiff's damages did consider that as one of the elements of damages in determining the amount of their verdict, they were justified by the evidence in so doing.

It is further argued: "There is still another reason why the jury should not have been instructed that they should include in the damages *'the impairment of his faculties of generation'*, and why the defendant's requested instruc-

tion should have been given. That is because those special damages were not averred in the plaintiff's petition." Authorities are cited to support this contention, but the rule in this court is otherwise. In *City of Harvard v. Stiles,* 54 Neb. 26, we held: "A recovery may be had under a general allegation of damages for all injuries which necessarily follow as results of the act, the subject of complaint. They need not be specially pleaded, and this is applicable to necessarily resulting permanent effects of the injuries." This is also the rule announced by the United States supreme court. In *Denver & R. G. R. v. Harris,* 122 U. S. 597, it is held: "In trespass on the case to recover for injuries caused by gunshot wounds inflicted by defendant's servants, evidence of the loss of power to have offspring, resulting directly and proximately from the nature of the wound, may be received and considered by the jury, although the declaration does not specify such loss as one of the results of the wound." It follows from what has been said that the court did not err in giving instruction No. 7, or in refusing to give instruction No. 1, requested by defendant.

The sixth and last assignment is the general one that the court erred in overruling defendant's motion for a new trial. Finding no error in the record of the trial, this assignment must also fail.

Upon a consideration of the whole case, we do not feel at liberty to disturb the judgment entered in the court below. It is therefore

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

EVA BELL HAIGHT, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED NOVEMBER 13, 1915. No. 17889.

1. **Jury:** DRAWING OF PANEL: PRESUMPTION. In counties of 30,000 or more inhabitants the regular panel of 30 jurors for each judge of the court must be drawn by lot from the regular jury list, and cannot be filled by the sheriff by calling bystanders. The regular jury list consists of not less than one-fifteenth of the legal voters of the county, and it will not be presumed, in the absence of evidence, that the list was exhausted in the ordinary work of the court.
2. ———: ———: TALESMEN. In case the jury list should be exhausted so that the panel could not be filled as the law requires, talesmen might be called, if "required in such court for trial of any cause" (Rev. St. 1913, sec. 8156), but the regular panel cannot in any case be filled in that manner. The third paragraph of the syllabus of our former opinion (97 Neb. 293) is disapproved.
3. ———: IRREGULAR PANEL: NOTICE: PRESUMPTION. The parties to an action are supposed to take notice of formalities in making jury lists which are required by statute and regularly shown upon the record, but not necessarily of orders made in the trial of other cases in which they are not interested, or that the regular jury panel had been exhausted in the trial of a prior case, and had then been unlawfully filled by calling bystanders.
4. ———: DRAWING OF PANEL: PRESUMPTION. If there is no order to call talesmen in the case in which counsel are interested, and the jurors are called by the clerk in the ordinary manner, they may rely upon the statute which requires that the jurors be called from the regular panel.
5. **New Trial:** JURY: IRREGULAR PANEL. It is erroneous to order that the regular trial panel be filled from bystanders. If the panel has been so formed, and a jury called therefrom for the trial of a cause, without the knowledge of the parties thereto until after the trial of the case that the panel has been so filled, and the objection is made in a motion for new trial regularly filed, such objection should be sustained and a new trial granted.

REHEARING of case reported in 97 Neb. 293. *Former judgment of affirmance set aside, and judgment of district court reversed.*

SEDGWICK, J.

Our former opinion is reported in 97 Neb. 293. The rehearing was allowed upon one proposition only—whether the court erred in not finding that the jury which tried the case was illegally constituted. The statute (Rev. St. 1913, sec. 8148 *et seq.*) provides that in counties having more than 30,000 inhabitants a list of names shall be made by the proper officers and placed in a box or wheel (sections 8148, 8153), and that from this list the clerk of the district court shall draw by lot 30 for each judge of the district court, who shall constitute the regular panel (section 8154). It also provides that, if the regular panel of 30 so constituted is exhausted, the judge of the district court shall order the clerk to fill the panel by drawing more names from the wheel or box. The parties so drawn are to be notified by registered letter. This, of course, takes some time. If, before they appear, a case is called and the panel is not sufficient, then the court may order the sheriff to call bystanders or men from the body of the county to act in that case. Some time before this case was tried in the district court, one of the judges was trying a criminal case, and he made an order reciting that the panel was exhausted and ordering the sheriff to call men from the body of the county to fill the panel in that (criminal) case, and then added these words: "Or such other cases as might be assigned for trial during the remainder of the third three weeks of the October, 1910, term." It seems that when the sheriff called these men they were treated by the clerk as a regular panel, and when the plaintiff's case came on for trial they were called as of the regular panel and sat upon the trial of the plaintiff's case. The plaintiff contends that the sheriff could not call men from the body of the county, except for the trial of the particular case in which he was ordered to do so, and that this plaintiff did not know that the regular panel had been filled by the sheriff from the body of the county, or that the regular panel had been exhausted, and

so was not bound to make objection before the trial of her case. It seems clear that under the statute the court had no jurisdiction to order the sheriff to fill the regular panel for other cases that might be assigned by calling men from the body of the county.

In Thompson & Merriam, Juries, sec. 102, published more than 30 years ago, it is said: "The frequent necessity of summoning talesman has had the effect of breeding in every community a disreputable class of loiterers about courtrooms, having no other purpose than to be selected for jury service. So conspicuous has this evil become of late years, that these persons have been dubbed with the distinctive title of 'professional jurors.'" The same evil continues, and it not infrequently happens that, when a case of public interest is about to be tried, many friends of the parties gather at the place of trial, and the sheriff, if conscientiously trying to perform his duty, is at a loss to know who of the bystanders might unduly favor the interests of either party. The same authors said: "'All questions touching the formation of juries,' said Mr. Justice Coleridge upon an important occasion, 'must be examined by the judges with very critical eyes.' This expression is a fair illustration of that solicitude for the right of the subject to an impartial jury, which has characterized the English law from the earliest period of its history." Section 125.

If the sheriff, in filling the panel for the trial of the prior criminal case, succeeded in avoiding all who might be interested for or against the defendant in that case, he still might have called the very men who should not be called for this subsequent case. To guard against errors of this nature, the statute provides for the larger cities a specific method of filling the panel not required in the less populous counties. The general statute for smaller counties (Rev. St. 1913, sec. 8143) does not apply. That section of the general act was in the Revised Statutes of 1866, p. 511, and in 1905 (Laws 1905, ch. 177) the statute providing specially for the more populous counties was en-

acted. Rev. St. 1913, sec. 8148 *et seq.* That statute (section 8156) provides that to fill the panel, when necessary, "the clerk of such court shall, when ordered by the judge, again repair to the office of the county clerk, and draw in the same manner as at the first drawing, such number of jurors as the judge shall direct, to fill such panel." The same section provides: "In case a jury shall be required in such court for trial of any cause, before the panel shall be filled in the manner herein provided, the court may direct the sheriff to summon from the bystanders, or from the body of the county, a sufficient number of persons having the qualifications of jurors, as provided in this article, to fill the panel, in order that a jury to try such cause may be drawn therefrom, and when such jury is drawn, the persons selected from the bystanders, or from the body of the county, to fill the panel, and not chosen on the jury, shall be discharged from the panel, and those who shall be chosen to serve on such jury shall also be discharged from the panel at the conclusion of the trial." This is a positive declaration that in these populous counties jurors called as talesmen for the trial of any case shall not be placed upon the regular panel, but must, when not wanted for, or when they have served in, the case for which the sheriff has called them, be discharged, and, to leave no doubt of the intention of the legislature, the section closes with the following proviso: *"Provided,* persons selected from the bystanders, as provided in this section, shall not thereby be disqualified or exempt from service as jurors, when regularly drawn by the clerk for that purpose in the manner provided in this article." The regular panel could only be filled by drawing names by lot from the lists prepared and in the wheel or box. The proceeding was erroneous, and the question is whether the plaintiff is estopped to make the objection now because she did not make it before the trial. Was the plaintiff bound to know that the regular panel was exhausted and that the court had filled it in an unlawful way? If she was, she is now estopped to complain, but if she was

not bound to know that, and made her objection in the district court, as it seems she did, upon the motion for new trial filed in due time, then the motion should have been sustained, and the judgment is erroneous.

Ordinarily a challenge to the array, to be available, must be made before the trial. A party cannot voluntarily take his chances with one jury, and then obtain another trial on the ground that the jury was irregularly called or some of its members disqualified. The parties are supposed to take notice of formalities prescribed by statute and regularly shown upon the records. But the parties to this case are not presumed to have been in court at the trial of the prior criminal case. They did not necessarily have notice that the panel of 30 jurors for the criminal court had been exhausted, or that the judge of that court had directed that bystanders called by the sheriff in the former trial should constitute the panel from which jurors should be called to sit in their case. The statute provided that the panel from which the jurors were to be called should be filled from the regular jury list, which must ordinarily contain the names of 500 or more qualified jurors and they could rely upon compliance with the statute in that regard. The presumption was that the regular jury list from the county at large prepared by the proper officers, before the term, and without reference to any particular case, would be unprejudiced and disinterested. The plaintiff might not regard it entirely safe to rely upon a similar presumption as to jurors called from the environment of the courtroom. The proceeding in this case was not only dangerous to the plaintiff's interests, but was in direct violation of the statute, and could not have been anticipated or guarded against.

Our former judgment is set aside, and the judgment of the district court is reversed and the cause remanded.

REVERSED.

LETTON, J., dissenting.

In the former opinion in this case (97 Neb. 293) three points were decided: (1) That there was sufficient evidence to support the verdict; (2) that it was not affirmatively shown that certain talesmen were improperly drawn; (3) that a party to a suit cannot wait until after the jury has returned an adverse verdict before raising objections to the qualifications of jurors.

The majority opinion does not consider nor controvert the first point, and, hence, we have the anomalous situation that, although a proper verdict has been rendered, it is set aside on account of a mere irregularity in filling the panel. As to the second point, upon further consideration, I am inclined to think that the law laid down in the third paragraph of the syllabus in the former opinion did not construe the statute properly, and that the present opinion makes the proper interpretation. This should not affect the judgment, because, as pointed out, the rule is that one will not be permitted to wait until after an adverse verdict before he questions the qualifications of a juror. If he does this, he waives his right to object. The majority opinion holding that this can be done overrules a number of former decisions of this court without mentioning them, and is contrary to the general rule in other states.

In 1 Thompson, Trials (2d ed.) sec. 116, Mr. Thompson says that the mass of American authorities is in conformity with this rule: "It has been repeatedly held that a cause of challenge not discovered until after verdict, whether the case be civil or criminal, as that some of the jurors were aliens, or *not* of the jury list as *selected* by the county authorities, * * * is not, *per se,* a ground of new trial, though it may be such in the discretion of the court. In the exercise of such a discretion, an essential inquiry will be whether the objecting party exercised reasonable diligence in ascertaining the qualifications of the obnoxious juror. Was he questioned on the *voir dire* as to the cause of challenge now alleged? If not, there has been

a lack of diligence on the part of the complaining party, which amounts to a waiver of the cause of challenge. * * * In England and in many American jurisdictions a paramount inquiry upon such an objection is whether it has resulted in an unjust verdict; if not, the objecting party has sustained no injury, and a new trial will not be granted in order that public and private time may be consumed, and the dangers of other irregularities incurred, when the same result must, on a just view of the evidence, be reached. Unless there is plain evidence of injustice done to the party complaining, the verdict should be allowed to stand."

This has heretofore been the settled rule in this state, even in criminal cases. In *Wilcox v. Saunders,* 4 Neb. 569, it was held that the objection that a juror was disqualified by reason of not being a resident of the county for the statutory period was waived because not made before the trial, and that, if the disqualification was not known at that time, the record should show that an effort to ascertain the facts was made upon the *voir dire* examination; otherwise a new trial would not be granted.

In *Brown v. State,* 9 Neb. 157 (a criminal case), it was held that, as the law then stood, a district judge, in calling a special term of court, had no authority to order the sheriff to summon grand and petit juries, but it was also held that objection to the mode of selecting the jury must be made by challenge or plea in abatement, and that after the accused had pleaded to the indictment it was too late to object that the jury were not legally summoned.

In *Davis v. State,* 31 Neb. 247, 254, the county commissioners selected only 59 names, instead of 60, as jurors. The opinion says: "The statute requires that the commissioners shall select 60 names. It has been frequently declared by this court that the provisions of the statute relating to the selection of grand and petit jurors are mandatory and must be strictly followed. *Burley v. State,* 1 Neb. 385; *Preuit v. People,* 5 Neb, 377; *Brown v. State,* 9 Neb. 157; *Clark v. Saline County,* 9 Neb. 516; *Barton*

v. State, 12 Neb. 260. No objection was made in the court below that the list from which the jurors were drawn did not contain the requisite number of names. The sole objection there made related to the inequality of the selection, and that was raised for the first time in the motion in arrest of judgment. This was too late. It should have been taken before the trial, by motion to quash the panel. The defendant waived all errors in the manner of selecting the jury."

Turley v. State, 74 Neb. 471, was a prosecution for murder. One who was disqualified by reason of having been convicted of a felony sat as a juror. In the opinion by Sedgwick, J., it is said: "Great latitude is allowed the defendant upon the *voir dire* examination to enable him to ascertain whether there is any ground for objecting to the juror. He cannot waive an objection of this nature, and, after taking his chances of an acquittal before the jury selected, insist upon an objection which he should have raised upon the impaneling of the jury, and, if he makes no effort to ascertain whether a juror offered is qualified to sit, he must be held to have waived the objection. Any other rule would introduce uncertainty into a jury trial which would be intolerable." This is followed in *Reed v. State,* 75 Neb. 509.

In the case at bar no objection was made at any stage of the trial. The list of names on the panel of regular jurors was of record and within the reach of plaintiff and his counsel before the trial. A reference to this list, which under the statute could not at any time include more than 24 jurors for each judge sitting with a jury, would at once have disclosed that the jurors complained of were not regularly upon the panel. Having failed to interpose any objection or complaint until after he had tested the temper of the jury and received an adverse verdict, the plaintiff waived the irregularity, and is bound by the verdict.

BARNES and FAWCETT, JJ., concur in this dissent.

LEWIS C. OVERTON ET AL., APPELLEES, V. CHARLES W. SACK ET AL., APPELLANTS.

FILED DECEMBER 3, 1915. No. 18317.

1. **Deeds:** CANCELATION: FRAUD. Before a court of equity will set aside a deed obtained by fraud, or imposition, practiced upon a person of weak mentality, it will require a return of the purchase money paid, or, if that cannot be done, will make such other order as will place the purchaser in substantially the same condition as he was in at the time the deed was made.
2. **Limitation of Actions:** BEQUEST. A specific money bequest, resting as a lien upon real estate in the hands of a residuary devisee, is barred after the lapse of ten years from the time the right of action thereon accrued.

APPEAL from the district court for Sarpy county: HARVEY D. TRAVIS, JUDGE. *Modified and remanded, with directions.*

Stout, Rose & Wells and *Matthew Gering,* for appellants.

William R. Patrick and *Anthony E. Langdon, contra.*

MORRISSEY, C. J.

June 16, 1885, William Overton died, testate, seised of certain lands in Sarpy county. He devised to the widow the land herein in controversy, during her natural lifetime, and provided that at her death it should descend to his son, William B. Overton, subject, however, to the payment of $200 each to his sons, John G. Overton, Lewis C. Overton, North L. Overton, and to his daughter, Martha C. Sack. The will was duly filed and admitted to probate in 1885, and in December, 1887, the accounts of the executor were approved and he was duly discharged by the county court. The widow, Catherine Overton, died May 11, 1901. July 15, 1907, Lewis C. Overton filed a petition in the probate court alleging the nonpayment of the legacies, and procured the appointment of an administrator with will annexed. September 3, 1910, the administrator filed his re-

port showing that no property had come into his hands and praying for his discharge. On the day set for hearing the court entered a decree finding it the duty of the administrator to collect the bequests, and that on such collection and payment an order of discharge would issue. This appears to end that proceeding.

From the death of William Overton in 1885 until the death of his widow, Catherine Overton, May 11, 1901, the widow and her son William B. Overton occupied the premises, and from the death of the widow until August 11, 1911, they were occupied by William B. Overton. On the last named date William B. Overton executed a deed of conveyance of the real estate to defendant Edgar R. Kobler, and, on the same day, Kobler executed a deed to the defendant Sack. Soon thereafter William B. Overton died intestate. This action was brought primarily for the cancelation of these deeds.

The plaintiff Lewis C. Overton is a son of William, and a brother of William B. Overton, and the other plaintiffs are also heirs of the deceased William and William B. By their petition, plaintiffs allege that shortly after the death of Catherine Overton they entered into a mutual agreement with William B. Overton that, in consideration of their forbearance to prosecute the collection of the legacies due them under the will of William Overton, William B. Overton should not alienate or incumber the real estate, and should die intestate, to the end that his property should descend to the legatees, or to those entitled to the property by right of representation, they being the sole heirs at law of the said William B. Overton; that, relying upon this agreement, the legatees forbore the prosecution or collection of the several amounts due under the will; that August 11, 1911, the defendants Edgar R. Kobler and Charles W. Sack, conspiring together for the purpose of unlawfully securing the property of William B. Overton, by the exercise of deception, fraud and undue influence, procured the execution of the deed from William B.

Overton to Edgar R. Kobler; that at the time Overton was mentally incompetent to execute and deliver a deed, and also that Sack and Kobler well knew of the oral agreement whereby he had agreed to die intestate without incumbering or alienating the real estate; "that, under the importunity, advice and direction of the defendant Kobler, said William B. Overton, having in his possession the sum of about $5,000, was, in the nighttime, taken by said Kobler and conveyed to a lonely spot in Douglas county, Nebraska, where the said William B. Overton was, during said night, murdered and robbed of said money, which was thereby lost to the plaintiffs and other heirs at law of said William B. Overton." It is also alleged that the consideration, $4,000, was grossly inadequate, and that the land was of the value of $5,000. There was a prayer that the alleged oral agreement be enforced and held valid; that the deeds be declared null and void; that the title to the land be quieted and confirmed in the plaintiffs to the extent of their interest as heirs of William B. Overton, or, in the event that the court did not so decree, that the plaintiffs be held to have a lien upon the premises for the amount of the bequests contained in the will of William Overton, together with interest thereon from the date of the death of Catherine Overton, May 11, 1901. Minor heirs, through their guardian *ad litem*, intervened, and by cross-petition set out all the matters contained in plaintiff's petition, and in addition prayed for a construction of the will of William Overton.

Defendant Charles W. Sack, by answer, denied all allegations of fraud and duress; admitted the purchase of the land, and the chain of title by which he held; and alleged that through Edgar R. Kobler, his agent, he purchased the same for $4,000, its full merchantable value; denied that he had any knowledge, part or participation in any artifice, trick or fraud employed by Kobler; denied that he had any knowledge or information that William B. Overton was incompetent to transact business; alleged that in making the purchase he acted in good faith; denied

that the murder and robbery were incident to or connected with the real estate transaction, or that they were in any way attributable to him; denied that either William B. Overton, during his lifetime, or any of his heirs or representatives, ever tendered or offered to return the $4,000 which he paid for the land; alleged that the estate of William Overton was fully administered and the executor discharged December 6, 1887; that more than ten years elapsed between the date of the decease of Catherine Overton, May 11, 1901, and the commencement of this suit, October 24, 1911, and that the legacies mentioned were barred by the statute of limitations. The defendant Edgar R. Kobler, filed a general denial.

The findings of the trial court, so far as material here, are: That the legacies mentioned in the will of William Overton were never paid; that in making the purchase the defendant Kobler acted as the agent of the defendant Charles W. Sack; that William B. Overton "was an old man, weak in body and mind, living the life of a recluse, and that said fact was well known to the defendants Kobler and Sack;" that by representing to Overton that he was about to be arrested on the charge of arson he was put in great fear, and while in a highly agitated state of mind and wholly disqualified to act rationally as to his property, and "probably insane," he made the deed, and that Sack was fully cognizant of these facts, and that these representations were false; that following the execution of the deed, and on the same day, the defendant Kobler conveyed Overton, who then had at least $5,000 on his person, to a lonely spot in Douglas county, "where said William B. Overton by some person or persons, was murdered and robbed of his money." The court makes the further finding that on August 11, 1911, defendant Kobler possessed himself of all the money of William B. Overton except $35; that the value of the land was $5,000; that the evidence did not sustain plaintiff's claim of an oral agreement on the part of William B. Overton to die intestate. He decreed that the deeds be set aside as fraudulent; that the legacies men-

tioned in the will of William Overton be established as liens upon the real estate, and the land to be sold to satisfy the same, and, after the payment of the legacies, the proceeds be divided among the heirs; that the defendant Martha C. Sack pay into court $200 which the defendant Kobler had given her immediately following the disappearance of William B. Overton; that Kobler pay into court $4,800, $4,000 of which to be paid to Charles W. Sack, and the remainder to be divided among the heirs of William B. Overton.

Overton was an eccentric character, who had spent nearly all his life on this little farm. After the death of his mother, which occurred in 1901, he had lived alone in a small cabin, and, though surrounded by relatives, he seldom visited them, and they rarely called on him. The land lay adjoining the farm owned by the defendant Sack, who was a relative but did not enjoy his favor. The defendant Kobler, a young man, who was also related to Overton, and on friendly terms with him, discovered that the farm might be purchased. He went to Sack and told him it could be bought for $3,000. Sack at once agreed to take the property and to pay Kobler $300 commission for making the purchase. Kobler returned to Overton only to find that he had raised the price to $4,000. Finally a contract was closed at the larger figure, but some modification was made between Sack and Kobler as to the amount of Kobler's commission. Sack went to his local banker, and, by executing a mortgage on the farm which he then owned, arranged with the banker to pay Overton the purchase price. Kobler and Overton went to the bank, Overton executed a deed of the property to Kobler, believing that Kobler was the real purchaser, and immediately thereafter Kobler deeded to Sack. The banker suggested to Overton that he take bank paper, but on Overton's insistence that he would accept nothing but cash the money was paid over. Overton then went to the home of a cousin in Springfield. He put the currency in a small sack, which he wore around his neck, and the gold and silver

into a tin bucket; he having about $5,000 all told. About 6 o'clock that evening, without waiting for supper, he left the home of this cousin, in company with Kobler, taking with him all of his earthly belongings. It is insisted by plaintiffs, and we think fairly shown by the evidence, that Overton had been led to believe that the sheriff was about to arrest him on a charge of burning some hay stacks, and that it was necessary for him to depart at once in order to avoid arrest. They drove to the town of Millard, where they were last seen together. About thirty days later the body of William B. Overton was found, and all of his money was gone, except $35, which was overlooked by the party who murdered and robbed him. The circumstances point strongly to Kobler as the perpetrator of this heinous crime.

Immediately following the execution of the deeds and the payment of the money, Sack met the plaintiffs in the town of Springfield, and told them of the transaction. It is insisted by the plaintiffs that he misled them as to Overton's whereabouts, but it is not contended that they made any objection to the sale or any claim to an interest in the property. Overton went freely about the streets of the little town during the afternoon, and the money was paid over by the banker in the regular course of business.

Having reached the conclusion that at the time Overton executed the deed he was of weak mentality and that the deed was obtained by fraud or imposition, practiced upon him by Kobler, it is unnecessary to discuss the testimony on which the trial court based its finding. But it is not claimed that Sack had any part in the murder or robbery of Overton, and the decree of the trial court directing Kobler to pay $4,000 into court for the benefit of Sack, the amount he had paid for the land, is as conclusive as though he had made a special finding to that effect, that the trial judge believed that Sack was in no way connected with the felonies.

Sack not being in any way connected with what occurred after the execution of the deeds and the payment of the

money, will a court of equity grant plaintiffs the relief prayed without a return, or an offer to return, the money paid? In reply to this question, appellees say, "Sack having availed himself of the real estate, which he received from Kobler, he is likewise charged with all the instrumentalities employed by Kobler to effect and secure the conveyance of the land to him by Overton," and cite, though under incorrect title, *McKeighan v. Hopkins,* 19 Neb. 33, and *Osborn Co. v. Jordan,* 52 Neb. 465. These cases merely lay down the familiar rule that a principal may not ratify the unauthorized act of his agent in so far as it operates to his advantage and repudiate those acts in so far as they impose burdens. Sack is not accused of entering into a conspiracy with Kobler for the commission of a felony. If Kobler be guilty of these crimes, they were perpetrated after his agency had ceased; they were beyond the scope of his employment, and Sack cannot be held accountable therefor in any degree. At the time Sack employed Kobler to negotiate the purchase, negotiated the loan with the bank, arranged for the banker to draw the deed and make the settlement with Overton, he surely had no reason to suppose that Overton would take this money in cash and go out unarmed in the night season, thus leaving himself subject to the assault that was made upon him. He could not reasonably contemplate that Kobler or anybody else would rob and murder him, and, in the absence of any proof that he might have contemplated these things, we must adhere to the rule requiring restoration of the *status quo* as a condition of decreeing the cancelation of the deeds. The appellees contend that Kobler robbed Overton of his money, and thereby made it impossible for plaintiffs to tender a return of the purchase price, and that Sack must look to Kobler and the warranties in his deed for reimbursement, and that Sack deceived plaintiffs as to the whereabouts of Overton and deprived them of the opportunity to quiet his fears and protect either him or his money, citing *Meyer v. Fishburn,* 65 Neb. 626. In that case the court held to the general rule that a party who seeks

to rescind a contract entered into fraudulently or induced by undue influence must return, or offer to return, the property acquired by such contract within a reasonable time, and so place the adverse party *in statu quo,* but held that there is an exception to that part of the rule requiring a return of the property where the party guilty of fraud and undue influence, and as a part of the general wrongful design, has by advice or interference induced the other party to part with his property, and held that in such case a tender of the value of the property received is sufficient, and decreed the defendant a lien upon the premises for an amount equivalent to the value of the property transferred. In the instant case Sack neither counseled nor advised Overton to take the money and lay himself open to robbery and murder, but, on the contrary, he arranged to have it paid by the banker in his bank, where he might reasonably suppose Overton would leave it until drawn out in the regular course of business, and it cannot be said that the robbery was any part of the design or scheme contemplated in the purchase of the real estate.

We are convinced that the court was warranted in finding that the oral agreement pleaded was not proved, but was in error in establishing the legacies left under the will of William Overton as liens upon the real estate. William Overton died in 1885, and his executor was discharged in 1887. Twenty years elapsed thereafter before any steps were taken looking to the collection of the legacies. Even at that late date these measures consisted only in the application to the county court for the appointment of an administrator with the will annexed, which appointment was made. And some three years later this administrator filed a petition asking for a final settlement of his account. Notice was published, and the county court entered a decree finding that the only duty devolving upon the administrator was the collection of the bequests, and that they were a charge upon the real estate, and that upon the collection thereof the administrator would be discharged. No further steps were ever taken.

The guardian *ad litem* has asked that the payment of these legacies be decreed to be a condition precedent to the vesting of the title in William B. Overton, but a reading of the will itself at once demonstrates that they never were anything but liens upon the real estate, and the only question to be determined in relation to the legacies is whether the statute of limitations has run against them. In *Klug v. Seegabarth,* 98 Neb. 272, this court held: "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." Taking the view most favorable to the contention of appellees, namely, that the bequests became due and payable upon the death of the widow, still more than ten years had elapsed before this suit was brought, or before the deeds were executed, and the legacies were barred by the statute of limitations.

So much of the decree as directs Martha C. Sack to pay $200 into court is entirely beyond the issues and is set aside. Kobler has not appealed from the judgment directing him to pay $4,800 into court, and therefore as to him the judgment will be affirmed, but modified, however, by striking out that clause directing the payment of $4,000 thereof to Charles W. Sack, and the whole amount, if collected, shall be credited to the estate of William B. Overton, deceased.

Having reached the conclusion that the deeds ought to be canceled and set aside, but that Sack is entitled to a return of his money, the cause as to him is reversed and remanded, with directions to the court to enter a decree setting aside the deeds, and to make an accounting of the value of any permanent improvements Sack may have made on the premises, and credit him with this amount, together with the original purchase price, with interest thereon at the rate of 7 per cent. per annum from date of payment, and from the amount so found deduct the value of the rents and profits of the real estate while in his possession, and establishing the amount so found to be

due as a first lien on the real estate. If the legal representatives of William B. Overton, deceased, fail to pay into court the amount so found, within 20 days from the entry of the decree, the real estate shall be sold for the payment and satisfaction thereof, the surplus, if any, to be paid to the legal representatives of William B. Overton, deceased.

MODIFIED AND REMANDED, WITH DIRECTIONS.

SEDGWICK, J., concurring.

I think that the judgment is rightly reversed, but I do not think it should be left entirely at the option of the plaintiffs to cause a sale of the property.

ROSE and HAMER, JJ., not sitting.

UNION PACIFIC RAILROAD COMPANY, APPELLEE, V. M. N. TROUPE, COUNTY TREASURER, ET AL., APPELLANTS.

FILED DECEMBER 3, 1915. No. 19086.

1. **Schools and School Districts: TAXES: AMOUNT OF LEVY.** When a school district has money in its treasury available for the support of the school during the ensuing school year, it is bound to take that fact into account in fixing the tax levy, and the levy should be made for no more than will approximately raise the difference between the amount on hand and the amount determined as necessary to meet the expenses of the district for the ensuing school year.

2. ———: **BUILDING FUND: TAX LEVY: VALIDITY.** Where a school district undertakes to vote a tax for the purpose of creating a building fund without complying with the provisions of section 11543, Ann. St. 1911, (Rev. St. 1913, sec. 6743) any assessment or levy made thereunder is void.

3. **Taxation: INJUNCTION.** Injunction will lie to restrain the collection of a tax levied or assessed for an unauthorized or illegal purpose.

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

H. M. Sinclair and *E. B. McDermott,* for appellants.

Edson Rich, B. W. Scandrett and *T. F. Hamer, contra.*

MORRISSEY, C. J.

Action by plaintiff to restrain the collection of taxes levied for school purposes under sections 11540, and 11543, Ann St. 1911. Twenty causes of action against as many school districts are set out in the petition. Nineteen of these causes of action involve the same question, the only difference being that they relate to separate and distinct school districts, and there is a difference in amount. The parties have seen fit to select district No. 3, being the second cause of action, as typical of the 19. The case of this district turns upon the construction of section 11540, Ann. St. 1911.

Plaintiff's line of railroad extends throughout the district, and its assessed valuation therein is approximately 50 per cent. of the total assessed valuation of the district. There is no substantial dispute as to the facts. Prior to the annual school district meeting held June 30, 1913, the district trustees estimated that the expense of maintaining the school during the ensuing year would be $800, and at the annual district meeting it was determined by the voters of the district, that $800 would be required for the maintenance of the school during the school year, and the district officers sent up their certificate to the proper county officers showing that the school district had voted $800 as the estimated expense of maintaining the school for the next school year, and requesting that a levy be made sufficient to raise that amount. The county board caused a levy of 8 1-2 mills on the dollar valuation to be made. Applied to the assessed valuation of the property of the district, this would produce $959, and it made a charge against plaintiff's property of $501. At the time the school district had on hand $703.82. Thus it will be seen

that it lacked only $96.18 of having as much money on hand as the total estimated expenses for the year. Plaintiff alleged that a levy of one mill on the assessed valuation of the district would raise an amount which, added to the money on hand, would exceed the amount necessary to maintain the school for the year, and on this basis tendered to the defendant county treasurer its proportion of the tax, and brought this suit to have the remainder of the tax declared null and void, and to restrain the defendant county treasurer from attempting to collect the same.

The section under consideration reads as follows: Section 11540: "That trustees of each school district within the State of Nebraska shall, prior to the annual school district meeting in each year, provided for by section 5427 of this act (11530), prepare an estimate showing the amount of money required for the maintenance of schools during the coming school year, and the legal voters at the annual school meeting each year, shall determine the amount of money required for school maintenance during the coming school year, which shall be an amount sufficient to maintain a school in the manner and for the time provided in section 5440 (11545) of the act and the amount of money so required shall be levied as a tax upon all of the taxable property of the school district; provided, that in districts having four children or less of school age, the amount levied shall not exceed the sum of four hundred ($400) dollars in any year; and in districts having more than four and less than sixteen children of school age, the levy shall not exceed the sum of fifty ($50) dollars per child in addition to the above. The amount of money so voted as being necessary for the maintenance of the school for the coming year, shall be certified by the district school board to the county clerk of the county in which said school district is located and said amount shall be levied by the county board on the assessed value of the school district, and be collected as other taxes; provided, that the amount so levied shall not exceed in any one year

two and one-half ($2.50) dollars on the one hundred dollar valuation as assessed and equalized."

Under this section it was the duty of the school district officers to prepare an estimate showing the amount of money required for the maintenance of the school, and the legal voters were left to determine at the annual school meeting the amount required for school maintenance during the succeeding year, with a provision that the amount so voted should not exceed "in any one year two and one-half ($2.50) dollars on the one hundred dollar valuation as assessed and equalized." The amount voted and levied is within the 25-mill limitation. But plaintiff contends that, after the school district has determined the amount necessary to meet the expenses for the ensuing year, it must then take into account the amount of money on hand, and that the levy shall be no more than is sufficient to raise the difference between the amount on hand and the amount fixed and determined as the sum necessary to meet the expenses for the ensuing year. So far as this cause of action and those similar to it are concerned, this is the question to determine.

The other complaint is directed against an assessment and levy made by district No. 22 for the purpose of creating a building fund. It is pointed out that the only authority for voting this tax was derived from section 11543, Ann. St. 1911, which, so far as material here, provides that the voters at the annual school district meeting may determine upon a levy not to exceed ten mills on the dollar valuation, which shall be expended for building purposes, upon petition filed with the district trustees at least twenty days before the annual meeting, of one-fourth of the legal voters of the district, praying that the question of voting a tax for that purpose be submitted at the annual meeting, and making it the duty of the trustees to include such question in the posted notices calling such meeting, requiring that the petition shall definitely state the whole question to be submitted, including the sum desired to be raised or the amount of the tax to be levied, and the whole regulation, in-

cluding the time of its taking effect or having operation. It further provides that, if a majority of the electors vote in favor thereof, that fact "shall be certified to the county board, which, upon being satisfied that all the requirements have been substantially complied with, * * * shall make an order that the levy be made." The preliminary steps for making this levy were not taken, and for these reasons, the plaintiff alleges that the assessment was null and void. The court found that the taxes complained of in the several causes of action were levied without authority of law, and were therefore null and void, and entered a decree as prayed, restraining their collection.

After a school district has determined the amount necessary to meet its expenses for the ensuing year, must it take into account the money it has on hand and adjust its levy so as to raise an amount which, added to the sum on hand, will meet the expenses of the district, or is it free to disregard the money already in the treasury and make a levy which will raise an amount equal to the estimated expense for the year, provided this levy is within the 25-mill maximum fixed by the statute? It has never been the policy of the law to create a fund by taxation to lay by for future use, except only in the case of building funds, sinking funds to meet outstanding bonds, etc., and in these cases express authority is given by statute. Even these statutes provide for certain formalities and special notice, so that the voters of the district may have their attention directed specifically to the proposed levy. The section quoted (11540) shows that the estimate shall be made annually. It also provides that the voters at the annual meeting shall determine the amount necessary for school maintenance during the coming year, and that this amount shall be "sufficient to maintain a school in the manner and for the time provided." There is no suggestion that money may be accumulated for future use. But the provisions for the annual estimate, the annual meeting, and the annual levy of a tax indicate a contrary intention

on the part of the legislature. In addition to the 25-mill limitation, we find the direction to determine the amount of money "required for school maintenance during the coming year, which shall be an amount sufficient to maintain a school in the manner and for the time provided." This provision, when read in the light of the preceding provisions of the section, cannot be said to fix a minimum only, but must be held to fix a maximum as well. If a district has a large sum of money in its treasury, and had no outstanding obligations, why not take this money into account when making the annual levy? In the instant case $800 is estimated as sufficient for the next ensuing school year, and is more than it required during the preceding year. It has available more than $700. Shall this sum be taken into account in making the levy? This question was before the court of appeals of Kentucky under a statute like ours. The school board requested a levy of 35 mills, the maximum under the statute. The taxing board found that the district had $13,000 in its treasury, and reduced the amount of the levy, as plaintiff is seeking to have done here. The court said: "While the statute provides for a tax for school purposes not to exceed in any one year 35 cents on each $100 taxable property valuation, the school board is not authorized to demand more than is reasonably necessary." *Board of Education v. Nelson,* 109 Ky. 203.

No complaint is made of the estimate, and there is no attempt to deprive the district of money sufficient to meet its expenses. But no reason is advanced for levying a tax to defray expenses when there is money in the treasury available for that purpose. The district court was right in holding that the amount in excess of that required to raise the difference between the amount on hand and the amount needed was levied for an illegal and unauthorized purpose.

The remaining question relates to the levy for building purposes made by district No. 22. Section 11543, Ann. St. 1911, heretofore in substance set out, was the only author-

ity for making this levy. The requirements of that section were not met, and counsel for the district do not contend that the preliminary steps were taken, but say that it was the duty of the county board to pass judicially or quasi-judicially upon the action of the district in voting the tax, and that there is no allegation in the petition nor evidence in the record that the county board erred in making the levy, and that the complaint of want of power to make the levy must be directed against the action of the county board, and not against the school district, and therefore it must be alleged and proved that the county board was without jurisdiction or unauthorized to make the levy. This contention is entirely too technical. Until the district had authorized the levy to be made, the county board was without authority to make it, and without complying with the statute no lawful levy could be made. In *Harmon v. City of Omaha,* 53 Neb. 164, in the body of the opinion it is said: "It is a familiar rule that enactments by which authority for special assessments or levies of taxes is conferred are to be strictly construed. It is also a familiar doctrine that, in order to sustain such assessments, the record must affirmatively show a compliance with all the conditions essential to a valid exercise of the taxing power. *Smith v. City of Omaha,* 49 Neb. 883; *Hutchinson v. City of Omaha,* 52 Neb. 345; *Stenberg v. State,* 50 Neb. 127. The proceedings being without the condition necessary at their inception, they were without authority and the taxes levied were void."

The taxes complained of, having been levied for an illegal and unauthorized purpose, come within the saving clause of section 6491, Rev. St. 1913, and were properly enjoined.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., concurring.

I think the levy in this case was made for an unauthorized purpose. "Taxes levied in excess of the constitu-

tional limit are for an illegal and unauthorized purpose and are void." *Dakota County v. Chicago, St. P., M. & O. R. Co.*, 63 Neb. 405. Of course, if the levy is in excess of a statutory limit, it would be equally unauthorized. The officers of the school district prepare the budget. They inform the voters at the annual meeting in detail what they consider the district will require to use during the ensuing year. The voters take action upon this report, and decide how much money the district will require for all purposes during the year. This matter is left largely to the discretion of the voters. They determine how much money the district will require to use and inform the county authorities. The school district has nothing to do with the levy. The county authorities have nothing to do with determining how much the district will be required to use. They are authorized to make such a levy as will be necessary, so that the district will have the money it needs for all purposes during that year. If the district will need to use $800 during the ensuing year, and already has at its disposal more than $700, any levy in excess of $100 is unnecessary to furnish the required amount, and the board is not authorized to make an unnecessary levy. It has no such discretion in the matter. It is simply to make such levy as is required to place at the disposal of the district the amount which the district has decided to be necessary for its purposes. If the board levies more than is required for that purpose, it exceeds its authority, and such levy is unauthorized.

FAWCETT, J., dissenting.

The important question in this case is: Can the relief sought by plaintiff be obtained by injunction? Section 6491, Rev. St. 1913, provides: "No injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof hereinafter levied, nor to restrain the sale of any property for the nonpayment of any such tax, except such tax or the part thereof enjoined be levied or assessed for an illegal or

unauthorized purpose." That a school district may levy taxes to meet the expenses of the district for the ensuing school year, and that it may also vote a tax for the purpose of creating a building fund, must be conceded. To make such a levy or to vote such a tax is not, therefore, either "illegal" or "unauthorized." In the suit at bar the most that can be said of the levy for expenses during the ensuing school year is that the levy was excessive; and the most that can be said about the tax voted to create a building fund is that the formalities prescribed by statute had not been observed in voting the tax. These facts do not render either the levy for expenses for the school year or the tax for a building fund subject to the charge that they are "levied or assessed for an illegal or unauthorized purpose." Conceding that the former is excessive and the latter irregular, plaintiff would not be entitled to an injunction, for the reason that it had an adequate remedy by appeal from the action of the county board. By such a proceeding the levy could have been adjusted in an orderly manner, and, if excessive, could have been reduced and the amount of plaintiff's just liability for taxes could have been definitely determined. This suit illustrates the wisdom of a statute like section 6491. Public officials, charged with the duty of providing the revenues necessary for any department of the government, should not be interfered with or embarrassed by the extraordinary writ of injunction, except where it is clearly shown that such officials are proceeding fraudulently, or without authority of law, and that the relator has no legal remedy by appeal or otherwise. Moreover, so far as the record shows, the county board acted regularly, without any notice of the fact that the school district board were attempting to obtain an excessive levy, or that they had on hand or under their control any surplus not disclosed by their report.

LETTON and ROSE, JJ., concur in above dissent.

LEOPOLD DOLL ET AL., APPELLANTS, V. CHARLES F. DOLL ET AL., APPELLEES.

FILED DECEMBER 3, 1915. No. 18344.

1. **Trusts:** RESULTING TRUST. "Where one buys real estate for which he pays the purchase price, and for convenience takes the title in the name of another, the person taking the title will hold the property in trust for the one who pays the purchase price." *Doll v. Doll*, 96 Neb. 185.
2. ———: ———: STATUTE OF FRAUDS. "The trust thus created is what is known as a resulting trust, and is not affected by the statute of frauds." *Doll v. Doll*, 96 Neb. 185.
3. ———: ———. The same presumption arises and the same rule obtains in transactions between uncle and nephew as those between strangers.
4. ———: ———: SUFFICIENCY OF EVIDENCE. Evidence examined, its substance stated in the opinion, and *held* sufficient to require a finding that the legal title to the several pieces of real estate in controversy in this case were held in trust by Charles F. Doll for August Doll at the time of his death, and in equity were a part of his uncle's estate.

APPEAL from the district court for Douglas county: JAMES P. ENGLISH, JUDGE. *Reversed in part, and remanded, with directions.*

Howard H. Baldrige, W. A. DeBord, John G. Kuhn, Louis J. Piatti and *John D. Wear*, for appellants.

John C. Cowin, Guy R. C. Read and *George W. Shields & Sons, contra.*

BARNES, J.

This was a suit in equity to establish a resulting trust in and to certain real estate alleged to have been purchased by August Doll, deceased, and to which the legal title had been placed in the name of his nephew, Charles F. Doll. The issues were the same as those in the case of *Doll v. Doll*, 96 Neb. 185. Therefore we do not deem it necessary to set forth the pleadings in this opinion.

The trial court held that the resulting trust was established as to the real estate described as: Commencing at a point 84 feet west of the northeast corner of lot 1, Reed's Second addition to city of Omaha, Douglas county, Nebraska, thence west 22 feet, thence south 98 feet, thence east 22 feet, thence north 98 feet to place of beginning, known as the "Hulshizer Hardware Store" property; that as to the west half of lot 2, block 167, city of Omaha, known as the "Festner Printing Plant" property, and lots 17, 18 and 19, block 2, Forest Hill addition to said city, known as the "Festner Home" property, a resulting trust was not established, and the two properties last established were decreed to be the property of the defendant Charles F. Doll. From this decree the plaintiffs have appealed, and the defendants have prosecuted a cross-appeal.

The appellants contend that the trial court erred in holding that a resulting trust was not established as to the two real estate properties last mentioned. This brings us to a consideration of the evidence so far as it relates to those two properties.

Considering the testimony first as to the Festner Printing Plant property, it is sufficient to say that it appears from the evidence of Mrs. Getzschmann, of Dexter Thomas, of the officers of the bank which had the lien on the property, and of other persons, all of whom were competent witnesses, that at the request of the Getzschmanns August Doll purchased the property and paid the purchase price thereof, and as a matter of convenience had the deed for the same made to his nephew, Charles F. Doll, who took no part in the transaction. August Doll himself took possession of the property, and with his own money built a three-story building thereon and leased it to the Getzschmanns. The building was partly destroyed by fire in 1897, and August Doll rebuilt it and extended the lease thereon to 1913. He paid all of the taxes, paid for all improvements, and for all of the repairs on the property, collected all of the rents, and had abso-

lute control and possession of the building up to the time of his last illness. His nephew, Charles F. Doll, never paid any of the purchase price and was never known in the negotiations for the purchase of this property. The evidence, of which we have given merely the substance, shows conclusively that August Doll was the equitable owner of this property at the time of his death, and that Charles F. Doll merely had the legal title as trustee of the resulting trust which existed in favor of his uncle.

There is no conflict in the evidence as to lots 17, 18 and 19, in block 2, Forest Hill addition to the city of Omaha. There is abundant proof in the record that August Doll conducted negotiations for the purchase of this property and paid for it with his own money. The purchase was brought about by Mrs. Getzschmann. It appears that she wanted August Doll to buy the property for a residence for herself and her family. She applied to him to loan her the money to purchase the property. He told her that he would help her get it. They consulted the agent who had it for sale, and, the terms being satisfactory to August, the property was purchased. August paid the purchase price, which amounted to approximately $12,000. A Mr. Schroeder was the owner of the property at the time of the purchase, and at the request of August Doll, and for his convenience, it was deeded by Schroeder to Charles F. Doll. A contract was made, giving the Getzschmanns an option to pay August Doll for this property, and, when paid for, the Getzschmanns were to have a deed for it. This contract was signed by Charles F. Doll as he had the legal title, and this was all he did in relation to the purchase of the property. August Doll took charge of the deed and the contract with the Getzschmanns, received the interest payments, saw to it that they paid the taxes and kept the property insured, and exercised complete and absolute control over it. The negotiations for the purchase occurred in the fall of 1897, the purchase was concluded in 1900, and the deed was made on June 31 of that year. Later on, in 1907,

August and the Getzschmanns disagreed in relation to these matters and a law suit resulted, after which they came together and settled their differences and new contracts were made.

Mrs. Getzschmann testified that Charles F. Doll never took any part in the negotiations and was never consulted; that he never collected any of the payments on the principal or interest of the Forest Hill property, but that all payments were made to his uncle, August Doll; that August paid the $8,000 mortgage which was on the property and held possession of the deed, notes and contracts up to 1907; that she saw them in his possession at that time. The amount paid by August as the consideration of the property, as above stated, was $12,000. Mrs. Getzschmann's evidence was corroborated by the testimony of Mr. Mickle, who acted as agent for the Provident Life & Trust Company, the owner of the mortgage. We are therefore of opinion that, when the deed to this property was made by Schroeder to Charles F. Doll, he took it in trust for his uncle, August Doll, who was in equity the real owner of the property. *Hoehne v. Breitkreitz,* 5 Neb. 110; *Chicago, B. & Q. R. Co. v. First Nat. Bank,* 58 Neb. 548; *Kobarg v. Greeder,* 51 Neb. 365; *Detwiler v. Detwiler,* 30 Neb. 338; *Doll v. Doll,* 96 Neb. 185. The rule announced in the foregoing decisions applies as well to transactions between uncle and nephew as those between strangers. *Summers v. Moore,* 113 N. Car. 394; *Harris v. Elliott,* 45 W. Va. 245; *O'Neill v. O'Neill,* 227 Pa. St. 334; *Wright v. Wright,* 242 Ill. 71; *Harris v. McIntyre,* 118 Ill. 275; 1 Perry, Trusts and Trustees (6th ed.) sec. 144.

In order to defeat the resulting trust, the defendant Charles F. Doll pleaded and attempted to prove an alleged agreement between himself and his brother, Augustus, and his uncle, August, in substance as follows: That August Doll and defendants Charles F. and Augustus Doll made a valid agreement that the nephews were to give their uncle, August, all the money they then had,

all that they were able to earn, and all that they could borrow from their brothers and sisters, all of which was to be used and invested by their uncle for the benefit of the defendants; and the said August Doll was to convey the property to defendants Charles F. Doll and his brother, Augustus Doll, as it became convenient for him to do so, and such property as he saw fit to so convey to them should become their property. It must be observed that the date of the alleged agreement was not stated, and defendant Charles F. Doll was unable to testify as to when and where it was made. Neither was he able to testify as to what amount he gave his uncle of his own earnings. It appears, however, that defendant's sisters loaned considerable money, which they had inherited, to their uncle, August Doll, for which he gave his notes to them, signed by himself and Charles F. Doll. It also appears that Charles was guardian for his brother, who was a minor, and loaned some of his ward's money to his uncle. The testimony shows, however, that all of this money, with interest, was repaid to defendant's brother and sisters in the lifetime of August Doll, except $2,000, which Charles afterwards repaid out of money collected by him on his uncle's life insurance policy. The defendant failed to trace any money of his own as payment of any part of the consideration for the properties in question in this suit. On the contrary, there was evidence which tended to show that Charles owed his uncle, August, $169 at the time he was taken to the hospital. As we view the evidence, the alleged agreement on which defendant relied was, to say the least, vague and uncertain, and the testimony failed to establish this agreement.

On the argument in this court, counsel contended that August Doll gave the properties in question to his nephew, Charles F. Doll; that August had the right to make such disposition of his property during his lifetime. This fact may be conceded, but, as we view the evidence, it fails to support this contention. August Doll was a successful business man. He was, to a large extent, a dealer in real

estate and a loaner of money. He acquired a large estate. He was frugal in his habits and a lover of money, and, while he was eccentric, his whole life and conduct was such as to convince us that he never intended to give the properties in question in this suit to his nephew. We think this sufficiently disposes of defendant's contentions.

It further appears that, when August Doll was at the hospital, by reason of his last illness, the defendant herein and his brother, Augustus, procured his signature to the following:

"Omaha, Neb., Feb. 9, 1909.

"To all the Tenants and Debtors of Charles F. Doll: You are hereby notified that I hereby resign my agency for my nephew, Charles F. Doll, and the said tenants and debtors of said Charles F. Doll are to pay to the said Charles F. Doll, or to any one empowered by him to collect, any rents, interest or principal due from any of said tenants or debtors to the said Charles F. Doll.

"Witness my hand at Omaha, the date aforesaid.

"(Signed) August Doll.

"In Presence of: Sister Tina Peterson."

Sister Tina Peterson testified in relation to the conversation at the hospital at the time August Doll signed the paper, as follows: "I was asked when I came in to sign a paper, and it seems to me that I hesitated to do so, and then I was told that it was only to enable his nephews to look after his property, and to collect rents, etc., *while he was sick.* * * * Well, the way I remember it was that the—both the nephews and the old man told me what it contained, what the paper contained. * * * Q. It was just to collect them while he was sick? A. That is the way I understood it." It also appears from the testimony that the nephews were very much elated over getting the uncle to sign this paper. Mrs. Reuman testified, in substance, that Augustus Doll, the brother of the defendant herein, said that they had some trouble collecting the rents, but that now they could get them. He said: "We have got so far; we had to do what my

uncle said, to dance when he whistled: now we have got him; now he has got to do the way we want it." This was in reference to the paper which was signed by August Doll while in the hospital. It also appears that at that time the uncle turned over to his nephews something over $600 in cash; that he left the hospital about March 1, 1909, and was taken to the house of his nephew, Augustus, where he remained until the time of his death in August, 1910. The evidence is convincing, to our minds, that when this paper was signed August Doll failed to understand the nature of its contents.

After a careful examination of the evidence contained in the record, we have reached the independent conclusion that the district court erred in holding that defendant Charles F. Doll was the owner of lots 17, 18 and 19, in block 2, Forest Hill addition to the city of Omaha, and the west half of lot 2, block 167, city of Omaha, known as the "Festner Printing Plant" property. We further find that these two properties belonged in equity to August Doll at the time of his death. The judgment of the district court, so far as it relates to the Hulshizer Hardware Store property, is therefore affirmed, and, as to the other two properties above described, the judgment is reversed and the cause is remanded to the district court, with directions to enter a decree in accordance with the views expressed in this opinion.

REVERSED IN PART, AND REMANDED, WITH DIRECTIONS.

LETTON and FAWCETT, JJ., not sitting.

SEDGWICK, J., not participating.

STATE, EX REL. WILLIAM S. RIDGELL, RELATOR, V. GEORGE E. HALL, STATE TREASURER, RESPONDENT.*

FILED DECEMBER 3, 1915. No. 19407.

1. **States:** SPECIAL FUNDS: APPROPRIATION. The fund created by the provision of chapter 23, Rev. St. 1913, and set apart by section 2511 of that chapter as a special fund for the maintenance of the office of state fire commissioner and the expenses incident thereto, may be paid out by the state treasurer on warrants properly drawn by the auditor of state for that purpose without a biennial appropriation by the legislature.

2. **Statutes:** TITLE: SPECIAL FUNDS. Section 19, art. III of the Constitution, does not apply to the use of that fund when the same has been collected.

3. **Mandamus:** WARRANTS: FIRE COMMISSION EXPENSES. The act creating that fund was intended as a continuing appropriation for the payment of the salaries and expenses of the state fire commissioner, and the treasurer may be required by mandamus to pay warrants properly drawn on that fund when collected and in his hands.

Original proceeding in mandamus to compel respondent to countersign and pay a warrant for the salary of relator as deputy state fire commissioner. *Writ allowed.*

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

Burkett, Wilson & Brown and *Berge & McCarty,* for respondent.

E. J. Hainer, amicus curiæ.

BARNES, J.

This is an action in mandamus to require the respondent, the state treasurer, to countersign and pay a warrant drawn by the auditor of public accounts for $200 in favor of the relator as chief deputy fire commissioner, drawn on what is known as the fire commissioner's fund, in payment of the statutory salary and the actual and necessary ex-

*Rehearing denied. See opinion, p. 95, *post.*

penses of the relator for the month of September, 1915, in the due and ordinary conduct of his office.

There is no disputed question of fact in this case. This is made evident by the following recital in the brief of the respondent: "The respondent by his answer has endeavored to relieve the state of the proof of the essential facts in this case, and relies upon the want of statutory authority to countersign or pay the warrant involved in this case. The respondent has endeavored to facilitate the presentation of this matter to the court in order that he might be advised as to his duties as state treasurer in reference to the fund in controversy. In the construction of the law, as he finds it, he is unable to find any authority that would justify him in countersigning or paying the warrant involved, and he therefore joins the relator in asking for a construction of the constitution and the statutes involved in this case."

The real question for our determination is whether the respondent is required to pay the warrant in question out of the fire commissioner's fund in his hands, without a specific act of the legislature appropriating said fund during each biennium to the payment of the salary and expenses of the officers administering the state fire department.

Chapter 23, Rev. St. 1913, creates a fire commission, the affairs of which shall be conducted by a fire commissioner and such subordinates as are provided for by that chapter. It makes the governor the fire commissioner, and provides for the appointment of a chief deputy, and defines his duties.

By section 2509, Rev. St. 1913, it is provided: "The chief deputy state fire commissioner shall receive an annual salary of two thousand dollars and each assistant deputy fire commissioner one thousand five hundred dollars, payable monthly, and their actual and necessary traveling expenses while engaged in the duties of their office. The fire commissioner shall employ clerks and assistants and incur such other expenses as may be neces-

sary in the performance of the duties of his office, not to exceed, including salaries, such sum as may be paid into the state treasury in the manner hereinafter provided."

Section 2510, Rev. St. 1913, provides: "For the purpose of maintaining the department of state fire commissioner, and paying the expenses incident thereto, every fire insurance company except Farmers' Mutuals, whether upon the stock or mutual plan, doing business in the state of Nebraska, shall pay to the state treasurer in the month of January, annually, in addition to the taxes now required by law to be paid by such companies, three-eighths of one per cent. on the gross fire premium receipts, after deducting cancelations and reinsurances, of such companies on all business done in Nebraska the year next preceding, as shown by their annual statements, under oath, to the state auditor, which sum shall be paid on or before the first day of January of each year, and no certificate shall be issued by the auditor to or on behalf of any such company, authorizing it to do or continue business in this state while any such percentage or tax remains due and unpaid."

Section 2511, Rev. St. 1913, provides: "The state treasurer shall hold the money so received into the treasury as a special fund for the maintenance of the office of state fire commissioner, and the expenses incident thereto. The state fire commissioner shall keep on file in his office an itemized statement of all expenses incurred by his department, and shall approve all vouchers issued therefor, before the same are submitted to the auditor of state for payment, which vouchers shall be allowed and paid in the same manner as other claims against the state."

It seems clear that the legislature, by the sections of chapter 23 quoted above, not only created a new department of government known as the state fire commissioner's department, but also designated its officers, fixed the amount of their salaries, and provided a special fund for the payment of such salaries and the expenses of ad-

ministering the department. The fund thus collected may be designated as a trust fund, which, by the terms of the act itself, cannot be used for any other purpose until further legislative action. It is conceded that this fund is amply sufficient for the payment of the warrant in question. Indeed, it is admitted that there is a large surplus of this fund in the hands of the respondent, who contends that he has no authority to pay the warrant in question because the legislature, at its 1915 session, made no specific appropriation of the fund for the payment of the relator's salary and the expenses of administration.

In *Shattuck v. Kincaid,* 31 Or. 379, speaking of appropriations, the court said: "And this gets us back to the original proposition that an appropriation is the setting aside or designation by express direction or by implication of particular funds for the discharge of definite and specified obligations or liabilities, which, however, may be in contemplation, such as will arise in the future, and the appropriation may be continuing in its nature, but the legislative intent to have funds always ready and applicable to their prompt discharge at stated times works out the appropriation, and nothing short of it can have such an effect."

Commonwealth v. Powell, 249 Pa. St. 144, was a like case with the one at bar. The application was for a writ of mandamus to compel the auditor general to draw his warrant on the state treasurer of the state of Pennsylvania in favor of the National Limestone Company on a fund received from the registration of license fees for automobiles, which was appropriated by the terms of the act imposing the fees for the maintenance and repair of the state highways. The opinion of the supreme court of Pennsylvania in that case is instructive and practically determines the questions involved in the case at bar. The constitution of Pennsylvania (Const., art. III, sec. 3) provides: "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title." Section 15, art. III of

the Constitution of that state, provides: "The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the commonwealth, interest on the public debt and for the public schools; all other appropriations shall be made by separate bills, each embracing but one subject." Section 16 of the same Constitution provides: "No money shall be paid out of the treasury, except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof." In discussing the questions arising in that case, the court said: "Clearly the disposition of such fees, paid as an incident to the system of regulation, was a matter closely allied thereto, and naturally to be considered by the legislature in connection with the main purpose of the act. The statute would have been incomplete, had it required the payment of fees, without providing for any disposition of them. No argument should be required to show that provisions for attaining various objects, which relate to the general subject of the bill, may be dealt with by its terms, without laying it open to the charge of containing more than one subject. * * * It is further suggested that the act offends against section 15 of the Constitution which provides that 'all other appropriations shall be made by separate bills, each embracing but one subject.'" The court further said: "There are two answers to this contention, each equally persuasive and both conclusive of the question involved. The first is that the act of 1913 was a separate bill when it was considered by the legislature and it contains only one subject within the meaning of the organic law as we have already pointed out in this opinion; the second is that this provision of the Constitution was only intended to apply to the biennial appropriations made by the legislature out of the general revenues of the commonwealth. It has no application to a fund created for a special purpose and dedicated by the act under which such fund is to be created to a particular use. The appropriation of the fund so cre-

ated continues as long as the act which dedicates it to a particular use remains in force."

We think this answers respondent's contention that no money shall be drawn from the treasury except in pursuance of specific appropriations made by law. In the case at bar, the act itself makes the specific appropriation, and provides: "The state treasurer shall hold the money so received into the treasury as a special fund for the maintenance of the office of state fire commissioner, and the expenses incident thereto." Rev. St. 1913, sec. 2511.

State v. Cornell, 60 Neb. 276, cited by respondent in support of his contention, can easily be distinguished from the case at bar. There the appropriation was made from the funds of the state treasury raised by general taxation, and was a part of the general revenue of the state. In the case at bar the appropriation is the special fund raised for the special purpose mentioned in chapter 23, and has nothing to do whatsoever with the general revenue belonging to the state.

By the act in question the legislature clearly intended that the money paid to the treasurer under the act should be applied by the deputy commissioner to the payment of his salary and the expenses of managing his office and performing the duties thereof. The right of the legislature to establish such an office and provide the fund for the necessary expenses, as this act does, is not questioned. The taxpayers, or parties upon whom the burden is cast, are not complaining. The fund has been provided and the services rendered. If the statute is unconstitutional, and if the taxpayers could demand a return of the money, they are not doing so. They made no objection to the act when the money was called for from them. They have (if the act is unconstitutional) voluntarily provided this fund. It is a general rule that parties not affected cannot be heard to challenge the constitutionality of an act of the legislature. We do not think that under the circumstances it is the duty of the custodian of the fund to prevent the application of it to the purposes for which it was provided

in accordance with the evident intent of the legislature. We are of opinion that it is the duty of the respondent to countersign and pay the warrant in question.

The writ as prayed for is awarded.

JUDGMENT ACCORDINGLY.

LETTON and SEDGWICK, JJ., concur in the result for the reasons stated in the final paragraph of the opinion.

ROSE and FAWCETT, JJ., not sitting.

The following opinion on motion for rehearing was filed January 15, 1916. *Former judgment adhered to.*

1. **Constitutional Law:** UNCONSTITUTIONAL STATUTE: MANDAMUS. "Where a supposed act of the legislature and the constitution conflict, the constitution must be obeyed and the statute disregarded. Ministerial officers are, therefore, not bound to obey an unconstitutional statute, and the courts sworn to support the constitution will not by mandamus compel them to do so." *Van Horn v State*, 46 Neb. 62, 83.

2. ———: ———: PARTIES. The court will not declare a statute unconstitutional at the suit of one who is not injuriously affected thereby.

3. ———: ———: ———. The act (Rev. St. 1913, sec. 2500 *et seq.*) plainly directs how the fund created thereby shall be used, and in what manner and by whom it shall be distributed. The only question as to its constitutionality is as to the manner of creating the fund by compulsory payments, and the insurance companies who are required to contribute to the fund are the only parties affected by this constitutional question.

SEDGWICK, J.

We have a very interesting and able brief upon the motion for rehearing. The propositions discussed are: (1) That the legislature cannot enact by general statute a continual appropriation of the funds of the state to some specified purpose. (2) That it is the duty of the state treasurer to guard the funds of the state and to refuse to pay them out to unauthorized parties or for unauthorized purposes. We are satisfied of the correctness of these propositions as stated and discussed in the

brief. The question is whether they apply and are controlling in this case. We do not intend to criticise the state treasurer for hesitating to pay out this money before the act had been officially construed. "Where a supposed act of the legislature and the constitution conflict, the constitution must be obeyed and the statute disregarded. Ministerial officers are, therefore, not bound to obey an unconstitutional statute, and the courts sworn to support the constitution will not by mandamus compel them to do so." *Van Horn v. State,* 46 Neb. 62, 83. But the law is equally well settled that the court will not declare a statute unconstitutional at the suit of one who is not affected thereby. The state treasurer stands for the state and the people thereof. If the state and the people of the state in general are not injuriously affected by this statute, neither they nor their representative, the state treasurer, can require the court to declare the statute unconstitutional. The class of citizens who pay this tax are not challenging its constitutionality. The legislature, no doubt, could authorize the insurance companies to create a fund to be employed in guarding against unnecessary or incendiary destruction of insured property, and could authorize the state treasurer to act as their trustee in preserving and paying out such funds. The statute must be construed as a whole, and must not be so construed as to render it unconstitutional if such construction can be avoided. If it had contemplated only voluntary contributions to the fund, there would be no question of its validity. If the insurance companies who create this fund were protesting that they ought not to be compelled to pay a tax that does not go into the funds of the state so as to be protected by constitutional safeguards in its expenditure, the power of the legislature to compel such payment would be drawn in question. As they have paid the money without objection on their part, such payment is voluntary. The fund is provided for a special purpose and not as for the use of the state. This is clearly what the legislature intended. Therefore

the only question is whether the constitution will permit compelling payment of taxes for such purpose, and those who are required to make such payment are the only ones affected by that question. Our former decision is adhered to.

FORMER JUDGMENT ADHERED TO.

ROSE and FAWCETT, JJ., not sitting.

MARTIN SCOTT, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE.

FILED DECEMBER 3, 1915. No. 18420.

1. **Carriers:** DUTY TO INTENDING PASSENGERS. Ordinarily it is not the duty of a railroad company to furnish an escort or guide to an intending passenger to protect him from accident, unless it is charged with knowledge from the circumstances that the intending passenger is weak, infirm or defective in such a degree as to necessitate assistance.

2. ———: ACTION FOR INJURY: PETITION: SUFFICIENCY. A petition, the substance of which is set forth in the opinion, *held* not to state a cause of action for negligence on the part of a carrier of passengers.

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

Wilcox & Halligan and *P. R. Halligan,* for appellant.

Edson Rich, A. Muldoon and *B. W. Scandrett, contra.*

LETTON, J.

This is an action to recover for personal injuries. A general demurrer to the petition was sustained. Plaintiff stood upon the demurrer, and judgment of dismissal was rendered. Plaintiff appeals.

The petition is too lengthy to be set forth verbatim. In substance it alleges that plaintiff went to the station of

defendant at Brule for the purpose of taking a train; that at that point its road is double-tracked, trains going west using the north track and east-bound trains using the south track; that the train upon which plaintiff desired to take passage ran east upon the south track; that defendant negligently refused to open the doors on the north side of its east-bound trains, and compelled passengers going east to cross both main tracks, and required plaintiff to cross the tracks in front of the moving east-bound train which he desired to take; that he was suffering from typhoid fever; that there was no agent at the station to sell him a ticket; that by reason of the effects of the fever "his perceptive faculties were so dulled and his reasoning power impaired to such an extent that he was unable to comprehend or understand the danger he incurred in crossing said railroad track, or to accurately estimate the distance which he was from said train, or to consider and reason that the engine and cars of said train extended out over the south side of said south rail of said south track, on which it was running, a distance of three feet, or to understand and comprehend the danger incurred in and around railroad yards in which trains were moving, as they were at Brule, Nebraska, on the evening the injury to plaintiff occurred." It is also charged that the defendant negligently failed to provide a platform or proper place on the south side of the south track for the accommodation of passengers; that from the depot to the south rail of the south main track the ground is covered with gravel to about a level with the top of the rails; that from the south rail of the main track "the space is uneven with a slope to the bottom of the north rail of the south side track." It is averred that the only space for the accommodation of east-bound passengers was eight feet in width between the south rail of the main track and the north rail of the side track; that trains extend out about three feet from the rail on each side; that it was dark at the time the accident occurred; that plaintiff saw his train coming from the west and crossed to the

south side of the main track for the purpose of taking it; that plaintiff "after he had crossed said tracks and proceeded west, and while so proceeding westward, for the purpose of taking said train, was struck on the side by the engine drawing said train, and was knocked down and injured, as will hereafter more fully appear." The further acts of negligence alleged are that the train was run at an excessive rate of speed; failure to blow the whistle or ring the bell at a public crossing about 400 feet west of the depot, or at the public crossing south of the depot; failure to have an agent or other person in the depot to sell tickets; and that defendant had no flagman or watchman on the depot grounds to give passengers proper directions for crossing. It is alleged that plaintiff has suffered permanent injuries and been compelled to pay a large amount of money for medical services and other expenses.

The appellant insists that at the time of the injury the plaintiff was a passenger "being transported," under section 6052, Rev. St. 1913, and that the defendant was therefore absolutely liable for his injuries. This position is not tenable. The plaintiff was not "being transported" at the time of the injury; he had not entered, or was not in the act of entering, the train; he was using his own powers of locomotion, and not being carried or moved by any other agency. The facts alleged do not bring plaintiff within the class of persons to whom the statute applies. *Fremont, E. & M. V. R. Co. v. Hagblad,* 72 Neb. 773, 791. In the consideration of the questions presented, we assume, without deciding, that the plaintiff was a passenger and was entitled to the care and protection which a carrier is compelled by law to extend to passengers. The defendant was therefore bound to exercise the care toward him which the law requires to be exercised when such a relation exists, viz., the highest degree of care and caution. There can be no doubt that, if the plaintiff had been struck by the incoming train while he was in the act of crossing to the south side of the train, the questions as to the negligence of the defendant and the contributory negligence

of plaintiff must have been submitted to the jury. But the petition shows that before the plaintiff was struck he had completed the act of crossing, had proceeded west, "and while so proceeding westward, for the purpose of taking said train, was struck on the side by the engine." It is not alleged that there was any engine or cars standing or moving on the side track at the time, or that there was anything to prevent the plaintiff from walking farther away from the rails. The proximate cause of the accident was that the plaintiff carelessly walked too close to the track.

As to the alleged negligence of defendant with respect to failure to open the doors on the north side of east-bound trains, failure to provide a proper platform, to light the tracks, to furnish a man to conduct passengers across the track, in running the train at an excessive rate of speed without ringing the bell or blowing the whistle, failure to open doors on the north side was a reasonable precaution to protect embarking passengers from trains going west on the adjacent main-line track, and none of the other facts alleged could have caused or contributed to plaintiff's injury, except, perhaps, the failure to have a watchman or flagman "to see that the passengers desiring to take said train were conducted over said tracks to the south side thereof on said public crossing, or to give passengers proper directions for crossing said tracks, and taking said trains." But, since the crossing had been safely passed before the accident, no negligence in this respect could cause it.

The only other question involved is whether the allegations of the petition with respect to plaintiff's physical and mental condition imposed the duty of greater care upon the defendant towards the plaintiff than it owed toward an ordinary passenger. It is not alleged that notice of this condition was brought home to defendant or any of its agents in any manner whatsoever. We have no doubt that, if such notice had been given, it would have been the duty of defendant to exercise greater care to see

that the plaintiff safely took passage than it owed to ordinnary passengers; but, in the absence of such knowledge, we fail to see wherein the defendant was guilty of negligence in this respect. *Louisville & N. R. Co. v. Crunk,* 119 Ind. 542; *Illinois C. R. Co. v. Cruse,* 123 Ky. 463, 8 L. R. A. n. s. 299, and note. The petition alleges that the plaintiff went to "said depot and found no agent or other person in same to direct him or to sell him a ticket," but it is also stated that he "saw said agent with a lantern down to the west of the depot on the south side of said south main track." It is to be presumed, since there is no allegation to the contrary, that when the plaintiff saw the agent out near the track with a lantern he was there in the exercise of his proper duties.

The accident is much to be regretted, but we are of opinion that the petition does not allege any act of negligence on the part of the defendant which was its proximate cause. This is the view which was taken by the district court, and its judgment is therefore

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

CUSTER COUNTY, APPELLANT, V. JOHN E. CAVENEE ET AL., APPELLEES.

FILED DECEMBER 3, 1915. No. 18467.

1. **County Treasurers:** LIABILITY FOR INTEREST. "A county treasurer is not liable on his bond for interest which he has not collected and has been unable to collect upon the public funds in his care, unless it appears that some act or neglect of his has prevented or hindered the collection of such interest." *Hamilton County v. Cunningham,* 87 Neb. 650.

2. **County Depository:** LIABILITY FOR INTEREST. In such a case, where there is no proof of any collusion or bad faith, and it appears that no interest or profit was received by the treasurer, and that the bank continuously had on hand in cash a sufficient amount over its legal reserve to pay the entire deposit, the bank is equally free from liability.

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

J. R. Dean and *C. W. Beal,* for appellant.

Silas A. Holcomb, Sullivan, Squires & Johnson and *C. L. Gutterson, contra.*

LETTON, J.

This is an action against John E. Cavenee, formerly county treasurer of Custer county, and the Custer National Bank, to recover $929.47 as interest on county funds deposited in the defendant bank by Cavenee while county treasurer, in excess of the amount for which the bank has qualified as a legal county depository. Judgment for defendants, and plaintiff appeals.

Cavenee was elected treasurer of Custer county in 1905, and assumed the duties of the office in January, 1906, serving for the years 1906 and 1907. He was reelected in 1907 and served until January, 1910. The Custer National bank had taken proper steps to be made a legal depository for that county to the extent of $4,000 for the years 1906 and 1907, and to the extent of $8,000 for 1908 and 1909. During each of his terms Cavenee, as county treasurer, deposited in the bank county funds in excess of the amount which the bank was entitled to receive as a county depository. The bank has paid to the county all interest due upon the money which could be legally deposited in it as such depository. The safe and vault provided by the county for the keeping of its funds were insecure and not burglar proof, and the county authorities were aware of this fact. A number of other banks in the county had qualified as depositories. The amount for which the depository banks qualified did not equal the amount of money which the treasurer often had on hand, so that he was often compelled to keep on deposit in these banks excess funds for safe-keeping. During all of this time the defendant bank kept cash on hand over its legal reserve in excess of the amount of county money deposited. It

is shown that the county treasurer had on deposit in all county depositories the full amount which each was entitled to receive, and in some of them excess funds, except in six banks situated in various towns in the county at a greater or less distance from the county seat, some of them many miles distant by rail, in which banks the amount on deposit varied. Section 6662, Rev. St. 1913, prohibits the deposit of more than an amount equal to 50 per cent. of the capital of each depository bank, and it is not shown that the amount deposited in each of these banks was less than this. No complaint is made in the petition as to any wrongful act or omission as to these banks, none has been proved, and none will be presumed. Defendant Cavenee, as county treasurer, and the bonding company which furnished the bonds, in 1906, procured letters to be written to and corresponded with the various banks of Custer county, urging them to become legal depositories, and informing them that, if the banks of the county did not become depositories to an amount sufficient to receive the county funds, the money might be sent out of the county for safe-keeping. Mr. Cavenee afterwards urged the banks of the county and city, including the defendant bank, to give larger bonds and become legal depositories for larger amounts than they were permitted to receive, which the banks refused to do, except the defendant bank, which increased its bond to $8,000 during his second term.

The question presented is whether, if a county treasurer deposits money in a bank in excess of the amount for which it has qualified as a county depository, is he, or is the bank, liable for interest on such excess deposits. The evidence fails to disclose any act of negligence upon the part of Cavenee. The county treasurer is the legal custodian of the funds which have not been deposited in the depositories. *State v. Whipple,* 60 Neb. 650. The liability of a county treasurer for money deposited in a depository bank in excess of the amount apportioned to it by the county board is the same as if the bank were not a legal

depository, and he is liable upon his official bond therefor. He is released by section 6665, Rev. St. 1913, from liability as to the amount which the county board apportions to a depository bank under its bond, but is personally liable for all other funds. It is plain that the treasurer would not have exercised ordinary good judgment if he had kept a large amount of funds in the only places afforded by the county authorities in which money could be kept.

The principal questions in this case have been settled by the cases of *Hamilton County v. Cunningham,* 87 Neb. 650, *Hamilton County v. Aurora Nat. Bank,* 88 Neb. 280, and *Furnas County v. Evans,* 97 Neb. 54. The first of these cases was brought to recover from a former county treasurer for interest on county money deposited in a bank which was not a legal depository. The court held that, since it appeared that the transaction was entered into in good faith by the treasurer in order to provide a safe place for the money, the treasurer was not liable for interest, and that a county treasurer is not liable on his bond for interest which he has not collected, and has been unable to collect, upon the public funds in his care, unless it appears that some act or neglect of his has prevented or hindered the collection of such interest. The second case was brought against the bank in which the money was deposited, and it was held that, if the transaction was in good faith and the treasurer was not liable for failure to collect interest, the bank was also free from liability. These cases were followed and the principles reiterated in the *Furnas County* case mentioned. While the facts are not entirely identical with those in each of these cases, the principles apply. Several other matters are discussed in the brief, but these questions are determinative of the case.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

COMMERCIAL NATIONAL BANK OF KEARNEY, APPELLEE, V. W. H. FASER ET AL., APPELLANTS.

FILED DECEMBER 3, 1915. No. 18496.

1. **Attachment:** REDELIVERY BOND: VALIDITY. A redelivery bond was executed and filed by one of the principals therein with the clerk of the district court with the purpose to procure the release of certain goods attached. The sheriff, by the consent and direction of the attorney for the plaintiff in the attachment suit, thereupon released the levy. *Held*, that since the bond accomplished its purpose and was in fact accepted and approved, the facts that it was not manually delivered to the sheriff and no approval was indorsed thereupon did not invalidate it either as to the principals or to a surety company who signed as security.
2. **Assignments:** ACTIONS: PARTIES: REDELIVERY BOND. One who purchases choses in action during the pendency of a suit thereon may carry on the suit in the name of the original plaintiff, and may maintain an action in the name of the original plaintiff and obligee in a redelivery bond given to secure the return of property attached in the suit.
3. **Election of Remedies:** ESTOPPEL. A mere attempt to pursue a remedy or to claim a right to which a party is not entitled, without obtaining legal satisfaction therein, will not deprive him of a right to which he is properly entitled.
4. **Attachment:** ACTION ON REDELIVERY BOND: BURDEN OF PROOF. Where attached property has been surrendered under a redelivery bond, the burden of proof is upon the attachment debtor to whom it has been surrendered to account for its loss or nonproduction.
5. **Estoppel:** REDELIVERY BOND: OWNERSHIP OF PROPERTY. A principal in a redelivery bond given to secure the surrender of attached property is estopped to assert that he is the owner of it in an action upon such bond.

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

W. D. Oldham and *John A. Miller*, for appellants.

H. M. Sinclair and *N. P. McDonald, contra.*

LETTON, J.

This is an action against the principals and surety upon a redelivery bond. The court found for the plaintiff, and defendants appeal.

Certain property was attached in an action against George W. Faser and W. H. Faser, and, in order to obtain its release, the bond sued upon was given. It was signed by the Fasers as principals and by the Lion Bonding & Surety Company as surety. Prior to the execution of the bond the sheriff had taken possession of a large amount of personal property in the hands of W. H. Faser, which was situated upon the farm of one of the defendants, and a caretaker was placed in charge of it. It is argued there is no evidence of the delivery of the bond. It was filed in the office of the clerk of the district court by George Faser in the suit pending, but no actual manual delivery to the sheriff was made. It is shown, however, that, when it was made known by the defendants, or one of them, to the attorney for the plaintiff in the attachment suit that the bond had been executed and delivered to the clerk of the district court, the attorney caused the attached property to be released by the sheriff from the lien of the attachment. The bond is somewhat defective in form, since the property was appraised at $4,920.50, and the penalty is fixed at the sum of $6,200, while section 206 of the Code requires that the bond be in double the amount of the appraised value of the attached goods.

It is argued that the bond was not accepted and approved by the sheriff, and is therefore void. This was not formally done, but the facts that the plaintiff, who stood back of the sheriff and for whom the sheriff was acting, was satisfied with it and the sheriff yielded possession of the property on account of its execution and delivery are sufficient, we think, to establish an actual approval. The instrument effectually served the purpose for which it was given. *Holt County v. Scott,* 53 Neb. 176. In *Fidelity & Deposit Co. v. Bowen,* 123 Ia. 356, it is said: "The object of the bond is the discharge of the attachment, and if

this be accomplished by its delivery, it is of no concern to the sureties that its sufficiency has not been passed upon by the sheriff or clerk. But the plaintiff, for whose protection the bond is executed, may waive the formal approval by these officers, and accept it as tendered under the statute, without invalidating its efficacy as a statutory release bond." An expression somewhat to the contrary was used in *Cortelyou v. Maben*, 40 Neb. 512, but in that case the property had not been delivered into the hands of the defendant, so far as the record discloses, and the statement was mere *obiter*.

It is next contended that the plaintiff has no corporate existence; that it is not the owner of the cause of action, and cannot maintain the suit. This contention is based upon the fact that, when the attachment suit was begun, the Commercial National Bank was a going concern. After the suit was begun the notes in suit were sold and transferred to T. B. Garrison, and it is stipulated that the bank has liquidated its affairs. Section 45 of the Code provides that, in case of a transfer of any interest in an action during its pendency, the action may be continued in the name of the original party. The original action proceeded to judgment in the name of the bank, and, since it is the obligee named in the bond and this action is merely ancillary to the attachment suit, we see no reason why the action cannot proceed in the name of the original judgment creditor. *Harman v. Harman*, 62 Neb. 452.

It is next claimed that the original case is pending in the supreme court and the judgment superseded. The supersedeas bond was given by W. H. Faser alone, the action was dismissed as to him, and the cost bond given has no effect to stay the execution of the judgment.

One of the principal contentions in the case is that, since before this suit was brought the plaintiff had begun an action which is still pending against the sheriff of Buffalo county and the surety upon his official bond to recover the value of the attached property, on the ground

that it was unlawfully surrendered by him and lost, destroyed and dissipated, he has elected between two inconsistent remedies, and cannot, therefore, maintain this suit. The defendants in this action are strangers to the action against the sheriff. If a judgment should be recovered against them in this action upon the theory that the redelivery bond is valid, and this fact is shown in the other suit, it would seem that no subsequent judgment could be rendered against the sheriff in that suit upon the inconsistent theory that it was he who had dissipated the property. Whether this is correct or not, in any event, if the defendants satisfy this judgment, no other judgment could be enforced. Even though two judgments existed, there could be but one satisfaction. A mere attempt to pursue a remedy or to claim a right to which a party is not entitled, without obtaining legal satisfaction thereon, will not deprive him of a right to which he is properly entitled. The sheriff testified that after judgment was rendered he could find none of the property; that he made a demand for it upon George W. Faser, who told him that part of it was destroyed by fire and the remainder had been sold. It is claimed by defendants that the burden of showing a negligent loss or wrongful disposal of the property rests upon the plaintiff. All the facts with regard to the loss or destruction of the property being peculiarly within the knowledge of the defendants who were in its possession, the law casts the burden upon them to explain what had become of it. It appears, also, that the property which was destroyed by fire was covered by insurance, and the proceeds of the policy were paid to one of the principal defendants.

It is contended that the court erred in the exclusion of evidence to show that W. H. Faser, and not George W. Faser, was the owner of the property. By the giving of the bond, W. H. Faser waived any claim of his against the right of the sheriff to the possession of the property. If he owned it, he could have taken it from the officer by proceedings in replevin, or he might have maintained an

action against the sheriff for conversion. Instead of taking either of these courses, he entered into a bond that, if the sheriff would release the property, it would be forthcoming to await the judgment of the court in the action. Having secured possession of the property by giving the bond, it is too late for him to assert ownership as a defense, and he has estopped himself from taking such a position. The judgment of the district court is

HAMER, J., not sitting.

RACHEL M. BAILEY, APPELLEE, V. UNITED STATES FIDELITY & GUARANTY COMPANY ET AL., APPELLANTS.

FILED DECEMBER 3, 1915. No. 19272.

1. **Master and Servant:** INJURY TO SERVANT: COMPENSATION ACT: PAYMENT IN LUMP SUM. Under section 3681, Rev. St. 1913, of the workmen's compensation act, after the amount of compensation payable has been fixed either by agreement or by the decision of a court, the parties may agree for the payment of a lump sum in lieu of the periodical payments. There is no provision in the statutes allowing either party to compel the employer to pay, or the workman or dependent to receive, a lump sum satisfaction.

2. ———: ———: AGREEMENT AS TO COMPENSATION: SURETY. If an employer and the party to whom payment is to be made make a reasonable agreement in good faith for the payment of a lump sum not inconsistent with the amount of the periodical payments previously determined, the agreement will bind an insurance company, which has assumed a risk under section 3688, Rev. St. 1913, equally with the employer. It has no greater rights than he has, and cannot block a settlement by objecting to payment in a lump sum merely because it was not consulted.

3. ———: ———: COMPENSATION: COMMUTATION. Commutation is a departure from the normal method of payment, and is to be allowed only when it clearly appears that the condition of the beneficiaries warrants such departure.

4. ———: ———: AGREEMENT AS TO COMPENSATION. There is no requirement in the section of the statute which applies to residents of this country that six months must elapse before an agreement for a lump sum payment may be made, or the consent of the district court be procured to such an agreement.

5. ———: ———: COMPENSATION: COMPUTATION. A lump sum settlement made by taking the present value of the periodical payments computed at 5 per cent. simple interest is not erroneous.

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

Strode & Beahtol and *Burkett, Wilson & Brown,* for appellants.

B. F. Good, A. W. Richardson and *A. M. Bunting, contra.*

LETTON, J.

The husband of plaintiff was accidentally killed while in the employment of defendant Apperson, and under the provisions of the workmen's compensation act she became entitled to receive from him the sum of $10 a week for 350 weeks. Apperson held a policy with the defendant United States Fidelity & Guaranty Company to cover the risk. Each of the defendants admits liability to make these payments. The controversy arises over whether the plaintiff can, as she asks in her petition, compel the insurance company to commute the amounts due so that she may recover a lump sum instead of the weekly payments provided for by the act. The court found for the plaintiff, and judgment was rendered in a lump sum for $2,968.62. Defendants have appealed. The insurance company insists that the court erred in assuming jurisdiction over the case, in refusing to hold that the action was prematurely brought, and in fixing the amount of recovery.

In his answer defendant Apperson says: "That he is willing and hereby consents to such composition and the payment of such lump sum in discharge of the obligations of said policy as to the court may seem just and proper, provided the court shall find that this is a proper case

in which to allow such compromise and compensation." A joint motion for new trial was filed on behalf of defendants, and joint notice of appeal was given. The petition sets forth facts showing that the financial circumstances of the plaintiff are such that it would be for her best interests and those of her children to allow the payments to be made in a lump sum and invested for her benefit, and the evidence sustains the allegations. It asks the court to determine that sum to be $3,086, and to enter judgment for that amount. The defendant insurance company denies there has been any agreement to pay a lump sum in lieu of the weekly payments, but says that, if it is compelled to pay such a sum, it should not be in excess of $2,364.86.

Section 3681, Rev. St. 1913, of the workmen's compensation act, provides: "The amounts of compensation payable periodically under the law, either by agreement of the parties, or by decision of the court, may be commuted to one or more lump sum payments, except compensation due for death and permanent disability. These may be commuted only with the consent of the district court."

The insurance company argues that, if the legislature had intended that the district court had authority to order such a payment without a prior agreement of parties, it would have so stated; that the act implies that a previous agreement must have been reached which will be ratified by the district court, and that without such an agreement the court cannot compel such a commutation of payments. We agree with this construction. The meaning of section 3681 seems to us to be that after the amount of compensation, payable periodically, has been fixed, either by agreement, or, in case of a controversy, by the decision of a court, the parties may, if they so desire, agree for the payment of a lump sum in lieu of the periodical payments. The lump sum by sections 3682, 3683, Rev. St. 1913, is made final, and is not subject to modification as periodical payments are. In case the amount agreed upon is for compensation for death and

permanent disability, the agreement cannot go into effect until it has been submitted to the district court and its consent has been given thereto. We do not feel at liberty to transpose the language of this section, as plaintiff desires, and change its meaning so as to make commutation compulsory. The meaning is not ambiguous. The fact that the legislature did not express such a thought, while many such statutes do, is significant.

The statute leaves the question of how much shall be paid in a lump sum in ordinary cases to the agreement of interested parties, but in such serious matters as death and permanent disability, where the interests of those dependent upon the workman may be involved, the question of whether it is for the best interests of the dependents to have the payments made periodically or to be made in a lump sum must be submitted to the district court, acting in a capacity somewhat analogous to that of a guardian or next friend of the dependents, for its approval or rejection. The object of this provision evidently is to preserve the rights of a class of persons who are often inexperienced in business matters and unable to protect themselves, and to determine whether it is to their best interests to substitute a lump sum, which might easily be dissipated, for the payments made in lieu of wages.

An investigation as to the provisions of the workmen's compensation laws in other countries, and in other states in this country, has disclosed that almost without exception such provisions are contained in the statutes. In some jurisdictions the lump sum payment may be made by agreement of parties, but in the majority the question whether it shall be permitted is left to the determination of an administrative board or to the judgment of a court. In some states it can be made by the tribunal on the application of either party; in some the matter is within the discretion of the court or commission, with or without the consent of either party; in some states six months must expire before the agreement or the application to the

court may be made. The manner in which the lump sum is to be arrived at or must be computed is also fixed in some states, while in others the matter is left as in this state.

The New Jersey statute, as amended in 1913, not only fixes the rate and manner of computation, but indicates the principles which shall guide the court in passing upon such an application. Section 21 of the act is, in part, as follows: "In determining whether the commutation asked for will be for the best interest of the employee or the dependents of the deceased employee, or that it will avoid undue expense or undue hardship to either party, the judge of the court of common pleas will constantly bear in mind that it is the intention of this act that the compensation payments are in lieu of wages, and are to be received by the injured employee or his dependents in the same manner in which wages are ordinarily paid. Therefore, commutation is a departure from the normal method of payment and is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure. Commutation shall not be allowed for the purpose of enabling the injured employee, or the dependents of a deceased employee, to satisfy a debt, or to make payment to physicians, lawyers, or any other persons." N. J. Laws, 1913, ch. 174, p. 309. It seems to us that the New Jersey legislature determined correctly the principles that should govern in passing upon such an application. The law should be administered with due regard to the preservation of the means of support, and in ordinary cases the normal method should not be departed from. Section 3684 of our statute indicates the general purpose and intent that the fund shall not be dissipated. It provides, in substance, that, after the amount of an award has been agreed upon, a sum equal to the present value of all future installments may, where death has rendered the amount of future payments certain, by leave of the court, be paid by the assured or com-

pany paying the risk to a savings bank or trust company, to be held in trust for the employee or dependents.

We find nothing in the statute to justify the claim that if the employer and the workman, or the dependent person to whom payment is due, agree upon a lump sum in lieu of the periodical payments, an insurance company has any right to object to the manner of payment agreed upon by the parties by the consent of the court. By section 3688 it is provided: "No policy of insurance against liability under this article shall be made unless the same shall cover the entire liability of the employer thereunder. * * * Every contract for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this article, and provisions thereof inconsistent with this article shall be void." This seems to give the insurance company no greater rights than the employer. A reasonable agreement made in good faith between the parties for the payment of a lump sum, not inconsistent with the amount of the periodical payments previously determined, binds the insurance company equally with the employer, and it cannot block a settlement by objecting to payment in a lump sum merely because it was not consulted. The evidence in this case clearly shows that the insurance company was willing to commute if the sum could be agreed upon.

As to the second error assigned, we find nothing in the statute to prevent the matter of a lump sum agreement being submitted to the court before six months have elapsed. It is hardly necessary to pass upon the assignment that there is error in the amount of the recovery, since defendant Apperson is not complaining of the amount, and the motion for a new trial is a joint one. But, since the statute is not clear, and the question may arise again, we indicate our views. In section 3684 the amount that may be paid by an employer to a trust company or savings bank for dependents is to be ascertained by taking "the present value of all future installments of compensation," and in section 3663 the amount which

may be paid by an employer for the benefit of nonresident alien dependents is fixed as two-thirds of the total amount of future installments. It is urged that the latter basis is the proper one. We are of the opinion that the legislature intentionally distinguished between residents and nonresident aliens and gave the former the preference. The present value of all future installments should be considered as the true basis for the adjustment. The district court properly adopted this method of computation, and was justified in fixing the rate at 5 per cent., which is the statutory rule in several states.

In conclusion, the employer and the dependent in this case both consented that commutation might be made. The amount was left by them to be fixed by the district court. It has been fixed at a reasonable sum, and the employer is willing that this sum be paid. While the proceeding has been different, the result is the same as if the parties had consented to settle, had agreed as to the amount out of court, and had come into court to procure its consent to the agreement.

We find no prejudice to the defendant in the manner pursued, and no reason to interfere with the judgment of the district court. Its judgment is therefore,

AFFIRMED.

FAWCETT, J., dissents.

SEDGWICK, J., not sitting.

INDIANA BRIDGE COMPANY, APPELLANT, V. HERBERT HOLLENBECK ET AL., APPELLEES.

FILED DECEMBER 3, 1915. No. 18422.

1. **Novation.** "There can be no novation of a debt in the absence of an unqualified discharge of the original debtor by the creditor." *Western White Bronze Co. v. Portrey*, 50 Neb. 801.

2. ———: DISCHARGE: ASSIGNMENT. An order assigning to a creditor money to become due from the state to a public building contractor, which was accepted by the state, is not a bar to an action against the contractor for a balance due on the order, where it was not agreed that such assignment should discharge the debtor's obligation.

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

Hall & Bishop, for appellant.

George W. Berge and *Brogan & Raymond, contra.*

ROSE, J.

This is an action by the Indiana Bridge Company against the partnership of Hollenbeck & Thompson, contractors, and their surety, the United Surety Company, for the balance due for materials furnished in erecting the stock pavilion at the state fair grounds in Lincoln. In the trial court judgment was entered in favor of plaintiff and against the surety, but discharging the principals, Hollenbeck & Thompson. Plaintiff has appealed, and the surety company has filed a cross-appeal.

The petition alleges that the balance due plaintiff was $869.26. E. H. Thompson, one of the contractors, for his separate answer, alleged that when the work was about completed, and when the state was owing them $8,575, and when the contractors were owing plaintiff $8,400, the latter and the contractors entered into the following agreement:

"This agreement, signed by E. H. Thompson, of University Place, Nebraska, for the firm of Hollenbeck & Thompson, contractors for the structural steel work for the live stock pavilion in the state fair grounds, and C. M. Kimbrough, of Muncie, Indiana, for the Indiana Bridge Company, of Muncie, Indiana, is to this effect:

"That the said Indiana Bridge Company did furnish, according to the plans and specifications, the structural steel for the live stock pavilion located on the grounds of

the State Agricultural Society at Lincoln, Nebraska, and that the said Hollenbeck & Thompson are indebted to the said Indiana Bridge Company in the total sum of eight thousand and four hundred dollars ($8,400); all matters of difference having been fully discussed and the above amount agreed upon by and between the said E. H. Thompson and the said C. M. Kimbrough in the presence of A. H. Thompson, of University Place, Nebraska.

"And it is hereby further agreed, by and between the above-named persons, that when the state board of public lands and buildings shall make allowance on the claims of the said Hollenbeck & Thompson, the same shall be payable to the Indiana Bridge Company, to the amount of eight thousand and four hundred dollars ($8,400).

"And it is further agreed that the secretary of state, as clerk of said board of public lands and buildings, shall be custodian for these funds, and he is hereby directed to forward said allowance in auditor's warrants or treasurer's checks to the said Indiana Bridge Company, at Muncie, Indiana, until the full amount of eight thousand and four hundred dollars ($8,400) has been paid.

"And it is further agreed and understood that the said E. H. Thompson, acting for Hollenbeck & Thompson and for himself and for A. H. Thompson, shall not present any other or additional claim, nor allow any one else to do so, for any money or other allowance, to the architect or superintendent, or to the state board of public grounds and buildings, for allowance from the sum of eight thousand five hundred and seventy-five dollars ($8,575) now due to the said Hollenbeck & Thompson, until the full amount of eight thousand and four hundred dollars ($8,400) has been allowed and fully paid to the said Indiana Bridge Company.

"And the said E. H. Thompson, acting for and in behalf of the firm of Hollenbeck & Thompson, further agrees that he will prosecute with diligence the unfinished part of the work of the stock pavilion, so that so far as that

part of the building for which the said Hollenbeck & Thompson are contractors is concerned the same shall be completed on or before June 1st next."

In Thompson's answer it was also alleged: "That, by the terms of said contract, said Hollenbeck & Thompson assigned to the plaintiff the sum of $8,400 of the moneys then belonging to said Hollenbeck & Thompson and in the possession of the state of Nebraska; that a copy of said contract was given to the state of Nebraska, and accepted by it, and that, by the terms and conditions of said contract, the title to $8,400 of the funds of said Hollenbeck & Thompson in the hands of the state of Nebraska, was thereby assigned to the plaintiff, and was a full settlement between the plaintiff and said Hollenbeck & Thompson, and a full payment of all sums and claims due from said Hollenbeck & Thompson to the plaintiff, and this defendant says that the firm of Hollenbeck & Thompson and this defendant have fully paid the plaintiff all that is due it under said contract of settlement."

The reply admitted the execution of the contract pleaded by Thompson, but challenged his construction thereof, and denied that the assignment of the $8,400 due from the state was intended as a full settlement of plaintiff's claim, and also denied that it constituted payment. It was further alleged in the reply that the contractors failed to complete the building, that the state was compelled to and did complete the same, and that "there was not left sufficient funds with which to pay all of the $8,400, but the state did pay to the plaintiff, and the same was credited upon the $8,400, all that was left as a balance due Hollenbeck & Thompson under their contract with the state, after the state had completed the said building."

Both plaintiff and defendant Thompson moved for judgment on the pleadings.

Defendants Hollenbeck & Thompson contend that the contract set out in the answer constitutes an equitable assignment or novation. The rule is: "There can be no novation of a debt in the absence of an unqualified dis-

charge of the original debtor by the creditor." *Western White Bronze Co. v. Portrey,* 50 Neb. 801.

In *Bonnemer v. Negrete,* 35 Am. Dec. 217 (16 La. 474) it was held: "Acceptance by a creditor of an order on a particular fund, for the amount of his debt, is not sufficient to constitute a novation, unless the original debtor was, by express agreement, discharged."

In the present case plaintiff sued for the balance due on the claim for $8,400 after crediting the contractors with all money due them from the state. The answer does not show that there was an agrement expressly releasing the contractors from liability, or that the parties intended the new agreement in itself to be a discharge of the original obligation. Under the circumstances the allegations in the answer that the agreement constituted a full settlement and full payment and that defendants had fully paid plaintiff all that was due under their contract were conclusions of law.

It follows that the answer fails to state a defense to the petition, and that the judgment releasing the contractors was erroneous. The judgment against the surety was also erroneous, since the record does not justify its affirmance on the ground that it was entered by confession. Both judgments are therefore reversed and the cause remanded for further proceedings.

REVERSED.

FAWCETT, J., not sitting.

FARMERS & MERCHANTS NATIONAL BANK OF FREMONT ET AL., APPELLEES, V. SHERMAN D. WORDEN ET AL.; MARGARET WORDEN, APPELLANT.

FILED DECEMBER 3, 1915. No. 18450.

Fraudulent Conveyances: PARENT AND CHILD: BURDEN OF PROOF. Where a transfer of personal property from a son to his mother in payment of a past-due indebtedness is attacked by judgment creditors as

fraudulent, the burden is upon the transferee to show that the indebtedness was genuine, that the transaction was honest and that the transfer was made in good faith, but where these facts are shown by uncontradicted testimony of the parties to the transfer and appear to be reasonable and to be consistent with honesty and fair dealing, when considered with surrounding conditions and circumstances, it may be upheld.

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

Frank D. Williams, J. A. Price and *C. J. Campbell,* for appellant.

M. B. Foster, A. E. Garten and *W. J. Courtright, contra.*

ROSE, J.

By means of a bill of sale reciting the consideration to be $3,680.05, Sherman D. Worden, defendant, transferred to his mother, Margaret Worden, defendant, personal property, consisting of cattle, grain and farm implements. Plaintiffs are judgment creditors of the transferor. The present action was brought for the purpose, among others, of subjecting to the payment of the judgments in favor of plaintiffs the property described in the bill of sale. The transferee defended the action on the ground that the transfer to her was made in good faith, for a valuable consideration, without any intention of defrauding creditors of transferor or of hindering or delaying them in the collection of their claims. The trial court rendered a decree in favor of plaintiffs, and the transferee has appealed.

What a court of equity should decree under the evidence is the question presented by the appeal. With a view to reaching a correct conclusion, the testimony has been considered from every standpoint in the light of all of the circumstances proved, without finding any justification for setting aside the transfer. The bill of sale was executed January 28, 1911. The judgments at law on which the creditors' bill is based were not rendered until July 26, 1911. Uncontradicted testimony of the parties to the

bill of sale tends to establish the following facts: From 1905 to 1910 the transferor, as tenant under an oral lease, lived with his father and mother on their homestead, consisting of a farm in Boone county. During the first and second years of the tenancy the crops were to be divided. For the remainder of the five-year period, the agreed rental, payable to the father of the tenant, was $500 a year in cash. The son had agreed to pay his mother for boarding him and his hired men $12 a month each. He sold live stock belonging to her and owed her the value thereof. During the five-year tenancy, he incurred an indebtedness to his mother aggregating about $1,800, which remained unpaid at the date of the transfer. He failed to pay his father the agreed rental, but executed and delivered to him a note for $1,850, November 10, 1910. His father died November 30, 1910. On his deathbed he handed the note to his son, and directed him, in case anything happened, to pay it directly to his mother. Early in December, following the death of the father, the son handed to his mother an envelope containing the note, saying it was something belonging to her. She preserved it, not knowing what it was until some time later. The note itself is in the record. The day before the son signed the bill of sale he executed in favor of one of his creditors a renewal note for $3,680.05. This note was signed by his mother as surety upon his promise to deed to her an estate in remainder in 80 acres of land devised to him by his father and to pay his existing indebtedness to her. Pursuant to this agreement she became surety on his renewal note, and he, for the expressed consideration of $3,680.05, conveyed to her his interest in the realty described. In addition, the mother testified that, a week before the bill of sale was executed, she had talked with her son about transferring his personal property to her, that he had said he would give her a bill of sale to indemnify her for signing his note, and that they had also talked about the unpaid board bill. This uncontradicted evidence is convincing proof of the son's indebtedness to his

mother, of the sufficiency of the consideration for the bill of sale, and of the good faith of the parties to it. The incurring of debts, the signing of notes, and the giving of security were familiar practices of the transferor. It is not strange that his mother became his creditor, or that she allowed his obligations to run for years, or that he was willing to indemnify her against loss. Though she did not know of the existence of the note for rental, when the bill of sale was executed, her son had been directed to pay her the amount due thereon, and in good faith attempted to comply with his obligation and to protect her rights by the transfer of personal property. The undisputed evidence tending to show the absence of fraud and the validity of the transfer is not overcome by the inferences arising from the relationship of the parties, from the claims of plaintiffs, and from the other circumstances calling for judicial scrutiny.

It follows that the decree, in so far as it invalidates the bill of sale and makes Margaret Worden liable to plaintiffs for individual debts of her son, Sherman D. Worden, is reversed, with a direction to the district court to enter a judgment conforming to the views here expressed.

REVERSED.

SEDGWICK, J., not sitting.

ANNIE E. AMSPOKER, APPELLEE, V. SAMUEL D. AMSPOKER, APPELLANT.

FILED DECEMBER 3, 1915. No. 18460.

Husband and Wife: SEPARATION: AGREEMENT AS TO PROPERTY RIGHTS: ENFORCEMENT. Where a husband and his wife are permanently separated, and the latter has legal grounds for a divorce, they may agree upon a settlement of their property rights, and provide by contract for the support and maintenance of the wife, and if the provisions are fair and reasonable the agreement may be enforced by the courts.

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

H. N. Mattley and *W. T. Stevens,* for appellant.

L. C. Burr and *R. J. Greene, contra.*

ROSE, J.

Plaintiff, who was formerly the wife of defendant, brought this action against him to recover $2,800 on a contract recognizing an existing separation and providing for the adjustment of their property rights. In a former suit, instituted by her after the execution of the contract, she procured a divorce without alimony. The husband, according to the terms of the contract mentioned, agreed to transfer to his wife a house and lot in Lincoln, the household property in her possession, and two shares of stock in a building and loan association. He permitted her to retain a similar share of stock standing in her own name. He promised to pay her existing doctor and hospital bills, and the costs of a suit by her for a divorce and an attorney's fee of $50 for prosecuting it. In addition, he agreed to pay her for support and maintenance $3,000 in monthly installments of $50 each. The wife, on her part, agreed to convey to her husband her interest in a lot in Lincoln, Nebraska, and in a lot in Pecos, Texas. She also agreed, upon her husband's performance of all the terms of his agreement, not to demand alimony in any action against him for a divorce. Defendant admitted the execution and delivery of the contract, but pleaded that it was procured by duress, that its terms were unconscionable, and that it was void as being contrary to public policy. Upon a trial of the issues, the district court rendered a judgment in favor of plaintiff for the unpaid installments and interest, computed to be $3,246.50. Defendant appealed.

Plaintiff performed the contract on her part. Defendant complied with his agreements, except that he refused to pay the monthly installments after having paid them

for eight months. The defense of duress was not proved. The evidence does not justify a finding that the burdens assumed by defendant were unconscionable. The appeal, therefore, presents these questions: Is the contract void as collusive? Is it void as facilitating a divorce in violation of public policy?

On the part of plaintiff there was no occasion for collusion. The evidence shows beyond question that the parties were not living together as man and wife when the contract was executed, that plaintiff then had more than one legal ground for a divorce, that she was entitled to reasonable alimony, that marital relations were never resumed, and that a divorce was promptly granted to her. Under such circumstances the law in the states of this country, with one or two exceptions, is that reasonable agreements confined to the adjustment of property rights are binding on the parties and may be enforced by the courts. Cases announcing this rule and giving the reasons on which it rests are collected in a note, in 12 L. R. A. n. s. 848, to *Hill v. Hill*, 74 N. H. 288.

It is argued, nevertheless, that the contract, in requiring defendant to pay the costs of a divorce suit and an attorney's fee for prosecuting it, indicates collusion and an unlawful purpose to facilitate the procuring of a divorce. This position is untenable for the following reasons: Plaintiff's right to a divorce on legal grounds was free from doubt. Her right to reasonable alimony was equally clear. A court, upon a proper showing, would have required defendant to pay the costs of a divorce suit and the fee of an attorney for prosecuting it. In mutually settling property rights during a permanent separation, defendant lawfully assumed such burdens. The contract did not require plaintiff to commence a suit for a divorce, and, if brought, defendant was left free to make a defense. The circumstances surrounding the transactions and the language used in the written instrument do not require a construction which would invalidate the contract. It fol-

lows that the trial court did not err in refusing to cancel it on these grounds.

Defendant further argues that collusion and an unlawful purpose to facilitate the procuring of a divorce are shown by the evidence. This contention is based largely on testimony of the attorney who drew the contract. It may be inferred from what he said about his recollection of the circumstances that a divorce was contemplated, and that he did not deliver the contract or the conveyances until after the decree of divorce had been entered. The parties did not meet and agree on all of the terms. Plaintiff had furnished to and had left with an attorney, who acted for both, data indicating the provisions to which she was willing to subscribe. Later each of the parties went to the office of the attorney at a different time and signed the instrument prepared by him. When all of the evidence is considered, any inference of collusion or of an illegal purpose to facilitate the granting of a divorce should be attributed to defendant. Such a purpose was not a part of the mutual understanding of the parties. In this view of the record, the contract does not violate the doctrine invoked by defendant and announced in *Wilde v. Wilde,* 37 Neb. 891, and *Davis v. Hinman,* 73 Neb. 850.

The judgment, however, is excessive. Defendant seems to concede that the amount due plaintiff under the contract, if valid, was $2,698.58, when the judgment was rendered. It is clear that plaintiff is not entitled to a greater recovery. The judgment will therefore be reduced to that sum, and, as thus modified, will be affirmed at the costs of defendant.

AFFIRMED AS MODIFIED.

LETTON, J., not sitting.

WEEKES GRAIN & LIVE STOCK COMPANY ET AL., APPELLANTS, V. WARE & LELAND, APPELLEES.

FILED DECEMBER 3, 1915. No. 18486.

1. **Corporations: FORFEITURE OF CHARTER: RIGHT TO SUE.** "After the charter of a corporation has been forfeited, under the act of 1909, for nonpayment of the occupation fee, an action cannot be prosecuted in the corporate name. Laws 1909, ch. 25." *Havens & Co. v. Colonial Apartment House Co.*, 97 Neb. 639.
2. ———: ———: ———: **AMENDMENT OF PETITION: PARTIES.** A mistake in beginning an action in the name of a domestic corporation after its charter has been forfeited for nonpayment of an occupation fee may be corrected by an amended petition showing that the managing officers or directors, as trustees, are plaintiffs.

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

Sutton, McKenzie, Cox & Harris, for appellants.

Smyth, Smith & Schall and *William A. Bowles, contra.*

ROSE, J.

This action was instituted by the Weekes Grain & Live Stock Company, plaintiff, to recover from defendants damages in the sum of $23,062.50 for breach of a contract of agency. Plaintiff was a domestic corporation, and filed its petition in its corporate name after its charter had been forfeited for nonpayment of the occupation fee imposed by statute. Laws 1909, ch. 25. Later William B. Weekes and Edgar T. Weekes, as managing officers, attempted to become plaintiffs by means of an amended petition containing, in addition to the facts originally pleaded, allegations that: "The charter of the Weekes Grain & Live Stock Company was forfeited under and by virtue of the laws of the state of Nebraska for the nonpayment of the corporation tax; that the debt and obligation herein sued on accrued to the said corporation prior to

the dissolution of the same; that this action is brought by the Weekes Grain & Live Stock Company, a dissolved corporation, for the purpose of winding up its affairs, and by the plaintiffs, William B. Weekes and Edgar T. Weekes, as the managing officers of said corporation at the time its charter was forfeited for the nonpayment of said corporation tax." On objections to jurisdiction, the trial court held that the action was not maintainable in the name of the corporation, and that its managing officers could not be made plaintiffs by amending its petition. A dismissal followed, and the managing officers have appealed.

In holding that the corporation was without capacity to sue, after the forfeiture of its charter, the trial court observed the following rule: "After the charter of a corporation has been forfeited, under the act of 1909, for nonpayment of the occupation fee, an action cannot be prosecuted in the corporate name. Laws 1909, ch. 25." *Havens & Co. v. Colonial Apartment House Co.*, 97 Neb. 639.

This is a harsh, technical rule resulting from a forfeiture made imperative by legislation as judicially construed. The statute makes a distinction between a corporation forfeiting its charter for nonpayment of a fee and other corporations abandoning or losing a charter for other reasons. The latter may sue in the corporate name after dissolution. Rev. St. 1913, sec. 555. *Schmitt & Bro. Co. v. Mahoney*, 60 Neb. 20. When the present suit was brought, the rule quoted had not been adopted. Who should be plaintiff in such a case was then a doubtful question. In any event the relief sought is the same. Defendants are called to answer for the same liability, whoever is plaintiff. In such a situation a rule preventing the managing officers from becoming plaintiffs by amendment, after defendants have appeared in response to a summons issued on a petition drawn and filed in the corporate name, should not be adopted unless demanded by the law.

Defendants justify the dismissal on the grounds that the proceedings instituted by the dissolved corporation are void and that therefore the petition is not amendable. It must be conceded that the argument in favor of these propositions is formidable, and that the position taken is not without support in adjudicated cases. The determination of the question, however, depends upon the proper interpretation of the Code as applied to the facts pleaded in the amended petition. The code provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect or by inserting other allegations material to the case." Rev. St. 1913, sec. 7712.

Defendants argue that this section does not authorize an amendment substituting a new plaintiff, where the action was commenced in the name of a dissolved corporation. Among the cases sustaining the position thus taken is *Proprietors of the Mexican Mill v. Yellow Jacket Silver Mining Co.*, 4 Nev. 40. There the plaintiffs were styled: "The plaintiffs, the proprietors of the Mexican Mill, a copartnership, doing business in that name in the county of Ormsby, state of Nevada." The Nevada statute relating to amendments was similar to that quoted. Leave to amend was denied, the court saying: "The very first step towards the commencement of a civil action or proceeding is the filing of a complaint, in which it is indispensable that there be shown a plaintiff and a defendant, and without which it is an absolute nullity, and renders void all subsequent proceedings had under it. In this instance no person, natural or artificial, is named as plaintiff; and if an amendment were allowed to supply the omission the effect of such amendment would necessarily be to make a plaintiff where there was none such at the inception of the action."

A more liberal interpretation, however, was adopted in *Omaha Furniture & Carpet Co. v. Meyer,* 80 Neb. 769. Henry J. Abrahams was doing business under the name of "Omaha Furniture & Carpet Company" and commenced an action in his trade name. An amendment was allowed substituting "Henry J. Abrahams" as plaintiff. This was held proper under the statute quoted.

Under a similar Kansas statute it was held proper to permit a petition, filed in the name of a dissolved corporation by its sole manager, to be amended to show the dissolution of the corporation and the substitution of the managing director as plaintiff. *Paola Town Co. v. Krutz,* 22 Kan. 725. In the case last cited the supreme court of Kansas said: "The only question remaining is whether the district court committed error in permitting the amended petition to be filed. We think not. Section 139 of the Code evidently contemplates all such amendments as are clearly in furtherance of justice, and consistent with the rights of all parties interested. The theory of our system of practice under the Code is founded upon the leading idea that the action once pending shall not be permitted to fail, if by amendment any defects or omissions in the pleading can be remedied."

The views thus announced are in harmony with expressions of opinion in cases cited by Judge Brewer in *Hanlin v. Baxter,* 20 Kan. 134. The conclusion of the supreme court of Kansas seems to be warranted by the letter and spirit of the Code, though the court commission, in *Weaver v. Young,* 37 Kan. 70, appears to have had some misgiving on the subject, as indicated by the following language found in the report of that case: "We must confess that, if this question were now presented to the court for the first time, we would have great difficulty in controlling the argument, and resisting the authorities cited by counsel for the plaintiff in error. The line of decision heretofore made by the court on this question is broad

enough to embrace the amendment made in this case, and there is no error in the district court permitting it."

This doubt does not appear to be shared by the supreme court of Kansas. In *Service v. Farmington Savings Bank,* 62 Kan. 857, it was said: "Great latitude is given to the trial court in the matter of the amendment of pleadings, with a view of curing defects, supplying omissions, and preventing injustice. Our statute in terms authorizes the adding or striking out of the name of any party or correcting a mistake in the name of a party, or a mistake in any respect. * * * While it is a radical amendment to substitute one plaintiff for another, such an amendment is clearly within the power of the court, under the plain provisions of the Code, and *Weaver v. Young,* 37 Kan. 70, is directly in point and settles the question in favor of the substitution. * * * Cases are cited from other states holding adversely to such amendments, but our statute and the cases interpreting it completely cover the present action, and a review of other cases, based on other statutes, would be without profit."

The proceedings are not void in the sense that the petition cannot be amended to allow the proper parties to maintain the action. For the reasons stated, the amendment should have been allowed. Complaint is made because the title does not show that the new plaintiffs are managing directors and trustees of the dissolved corporation, but this is an amendable defect. *Paola Town Co. v. Krutz,* 22 Kan. 725.

For the error pointed out, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

OMAHA NATIONAL BANK, APPELLEE, V. SMITH F. FERGUSON, EXECUTOR, ET AL., APPELLANTS.

FILED DECEMBER 3, 1915. No. 18357.

Mortgages: FORECLOSURE: SALE: CONFIRMATION: COLLATERAL ATTACK. It is the settled law of this state that an order of sale, a sale, and a confirmation of the sale, made after the death of a party to a foreclosure suit, subsequent to the decree, are impervious to collateral attack. *Jennings v. Simpson*, 12 Neb. 558, and *McCormick v. Paddock*, 20 Neb. 486, reaffirmed.

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

W. J. Connell, for appellants.

Ellery H. Westerfield and *Raymond M. Crossman, contra.*

FAWCETT, J.

The question involved on this appeal is one of law; no controverted question of fact being presented by the record. The facts, briefly stated, are: On November 3, 1888, Charles Childs executed and delivered to the Omaha Loan & Trust Company his promissory note for $8,000. As security therefor he and his wife, Catherine J., executed and delivered to the trust company a mortgage deed covering lands in sections 15, 22 and 23, in township 14, range 13, in Sarpy county, which note and mortgage were, on February 23, 1895, duly assigned to Everard D. Ferguson. Thereafter Ferguson brought suit in the district court for Sarpy county to foreclose such mortgage. December 4, 1900, a decree of foreclosure was entered. February 26, 1901, plaintiff in this suit obtained a judgment in the district court for Douglas county against Charles Childs. January 4, 1903, Charles Childs died, intestate, as we infer from the record, leaving as his heirs at law his children, Harriet M., Susan I., Lowrie and Caroline. An

appeal, which had been taken from the decree of foreclosure entered December 4, 1900, was argued and submitted to this court on December 2, 1902, and on January 21, 1903, the decree of the district court was affirmed. *Childs v. Ferguson,* 4 Neb. (Unof.) 65. March 17, 1903, the death of Charles Childs having been suggested, an order was entered in this court recalling the mandate theretofore issued. The judgment of affirmance was amended, and a judgment *nunc pro tunc* as of the date when the cause was submitted, to wit, December 2, 1902, was duly entered and mandate issued. June 15, 1903, Ferguson, plaintiff in the foreclosure suit, obtained an order of sale directed to the sheriff of Sarpy county. July 20, 1903, the property was sold by the sheriff to the plaintiff, Everard D. Ferguson, for $16,600. August 4, 1903, an order of confirmation of such sale was entered, and thereafter a deed was duly issued to the purchaser at such sale. Notice of the motion to confirm the sale was duly served upon the attorney of record of the defendants in the foreclosure suit and upon E. S. Park, administrator of the estate of Charles Childs, deceased. Susan I. Childs, a daughter and one of the heirs of Charles Childs, deceased, intervened and filed written objections to the confirmation of the sale. So far as this record shows, no other objections were filed. The objections filed by Susan I. Childs were overruled and an order of confirmation entered. From this order no appeal was prosecuted. December 8, 1905, plaintiff in this suit had execution issued on its judgment in Douglas county, which execution was returned *nulla bona.* Everard D. Ferguson died testate September 8, 1906, and defendant Smith F. Ferguson was appointed executor. January 19, 1908, plaintiff obtained in the district court for Douglas county a final order of revivor, reviving its judgment against the heirs at law of Charles Childs, to wit, Harriet M., Susan I., Lowrie and Caroline. On or about April 28, 1908, plaintiff obtained a transcript of its original judgment from the clerk of the district court for Douglas county, and on April 30, 1908, filed the same with the

clerk of the district court for Sarpy county, and on January 6, 1910, instituted the present suit in Sarpy county. April 12, 1913, an amended petition was filed, upon which, together with the answer thereto and the reply to such answer, the cause was tried. Plaintiff's prayer for relief is that the sale and the order confirming the same and the deed issued pursuant thereto in the foreclosure suit be adjudged to be null and void and vacated; that an accounting be had of the rents and profits and other credits, if any, received by Everard D. Ferguson, or his executor; that the amount due the executor be found and held to be a first lien upon the land, and plaintiff's judgment a second lien thereon; that the lands be sold and the proceeds be applied, first, to the payment of costs; second, to satisfy the lien of the executor; third, to satisfy the plaintiff's judgment; and that the balance be paid to the heirs of Charles Childs, deceased. The district court found for the plaintiff and entered a decree in accordance with the prayer of its petition. Defendants appeal.

The question of law to be determined is: Did the fact that Charles Childs died after the entry of the decree in the foreclosure suit, and that no order of revivor was entered prior to the issuance of the order of sale and proceedings had thereunder, render such proceedings null and void? The district court so held. In so holding the court erred.

Plaintiff cites *Vogt v. Daily,* 70 Neb. 812, *Street v. Smith,* 75 Neb. 434, *Wardrobe v. Leonard,* 78 Neb. 531, and *Seeley v. Johnson,* 61 Kan. 337, to support its contention that, "Where a judgment or decree has been rendered, and thereafter a party to the judgment dies, the judgment or decree is unenforceable by execution or judicial sale without revival as to the representatives of the deceased party to the judgment or decree." *Wardrobe v. Leonard, supra,* is an authority against this contention. In that case *Vogt v. Daily, Street v. Smith* and *Seeley v. Johnson, supra,* are all three considered, and the rule announced:

"A decree in a foreclosure proceeding entered after the death of the plaintiff, occurring subsequently to the time that the jurisdiction of the court had attached, is an irregularity not open to collateral attack." Our holding in *Wardrobe v. Leonard, supra,* is clearly in line with the earlier cases decided in this court and with the construction that has been put upon those decisions by the circuit court of appeals of the eighth circuit, and also by the supreme court of the United States. In *Jennings v. Simpson,* 12 Neb. 558, we held: "A judgment rendered against a person—and equally so of one rendered in his favor—after his death is reversible, if the fact and time of death appear on the record, or in error *coram nobis,* if the fact must be shown *aliunde;* it is voidable, and not void, and cannot be impeached collaterally. *Yaple v. Titus,* 41 Pa. St. 195." In *McCormick v. Paddock,* 20 Neb. 486, *Jennings v. Simpson, supra,* is cited, and the paragraph of syllabus therein which we have above quoted is repeated, and the doctrine adhered to.

After the death of their father, Susan I. and Harriet M. Childs challenged the validity of the order of confirmation in the foreclosure suit, and the executor filed a bill in the United States circuit court for the district of Nebraska for a writ of assistance to place him in possession of the homestead which the two daughters named had occupied with their father before his death, and which they were still holding and claimed the right to continue to hold, on the ground that Charles Childs died before the decree of foreclosure was filed or entered and before the sale thereunder was made, and that the suit had never been revived. The circuit court granted the writ, and the case was taken to the circuit court of appeals for the eighth circuit, where the judgment of the circuit court was affirmed. *Childs v. Ferguson,* 181 Fed. 795. Opinion by Sanborn, circuit judge. In the fourth paragraph of the syllabus it is held: "It was the settled law of Nebraska, when certain mortgages were made, that an order of sale, a sale, and a confirmation of the sale, made after the death

of the party to a suit in equity, subsequent to the decree, were impervious to collateral attack." In the opinion, *Vogt v. Daily, Street v. Smith,* and *Seeley v. Johnson, supra,* are all considered. In the opinion (p. 797) it is said: "In the case at bar the sale under the decree was made and confirmed without a revivor. No appeal was taken from the order of confirmation of the sale, no motion or petition to avoid it was made, and it is not now directly, but is collaterally, assailed. In *McCormick v. Paddock,* 20 Neb. 486, the supreme court of that state held that an order of confirmation of a sale under a decree made after the death of a party whose interest in the subject matter passed to another by her death, and the decree itself, were voidable, but not void, and that they were impervious to collateral attack, although there had been no revivor; and it cited in support of this conclusion its prior decision to a like effect in *Jennings v. Simpson,* 12 Neb. 558. In the year 1894, in the case of *Harter v. Twohig,* 158 U. S. 448, 454, 15 Sup. Ct. Rep. 883, 39 L. Ed. 1049, the supreme court of the United States cited these cases, and declared that this was the settled law in Nebraska." On page 798 it is said: "When a mortgagor dies after he has appeared, answered, presented his evidence and arguments, and the court has decided his case and ordered a sale of the mortgaged property to satisfy the liens the mortgages evidence, those who acquire his property by his death take it subject to that decision and to those liens. If the mortgagor conveys his title and interest, it is unnecessary to make his grantee a party to the suit, or to notify him of the decree or the subsequent proceedings to apply the land to the payment of the liens; and why should one to whom the title passes by descent without consideration have greater rights than one to whom it goes by purchase?" In like manner it may be said: And why should plaintiff who had a claim against the decedent under a judgment in another county, which was in no sense a lien upon the land of the decedent, and did not become a lien upon the land after it had passed to his heirs until nearly five years after the

proceedings complained of had been had in the foreclosure suit, and who for over five years after the death of its judgment debtor failed to file any claim in the probate court of the county where the estate of such debtor was being settled, have greater rights than one to whom the estate might go by purchase? It is entirely clear that, if at any time during the more than five years which elapsed between the death of Charles Childs and the filing of the plaintiff's transcript of its Douglas county judgment in the district court for Sarpy county, the heirs of Mr. Childs had all sold and conveyed their property, plaintiff's transcript, so far as the property in controversy is concerned, would have been of no force and effect. The purchaser from the heirs would have taken a perfect title as against plaintiff's present claim under its judgment. What difference is there between such a situation and this? In the cited case the heirs would have disposed of their entire interest in the estate by deed prior to the filing of the transcript. In this case they had been foreclosed of their entire interest in the estate by the confirmation of the sale under the decree of foreclosure, from which they prosecuted no appeal, and which they have never in any manner attempted to assail by a direct attack. *Harter v. Twohig,* 158 U. S. 448, cited by Judge Sanborn, was an appeal from the circuit court of the United States for the district of Nebraska. That case was a much stronger one than this. In that case the holder of a trust deed placed the deed and the notes secured thereby in the hands of his attorney for foreclosure, and verified a petition drawn for that purpose. The petition was filed seven days later, but one day after the plaintiff in that suit had died. The case proceeded to final decree, sale and deed, without, so far as the record shows, anyone becoming advised of the death of Mr. Harter. A number of years later Twohig learned of the condition of affairs, and proceeded to obtain quitclaim deeds from the original owners of the fee. He then brought suit to have the decree in favor of Harter and the sheriff's deed based thereon set aside and to be allowed to redeem the land. The

circuit court sustained his application. On appeal to the circuit court of appeals the judges were divided, and the case was thereupon certified to the supreme court. The supreme court reversed the cause and remanded it, with directions to dismiss Twohig's bill. On page 454 of the opinion, which is by Mr. Chief Justice Fuller, the court cite *Jennings v. Simpson,* 12 Neb. 558, and *McCormick v. Paddock,* 20 Neb. 486, and state: "It is settled law in Nebraska that a judgment rendered against a person or in his favor is reversible after his death if the fact and time of death appear upon the record, or in error *coram nobis,* if the facts must be shown *aliunde;* the judgment is voidable and not void, and cannot be impeached collaterally." We agree with this construction of our former holdings. This is the settled law in Nebraska. *Street v. Smith, supra,* was a direct attack by appeal in the same case from the order of confirmation of the sale; hence it is not an authority in this case. In *Vogt v. Daily, supra,* the judgments were entered in justice court. No transcripts were ever filed in the district court; the executions being issued by the justice many months after the death of the judgment creditor. The distinction between that case and the one at bar is obvious. In that case no lien on either real or personal property had attached at the time of the death of the judgment creditor. In the case at bar both the mortgage and the decree of foreclosure were liens on the real estate and the decree ordering its sale had been entered before the mortgagor (the defendant in the foreclosure suit) died. The mere statement of the difference in the two cases is sufficient to show that that case is not an authority in this.

The judgment of the district court is therefore reversed, and the suit dismissed at plaintiff's costs.

REVERSED AND DISMISSED.

LETTON, J., not sitting.

GEORGE L. COON, APPELLEE, V. DRAINAGE DISTRICT NO. 1, RICHARDSON COUNTY, APPELLANT.

FILED DECEMBER 23, 1915. No. 18193.

New Trial: NEWLY DISCOVERED EVIDENCE. A motion for a new trial on the grounds of newly discovered evidence will be sustained when the showing made in support thereof tends strongly to show that evidence materially affecting the amount of recovery, given by the prevailing party, on a point not suggested by the pleadings, was untrue, and the defeated party might not reasonably have anticipated the same and controverted it on the trial, and the showing made would require a different verdict.

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

Kelligar & Ferneau and *A. R. Keim,* for appellant.

C. F. Reavis, contra.

MORRISSEY, C. J.

Drainage district No. 1, of Richardson county, instituted *ad quod damnum* proceedings in the county court, and appraisers were duly appointed. They made an award of damages of $676. The owner of the land prosecuted an appeal to the district court, but filed no petition, and trial was had upon the issues made by the transcript, the answer and the reply. The tract of land through which this right of way was taken comprised approximately 45 acres, and the drainage district, by way of answer, set up that the total benefits to the tract, as adjudged by its board of supervisors was the sum of $1,890, that the apportionment of costs for the construction of the drainage canal was $710.57, and asked that the net difference, to wit, $1,179.43, be offset against any consequential damages which might be due the property owner; also that, at the request of the property owner, the location of the ditch had been changed, and he was therefore estopped from claiming any damages.

The reply admitted the amount of the benefits and the apportionment of costs of construction, alleged that the canal was not built in accordance with the report of the engineer and the plans and specifications adopted by the drainage district; that it was not constructed on the line of survey, nor was the canal of the width and depth called for by the plans and specifications; that the drainage district accepted the canal, although it is entirely different as to location, width and depth from the plans and specifications adopted and on which the benefits to the land were fixed and determined. There was a prayer for consequential damages caused by the construction of the ditch, as well as all actual damages, and that the drainage district be denied the right to set-off as prayed in its answer.

The jury returned a general verdict in favor of plaintiff in the sum of $1,132.57, and also made answer to four special interrogatories, finding: First, that the value of the land taken was $312; second, that the amount of consequential damage was $2,000; third, that the ditch differed materially from the ditch provided by the plans and specifications; fourth, that the changes were not made with the consent of plaintiff. Judgment was entered on the verdict, and the drainage district has appealed, relying upon three principal assignments of error. First, because the court submitted interrogatory 3, to wit: "Does the ditch, as constructed through the Coon land, differ materially from the ditch provided by the plans, specifications, and maps adopted by the drainage board?" To this interrogatory the jury returned an affirmative answer. Defendant now complains that this presented to the jury a question not properly triable in *ad quod damnum* proceedings. It is true that the appeal could bring to the district court for decision by the jury only the questions that were covered by the award, but defendant, by its answer, injected this issue into the record. The question may have been entirely foreign to the real issue, but in the instructions the court did not permit the jury to take this into con-

sideration in arriving at the amount of their verdict, and we are inclined to take the view, contended for by plaintiff, that interrogatories 3 and 4 were submitted by the court to meet the question of estoppel which defendant itself raised by its answer. As we do not see that defendant was in any sense prejudiced by the submission of these interrogatories, it is unnecessary to discuss them further.

The second assignment complains of the admission of testimony showing the sum paid for the bridge constructed over the ditch. By the construction of this canal the land was divided, leaving about five acres upon one side and about 35 acres on the other. Plaintiff testified that it was necessary to have a bridge; and, over the objection of defendant, he was permitted to testify that the bridge cost $1,250. This was followed by the testimony of the bridge builder, who testified that he "got $1,250." The better course would be to show the necessity for its construction, that competent men were engaged to build it, and then show its cost. But the assignment directed against the ruling on the motion for a new trial presents a more serious question. A number of witnesses testified as to the value of the land both before and after the appropriation and construction of the canal. Plaintiff testified that the land prior to the construction of the ditch was worth $80 an acre, but after the construction it was worth $30. A number of witnesses corroborated him, while farmers and landowners in the immediate neighborhood placed the value at from $25 to $45 before the ditch was constructed and at $50 to $75 after its construction. The answer to interrogatory 2 fixed the value of the land taken at $65 an acre.

Plaintiff did not become the owner of the land until after these proceedings were commenced, but had been the agent of the owner, and testified that for several years immediately preceding the institution of these proceedings the land had yielded as a net income to the owner $9.35 an acre. This testimony having been admitted over ob-

jection, on cross-examination a hypothetical question was submitted to a number of defendant's witnesses, and they were required to place a valuation on the land based upon the supposition that it had returned the revenue testified to by plaintiff. In this way a valuation was fixed on this assumed income. At the time plaintiff claimed the land returned a net income of $9.35 an acre, it was owned by a non-resident blind woman. After the trial counsel located this woman, and secured and filed, in support of a motion for a new trial, her affidavit, with others, contradicting the testimony of plaintiff, showing that some years she received little, if any, rent, as the crops were destroyed by flood, and that she sold the land after these proceedings were instituted for $1,200.

There was no allegation in the pleadings as to the productiveness of the land, and defendant could not have anticipated that plaintiff would testify to a rental value so greatly in excess of what the former owner says it was. Mrs. Mullins has no interest in the litigation, and there appears to be no reason to doubt the truthfulness of her statements. Her sale of the land, after these proceedings were instituted, for $1,200 is a circumstance corroborative of her statement, and tends very strongly to disprove the testimony of plaintiff. We cannot believe that she would have sold the land for approximately $27 an acre if her returns therefrom were as great as testified to by the plaintiff. Defendant was bound to anticipate every legitimate claim that might be made by plaintiff under the pleadings, but cannot be charged with a lack of diligence in failing to anticipate the testimony of plaintiff as to rentals.

After deducting the acreage actually taken, there were approximately 40 acres to which consequential damages could attach, and by making an award of $2,000, the jury allowed $50 an acre, which is an unreasonable allowance under any view taken of the evidence.

The legitimate effect of the evidence offered in support of the motion for a new trial would be to require a differ-

ent verdict, and, as we find no lack of diligence on the part of the defendant, the judgment of the district court is reversed and the cause remanded.

REVERSED.

HAMER, J., not sitting.

NEWARK TOWNSHIP, APPELLANT, V. KEARNEY COUNTY, APPELLEE.

FILED DECEMBER 23, 1915. No. 18319.

Paupers: LIABILITY OF COUNTY. A resident of Kearney county became sick and destitute in Newark township, of that county. He was without property or means of any kind, but had living within the county an able-bodied, unmarried son, employed as a farm hand, and the owner of unincumbered real estate worth more than $1,000. Without calling upon the son to provide for his father, and without any authority from the county board to create an obligation against the county, plaintiff township expended money for his board and hospital fees. In an action against the county to recover the amount expended, *held* that the county is not liable.

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

Lewis C. Paulson, for appellant.

Charles A. Chappell, contra.

MORRISSEY, C. J.

Action to recover from defendant $223 paid by plaintiff for board, nursing and hospital fees for John Peebles, a pauper. A jury was waived and the cause tried to the court, with finding and judgment in favor of defendant.

Plaintiff alleges that Peebles was a nonresident of the county. It appears to be conceded that there can be no recovery unless the pauper's nonresidence is established. A number of defenses are set out; among others, a denial of the nonresidence of Peebles; also that he had a son within the county who was liable for his support. Testimony on the question of residence was offered by each

party, but the record does not disclose what conclusion the court reached; it having entered a general finding for the defendant. On this branch of the case, the testimony shows that Peebles settled in the county at a very early day, and had a homestead there. Twenty years or more before the trial he and his wife separated. They had two children, a son and a daughter. The daughter married and removed to a distant county, but the son, with the exception of a short absence, continued to live in Kearney county. He appears to be an able-bodied farm hand, or laborer, and the owner of a small house in the city of Minden, worth more than $1,000. A part of each year his mother lived with him, and the remainder of the time she worked for wages. Peebles drifted around the country more or less, but when so minded, made his home at his son's house. A year before plaintiff furnished this assistance the old gentlemen was living at the son's house, while it appears the wife and son were away, and Hayes township, the township in which this house was located, treated him as a pauper and furnished him aid from October 19, 1910, to July 5, 1911. On the latter date he was induced to go to Iowa, which he testifies was for the purpose of making a visit. He returned to Kearney county early in December, 1911, and went into the plaintiff township, where his son was employed as a farm hand. Being sick and in destitute circumstances, the officers of the township took charge of him and expended the money for which the suit is brought.

The son testified that he owned a house in the city of Minden, and for the past three years made that his home, and that his father had been "there a short time at spells," and came and went as he pleased, and whenever he wanted to come back he did so.

The gentleman who took care of Peebles during the time he was supported by Hayes township testifies that during this period the old gentleman lived in the son's house in the city of Minden, which is the county seat of Kearney county; that the witness advised him to go to Iowa, telling

him that if he remained in Minden he might be committed to the asylum for the insane; that he furnished him the money to defray his expense and was reimbursed by Hayes township.

The old gentleman testified that he was about 73 years of age; that he went to Iowa "to make a visit;" that he had no property; that for the past five or six years "I was mostly with the boy on the place and here in Minden, and I stayed here awhile, and after I came back I was sick, you know, and I had to stay in the house; they helped me, I stayed there and batched, and they had this man come there and look after me." In answer to the question where he had lived for the last four or five years he answered: "Oh, around mostly with the boy. * * * Yes, sir; I made my home with him all the time since the last few years lately, and then I had to go to the hospital." "Q. Your home was with your son? A. Yes, sir." It is evident that he looked upon his son's house as his home. The son testified that it had been open to the father, and that he might come and go at will.

The cause was tried on the theory that, if Peebles were a resident of Kearney county, plaintiff could not recover. The testimony is sufficient to warrant the conclusion that he was a resident of that county.

The county was under the township organization, and, as a poorhouse had not been established, the justice of the peace was *ex officio* overseer of the poor. As said by Mr. Justice Cobb in *Waltham v. Town of Mullaly*, 27 Neb. 483: "The law for the government of towns in those counties where the system of township organization has been adopted is far from perfect, or comprehensive in its provisions."

Section 4543, Ann. St. 1911, provides: "The electors present at the annual town meeting shall have power * * * to direct the raising of money by taxation * * * for the support of the poor within the town; provided, that when the county board of any county shall have established a poorhouse under any statute law of this

state, the support of the poor shall be provided for by the county board, and no taxes for that purpose shall be voted by the electors at town meetings except sufficient to provide temporary relief." Sections 9750, 9751, Ann. St. 1911, make it the duty of the children, where able, to support the dependent parents.

"A person is chargeable as a pauper under the statute, when he is without means, and unable, on account of some bodily or mental infirmity, or other unavoidable cause, to earn a livelihood, and has no kindred in the state liable under the statute for his support, or whose kindred within the state are of insufficient ability or fail or refuse to maintain him." *Otoe County v. Lancaster County,* 78 Neb. 517. This man had an able-bodied, unmarried son, 26 years of age, with unincumbered property worth over $1,000. He had constant employment, and was surely liable for the support of his father, but no demand was made upon him.

It is said in appellant's brief, although not shown in the record, that the trial court, in rendering its opinion, held that the payments made by plaintiff were voluntary, and for that reason it could not recover. As against defendant county this is certainly true. Before any obligations were incurred the county attorney was consulted by the justice of the peace, and was advised that the county would not reimburse the township. The county board was never asked to audit the claims of those actually caring for the old gentleman. These claims were paid by the township without a request for aid being made to the county board. A somewhat similar question was presented in *Hamilton County v. Meyers,* 23 Neb. 718, where a physician attended a nonresident pauper, and afterwards filed his claim against the county, and it was held that the county was not liable.

The record being free from error, the judgment is

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

STATE, EX REL. WALTER CHAMBERLIN ET AL., APPELLEES, V. JOHN H. MOREHEAD ET AL., APPELLANTS.

FILED DECEMBER 23, 1915. No. 19406.

Banks and Banking: SAVINGS BANK: CHARTER: DISCRETION. Article I, ch. 6, Rev. St. 1913, the Nebraska banking act, construed, and *held* to vest the banking board with discretionary power to refuse a charter for a savings bank when it appears that the proposed bank is to be conducted in the same room, or in a room immediately adjacent to a room, occupied by a national bank, and the officers and directors of the two banks will be substantially the same persons.

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

Willis E. Reed, Attorney General, and *Charles S. Roe,* for appellants.

W. T. Thompson, contra.

MORRISSEY, C. J.

Relators made application to the state banking board for a charter for a savings bank, to be known as the State Savings Bank of Clarks, Nebraska. The preliminary steps provided by the statute were taken in due form, and no objection was raised as to the character of the parties, their financial ability, or the form of the application, but the banking board ascertained that, if the charter were granted the relators intended to conduct the business of the state savings bank in the same room, or in a room immediately adjacent to the room, occupied by the First National Bank of Clarks, and that the officers and directors of the two banks would be the same persons, or practically so. Some time preceding this application, the banking board had before it a similar application, which it rejected, after adopting a resolution declaring it unwise, unsafe, and against public policy to permit the operation of banks as relators proposed, and declaring it the fixed

policy of the board that, in the future, charters under such circumstances would not be granted. On consideration of relators' application the board adhered to its policy theretofore announced and refused to issue a charter.

This action was then commenced in the district court for Lancaster county, and, on hearing, a writ of mandamus issued directing respondents to forthwith convene, approve the articles of incorporation, and issue the charter as prayed. Respondents have appealed. No question of fact is in dispute. But we are called upon to determine whether the board had discretionary power to refuse to grant the charter under the provisions of the banking act.

By the Nebraska banking act, article I, ch. 6, Rev. St. 1913, banking is declared to be a quasi-public business, subject to regulation and control by the state, and it is made unlawful to engage in this business, except by means of a corporation duly organized for that purpose. The act creates a banking board, giving it general supervision and control of all banks coming within its provisions. It is made the duty of the governor to appoint a secretary for the board, and examiners, who are empowered "to make a thorough examination into all the books, papers and affairs of any corporation transacting a banking business in this state." Section 8. These examiners are empowered to summon witnesses and administer oaths, and it is made their duty to make a detailed report to the banking board. If, upon examination, a bank is found to be insolvent, "or is conducting its business in an unsafe or unauthorized manner, or is endangering the interest of its depositors, then such examiner shall have full power and authority to hold and retain possession of all the money, rights, credits, assets, and property of every description belonging to such bank, * * * until the state banking board can receive and act on the report made by the examiner of said bank, and have a receiver appointed as hereinafter provided." Section 10. There is further provision for the issuance of a certificate stating that the banking corporation has complied with the laws of this state for the

protection of bank depositors, and that the depositors are protected by the depositors' guarantee fund, and that every banking corporation receiving such certificate shall conspicuously display the same in its place of business, and "may print or engrave upon its stationery words to the effect that its depositors are protected by the depositors' guarantee fund of the state of Nebraska." Section 16 provides that, after the parties have taken the preliminary steps which relators took in this case, "then the state banking board, if, upon investigation, it shall be satisfied that the parties requesting said charters are parties of integrity and responsibility, shall * * * issue to said corporation the certificate provided for in section 14 and a charter to transact the business provided for in its articles of incorporation."

Relators contend that this provision is mandatory; that, it being admitted that the parties had complied with all the terms of the act and are men of integrity and responsibility, the board has no power to inquire further into the manner or method of doing business. This is evidently the view taken by the district court, and the section, standing alone, may bear that construction. But the statute on banking is a complete and comprehensive act. It was enacted by the legislature of 1909 after it had been drafted by able lawyers, selected specially for that purpose, and after the fullest discussion and most careful research. Its purpose cannot be questioned. It aimed to take the banking business out of private hands and place it under state control, to the end that failure might be made unlikely and a general panic almost impossible. And its right to do so under the police power has been upheld by the supreme court of the United States. *Shallenberger v. First State Bank of Holstein*, 219 U. S. 114. The act provides not alone for the investigation that is to be made under section 16, before the issuance of a charter, but for a continuing supervision. Banks operated under the provisions of the act are required to carry a certain reserve, and it is provided that no part of said

reserve fund shall be kept in any depository which, in the opinion of the state banking board, would not be a proper and safe custodian thereof. The board is authorized to call upon the bank, in case its reserve falls below the proper amount, to make good the deficiency, and its failure is made cause for the appointment of a receiver. The act fixed a maximum rate of interest; two or more banks transacting business in the same city are forbidden to use the same name, or names so nearly alike as to cause confusion in transacting business, and, in case such condition did exist at the time the act became effective, the board is empowered to require such change or modification as will prevent the confusion.

Section 44 provides: "For the purpose of providing a guarantee fund for the protection of depositors in banks, every corporation engaged in the business of banking under the laws of this state shall be subject to assessment to be levied, kept, collected and applied as hereinafter provided." By subsequent provisions, the banking board is authorized to make such adjustment of rates and assessments to be paid by any bank engaging in business as will require such bank to contribute to the depositors' guarantee fund a just and equitable sum, and all banks are required to set apart, keep, and maintain the amount thus fixed and levied; the same to be payable to the state banking board on demand. It is further provided that if the depositors' guarantee fund be depleted, or reduced below a certain amount, the state banking board shall make a special assessment against the capital stock of each of the banks covered by the banking act. Section 49 provides: "Whenever it shall appear to the state banking board, from any examination or report provided for by this article, that the capital of any corporation transacting a banking business under this article is impaired, or that such corporation is conducting its business in an unsafe or unauthorized manner, or is endangering the interests of its depositors," the banking board shall proceed to secure the appointment of a receiver to

wind up its affairs. If it may do this with a bank that is a going concern, why not, before the issuance of a charter, take precautions to see that the business of the corporation will be conducted in a safe manner and that the interests of the depositors will be fully protected.

Upon the failure of any bank to pay its depositors in full, the guarantee fund, under the direction of the banking board, immediately becomes available for such purpose, and, as all of the banks operated under the jurisdiction of the banking board contribute to this fund, directly or indirectly, its conservation affects all of the depositors in these banks. Again, it may be said that when two banks are conducted in the same room, and managed by the same people, depositors may easily be mistaken as to which bank has their account. They may believe that it is deposited under the provisions of this act, while in reality their account is carried in the other bank. Again, it may complicate examinations. National banks are not subject to examination by the state examiners. State banks are not under the control of the federal government, nor subject to examination by its examiners. Experience has shown that, where the banking business is conducted as proposed by the relators, it is easy to transfer funds from one bank to another. If one of the banks finds itself in straitened circumstances, the temptation is great to draw on the other bank to tide it over an examination. Indeed, it is stipulated in the record that, in the year 1913, where a national bank and a state savings bank were conducted under conditions such as are proposed, the failure of the national bank caused the failure of the state bank with a loss to the guarantee fund in the sum of $54,000.

If standing alone and construed literally, section 16 might bear the interpretation for which relators contend. But, in addition to the provisions already pointed out, section 60 reads: "The state banking board shall prescribe all such forms as may be useful or necessary in carrying out the provisions of this article, and shall have power to make such rules and regulations, not inconsis-

tent with the provisions of this article, as may be necessary or proper to carry it into effect according to its true intent." When the general rule of statutory construction is applied and section 16 is considered in connection with the other provisions, it must be held that the board is vested with authority not only to correct evils that may creep into the management of an existing bank, but to guard against dangers that may threaten institutions about to be formed. "The power to compel, beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end." *Noble State Bank v. Haskell,* 219 U. S. 104, 112. To give section 16 the construction asked by relators would be to narrow, if not to nullify, the provisions of the act vesting the board with power to take all steps necessary for the proper regulation of the banking business.

If the guarantee fund does not directly guarantee the deposits in the national bank, yet the fact that in the same room, or in the room adjacent, the same parties are operating a state bank under the guarantee fund, may lead the general public to believe that the money deposited in the national bank is also guaranteed. We think the intention of the legislature was to vest the banking board with general control and with authority to do all things reasonably necessary for the protection of depositors throughout the state. The board also stands in the nature of a trustee for this guarantee fund, and it is its duty to take such precautions as may be necessary to protect its integrity. The terms "general supervision and control" vest the banking board with duties of a very high order, and they are not to be perfunctorily discharged, but to be administered with the highest degree of intelligence and discretion.

It is customary for legislatures to grant to administrative bodies of this character the power to adopt rules, by-laws, and regulations reasonably necessary to carry out the

purpose for which they are created, and this grant is not an improper delegation of authority. *Blue v. Beach*, 155 Ind. 121, and cases cited. This is held generally to be the rule in matters coming within the police power of the state. That the banking business comes within that power is no longer an open question. "The police power extends to all the great public needs (*Camfield v. United States*, 167 U. S., 518) and includes the enforcement of commercial conditions such as the protection of bank deposits and checks drawn against them by compelling co-operation so as to prevent failure and panic." *Noble State Bank v. Haskell, supra.*

The business of banking coming within the police power of the state, the same rule of construction may be applied to banking acts and to rules and regulations established by banking boards as applies to acts creating other administrative bodies coming within the police power. The supreme court of judicature of Indiana, in discussing this phase of the question, in *Blue v. Beach, supra*, say: "While it is true that the character or nature of such boards is administrative only, still the power, conferred on them by the legislature, in view of the great public interests confided to them, have always received from the courts a liberal construction, and the right of the legislature to confer upon them the power to make reasonable rules, by-laws, and regulations, is generally recognized by the authorities."

In that case the court was discussing rules and regulations made to protect the public health, but these rules and regulations are made under the police power of the state, and the same rule may reasonably be applied to all boards acting within that power. The rule adopted and followed by the banking board appearing to be a reasonable and salutary one, its action will not be disturbed. The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

ROSE, J., not sitting.

MARTHA W. WHIPPLE, APPELLEE, V. JOHN H. ROSENSTOCK ET AL., APPELLANTS.

FILED DECEMBER 23, 1915. No. 18518.

1. **Intoxicating Liquors:** LOSS OF SUPPORT: RIGHT OF ACTION. A married woman and her minor children consisting of one family may maintain an action for loss of means of support against all those who have furnished intoxicating liquors to the husband and father, which occasioned or contributed to the damages.
2. ———: ———: DAMAGES. In estimating the damages, the jury may consider the situation of the deceased, his annual earnings, if any, his habits, health, and reasonable expectancy of life.
3. ———: ———: ———. The right of support is not limited to the bare necessaries of life, but in no case can the judgment be for a greater sum than the value of the means of support of which plaintiff has been deprived.
4. ———: ———: ACTION FOR DAMAGES: ABATEMENT. The death of the husband and father does not cause an action for loss of means of support to abate, the death being a mere incident, not the principal cause of action.
5. ———: ———: ———: DEFENSE. "A license is no protection to a vendor of intoxicating drinks in an action for loss of the means of support. The statute, in effect, says to every one engaged in the traffic, 'Beware to whom you sell or furnish intoxicating liquor.'" *Roose v. Perkins*, 9 Neb. 304.
6. ———: ———: ———: PARTIES. The bondsmen of the liquor dealers who have furnished intoxicating liquors to the husband and father may be joined with the liquor dealers as defendants in an action for the loss of support.
7. ———: ———: DAMAGES. Evidence examined, and *held* that a verdict for $10,000 was excessive, and the amount of recovery is reduced to the sum of $5,000.

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

T. J. Doyle, for appellants.

Burkett, Wilson & Brown, contra.

BARNES, J.

The plaintiff commenced this action against John H. Rosenstock, Alexander Butz, Charles A. Schwedop and Leonard Bauer, who were licensed saloon-keepers in the city of Lincoln, and their bondsmen, to recover damages which she alleged had accrued to herself and her two infant children by reason of the sale of intoxicating liquor to her deceased husband, Frederick H. Whipple. The action as originally commenced was against the persons and bondsmen above named, together with some others.

It was alleged in the petition that from January 1, 1912, the saloon-keepers therein named had sold, given to, and furnished her husband, Frederick H. Whipple, with large quantities of intoxicating liquors, which he drank, and thus had caused him to become intoxicated, debauched and an habitual drunkard; that her husband had abused her and neglected to furnish any support for herself and minor children; that before he became so debauched he was kind to her and had furnished his family suitable support in the way of food and clothing; that by reason of the use of the intoxicating liquors so sold, given and furnished him by defendants, he became sick and diseased in mind and body, and died on the 18th of August, 1912, of an injury to his arm, complicated by delirium tremens, and by reason of which she and her children had sustained damages in the sum of $20,000, for which she prayed judgment.

The defendants answered separately. Each of the saloon-keepers denied that he had sold, furnished or given plaintiff's husband any intoxicating liquors, denied that Whipple was a sober and industrious man, and alleged that for many years he had been a confirmed drunkard. They denied that plaintiff had been damaged in her means of support by reason of any sales of liquor made by them to her husband; and the answers further denied that plaintiff was the wife of Frederick H. Whipple. They admitted that they were licensed saloon-keepers doing business in the city of Lincoln, and denied all the other allegations

of the petition. The reply was a general denial of the facts alleged in the answers.

When the case came on for trial in the district court for Lancaster county, and after plaintiff had introduced her evidence, the action was dismissed as to all of the defendants other than the saloon-keepers above mentioned and their sureties. The petition was amended so as to allege the sale to Whipple of intoxicating liquors from the 1st day of May, 1912, to the 15th day of August of that year, and the case was finally submitted to the jury as to such sales alone. After all of the evidence had been introduced, instructions were given, which were excepted to by each of the defendants. The jury returned a verdict in favor of the plaintiff and against all of the defendants for the sum of $10,000, on which the court rendered judgment, and the defendants have appealed.

It is contended by the appellants that the evidence is insufficient to sustain a verdict for the plaintiff. The record fairly shows that each one of the defendant liquor-dealers sold and furnished to plaintiff's deceased husband intoxicating liquors, including beer, at some time during the period from the 1st day of May to the 15th day of August, 1912; that Frederick H. Whipple died on the 18th day of August, 1912, as alleged in plaintiff's petition. While there is some conflict in the evidence, that branch of the case was properly submitted to the jury. Under the provisions of chapter 40, Rev. St. 1913, as construed by the decisions of this court, the verdict of the jury on that question should be sustained. The saloon-keepers were jointly liable on their bonds for whatever damages the plaintiff may have sustained by reason of the traffic. *Roose v. Perkins,* 9 Neb. 304; *Kerkow v. Bauer,* 15 Neb. 150; *Warrick v. Rounds,* 17 Neb. 411; *Gorey v. Kelly,* 64 Neb. 605. The cases cited also dispose of the appellant's claim of misjoinder adversely to their contention, as will presently be seen.

It is strenuously contended that the verdict in this case was excessive. There seems to be merit in this contention.

It appears from the record that the plaintiff and Frederick H. Whipple were married on the 28th day of June, 1904; that two children were born to them, both of whom are living, and at the time of the trial were aged five and eight, respectively; that at the time of the marriage the plaintiff's husband had employment as a buggy washer at the Palace livery stable in the city of Lincoln. The amount of his earnings at that time is not shown, but it is apparent that they were not large. It also appears that at the time he was addicted to the use of intoxicating liquors, but not to the extent of destroying his ability to work. For some time he had no steady employment, but worked at different places in the city and in private families; and his earnings did not exceed $35 a month. It also appears that about four years before his death Whipple became an itinerant peddler of horseradish, peanut butter, hominy and some other household articles of food. There is no evidence in the record as to the amount of his earnings while he was engaged in that business, but it seems clear that they must have been limited to a rather small sum. A little later on Whipple commenced to prepare horseradish and hominy on his own account. This was peddled, together with icecream, popcorn, pop and some other things which he purchased of the manufacturers. These articles were peddled by him from about the first day of June until the latter part of September of each year. The record also shows that he sold hominy, horseradish and peanut butter a great part of the year. The plaintiff testified that he made in his business $150 a month, but that was purely her opinion without any competent evidence to support it. She also testified that he furnished for the support of his family, $25 a week. That testimony was also her opinion, and is not supported by any other evidence. The testimony of the grocer of whom Whipple bought his groceries was that his bills ran from $3.50 to $5 a week, but he was unable to state that Whipple bought all his meats and foods from him. It may be presumed that, while Whipple had credit at the

grocery and ran a weekly account, he bought practically all of his supplies from him. There is no evidence in the record as to how much or what kind of clothing Whipple furnished his family. Plaintiff testified that after the 1st of January, 1912, he furnished them nothing, and that the only money she was able to obtain from him was $5. The record clearly shows that Whipple at all times during the last ten years was an habitual user of intoxicating liquors; that his drinking had increased by January, 1912, to such an extent that he was unable to attend to his business; that just before his death he was trying to sell his wagon and outfit for $40; that his business had become unprofitable; that he procured intoxicating liquors in bottles and jugs from some place other than that disclosed by the testimony, and kept intoxicating liquors in his house, his wagon and other places; that he drank to such an extent that on the evening of the 14th day of August, 1912, he fell and broke his arm; that his wife helped him into the house, undressed him, and put him to bed; that on the morning of the 15th a physician was called, who dressed the arm and sent him to a hospital, where he remained until the afternoon of the 17th of August, when he was sent home because of his conduct; that when he arrived at the house he became wild and incoherent and developed symptoms of delirium tremens; his conduct was such that his wife was afraid of him, and he was taken to a room in the county jail, where he died on the morning of August 18, 1912.

A the time of Whipple's death he was 54 years of age and had a life expectancy of 18 years. Considering the evidence contained in the record, we are of the opinion that the verdict was excessive; that by Whipple's death plaintiff and her children could not have been damaged in their means of support in any sum exceeding $5,000.

The amount of plaintiff's recovery having been reduced to the penalty mentioned in a single bond furnished by the sureties there can be no contention of a misjoinder of of parties defendant. Plaintiff therefore is required to

file a remittitur in the sum of $5,000 within 20 days, and, if this is done, the judgment of the trial court will be affirmed for that amount, with the costs of that court; otherwise, the judgment will be reversed and the cause remanded.

AFFIRMED ON CONDITION.

LETTON, J., not sitting.

BARNEY MALKO, APPELLEE, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL., APPELLANTS.

FILED DECEMBER 23, 1915. No. 18535.

1. **Railroads:** INJURY TO PEDESTRIAN: DUTY OF TRAINMEN. A pedestrian was struck by a passing train while walking along a well-beaten footpath between the main tracks of a railroad, which path had been used by the public for more than twenty years without objection by the company's officers and employees. He was apparently oblivious of the approach, but was seen for the distance of a quarter of a mile by the engineer and fireman of the train. He was struck by the overhang of the engine and severely injured. Under such circumstances it was the duty of those in charge of the train approaching him from the rear, not only to ring the bell, but to sound the whistle to warn him of his danger, and thus enable him to take a position of safety.
2. **Trial:** INSTRUCTIONS. Where the trial court has properly instructed the jury on the question of the plaintiff's contributory negligence, it is not reversible error to refuse to give another and more specific instruction of the same nature at the request of the defendant.
3. **Record** examined, and found that the other instructions were properly given and refused.
4. **Damages.** A verdict and judgment for the plaintiff for $10,000, under the circumstances as shown by the evidence, *held* to be excessive, and the recovery is reduced to the sum of $7,000.

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

William D. McHugh and *W. H. Herdman,* for appellants.

Gurley, Woodrough & Fitch, contra.

BARNES, J.

This was an action to recover damages alleged to have been sustained by the plaintiff by being struck by one of the defendant railroad company's engines attached to a passenger train running over the Union Pacific Railroad Company's tracks between Omaha and South Omaha.

It appears that on the 8th day of April, 1912, the plaintiff, with two companions, was walking from the packing houses in South Omaha toward the city of Omaha along a beaten path between the two main-line tracks of the Union Pacific Railroad Company. The place where the plaintiff was walking at the time of the accident was much used by pedestrians in traveling to and from the packing houses and had been so used for more than 20 years. It appears that there were signs posted along the right of way stating that the tracks were private grounds, and that persons using the right of way would be trespassers, but that rule had never been enforced by the officers or employees of the company. The defendant company in this case was using the Union Pacific tracks over which to run their through passenger trains from a junction near South Omaha to the Union Station in the city of Omaha. While plaintiff was walking along the path above mentioned, in the direction of Omaha, a through passenger train of the defendant company came from the south behind him and the overhang of the engine struck and injured him. One Nat Downes, who was the engineer in charge of the engine, was joined with the railroad company as a defendant.

Plaintiff's petition presented two theories on which a recovery was sought. First, that while the plaintiff was rightfully walking on the right of way of the railroad, and near the track upon which the engine and train were running, the defendants negligently failed to ring the bell or

blow the whistle or slow down the train or to warn the plaintiff in any way of its approach. The second theory is based upon the claim that, while plaintiff was walking near the track upon which the train was being operated, the defendant railroad company's engineer and fireman saw that he was in a position of peril, and, after seeing and knowing such situation, they negligently failed to give him any warning of the approach of the train by ringing the bell or sounding the whistle or slowing down or stopping the train so as to prevent the injury; that his injuries could have been avoided by the defendants, after seeing plaintiff's peril and danger, by exercising reasonable care to warn him by bell or whistle or slowing down and stopping the train.

The defendants filed separate answers, each containing certain formal admissions, and also a general denial and plea of contributory negligence, as follows: "Further answering said petition, the defendant alleges that whatever injuries were received by said plaintiff were received by him solely as the direct and proximate result of his own negligence and carelessness in not taking proper care to protect himself from injury, and in not taking proper care to avoid danger, in this, that said plaintiff carelessly and negligently stepped on the tracks or so near thereto as to be within the overhang of the engine and cars immediately in front of the engine operated by this defendant, which was bordering on said track, the said engine being in plain sight and but a few feet distant from said plaintiff." The reply to the answers was a general denial. On the issues thus joined the cause was tried in the district court for Douglas county. The jury returned a verdict for the plaintiff and against both of the defendants for the sum of $10,000. Judgment was rendered on the verdict, and the defendants have appealed.

The only serious conflict in the evidence was whether the plaintiff, at the time the accident occured, was walking so close to the track that he was in danger of being struck by the engine. The plaintiff's evidence was, in substance,

that he was walking along the path with his back towards the oncoming train; that he did not see the train and had no warning of its approach, and that he did not swerve to the right; that defendant Downes failed to ring the bell or sound the whistle of the engine before it struck him. On the other hand, the defendant's testimony was that the engineer and fireman saw plaintiff for about a quarter of a mile before the train reached him; that they thought he was a sufficient distance from the track to be out of danger, but just as the train reached him he turned, or swerved, to the right and towards the track, so that he was struck by the overhang of the engine, and was injured without any negligence on the defendant's part. It appears that the whistle was not sounded, but the defendants testified that the automatic engine bell was ringing. This conflict in the evidence was sufficient to take the case to the jury, for, if the whistle had been sounded, the plaintiff would have known of the approach of the train and would have removed himself to a place of safety.

Defendants' first contention is that the district court erred in refusing to give instruction No. 3, which they requested, for the reason that it fairly stated their theory of the case. It reads as follows: "You are instructed that if you find from the testimony that the plaintiff Malko, when first seen by the defendant Downes, the engineer operating the defendant company's train, was walking so far distant from the track on which said train was running as to be out of danger of injury therefrom as it passed him, then and in that case the defendant Downes, as the engineer of the train and operating the engine on said train, was not bound to check the speed of his train, and had the right to presume that plaintiff would continue to walk so far distant from the track as to be in no danger of injury from the passing of the train; and, if you find from the evidence that the plaintiff immediately before being struck by said train moved from his position of safety to the right and towards the track on which train was approaching, and

thus brought himself so near said track that he was struck by said train in passing, and you further find that after plaintiff so moved towards said track, the defendant Downes, in the exercise of all reasonable care and diligence on his part, could not check the speed of or stop his engine and avoid striking the plaintiff, then and in such case your verdict must be for the defendants." It appears, however, that the court gave a like instruction on his own motion. Paragraph numbered 9 of the court's instructions reads as follows: "The defendants allege in their answer that the injuries to the plaintiff were caused by his own negligence and want of care in looking out for his own safety, and the burden of proof is upon the defendants to show by a preponderance of the testimony that the plaintiff was negligent, and that his negligence contributed to the injury. And in passing upon this issue you are instructed that a person walking upon a railroad track is bound to exercise reasonable care for his own safety, and it was his duty to look and listen, such as an ordinarily prudent person would have done under the situation and surroundings then present. And if you believe from all the testimony that the plaintiff did not take such precautions in looking or listening or otherwise watching out for his own safety as an ordinarily prudent person would have done under the circumstances and surroundings then present, then you should find that the plaintiff was guilty of negligence, and if you further believe from the evidence that such negligence of the plaintiff contributed to his said injury, then he could not recover upon his first theory, and you will find for the defendants upon that issue." We are satisfied that this instruction fairly stated the defendants' theory, and, while it was not in the exact language of the one requested, its effect was the same, and the jury could not have been misled on the question of contributory negligence by anything contained therein.

It is further contended that the court erred in refusing to give instructions numbered 1 and 2 requested by the

the defendants. Without setting out these instructions in the opinion, it may be said that they did not apply to the facts of this case.

The plaintiff, at the time he was injured, was walking along a well-beaten path which had been used by pedestrians for more than 20 years, with the knowledge and at least the tacit consent of the officers and employees of the railroad company. He was therefore not a tresspasser in the strict sense of the word, but was in a sense a licensee, and the defendants were charged with the duty of so operating their train by giving suitable signals of its approach as to enable plaintiff to remove himself from the place of danger and thus avoid the injury. Many other assignments of error are based upon the refusal of the court to give requested instructions; but, after a careful examination of the record, we are of the opinion that the court did not err in giving any of the instructions given or in refusing to give any that were requested.

Finally, it is contended that the verdict and judgment is excessive. We think there is merit in this contention. It appears from the evidence, without dispute, that the plaintiff was a common laborer 39 years of age; that at the time he was injured he was earning $1.75 a day. There is no evidence showing, or tending to show, that his earnings would ever exceed that amount. If plaintiff should work steadily for eight hours a day he would earn $436.80 a year. Common experience teaches us that the hazard of sickness, disease, and loss of time is such that plaintiff could not reasonably be expected to earn that amount per year during his entire life expectancy. Again, the uncertainties of obtaining employment are such that there would be times when he could not earn that amount by reason of slack business conditions. The record shows that the injury to his shoulder and arm were severe and are permanent. It does not show, however, that he is wholly incapacitated. The evidence shows that after he recovered from his injury he worked for a time at one of the packing houses, and that while he so worked he re-

ceived as wages 12 cents an hour, so it cannot be stated that he is wholly incapacitated from labor. His life expectancy was about 29 years, but, of course, it could not be expected that he would be able to continually labor for that length of time. The verdict and judgment in this case is $10,000. We are of the opinion that a verdict for $5,000 would compensate him for his loss of earning capacity. In addition to that, plaintiff should recover a reasonable sum for his pain and suffering, together with the amount necessary to pay for the services of his physician and his hospital charges. Allowing $2,000 for those items, and adding this to his loss of earning capacity, we have $7,000. This, we are of the opinion, would be amply sufficient to compensate the plaintiff for all of the injuries he has sustained. The verdict and judgment should be reduced to that amount.

It is therefore ordered that the plaintiff be required to file a remittitur in the sum of $3,000, and, if such remittitur is filed within 20 days, the judgment of the district court, as thus reduced, will be affirmed; otherwise the judgment will be reversed and the cause remanded for further proceedings.

AFFIRMED ON CONDITION.

SEDGWICK, J., concurs in the conclusion.

JOHN B. VAN BOSKIRK, APPELLEE, V. A. S. PINTO, APPELLANT.

FILED DECEMBER 23, 1915. No. 18330.

1. **Physicians and Surgeons: CARE AND SKILL: DIAGNOSIS.** A physician or surgeon, when he accepts employment to treat a patient professionally, must exercise such reasonable care and skill in that behalf as is usually possessed or exercised by physicians or surgeons in good standing, of the same system or school of practice, in the vicinity or locality of his practice, having due regard to the ad-

vanced state of medical or surgical science at the time, and he is not liable for a mistake in judgment made in diagnosing a physical injury where he used such ordinary and reasonable care and skill, even though his judgment may be erroneous.

2. ———: ———: ———: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held*, not to establish that the failure of defendant to procure a Roentgen ray picture to be taken of the plaintiff's foot and ankle as an aid to diagnosis constituted lack of reasonable care and skill under all the surrounding circumstances.

3. ———: ACTION FOR MALPRACTICE: REASONABLE CARE: QUESTION FOR JURY. The question whether a physician and surgeon, after having reasonable grounds to believe that he had made a mistake in diagnosis and that a fracture existed in a case where the injury had been considered by him to be merely a sprain, exercised reasonable and proper care and skill after he had reached such conclusion, is a matter, under proper pleadings and instructions, for a jury to determine, and it is *held* that there was sufficient evidence on this point to go to the jury.

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

Mahoney & Kennedy and *Philip E. Horan,* for appellant.

Brown, Baxter & Van Dusen and *M. L. Donovan, contra.*

LETTON, J.

This is an action against two physicians for malpractice. The case was afterwards dismissed as to Dr. Spaulding. The jury found for the plaintiff in the sum of $1,500, and, from a judgment on the verdict, defendant Pinto appeals.

The facts developed at the trial are that on the 4th of May, 1912, the plaintiff, who was a man 27 years of age employed by a tent and awning company, was putting up awnings on the Omaha post office building. The ladder slipped and he fell a distance of about 15 or 18 feet. Dr. Spaulding was called, who gave him a hypodermic injection to relieve the pain. He was taken to a hospital, placed upon an operating table, and Drs. Pinto and Spaulding made an extended examination of his ankle,

spending over half an hour in doing so. They diagnosed the injury as being a severe sprain. The ankle was placed in splints and the patient placed in charge of a nurse who was instructed to pour liniment upon it. Dr. Spaulding then gave the case over to Dr. Pinto. Three or four days after the injury the splints were removed, the foot placed on a pillow with a sandbag to support it, and the nurse was directed to massage the ankle and move it as much as the patient could stand. This was done each day. He remained under Dr. Pinto's care in the hospital 17 days. At the time he left he was unable to bear his weight upon the injured foot without pain or to walk without crutches, and finally the foot remained fixed in such a position that the front part of the foot was left at a downward angle from the normal position. On July 11 he suggested to Dr. Pinto he would like an X-ray taken. An X-ray picture was then taken by Dr. Tyler. It disclosed that the fall had caused a slight impacted fracture of the forward part of the astragalus and a rupture or raising of the periosteum on the posterior portion of this bone. A fluid exuded which afterwards hardened into a bony substance and formed a wedge between the articulation of the tibia and astragalus, thus causing the abnormal position of the foot.

Four physicians were called by the plaintiff. One of these physicians, Dr. Tyler, was an X-ray expert. He testified to having taken X-ray pictures of the plaintiff's foot on July 11 or 12, 1912, and on November 12, 1912, which disclosed practically the same conditions. The negative of the first picture was accidentally broken, but the pictures taken November 12 are in the record. Dr. Tyler testified that an X-ray picture taken at or about the time of the injury would not have disclosed the condition with reference to the periosteum or the effusion of the fluid; that the proper treatment for the impacted fracture would have been to keep the foot at rest by means of splints for six or eight weeks. He also testified that, if when Dr. Pinto examined Mr. Van Boskirk's ankle he

found swelling, mobility, no displacement, no dislocation, and no crepitation, his diagnosis in the first instance that his injury was a severe sprain would have been the diaognosis of an ordinary practioner of the allopathic school of medicine in Omaha about May, 1912. The other three witnesses called on behalf of plaintiff testified substantially to the same effect, though one or two said that if the patient would stand the expense he would, in case of doubt, or under such circumstances, have had an X-ray picture taken. None, however, testified that this was the usual method. It was also proved that an operation to remove the bony growth could be as well made now as at any previous time. It was shown that few doctors in Omaha own X-ray machines, but that X-ray pictures may be procured by paying for them. The testimony of Dr. Piñto and Dr. Spaulding is to the effect that at the time of their examination they used all the well-known tests for determining whether there was a fracture or not. They found mobility, no dislocation, no crepitation, and nothing else that would indicate that a fracture had occurred. The conclusion which must be drawn from the testimony is that it does not establish that the failure to have an X-ray picture taken as an aid to diagnosis at this time constituted lack of reasonable care and skill under all the surrounding circumstances, and that if plaintiff's case rested upon the claim of negligent diagnosis alone the evidence would not support a verdict in his favor. The testimony showed that the treatment which was given to the ankle, while proper if the injury had merely consisted of a sprain, was improper for an impacted fracture, that in such a case the splints should have remained for several weeks and until there was no danger of the foot being distorted. It is shown that, if splints had been applied and the ankle bandaged so that the foot was kept at right angles to the leg, the bony fluid would have exuded into the space between the tibia and the astragalus, but the foot would have been left in its normal position. The evidence of plaintiff and his wife is that he had less pain

when the foot was thus placed than when it was left in the slanting position which it assumed. The medical testimony is to the effect that this position was in all probability caused in the first place by the involuntary action and superior strength of the muscles of the calf over those of the front of the leg, but that later the position became fixed by the exudation and hardening of the callous between the bones.

The only question in the case as to which there is room for doubt is whether, after the diagnosis was made and after sufficient time had elapsed to show that the injury was in all probability more serious than a sprain, Dr. Pinto failed to give reasonable and proper treatment. The strongest evidence on this point was given by the defendant himself. He testified that he had an idea on the Saturday following the injury that there was a fracture of the articular ends of the bones, and that from the 11th of May he treated the case with the view that the ankle was fractured; that on the Saturday following the injury he suggested an X-ray, but that he did not mention this to Mr. Scott, the plaintiff's employer, who had directed him to take care of the plaintiff's case and to send him the bill; that on the 17th of May, the day the plaintiff was taken to his home, he told him he ought to have an X-ray, but the plaintiff said he could not afford it. On the other hand, plaintiff denies these statements, and testifies that while in the hospital he suggested that the X-ray should be used, but defendant said it was unnecessary, that there was no change in the treatment and on July 11 defendant said that with manipulation and massage of the ankle the stiffness would wear away in time. Two witnesses testify that while in the hospital the ankle was swollen and the foot turned to one side, that the doctor was informed that plaintiff complained that the foot felt as if it was twisted, and that it kept him on a nervous strain all the time; and that when Dr. Pinto dismissed the case there was still discoloration and swelling of the ankle. It seems to be established that, if the foot

could have been fixed in the natural position without severe pain while the patient was in the hospital, it would have been the correct and proper course of treatment for a fracture.

Counsel for defendant admits that the evidence disclosed that the treatment given was the proper treatment for a sprain, but not for the injury received, and asserts that the testimony with respect to what would have been proper treatment for a fracture was improperly admitted, since it was impossible to determine the real nature of the injury for weeks after it occurred. His brief "admits that, in order to absolve Dr. Pinto from all liability and from all negligence, it is necessary for us to go one step further and to consider the case in its development, not only from the point of view of the treatment actually accorded, but from the point of view of any symptoms that arose during the treatment that should have required Dr. Pinto to subsequently doubt the correctness of his original diagnosis." He insists in this connection that, if negligence did exist in this phase of the case, it was negligence for which a different rule of damages should have been laid down by the trial court, and he further complains of the manner in which the case was submitted to the jury, mainly for the reason that the charge included the element of negligence in the diagnosis, which there was no evidence to sustain. We are convinced that, if defendant was guilty of any negligence at all, it was in failing to change his manner of treatment after he had reason to believe that a fracture had occurred, and that the other question should not have been submitted.

The petition, after pleading negligent diagnosis, in substance alleges that defendant wrongfully advised plaintiff that his injuries were being properly treated and he would soon recover the use of his foot and ankle, and that, relying thereon, plaintiff was induced to allow defendant to continue to treat the injuries until about June 22, 1912, when plaintiff was discharged from further treatment, and that, if defendant had properly diagnosed the injury and

had properly treated the same, he would have wholly recovered in two or three months and would have had the unimpaired use of his limb. It is with some hesitancy that we have come to the conclusion that under these allegations proof of negligent and unskilful treatment, after Dr. Pinto had reason to believe a fracture had occurred, may be made. There is sufficient evidence on this point to go to the jury. We believe that the defendant's substantial rights were injuriously affected by the submission to the jury of the question as to negligence in the original examination and diagnosis. The judgment of the district court is

REVERSED.

SEDGWICK and HAMER, JJ., not sitting.

ELLA HUXOLL, ADMINISTRATRIX, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 23, 1915. No. 18377.

1. **Appeal:** HARMLESS ERROR. Under section 7713, Rev. St. 1913, an error which does not affect the substantial rights of a party will not justify a reversal of a judgment.

2 **Master and Servant:** INJURY TO SERVANT: DEFENSES. Under the federal employers' liability act contributory negligence is not a complete defense in any case, and assumption of risk is only eliminated as a defense in cases where the "violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 4 U. S. Comp. St. 1913, sec. 8659, p. 3914.

3. ———: ———: ASSUMPTION OF RISK. An employee assumes the ordinary risks of his employment, but he does not assume the extraordinary risks caused by direct acts of negligence of his employer.

4. ———: ———: NEGLIGENCE. *Glantz v. Chicago, B. & Q. R. Co.*, 90 Neb. 606, followed.

5. ———: ———: ———: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. Plaintiff's intestate was a locomotive engineer in the service of the defendant. He was directed to take an engine stationed

in the yard of defendant at Sidney and proceed to another point on the line for the purpose of bringing in a train used in interstate commerce. A strong north wind was blowing, the thermometer was 10 to 15 degrees below zero, snow was on the ground and was drifting, and clouds of smoke and steam from the roundhouse and from engines made it almost impossible to see ahead. As deceased was approaching his engine, he went between the rails of the main-line track. A high-tank road engine engaged in switching in the yards, moving backwards, without lookout, warning or signal, at a rate variously estimated at from three to eight miles an hour, at a point where the smoke and steam were so dense that objects one or two feet away could not be seen,, struck and killed the deceased. *Held*, that a finding that the defendant was guilty of actionable negligence is sustained by the evidence, and that the question whether the deceased was guilty of contributory negligence was for the jury.

6. ———: ———: ASSUMPTION OF RISK. A locomotive engineer in walking to his engine in the switching yards of a division station through a cloud of smoke and steam does not assume the risk that his employer will negligently propel an engine backwards through the yards and through dense clouds of smoke and steam without warning of some character either by bell, whistle, light, or lookout.

7. **Instructions** given and refused, examined, and *held*, that no prejudicial error was committed by the court with respect thereto.

8. **Appeal**: SPECIAL INTERROGATORIES: DISCRETION OF COURT. It is within the discretion of the court to submit special interrogatories to the jury when requested, and, unless an abuse of such discretion is shown, such a refusal will not be held to be erroneous.

9. **Instructions** given to the jury will be considered together, and, if the charge taken as a whole properly and fairly submits the issues in the case, a mere technical inaccuracy in one or more will not justify a reversal of the judgment for that reason alone.

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

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

Stout, Rose & Wells, Hoagland & Hoagland and *Wilmer B. Comstock, contra.*

LETTON, J.

This is an action to recover damages on account of the death of Fred J. Huxoll, the husband of the plaintiff, by

reason of certain alleged acts of negligence on the part of the Union Pacific Railroad Company. Plaintiff, as administrator, recovered judgment for $20,000 for the benefit of herself and children. Defendant appeals.

Huxoll left surviving him his widow and two minor children. At the time of his death he lived at North Platte, and was a locomotive engineer in the service of the defendant, running between North Platte and Sidney. On the morning of January 1, 1911, Huxoll, while at Sidney, was called and ordered to take engine No. 1909, to leave at 11:10 A. M., with another engine and run to Perdue to bring in a freight train. The engine was headed westward and was to run backward to Perdue. At the time of the accident he was proceeding to his engine in response to the call. The train he was to move was being used in interstate commerce. The train order gave these engines a clear track and right of way over all trains on the main line. Sidney is a division station, and defendant maintains there a roundhouse, turntable, water-crane, wash-house and switching yards. Near the water-crane there is what is known as a "spot track" on which engines are stationed after being coaled, watered and made ready to be taken out. The water-crane and "spot track" are some distance south and east of the wash-house. In order to reach the engine it was necessary for Huxoll to cross one or more tracks and to proceed some distance eastward, passing the turntable, with the main-line track to the north. On this morning engines 1913 and 1909 were upon the "spot track," 1913 standing at the water-crane and 1909, Huxoll's engine, farther east. The weather was extremely cold, 10 to 15 degrees below zero, and a strong north or northwest wind was blowing. The roundhouse is situated to the south of a bluff, the elevation of which is from 100 to 200 feet in height. It was snowing, and the ground and tracks were covered with snow about two inches deep when undisturbed by the wind. Clouds of smoke from the roundhouse, steam from the engines and snow from the storm were blowing across the yards, and

in places it was almost impossible to see more than a foot or two. The water-crane stood upon a small platform about 12 feet long from east to west. There was a pit and drain connecting with a sewer in order to carry off the overflow, but, on account of the intense cold, there was more or less ice around and about the platform. Plaintiff's theory of the case, which is supported to some extent by testimony, is that as Huxoll, in going to his engine, approached the crane and platform, in order to avoid walking upon the ice, he stepped around it upon the main-line track. There was a cloud of fog, steam and smoke at that point. Almost instantly he was struck by an engine running backwards to the west, which gave no signals of its approach, and which was running about eight or ten miles an hour. The whistle was not sounded, and the bell was not rung, the machinery to ring the bell automatically was out of order, and the power brake upon this engine was defective. Huxoll was knocked down, was dragged by the ash pan and brake beams a distance of about 75 feet, and the leading end of the engine moved about 150 feet before it was stopped. He was then extricated, but died soon afterwards.

The specific allegations of negligence in the petition, much abridged, are: Negligence of defendant in maintaining the roundhouse in close proximity to the main-line track and to the water-crane and engine tracks, so that the smoke and steam therefrom enveloped and obscured its engines, and obstructed the view of engine and train movements upon the tracks; negligence in permitting an accumulation of ice about the crane, in permitting the crane to become out of order so as to permit the escape of water on the ground, where it froze and rendered the way slippery and dangerous, making it necessary for Huxoll's safety that he make a slight detour in his course and go upon the main-line track; negligence and carelessness in using in switching an ordinary locomotive with high tank, instead of a switch engine with a sloping tank, so as to allow a free and unobstructed view of the track

in either direction, and in failing to station a man on the front end of the engine for the purpose of warning persons upon the track, and it is alleged that "in general and common practice a brakeman or other servant is so stationed for that purpose;" negligence in not providing a foot-board, and in running the engine at a high and dangerous rate of speed, "and not under control." It is also charged by amendment that the power brake on the engine was broken and defective, that the bell was defective and out of repair, and that no warning signals of any kind were given.

The answer, in substance, is a general denial, with a plea of assumption of risk and contributory negligence. An amendment was filed pleading that the acts of negligence set out in the amendment to the petition were not alleged in the original petition and were not charged within two years after such acts are alleged to have occurred.

Defendant assigns 56 errors as ground for the reversal of the judgment. We cannot consider them in detail. Some are complaints of mere technical irregularities of a nature which may and usually do occur in the trial of almost every case where so much testimony was taken. We have passed the day when an error which does not injuriously affect the substantial rights of a party will entitle him to a reversal of the judgment, and it serves no useful purpose for parties to complain of, or for courts to consider and discuss, mere lapses from strict and formal methods of procedure. This applies with most force, perhaps, to assignments of error in rulings upon the admission of evidence. Unless prejudice appears to have resulted from an erroneous ruling of this nature, a judgment will not be reversed upon that ground.

Many assignments of error are made as to the giving and refusal of instructions. The court gave 29 instructions on his own motion. The defendant requested 47. In its charge the court practically eliminated a number of the grounds of negligence charged in the petition. The

only questions left were whether the defendant was guilty of negligence in failing to have a lookout on the leading end of the switch engine; in moving it at an excessive rate of speed under the circumstances and in failing to keep it under control; whether the track was obscured by smoke and steam; whether the death of Huxoll resulted in whole or in part from its negligence; whether the power brake of engine No. 213 was in working order at the time of the accident; and, if not in working order, whether such condition contributed to his death.

The complaint is made that the court should have told the jury that Huxoll was guilty of contributory negligence, as a matter of law, and that each of the instructions tendered by defendant should have been given. The instructions tendered by defendant endeavored to separate into distinct elements each charge of negligence made by plaintiff, and requested a specific direction that each of these charges would not warrant a verdict for the plaintiff. Some of these instructions are so clearly erroneous that they are not worthy of consideration and should never have been requested. Such requests entail needless labor upon trial and reviewing courts. An illustration is No. 2, which asked the court to instruct that Huxoll was not engaged in interstate commerce at the time he received the injuries. The substance of some and the identical language of a number of others were adopted by the court and incorporated as a part of its own instructions.

The gist of the requested instructions is contained in defendant's No. 1, that the jury be directed to find for the defendant. The testimony is so conflicting, not only for the reason that the witnesses differ, but because some of the witnesses for each party told materially different stories at different times, that it is almost impossible for a reviewing court, which cannot see the witnesses, to determine what the true facts are. The verdict of the jury must be taken as settling their credibility.

We will endeavor to notice the assignments in the order followed in defendant's brief, but cannot within the proper limits of an opinion discuss them at length. It is contended that the court should not have submitted to the jury any issue as to the condition of the brakes on engine No. 213. There is a sharp conflict in the testimony with respect to the condition of these brakes. Zimmer, the engineer, testified that about 8 o'clock of that morning he noticed that the air was not working properly, and he found upon investigation that the brake pistons were not working on account of ice that was frozen upon them, coming from a washout plug above them; that he then procured and set fire to some waste and oil and applied it to the brake cylinders until the brakes worked, and he had no more trouble with them. The testimony of other engineers, having experience with air brakes, but who do not testify with respect to this particular engine, is [illegible] in very severe, cold weather the air appliances sometimes freeze and require to be thawed out. Matthews, the fireman, testified the air was not working, and the brakes could not be used at the time of the accident. The other men working with the engine testify that the brakes were in perfect working order at that time. If material, there was sufficient conflict in the evidence to take the matter to the jury.

We are unable to see wherein the condition of the brakes had anything to do with the accident, unless an inference may be drawn from the testimony that, if the brakes had been working properly, the engine, after knocking Huxoll down, would not have injured him fatally; that, when the switchman on the engine called to the engineer, an immediate stop could have been made, and Huxoll would not have been entangled in the brake. If the engine was only moving at the rate of three or four miles an hour, as these men say, the evidence shows that if the brakes had been set at once the engine would have made a quick stop and would not have dragged Huxoll for 60 or 70 feet. Riggs called to the engineer as soon as he felt the jolt occasioned

by the trucks running over Huxoll. The accident would have happened if the brakes had been working, since they were not applied, or attempted to be applied, until after Huxoll had been knocked down and run over. It seems a fair inference that Huxoll was fatally injured when run over by the trucks, although he was conscious after being extricated; but the evidence is not entirely clear, and we think there is sufficient doubt to render this a question for the jury. Defendant argues that, if deceased was injured by a defective brake, the defense of assumption of risk and contributory negligence are by the federal statute eliminated, and that it therefore was prejudicially erroneous to allow this issue to go to the jury. It is true that the statute thus provides, but we think that under the facts in this case the defendant is not in a position to complain that its substantial rights were adversely affected by the submission of these issues. We cannot give this matter the importance attached to it by defendant. Independent of the provisions of the federal law, we take the view that, though Huxoll assumed the ordinary risks of his employment, he did not assume such an extraordinary risk as that his employer would carelessly and negligently, while he was enveloped in a dense cloud of smoke and steam and was engaged in proceeding to his engine in the course of his duties, without warning or signal of any kind, run an engine through the fog and darkness upon him at such a rate of speed that it was impossible for him to know that it was coming until he was struck. Under the undisputed facts, the applicability of the safety appliance law is of no importance.

It may be as well at this point to say that there is practically no conflict in the evidence with respect to the condition of the weather, and the density of the clouds of smoke and steam that were flying; men who were working from 17 to 25 feet away from the switch engine as it passed the water-crane neither heard nor saw the engine until after the accident. There is conflict as to the ex-

tent of ice on or about the water-crane and platform, and a positive and direct conflict as to whether the bell was sounded on the switch engine, whether the bell ringing apparatus was in working order, as to the rate of speed that the engine was moving, and as to whether it was a custom or usual practice in the Sidney yards for a man to be stationed upon the foot-board at the forward end of the switch engine in order to warn persons on the tracks. It is shown by the testimony of defendant's employees that, in conditions such as were prevalent that morning where the vision was blinded by storm or fog, proper care in the movement of trains in the yards required greater precautions than when the vision is clear.

It is argued that the court erred in refusing instructions telling the jury that there was no evidence that defendant was negligent in the location of its roundhouse or in permitting clouds of smoke and steam to escape therefrom, and in giving instruction No. 15, which is as follows: "The distance from the main-line track at which the roundhouses of the defendant were located, the elevation of the ground beyond the roundhouses, the tendency of smoke from the roundhouses to collect about the tracks, and the presence of ice, to some extent, at least, in the vicinity of the water-crane, together with the conditions of the weather, as shown by the evidence, are proper subjects of consideration in determining whether the acts of the defendant's servants, on the one hand, and of the deceased, on the other, were such as persons of ordinary care and prudence would have done at the time and under the conditions surrounding the casualty in question; but the incidents just referred to are not, in and of themselves, causes or grounds of negligence upon which a recovery in favor of plaintiff can be had." There was no error in this. It would have done no harm to give the requested instructions withdrawing these grounds, but this was practically done by the foregoing instruction, and it was certainly proper to allow the jury to consider all the surrounding circumstances in determining whether the de-

fendant's servants were negligent and whether the deceased acted with proper care.

Assignments 5, 6 and 7 are with respect to the refusal to charge that the water-crane was not out of repair, and that there was no evidence that ice had negligently been permitted to accumulate around and about it. The charge that there was no proof that the water-crane was out of repair might properly have been given, but the jury could not have been misled by the failure to give it. As to the evidence of ice about the water-crane, Dupont, the fireman on Huxoll's engine, testified that Huxoll and he went southwest from the wash-house to a point between the turntable and the main line, and then went east, he walking north of the main line and Huxoll about 10 feet behind him between the rails; that when about 30 feet west of the crane he heard a noise like an engine, either east or west of them, and called to Huxoll; that his grip was struck by an engine and knocked out of his hand, and he turned and at that instant saw Huxoll knocked down. In a previous statement he had said that Huxoll was struck about 10 or 12 feet west of the water-crane. The yardmaster testified that there was more or less ice all about the platform and the track at the crane, and that about 15 feet west of the crane he found marks in the snow in the middle of the track that indicated Huxoll had been knocked down at that point. This is only about two steps from the west end of the platform. If the jury disbelieved Dupont's later testimony, and there was ice frozen on and about the platform, Huxoll, if walking parallel with the main track, may have stepped between the tracks to avoid the ice, or he may have lost his way in the dense cloud of smoke and steam. Plaintiff argues that Huxoll's body may have been driven backward when he was struck, so that he fell further to the west than where he was walking when struck. Whether this is a proper inference was a matter for the jury. We think that all the facts as to the conditions surrounding the

water-crane and platform were proper to be submitted, and no prejudicial error was committed in relation to this issue.

The next complaint argued is as to the instructions given and refused with respect to whether there was a rule or custom requiring switchmen to ride on the leading end of the switch engines in the Sidney yard. There is a conflict of evidence upon this, and the evidence to establish such custom is not strong. It may be noticed that a number of the questions asked by counsel for the defendant upon this point contain a negative pregnant. For example, in the examination of the foreman in charge of the roundhouse, defendant asked: "Do you know whether or not there was, or was not, a custom or practice, in that yard, on January 1, 1911, or prior to that time, of having any switchman riding on the leading end of the engine through the yards, for the purpose of warning or giving warning to the engineer of obstruction upon the track, or flagging the engine through steam or smoke? A. No, sir; there was no practice that I knew of, or observed." A similar question was asked Mr. Borton, the yardmaster: "Q. What was the practice or custom with reference to having a flagman or a switchman on the front end of an engine in switching in the yards, on the leading end of the engine, in order to flag the engine through steam or smoke or storm? A. We never put a man there for that purpose; it wasn't necessary." The questions do not ask whether a custom of placing men upon the leading end of engines while moving in the yards existed, but whether it was the custom to put them there to warn the engineer or to flag the engine. The court is committed to the doctrine of the *Glantz* case (*Glantz v. Chicago, B. & Q. R. Co.*, 90 Neb. 606) that to run a high-tank road engine backwards through railroad yards without a lookout, when to have one is the usual custom in such yards, is a negligent act. This is a humane doctrine, and we adhere to it. It may be true, as defendant asserts, that the cloud was so dense that a lookout could not have warned Huxoll

until too late, but the surrounding conditions were in evidence, and the matter was for the jury.

The court in this connection gave the following instruction: "25. The fact that road engine No. 213 was used by defendant for switching purposes at the time of the accident is not in and of itself negligence, and a recovery in plaintiff's favor cannot be based upon the fact that such engine was so used. It is proper, however, to take into consideration the type, form and equipment of said road engine, and any variance in its equipment from the class and type of engine usually employed in the switching service in determining whether the acts of defendant's servants, on the one hand, and of the deceased, on the other, were such as persons of ordinary character and prudence would have done at the time and under the conditions surrounding the casualty in question." This is as far as the court should have gone in withdrawing this issue from the jury.

Defendant contends there is no duty on the part of a railroad company to warn employees in its yards of moving engines, and cites the case of *Anderson v. Missouri P. R. Co.*, 95 Neb. 358, as establishing such a principle. No such weather conditions obtained in that case, and the rule announced cannot apply here.

Complaint is made that many of defendant's rules relating to the general operation of engines and not confined to their operation in switchyards were erroneously admitted in evidence. This is true as to several of the rules read to the jury, and, if we were satisfied the jury had been misled by any of this evidence, we would without hesitation reverse the judgment. But we are not so convinced. One of the rules complained of requires yard engines to display a headlight to the front and rear, by night, and another rule provides that, "when weather or other conditions obscure day signals, night signals must be used in addition." These rules were relevant, and it was for the jury to determine whether they were violated. Defendant was by no means free from the erroneous prac-

tice of offering immaterial rules. Other testimony was improperly admitted, but we are unable to see how its admission could have changed the result.

It is complained that the court erred in refusing to submit a special interrogatory as to the amount which the jury deducted for contributory negligence. The amount of the verdict indicates that the jury found no contributory negligence existed. The submission was a matter for the discretion of the trial court, and no abuse of discretion has been shown.

We are convinced that the facts in the case warrant the conclusion reached by the jury. The peculiar conditions demanded special care. Granting that the brakes were not out of repair, that there was no ice around the water-crane that required Huxoll to step between the tracks to avoid it, and that it was not customary to have a lookout on the leading end of the engine under ordinary conditions, still the reckless manner in which the engine was sent into the fog and cloud in the yard, without warning, as the jury evidently believed and found from the evidence, constituted such carelessness as to justify a verdict, and the question whether, under all the conditions, Huxoll was guilty of contributory negligence in being between the rails when struck was also one for the jury to determine.

The questions of law governing this case are few and simple, though the record is long and the briefs are elaborate. We find no error prejudicial to the substantial rights of the defendant, and the judgment of the district court is therefore

AFFIRMED.

ROSE and HAMER, JJ., not sitting.

OSCAR C. ENG, APPELLANT, V. GEORGINE C. OLSEN, APPELLEE.

FILED DECEMBER 23, 1915. No. 18515.

1. **Easements:** WAY OF NECESSITY: IMPLICATION. A way of necessity over the land of a grantor is not generally implied in favor of a grantee who has a convenient outlet across his own land which adjoins that conveyed.
2. **Homestead:** CONVEYANCE: EXECUTION. A 99-year lease purporting to grant a right of way for a road across the homestead of a married person is void unless executed and acknowledged by both husband and wife. Rev. St. 1913, sec. 3079.

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

H. Halderson, for appellant.

William V. Allen and *William L. Dowling, contra.*

ROSE, J.

This is a suit to enjoin the obstruction of a roadway 33 feet wide and 227 feet long, extending west from lands owned by plaintiff to a highway running north and south. The strip of land in dispute is the north half of part of an abandoned highway along the section line running east and west between the counties of Madison and Platte, near Newman Grove. When the parties were adjoining proprietors, with the section line north of plaintiff and south of defendant, the latter sold and deeded to the former for $250, May 24, 1902, a small triangular tract with its southwest corner at the southeast corner of the roadway in controversy. The western boundary of the conveyed land, a line running north and south, is other land of defendant, and the northern and eastern boundary is a railroad right of way running northwest and southeast; the southern boundary being land of plaintiff. In the petition it is averred, in substance, that the tract sold

was inaccessible and landlocked; that it was deeded to plaintiff by defendant and her husband; that simultaneously with, and as a part of, the same transaction, defendant, pursuant to agreement, signed and acknowledged a writing, granting to plaintiff the right to use for roadway purposes for 99 years the 33-foot strip described; that she afterward obstructed the road. The granting of an injunction was resisted on the grounds that plaintiff, by means of his own land, had convenient access to the tract purchased by him, and that the 99-year lease was void because the land described therein was part of the homestead of plaintiff and her husband, and was not signed and acknowledged by the latter. The trial court dismissed the suit, and plaintiff has appealed.

Plaintiff claims a way of necessity, and argues that an injunction to protect it should have been granted. On this issue the trial court properly found for defendant. A way of necessity is not implied from the existing conditions, from the transactions of the parties, or from the instruments executed. Plaintiff, by using his half of the abandoned highway for a distance of 260 feet, may have convenient access to the tract purchased and an outlet to a public highway. In the deed a piece of land was described without reference to the means of access. The parties thereto did not understand that its terms implied a way of necessity over other land of defendant. A separate lease for a roadway was deemed necessary. The lease itself did not imply such a right, because it contained the specific grant of an easement. Since plaintiff has an outlet over his own land to a public highway, a way of necessity across the land of defendant does not exist. 9 R. C. L., p. 768; *Doten v. Bartlett,* 107 Me. 351, 32 L. R. A. n. s. 1075.

The principal question presented by the appeal may be stated thus: Is an instrument granting for a term of 99 years a right of way for a road across the homestead of a married person void unless executed and acknowledged by both husband and wife? The answer must be found in

the terms of the statute providing: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Rev. St. 1913, sec. 3079.

Plaintiff argues that the granting of the easement does not interfere with the substantial enjoyment of the homestead or conflict with the terms of the statute. On this proposition the courts differ. The doctrine invoked by plaintiff was announced by the supreme court of Iowa and followed in Texas. *Chicago & S. W. R. Co. v. Swinney,* 38 Ia. 182; *Maxwell v. McCall,* 145 Ia. 687; *Randall v. Texas C. R. Co.,* 63 Tex. 586; *Chicago, T. & M. C. R. Co. v. Titterington,* 84 Tex. 218. In applying similar statutes, however, the Iowa ruling adopted in Texas has been rejected by the courts of other states. The weight of authority and the better reasoning support the rule that the granting of a right of way for a road across the homestead of a married person is void unless executed and acknowledged by both husband and wife. *Delisha v. Minneapolis, St. P., R. & D. E. T. Co.,* 110 Minn. 518, 27 L. R. A. n. s. 963, and note; *Lindell v. Peters,* 129 Minn. 288; *Kelly v. Mosby,* 34 Okla. 218.

In *Pilcher v. Atchison, T. & S. F. R. Co.,* 38 Kan. 516, it is said: "The case of *Chicago & S. W. R. Co. v. Swinney,* 38 Ia. 182, has been examined with some care. It holds that 'the husband can convey a right of way over the homestead without the concurrence and signature of the wife to the deed, when such conveyance will not defeat the substantial enjoyment of the homestead as such.' The qualifying expression involves trouble. Who is to determine whether or not the right of way will not defeat the substantial enjoyment of the property? The court says, if the homestead were a single lot, and the right of way occupied it all, or most of it, the case would be very different. Why different? The rule of the Iowa case is too flexible. We cannot adopt it. In this state all questions affecting the rights of the wife and children in the

homestead must be discussed and determined by the constitutional and statutory enactments regarding them. These create them, fix their limits, direct their operation, and have such mandatory force of expression that this court can discharge its duty respecting them only by a strict adherence to the letter of the organic command. The homestead law is a part and parcel of the public policy of the state, and its provisions in cases of this character cannot be waived or avoided, except by an exact and literal compliance with the mode and manner it has prescribed."

Upon the same subject the supreme court of Mississippi said: "Our statute, however, requires the signature of the wife of the owner to validate a conveyance of the homestead or an incumbrance upon it. A right of way for a railroad company is, from its essential nature, an interest in land, and, to the extent of the land taken, is a direct diminution of the homestead. The statute which inhibits the conveyance of the entire homestead by the owner inhibits the conveyance of any part of it, for the whole includes all its parts, otherwise the statute would be rendered ineffective by construction." *Gulf & S. I. R. Co. v. Singleterry,* 78 Miss. 772.

The statute, without exception, applies to instruments conveying or incumbering the homestead. The trend of judicial construction in Nebraska is to avoid an interpretation which would facilitate the impairment of the homestead estate without compliance with statutory formalities. For the reasons stated, the lease does not create rights which can be protected by injunction. This conclusion is a necessary result of enforcing the homestead law.

AFFIRMED.

LETTON, J., not sitting.

IRA L. PHILLIPS V. STATE OF NEBRASKA.

FILED DECEMBER 23, 1915. No. 19048.

Criminal Law: APPEAL: PREJUDICIAL ERROR. In a prosecution for arson, the erroneous admission of prejudicial proof tending to show that accused, at another time and place, committed a crime similar to that with which he is charged is ground for reversing his conviction.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

B. F. Gilman, Allen G. Fisher and *William P. Rooney,* for plaintiff in error.

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

ROSE, J.

In an information filed in the district court for Dawes county, Ora E. Phillips and Ira L. Phillips were charged with arson. They were accused of setting fire to a storehouse owned by George H. Young in the town of Marsland with intent to burn and destroy it. On a separate trial Ira L. Phillips, defendant, was found guilty and sentenced to serve a term of not less than one nor more than seven years in the penitentiary. As plaintiff in error he presents for review the record of his conviction.

The information is challenged for duplicity and for failure to charge that defendant was a tenant of the owner of the storehouse. According to a former ruling the information properly charged a single offense. *State v. Martin,* 87 Neb. 529.

A reversal of the conviction is sought on the ground that the trial court erred to the prejudice of defendant in admitting in evidence testimony implying that he had previously been implicated in another felony of the same nature as the one charged in the information. The fire which defendant was convicted of starting was observed

about 8:15 in the evening, September 24, 1914, and the state adduced proof tending to show: It started in the basement of a building in which defendant and his brother, Ora E. Phillips, conducted a general store. The storehouse was owned by George H. Young, from whom it had been leased for mercantile purposes. Defendant's brother was the holder of the lease. The stock of goods was insured in the name of the brother for $750, a fair valuation. He had made application for additional insurance, but had not procured it. The fire was promptly discovered, was confined to the basement, and was soon extinguished; little damage being done. In addition to evidence of the facts narrated, there was proof of circumstances tending, by inference, to implicate defendant in the starting of the fire, though there was no direct evidence of his guilt.

The testimony challenged as erroneous and prejudicial relates to a previous fire which destroyed a storehouse containing a stock of merchandise in the same town. As part of its case in chief, the state, over the objections of defendant, was permitted to adduce proof tending to show that the previous fire occurred July 8, 1914; that the Farmers Co-operative Company had conducted a general store in the consumed building; that Ora E. Phillips was secretary and manager of the Farmers Co-operative Company; that defendant was a clerk in the store; that the merchandise was insured; that the stock was a total loss, with the exception of some unconsumed goods invoiced at $1,055; that defendant's brother was indebted to the Farmers Co-operative Company, and that the indebtedness of the latter was far beyond what he represented it to be in his report to the directors; that the Farmers Co-operative Company was known by him to have been insolvent at the time its property was destroyed by the fire, but its insolvency was then unknown to its stockholders and directors.

A large part of the state's evidence related to the fire of July 8, 1914, to defendant's connection with the stock

of merchandise then destroyed, and to the motives for its destruction. The plain inference from the testimony of this character, much of which is immaterial, is that defendant and his brother started the fire in the co-operative store. This was not competent evidence tending to show that defendant set fire to Young's storehouse. The jury were not directed to confine their consideration of such proof to the question of motive or intent or to defendant's interest in the store conducted in the building fired September 24, 1914. On the contrary, the charge as a whole amounted to a direction to consider the inadmissible testimony as circumstantial evidence of defendant's guilt; there being no direct evidence thereof. It follows that the rulings challenged were both erroneous and prejudicial. They cannot be justified under any exception to the rule excluding proof that accused, at another time and place, committed a crime similar to that with which he is charged. *Cowan v. State,* 22 Neb. 519; *Berghoff v. State,* 25 Neb. 213; *Morgan v. State,* 56 Neb. 696.

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

REVERSED.

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

MARGARET M. WILCOX, APPELLEE, V. BADGER MOTOR CAR COMPANY, APPELLANT.

FILED DECEMBER 23, 1915. No. 18336.

Contracts: CONSTRUCTION: DIVISIBLE CONTRACT. The contract and bill of sale set out in the opinion, examined, construed together, and *held*, to constitute a divisible contract.

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

John W. Parish and *Amos E. Henely,* for appellant.

Rosewater & Cotner and *Charles H. Marley, contra.*

FAWCETT, J.

On April 3, 1911, H. E. Wilcox, of Omaha, husband of plaintiff, entered into a written contract with the defendant for the purchase of two separate lots of automobiles, of four and three cars, respectively, and for the appointment of himself as agent for defendant in the sale of its cars. The four cars were described in the contract as "lot one" and the other three as "lot two." The contract provided that he was to pay for the four cars by conveying to defendant 200 acres of land in Custer county, and was to pay for the other three cars cash on delivery, or rather, cash before delivery. Upon delivery of the deed and an abstract showing good title to the Custer county land, defendant was to execute to Wilcox a bill of sale for the four cars in lot one. About 19 days later Wilcox advised defendant that the land belonged to plaintiff (his wife), and directed that the bill of sale to the four cars in lot one be made to her, and on April 26, 1911, the defendant did as directed. One of the cars in lot one was delivered by defendant. Two of the cars in lot one were shipped to H. E. Wilcox, together with one car of lot two. Wilcox paid for the one car in lot two, and the three cars were delivered, Wilcox receiving one and plaintiff two. Later defendant shipped to Wilcox the remaining one car of lot one and the remaining two cars of lot two. Wilcox failed to pay for the two cars of lot two and they were not delivered to him, nor was the one car of lot one delivered to plaintiff. Thereupon plaintiff instituted this action and attached all three of the cars for the purpose of enabling her to recover her damages by reason of defendant's failure to deliver the fourth car of lot one. Defendant gave the necessary bond provided by our statute, and all three of the cars were returned to it at its factory in Columbus, Wisconsin. Defendant filed an answer in the action, in which it claimed that the contract for the seven

cars was an entire contract, and counterclaimed for damages by reason of the failure of Wilcox to pay for and receive the two cars of lot two. The trial court held that the contract was divisible and refused to submit defendant's counterclaim to the jury, but submitted only the question of the value of the car of lot one which was not delivered to plaintiff. The jury returned a verdict in favor of plaintiff for $1,589.92. When considering the motion for a new trial, filed by defendant, the trial court stated that unless plaintiff filed "a remittitur on this verdict, so as to reduce it down to the sum of $1,164.50," a new trial would be granted. Thereupon, in open court, plaintiff consented to such remittitur, and judgment was entered for the reduced amount. From this judgment defendant appeals.

It is conceded by the parties that the principal question to be determined in this suit is whether or not the contract of April 3, 1911, is a contract entire or a divisible contract. The determination of this question requires a consideration of the contract of April 3 and the bill of sale of April 26. The latter having been given in compliance with requirements in the former, the two must be construed together in order to determine the rights of the parties.

The contract of April 3 appears to have been carefully drawn. The provisions relating to the sale of the four cars in lot one and the three cars in lot two are separate and distinct and contained in separate paragraphs. It first provides: "That the party of the first part has this day sold, and does hereby sell, to the second party 4 Badger automobiles, being 2 cars of type D, 1 car of type B, and 1 car of type C, all equipped as specified in the first party's catalogue of 1911, and in payment for said cars, the second party has agreed to convey to the first party, as soon as the title papers can be perfected, 200 acres of land in Custer county, Nebraska." Here follows the description of the land. It further provides that the lands will be conveyed by warranty deed, free from all in-

cumbrances except a mortgage for $1,300, and interest on the same from the first of the month in which the contract was made; that an abstract is to be furnished, etc.; and that as soon as the deed and abstract are delivered to the first party it will ship one of the cars; and that the four automobiles covered by this sale shall be designated as "lot one." Here we find a separate and distinct sale by defendant to H. E. Wilcox of four cars designated as lot one, in consideration of the conveyance to defendant of 200 acres of land in Custer county, subject to a mortgage for $1,300.

The next paragraph provides: "It is further agreed that the first party has sold to the second party, and the second party has purchased, and does hereby purchase, from the party of the first part, in addition to lot one, 3 Badger automobiles, to be known and designated as lot two, to be delivered f. o. b. cars at Columbus, Wisconsin, within a reasonable time after being ordered, and on or before September 1, 1911, and that the second party shall pay for the automobiles in lot two the sum of $1,500 less a 25 per cent. discount per car for type D, and $1,250, less a discount of 20 per cent. for types B and C." It then provides for an additional discount for all cars which the party of the second part might sell in excess of five cars. Here we have a separate and distinct contract for the sale of three cars under a separate and distinct designation as lot two. It further provides: "It is further mutually agreed, that the second party shall have the option, as to lot two, of designating the number of automobiles he wishes of the three types above named." No such option is anywhere given in the contract as to the types of the cars to be delivered under lot one.

Then come two separate paragraphs of the contract which clearly show: First, how these cars were to be paid for; and, second, how they were to be delivered. The two paragraphs are as follows:

"It is further mutually agreed that all cars, except those in lot one, purchased under this contract, shall be paid

for before the second party shall be entitled to the possession thereof, and that they shall be shipped with a sight draft attached to the bill of lading.

"It is further mutually agreed that the first shipment shall be one car, as above specified (referring to the one car of lot one which was to be shipped as soon as such deed and abstract are executed and delivered to the first party); that the second shipment shall be two cars of lot one and one car of lot two; that the third shipment shall be one car of lot one and two cars of lot two; that shipments may be ordered by letter or telegram."

The exception in the first of these two paragraphs clearly shows that it was not the intention of the contracting parties that the delivery of the cars in lot one should depend upon the payment for those in lot two, but that all cars "except those in lot one" were to be paid for before the second party should be entitled to the possession thereof. There is no reservation here or anywhere in the contract that delivery of any of the four cars in lot one should depend upon the payment by Wilcox for the cars shipped to him under lot two. The second of the two paragraphs just quoted provides simply for the manner of shipping the last three cars of lot one and the three of lot two. Construing the contract most strongly against the party who prepared it, we construe this paragraph as meaning that the defendant was simply safeguarding itself against a demand for an immediate delivery of all of the cars in lot one, and was reserving to itself the right to ship the last three cars of lot one at the times and in the manner set out in this paragraph of the contract.

The next paragraph of the contract provides: "It is further mutually agreed that the first party shall, upon the delivery to it of the deed and title papers, as hereinbefore provided for said 200 acres of land, execute and deliver to the second party a bill of sale of the four cars, constituting lot one." The next paragraph provides: "That in consideration of the foregoing, and other valu-

able considerations, the party of the first part has agreed to give, and does hereby give, to the party of the second part, the exclusive right, during the term of this contract, to sell Badger automobiles throughout the state of Nebraska; and also the west half of Iowa, except those counties in Iowa now covered by contract for the sale of Badgers."

The bill of sale is in the usual form of such instruments, and provides: "For and in consideration of the conveyance to it of the (land described) at or before the ensealing and delivery of these presents, by Margaret Mitchell Wilcox and Henry E. Wilcox, her husband, of Omaha, Nebraska, the receipt of which deed of conveyance the said Badger Motor Car Company does hereby acknowledge, has granted, bargained, sold, and by these presents does grant, bargain, and sell to said Margaret Mitchell Wilcox four (4) Badger automobiles, being two cars type D, one car type B, and one car type C, the said automobiles being the ones mentioned and described as lot one in a certain written contract entered into between the vendor and said Henry E. Wilcox, bearing date and executed April 3, 1911, which written contract is here referred to and made a part of this bill of sale, and that this bill of sale is made and given upon the express condition and reservation that the terms of said written contract, and especially the conditions thereof as to the time and manner of delivery of said automobiles, shall be complied with and carried out by the vendee, or by said Henry E. Wilcox; and upon the further express condition and reservation that none of said cars, except the first one, shall be delivered until the vendee, or said Henry E. Wilcox, shall have furnished the vendor satisfactory proof that $200 has been paid upon the principal of the note and mortgage given by them January 23, 1911, to Claude S. Sidwell upon the lands above described, which mortgage is recorded in book 83 on page 270 in the registry of deeds of Custer county."

It will be seen from this provision in the bill of sale that the conditions and reservations in the contract of

April 3, subject to which plaintiff took her bill of sale, are described "especially" as those referring to the time and manner of delivery of the automobiles. It contains no reference to any condition in the contract as to payment for the cars in lot two, but provides that none of the cars sold to Mrs. Wilcox in the bill of sale should be delivered until either she or Henry E. Wilcox should furnish the defendant with satisfactory proof that $200 had been paid upon the principal of the note and mortgage on the Custer county land which it had assumed. Construing this instrument, which was also prepared by defendant, under the rule applied to the contract, it cannot be said that Mrs. Wilcox agreed to be bound by any other conditions in the contract of April 3 except the one as to the time and manner of delivery of the cars. We are unable to see how any construction of the contract and bill of sale other than that given by the learned district court could be sustained. Having reached this conclusion upon the concededly controlling question in the case, we deem it unnecessary to consider any of the other matters argued in the briefs.

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

AFFIRMED.

LETTON, J., not sitting.

SEDGWICK, J., dissenting.

The defendant company was engaged in the automobile trade. The object of making the contract was to sell automobiles. They contracted seven automobiles, and were to receive cash for three, and possibly more, if the agency succeeded, and for four they took land. If the land deal was completed they wanted to be sure of the cash sales. The provision in the original contract, that one of the automobiles of lot one for which the land was exchanged should be first shipped, and that thereafter the shipment should be so arranged that the four automobiles for which the land was exchanged should not be delivered before

the other three were delivered and the contract completed as to them, would, if Mr. Wilcox was seeking to enforce the contract, as to the four automobiles of lot one, enable the defendant to secure payment for the three automobiles of lot two before, or upon, the delivery of the other four automobiles. This seems to have been the understanding of the parties to that contract, since there has been no other reason suggested for such a specification in the contract, except the suggestion in the majority opinion, that the agreement in the contract and in the bill of sale requiring the automobiles sold for cash to be delivered and paid for as soon as the others, was for the purpose of "safeguarding" the defendant "against a demand for an immediate delivery of all of the cars in lot one." Of course, it could not have that effect, as it was left to Mr. Wilcox to order all of the automobiles immediately if he chose. It was immaterial to the defendant whether the four automobiles should become the property of this plaintiff or of Mr. Wilcox. To reserve and make plain the right which the stipulation as to the manner of shipment of the automobiles gave them, it was specifically provided in the bill of sale of the four automobiles that "the time and manner of delivery of said automobiles shall be complied with and carried out by the vendee, or by the said Henry E. Wilcox." The two writings together, so far as Mrs. Wilcox was concerned, constituted her contract, as stated in the majority opinion. The fact that it was especially agreed in the bill of sale that the provision that "the time and manner of delivery of said automobiles" must be observed shows what the parties considered to be the force and effect of that provision of the original contract, which provided that the automobiles for which cash should be paid should be delivered and paid for at or before the delivery of the automobiles of lot one for which the land was exchanged. These provisions of the bill of sale are explicit, and by their terms this plaintiff was not entitled to enforce the delivery of the four automobiles for which she exchanged her land, unless Mr. Wilcox also complied

with the remainder of the contract by receiving and paying for the other three automobiles.

MORRISSEY, C. J., concurs in this dissent.

SAMUEL NATHAN V. STATE OF NEBRASKA.

FILED DECEMBER 23, 1915. No. 19335.

1. **Intoxicating Liquors:** UNLAWFUL POSSESSION: COMPLAINT: RIGHT TO FILE. Section 3864, Rev. St. 1913, which provides that it shall be a misdemeanor for any person to keep for the purpose of sale without license any malt, spirituous or vinous liquors in the state of Nebraska, does not restrict the filing of a complaint for a violation of such provision to a credible, resident freeholder of the county where such complaint is filed. That restriction relates solely to the obtaining of a search warrant for the purpose of searching the premises of the accused.
2. **Criminal Law:** COMPLAINANT AND WITNESSES: EVIDENCE OF MOTIVES: GROUND FOR REVERSAL. The fact that one who files a complaint against another, charging him with the commission of a crime, is actuated in the filing of such complaint by some ulterior motive, may be shown for the purpose of affecting his credibility; and the same rule will apply as to witnesses in his employ who are called for the purpose of establishing his complaint; but such fact will not excuse the crime of the person complained against, nor will the admission of such testimony be ground for the reversal of a conviction had thereunder, where the court properly charges the jury as to the weight which should be given to such testimony.
3. **Instructions** examined, and *held* to have fully and fairly submitted the case to the jury.

ERROR to the district court for Washington county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

G. W. Shields & Sons, for plaintiff in error.

Willis E. Reed, Attorney General, Charles S. Roe and *George A. Doll, contra.*

FAWCETT, J.

Defendant was convicted in the district court for Washington county on two counts of an information, the first of which charged the sale of intoxicating liquors on June 7, 1914, without having obtained a license so to do, and the second of which charged that on the 7th day of June, 1914, defendant was keeping for purpose of sale without a license intoxicating liquors, commonly called beer. From this conviction defendant prosecutes error.

The errors assigned are: First, that the county court, in which the information was first filed, never obtained jurisdiction of the subject matter, because it did not appear that the complaining witness was a credible, resident freeholder of Washington county at the time he made and filed the complaint; and, second, that the district court did not therefore acquire jurisdiction. The argument in support of these two assignments is based on section 3864, Rev. St. 1913. The section is a long one and will not be set out in full. It first provides that it shall be unlawful for any person to keep for the purpose of sale without license any malt, spirituous, or vinous liquors in the state of Nebraska, and that any person or persons who shall be found in possession of any such liquors, with the intention of disposing of the same without license, "shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned as provided in section twelve of this chapter." It then makes certain exceptions in favor of physicians or druggists, and of liquor kept for sacramental purposes or by persons having the same in their possession for home consumption. It then provides that if any credible, resident freeholder of any county in the state shall, before any police judge, county judge, or justice of the peace, make a sworn complaint in writing that he has reason to believe and does believe that any intoxicating liquor is owned or kept in the county by any person named or described in the information, with the intention to sell the same without license, the magistrate shall, if he believes there is probable cause therefor, issue his war-

rant for the search of the premises described in the complaint. It then defines how the officer shall proceed if upon a search he finds liquor on the premises, and further provides that, in case the place described in the complaint is the residence of the person named in the complaint or of any other person, then and in that case the warrant to search the premises shall not issue unless the complaint shall state that within 30 days immediately preceding the filing thereof liquor has been sold therein in violation of the act. It will be seen from this statement that the provision requiring a complaint to be made by a credible, resident freeholder has no application to a prosecution for a violation of this section of the statute, but relates solely to the obtaining of a search warrant for the purpose of searching the premises of the accused. The prosecution for the violation proceeds, and on conviction the defendant must be fined or imprisoned in the same manner as prosecutions under section 12 of the act which relates to the sale of the liquors named without a license.

The fifth and sixth assignments urge that the prosecution was instituted solely for the purpose, upon the part of the complaining witness, of extorting money from the defendant, and that such prosecution constituted an unlawful use of the criminal arm of the law. These two assignments are based upon evidence of the fact that the complaining witness had an alleged claim against the defendant which he had been trying to collect, but had been unable to do so, and that this prosecution was either for the purpose of frightening the defendant into settling the claim, or for revenge. While we are fully in accord with counsel for defendant in condemning such a course on the part of any one, we cannot hold that it is a defense to a prosecution of the person complained of, where the evidence shows him to be guilty. The ulterior motive of the complainant may be shown for the purpose of affecting his credibility, and the same rule will apply as to witnesses in his employ who are produced by him for the purpose of establishing his complaint; but this improper

conduct will not excuse the crime of the one complained against, nor will the admission of such testimony be ground for reversal of a conviction had thereunder, where the court properly charges the jury as to the weight which should be given to such testimony. This was clearly done by the trial court in this case.

The third and fourth assignments are that the verdict and judgment are not supported by sufficient evidence and are contrary to law. These assignments rest chiefly upon the fact that the principal testimony was given by the complainant, who was running a detective agency, and by his employees. If no other evidence had been offered, we probably could not disturb the verdict of the jury, who under the law were the judges of the credibility of the witnesses; but the state is not compelled to rely upon the testimony of such witnesses alone. Their testimony is materially corroborated by the witness Kopecky, whose testimony would have been sufficient, standing alone, to sustain the conviction.

We find no error in the record.

AFFIRMED.

LETTON, J., not sitting.

CATHERINE B. MARTINDALE, APPELLANT, V. D. W. GALLADAY ET AL., APPELLEES.

FILED DECEMBER 23, 1915. No. 18249.

1. **Evidence:** PROBATIVE EFFECT. Physical facts that are so palpable as to amount substantially to demonstration may entirely overcome the testimony of several interested witnesses, especially if they are testifying long after the circumstances to which their testimony relates, and the circumstances, and their manner of testifying, are such as to indicate that they are testifying, not from actual knowledge and recollection of the facts, but from a strong belief and desire to establish such facts.

2. **Bills and Notes:** INDORSEMENT: EVIDENCE. In this case the plaintiff purchased the notes in suit in good faith and paid full value, and the evidence furnished by the physical condition of the notes in suit, together with plantiff's evidence and the circumstances proved, overcome the testimony of defendants that the indorsement of transfer of the notes, rendering them negotiable, was not upon the notes when the plaintiff purchased them.

APPEAL from the district court for Boyd county: R. R. DICKSON, JUDGE. *Reversed.*

W. T. Wills and *DeBord, Fradenburg & Van Orsdel,* for appellant.

John A. Davies and *M. F. Harrington, contra.*

SEDGWICK, J.

The plaintiff brought this action in the district court for Boyd county upon three promissory notes. The defendants answered, alleging that the notes were obtained by fraud. The plaintiff replied "that the plaintiff is an innocent purchaser and holder of said notes; that she purchased the said notes of Champlin Brothers, the payees of said notes, on Jan. 13, 1904, and on said date paid full value therefor to said Champlin Brothers, to wit, the full amount of principal and interest accrued to said date upon said notes; that she purchased the same in good faith in the regular course of business before the maturity of said notes, without notice or knowledge of any defense thereto or of any equities between the makers or any of them and the payees of said notes, and without notice or knowledge that any claim was made by any one that any such defense or equities existed." The court submitted to the jury the question of fraud in the notes, and also gave the jury the following instructions:

(4) "If you find that the plaintiff has established, by a preponderance of the evidence, that at the time she purchased, paid for, and received the notes in suit from Champlin Brothers, that the indorsement now appearing on said notes, 'Pay to the order of Catherine B. Martindale without recourse on us, Champlin Brothers,' was upon

each of the notes in suit, you will find for the plaintiff for the sum of $2,390."

(5) "If you find from the evidence that the indorsements now appearing on each of the notes, 'Pay to the order of Catherine B. Martindale without recourse on us, Champlin Brothers', was not upon the notes when the plaintiff purchased, paid for, and received them, the defendants can interpose any defense against said notes they had against Champlin Brothers."

There was a verdict and judgment for the defendants, and the plaintiff has appealed.

The plaintiff contends that the court should have instructed the jury to find for the plaintiff because the evidence establishes that at the time the plaintiff purchased the notes the indorsement stated in instruction No. 4 was entered upon the notes and duly signed by Champlin Brothers. The plaintiff also contends that instruction No. 5 is erroneous because, if the indorsement mentioned therein was placed upon the notes any time before the maturity thereof, the plaintiff was an innocent purchaser; that the notes were fraudulent and subject to defense in the hands of Champlin Brothers, the real payees, is conceded for the purposes of this appeal.

The plaintiff personally had nothing to do with the transaction of the purchase of these notes. Doctor Martindale, her husband, transacted the business for her, and he in turn relied upon their attorney, Mr. Skinner, a practicing lawyer at Clinton, Iowa. The plaintiff took the evidence of herself and her husband and Mr. Skinner by deposition. It did not appear whether the plaintiff herself saw the notes at the time or soon after their purchase. She was not asked whether the indorsement and transfer of the notes signed by Champlin Brothers was on the notes at the time of the purchase, neither was her husband asked that question. Mr. Skinner, who transacted the business for them, testified positively that he wrote the indorsements upon the three several notes respectively, and that they were signed by Champlin Brothers at the time they

were purchased. The notes were executed by each of nine defendants on the 30th day of October, 1903. The notes became due July 1, 1905, 1906, and 1907, respectively. Five of these defendants testified that they saw these notes at the bank in Naper in July, 1905, and that at that time the indorsement of transfer signed by Champlin Brothers was not upon the notes. It is conceded that, if the notes were indorsed when purchased by the plaintiff so as to then be negotiable, the plaintiff is an innocent purchaser, and as such is entitled to recover upon the notes. If the indorsement of transfer was not upon the notes in July, 1905, it cannot be determined from this evidence when it was made, and it might in such case be found that the plaintiff is not an innocent purchaser of the notes.

The question thus presented is of the highest importance and frequently presents difficulties of solution. If our laws do not protect commercial paper negotiated in the regular course of business, our financial transactions will be embarrassed to the great injury of those enterprises which depend upon their credit in the business world. On the other hand, to permit fraudulent practices to succeed by pretended transfers to confederates in fraud is at least equally as injurious to legitimate business. To guard against these evils, the law has provided regulations and means to assist in determining the good faith of the holders of commercial paper which in other business relations might appear quite technical. There were many signers of the notes, and the paper on which they appear is of unusual dimensions both in length and width. As they now appear, they have been folded lengthwise so as to inclose the face of the notes respectively. Payments were made thereon by some of the makers, each apparently acting for himself in making such payment. Three several payments were made on each of the notes, and indorsed as of the date of the execution of the notes. These indorsements are written at full length entirely across the back of each note, as close to the end of the note as conveniently practicable, evidently before the notes had been folded. Then

follows the indorsement of transfer: "Pay to the order of Catherine B. Martindale without recourse on us. Champlin Brothers." This indorsement is written entirely across the notes, as it would naturally have been written if the notes were not folded. The signature of "Champlin Brothers," is immediately below the indorsement, and entirely to the right of the fold in the paper. This indorsement of transfer is written in the same bold hand and occupies a considerable space on each of the notes. Below these indorsements are impressions of rubber stamps which occupy substantially all of the remaining space to the right of the fold in the note. On July 1, 1905, the day the first note became due, five different signers made payments on that note, each payment being $86.51. These payments are indorsed on the left of the fold, and immediately under, and as close as practicable to the indorsement of the transfer, and to each other. Under each of these indorsements an ink line is drawn. Three of these lines extend beyond the indorsements, and somewhat beyond the fold in the note. If this indorsement of transfer was not placed on this note after the indorsements of the payments of July, 1905, as testified by defendants, it was placed thereon at the time of the purchase of the note, as testified by plaintiff's witness. There is no other evidence fixing the time. The evidence that it is in the handwriting of plaintiff's agent who purchased the notes for her is uncontradicted. If it was not upon the note when the indorsements of July, 1905, were made, why was a blank space of two and one-half or three inches left between those indorsements and the prior indorsement of October, 1903, and the later indorsements crowded as closely together as possible to economize room? No explanation is attempted. The evidence that the indorsement of transfer was made before the indorsements of payment which follow it in form upon the notes, which is most discussed in the briefs, is derived from the appearance of the notes themselves. The transfer indorsement is written across the entire back of the notes, and upon each note two words of this in-

dorsement are across the fold in the note. The appearance of these lines over the fold is such that it may be said to be impossible that they were written after the fold had broken the fiber of the paper. The lines drawn between the indorsements of July, 1905, which extend somewhat over the fold, are blurred at the fold, so much so as to furnish strong proof that when those lines were drawn the fiber of the paper had been so broken by the fold as to absorb the ink along the fold of the paper, and that the paper had become much more broken by the fold than it was when the transfer indorsement was made. If the effect of this fold upon these lines was so palpable as to amount to a demonstration of that fact, it would of itself be decisive of this appeal.

"A document or a part of a document is sometimes proved to be fraudulent if it can be conclusively shown that a part of the writing preceded and a part followed the folding of the paper. An ink line crossing a fold has certain definite characteristics, but such a line may not be more than one one-hundredth of an inch in width, and the unaided eye may not be able to see the physical evidence of the fact which under the microscope is so plain that it cannot be denied. A tiny portion of the ink in such case may actually have gone through the paper to the opposite side, and under the microscope this fact is unmistakable." Osborn, Questioned Documents, p. 73.

The appearance of these lines under a magnifying glass, together with the relative location and form of all of the indorsements on the notes, establish that the indorsements of payment of July, 1905, were made after the transfer indorsement, and entirely overcome the evidence of defendants upon that point. The fact being established that the indorsement of transfer was before July, 1905, it must have been at the time of the purchase of the notes. Plaintiff's evidence to that effect is not contradicted, except by the attempt to prove that it was not on the notes in July, 1905.

As before stated, each one of five of these defendants testified that he saw these notes in July, 1905, and that at that time the indorsements of transfer were not upon the notes. In determining the force of this testimony, we may consider the interest of these parties in the result of the litigation; that six years had elapsed since they made these payments; the circumstances under which they saw the notes at that time, and other circumstances connected with their testimony. It appears from their evidence that they had not seen the notes from the time they were signed in October, 1903, until they made these payments on the first of July, 1905; that when they made these payments the president of the bank, who was not called as a witness, showed them the notes through the window over the counter in the bank. On the evening before they testified, they were at the office of their attorney and were shown the notes by him, and apparently agreed that this transfer indorsement was not upon the notes when they made these payments in July, 1905. When they were called to the stand to testify, they were not asked to state the condition of the notes at the time they refer to, but each of them was asked a somewhat leading question in substantially the following form: "Q. I call your attention to the note marked Exhibit '5'. When you saw that note in July, 1905, at the bank of Naper, you may state whether there was written on that note at that time these words: 'Jan. 13, 1904, pay to the order of Catherine B. Martindale without recourse on us. Champlin Brothers.' A. No, sir. Q. Was the name of Champlin Brothers there? A. No, sir." One of these witnesses was asked upon cross-examination: "Q. Mr. Briggs, at the time you saw these notes in July, 1905, you knew that they were then in Martindale's possession, did you not? A. No, sir. Q. Hadn't you ever heard of Martindale up to that time? A. I don't think so. * * * Q. Didn't you hear that Martindale had these notes? A. Not to my recollection. Q. When did you first learn that the Martindales were connected with these

notes? A. I couldn't say the year. Q. What is your best impression as to the time? A. I think it was some time when the second note became due. Q. But up to July, 1905, when the first note became due, you had never heard anything about the Martindales in connection with these notes, or otherwise? A. Not to my recollection." He was then shown a letter which he wrote to Mr. Martindale December 15, 1904, while Mr. Martindale was considering the advisability of purchasing the notes, in which letter the witness acknowledged the receipt of a letter from Mr. Martindale dated December 13, 1904, and in which the witness wrote Mr. Martindale: "We are of the opinion that your note was given payable on July 1, 1905, and that there was no interest due until that time, now you have a good note and it will be paid as soon as the company can get to it. * * * We are all very well satisfied to have you leave the note at the Bank of Naper." He then admitted that he wrote the letter, and that he received from Mr. Martindale the letter referred to therein. He was then asked: "Q. Now, did you see the note in the bank of Naper in December, 1904? A. According to that letter, I did." No doubt this witness believed what he testified to. He was testifying from recollection to matters that had taken place six or seven years previously. He had been led to fully believe by the strong representation of his codefendants that the transfer indorsement was not upon the note when he saw it six years before, and was made to understand that to establish that fact would win his case; and, being asked upon the witness stand only the question which called for an explicit answer "yes" or "no," he answered according to his understanding and belief, and without having testified that he had any certain knowledge in regard to it. These observations apply equally to the other defendants who so testified. Such testimony amounts to an expression of strong belief of a circumstance which would win his case, and cannot overthrow physical facts which amount to a substantial demonstration.

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

REVERSED.

MORRISSEY, C. J., dissenting.

HAMER, J., not sitting.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE AND CROSS-APPELLANT, V. BOX BUTTE COUNTY, APPELLANT AND CROSS-APPELLEE.

FILED DECEMBER 23, 1915. No. 18427.

1. **Appeal:** BRIEFS: STATEMENT OF EVIDENCE. Upon appeal the statement in the briefs of the substance of the evidence bearing upon a question of fact necessary to the determination of the case "will be taken to be accurate and sufficient for a full understanding of the questions presented for decision, unless the opposite party in his brief shall deny the correctness or accuracy of the statement, specifying with particularity the defects and inaccuracies therein, with citation of the page and paragraph of the transcript or page and question of the bill of exceptions, as the case may be, relied upon by him in support of his contentions in that regard." Supreme Court Rule 12 (94 Neb. XI).

2. **Taxation:** RAILROAD PROPERTY: ASSESSMENT. The expression "right of way and depot grounds" in section 6375, Rev. St. 1913, was not intended to exclude from the jurisdiction of the state board in assessing railroads all property situated more than 100 feet from the center of the main track of the road.

3. ———: ———: ———. A railroad, for the purpose of assessment and taxation, is considered as an entity, and includes all property that is held and used principally in the operation of the road and carrying on the business of transportation.

4. ———: ———: ———. The state board of equalization in assessing a railroad acts in a quasi-judicial capacity. In doubtful cases its determination as to whether a particular article of property is a part of the railroad entity is to be considered by local assessors.

5. ———: ———: ———. The construction in *Adams County v. Kansas City & O. R. Co.*, 71 Neb. 549, of that part of the revenue

law (Rev. St. 1913, sec. 6375) which specifies property to be assessed locally is adhered to.

6. ———: ———: ———. A large quantity of steel rails not shown to be intended for repair of the road in this state and not assessed by the state board may be assessed locally.

7. ———: ———: ———. Eleven miles of fence on leased land not assessed by the state board may also be locally assessed.

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

Lee Basye and *Burkett, Wilson & Brown,* for appellant.

Byron Clark, Jesse L. Root and *F. A. Wright, contra.*

SEDGWICK, J.

The Chicago, Burlington & Quincy Railroad Company is a corporation operating a railroad throughout this and adjoining states, a line of its road extending through Box Butte county and the city of Alliance, a division city on this line. It made a return of its property to the state board of equalization of assessment, which was duly assessed by that board. The local authorities in Box Butte county assessed certain items of property which had been so assessed by the state board, and from the action of the local board of equalization thereon the railroad company appealed to the district court for that county. Upon trial in that court the action of the board of equalization was affirmed in part and reversed in part, and the railroad company and the county have both appealed to this court.

The attorneys for the county say in their brief: "The disposition of this case seems to turn upon the definition of 'right of way' used in the statute." They also quote the following stipulation from the record. "It is stipulated between the parties hereto that all of the property included in the assessment to which the plaintiff is objecting is situated more than 100 feet from the main track of the plaintiff company's railroad, and that it is south of the main track." They also quote another stipulation which

relates only to an article which the district court found should be assessed locally, and then say: "These two stipulations set at rest the question of the location of this property, and settle beyond doubt that the property included in the assessment of the local authorities was located beyond the right of way, that is, more than 100 feet from the center line of the main track, and it appears from the testimony of the engineer that the right of way of this appellee is 200 feet wide, 100 feet on each side of the center of the track, or less." The attorneys for the railroad company quote from the record testimony of the general superintendent of the company and another witness that the land on which the property in controversy was located at the time of the assessment was then, and had been for many years, used by the company for station and depot grounds; that it was purchased for that purpose and had always been so used. The brief of the county does not deny that all of the property that was by the district court found to be a part of the railroad entity and should be properly assessed by the state board was and is located on the depot grounds, and that the buildings, yards and barns involved are all served by side and spur tracks; so that the contention of the county seems to be that under no circumstances can the right of way extend more than 100 feet from the center of the main track, and that property not on this right of way must be locally assessed.

In 1869 the legislature provided for the assessment of railroad property by the state board of equalization. Laws 1869, p. 179, sec. 17. By this act, as amended (Gen. St. 1873, ch. 66, sec. 17), the state board was required to assess "roadbed, superstructure, right of way, rolling stock, side track, telegraph lines, furniture and fixtures, and personal property belonging to such corporation." This statute was several times construed by this court, and also amended from time to time. As amended in 1881 (Laws 1881, ch. 70, sec. 1) the statute required the report to the state board of assessment to state: "The number of miles of such railroad and telegraph line in each organized county

in the state, and the total number of miles in the state including the roadbed, right of way and superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock and personal property necessary for the construction, repairs or successful operation of such railroad and telegraph lines: Provided, however, that all machine and repair shops, general office buildings, storehouses, and also all real and personal property outside of said right of way and depot grounds as aforesaid, of and belonging to any such railroad and telegraph companies, shall be listed for purposes of taxation" by the county assessors. The general purpose of this legislation is stated in *State v. Savage,* 65 Neb. 714, 750, as follows: "It seems reasonably clear that in assessing railroad and telegraph property, as contemplated by sections 39 and 40, the whole property belonging to any one corporation, and subject to assessment in this state, should be valued for tax purposes in its entirety, and that in such valuation should be included all elements going to make up the entire property, whether consisting of franchises or other intangible property, or physical property, be it real, personal or mixed." It is explained somewhat more at large in *Chicago, B. & Q. R. Co. v. Richardson County,* 72 Neb. 482: "If the railroad is an entity, we have one piece of property, spreading over several counties; if that portion within each county is a separate entity, then a valuation of such separate entity should be made in each county, as in other cases. * * * If the road as a whole is valued correctly, the several portions in each county cannot fail to be justly valued when assessed at the proportion they bear to the whole." Apparently each successive amendment of the statute makes this purpose of the legislature more plain. The final amendments by which this action is to be determined were made in 1903 and 1909. Laws 1903, ch. 73, p. 413; Laws 1909, ch. 111, p. 441; Rev. St. 1913, secs. 6374-6386.

Section 6374 provides: "The property of railroads, railroad corporations and car companies shall be annually as-

sessed as prescribed in this article by the state board of equalization and assessment."

Section 6375 provides: "The state board of equalization and assessment is hereby empowered, and it is made its duty, to assess all property of the railroads and railroad corporations in the state of Nebraska: Provided, however, all machine repair shops, general office buildings, storehouses, and also all real and personal property outside of right of way and depot grounds as of and belonging to any such railroad and telegraph companies, shall be listed for purposes of taxation by the principal officers or agents of such companies with the assessors of any precinct of the county where such real or personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property."

Section 6376 provides: The state board shall "ascertain all property of any railroad company owning, operating or controlling any railroad or railroad service in this state, which, for the purpose of assessment and taxation, shall be held to include the main track, side track, spur tracks, warehouse tracks, road bed, right of way and depot grounds, and all water and fuel stations, buildings and superstructures thereon, and all machinery, rolling stock, telegraph lines and instruments connected therewith, all material on hand and supplies provided for operating and carrying on the business of such road, in whole or in part, together with the moneys, credits, franchises and all other property of such railroad company used or held for the purpose of operating its road."

Section 6377 requires the company to "return to the state board of equalization and assessment a sworn statement or schedule of the property of such company." This statement or schedule it provides shall include: "Third—a complete list giving size, location as to county, township and city and village, material and value of all depots, station houses, machine shops, stock yards, scales or other buildings situated wholly or in part on the right of way,

together with all platforms, fuel and water stations, and the machinery and tanks connected therewith."

It will be noticed that section 6375 is the only section specifying property to be assessed by the local authorities, and the language of this section in that regard, as amended in 1909 (Laws 1909, ch. 111, p. 441), is the same as in the corresponding section of the act of 1881, except that as published it omits the word "and" in the phrase "all machine and repair shops." This omission of the word "and" is of little importance, since the history of this legislation shows that such omission was an oversight. The word is in the enrolled and authenticated bill of the act of 1903, filed in the office of the secretary of state, but was, by mistake, omitted from the act as published. This omission evidently led to the same omission in the amendment of 1909. Section 6376 specifies the property of the railroad company which shall be included for the purpose of assessment by the state board, and it includes "the main track, side track, spur tracks, warehouse tracks, road bed, right of way and depot grounds." The railroad for the purpose of assessment and taxation is considered as a whole. The reason for treating it as an entity is stated in the opinion of Mr. Commissioner Pound in *Chicago, B. & Q. R. Co. v. Richardson County, supra.* Its business being the transporting of persons and property, the entity so to be assessed includes all property that is held and used principally in carrying on such business. The difficulty in the case is in determining what property is held and used for such purpose. In *State v. State Board of Equalization,* 81 Neb. 139, it is said that the state board "acts in a quasi-judicial capacity." In *Chicago, B. & Q. R. Co. v. Merrick County,* 36 Neb. 176, the trial court found specially that the property involved was not returned by the railroad company to the state board for assessment, and that it was not assessed by the state board. The court said in the opinion that the principal complaint of the plaintiff was that the evidence did not support that finding, and "that the presumption is that the state board

assessed the property in question, hence it is liable to double taxation thereon. * * * Did the plaintiff return the property in question to the state board? If it did, the return will show. If it did not, it has no cause of complaint. The revenue law of this state is designed to make a fair and just apportionment of taxes upon all the taxable property of the state whether the owner be a wealthy corporation or a person of but little means. There is no complaint that the property is assessed too high or that the tax itself is unjust if the property has not already been assessed by the state board. The proof fails to show that it was so assessed."

It is not the policy of the law to create dissensions or difference of views of jurisdiction or to cause double or conflicting assessments. Some articles of property are plainly assessable by the state board; others are as plainly subject to local assessment. There are articles of property in regard to which it is not so easy to determine whether they should be assessed locally or are within the jurisdiction of the state board as part of the railroad entity. If these doubtful cases are determined by local assessors, there will be a variety of conclusions and no uniformity and no equality between different localities. The state board, with the assistance of its experts, is better qualified to determine what articles of property are essentially a part of the railroad, and there is no doubt that some consideration should be given to its action in the matter. If it declines to assess an article of property as not being a part of the railroad, the local assessor may well assume that it falls within his jurisdiction. If it assesses property as a part of the railroad entity, local assessors may well assume, in doubtful cases, that such property has been properly assessed.

It seldom happens that a common expression has received such diverse construction and application, depending upon the particular circumstances of its use, as has the expression "right of way." Even when the right of way of a railroad company is defined, we find a great variety of

construction, depending upon the connection in which it is used. The supreme court of the United States in *St. Louis, K. C. & C. R. Co. v. Wabash R. Co.,* 217 U. S. 247, adopted the definition of the term "right of way" of the circuit court of appeals in the same case, as follows: "The ordinary signification of the term 'right of way,' when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes, is the entire strip or tract it owns or is entitled to use for this purpose, and not any specific or limited part thereof upon which its main track or other specified improvements are located. *Joy v. St. Louis,* 138 U. S. 1; *New Mexico v. United States Trust Co.,* 172 U. S. 171,174 U. S. 545; *Chicago & A. R. Co. v. People,* 98 Ill. 350; *Lake Erie & W. R. Co. v. Middlecoff,* 150 Ill. 27; *Pfaff v. Terre Haute & I. R. Co.,* 108 Ind. 144."

In view of the general purpose of our statute that the state board shall assess the railroad as an entity, including all of its property used in operating its road or carrying on the business of such road, and considering the language used in other sections of the statute, it seems clear that the words "right of way and depot grounds," as they are used in section 6375, could not have been intended to exclude from the jurisdiction of the state board all property situated more than 100 feet from the center of the main track of the road. The brief of appellant rests entirely upon this proposition. It offers us no assistance upon any other theory of the case. As this theory fails, and we have not observed any plain error which requires a reversal upon any other theory, we must hold that the appeal of the county is without merit.

The railroad company suggests a question as to the construction of that part of section 6375 which specifies property to be assessed locally: "All machine and repair shops, general office buildings, storehouses, and also all real and personal property, outside of right of way and depot grounds." This provision was construed in *Adams County v. Kansas City & O. R. Co.,* 71 Neb. 549, in which it was said: "The plaintiff contends that each of the

terms used in the proviso, to designate the different classes of property, is qualified by the phrase, 'outside of said right of way.' * * * Had the legislature thus intended, it is not likely they would have followed a specific enumeration by general terms sufficiently comprehensive to include all the preceding terms. * * * Besides, from the word 'also,' following the conjunctive, and the repetition of the collective 'all,' it is clear, we think, that the phrase, 'outside of said right of way,' was intended to qualify only the word 'property' immediately preceding it." We do not feel justified in departing from this construction of the statute.

The district court decided that 12,938 steel rails, valued at $97,020, and 11 miles of fence on leased land should be assessed locally. These rails and fence, it is contended, should have been assessed by the state board. In *Chicago, B. & Q. R. Co. v. Merrick County, supra,* it was decided that "material for the construction of a railroad which was piled up near Central City and had so remained for a long time * * * was taxable" by the local assessor. It is not clear that these rails were on hand for the repair of the road in this state, and we cannot say that the assessing authorities and the district court have erred in this regard. The fence, being on leased lands, and not having been assessed by the state board, was properly assessed locally.

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

AFFIRMED.

FAWCETT, J., not sitting.

BASKET STORES OF LINCOLN, NEBRASKA, APPELLEE, v. FRANK S. ALLEN ET AL., APPELLANTS.

FILED DECEMBER 23, 1915. No. 18449.

1. **Trade-Names:** INFRINGEMENT. It is an infringement on a legally acquired trade-name to use, in the same locality and in the same line of business, another name of such similar import that the ordinary attention of persons would not disclose the difference between the two names.
2. **Trade-Marks:** INFRINGEMENT: INJUNCTION. When the owner of a trade-mark applies for an injunction to restrain a competitor from injuring his property by making false representations to the public, it is essential that the complainant and the defendant should both be engaged in the sale of the same kind of goods.

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

R. H. Hagelin, for appellants.

Sterling F. Mutz, contra.

HAMER, J.

The plaintiff, a corporation, seeks to enjoin the defendants, Frank S. Allen and Ida Ford, from doing business under the firm name of "The Basket Store." Plaintiff alleges that its place of business is at 1020 P street. It is conducting eight stores in Lincoln. They are described in the plaintiff's petition as "Basket Store" No. 1; "Basket Store" No. 2; "Basket Store" No. 3; "Basket Store" No. 4; "Basket Store" No. 5; "Basket Store" No. 6; "Basket Store" No. 7; "Basket Store" No. 8. Plaintiff alleges that it has been continuously in the business of buying and selling groceries and meats at retail since the 18th day of March, 1908, and that it has used for its trade-name at the several places of business, which it names in its petition, the words "Basket Store," that the scope of territory in which the plaintiff does business includes all the city of Lincoln, University Place, Havelock, College View,

Bethany and West Lincoln, with contiguous territory in Lancaster county on all sides of the said cities and villages and for a distance of several miles into the country. Plaintiff claims that it is entitled to the exclusive use of the name "Basket Store" in its business in said territory and without interference; that the plaintiff has built up a large and prosperous business and has spent large sums of money in advertising and putting the name "Basket Store" before the public; that the public became acquainted with the plaintiff through the use of the trade-name "Basket Store," as also the reputation of the plaintiff for low prices when compared with other stores; that the defendants, knowing these facts, on the 15th day of June, 1912, fraudulently and unlawfully commenced to use the plaintiff's said name "Basket Store" in the grocery business in University Place, and within the territory in which the plaintiff does business; that, by virtue of the use of said name by the defendants, the public and the plaintiff's customers have been deceived and have been led to believe that they are dealing with the plaintiff, when in fact they are dealing with the defendants; that the use of said name by the defendants is unfair to the plaintiff, and is taking advantage of the plaintiff's extensive advertising of its business, and that the plaintiff has thereby lost many customers and is still losing them; that the plaintiff has been damaged by the loss of said customers and by the loss of profits and by the loss of the value of its advertising; that the plaintiff has repeatedly requested the defendants to refrain from using the said name in their said business, but they refused to do so and are still using said name; that, by virtue of the continuing nature of the injury and damage to the plaintiff, there is no adequate remedy at law, and that, if there was a remedy at law, the same would involve a multiplicity of suits, and would be uncertain, protracted and of no value. The prayer to the original petition is that the defendants be forever enjoined from using the name "Basket Store" in connection with the grocery and meat business which they conduct in University Place and

within the territory in which the plaintiff does business. The defendants in their answer claim to be conducting a store in the city of University Place, known as a "Basket Store," that University Place is a separate and distinct municipality from that of the city of Lincoln, and that said cities are five miles apart; that what the defendants did was done in good faith, and without any intention to injure or defraud the plaintiff. The case came on for trial on the 7th day of July, 1913, whereupon it was adjudged that the plaintiff is entitled to the exclusive use of the name "The Basket Store" within the territory named in the petition, and that the defendants be forever enjoined from using the said name in connection with their said grocery and meat business in University Place, Nebraska, and that the defendants pay the costs. From this judgment the defendants appeal.

An examination of the evidence would seem to show that the plaintiff's business has become valuable by reason of the fact that the purchaser of goods is attracted by the method of doing business and the financial advantage which may result to him. He is likely to say to himself that, if he goes and pays cash at that kind of a store for such goods as he can purchase, he will get the goods for less than their retail price; that other persons who buy there will get the goods which they purchase at less than the retail price; that one of the reasons that he will get the goods at less than the retail price is because, where the store is a basket store, it does not carry the goods to the home of the purchaser. He carries the goods himself, or procures a method of transfer. The purchaser may say to himself, so long as I deal at the basket store, I will get the goods for a less price by reason of the fact that the store is not put to the expense of carrying goods over a wide expanse of territory and to many purchasers, some of whom never pay. A basket store sells strictly for cash. There is, therefore, no loss by reason of failure to collect. Also, it may be said that the quality of the goods will be

much improved by reason of the fact that large quantities will be sold, and that they will always be fresh.

The use of the descriptive words may not be defended upon the ground that they constitute a trade-mark; at the same time it would seem to be unfair that one may obtain the business of another when the chief value in such business is the name. The plaintiff, with his eight stores of the same name, has built up a large and prosperous business, as it appears from the evidence. If the defendants seek to take advantage of the name under which the plaintiff has been doing business, it is, to say the least, unfair. If theirs is a good store, they can build up a reputation of their own.

In the case of *Miskell v. Prokop,* 58 Neb. 628, this court held that a trade-name might be acquired. The first paragraph of the syllabus reads: "A right to the exclusive use in the particular locality of a trade-name or a sign may be acquired." In that case, however, the judgment was for the defendant. The controversy was about the right to use the term "Racket Store." The defendant conducted its business under the name "New York Racket Store." This court held that there was a distinction between "New York Racket Store" and "Racket Store," and that a careful examination of the words would prevent the public from being deceived. This court said: "In the present case we think the question upon which the decision must turn is, was the defendant's sign, taken as a whole, such a simulation of that of the plaintiff as to work the mischief attributed to it, or well calculated to so do?" The doctrine is clearly laid down, however, that there is no right to deceive the public or to injure a merchant by the adoption of the peculiar name under which he does business. See *Beebe v. Tollerton & Stetson Co.,* 117 Ia. 593.

In *Regent Shoe Mfg. Co. v. Haaker,* 75, Neb. 426, this court held that, where a mercantile company has acquired a trade-name in a particular locality, it is entitled to protection against unfair competition in its particular line

of business by the use by a competitor of a name of such similar import as to probably deceive the public.

We are unable to discover a sufficient reason for setting aside the judgment of the district court in favor of the plaintiff. The judgment of the district court is

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

JAMES T. MASON V. STATE OF NEBRASKA.

FILED DECEMBER 23, 1915. No. 19049.

1. **False Pretenses:** EVIDENCE. Where the prosecution in a criminal case was under section 8874, Rev. St. 1913, and the information alleged that the defendant executed and delivered a chattel mortgage to a certain bank for the purpose of cheating and defrauding the same, and it appears that the defendant had obtained the credit before that time, except the sum of $14, and that the last mortgage given was a renewal, the evidence is not sufficient to establish the commission of a felony, and does not tend to prove an offense greater than a misdemeanor.

2. ———: AMOUNT INVOLVED: PENALTY. In such case, where the evidence shows that the defendant only got $14 in cash from the bank at the time of the transaction, and that the mortgage given is a renewal, except as to the said sum of $14, it will be held that the defendant may not be found guilty of a felony, and, at most, can only be guilty of fraudulently obtaining the $14, and so, under the section, if guilty, is only guilty of a misdemeanor, and can only be fined not exceeding $100, or be imprisoned in the jail of the county not exceeding 30 days, all as is provided by said section 8874, Rev. St. 1913.

3. ———. Where the defendant received only $14 in money at the time of the renewal when the chattel mortgage was made, and the bank at Crawford undertook to pay a coupon held by the bank at Fremont, and amounting to the sum of $188, and failed or refused to do so, there can be no indebtedness of the defendant for the $14 that he received because he is entitled to have the bank at Crawford pay the coupon at Fremont, and $14 is not sufficient to pay said coupon, and the payment of that sum to the defendant

would leave the bank at Crawford indebted to him for the difference between $14 and $188, being $174.

4. ———: SUFFICIENCY OF EVIDENCE. Where the evidence shows that the cashier of the bank alleged to have been defrauded told the defendant that he wanted him to pay up, that the paper had run over a long series of years and the directors were not satisfied to renew, and this and other evidence tends to show that the cashier of the bank did not believe that the defendant had the live stock described in the mortgage, then it must follow that the cashier was not deceived and did not rely upon the security of the mortgage. In that event, the evidence is insufficient to sustain a verdict of guilty of a felony or a misdemeanor.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed and dismissed.*

Earl McDowell, Allen G. Fisher and *William P. Rooney,* for plaintiff in error.

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

HAMER, J.

The plaintiff in error will be called the defendant. The charge against him is that he is guilty of false pretenses because he obtained a credit with the First National Bank of Crawford, Nebraska, for $4,560 on alleged fraudulent statements touching his ownership of cattle and horses in Sioux county, Nebraska. The defendant was tried in the district court for Dawes county, and the jury rendered a verdict finding him guilty as charged in the information, and found "the value of the money and credit fraudulently secured from the First National Bank to be the sum of $2,111.10." Upon this verdict the defendant was, on the 2d day of March, 1915, sentenced to the penitentiary at hard labor for an indeterminate period of not less than one nor more than five years. The prosecution is under section 8874, Rev. St. 1913. The part of that section applicable to the case reads as follows: "Whoever by false pretense or pretenses shall obtain from any other person, corporation, association, or partnership, any money, goods,

merchandise, credit or effects whatsoever with intent to cheat or defraud such person, corporation, association, or partnership of the same, or shall sell, lease or transfer any void or pretended patent right or certificate of stock in a pretended corporation and take the promissory note or other valuable thing of such purchaser, * * * if the value of the property or promissory note or written instrument or credit, fraudulently obtained or conveyed as aforesaid, shall be thirty-five dollars or upwards, shall be imprisoned in the penitentiary not more than five years nor less than one year; but if the value of the property be less than thirty-five dollars the person so offending shall be fined in any sum not exceeding one hundred dollars or be imprisoned in the jail of the county not exceeding thirty days and be liable to the party injured in the amount of damage sustained."

The First National Bank of Crawford was the successor of a bank having the same cashier and stockholders. When the first bank went out of existence, the defendant continued to make mortgages and borrow money of the new bank, the First National Bank. He got no money by the transactions described in the information in this case, except $14. He may have received money before this last transaction because of representations which he made when the debt was contracted, but no new debt was contracted when the mortgage and notes were given which are described in the information, unless it was the $14. There was already an indebtedness, and therefore, if the transaction was fraudulent, the fraudulent act had already been consummated. Of course, there can be no valid trial and no lawful punishment except for the violation of law charged in the information. The facts fail to show that the defendant requested an extension of the debt, and it is not saying that he requested an extension of the debt to say that he desired to borrow money of the bank to pay what he owed the bank by reason of a former transaction. As he got no money out of the last transaction, there could be no deception at that time, except in

the matter of obtaining the $14 which is hereafter referred to.

The cashier of the bank at Crawford testified that there was a real estate mortgage given by the defendant which was held by the bank at Fremont, the Commercial National, or an associate of that bank. The bank at Fremont was the correspondent of the bank at Crawford. The cashier of the bank at Crawford, Mr. Minick, appears to have indorsed the note or notes secured by the said real estate mortgage, and appears to have sent the same down to the bank at Fremont, and there was an interest coupon on this real estate note and mortgage to be paid at the bank at Fremont, amounting to $188, which the cashier of the bank at Crawford undertook to pay. He, the said cashier of the bank at Crawford, could not rightfully claim that the defendant was indebted to the said bank at Crawford for a transfer of money to pay interest on the said real estate mortgage held by the bank at Fremont when such transfer was not in fact made, and the coupon attached to the real estate note at Fremont was not surrendered to the defendant, but was retained by the bank there against the request of the defendant. If the contention of the defendant concerning the real estate coupon is true, there is no evidence in the case sufficient to convict him of anything. The money to pay the interest coupon was not sent at the time of the transaction, and the defendant insisted that he should have the coupon but Minick did not get him the coupon, and refused at that time to do so. Minick could not keep the coupon in his correspondent's hands at Fremont and yet legally claim that the defendant became indebted to him for the transfer of money to pay interest on the real estate mortgage when such transfer was not made and the coupon was not surrendered. The verdict of the jury finds that the defendant defrauded the bank out of $2,111.10. So long as the defendant did not receive anything, he could not be guilty of taking anything. The $14 in money which the defendant got would not pay the coupon. There can be no

indebtedness of the defendant for the $14 which he received because he is entitled to have the bank at Crawford pay the coupon at Fremont, and $14 is not sufficient to pay said coupon, and the payment of that sum to the defendant would leave the bank at Crawford indebted to him for the difference between $14 and $188, the amount of the coupon, being $174.

There is a failure to furnish evidence which tends to sustain the information, and such evidence as is furnished wholly fails to support the verdict. As the defendant had contracted the debt before the renewal was made, it follows that the misrepresentations which he made, if any, were when the debt was created, and not when it was renewed. Of course, no evidence was offered showing, or tending to show, that any misrepresentation was made when the loan was first obtained, and under the information it would have been prejudicial error to admit such evidence. There was no charge which in any way related to the making of any loan prior to the renewal. In no event could the defendant be tried except upon the charge contained in the information. As the defendant had the credit when the renewal was made, he did not need to get it again, and of necessity could not get it again. If the defendant got any additional credit when the note was renewed and a new mortgage taken, it was only for $14. This would make the offense, if any offense was committed, a misdemeanor, and not a felony.

It further appears that the cashier of the bank, Mr. Minick, claimed to the defendant that he, the defendant, did not have the security. Minick so testified. If that is true, then Minick was not deceived, and could not have relied upon any belief that Mason still had the security. Minick testified that he told Mason, "We had been unable to get him to show us the security." The essentials of the crime of obtaining money or property by false pretenses are that the false pretense or pretenses must relate "to a past event or an existing fact," and "any representa-

tion, or assurance, or promise, in relation to a future transaction, however false and fraudulent it may be, is not within the meaning of the statute," and "the misrepresentations must be of a fact, and not a statement of an opinion, or the making of a promise." *Cook* v. *State,* 71 Neb. 243. Maxwell, Criminal Procedure (2d ed.) p. 129; *Dillingham v. State,* 5 Ohio St. 280; 1 McClain, Criminal Law, sec. 668.

In the case of *State v. Matthews,* 44 Kan. 596, 10 L. R. A. 308, the court held: "The charge of committing the offense of obtaining money or property under false pretenses cannot be maintained in any case unless it appears not only that a false pretense was in fact made, but also that it was made with the intention of cheating or defrauding some person, and that such person was in fact cheated or defrauded to his or her injury." In that case the name of the wrong person cheated and defrauded was put in the information, and the judgment of the district court was reversed for that reason.

The alleged fraud must be proved, and must be relied upon by the plaintiff before damages can be recovered. *Dresher v. Becker,* 88 Neb. 619.

"Fraud cannot be predicated on a promise not performed. To be available there must be a false assertion in regard to some existing matter by which a party is induced to part with his money or property." *Perkins v. Lougee,* 6 Neb. 220.

"In order to obtain redress or relief from the injurious consequences of deceit, it is necessary for the complaining party to prove that his adversary has made a false representation of material facts; that the complaining party was ignorant of its falsity, and believed it to be true; that it was made with intent that it should be acted upon; and that it was acted upon by the complaining party to his damage." *Omaha Electric Light & Power Co. v. Union Fuel Co.,* 88 Neb. 423.

"It is a general rule of law that, in order to obtain redress or relief from the injurious consequences of deceit,

it is necessary for the complaining party to prove that his adversary has made a false representation of material facts; that he made it with knowledge of its falsity; that the complaining party was ignorant of its falsity, and believed it to be true; that it was made with intent that it should be acted upon; and that it was acted upon by the complaining party to his damage." 1 Bigelow, Fraud, p. 3.

It will be noticed that the act done must be done "with the intent to cheat or defraud;" because of the necessity of knowledge on the part of the defendant, it must be proved that he knew, or had reason to know, that he did not have the property at the time he undertook to make the mortgage. There is no proof of that given in this case.

Because the evidence does not tend to sustain the information and wholly fails to support the verdict, the judgment of the district court is reversed and the case dismissed.

REVERSED AND DISMISSED.

SEDGWICK, J., concurring.

The information in this case is, I think, wholly insufficient in several particulars to inform the defendant what proof he might expect would be offered against him, or what evidence it would require him to furnish in his defense. An information for obtaining money, goods, merchandise, credits, or effects by false pretense or pretenses must specify and describe the things so obtained in such manner that the defendant may definitely know the charge against him and prepare to produce such evidence as may exist in refutation of the charge. The information charges that the defendant was then indebted to the bank, but in what amount it is not alleged. It also charges that he was desirous of obtaining credit from the bank with which to discharge his indebtedness. The things that he did for which he was prosecuted were done for the purpose of enabling him to procure such credit "and divers sums of money from time to time advanced to him by said bank." It does not appear from the information whether

these divers sums of money were advanced after or before the representations were made. He applied to the bank "for credit and money in said sum." No sum of money had been before that named in the information, so that it is entirely indefinite as to how much credit or what sum of money was applied for. The bank agreed to give the defendant "credit and money in said sum," no sum having been named in the information, so that it is entirely indefinite as to what amount of money or credit, or both, the bank agreed to give him. Then follows the allegation that the bank received a mortgage from him in the sum of $4,560, "and did give to the said James T. Mason moneys and credits in said sum * * * of the value of forty-five hundred and sixty dollars." It is not alleged that this money and credit was the property of the bank, and it is not alleged how much of this was money and how much was credit. The credit that the defendant desired, and the credit which he obtained, is not at all defined in the information. The implication is that the amount of money and credits which he received were represented in the mortgage of $4,560. This mortgage, it is alleged, is given to secure notes. There is no allegation as to the number of the notes nor the amounts of them, respectively, and it does not appear whether they were given on demand, on one day's time, or upon a longer time. It is impossible to tell from the information what the nature of the credits might be. There is no allegation of any specific amount of money that the defendant obtained, nor when he obtained such amount. It may be that these defects in the information were not seasonably challenged, but an information of this nature, that fails wholly to describe or in any way identify the property obtained by the alleged fraudulent pretenses, is so fatally defective that it cannot be presumed that the defendant could have a fair trial upon such information. For this reason, I concur in the reversal of the judgment.

ROSE, J., dissenting.

LETTON, J., not sitting.

IN RE ESTATE OF SARAH J. MERICA.
JOHNATHAN MERICA ET AL., APPELLANTS, V. JULIUS L. GREER, ADMINISTRATOR, APPELLEE.

FILED DECEMBER 23, 1915. No. 18278.

Wills: CONTEST: ATTORNEY'S FEES: ALLOWANCE: AMOUNT. Counsel were employed by decedent's husband, who was not a legatee, and the will was successfully contested. *Held*, that compensation for such services, the costs and necessary expenses thereof are proper charges against the estate. The amount of such allowances should be determined upon consideration of the reasonableness of the charges, the necessity of the employment, the actual services rendered, the size of the estate, and the benefits accruing thereto.

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

Frederick Shepherd, for appellants.

John P. Breen, contra.

MARTIN, C.

Johnathan Merica and his wife, Sarah J., lived at Blair, Nebraska, where they had a small fruit farm. The husband was about 80 years of age and the wife 70. In 1909 they came to the city of Lincoln to live with a daughter, Mrs. Oelting. Thereafter the wife became insane, and upon a hearing before the insanity board was duly committed to the insane asylum. Soon thereafter the daughter, Mrs. Oelting, was appointed guardian for her mother. After a lapse of several months a sister, who resided in Seward county, took the incompetent out of the asylum on parole, and procured her release by proceedings in habeas corpus before the county court of that county. Immediately thereafter the incompetent made application to the county court of Lancaster county in the original guardianship proceedings to be discharged therefrom. This application was unsuccessful. A few months later, while she was at Oakland, Nebraska, she made a will, mak-

ing no mention of her husband, and allowing her daughter, Mrs. Oelting, one dollar, and giving some of her property to her sister and the rest to her other children. She died in Omaha not long after making this will. The will was offered for probate in the county court of Douglas County, and the husband, Johnathan Merica, employed counsel and contested the will, and the same was set aside for the want of testamentary capacity. No appeal was taken from this judgment. Johnathan Merica incurred costs, expenses and attorney's fees in securing the setting aside of the will. His claim and that of the attorneys employed by him for these costs, expenses and attorney's fees was disallowed by the county court, and on appeal to the district court a demurrer was sustained to the petition and the case was dismissed, and is now here on appeal.

This precise question has never been before this court. In *Mathis v. Pitman,* 32 Neb. 191, and in *Scebrock v. Fedawa,* 33 Neb. 413, the unsuccessful contestants of a will were allowed to recover their costs and attorney's fees upon the ground that they had instituted the contest in good faith and upon reasonable grounds. But these cases were overruled in *Wallace v. Sheldon,* 56 Neb. 55, wherein Commissioner Ragan wrote the opinion and said: "We do not attempt to formulate a rule for determining what state of facts will justify a court in any case in awarding costs to an unsuccessful litigant, but what we do decide is that the courts are not invested with the discretion to award costs or attorney's fees to an unsuccessful contestant of a will simply and solely because of the fact that he undertook the contest in good faith, and at the time he did there existed probable cause for the contest."

In the case of *Atkinson & Doty v. May's Estate,* 57 Neb. 137, which was an unsuccessful contest of a will, Commissioner Ragan, again writing the opinion, said: "The estate of a decedent is not liable to an attorney for services rendered by him for and at the request of a legatee under decedent's will in a contest thereof." No authorities are cited.

In *St. James Orphan Asylum v. McDonald,* 76 Neb. 630, this court held: "The estate of a decedent is not ordinarily liable to an attorney for services rendered by him, for and at the request of a legatee under decedent's will, in a contest thereof." This was a case wherein the attorneys for a legatee and proponent of a will were successful in sustaining it, and then sought to make their services a charge against the estate when their client received under the will three-fourths of the estate, amounting to $150,000.

Thus it appears that the question of the allowance of attorney's fees as a claim against an estate has never come squarely before this court in a case where such attorneys were successful in setting aside a will.

This court has held that the county court has authority to allow attorneys reasonable fees as a claim against the estate when such attorneys were employed by the executor and rendered services which were necessary and beneficial to the estate. *Hazlett v. Estate of Moore,* 89 Neb. 372. It seems to be the general rule that compensation for attorney's services rendered under employments by executors, administrators, guardians, and trustees are proper claims against such estates. Matters of probate and settlement of estates are often complicated, requiring the executor or administrator to pass upon the intricacies of the law of which he is ordinarily ignorant. He must necessarily have counsel to guide him in the performance of his duties, and this to the end that the estate may be protected. This, no doubt, is the foundation for the rule which generally prevails.

In the syllabus of the *St. James Orphan Asylum* case, *supra,* there is an implication that counsel fees obligated by a legatee are chargeable to the estate. Evidently the writer of that opinion had in mind extraordinary cases wherein a legatee might employ counsel and still their services be justly compensated out of the estate. It is easy to suppose cases of such character. Take, for instance, a case where five children are only

nominal legatees and are allowed one dollar each under the will, and the remainder of the $100,000 estate is bequeathed to some charitable purpose. One of the nominal legatees employs counsel, assumes the burden, and successfully contests the will. On what equitable theory should the estate escape the payment of reasonable counsel fees and expenses of the contest, and the nominal legatee who instituted and successfully carried it through be compelled to pay from his separate share the entire expenses when the estate and the other children profit four times as much as he does by the proceedings?

In the case at bar the will was successfully contested and set aside on the ground that the deceased lacked testamentary capacity. The property was saved to the lawful heirs. The services were eminently necessary and irrefutably beneficial to the estate. The fact that the executor of the false will employed counsel and resisted the assault upon the will and lost argues strongly that the estate was benefited. The property does not pass according to the terms of the false will, but it passes to the lawful heirs; an unlawful distribution is prevented and a lawful one enforced. Measured by this rule, even where the employment is actually made by an executor or administrator, instead of by the surviving husband who is not a legatee, as in this case, it is difficult to imagine a case wherein the necessity of the employment and the certainty of the benefits to the estate would be any more pronounced than they appear to be in the one before us. Because the services were rendered before the will was set aside and the administrator appointed does not destroy the force of the fact that the estate received the protection and benefits just as surely as it would have done had the administrator made the employment. Had the administrator employed these attorneys there would be no question under the authorities about the liability of the estate for the payment of their reasonable fees. By analogy there ought to be no question about the allowance of a reasonable amount to

the attorneys to be paid from the estate which they preserved for lawful administration.

When one who is not a legatee employs counsel through whose services the will is set aside, it is the duty of the court to consider a claim filed for such services, and allow, not necessarily the amount of the claim, but such amount as shall be just and reasonable, considering the necessity of the employment, the actual services rendered, the size of the estate, and the benefits accruing thereto by reason of the services. When no necessity exists for the services and no benefits accrue to the estate, no compensation should be allowed. This we regard as a sound, safe and equitable rule. Included in this claim were some items for expenses and services in making and presenting objections to the jurisdiction of the county court of Douglas county. Such items should not be allowed against the estate. But there were items separately itemized for costs in the taking of depositions and procuring evidence for the contest, amounting to $58, which are clearly statutory costs and should have been allowed by the court. These, together with perhaps other items of cost and reasonable attorney's fees, should be allowed in accordance with the views herein expressed. The judgment is reversed and the cause remanded.

BY THE COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial, and this opinion is adopted by and made the opinion of the court.

REVERSED.

MEYER PANSIK, ADMINISTRATOR, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY ET AL., APPELLANTS.

FILED JANUARY 15, 1916. No. 18500.

Railroads: ACTION FOR DEATH: CONTRIBUTORY NEGLIGENCE. An adult person, in attempting to pass over the coupling between two cars standing on a street crossing and liable to be moved by an engine attached to them for switching purposes, is guilty of contributory negligence, which will preclude a recovery for his injury and death in consequence of the moving of the cars.

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

B. P. Waggener, J. A. C. Kennedy and *Philip E. Horan,* for appellants.

Weaver & Giller, contra.

BARNES, J.

This was an action by the administrator of the estate of Paul Pansik to recover damages for the negligent killing of his decedent.

Plaintiff alleged in his petition that the defendants were negligent in causing their train of cars to be backed across Nicholas street and allowing it to stand there in a solid train, consisting of some 26 cars, for several minutes, thus forbidding the free use of the street; that they

were negligent in uncoupling the train at a point north of Nicholas street; that they were negligent in causing a part of said train to start up suddenly and with a jerk towards the south, thereby throwing plaintiff's intestate from the position that he had taken on said cars down upon the rail of defendant's track, causing his death; that they were negligent in failing to give deceased any warning of their intention to start the train; that they failed to keep a proper lookout to ascertain the presence of people crossing between the cars of said train, which was standing upon and over Nicholas street; that they failed to ascertain that the plaintiff's intestate was crossing between the cars at the time the train was started forward. The defendants filed separate answers which contained a general denial and an allegation that the accident which caused the death of Paul Pansik was due entirely to his own negligence. The reply was a general denial. At the close of the plaintiff's evidence the defendants requested the court to direct the jury to return a verdict in their favor. The request was refused. The defendants introduced no evidence. The court gave his instructions to the jury, consisting of some 15 paragraphs, each of which was excepted to by the defendants. The jury returned a verdict for the plaintiff and against both defendants for $7,500, on which the court rendered judgment, and the defendants have appealed.

The facts, as shown by the evidence, are, in substance, as follows: On the morning of the 23d day of August, 1912, shortly before 7 o'clock, Paul Pansik, then about 19 years of age, came down Nicholas street on his way to his work in the Union Pacific shops. He was going east on the south side of said street. When he arrived at Fifteenth street, he found the way blocked by the defendant's train, which was switching at that point. The train had just been backed or pushed in by an engine to which it was attached about four car lengths south of the crossing. A coal car was on the crossing, and the train extended farther north, a distance of about 20 car lengths. The

train stood there about three minutes, when the flagman, who was on the east side, uncoupled the cars at the north line of the street and signalled to the engineer to pull back to the south in order to open up the street crossing. The testimony shows that two persons climbed over the bumpers between the cars at the north side of the street where the flagman was uncoupling, but two witnesses who stood east of the crossing on the south side of the street stated that no one had attempted to pass between the cars at that side of the street. Just as the flagman uncoupled the cars at the north side of Nicholas street, Paul Pansik climbed upon the bumpers between the cars at the south line of the street, and, when the cars were moved to the south, fell or was jerked off from the bumpers, fell upon the track, and two truck wheels passed over his body, instantly killing him.

The record discloses that Nicholas street crosses the railroad yards, and on what was the extension of Fifteenth street there is a large number of tracks which are used in switching cars and making up trains. Plaintiff's evidence shows that at the time the accident occurred the train in question had not blocked the crossing for a period of more than three to five minutes; that quite a number of persons came down Nicholas street from the west on their way to work. Plaintiff's witnesses, Miss Bigley and Miss Baber, were on their way west on the south side of the street, and arrived at the crossing just at the time the train backed in from the south. They both testified, in substance, that defendant Ryder and the flagman were on the east side of the train at the point where the flagman uncoupled the cars; that two men came through between the cars at that point just as they were uncoupled. The witnesses were standing on the east side of the train at the south side of the street. They both testified that no one had attempted to cross over between the cars on the south side but Paul Pansik; that he climbed up on the bumpers between the cars directly in front of them, and that as the train was moved to the south he slipped or fell to the

track and was run over and killed; that none of the trainmen were where they could see Pansik, and there is no evidence showing, or tending to show, that any of the defendant's servants knew that Pansik was attempting to cross over between the cars. The engine attached to the south end of the train was in plain sight. Sam Temin, a witness for plaintiff, testified, in substance, that there were no trainmen on the west side of the train; that he came down the street from the west and on the south side; that there was quite a number of persons there when Paul Pansik started to go over the cars from the west to the east side; that he himself was just behind Pansik; that the train gave a pull, and Pansik fell down on the track and was killed. He testified that he did not see the engine then, but saw it afterwards, and that he saw no signal and heard no bell or whistle. Miss Bigley and Miss Baber also testified that they heard no bell or whistle. Barney Feltman's testimony was, in effect, the same as Temin's. There was no evidence showing, or tending to show, any act of negligence on the part of defendant Ryder. He was on the east side of the train north of the flagman and at a point where he could see the engine and attend to his duties in managing the switching crew.

Appellants contend that the court erred in refusing to direct the jury to return a verdict in their favor. If this contention is sustained, the judgment must be reversed, and it will not be necessary to consider any of the other assignments of error.

As shown by the evidence, the accident in question happened at a public street crossing in the city of Omaha, and the plaintiff's rights at that point were greater than they were at other places on defendant's right of way. At public crossings the rights of the railroad company and the public are equal, and each has the right to assume that the other would be controlled by such considerations as would influence a man of ordinary care and prudence. Plaintiff's decedent had the right to the reasonable use of the crossing at Nicholas street for his own purposes,

subject to the right of the defendant railroad company to make a reasonable use of the crossing in conducting its business through the city. *Williams v. Chicago, B. & Q. R. Co.*, 78 Neb. 695. The delay caused plaintiff's decedent was slight, and did not justify him in attempting to cross over between the cars, to which a live engine was attached, without ascertaining, or attempting to ascertain, whether the cars were about to be moved or not. It was gross negligence for young Pansik to make such an attempt. By his own conduct he placed himself in a dangerous position without any knowledge of his presence or his danger on the part of those in charge of the train. They had not, by any conduct on their part, invited Pansik to make the attempt to cross over between the cars. As a matter of fact, they were engaged in opening the crossing. If Pansik had waited only three minutes the way would have been clear, and the accident could not have happened. As we view the record, plaintiff's decedent was guilty of such contributory negligence as would prevent a recovery for his injury and death. 3 Elliott, Railroads (2d ed.) sec. 1169; 2 White, Personal Injuries, sec. 1028; *Howard v. Kansas City, F. S. & G. R. Co.*, 41 Kan. 403. It was not the duty of the flagman or switchmen to examine the train at the crossing to determine that pedestrians had not placed themselves in a position of danger. *Hudson v. Wabash W. R. Co.*, 101 Mo. 13; *Atchison, T. & S. F. R. Co. v. Cross*, 58 Kan. 424.

In *Bird v. Flint & P. M. R. Co.*, 86 Mich. 79, the court said: "A train standing upon a highway, with an engine attached, is of itself notice of danger; and, in the absence of a special assurance on the part of the defendant to one desiring to cross that he may safely do so, so far as any movement of the train is concerned, he assumes all the risks. To attempt to cross, in the absence of such assurance, is gross negligence."

In *Jones v. Illinois C. R. Co.*, 104 S. W. (Ky.) 258, it was said: "It may be conceded that appellant, as well as

the general public, had a right to use this crossing, and that the company might be guilty of a nuisance in obstructing it for an unreasonable length of time; but under the facts of this record these rights and obligations did not relieve the appellant of the duty of exercising ordinary care for his own safety or fix responsibility on the company for injuries received by his gross contributory neglect. When a train of cars is standing temporarily, as these were, on a crossing, and there is a live engine nearby or attached to the train, liable to move them at any moment, persons who desire to cross the track do so at their own peril if they make the attempt by going under, climbing over, or passing between the cars; and the company will not be liable for injuries received by them unless their dangerous condition is discovered in time to prevent accident. The presence of cars and an engine, either attached to them or in the immediate vicinity for the purpose of moving them, is such an obvious warning of danger to adult persons attempting to cross under, over, or between them that to do so is gross negligence, and there can be no recovery for injuries received under circumstances like these."

We are of opinion that the great weight of authority is such that the trial court should have directed a verdict for the defendants. The judgment is therefore reversed and the cause is remanded to the district court for further proceedings.

REVERSED.

ROSE, J., not sitting.

ALZINA CRITCHFIELD, ADMINISTRATRIX, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JANUARY 15, 1916. No. 18504.

Street Railways: ACTION FOR DEATH: CONTRIBUTORY NEGLIGENCE. Plaintiff's decedent, a young business man who lived in the city of Omaha and was familiar with the operation of street cars, stepped from a north-bound moving car opposite the termination of Templeton street. He immediately went around the back end of the car from which he had alighted and started to cross a parallel track without looking or listening for an approaching car. He came in contact with, and was killed by, a south-bound car which is alleged to have been running at an excessive rate of speed on the parallel track. *Held*, that he was guilty of contributory negligence precluding a recovery.

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

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

Matthew Gering and *Sutton, McKenzie, Cox & Harris*, *contra.*

BARNES, J.

This was an action by the administratrix of the estate of Harlon Critchfield against the Omaha & Council Bluffs Street Railway Company to recover damages alleged to have been sustained by the widow and next of kin by the killing of plaintiff's decedent. A trial in the district court for Douglas county resulted in a verdict for the plaintiff for $6,000, upon which the court rendered a judgment, and the defendant has appealed.

The record before us discloses that on the night of October 3, 1912, Critchfield, who was familiar with the movements of street cars, became a passenger on one of defendant's cars north-bound at Twenty-fourth street and Ames avenue in the city of Omaha, intending to alight at

the intersection at the north side of Templeton street, which street does not cross Twenty-fourth, but terminates at the east side of that street. As the car approached the north line of Templeton street, while it was still running at a speed of from two to six miles an hour, and before it reached the regular stopping place, Critchfield got off from the moving car and immediately went west around the south end of the car without looking or listening for the approach of the south-bound car, with which he came in contact, on a parallel track. The projection at the end of the front vestibule struck his head. The impact threw him back to the southeast and just across the north-bound track. He was taken to a hospital, where he died without having fully recovered consciousness.

The witnesses who saw the accident do not materially differ in their testimony in any important particular.

It was admitted by defendant that Critchfield received a wound on the frontal bone of the head over the right eye, which resulted in a complex fracture; the skull was crushed, such as could only result from a terrific impact. The fracture extended towards the right jaw and caused a counter fracture at the base of the brain. He had an injury on the back of his right hand and was unconscious most of the time until his death in November. There was a contused wound, not an abrasion, upon the inside of the left leg about eight inches above the heel.

It clearly appears that this is not a case where the car on which Critchfield was a passenger had come to a stop at the usual place for discharging passengers. Neither is it a case where one car was passing another car which had come to a stop and was in the act of discharging its passengers. It is a case where a passenger got off a moving car while it was opposite the termination of a city street, and at a time when the car from which he alighted was running at a speed of from three to six miles an hour.

The record shows that Critchfield's actions were such as to establish a clear case of contributory negligence on his part, which was the proximate cause of his death.

In *Doty v. Detroit Citizens' Street R. Co.*, 129 Mich. 464, it was said: "It is apparent that by a moment's delay, allowing the car which he had just left time to move forward, the plaintiff would have a view of the track which would enable him to see any approaching car. It is also evident, if he had exercised ordinary care before attempting to step upon the track upon which the car was approaching which injured him, he would have seen the car. Upon the facts as disclosed by his own testimony, he was guilty of contributory negligence, and the court properly directed a verdict in favor of defendant."

In *Deane* v. *St. Louis Transit Co.*, 192 Mo. 575, it was said: "The unfortunate accident in this case would easily have been avoided if the deceased had taken the slightest care to prevent it. Instead of doing so, he walked onto the track, or so close to it as to be injured, without looking for an approaching car, but with his eyes fixed in an opposite direction, and, as some of the witnesses say, reading his paper while he walked. The conclusion is irresistible that the deceased was guilty of contributory negligence which cuts off a recovery, even though the defendant could properly, under the evidence in the case, be said to have been guilty of negligence, for there is no evidence whatever of any recklessness or wantonness in the case. It follows that the judgment of the circuit court must be reversed."

In *Shuler v. North Jersey Street R. Co.*, 75 N. J. Law, 824, it was stated that the plaintiff alighted from a car, passed around the rear platform, and was struck by the corner of the fender of a car approaching at an excessive speed on the other track, just as he reached the nearest rail of that track. He looked for the approaching car just as he was struck. The trial court allowed plaintiff to recover, but the appellate court reversed this judgment, saying: "The excessive speed of the car is persuasive of

negligence on the part of the defendant, but we fail to see how it relieves the plaintiff of the charge of contributory negligence for not looking, or for not waiting until the obstruction to his vision by the car from which he had alighted was removed. The speed of the car in no way prevented him from seeing its approach, and the faster it was going the less excuse he had for advancing in a direction across its track. If it were going so fast that the motorman obviously did not intend to respect his right, he would have been guilty of negligence in attempting to cross."

Plaintiff strenuously contends that the defendant was negligent in not sounding the gong on the car with which Critchfield came in contact. As to that question, several witnesses testified that the gong was sounded, while others stated that they did not hear it sounded. This evidence should not prevail over the positive statements of disinterested witnesses who testified that they heard the gong sounded.

The cases cited by plaintiff in support of the right of recovery are distinguishable from the facts in the case at bar.

In conclusion, we are satisfied that the record discloses such contributory negligence on the part of Critchfield that there should be no recovery in this case. The trial court, therefore, erred in overruling defendant's motion for a directed verdict. The judgment of the district court is reversed and the cause is remanded.

REVERSED.

MORRISSEY, C. J., dissenting.

LETTON, J., not sitting.

NYE-SCHNEIDER-FOWLER GRAIN COMPANY, APPELLANT, V. MICHAEL HOPKINS ET AL., APPELLEES.

FILED JANUARY 15, 1916. No. 18126.

1. **Deeds:** FORFEITURE OF TITLE. Where a contract, under which the title to an elevator site was conveyed to a grain dealer for the erection of an elevator, contains the provision that, "in case the elevator burns or is otherwise destroyed," grantee "will rebuild the same within a reasonable time, or, failing to thus rebuild, reconvey the real estate" to the grantor, the title of the grantee cannot be forfeited for not rebuilding, until the lapse of a reasonable time after the destruction of the elevator.

2. ———: ———. Where land is conveyed by a deed containing the provision that, in case of the destruction of a building thereon and the failure of the grantee to rebuild within a reasonable time, the grantee shall reconvey the land to the grantor, grantee does not lose title by forfeiture during an extension of time duly granted for rebuilding purposes.

3. ———: AGREEMENT TO RECONVEY: WAIVER. The right of a corporate grantor to demand a reconveyance of land in the event of a breach of an agreement by grantee to rebuild an elevator thereon within a reasonable time after its destruction by fire may be waived without the formalities essential to the execution of a deed conveying real estate.

4. **Principal and Agent:** CONTRACT BY AGENT: ACCEPTANCE OF BENEFITS. "A principal who accepts the benefits of a contract executed in his behalf by an agent is chargeable with the instrumentalities employed by the latter in procuring it." *Tylee v. Illinois C. R. Co.*, 97 Neb. 646.

5. ———: ———: ———. "A principal will not be permitted to adopt the beneficial part of an unauthorized contract made by his agent and reject the remainder." *Farmers & Merchants Bank v. Farmers & Merchants Nat. Bank*, 49 Neb. 379.

OPINION on motion for rehearing of case reported in 98 Neb. 512. *Former judgment of affirmance vacated, and judgment of district court reversed, with directions.*

ROSE, J.

This is an action to quiet title to an elevator site in Omaha. The real parties to the controversy are Nye-Schneider-Fowler Grain Company, plaintiff, and the Chicago Great Western Railroad Company, defendant. The action involves the title to land conveyed to plaintiff by the Omaha Grain Terminals company, a subsidiary of defendant, pursuant to a contract executed March 1, 1906. According to that contract, plaintiff agreed to construct upon the site in dispute an elevator with a capacity of 750,000 bushels. Defendant promised to construct switch tracks and to furnish to the elevator as long as it "shall be operated by the Nye-Schneider-Fowler Company or by any company controlled by said Nye-Schneider-Fowler Company" a "free in-switch." It was further provided: "The Nye-Schneider-Fowler Company hereby agrees that, in case the elevator burns or is otherwise destroyed, it will rebuild the same within a reasonable time, or, failing to thus rebuild, reconvey the real estate to the Terminals company." The elevator was constructed and operated by plaintiff until destroyed by fire. Upon its completion the site was deeded to plaintiff. The elevator has not been rebuilt. Defendant claims the land by reason of the forfeiture clause quoted, and asks for a decree quieting the title in its name. Plaintiff insists that the period for rebuilding the elevator was extended by defendant until the contract of March 1, 1906, was canceled by a subsequent agreement. The trial court quieted the disputed title in defendant. Plaintiff appealed and the judgment was affirmed. *Nye-Schneider-Fowler Grain Co. v. Hopkins,* 98 Neb. 512. A rehearing was granted upon motion of plaintiff and the cause has been reargued.

During the former argument on the appeal, it was conceded that the controversy should be treated as if the parties to the transactions were the plaintiff and the defendant as already described herein. *Nye-Schneider-Fowler Grain Co. v. Hopkins,* 98 Neb. 512.

Plaintiff argues that defendant waived and released the right to insist upon a reconveyance of the land. The fire occurred April 3, 1910. The grain in the elevator continued to burn for several months thereafter, and the work of rebuilding was practically impossible during that time. Plaintiff's president and manager testified that it would have taken at least a year to rebuild the elevator under favorable conditions. He had written defendant's officers in 1910, "We would very probably not rebuild our Omaha elevator;" but he also testified that no decision in the matter had been reached, and that the question was being kept open until certain matters concerning the grain market at Omaha were settled. John W. Blabon, vice-president of defendant in charge of traffic, wrote plaintiff August 15, 1910:

"In conversation with Mr. Berry prior to his visiting Omaha I said to Mr. Berry that we desired to impress you with our disposition to grant you reasonable time in which to rebuild on our terminals, which meant that if conditions were not favorable to your rebuilding at once the question could go over until another year."

In the same letter Blabon expressed a desire for an arrangement which would avoid the burden of the "free in-switch." This privilege of plaintiff was an expensive and troublesome obligation of defendant. The principal purpose of the latter in carrying on the negotiations was relief from this condition of affairs. Plaintiff had not decided to rebuild, but desired to lease from defendant an independent elevator. The privilege of a free in-switch applied alone to the elevator operated by plaintiff on the site in controversy. Blabon, the vice-president of defendant in charge of traffic, sent the following telegram to plaintiff July 24, 1911:

"If we could both agree on canceling the contract of March, 1906, both interests relinquishing all rights thereunder, we might entertain leasing you independent house for one year at rate of ten thousand, you to undertake to give us at least two thousand cars for Chicago and

Minneapolis. * * * This would mean disregard of any land proposition as partial or whole payment and leave you free to negotiate this with others."

Plaintiff answered, offering to pay a rental of $6,000, and refusing to guarantee tonnage. Blabon, July 25, 1911, replied:

"We feel that the rental you propose is inadequate and that other inducements to turning the house over to you exclusively are too indefinite. * * * Mr. Somers plans to be in Omaha tomorrow and you can discuss matter with him, and, if necessary, I will spend Thursday there as I propose to dispose of the matter one way or the other this week."

Somers was the general freight agent of defendant. July 27, 1911, he met with officers of plaintiff, and a memorandum was drawn up and approved, leasing the independent elevator to plaintiff as the second party for one year from July 15, 1911, for a rental of $8,000. It provided for the payment of switching charges on cars both in and out of the terminal, and contained the following stipulations:

"A certain contract between first party and allied interests on one hand and second party on other, dated March, 1906, to be canceled by both, both interests relinquishing all rights thereunder. The second party's land to be freed to it, and if necessary quitclaim deed to pass to confirm title in second party."

Somers wrote to plaintiff August 8, 1911, stating that in agreeing to the provision just quoted he had exceeded his authority and that the agreement of March 1, 1906, could be canceled only by resolution of the board of directors of the Terminals company. He also said: "All of the other provisions in our memorandum of agreement will be carried out substantially as outlined. * * * We will at once publish a tariff assessing an in-switching charge, and as to what effect this will have on the agreement is mere conjecture." A tariff with an in-switching charge was in fact published by defendant, contrary to the terms

of the contract of March 1, 1906. October 6, 1911, a formal lease for the independent elevator for one year at a rental of $8,000 was executed as of date July 15, 1911, conforming to the memorandum of July 27, 1911. In returning the executed lease, plaintiff inquired, referring to the memorandum of July 27, 1911, regarding the cancelation of the contract of March 1, 1906: "When will the quitclaim deed be ready?" Plaintiff's president testified that there were no negotiations subsequent to the memorandum of July 27, 1911. The lease was executed without substantial variance from the memorandum of that date.

To prevent the quieting of title in plaintiff, defendant urges the following propositions: Somers had no authority to agree to cancel the contract of March 1, 1906. The memorandum was not a contract. Defendant had title to the land. It could not be conveyed except under the direction of the board of directors of the Omaha Grain Terminals company. The position thus taken does not seem to be tenable. When the deed was delivered to plaintiff upon completion of the elevator, the title vested in plaintiff, subject to reconveyance on the terms specified in the contract of March 1, 1906. The title remained in plaintiff, subject to forfeiture, if it failed to rebuild the elevator within a reasonable time after its destruction. What was a reasonable time depended upon the circumstances. The conduct of the parties is evidence of what they considered to be a reasonable time. By its acts or agreements defendant could extend the period for rebuilding the elevator. The letter of its vice-president, August 15, 1910, amounted to an extension for one year, even if the circumstances indicated a shorter term; but it is not shown that a reasonable time for rebuilding had expired. On the contrary, the record shows that defendant considered that the title remained in plaintiff. Correspondence leading to the memorandum of July 27, 1911, indicates this. Had plaintiff forfeited its rights under the contract of March 1, 1906, defendant would be under no obligation to furnish plaintiff a free in-switch. The evidence shows,

as already intimated, that the purpose of defendant in conducting the negotiations terminating in the memorandum of July 27, 1911, was to be relieved from the liability to furnish free switching facilities. There was no forfeiture of plaintiff's title to the elevator site. The title was in plaintiff, and not in defendant. The latter's interest was a mere right to a reconveyance in case plaintiff did not rebuild the elevator within a reasonable time. The waiver thereof did not require a conveyance of real property or the formalities incident to such a transaction. An authorized agent may agree to cancel or waive such a right. *St. Clair v. Rutledge,* 115 Wis. 583.

Plaintiff insists that Somers had authority to cancel or waive any existing right to a reconveyance; but, even if this position is untenable, defendant ratified his acts by accepting benefits secured thereby. Somers was the general freight agent of defendant. Blabon was vice-president in charge of traffic. In-switching is a branch of that subject. Somers was acting under the direction of Blabon, and the agreement made by the former contained the general terms which Blabon had suggested to plaintiff. The main purpose of Blabon was to relieve his principal from a costly obligation to furnish switching services without charge. This purpose was accomplished through the memorandum made by Somers. Pursuant to its terms defendant published a tariff requiring plaintiff to pay the regular charges for in-switching. Plaintiff executed the lease for the independent elevator in accordance with the terms of that memorandum and delivered it to defendant with the understanding that plaintiff should have a quit-claim deed to the property in controversy. If Somers was without actual authority to represent defendant in canceling the contract of March 1, 1906, his principal, by knowingly adopting his acts and by retaining the benefits thereof, is bound by his agreements. The rules are:

"A principal who accepts the benefits of a contract executed in his behalf by an agent is chargeable with the in-

strumentalities employed by the latter in procuring it." *Tylee* v. *Illinois C. R. Co.*, 97 Neb. 646.

"A principal will not be permitted to adopt the beneficial part of an unauthorized contract made by his agent and reject the remainder." *Farmers & Merchants Bank v. Farmers & Merchants Nat. Bank*, 49 Neb. 379.

For the reasons stated, the judgment of affirmance is vacated, and the judgment of the trial court is reversed, with directions to enter a decree quieting in plaintiff the title to the land in controversy.

REVERSED.

MORRISSEY, C. J., dissents for the reasons stated in the former opinion.

HAMER, J., dissents.

LAVILLA J. BURTLESS, APPELLEE, V. MCCOOK IRRIGATION & WATER POWER COMPANY, APPELLANT.

FILED JANUARY 15, 1916. No. 18493.

Waters: IRRIGATION: DISCRIMINATION. The evidence examined and referred to in the opinion *held* insufficient to sustain any recovery by plaintiff.

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

C. E. Eldred, for appellant.

W. S. Morlan, contra.

FAWCETT, J.

The defendant, a corporation organized under the laws of this state, has for more than 20 years been engaged in the business which its name implies, and plaintiff is the owner of land lying under its irrigation canal and within

the territory which can be successfully irrigated by water therefrom. On January 30, 1912, plaintiff instituted this suit in the district court for Red Willow county. Her petition recites that the usual charge made by defendant for perpetual water rights has been at the rate of $6.25 an acre; that she applied to defendant for a perpetual water right and offered to pay defendant the full rate and charge exacted and demanded of owners and holders of perpetual water rights, for use of water; that defendant wrongfully refused to accept plaintiff's application equally and without discrimination as compared with other users of water of said canal, but unjustly and unreasonably demanded of plaintiff the sum of $35 an acre for such perpetual water right; that the sum demanded is unlawful, unreasonable and discriminatory. Her prayer is that she be decreed to be entitled to a perpetual water right for 42 acres of land upon bringing into court and paying defendant therefor the sum of $208, and that defendant be enjoined from discriminating against her by charging and demanding more from her than from other consumers under its canal, and from making and demanding other than uniform rates governing the delivery of water from its canal for irrigation purposes, and for general relief. The district court found for plaintiff as to her right to maintain the suit, and decreed that she have a perpetual water right for the land described in her petition upon bringing into court and paying to defendant for such water right $500, and enjoined defendant as prayed in the petition. Defendant appeals.

The petition and answer both proceed upon the theory that the regulation of perpetual water rights is a matter within the jurisdiction of the state railway commission. The petition alleges that defendant has never had rates fixed or determined by the state railway commission or by any tribunal, board or public officer whatever. The answer alleges that on September 11, 1911, defendant filed with the state railway commission its schedule of rates and charges as fixed by it for water furnished, sold and deliv-

ered under both permanent water rights and for rental service; that such schedule was approved by the railway commission and ever since has been in full force and effect. In determining this appeal, we deem it unnecessary to consider the question of the jurisdiction of the state railway commission to determine the price which a corporation, such as defendant, may charge for the sale of its perpetual water rights. Regardless of that question, plaintiff has not sustained her allegations of unjust or discriminatory action by the defendant. The record shows that prior to April 7, 1911, defendant had no established or settled rate for the sale of perpetual water rights, but sold such rights from time to time in a manner which indicates that such sales were made to meet then existing conditions. From the time of its organization down to the date just named it made sales of perpetual water rights at rates ranging from $6.25 to $20 an acre. On that date, at a meeting of the water committee of defendant at the secretary's office, it was unanimously voted to sell no more perpetual water rights at a price less than $35 an acre and to furnish no water under lease at a less price than $3.50 an acre. The record shows that since the taking of such action these rates have been strictly adhered to, and all sales of perpetual water rights have been made at $35 an acre.

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

REVERSED AND DISMISSED.

SEDGWICK, J., not sitting.

ISAIAH H. WASSON, APPELLEE, V. MCCOOK IRRIGATION & WATER POWER COMPANY, APPELLANT.

FILED JANUARY 15, 1916. No. 18494.

The syllabus in *Burtless v. McCook Irrigation & Water Power Co.*, *ante*, p. 250, applied to this case.

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

C. E. Eldred, for appellant.

W. S. Morlan, contra.

FAWCETT, J.

This suit is an exact counterpart of *Burtless v. McCook Irrigation & Water Power Co., ante,* p. 250, except that it seeks to recover a perpetual water right for 160 acres of land upon the payment of $1,000. The cases were tried upon substantially the same pleadings and evidence and are governed by the same rules of procedure. It follows that our judgment in that case must control this.

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

REVERSED AND DISMISSED.

SEDGWICK, J., not sitting.

LUCIE BODIE, APPELLEE, V. EDWARD BATES, APPELLANT.

FILED JANUARY 15, 1916. No. 19146.

1. **Divorce:** JURISDICTION. In the state of Arkansas, divorce and all incidental questions, including alimony and matrimonial causes, are not subjects of equitable jurisdiction. In such cases the courts of that state have no other powers than those expressly conferred by the statute. *Bowman* v. *Worthington,* 24 Ark. 522.

2. ———: PROPERTY RIGHTS: STATUTES: CONSTRUCTION. Sections 2681, 2684, Kirby's Digest of the Statutes of Arkansas, set out in the opinion, examined, and *held,* that section 2681 applies to cases where a husband obtains a decree of divorce against his wife, and section 2684 to cases where the decree is granted to the wife against her husband.

3. ———: ———: ———. Section 2684, Kirby's Digest of the Statutes of Arkansas, examined, and *held* to expressly determine just what interest a wife shall take in both real and personal property

of her husband where she is granted a divorce, and that under that statute the Arkansas court could not have vested in plaintiff in this suit, who was defendant there, an interest for life, or other interest, in the land of which her husband was then seised located in Nebraska.

4. ———: ALIMONY. The pleadings and decree of the court of chancery in Arkansas examined, and *held* to have allowed plaintiff, as alimony, the sum of $2,611, and no more; and that such sum was the amount which she was entitled to receive out of the estate of defendant, located in the state of Arkansas.

5. **Judgment:** RES JUDICATA. "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit." *Russell v. Place*, 94 U. S. 606.

6. ———: ESTOPPEL. "The general principles governing the pleading and proof of former judgments as estoppels are now quite well settled by so long a line of authorities that it is useless to review them. Generally speaking, in order that a judgment in one action shall operate as an estoppel in a second action, it must be made to appear, not only that there was a substantial identity of issues, but that the issue as to which the estoppel is pleaded was in the former action actually determined." *Slater v. Skirving*, 51 Neb. 108.

7. **Divorce:** ALIMONY. The evidence in the record, taken in connection with the pleadings and decree in the chancery court of Arkansas, and the then value of the real estate owned by defendant in the state of Nebraska, *held* to conclusively show that the court of chancery in Arkansas did not take the Nebraska land into account in fixing the amount of alimony allowed plaintiff.

8. **Estoppel:** INCONSISTENT CONTENTIONS. A party cannot in one litigation insist that the court has no jurisdiction of specified property and succeed in that contention, and afterwards in another litigation with the same party insist that the court did have jurisdiction of that particular property and should have adjudicated it in the former action contrary to his contention there made, and so defeat an adjudication thereof entirely.

9. **Divorce:** ALIMONY: JURISDICTION. The Arkansas court being without jurisdiction to take the Nebraska land into account in fixing the amount of alimony allowed plaintiff, and having for that rea-

son refused so to do, its judgment was right, and an appeal therefrom would have been unavailing.

10. ———: ———: FOREIGN JUDGMENT: FULL FAITH AND CREDIT. The contention that the decree in this case does not give full faith and credit to the judgment of a sister state is without merit.

11. **Former Opinion:** LAW OF THE CASE. The opinion on the former hearing in this case, 95 Neb. 757, in so far as it is applicable to the facts now appearing in the record, is adhered to as the law of the case.

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

Field, Ricketts & Ricketts, W. L. Kirkpatrick and *J. Wythe Walker,* for appellant.

S. P. Davidson and *Gilbert Brothers, contra.*

FAWCETT, J.

On the first trial of this cause in the district court for York county, a general demurrer to the petition was sustained and plaintiff appealed to this court. We found that the petition stated a cause of action, and the judgment was reversed and the cause remanded for trial. 95 Neb. 757. The trial in the district court after the case was remanded resulted in a decree in favor of plaintiff for $10,000 alimony. Defendant appeals.

Our former opinion contains quite a full recital of the troubles of plaintiff and defendant, while husband and wife, and a sufficient statement of the issues involved in this suit. The parties were divorced March 2, 1911, in the court of chancery in Benton county, Arkansas, and plaintiff, by the decree in that case, was restored to her maiden name of Bodie, which accounts for the difference in the names of the parties in the present suit. As reference will frequently be made in this opinion to the parties as they appear in the Arkansas suit and as they appear in the present suit, we will, for the purpose of avoiding any confusion as to the parties, refer to the plaintiff in this suit, who was the defendant in the Arkansas court, as "Bodie" and to her former husband, defendant in this suit, as

"Bates." In the Arkansas court Bates instituted the suit for divorce, alleging infidelity and other misconduct. Bodie denied the allegations of the petition and prayed for a decree of divorce in her favor. She alleged the property of Bates in Arkansas, and also alleged that he was the owner of real estate in Nebraska of the value of $48,000, and prayed judgment and alimony. Bates and his counsel there contended on the trial of that suit that, under the law of Arkansas, the court in fixing the amount of alimony could not take into consideration the Nebraska land and allow the wife alimony on account of the value of such land. This contention was sound. The rule is settled in Arkansas that "in divorce cases the court of equity must look to and be governed by the statute, and cannot exercise inherent chancery powers not provided by the statute." *Ex parte Helmert,* 103 Ark. 571. "Where by statute jurisdiction over particular subjects of equity is conferred, or given to common law courts, the entire body of law administered in the equity courts of this country attaches; but the subject of divorce and all incidental questions, including alimony and matrimonial causes, are not subjects of equitable jurisdiction; and in such cases the courts have no other powers than those expressly conferred by the statute." *Bowman v. Worthington,* 24 Ark. 522. See, also, *Thomas v. Thomas,* 27 Okla. 784.

In our former opinion we determined (p. 762): "An examination of the Arkansas statute above set out shows that in that state no provision is made authorizing a money judgment as alimony. The law expressly declares just what interest the wife shall take in both the real and personal property of her husband, where she is granted a divorce. As to real estate, the provision is that she shall be entitled to 'one-third of all lands of which her husband is seised of an estate of inheritance at any time during the marriage for her life, unless the same shall have been released by her in legal form.' It will not, of course, be contended by any one that under that statute the Arkansas court could have vested in Mrs. Bates, for life, one-third

of the lands of which her husband was then seised located in Nebraska. That provision unquestionably refers to lands situated within the jurisdiction of the court." We also decided (p. 763): "It is clear, therefore, that as to the Nebraska land, the rights of the parties were not adjudicated in that action." There is some contention now that our former decision as to the effect of the Arkansas statute, and as to the fact that the Arkansas court did not allow alimony on account of the York county land, should not be considered as the law of the case because of the evidence which was introduced upon the trial from which this appeal is taken. The Arkansas statute referred to in the opinion, so far as it is pleaded and proved in the case, reads as follows: "And where the divorce is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and the wife so granted a divorce against the husband shall be entitled to one-third of the husband's personal property absolutely, and one-third of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form." Kirby's Digest, sec. 2684. The record now shows that there is a prior section of the statute of Arkansas which provides: "When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." Kirby's Digest, sec. 2681. Can these two sections of the statute be construed together, or must they be distinguished and construed to apply to different conditions or situations? That they cannot be construed together is apparent upon their face, for they are directly contradictory. The statute first above quoted, which prescribes specifically what shall be allowed the wife as alimony when

she is "so granted a divorce against the husband," is a later statute than section 2681, above quoted. Section 83, p. 936, 1 R. C. L., shows very clearly why section 2681 was enacted by the Arkansas legislature, viz.: "According to the rule of the common law, where a divorce was granted for the misconduct of the wife, she was not entitled to alimony. This was productive of so much hardship, however, and so frequently left her a prey to starvation or a life of shame, especially where her own property had become vested in her husband by reason of the marriage, that statutes have been enacted in England and a number of the United States authorizing the courts to make such an allowance of alimony in favor of a guilty wife as the surrounding circumstances may justify." Two of the states cited in this text are Arkansas and Oklahoma.

In *Ecker v. Ecker*, 22 Okla. 873, we have a discussion of this identical section, viz.: "The second assignment of error urged is to that part of the master's report recommending that defendant be awarded, and to that part of the judgment awarding to defendant, one-half of plaintiff's property or one-half of its value. At common law a delinquent wife, on account of whose conduct the husband obtained a divorce, was not entitled to receive alimony, but in a number of the states, including the state of Arkansas, from which state the statutes in force in the Indian Territory were adopted, the common law has been modified by statute. The statute governing in this case reads: (The section of the statute quoted in the opinion is a verbatim copy of 2681, Kirby's Digest, under consideration in this case.) Under the language of this statute, or similar language of the statutes of other states, the courts have held that the authority of the court to make orders touching the alimony of the wife is not limited to those cases in which she prevails, or that whether the guilty wife will be granted alimony and the amount thereof is within the discretionary power of the court, to be controlled by the circumstances of each case. (Citing cases.) It is, however, a discretion that a court should at all times

exercise with a great care, and it should not be exercised in favor of the guilty wife when there are no mitigating circumstances. In the case at bar the wife is guilty of gross misconduct, but the husband has not been free from fault. The finding of the master is that the conduct of each party toward the other has been such as to render their living together as husband and wife intolerable. There is nothing in the master's report as to whom he finds the more culpable, except that he recommends that the husband be granted a divorce." The trial court ordered an equal division of the property or that defendant have judgment for one-half of the value of the same. This judgment was held erroneous, the holding being based on section 2568, enough of which is set out to show that that section is a duplicate of section 2684 in this case.

In *Pryor v. Pryor,* 88 Ark. 302, it is said: "The first question presented is whether or not the chancery court had jurisdiction to decree an allowance of alimony to a guilty wife against whom a decree for divorce was granted." The court then quotes from 2 Nelson, Divorce and Separation, sec. 907, where the question of the allowance of alimony to a wife, when the husband has obtained a divorce, is discussed along the same lines as the discussion in 1 R. C. L., above cited. The court then say: "A statute of this state provides that." The court here quotes section 2681, Kirby's Digest, and then adds: "Similar statutes in other states have been construed to have enlarged the powers of courts in divorce cases so as to empower them to allow alimony in any case, even to a guilty wife."

The above authorities clearly show just what the legislature intended when it enacted section 2681, viz.: That this section was enacted in order to permit the chancery courts of the state to award alimony to the wife in cases where the divorce was obtained at the suit of the husband on account of her misconduct. In such cases the legislature very properly left it to the court to make "such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties

and the nature of the case shall be reasonable." But when, later on in the act, the legislature considers the question as to what a wife shall be entitled to receive when a divorce is granted to her against her husband for his wrongdoing, they enacted section 2684, above quoted. Otherwise, why do they use the language "where the divorce is granted to the wife," and the further expression, "and the wife so granted a divorce against the husband shall be entitled," etc. It is clear that the purpose of the legislature was that the amount which the wife should receive in such a case should not be enshrouded in any uncertainty by leaving it to the discretion of the court to say what should be a reasonable allowance to her, but fixed the amount, definitely, as to both the real and personal estate. There is nothing ambiguous in this section of the statute. Its terms are too plain to be misunderstood. It is clear, therefore, that the allegation in the petition in this suit that section 2684 of Kirby's Digest was the only statute in force in Arkansas, at the time of the trial of the suit there, which provided for the allowance of alimony in a case where a divorce was granted to the wife as against the husband is a correct statement of the law. Section 2681 has no application whatever to such a case. In this manner, and in no other, can effect be given to each of the two statutes under consideration. It will be seen that the allowance of alimony to the wife, when a divorce is granted for her fault, rests upon an entirely different basis than when the divorce is granted in her favor, and it is common in the United States, as above shown, to make that distinction by statute. There can be no doubt, therefore, that the general rule that a specific statute on a given subject will control as against a general statute that might include the same subject in the absence of a specific statute applies here, and that the statute quoted in our former opinion, being section 2684, controls the courts of Arkansas in all cases where a divorce is granted in favor of the wife. In such case the court is required to divide the personal property, to give her one-third thereof "abso-

lutely," and to give her a life estate of one-third of the husband's lands. The Arkansas court could not secure to the wife the use of real estate outside of the jurisdiction of the court.

In *Wood v. Wood,* 59 Ark. 441, 452, it is said: "Appellant did not undertake to show, in her original or amended bill for divorce, that she was entitled to the benefits of the act of March 2, 1891. Her original bill was filed before it was passed, and it was not amended thereafter in that respect. For the purpose of showing that she was entitled to considerable alimony, she alleged in the original bill that the defendant was not worth less than $200,000, but did not say in what his estate consisted, or that it was within the jurisdiction of the court. No information is given to show that the court had the jurisdiction, by reason of the quality and location of the property, to set apart to her one-third of it under the act. It might have been real estate situate in another state. Nothing appears in the record, outside of the evidence, to show that the court committed an error of law in failing to divide the estate of the husband in accordance with the act."

We are unable to read that language of the court and reach any other conclusion than that the law of Arkansas limits the jurisdiction of a court of chancery in fixing alimony in a divorce case to property within the jurisdiction of the court. There was, then, just ground for the contention in the Arkansas court that that court had no jurisdiction to allow the wife alimony on account of the real estate of the husband in Nebraska. Was such a contention made? It is conceded, and the record before us clearly shows, that defendant did, with the help of able counsel, strenuously contend in the Arkansas court that that court could not in that case allow alimony to Bodie on account of the Nebraska lands. And the record also shows that the court did not in fact make any allowance on account of the Nebraska lands. It is shown by the overwhelming weight of the evidence before us that the Arkansas court allowed Bodie $5,111 "in full of alimony

and all other demands set forth in the cross-bill." The only demand set forth in the cross-bill, outside of alimony, was the restoration to her of $2,500 which she had loaned to Bates when they were living together as husband and wife. Deduct this sum from $5,111, and it will be seen that the total amount allowed for alimony was $2,611. Under the admissions of Bates and the uncontradicted evidence, he, at the time of the divorce trial, owned personal property and notes and mortgages within the jurisdiction of the Arkansas court, amounting in the aggregate to $7,000, and a house and lot, also within the jurisdiction of the court, worth $2,500. Under the statute Bodie was entitled "absolutely" to one-third of the $7,000 of personal property, or $2,333.33. She was also entitled to the present value of a one-third interest for life in the house and lot. If we figure that life interest at only $278, it would make her statutory interest in the property of Bates, situated in Arkansas $2,611, being the sum allowed as alimony by that court. Hence, it is idle to say that the chancellor considered the Nebraska land in fixing the amount of alimony. If he "considered" it, he considered it only to the extent of determining that he had no jurisdiction to take it into account in fixing the amount of alimony. It would be a travesty, not only upon the law, but upon the commonest principles of justice, for us to hold that the chancellor, when he decided the divorce case and allowed Bodie $2,611 of alimony, took into consideration personal property of the value of $7,000 and real estate to the value of $2,500, located within the jurisdiction of his court, and also took into consideration the value of real estate in this state which the decree before us finds was worth $40,000 at the time the chancellor in Arkansas tried that case. If, in addition to the property within his jurisdiction, he had also taken into account the present value of an estate for life in one-third of land in Nebraska, worth $40,000, the amount which he would have been compelled to allow would have far exceeded the value of all the property which Bates owned in

Arkansas at that time. If he took into consideration the land in Nebraska, he was bound to consider it in the light of the law of Arkansas which would require him to allow her a life estate of one-third interest in the Nebraska land. He allowed her, all told, $2,611. Further comment is unnecessary. *Res ipsa loquitur.*

From what has just been said, it will be seen that defendant succeeded in his contentions in the Arkansas court that that court was without jurisdiction, and prevented any allowance on account of the Nebraska land. He now, in this case, says that his contentions there were unwarranted, that the court did have jurisdiction, and by these inconsistent positions he insists that he has defeated the just claims of his wife. This, of course, he cannot be allowed to do.

In *Cross v. Levy,* 57 Miss. 634, it was held that a party who had agreed that a justice of the peace had jurisdiction of a case could not afterwards, as against the same party, contend that the justice did not have such jurisdiction. In *Long v. Lockman,* 135 Fed. 197, it was held that a party, who, in a suit in the district court of the Arkansas district, had alleged that the district court of the Colorado district had exclusive jurisdiction of the case and upon that contention had procured the case to be dismissed by the court of the Arkansas district, could not afterwards be heard to contend against the same party that the court of the Colorado district was without jurisdiction when sued in that district. The court said: "In my opinion, Williams in his lifetime was, and the administrator now is, estopped from denying that his residence was in Colorado when the petition herein was filed. * * * Every element of estoppel is in the evidence, and the evidence on that question is not in conflict. Williams, under oath, said his residence was in Colorado. He received the advantage from that oath. The petitioning creditors acted on it. They filed their petition here. They have incurred much expense by reason of that oath. It cannot now be controverted. * * * I pass those questions by, and hold that

this court has jurisdiction upon the grounds of estoppel. And that filing pleadings, offering evidence, making objections, obtaining rulings, and so forth, in one case, may be an estoppel in another case, see the following"—citing many cases. A party is estopped to deny facts pleaded to defeat jurisdiction of court. *Caldwell v. Morris,* 120 La. 879, 15 L. R. A. n. s. 423, and cases cited in note. He cannot in one litigation insist that the court has no jurisdiction of specified property and succeed in that contention, and afterwards in another litigation with the same parties insist that the court did have jurisdiction of that particular property and should have adjudicated it in the former action, and so defeat any adjudication thereof entirely.

Is the judgment in the Arkansas court *res judicata? Thomas v. Thomas,* 27 Okla. 784, construing an exactly similar statute, cites *Bowman v. Worthington, supra,* and quotes with approval the holding in that case above set out, and adds: "The trial court not possessing jurisdiction to entertain the question of the disposition of this property in the divorce proceeding, the same did not become *res adjudicata* by reason of that action, hence is left open for determination in this case."

Matson v. Poncin, 152 Ia. 569, holds: "A judgment to be available as an estoppel must have decided the particular matter involved in the later suit; it is not sufficient that the same question may have been determined."

In 1 Herman, Estoppel and Res Judicata, sec. 252, it is said: "The rule that estoppels must be certain to every intent, and precise and clear, is peculiarly applicable to estoppels by record and judicial proceedings; and, for this reason the record of a judgment must show with some degree of certainty the precise points determined, and not from inference or argument; and, where it gives no indications at all of what particular matters were adjudicated, it leaves the question unsettled, and is not available either as an estoppel or anything else, but merely evidence of its own existence. The conclusive effect of a judicial decision

cannot be extended by argument or implication to matters which were not determined. An estoppel by judgment is never inferred unless the basis on which it rests is such as to lead to the conclusion that the whole subject was litigated and adjudicated." See also, Wells, Res Adjudicata, sec. 223.

In *Packet Co. v. Sickles,* 72 U. S. 580, 592, it is said: "As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se,* it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

In *Russell v. Place,* 94 U. S. 606, the court, speaking through Mr. Justice Field, said: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have

been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered —the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

In *Mercer Co. v. City of Omaha,* 76 Neb. 289, the first paragraph of the syllabus holds: "The rule is well settled, both in this state and elsewhere, that a judgment is an estoppel only as to those matters actually in issue and tried and determined in the action in which it is rendered."

Finally, we cite *Slater v. Skirving,* 51 Neb. 108. The opinion in this case was by Mr. Commissioner Irvine. It shows a very careful consideration by that talented commissioner of a plea of *res judicata.* Beginning on the fourth line from the bottom of page 112, it is said: "The general principles governing the pleading and proof of former judgments as estoppels are now quite well settled by so long a line of authorities that it is useless to review them. Generally speaking, in order that a judgment in one action shall operate as an estoppel in a second action, it must be made to appear not only that there was a substantial identity of issues, but that the issue as to which the estoppel is pleaded was in the former action actually determined; and, where the record is uncertain, parol evidence is admissible to show what issues were determined in the former suit (citing case), and we think that, while the authorities are conflicting, their greater weight is in favor of the view that the burden of proof is upon the party pleading the estoppel to establish the fact of the adjudication by extrinsic evidence if necessary, and not upon the other party to show that an issue which might have been adjudicated was not."

Slater v. Skirving cast the burden in this case upon the defendant to sustain his plea by establishing the fact of the actual determination, in the former trial, of the issues involved here, and under the other authorities cited that proof must be clear to the extent of leaving no room for doubt.

Judge Humphreys, who presided at the trial of the case in Arkansas, was called as a witness in this case. He was interrogated as to whether he took into consideration any ownership or equity of Bates in the land in Nebraska. His answer was: "I think I did; it was my intention to cover the whole case." He stated that he was testifying from his best recollection, but a reading of his entire testimony will show that his recollection was not any too clear. Bates, himself, and Mr. Walker, his attorney at the Arkansas trial, both testified that the chancellor took the Nebraska land into consideration in determining the amount which should be allowed Bodie as alimony. This testimony is controverted by the testimony of Mr. Lindsey, Mr. Shannon, Judge McGill, and Judge Davidson, all of whom were present and participating in the trial as counsel for Bodie at the time the chancellor rendered his decision, and by Mr. Heaslet, clerk of the court of chancery in which the case was tried. These five witnesses all testified clearly and explicitly that the chancellor announced from the bench at the time he decided the case that he did not have jurisdiction over the Nebraska land, and could not consider the same. The four lawyers representing Bodie are gentlemen of high standing in the profession of the law, and, with the exception of Judge Davidson, have no present interest in the litigation. Mr. Heaslet was clerk of the court, and his testimony stamps him as a candid and truthful gentleman. There is nothing to show that he is in any manner interested in either of the parties to the suit, and it cannot be supposed that he would have any motive in giving testimony about a transaction in the court of which he was clerk, at variance with that given by his presiding judge. When you add to the

testimony of these five witnesses the fact that the court could not have taken the Nebraska land into consideration in making his allowance, as hereinbefore shown, the district court before which the suit at bar was tried could not have done otherwise than to credit the testimony of the five witnesses, corroborated by the facts so clearly shown, and discredit the testimony of the three witnesses to the contrary. Under the evidence above set out and the authorities cited, it is clear that the record now before us sustains the allegations in the petition which our former judgment held stated a good cause of action, and fully sustains every point decided in our former opinion. There is therefore no reason why that opinion should be departed from or in anywise modified.

It is urged that the failure of Bodie to prosecute an appeal from the decree of the Arkansas court is a bar to the present suit. For the reasons above stated, this contention is without merit. The Arkansas court being without jurisdiction to take the Nebraska land into account in fixing the amount of alimony, and having refused so to do, its judgment was right, and an appeal would have been unavailing. There was nothing to appeal from. Nor is there any merit in the contention that the decree in this case does not give full faith and credit to the judgment of a sister state.

On the trial of this case the learned trial court followed our former decision. He was fully justified under the evidence in doing so, and we cannot, without violating every principle of law and justice, reverse his judgment. If he erred at all, it was in not allowing Bodie more than $10,000.

The judgment of the district court dismissing the petition of intervention of the interveners is so clearly right that we shall not spend time discussing it.

The motion of plaintiff for an allowance of attorney's fees is overruled. The judgment of the district court is in all respects

AFFIRMED.

SEDGWICK, J., concurring.

No one denies that there was at least serious doubt as to the jurisdiction of the Arkansas court to give the wife anything on account of the Nebraska land. Their statutes expressly provided that, when the wife obtained the divorce, the court should give her one-third of the personal property and the use of one-third of the husband's real estate during her life. The court could not give her the use of real estate that was not within the jurisdiction of the court. That proposition was contested vigorously before the Arkansas court, the husband contending earnestly by his attorneys that the court could not give her anything on account of foreign land, and the court, as is demonstrated from the record, did not give her anything.

It appears conclusively from the record that the Arkansas court allowed her the money which she had loaned to the defendant, and the one-third of his personal property there in Arkansas, and the value of her life interest in the real estate that he had there. These items added together make the exact amount that the court allowed her, so that the record speaks for itself that the Arkansas court did not as a matter of fact give her anything on account of the York county land.

In *Cizek v. Cizek*, 76 Neb. 797, it was decided: "Under section 27, ch. 25, Comp. St. 1905, the district court has a continuing power, after a decree of divorce and alimony has been granted, to review and revise the provisions for alimony at its subsequent terms on petition of either of the parties." In the opinion the court said: "In the case at bar a good and sufficient reason is shown why the former decree for alimony should be modified. * * * Having demonstrated that the attempted adjudication of the court upon the question of alimony was nugatory and of no effect, he cannot now be heard to urge it is a final adjudication of the matter." So in this case the defendant on this trial insisted that the court could not give plaintiff anything on account of the Nebraska land. The

court did not give her anything. "He cannot now be heard to urge it as a final adjudication of the matter."

ROSE, J., dissenting.

The simple question presented by the appeal should have been determined as follows: An independent suit in equity to recover additional alimony based on defendant's ownership of land in Nebraska should be dismissed, where the uncontradicted evidence shows that plaintiff had procured a divorce and alimony in another state in a court having jurisdiction to consider the Nebraska land in awarding alimony, that both parties had appeared therein in person and by counsel, that each had asked for affirmative relief, and that the value of defendant's interest in the Nebraska land had been made the subject of pleading, proof and argument.

For the purpose of stripping from the controversy conflicting proofs relating to extraneous facts and confusing principles of law foreign to the issues, I prefer to make my own statement of the case.

Plaintiff had been the wife of defendant, and, in the court of chancery for Benton county, Arkansas, had procured a decree of divorce and alimony on a cross-bill filed by her in a divorce suit instituted by her husband. The Arkansas court granted the divorce March 2, 1911, allowing "$5,111 in full of alimony and all other demands set forth in the cross-bill." From that judgment no appeal was taken. The petition in the present case was filed in the district court for York county, Nebraska, November 24, 1911. It contains the plea that defendant owns in York county, Nebraska, lands worth $48,000, which the Arkansas court had no jurisdiction to, and did not, consider in awarding alimony. To the petition for additional alimony defendant demurred on the ground that the Arkansas decree is a bar to a further recovery and the plaintiff is defeated by estoppel, because she accepted and retained the fruits of the former adjudication. The trial court sustained the demurrer, and, from a dismissal of the action for additional alimony, plaintiff appealed to this court.

where it was held the petition showed on its face that the Arkansas court had no jurisdiction to, and did not, consider defendant's York county lands in awarding alimony. The dismissal, consequently, was reversed and the cause remanded for further proceedings. *Bodie v. Bates,* 95 Neb. 757. A trial on the merits of the case resulted in a decree awarding plaintiff additional alimony in the sum of $10,000. Defendant has appealed.

The question raised may be stated as follows: Under the facts pleaded and proved in the present case, did the court of chancery of Benton county, Arkansas, have jurisdiction to consider the value of defendant's Nebraska lands in determining the amount of alimony to which plaintiff was entitled? If this inquiry should be answered in the affirmative, the question now in controversy was adjudicated in the former action for divorce. In that suit both parties appeared before the court in person and by counsel, each asking for affirmative relief. Defendant's interest in the York county land was there put in issue by the pleadings. Proof of its value was adduced at great length. Whether the Arkansas court, in determining the amount of plaintiff's alimony, had jurisdiction to consider defendant's Nebraska land in York county was a question argued at the trial of the action for a divorce.

It is the policy of the law to determine in one action litigable questions relating to divorce and alimony, unless the legislature has otherwise provided. Society's interest in proper domestic relations and the rights of parties to a suit for a divorce require a complete adjudication in a single action, where jurisdiction to sever marital relations and to adjust property rights exists. Owing to a controversy over the power of an Arkansas court to consider the value of Nebraska land in awarding alimony, the parties have been permitted to narrate in the courts of two states the unhappy and distressing incidents of their married life.

The former appeal presented the sufficiency of a petition alleging that the following provision of an Arkansas

statute was the only law of that state authorizing the allowance of alimony to a wife in case of a divorce.

"Where the divorce is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and the wife so granted a divorce against the husband shall be entitled to one-third of the husband's personal property absolutely, and one-third of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form." Kirby's Digest of the Statutes (1904) sec. 2684.

After the case had been remanded to the district court, defendant pleaded and proved another Arkansas statute containing these words: "When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." Kirby's Digest of the Statutes (1904) sec. 2681.

This statute, authorizing divorce courts to award alimony according to the circumstances, uses general terms applying to all cases. It confers on the divorce courts of Arkansas the power of similar courts throughout the country, That act was passed long before the enactment invoked by the majority to narrow the jurisdiction of divorce courts. The earlier statute is in full force according to its original import, since it has not been changed, modified or amended in a manner authorized by the constitution of Arkansas. The statutes may be construed together without doing violence to the rules of statutory construction. Both may be enforced. Under the earlier act, reasonable alimony may be determined from the circumstances of the parties and the nature of the case. For that purpose, land outside of Arkansas may be considered. Inquiry into general equity power of divorce courts of Arkansas is therefore immaterial. By proper pleadings

and proofs the facts relating to defendant's interest in the Nebraska lands were presented to the Arkansas court. If they were not in fact considered, plaintiff had her remedy by appeal to the supreme court of that state. In any event the question now determined was formerly adjudicated, according to principles of law properly settled. There is no Arkansas precedent to the contrary.

In *Fischli v. Fischli,* 1 Blackf. (Ind.) 360, the report shows that plaintiff procured a divorce from her husband in Kentucky, where the statute provided that the wife should have a specific share of his property. Subsequently she brought an action in Indiana for additional alimony based on property owned by defendant in that state. A demurrer to the petition was sustained, the court saying:

"This divorce having been granted in Kentucky, and a part of the husband's property decreed to the wife, it is important for us to know how far the rights of the parties, with regard to the provision made for the wife, were adjudicated and determined by the proceedings which were had in that state. For whenever a matter is adjudicated, and finally determined, by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends; and it therefore prevails, with a very few exceptions, throughout the civilized world. This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case. * * * Guided by this principle, we should naturally suppose that the decree of the circuit court in Kentucky had done all that equity and justice required between the parties, if there is nothing in the record of their proceedings to evince the contrary, nor anything in the case to limit their authority; and that the rights of the parties, being thus determined, were subject to no further litigation. The separate maintenance that should be decreed to the wife out of the husband's property, according to her condition in life, the fortune she brought, and her husband's circumstances, was the subject matter of

adjudication before the court that granted the divorce; and if that tribunal had the power to do ample justice between the parties, but has failed to do it, no other tribunal can take cognizance of the subject, and supply the deficiency." See, also, *McCormick v. McCormick,* 82 Kan. 31.

The decision of the majority that the general statutory power of the Arkansas divorce court to award the wife reasonable alimony, upon the granting of a divorce, applies alone to cases wherein the husband obtains the decree is not warranted by the language or intention of the lawmakers or by any construction of the supreme court of Arkansas. The earlier Arkansas statute was adopted in the Indian Territory.

In *Ecker v. Ecker,* 22 Okla. 873, it was argued that this section did not authorize a court to grant alimony to a wife when the divorce was granted to the husband for her misconduct. The supreme court of Oklahoma said: "Under the language of this statute, or similar language of the statutes of other states, the courts have held that the authority of the court to make orders touching the alimony of the wife is not limited to those cases in which she prevails, or that whether the guilty wife will be granted alimony and the amount thereof is within the discretionary power of the court, to be controlled by the circumstances of each case."

Adams v. Adams, 30 Okla. 327, is to the same effect.

In the majority opinion, an estoppel not well pleaded or properly proved is substituted for a technical plea of *res judicata.* The law on both subjects is confused in disregard of the following observation in *Hanson v. Hanson,* 64 Neb. 506: "Considerable obscurity may be avoided by keeping in mind the distinction between a judgment, urged as a technical bar to another action, and one that is urged as conclusive as to some one or more points tried and determined in a former action."

In affirming the judgment allowing plaintiff additional alimony in the sum of $10,000, a technical plea of *res judicata* established by uncontradicted evidence has been

disregarded without ending the litigation for alimony. The record shows that defendant has property in Oklahoma. If the decision is right, he may be pursued in that state for still further alimony and in other states where he may have additional property. The decision of the Arkansas court has been reviewed here. Full credit has not been given to the judgment of the court of another state. The decree for additional alimony should be reversed and the action dismissed.

BARNES and LETTON, JJ., concur in this dissent.

IN RE ESTATE OF JOHN JOHNSON.
JULIA JOHNSON, EXECUTRIX, APPELLANT.

FILED JANUARY 15, 1916. No. 19391.

1. **Constitutional Law:** DEFINITIVE STATUTE: "WEEK." The act of 1915 (Laws 1915, ch. 222) is a general act defining the word 'week" as used in our laws, and is not unconstitutional as an attempt to control judicial actions.
2. **Wills:** PROBATE: NOTICE. The act was not intended to change the construction of former statutes which provide for publication of notices in weekly papers.

OPINION on motion for rehearing of case reported in 98 Neb. 799. *Former judgment of affirmance vacated, and judgment of district court reversed, with directions.*

SEDGWICK, J.

Upon the motion for rehearing in this case, briefs have been filed by the attorneys involved, and also several briefs have been filed by attorneys interested in the general question involved. It is strenuously argued that the statute is unconstitutional. It is said in the brief: "The court in the case at bar erroneously concedes to the legislature the unlawful power to change the judicial construction of the existing will statute (Rev. St. 1913, sec.

1303) and to overrule *Alexander v. Alexander,* 26 Neb. 68, by legislative mandate." In the *Alexander* case the notice of probate of will was published less than 21 days, and the court held that a publication once a week for three weeks was sufficient. Under this new statute as now construed, the publication is held to be insufficient, and in an entirely similar case the same statute that was construed in the *Alexander* case is construed differently. The argument in the brief is that the legislature has no jurisdiction to direct this court to change the construction of an existing statute, and the following is quoted from the decision in *Lincoln Building & Saving Ass'n v. Graham,* 7 Neb. 173: "An expository statute, which is substantially in the nature of a mandate to the courts to construe and apply a former law, not according to judicial, but according to legislative judgment, is inoperative, and cannot control the courts in interpreting the law and declaring what it is."

The language of the statute we are construing and of the title to the act furnish some ground for the contention that the statute is unconstitutional for the reason above stated. It says what the term "weeks" shall be construed to mean, and the title of the act is to define the word "week," but this is an entirely different thing from specifying and construing a particular statute. A general law that a week in the publication of legal notices shall always be seven full days would, if valid, of course change the holding of the court in many cases in the construction of various statutes, and indirectly tend to give a different meaning to many statutes from the meaning which the court has already given them; but it is a general statute, applying in all cases, and does not enact that the court shall construe a certain statute in a certain way, but provides what shall constitute a week in the state in regard to the publication of notices. Formerly the courts were very technical in holding statutes unconstitutional, but the courts are not now looking for excuses to declare laws unconstitutional, but are seeking to avoid that un-

pleasant duty whenever they can, and this case is so different from the *Graham* case above cited that it ought to be distinguished for the purpose of upholding and enforcing a legislative enactment. The statute (Laws 1915, ch. 222) to be construed is not plain and unequivocal, and the intention of the legislature is not easily discovered. It provides that when legal notices are required to be published "any number of weeks, or for any number of weeks, the term 'week' shall be construed to mean either a period of time known as a calendar week beginning on Sunday and ending with Saturday, or any period of seven consecutive days beginning with the date of the first publication of notice."

Our former opinion construes this statute to mean that in no case will the publication be complete until the full number of weeks of at least seven days each have elapsed after the first publication. The statute would have this meaning if it simply read "a period of seven consecutive days beginning with the date of the first publication of notice," and omitted the other clause referring to calendar week, so that the clause referring to calendar week seems to have no force or effect in the statute as we have construed it. This court had decided that when a statute provided that a notice should be published three weeks successively, publication on any day during each week, if in a weekly paper, would be complete upon the last publication, but in a semiweekly paper it would not be complete until it had been published twice in each of the required number of weeks. Some statutes provided that the legal notice should be published for a certain number of weeks; some omitted the word "for" and provided that they should be inserted in a paper three successive weeks, with different variations of these several wordings, so that the decisions of the court became diverse and perhaps inconsistent. If it was the intention of the legislature to simply provide that in all publications a week should be full seven days, and that three or four weeks' publication must be three or four full weeks of seven days each after the

first publication, it was unfortunate that the statute was passed with an emergency clause. It would naturally follow that publications in the meantime after the statute took effect and before it was published would disregard the change in the law. If this statute which we are construing now omitted the expression "a period of time known as a calendar week beginning on Sunday and ending with Saturday," there would of course be no ground to doubt of its meaning. What, then, was the purpose of inserting that clause in this statute? We must give force and meaning to this expression, if possible. Prior to the enactment of this statute it was held that, when the publication was in a semiweekly or triweekly paper, one publication alone in any week was not counted. A notice could not be considered as published a week unless published in every issue of the paper in that week. If the purpose of the legislature was to remedy this condition, which the clause defining a week a "period of seven consecutive days beginning with the date of the first publication of notice," indicates, it might be considered that the clause referring to a calendar week was inserted as recognizing the existing condition of the statutes regulating publications in weekly papers. That is, these two clauses, taken together, were intended to continue the law as it had been construed as to publications in weekly papers, so that a notice published once in a weekly paper is a compliance with that statute for that week.

The sole purpose, then, of this statute is to provide for publications in other than weekly papers. When we consider the effect of the emergency clause, it seems still more probable that it was not intended by the legislature to extend the required time of publication in weekly papers without notice to those who might make such publications before the new statute should be published. Other publications generally, if complying with the former statutes, would be valid under this act. While the matter is unfortunately not free from doubt, we have concluded that this statute does not affect publications in weekly papers,

and such publication will be controlled by former statutes as heretofore considered.

Our former judgment is vacated, and the judgment of the district court is reversed, with instructions to enter a judgment reversing the judgment of the county court.

REVERSED.

FAWCETT, J., dissenting.

In my judgment the majority opinion constitutes a judicial amendment of chapter 222, Laws 1915. In our former opinion (98 Neb. 799) it is stated: "We think this act of the legislature is clear and unmistakable in its terms and relieves the situation of all doubt as to the construction which must be given to statutes of the kind therein referred to, and that section 1303, Rev. St. 1913, is clearly one of the statutes contemplated." Nothing has been said in the briefs on rehearing or in the majority opinion which, in my judgment, should cause us to change that construction of the statute referred to. I concede that it is unfortunate that the legislature passed chapter 222 with an emergency clause. It was bad judgment. But my idea of the law is that the question as to whether the legislature uses good or bad judgment in the passage of an act is not one for review by the court. I think our former judgment should be adhered to.

LETTON, J., joins in dissent.

KATHERINE FERBER, APPELLANT, V. JOHN MCQUILLEN, APPELLEE.

FILED FEBRUARY 5, 1916. No. 18354.

1. **Adverse Possession:** APPEAL: SUFFICIENCY OF EVIDENCE. Where a railroad company succeeds to the interest of a grantee in a void tax deed covering a vacant town lot lying contiguous to its right of way, pays the taxes assessed thereon for nearly 30 years, and exercises the same jurisdiction over it as over other parts of its right of way and property at that point on its line, a verdict of a jury holding in effect that its title has become absolute will be sustained.

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

J. F. Boyd, R. J. Millard, Edward E. Baron and *W. L. Harding,* for appellant.

J. J. McCarthy, contra.

MORRISSEY, C. J.

This was an action of ejectment brought in the district court for Dixon county; the real estate involved being lot 4 in block 49 of the city of Ponca. Originally this lot was owned by the Nebraska Land & Town Lot Company, a corporation. The owner failed to pay the taxes for the year 1879 and subsequent years, and in 1882 a tax deed was issued therefor. By quitclaim deed the grantee in the tax deed conveyed the lot to the Chicago, St. Paul, Minneapolis & Omaha Railway Company, which now claims to be the owner thereof, and is the real defendant; the defendant named herein being the lessee of that company. During all of the years intervening between the issuance of the tax deed and the filing of this suit in 1911 the railroad company paid the taxes on the lot. December 30, 1910, for the consideration of one dollar, plaintiff procured a quitclaim deed for lot 4, as well as other lots that are not herein in-

volved, from the old town-site company, which had long since abandoned the property. Defendant claims under his lease from the railroad company. It is conceded that the tax deed was technically defective, and the issue is whether the railroad company had acquired title by adverse possession for a period of more than ten years. This issue was submitted to the jury, which found for defendant. No error in the instructions or in the conduct of the trial is pointed out, but we are asked to set aside the verdict because it is not sustained by sufficient evidence.

The lot lies contiguous to the right of way of the railroad company. For many years it has been taxed in connection with the railroad company's right of way, and the evidence indicates that it has been treated by the company as forming a part of its right of way. The original owner completely abandoned it for 30 years, and then for the consideration of one dollar made a quitclaim deed to the plaintiff. The testimony as to possession is somewhat hazy. The section-men mowed the weeds that grew on the lot; they also piled ties there from time to time; and a witness testified that from the year 1885 to 1909 he and his father were in the lumber and coal business and occupied lots in this block. While the witness is unable to give the exact location of the lot lines, his testimony shows that one or two of their buildings were located to the west of this lot and another was located to the east of it, and that this lot was used in connection with the lots on which their buildings stood. He also testifies positively that they had a lease to the ground on which their buildings stood, but is unable to give the numbers of the lots covered by the lease. He does not remember whether the lease was a verbal or written one, but from his testimony it is clear that this lot was necessarily used at least as a right of way between the buildings used by this witness. He is unable to testify very definitely about the rental, but is positive that a part of the time at least they paid rent to the railroad company, and that they had permission to put their buildings there.

"A void tax deed affords color of title in an action of ejectment in which adverse possession of real estate for the statutory period of ten years is relied upon as a defense." *Twohig v. Leamer,* 48 Neb. 247.

To determine the acts necessary to constitute adverse possession it is sometimes necessary to take into consideration the character of the property and the purposes for which it is suitable. The testimony covers a period of 30 years, and the only use made of the property was to furnish a place for piling railroad material, a roadway for the lumber and coal dealers having sheds on the railroad property, and finally serving as a roadway or approach for a grain elevator, except that for a few years plaintiff's husband had part of it inclosed as a corral for his cow. But he made no claim to ownership. The use to which it was put was entirely consistent with the railroad company's claim of ownership. The property was abandoned by the owner; it was taken over under a tax deed, and the taxes paid thereon by the railroad company; for nearly 30 years it was treated like the other property making up the railroad right of way, and the railroad company's ownership was recognized by the people who operated the coal and lumber business there. Prior to the beginning of this suit a grain elevator was built on one of the adjoining lots, and the owner of the elevator recognized the ownership and possession of the railroad company and procured permission to use the lot for an approach to the elevator.

After an examination of the whole record, we are of the opinion that the evidence is sufficient to sustain the verdict of the jury, and the judgment is

AFFIRMED.

LETTON, J., not sitting.

EDWARD IRWIN, APPELLEE, v. F. P. GOULD & SON, APPELLANT.

FILED FEBRUARY 5, 1916. No. 18480.

1. **Master and Servant:** INJURY TO SERVANT: PLEADING: FELLOW SERVANTS. In an action for personal injuries by a servant against the master, it is not necessary to allege in the petition that plaintiff and defendant's servants charged with the negligence alleged were not fellow servants, if the petition sets up facts from which such conclusion necessarily follows.
2. **Appeal:** PLEADING. Where the sufficiency of a petition is attacked for the first time in this court, it will, when possible, be sustained.
3. **Master and Servant:** FELLOW SERVANTS. "Employment in the service of a common master is not alone sufficient to constitute two men fellow servants within the rule exempting the master from liability to one for injuries caused by the negligence of the other. To make the rule applicable there must be some consociation in the same department of duty or line of employment." *Union P. R. Co. v. Erickson*, 41 Neb. 1.

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

Gurley, Woodrough & Fitch, for appellant.

W. R. Patrick and *C. J. Southard, contra.*

MORRISSEY, C. J.

Action for personal injuries received by plaintiff while in defendant's employ as the operator of a concrete mortar mixing machine. Defendant was a building contractor engaged in erecting a concrete structure. It is alleged that, while plaintiff was performing his duties as a mortar mixer, the defendant, "by and through its foreman and employees, carelessly and negligently permitted a heavy plank * * * to fall from the platform or cage of a steam hoist used by the defendant in the construction of said building, from a height of about 100 feet, and strike plaintiff upon the instep of his left foot," crushing the same and render-

ing immediate amputation necessary. From a judgment in favor of plaintiff, defendant appeals.

Defendant first asserts that the petition does not state a cause of action; that it was incumbent upon the plaintiff to plead that the accident was not due to the negligence of a fellow servant. The claim is made that the allegation of the petition that "the defendant, by and through its foreman and employees, carelessly and negligently permitted" the plank to fall is insufficient, and this is especially urged because the evidence shows that the foreman was not present when the accident occurred. Preceding the clause complained of, the petition specifically alleges the character of plaintiff's employment. It sets out the work he was employd to do, and was doing, when the accident occurred. It also shows that the plank was permitted to fall "from the platform or cage * * * from a height of about 100 feet."

"In an action for personal injuries by a servant against his master, the declaration may allege either that the plaintiff and the defendant's servant charged with the negligence in question were not fellow servants, or such declaration may set up the facts from which such conclusion necessarily follows." *Bennett v. Chicago City R. Co.*, 141 Ill. App. 560.

Had plaintiff alleged that he and the men handling the plank were not fellow servants, it would have been but the statement of a mere conclusion. He followed the better course by pleading the facts.

Appellant relies upon the rule announced in *Norfolk Beet-Sugar Co. v. Koch*, 52 Neb. 197, but in that case the question did not arise on the pleadings, but on the evidence, and the jury were asked to say whether the relation of fellow servant existed, and answered, "We don't know," and the court held a general verdict in favor of the plaintiff was not sustained.

In the instant case, the petition was not attacked in the lower court by either motion or demurrer, nor any defense based upon the fellow-servant doctrine pleaded in the an-

swer. It may be upheld under the rule stated in *Bennett v. Chicago City R. Co., supra,* or the long-established rule that, when timely objection is not made, pleadings, when possible, will be sustained.

It is next urged that the court ought to have instructed a verdict for defendant because plaintiff and the men handling the plank were fellow servants, and that there was a failure to prove that defendant permitted the plank to fall, and that if it did fall, as claimed by plaintiff, the men responsible for the act were his fellow servants.

Plaintiff was engaged in operating his machine, which was located on the ground about 40 feet west of the foundation of the hoist, while other employees of the defendant were on the sixth floor of the building engaged in loading planks onto the hoist and lowering them to the ground. It does not appear that they were within his view or that he had any opportunity to observe them or see the manner in which they were doing the work. His work was entirely separate and distinct from theirs, although they were under the same foreman.

In *Union P. R. Co. v. Erickson,* 41 Neb. 1, there is a full discussion of the fellow-servant question, and the rule in force in this state is therein laid down, viz.: "Employment in the service of a common master is not alone sufficient to constitute two men fellow servants within the rule exempting the master from liability to one for injuries caused by the negligence of the other. To make the rule applicable there must be some consociation in the same department of duty or line of employment." There was no consociation between the plaintiff and the men operating the hoist, and the rule of fellow servant does not apply.

The evidence is amply sufficient to warrant the court in submitting the case to the jury. One of the men who was handling the plank testified that he handed a plank like the one which struck plaintiff's foot to his coworker, whose duty it was to place it on the hoist. A workman on the fifth story testified that he saw a plank fall down the shaft. Witnesses testified to finding a broken cross-timber of the

hoist which was apparently struck by the plank as it descended to the ground. According to the theory of the plaintiff, this cross-timber split the plank and deflected one part thereof so that it caused the injury to plaintiff. The man who was loading the planks onto the hoist denied dropping any plank, and denied all knowledge of any falling from the hoist; but this question was properly submitted to the jury, and its verdict seems to be the only one which would be warranted under the evidence.

Complaint is made of an instruction in which it is claimed that the burden of proof was shifted from plaintiff to defendant, but the instruction does not bear the interpretation which defendant attempts to place upon it, nor is it subject to the criticism made.

No error prejudicial to the rights of defendant is found in the record, and the judgment is

AFFIRMED.

PETER E. MILLER ET AL., APPELLANTS, V. W. C. WENTZ COMPANY ET AL., APPELLANTS; EMIL J. KREMER, APPELLEE.

FILED FEBRUARY 5, 1916. No. 18582.

1. **Deeds:** SETTING ASIDE. Courts hesitate to set aside deeds merely because of the mental weakness of the grantor, where a total want of reason is not shown. But where mental weakness exists, and misrepresentation on the part of the grantee, or those in privity with him, is shown, a court of equity will, in a proper case, grant relief.
2. **Vendor and Purchaser:** BONA FIDE PURCHASERS: EVIDENCE. Evidence set out in the opinion *held* sufficient to show that defendants Barnes and Wentz were not *bona fide* purchasers for value.

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

Hainer, Craft & Edgerton, W. A. Prince and *W. G. Hastings,* for appellants.

J. H. Grosvenor, contra.

MORRISSEY, C. J.

This is a suit in equity to set aside deeds of conveyance covering a farm of 160 acres, a five-acre tract in the suburbs of the city of Aurora, and a house and lot located in that city, all of the property being in Hamilton county, Nebraska. The suit was brought by Peter E. Miller through his guardian and next friend, and by Mrs. Miller for herself. Anna Poole intervened, but her interests are not herein involved and no further reference will be made to her. On and prior to May 29, 1913, Peter E. Miller was the owner of this real estate. The family lived in the city, at least a part of the time, but operated the farm and the five-acre tract. The defendants Wentz were engaged in the real estate business in Aurora; the defendants Adams were of the same occupation, with their principal place of business in Colorado; defendant Barnes lived in Aurora and appears to have been a subagent for Adams, while the defendant Kremer was a farmer living in Hamilton county.

Through the solicitation of defendants Adams and their agent, Barnes, Miller was induced to go to Colorado to look over land with the view of trading some of his Hamilton county property therefor. No trade, however, was made following his first visit to Colorado; but a few days later Miller, in company with his 16 year old boy and the defendant Barnes, again went to Colorado, and this time he inspected a section of land, which was represented as the property of E. E. Adams. While in Colorado a contract was drawn up whereby Miller agreed to transfer the Hamilton county real estate for this section of Colorado land, and give a mortgage back on the Colorado land for something in excess of $3,000. Miller and Barnes then returned to Aurora, and Mrs. Miller affixed her signature to the contract. For the purposes of the trade it was agreed that Miller's farm should be put in at the gross price of $20,000,

and that there should be deducted therefrom the amount of the mortgage then resting as a lien thereon in the sum of $6,000. The agreed price of the five-acre tract was $2,350, which was represented to be clear of incumbrance, and the city property was put in at an agreed price of $4,500, subject to a mortgage of $1,500, which was to be deducted from the gross amount. Adams' Colorado property was put in at $35 an acre, or a gross amount of $22,400, and was to be free and clear of incumbrance. It was agreed that the difference, $3,050, should be covered by Miller executing and delivering to Adams a note secured by mortgage on the Colorado property for the amount. It was agreed that Miller should retain possession of the farm until March 1, 1914, but pay as rent therefor one-fourth of the crops raised; that possession of the other property should be surrendered upon the execution and delivery of the deeds. This contract bears date May 17, 1913, and on May 29 following Miller and wife executed deeds conveying all of their property heretofore described, and accepted a deed to the Colorado property, and executed a note for $3,200 secured by mortgage on the Colorado property. Adams was not the owner of this land, as stated in the contract he made with Miller, but it was owned by one Cummings, who executed a deed therefor and sent it to a bank in Aurora, with the name of the grantee blank, and with instructions that it be delivered upon payment of $8,400.

Adams had come to Aurora and arranged with defendants Wentz to pay this money to the bank for the Cummings deed and to take over the Miller farm at the agreed price of $14,400. The farm being subject to a $6,000 mortgage, it was necessary for Wentz to advance only the amount required to take up the Cummings deed. This he did, and Miller executed a deed conveying the farm to Wentz. By an arrangement between Adams and Barnes, the five-acre tract was deeded by Miller to Barnes. It is said that the consideration was $1,700 or $1,800, about one-third of which was paid in commissions due from Ad-

ams to Barnes; a part being a commission on this Nebraska trade. Kremer was in no way connected with the trades, but was in the market for a residence property, and was shown this property by Wentz and induced to buy at an agreed price of $3,500, and the Millers delivered him a deed to that property. These deeds were all made and delivered on May 29, 1913. In July following this suit was instituted.

The petition alleges that the contract and deeds were obtained by fraud, misrepresentation and undue influence practiced upon Peter E. Miller, who was mentally incompetent. The defendants Wentz deny the allegations of fraud and undue influence and the incompetency of Miller, and as an affirmative defense claim to be *bona fide* purchasers for value; that plaintiffs, having executed the deed and accepted a lease from them to the farm, are estopped from assailing their title. Barnes denied generally the allegations of fraud, undue influence and mental incompetency of Miller, and claimed to be a *bona fide* purchaser for value without notice or claim of fraud. Kremer also claimed to be a *bona fide* purchaser, and that he purchased the property through his codefendants Wentz and paid therefor its full value. The court entered a decree setting aside the deeds to the farm and the five-acre tract, but sustaining the deed covering the city property. Defendants Wentz have appealed from so much of the decree as affects the farm; Barnes has appealed from the decree as affecting the five-acre tract; and plaintiffs have appealed from so much of the decree as covers the city property.

The first thing to determine is the mental capacity of Miller. There is little conflict in the testimony as to his condition up to the time these trades were made; but, of course, different minds may draw different conclusions. He had lived in Hamilton county about four years prior to this trade, and many of his neighbors were called as witnesses. It would serve no useful purpose to quote their

testimony. It is conceded by every witness that he was not of normal mentality. Yet with the advice and assistance of his wife he had transacted a large amount of business and appears to have been reasonably successful. He inherited property in Illinois. He sold that at a good figure and brought the proceeds to Nebraska and made an advantageous investment. It was agreed between all parties that the question of his mental condition should be submitted to a board of nine experts. This board made the following report:

"Alienists' Report.

"Aurora, Neb., Oct. 21, 1913.

"We, the undersigned, physicians summoned to testify in the case of *Miller et al. v. Wentz et al.*, do hereby certify that after a careful, thorough and painstaking examination, we are of the opinion that the plaintiff, Peter E. Miller, is a feeble-minded individual, or in other words an imbecile of not the highest grade. We find that Peter E. Miller is mentally and physically deficient; that we would denominate him feeble-minded. We believe that he is not insane, meaning by this that there has been no perversion in his mental functions from his normal, which has always been deficient. We believe that he is able to carry on the ordinary, simple duties of life. The question of his ability to accomplish the greater matters of business must necessarily depend upon the influences which are brought to bear and the impress which they have upon one who is not as strong mentally as the average human individual.

"Joseph M. Aikin, M. D.
"F. E. Coulter, M. D.
"W. B. Kern, M. D.
"Benj. F. Bailey, M. D.
"L. B. Pilsbury, M. D.
"E. A. Steenberg, M. D.
"D. S. Woodard, M. D.

"We, the undersigned, dissent from the word 'imbecile,' but concur in the statement that he is physically

and mentally defective, and indorse the remainder of the majority report.

"W. D. Guttery, M. D.
"M. W. Baxter, M. D."

Giving proper credit to this report, which is in harmony with the testimony of the lay witnesses, we must determine whether he was able to meet on fair terms the experienced real estate men with whom he had to cope. To determine this question, we are not compelled to rely alone on the testimony offered as to his mental capacity. We may consider the facts admitted, or established beyond all controversy, and their relation to and bearing upon the question under consideration. In fixing the price of the property, the Colorado land was priced at $35 an acre. This is conceded to be more than it was worth. Plaintiff's property was also priced at a value in excess of its true worth, and this practice is not uncommon in the exchange of property. But as deeds to these properties were all exchanged on May 29, we may consider the prices realized as determining their values. Mr. Cummings, the owner of the Colorado land, realized but $8,400, $3,200 of which under the arrangement with Adams was paid by the note and mortgage executed by Miller. The equity in Miller's farm sold to defendants Wentz for $8,400. The city property sold to Kremer for $3,500, and the acre property to defendant Barnes for $1,700. Even on these figures Miller lost by the transaction $5,200. It is contended, and we think fairly shown by the evidence, that Miller's property was actually worth more than the prices paid by Wentz, Barnes and Kremer. This transaction for a man in his station in life may be termed one of these "greater matters of business" mentioned by the alienists.

In view of the circumstances, we are convinced that Miller was not capable of comprehending fully the nature and effect of the transaction, and was unfitted to attend to business of such importance as the trade of his entire real estate holdings for property he had seen but once, and then only under the watchful eye of the trained broker.

Courts hesitate to set aside deeds merely because of the weakness of mind of the grantor, where a total want of reason is not shown. But where mental weakness exists and misrepresentation is shown, a court of equity will grant relief and set aside a deed which has been secured through the fraud and undue influence of the grantee. "The acts and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning, or artifice, or undue influence." 1 Story, Equity Jurisprudence (13th ed.) sec. 238. *Allore v. Jewell,* 94 U. S. 506.

Defendant Barnes had full knowledge of the entire transaction and was credited with a commission for bringing about the trade. He took title with full knowledge of the misrepresentation that had been made to Miller, and is in no sense to be considered an innocent purchaser for value. The defendants Wentz, it is true, are not shown to have knowledge of the value of the Colorado property, but they did have knowledge of the contract made between Miller and Adams. This contract showed that the land was represented as being the property of Adams, and was being put in on the trade at $35 an acre. They also knew that the property did not belong to Adams, but to Cummings, and that Cummings was receiving only $13 an acre. As experienced real estate dealers they must have known that its value was not far in excess of the amount for which its owner had it listed upon the market. With knowledge of these facts they advanced the money to buy the Cummings land, and, as a part of the same arrangement and agreement between themselves and Adams, they took this deed, Miller's name was filled in as grantee, and Miller was induced to deed his farm to Wentz. Defendants Wentz stepped into Adams' shoes and assisted in carrying to completion the contract secured by the misrepresentation and fraud of Adams, and they cannot be held to be

innocent purchasers for value. Inasmuch as the defendants Barnes and Wentz voluntarily took Adams' place in carrying out the terms of the written contract, they took their deeds subject to all the infirmities that would have come with them had the deeds been made to Adams. *Thomas v. Sweet,* 111 Ky. 467.

The point is made by counsel for Wentz that plaintiff accepted a lease from them and was in possession of the farm under this lease at the time suit was brought, and cites authority holding that the tenant while in possession may not question the landlord's title. But the facts in this case do not bring us within that well-established rule. When the contract was made for the exchange of the properties, it was provided therein that Miller should retain possession of the farm for the remainder of that year, paying as rental therefor one-fourth of the crop. In place of writing this provision in the deed of conveyance from Miller, it was put in a separate paper in the form of a lease, and this appears to have been done on the suggestion of Wentz, who desired and insisted that the original contract be surrendered. By changing the evidence of this agreement, they did not change the true status of the parties, and Miller is not estopped because he accepted this lease and surrendered the old contract.

Defendant Kremer had no notice that any fraud or imposition had been imposed upon Miller. He was in the market for a residence property. This property was offered for sale, and he bought without anything to arouse a suspicion of unfair dealing. He appears to have been a purchaser in good faith for a valuable consideration, and his title will not be disturbed. Plaintiffs offered to do equity by conveying the title to the Colorado property to whomsoever the court might order, but no order in relation thereto was made.

The judgment is affirmed, but the district court is directed to ascertain and determine the value of Miller's equity in the house and lot at the date of the transfer to Kremer, and if defendants Wentz pay the amount so found

as the value of the equity into court for the benefit of plaintiff within 30 days from the entry of the order, plaintiffs be directed to convey such equity as they hold in the Colorado land to them by quitclaim deed.

AFFIRMED, WITH DIRECTIONS.

LETTON, J., not sitting.

ANDREW J. SAWYER ET AL., APPELLANTS, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED FEBRUARY 5, 1916. No. 18566.

1. **Waters: FLOOD WATERS: ACTION FOR DAMAGES: REVIEW.** In an action to recover damages to lands, claimed to have been sustained by the negligent construction of railroad grades, bridges, yards, embankments and tracks, which were alleged to have held back the flood waters of Salt creek on plaintiffs' lands for such a length of time as to destroy a permanent stand of blue grass and alfalfa growing thereon, the verdict of a jury will not be set aside if it is sustained by competent evidence.
2. **Instructions** examined and found to contain no reversible error.

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

Lincoln Frost, A. J. Sawyer, N. Z. Snell and *W. B. Comstock*, for appellants.

Byron Clark, Jesse L. Root and *Strode & Beghtol, contra.*

BARNES, J.

Plaintiffs commenced this action to recover damages, to both personal property and certain real estate, alleged to have been caused by the flood of July 5 and 6, 1908.

The petition alleged, in substance, that the defendant railroad company negligently constructed its bridges, grades, railroad yards, tracks and other improvements across the

streams and in the basin into which they flowed just west of the city of Lincoln, and thereby caused the flood waters to overflow plaintiffs' lands and remain thereon a sufficient length of time to drown out, kill and destroy the plaintiffs' blue grass and alfalfa growing thereon, and wash away, injure and destroy the fences, outbuildings, and other personal property situated on their said lands. The pleadings were amended from time to time before the trial of the cause, and the last amendment to the petition contained an allegation that the defendant's Denver grade contributed to plaintiffs' damages by holding the flood waters on the land for more than 12 hours, thus destroying the stand of alfalfa and blue grass growing thereon.

The defendant, by its answer, denied generally the allegations of the petition, and alleged that the rain storm which caused the flood waters and injured the plaintiffs' property was so severe and unprecedented as to amount to an act of God, and pleaded the statute of limitations as to the damages which were set forth in the last amendment relating to the construction of the Denver grade because that amendment related to a cause of action which accrued more than four years before the amendment was tendered.

The reply was in effect a general denial of the allegations of the answer.

A trial in the district court for Lancaster county resulted in a verdict and judgment for the defendant, and the plaintiffs have appealed, and contend, first, that the judgment is not sustained by the evidence.

It appears that the plaintiffs' land is situated in Salt creek valley, directly south and west of the city of Lincoln, and about one and one-fourth miles south of what is known as defendant's J street bridge. The evidence discloses that the greater part of the city of Lincoln lies east of Salt creek, which flows from south to north through Lancaster county, and which rises near the southwest corner of the county, about 23 miles from the city, at an elevation of 1,500 feet above sea level. The head of Middle creek is 4 miles west of Pleasant Dale, in Seward county, at an elevation of

1,500 feet. Oak creek heads at Brainard in Saunders county, at an elevation of 1,600 feet. The three streams converge in what is called the "Salt creek basin," at the west of the city of Lincoln where the elevation is only 1,140 feet above sea level. In the 11 miles above defendant's J street grade, Salt creek falls 70 feet, and Middle creek falls 20 feet in the last 3 miles of its course. Oak creek has a fall of 420 feet, 40 feet of which is in the last 5 miles before it enters Salt creek. A short distance below the mouth of Oak creek, Antelope creek, with a total fall of 300 feet in 9 miles, empties into Salt creek. Little Salt creek, with a total fall of 410 feet and a fall of 70 feet in the last 7 miles of its course, empties into Salt creek, and Stevens creek, also a stream of considerable size, joins Salt creek below the mouth of Antelope creek, while the fall of Salt creek north from the city of Lincoln is only about 8 feet in 12 miles of its course.

The testimony shows that on the 5th and 6th days of July, 1908, a heavy rain storm raged over the 681 square miles of area drained by the creeks above mentioned. This rainfall was unusual in its extent and intensity. At Palmyra, in Otoe county, southeast of Lincoln, 4.8 inches of rain fell in 24 hours. During the same period of time, at Crete, 2.81 inches of rain fell. On the campus at the University, in the city of Lincoln, 5.3 inches of rain fell. At Woodlawn, on Oak creek, 5 miles from Lincoln, on the morning of July 6, the six-inch rain gage was found to be running over. Eight miles west of Lincoln, on Middle creek, 8 inches of rain fell during this storm. When the rain began falling the ground was already saturated with water, and witnesses testified that just north of the mouth of Antelope creek the high water, at daylight on the morning of July 6, was backing up from the north, and so continued for some time. This condition existed about two miles north of defendant's embankment and grades. Several witnesses testified, in substance, that at 6 o'clock on the morning of July 6 the water south of the J street grade

was near the top of that grade; that it went over the grade at about 8:30 o'clock, and in 15 or 20 minutes it filled up the basin north of the grade, and from that time the water was all over the tracks both north and south, and was over the J street grade; that in the morning when they first noticed the water it was higher on the south side of the track than it was on the north side, but at 2 o'clock in the afternoon it was nearly the same height on both sides of the grade, and was from 9 to 12 feet deep; that when the water was at its highest point it was as high on the north side as it was on the south side. It appears that the water commenced to recede about the middle of the afternoon of July 6; that it first ran to the north until about 10 o'clock in the forenoon, when the current ran back to the south; that about 5 o'clock in the afternoon it again ran to the north; that when the water was highest it was all over Middle creek valley and extended up that creek as far as one could see.

Defendant's engineers testified that the outlet of the Salt creek basin northeast of the city near Havelock was insufficient in size and extent to carry off the flood waters. Their testimony was corroborated by the topographical maps which were introduced in evidence, on which were shown the high water marks of the flood in question.

Mr. J. R. Hickox, a civil engineer, a graduate of Yale college, after describing the different elevations and the extent of the flood, testified that it would take about 76 hours for the flood water to flow out of the Salt creek basin, as the outlet near Havelock had a capacity to discharge only about 18,000 cubic feet of water per second.

As we view the record, there was sufficient evidence from which the jury could reasonably find that the extent of the flood in question was so great that the several improvements made by the defendant company in the Salt creek basin did not cause the water to remain upon plaintiffs' lands for more than 12 hours. The waters were caused to remain there by reason of the insufficiency of the outlet near Havelock.

Appellants assign error for the giving of instruction No. 1, in which the court stated that the defendant's improvements covered about 600 acres of land in the Salt creek basin. When these improvements are all taken into account, it is difficult to determine with any degree of certainty their full nature and extent, and it cannot be said that this instruction was so different from the facts which plaintiffs, by their evidence, attempted to describe as to amount to reversible error. The statement was merely an approximation and could not have influenced the jury to plaintiffs' prejudice. Again, the plaintiff tendered no instruction on that point and made no objection to the instruction when it was given.

Appellants also complain of instructions Nos. 8 and 9. The substance of these instructions was approved by this court in *Chicago, R. I. & P. R. Co. v. Shaw*, 63 Neb. 380, and *Conn v. Chicago, B. & Q. R. Co.*, 88 Neb. 732.

Appellants further complain of instruction No. 10, in which damages to personal property as well as to plaintiffs' real estate were mentioned. It appears that after the evidence was all taken, and just as the case was about to be submitted to the jury, plaintiffs dismissed the action so far as any claim for injury to personal property was concerned. Evidently this instruction was given because the jury had heard the evidence concerning the damages to personal property, and the giving of the instruction was not prejudicial error.

Complaint is made of instruction No. 11, for the reason that it does not contain the word "necessary" found in section 5944, Rev. St. 1913, which authorizes the railroad company to construct its line of watercourses. There is no claim that the construction complained of was not necessary. Therefore the plaintiffs could not have been prejudiced by leaving out the word "necessary," because that issue was not tried, and hence the omission of that word did not constitute error.

Instruction No. 13 is complained of because it is incomprehensible and argumentative and assumes a condition of

things not borne out by the evidence. It appears from the testimony of Mr. Loveland that the rain of July 6 and the previous day was greater by almost 100 per cent. than any rain covering the above described drainage area since the year 1887.

Other instructions complained of seem to be warranted by the evidence, and it was not error for the court to give them.

Finally, it is contended that the court erred in his instructions on the question of the statute of limitations. In the original petition plaintiffs did not claim any damage on account of the embankment known as the "Denver grade." That question was brought into the controversy, as above stated, by a rider, or amendment, to the petition, which was filed on the 4th day of November, 1913, and during the trial of the case. It brought into the case a new and different cause of action. Therefore the defendant pleaded the statute as against plaintiffs' Denver grade theory. That defense was good because more than five years had elapsed since the damage and before the filing of the amendment. *Westover v. Hoover,* 94 Neb. 596.

In conclusion, this court has twice decided on evidence substantially the same as that found in the record in this case that the defendant was not liable in damages for the flood of 1908. *Albers v. Chicago, B. & Q. R. Co.,* 95 Neb. 506; *Alt v. Chicago, B. & Q. R. Co.,* 96 Neb. 714. It seems clear that the extent of the flood of July 5 and 6, 1908, by which the plaintiffs were damaged, occurred from natural causes, and not by reason of the construction of defendant's bridges, embankments or grades.

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

AFFIRMED.

SEDGWICK, J. I think that some of the instructions were erroneous.

LEONARD E. BRITT, APPELLEE, V. OMAHA CONCRETE STONE COMPANY, APPELLANT.

FILED FEBRUARY 5, 1916. No. 18601.

1. **Municipal Corporations:** OBSTRUCTIONS IN STREETS: ACTIONABLE NEGLIGENCE. It is actionable negligence to deposit a pile of sand and crushed stone on a paved street of a city and allow it to remain there over night without guarding it with a red light danger signal.
2. **Appeal:** CONFLICTING EVIDENCE. Where the question as to whether such an obstruction was guarded has been submitted to a jury upon conflicting evidence, the verdict will not be set aside by a reviewing court.
3. **Evidence:** SUFFICIENCY: PHYSICAL FACTS. Where a person has been injured in a collision with such an obstruction and it is claimed that the physical facts related by plaintiff's witnesses destroy their direct and positive evidence, which tends to show that the party injured was not guilty of contributory negligence, the physical facts must be so conclusive as to leave no question for the jury and require the court to direct a verdict for the defendant. If, however, the evidence is such as to present a question for the jury, their verdict will be sustained.
4. **Instructions** given by the court on his own motion examined and found to contain no reversible error; and the instructions requested by the defendant are held to have been properly refused.

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

Alvin F. Johnson, for appellant.

W. W. Slabaugh and *C. W. De Lamatre, contra.*

BARNES, J.

This was an action brought in the district court for Douglas county for damages which the plaintiff alleged he had sustained by a collision of an automobile, in which he was riding, with a pile of sand and crushed stone which had been deposited by defendant, the Omaha Concrete Stone Company, on Thirtieth street, in the city of Omaha,

in front of a residence near Binney street. The owner of the residence was joined as a party defendant with the stone company, but the action was dismissed as to him before the trial was concluded. The plaintiff had the verdict and judgment, and the defendant has appealed.

The facts as shown by the evidence are, in substance, as follows: The plaintiff is a colored man, and a physician. On the evening of the 14th day of November, 1912, he had given a dinner party to one Guy Overall, who was about to leave that city. After the dinner was over, and at about midnight, plaintiff, together with Overall and his mother, and with one Adams, all colored people, started on an automobile ride about the city. Adams was the owner of the car and was also the driver. The party started from plaintiff's home and went west on Lake street to Thirtieth street, and thence north on that street about 1,800 feet to near the corner of Binney street, where they ran into the pile of sand and stone which had been left on the street by the defendant stone company on the previous evening at about 6:00 o'clock. The collision resulted in certain injuries, for which plaintiff obtained the judgment, and from which this appeal is prosecuted.

The defendant contends that the judgment is not sustained by sufficient evidence. The record discloses that when the car left Lake street it was allowed by the driver to coast down Thirtieth street to the place where it struck the stone pile. The driver of the car testified that as he was running the machine down the east side of Thirtieth street he saw two coal wagons standing on the street some distance ahead and turned out for them onto the street car tracks; that he, immediately after passing the coal wagons, turned back to the east side of the street; that he struck the pile of stone just north of Binney street; that as the car coasted down Thirtieth street it increased its speed and was running about 12 miles an hour when it struck the stone pile; that there was no light on the pile; that there was an arc light at Binney street; which was behind the car when the collision occurred; that the lights on the car were burn-

ing; that he did not see the stone pile until the car struck it. The plaintiff testified that he cautioned Adams as they coasted down Thirtieth street; that he looked behind to see that the car was not overtaken by the street car, and he thought the car was going about 12 miles an hour when it struck the stone pile; that he was looking ahead, but could not see the stone pile until the car was within five or six feet of it, and at that instant it was too late to stop the car; that when he saw the obstruction it looked like a shadow, looked grayish like a reflection from the arc light. Adams testified that he passed along Thirtieth street as late as 5 or 6 o'clock on the evening before the accident; that the street was practically clear at that time, and he had no reason to expect to meet any obstruction at that point. He also testified that there was no light burning on the stone pile when the accident occurred.

Appellant alleges that the trial court erred in receiving in evidence the ordinance of the city of Omaha in regard to depositing building material on the streets. This evidence was proper as tending to establish negligence on the part of the defendant. In this connection it should be further said that the court properly instructed the jury that the ordinance did not of itself establish negligence, but the jury were told that it might be considered in determining whether or not defendant was guilty of negligence under all of the facts as shown by the evidence.

Some of defendant's witnesses testified that they saw a red light on the stone pile early in the evening, while others claimed that they saw no light whatever. On that question the jury found for the plaintiff on conflicting evidence, and that finding should stand as establishing the fact of negligence on the part of defendant.

It is further contended that plaintiff was guilty of such contributory negligence as prevents any recovery in his favor in this case. The plaintiff testified that shortly before the car struck the stone pile he warned the driver to be careful, and that he looked behind the car to see that the street car did not overtake them. This testimony was

not contradicted by any one, and tends to show want of contributory negligence on the part of the plaintiff, as well as to refute the defendant's contention that the negligence of the driver should be imputed to the plaintiff. The jury determined both of those questions, and their verdict should be sustained.

It appears that no one but those riding in the auto saw the accident. None of the defendant's witnesses could testify as to the speed at which the car was going when it struck the stone pile, but the defendant strenuously contends that the physical facts shown by the testimony of plaintiff's witnesses are such as to discredit their statements as to the speed of the car, and show that it must have been going at the rate of 30 or 35 miles an hour when the accident occurred. On that question it may be said that just what the effect of such a collision would be is extremely problematical. There was testimony that when the car struck the stone pile the shock threw the plaintiff out of the car and about 15 feet, where he struck on the pavement and was severely injured. There was testimony on the part of other witnesses, however, which contradicted this statement and tends to show that the distance was not so great. Mrs. Overall, who was a large woman, was thrown some distance, and Guy Overall was also thrown out of the car, but was unhurt. The driver, who had hold of the steering wheel, remained in the car, but jumped out as soon as he could. The car ran on over the obstruction and about 100 feet onto a vacant lot before it stopped. We are unable to determine the speed of the car from these facts, and upon that point the evidence is conflicting. The rate of speed at which the car was going is not shown to be so great as to necessarily determine the question of contributory negligence, and we should not reverse the judgment of the trial court on a mere conjecture.

Defendant contends that the court erred in giving instructions numbered 7, 8, 9 and 11, on his own motion.

We have examined all of those instructions and find none of them contains reversible error.

It is further contended that the court erred in refusing to give each of ten instructions requested by defendant. From an examination of the record it appears that those requests were properly refused, for the court had on his own motion instructed the jury on all of the questions presented at the trial.

The controlling question in this case appears to be whether the plaintiff was guilty of contributory negligence at the time the car in which he was riding struck the stone pile. The attention of the jury was directed to that question by two separate instructions. In one of them it was said: "You are instructed in considering the evidence bearing on the question of the contributory negligence of the plaintiff just before and at the time of the accident it would be proper for you to take into consideration the entire situation and surroundings as existed at that time, including the rate of speed of the car, and if you believe from the evidence and under the instructions of the court, taking into consideration the entire situation, that plaintiff exercised ordinary and reasonable care for his own safety, then you are instructed plaintiff would not be guilty of contributory negligence. But, on the other hand, if you believe that the plaintiff failed to exercise ordinary and reasonable care for his own safety under the situation as existed just before and at the time of the accident, then you are instructed that plaintiff cannot recover."

By instruction No. 10 the court directed the attention of the jury to the street lights, and told them that if the street or arc lights lighted up the stone pile and its immediate vicinity so that it could have been seen by plaintiff in time to have avoided the accident without the aid or assistance of other artificial lights, then, as a matter of law, the defendant would not be guilty of negligence in failing to place a danger signal upon the stone pile or in failing to comply with the city ordinance. If the instruction was

erroneous, it was prejudicial to plaintiff and not to defendant.

We have not discussed all of the defendant's 23 assignments of error, but they have all been carefully considered, and, viewing the whole record, we are unable to say that it contains any reversible error.

The judgment of the district court is therefore

AFFIRMED.

LETTON, J., not sitting.

KEYA PAHA COUNTY, APPELLEE, V. BROWN COUNTY, APPELLANT.

FILED FEBRUARY 5, 1916. No. 18877.

1. **Counties: REPAIR OF BRIDGES: SUIT FOR CONTRIBUTION: SUFFICIENCY OF PETITION.** In a suit by a county to recover from an adjoining county one-half of the cost of repairing a bridge over a river dividing the two counties, a petition which describes the bridge, and alleges that it has been damaged and is in need of repair, that a portion of the bridge has been entirely washed away and destroyed, is sufficient to resist a general demurrer.
2. ———: ———: ———: **NOTICE.** "For the purpose of requiring a county to contribute to the expense incurred by an adjoining county in repairing a bridge over a river between them, a previous notice that it would be necessary to rebuild a portion which had been entirely washed away is sufficient to include an approach or abutment and any grading or riprapping essential to the proper construction thereof." *Brown County v. Keya Paha County*, 88 Neb. 117.
3. **Evidence** examined and found sufficient to sustain the judgment.

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

John M. Cotton, William M. Ely and *J. S. Davisson*, for appellant.

Forrest Lear and *C. E. Lear, contra.*

BARNES, J.

This was an action by which Keya Paha county sought to recover from Brown county one-half of the cost of repairing and rebuilding a bridge over the Niobrara river between the counties above named. The defendant demurred to plaintiff's petition. The demurrer was overruled, and defendant filed an answer in which it was alleged that the bridge in question consisted of two spans, or two separate bridges; that one of the bridges was entirely washed away and destroyed, and that the work of restoring it was new construction, and was in fact the building of a new bridge; that defendant was not liable for one-half of the cost thereof because the notice served on the county commissioners of the defendant county provided for repairing the bridge. It was also alleged that the bridge was on a county line road between Rock county and the defendant county, and therefore there was a misjoinder of parties defendant. The allegations of fact, as stated in the petition, were admitted and the answer concluded with a prayer that the action be abated and dismissed, but, if it was not dismissed, judgment should not be rendered for more than one-fourth of the amount paid by the plaintiff for the repair of the bridge. The allegations of the answer were denied by a reply in which it was alleged that the bridge in question was originally constructed by subscriptions taken in Brown county; that the part of the bridge repaired by plaintiff had been twice destroyed and was repaired by Brown county; that plaintiff had been required to pay one-half of the cost of such repairs; that the bridge was not on the county line between Rock and Brown counties; that Rock county had never been called upon to contribute to the payment of the original construction of the bridge or of any of the repairs above mentioned. On the issues thus joined a trial was had to the court without the intervention of a jury. The evidence consisted of a stipulation of facts and certain exhibits, which were used as the bill of exceptions. The trial court found for the plaintiff and rendered a judgment against the de-

fendant for the amount prayed for in the petition. The defendant has appealed.

The record discloses that the bridge in question is situated some distance west of the county line between Rock and Brown counties; that it crosses the Niobrara river between the plaintiff county and Brown county. It appears that the road leading from the bridge, a distance of about three-fourths of a mile to the top of the hill southeast of the river, strikes the county line between Rock and Brown counties at that point; that there is a branch of the road which leads to Bassett, in Rock county, but the main road leads to Long Pine, in Brown county. The record shows that there is no road on the section line between Rock and Brown counties which extends north into and through Keya Paha county; that the road between Rock and Brown counties is not a regularly laid out or established highway; that the road above described as leading from the bridge to the top of the hill was laid out and established by the defendant county. It also appears that the bridge in question consists of two spans over the two channels of the Niobrara river, which is divided at that point by a small artificial or made island; that the two spans above mentioned have always been used and considered as one bridge, and that one of the spans would be useless without the other; that one of the spans of the bridge was washed away and totally destroyed by the flood waters of the river, and that the other span was damaged and needed repair. The record also shows that the bridge has been twice repaired by Brown county, and that plaintiff has paid one-half of the costs of such repairs. We have not set out all of the stipulations, but only so much thereof as is necessary to a decision of this controversy.

The appellant contends that the trial court erred in overruling its demurrer to plaintiff's petition. An examination of the record convinces us that this contention is not well founded.

It is further contended that the judgment is contrary to law and is not sustained by the evidence. Section 2988,

Rev. St. 1913, provides: "Bridges over streams which divide counties, and bridges over streams on roads on county lines, shall be built and repaired at the equal expense of such counties: *Provided,* for the building and maintaining of bridges over streams near county lines, in which both are equally interested, the expense of building and maintaining any such bridges shall be borne equally by both counties." This section of the statutes was construed in *Dodge County v. Saunders County,* 70 Neb. 442, and *Brown County v. Keya Paha County,* 88 Neb. 117. The opinions in those cases resolve all of the questions presented in the case at bar against the defendant's contentions.

The evidence sustains the findings of the district court, and the judgment is

AFFIRMED.

JENKINS LAND & LIVE STOCK COMPANY ET AL., APPELLANTS, V. SAMUEL E. KIMSEY ET AL., APPELLEES.

FILED FEBRUARY 5, 1916. No. 19283.

1. **Mortgages:** FORECLOSURE: DECREE: DORMANCY. A decree of foreclosure of a mortgage in this state is not a judgment within the meaning of section 8056, Rev. St. 1913. *St. Paul Harvester Works v. Huckfeldt,* 96 Neb. 552.
2. ———: ———: LIMITATIONS: ORDER OF SALE. A decree of foreclosure may be enforced without an order of sale, and the lien thereof is not lost by a failure to procure the issuance of such an order within five years from the date of the decree.

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

J. H. Broady and *Charles T. Jenkins,* for appellants.

C. E. Eldred and *Meeker & Hines, contra.*

BARNES, J.

This was an action to restrain the sale of certain real estate under a decree of foreclosure, on the ground that the decree was rendered more than five years next before the order of sale was issued, and to quiet plaintiffs' title. The trial court sustained a demurrer to the petition. The plaintiffs elected to stand upon their pleading and their action was dismissed. They have brought the case to this court by appeal.

The only question presented by the record is whether a decree of foreclosure is within the provisions of sections 8056 and 8088, Rev. St. 1913, relating to dormant judgments, and providing when a judgment shall cease to be a lien on real estate. It is hardly necessary to set forth the sections above mentioned for their provisions are well known.

Plaintiffs contend that the decisions of this court in *Herbage v. Ferree,* 65 Neb. 451, *Medland v. Van Etten,* 75 Neb. 794, and *St. Paul Harvester Works v. Huckfeldt,* 96 Neb. 552, are unsound and should be overruled and a contrary rule should be established. Those decisions are based on *Beaumont v. Herrick,* 24 Ohio St. 445, and *Moore v. Ogden,* 35 Ohio St. 430. We have re-examined those cases and are convinced that they contain a correct statement of the law. It is there held that a decree finding the amount due on a mortgage, and ordering the sale of the real estate described therein, is not a judgment within the meaning of section 422 of the Ohio Code, which provides when a judgment shall become dormant. The Code of Ohio relating to the foreclosure of mortgages is practically the same as our own. Our Code provides that the action shall be commenced in the district court; that the petition must allege that no proceedings at law have been had, or commenced, to recover the mortgage debt; that the court shall find the amount due on the mortgage, and order the mortgaged premises sold for the satisfaction of that amount, with interest and costs. No judgment can be rendered by the court until after a confirmation of the sale,

when the court may render a judgment for a deficiency, if any exists. The action is still pending and no final judgment can be rendered until the sale is confirmed, when, if there be a deficiency, a personal judgment may be rendered therefor upon which an execution may be issued. *Parmele v. Schroeder,* 59 Neb. 553; *Alling v. Nelson,* 55 Neb. 161. In *Jarrett v. Hoover,* 54 Neb. 65, it was said: "A decree of foreclosure may be executed without order of sale. If one be issued, it cannot limit the power conferred by the decree."

Counsel for plaintiffs cite a Kansas case and one from Michigan in support of their contention that a decree of foreclosure is embraced in the provisions of the statute above mentioned. It appears from examination of the Kansas statutes that in that state a final judgment is rendered against the mortgagor in the first instance, and the mortgaged premises are sold under a special execution issued for that purpose. No provision is found in the statutes for the entry of a deficiency judgment. In Michigan a mortgage containing a power of sale is foreclosed by the publication of a notice for that purpose. Therefore the decisions of those states do not support the plaintiffs' contention. We are of opinion that our former decisions are right, and should be adhered to.

The judgment of the district court is

AFFIRMED.

MARGUERITE PHAIR ET AL., APPELLEES, V. SAMUEL G. DUMOND ET AL., APPELLANTS.

FILED FEBRUARY 5, 1916. No. 18580.

1. **Intoxicating Liquors: ACTION FOR LOSS OF SUPPORT: PARTIES.** An action for loss of means of support caused by the death of a person in consequence of, or as the result of, traffic in intoxicating liquors, may be maintained by the children of the deceased, under the liquor laws of the state. *Roose v. Perkins,* 9 Neb. 304.

2. ———: ———: DEFENSE. Where whiskey sold or given by a saloon-keeper contributes to a resulting intoxication, it is immaterial in what manner or from whom the drinker obtained the other liquor which helped to cause the condition.

3. ———: ———: LIABILITY ON BOND: RIGHTS OF CHILD. During incapacity caused by habitual drunkenness of her husband, a wife supported her minor children by her own labor. She afterwards died as the result of an assault committed upon her by the husband while drunk. *Held*, that a child born after the assault may, after the death of the mother, recover for loss of means of support upon the bond of a liquor dealer who contributed to the intoxication of the husband at the time he committed the assault.

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

T. J. Doyle and *Claude A. Davis*, for appellants.

E. P. Clements and *A. Norman, contra.*

LETTON, J.

This action was brought by the guardian of two minor children to recover damages caused by loss of their means of support alleged to have been caused by the sale of intoxicating liquor by defendant Dumond to Orval Phair, their father, on May 22, 1908. Dumond was a licensed saloon-keeper in the city of Ord at that time. The other defendant is the surety upon his bond.

Two causes of action are set forth in the petition. The first alleges that Phair was an habitual drunkard in May, 1908, and that during the license year from the 1st of May, 1908, to the 1st of May, 1909, defendant furnished and sold Phair liquor to such an extent that he became debauched and depraved, and incapable of supporting his family; that he was arrested many times for drunkenness, and was sentenced to a term in the penitentiary on account of an offense committed while in that condition, and that the plaintiffs will be deprived of their sustenance during the time he is confined. The second cause of action charges that on the 22d of May, 1908, Jennie Phair, the mother of the plaintiffs, was a strong, healthy woman, capable of earning $500 a year; that on that day Dumond furnished

intoxicating liquors to Phair, which caused him to become intoxicated, and that while intoxicated he assaulted her, threw her upon the ground, kicked her in the side, and so injured her that she died as a direct result of said injury; that by reason of the injury and death of their mother, who during Phair's incapacity on account of habitual drunkenness and imprisonment had worked for money and supported them, the plaintiffs were deprived of her care and support, and that they have no property or estate.

The evidence and verdict establish the following facts: Phair was married in Ord, in March, 1905. He was a moderate drinker before he was married, but afterwards he became addicted to the use of liquor to excess, had prior to the fall of 1907 become a confirmed and habitual drunkard, and had repeatedly been arrested and committed to jail for offenses committed while drunk. In September, 1907, with his family, he removed to Central City, Nebraska. In this town there were no saloons, and Phair refrained from drinking to excess, was a steady worker, and supported his family. Mrs. Sower, the mother of Mrs. Phair, who lived at Ord, was taken sick early in May, 1909, and Mrs. Phair came from Central City to take care of her. On the evening of May 22 Phair came to Ord. He went into the saloon of defendant, asked for and was given a drink of whiskey by Dumond, and bought and drank another glass. Dumond stepped out of the room, and while he was gone Phair stole the bottle from which he had been served, with some whiskey in it. Soon after he went to the house of Mrs. Sower, created a disturbance, and, upon his wife attempting to quiet him, he pulled her out of the house, assaulted her and kicked her in the side. Officers were called. When they reached the house Phair and Mrs. Phair had gone. Upon making a search they found Mrs. Phair lying upon the ground beyond a railroad embankment not far away; Phair having run away. Her dress was torn, and she appeared to have suffered a shock. She was assisted to her mother's house, and upon examination it was found that her side was bruised, swollen and

much discolored just above the hip. The doctor who attended her testified there were bruises all over her body that night when he was called. She was pregnant and suffered a miscarriage about a month afterward. After this miscarriage her side would swell at intervals of three to five weeks; she would suffer from dull pains in her head and would seem somewhat stupified. A discharge would then occur of blood and pus, and she would apparently recover until the recurrence of the same symptoms. She continued to live with her mother for over a year after the injury, when she went back to her husband and lived with him until August 20, 1910. At about this time Phair was arrested and sent to the penitentiary. On October 25, 1910, she gave birth to one of the plaintiffs, Clara E. Phair. After the birth of the child the trouble with her side recurred. On Sunday, May 9, 1911, she had a similar attack to those she formerly had, except that she had a severe chill. She gradually became unconscious, an eruption broke out over her body which was diagnosed as a septic inflammation, and she died upon the following Wednesday. Previous to the assault Mrs. Phair had been a strong, healthy, young woman, had borne one child and had never had a miscarriage. Several physicians testified that in their opinion her death was due to septic poisoning, proceeding from a pus cavity which resulted from the assault made by her husband; that the cavity would periodically fill with pus which would force a passage and close again. Other physicians testified that in their opinion if this condition existed it would be impossible for a woman to conceive and bear a healthy child as Mrs. Phair did. There is evidence enough to sustain a verdict based upon the proposition that the assault produced the septic conditions which caused her death.

More than 40 assignments of error are made, and many of the instructions given by the court are attacked. The law in cases of this nature has been repeatedly declared by this court and the charge of the court seems in the main to be in accordance with settled principles.

One of the principal complaints made is that the second cause of action, which was based upon loss of support furnished by Mrs. Phair to her children, cannot be maintained after her death by the children, but can only be maintained by the administrator of Mrs. Phair in a separate action for her death. This precise question has been settled in this state against the appellant's contention. *Gran v. Houston,* 45 Neb. 813; *Fitzgerald v. Donoher,* 48 Neb. 852; *Murphy v. Willow Springs Brewery Co.,* 81 Neb. 223.

Another complaint is that, since the guardian was given power to relinquish the care of the children to the Nebraska Children's Home Society by the county court and had relinquished their persons to such society, she was not competent to act in their behalf. The guardian had been regularly and legally appointed and has never been discharged. It is not shown that any adoption of the children had taken place or that any other guardian or caretaking agency had ever been appointed. The court will not presume that she will misappropriate any fund belonging to these children, and the mere relinquishment of their personal care does not deprive her of control over their estate. Furthermore, the action could be maintained by the plaintiff as next friend. The objection is merely to a matter of form and is not sustained.

It is strongly urged that, since the intoxication of Phair resulted from the drinking of whiskey in the stolen bottle, the defendant is not liable. The evidence shows that Dumond furnished two glasses of whiskey to Phair before the bottle was stolen. The whiskey sold and given contributed to the resulting intoxication. This is sufficient under the statute.

The argument that, because the system of Phair had become so weakened by drunkenness before May 22, 1908, he was worthless to his family, and that therefore recovery could not be had for failure to support his children thereafter, is unsound. Phair had for months before that day abstained from drinking to excess and had supported his family in Central City. He was set upon the old path by

the liquor furnished by Dumond and he never left it afterward. Instruction No. 6 told the jury that if they believed Phair was an habitual drunkard and failed to support his family before May 22, 1908, no compensation should be given for the want of earning capacity or squandering his earnings resulting from his condition as it was before that date. Instructions 18 and 19 protect defendant's interest in this behalf. The instructions fairly submit the questions presented by the pleadings and the evidence.

It is said that instruction No. 13, which told the jury that, if the whiskey sold by Dumond contributed to intoxicate Phair, it is not material how he obtained the liquor that completed the intoxication, "has no support in principle or precedent," and "is shocking to every true conception of right and wrong." By section 3862, Rev. St. 1913, it is provided that, in such an action as this, it is only necessary to prove that the defendant gave liquor to the person whose acts are complained of on the day when the acts were committed, and that, in an action by one whose support legally devolves upon a person disqualified by intemperance from earning the same, it shall only be necessary to prove that the defendant has given or sold liquor to such person during the period of disqualification. This court has consistently held from the first that each licensed vendor who contributes to the intoxication is liable. Granted that the stolen whiskey completed the intoxication, it is clear that the liquor drank in the saloon contributed to produce it. *Gorey v. Kelly,* 64 Neb. 605; *Kerkow v. Bauer,* 15 Neb. 150.

Summons was issued for defendant Dumond on February 27, 1912. There was no indorsement on this of any amount for which plaintiffs would take judgment if defendant failed to appear. An alias summons bearing such an indorsement was issued and served on November 14, 1912. It is argued that as to Dumond the action was barred by the statute of limitations before the latter summons was served. One of the plaintiffs was not *in esse* and the other was under disability when the cause of action

accrued, and the guardian was not appointed until a short time before the suit was begun. Under section 7576, Rev. St. 1913, the action was not barred.

The evidence shows that Mrs. Phair supported her children by her own earnings up till the time of her death.

It is contended that, since Clara E. Phair was not born until October, 1910, while the sale of liquor was made in May, 1908, no action can be maintained by her or in her behalf. The statute (Rev. St. 1913, sec. 3859) provides: "The person so licensed shall pay all damages that the community or individual may sustain in consequence of such traffic, he shall support all paupers, widows, and orphans, and the expenses of all civil and criminal prosecutions growing out of, or justly attributed to, his traffic in intoxicating liquors."

In an action of this nature in Indiana it was held that a posthumous child could recover. *State v. Soale,* 36 Ind. App. 73. It was held in *Nelson v. Galveston, H. & S. A. R. Co.,* 78 Tex. 621, that a posthumous child was within a statute giving a right of recovery to "surviving children." In *Roach v. Wolff,* 96 Neb. 50, a child was held entitled to recover damages for the death of the father, even though the mother, suing for herself and another child, had already recovered on account of the same death. We think the provisions of our statute broad enough to include any child who has been deprived of its support in consequence of the traffic.

A number of other complaints are made; but, since we are of the opinion that the trial was fairly conducted and the verdict is supported by the evidence, the judgment of the district court is

AFFIRMED.

CLARENCE L. SHAFER, ADMINISTRATOR, APPELLANT, V. BEATRICE STATE BANK, APPELLEE.

FILED FEBRUARY 5, 1916. No. 18326.

1. **Appeal in Equity:** TRIAL DE NOVO. Upon appeal in actions in equity, this court is required by the statute to try the issues *de novo*, without reference to findings of the trial court; but, when the testimony of witnesses orally examined before the court upon the vital issues in the case is conflicting, so that it would be impossible that both versions of the transaction can be true, this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. ———: CONFLICTING EVIDENCE. When witnesses, of apparently equal credibility, disagree in their testimony as to an important fact, circumstances in the evidence which tend to indicate which version of the transaction is reliable will be carefully considered.
3. ———: SUFFICIENCY OF EVIDENCE. The evidence in this case is considered to justify the findings of the trial court.

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

Burkett, Wilson & Brown, for appellant.

Sackett & Brewster, contra.

SEDGWICK, J.

In April, 1912, Mary V. Shafer, with her daughter Lois Ripley, and O. A. Ripley, the husband of Lois, executed and delivered to the Beatrice State Bank a promissory note for $1,100, payable one year after date. Afterwards Mary V. Shafer began this action in the district court for Gage county, and in April, 1913, Clarence L. Shafer filed an amended petition therein, as administrator of the estate of Mary V. Shafer, in which he alleged that Mary V. Shafer "departed this life * * * on the 24th day of November, 1912," and that thereafter he was duly appointed administrator of her estate. In his amended petition he asks "that

the defendant, the Beatrice State Bank, be perpetually enjoined from selling, negotiating, indorsing or transferring the said note, and that the said note as to the said Mary V. Shafer and her estate be canceled, annulled and held for naught, and for such other, further and different relief as equity may require." It appears that O. A. Ripley had sold a note in the same amount to the bank, which bore the name of John Wignall as maker, and in which Mr. Ripley was payee. Mr. Wignall denied his signature to the note and refused to pay the same, and afterwards, as a witness in the case, testified that he never signed the note and did not know that the note had been executed to Mr. Ripley. The note executed by Mrs. Shafer was given in lieu of the Wignall note, and it was alleged that Mrs. Shafer's signature to this note was procured by duress by Mr. Harden, the vice-president of the bank, and that this note was given on an agreement to compound a felony and prevent a prosecution against Mr. Ripley for forging the Wignall note. The defendant admitted purchasing the Wignall note, and alleged that it was a forgery, admitted that the note now in question was taken by the bank in lieu of the Wignall note, and denied that this note was procured by duress or that there was any agreement to compound the felony. The court found generally in favor of the defendant, and the plaintiff has appealed.

It appears that a meeting was held by the various parties interested, at which the plaintiff Clarence L. Shafer, Mr. Ripley, and Mrs. Shafer, and two daughters of Mrs. Shafer, Mrs. Ripley and Mrs. Ella Doty, and Thomas Harden, the vice-president of the bank, were present. This plaintiff and Mrs. Doty testified directly and positively to language used by Mr. Harden and statements made by him which would strongly tend to prove the allegations of the petition. Mrs. Ripley testified that she was present during the whole transaction, and she as emphatically denied that any such language was used by Mr. Harden or any such statements made by him. Mr. Harden was called as a witness in behalf of the bank and was asked to testify in

regard to the transaction of the execution of the note. This was objected to under the statute on the ground that he had direct legal interest in the result of the suit and could not be allowed to testify to conversations and transactions between himself and the deceased maker of the note. This objection was sustained by the court, but his counsel was allowed to call the witness' attention to the statements of the plaintiff's witnesses as to language used by him, and he was allowed to categorically deny having made the representations and statements attributed to him by the plaintiff's witnesses. His evidence explicitly denies the most important testimony of the plaintiff's witnesses in that regard.

Upon appeal in actions in equity, this court is required by the statute to try the issues *de novo,* without reference to findings of the trial court; but, when the testimony of witnesses orally examined before the court upon the vital issues in the case is conflicting, so that it would be impossible that both versions of the transaction can be true, and it is apparent that the trial court relied upon the evidence of two witnesses rather than that of the two witnesses who oppose them, this court will consider the fact that the trial court had the opportunity of observing the witnesses, their manner of testifying, their probable knowledge and understanding of the facts that they testify to, their interest in the result of the suit, and other circumstances of that nature that might enable him to determine the truth of the matter. This is especially true when there are other circumstances in the case that tend to indicate which version of the transaction is reliable.

It appears that the evening before this note was given, Mrs. Shafer and Mr. Ripley and other members of the family had a conference in regard to the matter, and that at some time during negotiations it was arranged among the relatives that Mrs. Ripley should sign this new note with her husband, and that Mrs. Shafer should also sign it, and if Mr. and Mrs. Ripley were unable, or for any reason failed to pay the note, or any part of it, so that Mrs. Shafer

was required to pay some part of it, the amount so paid by Mrs. Shafer should be deducted from that part of Mrs. Shafer's estate which would otherwise go to her daughter, Mrs. Ripley. It also appears that shortly before that time Mrs. Shafer had made a will whereby she devised and bequeathed to her daughter, Mrs. Ripley, an undivided one-seventh part of her estate, and that after the death of Mrs. Shafer it appears that her estate was of the value of at least $15,000. At the time when this note in question was executed Mrs. Ripley and her husband, in pursuance of this understanding between the relatives, executed and delivered to Mrs. Shafer their promissory note in like amount, and also executed and delivered to her their written agreement, which provided that any amount that Mrs. Shafer might be compelled to pay on account of the note in question should be deducted from Mrs. Ripley's share of her mother's estate. This plaintiff, as administrator of Mrs. Shafer's estate, now holds the note which Mrs. Ripley and her husband executed to Mrs. Shafer, and if the estate is required to pay this note to the bank, or any part of it, there is nothing to indicate that he will be prevented from offsetting such payment against the interest of Mrs. Ripley in the estate under the will. It is not contended that the signature of Mrs. Ripley to the note in question was obtained by duress. These and other circumstances in the case tend strongly to indicate that Mrs. Shafer in signing this note relied upon this family arrangement rather than that she was compelled by duress.

The evidence offered tending to show an agreement to compound a felony is not clear and satisfactory. The petition alleged that the note which it is alleged was forged was delivered by Mr. Harden to Mr. Ripley, but the testimony of all the witnesses was that the note was turned over to Mrs. Shafer. The plaintiff and Mrs. Doty testified to some remarks of Mr. Harden during the negotiations to the effect that a prosecution for forgery would be an unfortunate thing, and similar remarks, but they do not testify to any agreement that such prosecution should be

stifled or prevented in any way, and their testimony as to these statements is denied by Mr. Harden, and also by Mrs. Ripley.

While the case is not free from doubt, it appears that the court tried the case with care, and under all the circumstances we do not feel justified in coming to a different conclusion.

The judgment of the district court is

AFFIRMED.

FAWCETT, J., not sitting.

JAMES PIERCE, APPELLEE, V. BOYER-VAN KURAN LUMBER & COAL COMPANY, APPELLANT.

FILED FEBRUARY 5, 1916. No. 19447.

1. **Master and Servant**: INJURY TO SERVANT: RIGHT TO COMPENSATION. An employee is not entitled to compensation for injury under the employers' liability act unless the accident which caused the injury happened in the course of his employment, and arose out of his employment. Rev. St. 1913, sec. 3650.
2. ———: ———: ———. An accident resulting from a risk reasonably incident to the employment should be considered as arising out of the employment.
3. ———: ———: ———: ASSAULT. If an employee is assaulted by a fellow workman, whether in anger or in play, an injury so sustained does not arise "out of the employment," and the employee is not entitled to compensation therefor under the employer's liability act.
4. ———: ———: COMPENSATION. The employers' liability act allows the parties interested to "settle all matters of compensation between themselves." Rev. St. 1913, sec. 3677. The amount of compensation, when not agreed upon by the parties, is to be determined by the district court (section 3680) and, except as expressly provided in the act, must be payable periodically (section 3666).
5. ———: ———: COMMUTATION OF COMPENSATION. When the amount of compensation in periodical payments has been determined, either by agreement of the parties, or by the decision of the court, it "may be commuted to one or more lump sum payments, except

compensation due for death and permanent disability." Rev. St. 1913, sec. 3681.

6. ———: ———: ———: CONSENT OF COURT. In such case no other or different authority for making such commutation is provided by that section. It still depends upon the agreement of the parties, except that their right to so agree in the specified cases depends upon "the consent of the district court."

7. ———: ———: ———: ———. In general, the agreement of the parties will authorize such commutation of payments. In case of death or permanent disability, the consent of the court is also necessary. If the district court upon careful investigation finds that special circumstances exist making it necessary to commute to a lump sum for the protection of the workman or his dependents, the court may "consent" to such agreement by the parties.

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

Mahoney & Kennedy, for appellant.

Dunham & Aye, contra.

SEDGWICK, J.

While the plaintiff was in the employ of the defendant, another employee of the defendant threw a small stick, which struck the plaintiff in the eye. The plaintiff brought this action in the district court for Douglas county to recover compensation under the employers' liability act. The trial court found in plaintiff's favor, and defendant has appealed.

The defendant presents two questions for consideration, and contends: First, that the findings of the court that the accident arose out of plaintiff's employment is not supported by the evidence; second, that the court erred in finding that the plaintiff is entitled to have his weekly compensation payments commuted to one lump sum payment, and the court erred in entering judgment for the plaintiff for a lump sum. These are important questions under this statute. Section 3650, Rev. St. 1913, provides: "If both employer and employee become subject to part II of this article, both shall be bound by the schedule of compensation herein provided, which compensation shall be

paid in every case of injury or death caused by accident arising out of and in the course of employment, except accidents caused by, or resulting in any degree from wilful negligence, as hereinafter defined, of the employee." It is clear that the meaning is that the employee shall not be entitled to compensation under the act unless the accident which caused his injury happened in the course of his employment. The facts conceded by the parties are that the plaintiff was regularly in the employment of the defendant. He was acting as a teamster, and at the time of the accident complained of was returning with his team and wagon to the yards of the defendant, and as he was entering the yards another employee, Brown, jumped into the wagon and began a playful scuffling with the plaintiff. Brown soon left the wagon, and, after running a short distance, picked up a small stick, which he playfully threw at the plaintiff, and which struck the plaintiff in the eye, causing the loss of his eye. The contention is that the plaintiff scuffled with Brown while he was upon the wagon, and that after Brown left the wagon the plaintiff attempted to strike him with one of the lines. This latter contention is alleged in the answer, as follows: "Such injury as the plaintiff has was received through a playful assault or friendly scuffle which plaintiff provoked and brought upon himself by attempting to strike said Guy Brown with the end of one of the lines with which the plaintiff was driving his team, and the action of said Guy Brown in throwing the stick which injured the plaintiff was incited and caused by plaintiff's own action." The plaintiff in his testimony denied that he engaged voluntarily in any scuffle with Brown, and denied that he struck Brown with the line or made any attempt or motion toward doing so. Brown testified to something of a scuffle upon the wagon, and also testified positively that the plaintiff attempted to strike him with the line after he left the wagon, which was the cause of his throwing the stick. There was some other evidence upon these two points, but it may be said to be substantially conflicting.

"The accident must 'arise out of' the employment, as well as 'in the course of' the employment. Thus, where a workman during the course of the employment does something entirely foreign to the work which he is employed to do (playing a practical joke, for example) whereby he is injured, this accident could be said to have occurred 'during the course of' the employment, but it could not be said to 'arise out of' the employment, because the workman was not doing anything which he was employed to do when the accident happened." 1 Bradbury, Workmen's Compensation, p. 398.

The parties cite other authorities in the briefs establishing this rule. In this case clearly the plaintiff was not doing "something entirely foreign to the work which he is employed to do." He did not leave his wagon; the team was not stopped; he continued his regular employment. If he resisted the advances of Brown and attempted to force him from the wagon, there is no evidence whatever that plaintiff did anything to encourage Brown to continue his performances. There is no doubt, under the many authorities cited by both parties, that if the workman abandons his employment, even for a short time, and engages in play, or some occupation entirely foreign to his employment, he is not entitled to compensation for an accident by which he is injured while so doing. It would seem also to be clear that, even if he does not abandon his employment, and even while engaged in the performance of his duty, if he does some act or thing not connected with his employment, which was intended to and probably did provoke an assault or retaliation, he would not be entitled to compensation for an injury the result of an accident so caused by himself. It is difficult to determine from this evidence whether the plaintiff made any motion at or toward striking Brown with his lines, and if he did it was in direct connection with Brown's interference with him, and may reasonably be said to be a part of that transaction.

There is evidence in the record that the defendant's employees were accustomed to join in what they called

horse-play, and that the defendant took no precautions to stop such a custom or protect his employees. There is also evidence that this plaintiff was not in the habit of joining in such playful performances. Under such circumstances the supreme court of New Jersey said: "Where the accident is the result of a risk reasonably incident to the employment, it is an accident arising out of the employment (citing cases). The trial judge found, as a fact, that the decedent did nothing to invite the attack, and it is not denied that the decedent was acting, at the time, within the scope of his employment. * * * In the case under consideration, it appears that the prosecutor employed young men and boys. It is but natural to expect them to deport themselves as young men and boys, replete with the activities of life and health. For workmen of that age, or even of maturer years, to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman is a matter of common knowledge to every one who employs labor. At any rate, it cannot be said that the attack made upon the decedent was so disconnected from the decedent's employment as to take it out of the class of risks reasonably incident to the employment of labor." *Hulley v. Moosbrugger,* 87 N. J. Law, 103.

Such rule would perhaps not be unjust in its general application. The question is whether our statute can be so construed. The language of the statute is identical with the earlier statute of England, which was adopted also by some of our states. It had been many times construed by the English courts before it was adopted by our legislature. Under such circumstances, the courts always consider that, if the legislature was not satisfied with the construction which had been given to language adopted from another jurisdiction, the language adopted would have been so guarded in the statute adopting it as to make the intention of the legislature clear. In other words, as it is generally stated, when a statute of another jurisdiction is adopted, its known construction and meaning in the jurisdiction of its origin is adopted also, unless a contrary intention is

expressed by the legislature adopting it. The case of *Hulley v. Moosbrugger,* upon appeal to the court of errors and appeals (95 Atl. (N. J.) 1007), was reversed, and the law stated to be: "An employer is not charged with the duty to see that none of his employees assaults any other one of them, either wilfully or sportively. An employer is not liable, under the workmen's compensation act (P. L. 1911, p. 134), to make compensation for injury to an employee which was the result of horse-play or skylarking, so called, whether the injured or deceased party instigated the occurrence or took no part in it; for, while an accident, happening in such circumstances, may arise in the course of, it cannot be said to arise out of, the employment." The court cited and quoted from many decisions of the English courts which had so construed the statute long before our legislature adopted it, and we must conclude that our legislature intended that it should be so construed.

Did the court err in entering judgment for the plaintiff in a "lump sum"? The following sections of the Revised Statutes of 1913 appear to bear upon this question:

"Except as hereinafter provided, all amounts of compensation payable under the provisions of this article shall be payable periodically in accordance with the methods of payment of the wages of the employee at the time of his injury or death." Section 3666.

"The interested parties shall have the right to settle all matters of compensation between themselves in accordance with the provisions of this article." Section 3677.

"The amounts of compensation payable periodically under the law, either by agreement of the parties, or by decision of the court, may be commuted to one or more lump sum payments, except compensation due for death and permanent disability. These may be commuted only with the consent of the district court." Section 3681.

This court had occasion to consider one phase of this question in the recent case of *Bailey v. United States Fidelity & Guaranty Co., ante,* p. 109. In that case the employer and the workman had agreed upon such commutation and

the trial court rendered judgment in a lump sum. The question was whether the court had power to do so without the consent of the insurance company, which was also a party to the suit and was objecting to such commutation. This court sustained the trial court in so holding. It may no doubt sometimes happen that the workman, or his dependents, will be placed at a disadvantage by the refusal of the employer to agree to commutation in a lump sum. He may be compelled to receive a much less amount than he is entitled to because of his necessity to have the same paid in a lump sum. In the recent case above cited, the court construed the statute and held that the statute implies "that a previous agreement must have been reached which will be ratified by the district court, and that without such an agreement the court cannot compel such a commutation of payments. * * * We do not feel at liberty to transpose the language of this section, as plaintiff desires, and change its meaning so as to make commutation compulsory. The meaning is not ambiguous. The fact that the legislature did not express such a thought, while many such statutes do, is significant." The law provides that "interested parties shall have the right to settle all matters of compensation between themselves." Section 3677. Section 3681, which provides that periodical payments may be commuted, is in harmony with this provision. It does not provide that the district court may order commutation at the request of one of the parties, but does provide that the parties themselves cannot agree upon a commutation in certain cases without the consent of the court. If there is doubt in regard to the justice of this provision, there seems to be nothing in the language of the statute that would justify the court in construing it differently, and the remedy, if one is needed, must be by the legislature. It does not appear that the parties had agreed upon commutation, and the court has no authority to order it without such agreement.

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

REVERSED.

FRED JOHANSEN, APPELLEE, V. UNION STOCK YARDS COMPANY, APPELLANT.

FILED FEBRUARY 5, 1916. No. 19457.

1. **Employers' Liability Act:** "ACCIDENT," "INJURY." The employers' liability act defines the words "accident" and "injury" as used in that statute, and distinguishes between them. An accident produces "objective symptoms of an injury," and an injury includes violence to the physical structure of the body and the natural results therefrom. Rev. St. 1913, sec. 3693*b*.
2. **Master and Servant:** INJURY TO SERVANT: EMPLOYERS' LIABILITY ACT: WHEN INJURY OCCURS. When an accident to an eye, which at first appears not serious, results, after a week or more, in a diseased condition of the eye which destroys the sight, the "injury occurred," within the meaning of the statute, when the diseased condition culminated.
3. ———: ———: ———: JUDGMENT. The district court cannot enter judgment for a "lump sum" under the employers' liability act without the agreement of the parties.

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

Mahoney & Kennedy and *Guy C. Kiddoo*, for appellant.

Murphy & Winter, contra.

SEDGWICK, J.

While the plaintiff was employed by defendant, he was injured by an accident which caused the loss of an eye. He brought this action in the district court for Douglas county under the employers' liability act, and obtained a judgment, from which the defendant has appealed.

The defendant presents two principal questions for our consideration: First. Has there been a substantial com-

pliance with section 3674 of the Revised Statutes, which provides: "No proceedings for compensation for an injury under this article shall be maintained, unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof; and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same." Second. Can the district court enter a judgment for a lump sum without an agreement of the parties to that effect?

The plaintiff alleged in his petition that on the 18th day of December, 1914, he "was engaged as one of the men in putting the roofing on the hog-house, one of the buildings being erected and constructed by the said company, and while so engaged, and while preparing a tar mixture and composition used in the construction of said roofing, by reason of the splashing of the hot tar mixture, a portion of which struck plaintiff in the left eye," he lost the eye. He also alleged that the defendant company, in charge of the plant "in which plaintiff was working, knew of the injury and talked to the plaintiff about it, advising this plaintiff to go and consult a physician with reference to said injury," and that the plaintiff lost the sight of his eye, "which loss of sight occurred on or about June 1, 1915," and that "within six months after the occurrence of said injury the plaintiff herein made claim to defendant company for his compensation, as by law required." This notification was in a letter written to the defendant by plaintiff's attorney and is conceded to be sufficient in form, but the defendant alleges that the notice was dated June 19, 1915, and was not within six months after the injury. It is conceded that the accident happened more than six months before this claim was made. The trial court found "that said accident resulted in a total disability to plaintiff on December 25, 1915."

The statute defines the word "accident" and the word "injury" as used in the act and distinguishes between them.

"The word 'accident' as used in this article shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforseen event, happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. The terms 'injury' and 'personal injuries' shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom." Rev. St. 1913, sec. 3693*b*.

The evidence was without contradiction that the employees who were working with the plaintiff at the time treated the boiling over of the tar and its effects upon those working over it in the nature of a joke, not realizing that any one had been seriously injured. The plaintiff himself was not aware of the effects that would "naturally result therefrom." The plaintiff went to his home the night after the accident, and he testified that, with the help of his niece, who was living with him, he washed his eye with warm water, and they appear to have so continued treating it, without realizing what might result from the accident, for several days, until about the 25th day of December, when he was induced to consult a physician, who advised him to go to a hospital and consult an expert. This he accordingly did, and was informed that his eye was in a serious condition and might result very unfavorably. During this time apparently, from this evidence, the injury resulting from the accident gradually became developed, and it cannot be said that the injury resulted from the accident, within the meaning of the statute, before the time it was discovered that it might become permanent, which was some time after the 25th of December. This evidence clearly justifies the finding of the trial court, under this statute, that the accident resulted in a total disability to plaintiff on December 25, 1915. It also appears from the evidence that the plaintiff's foreman knew of the accident at the time, or very soon after it occurred. He so testifies himself. He could not, of course, then have known of the injury as it finally developed.

The defendant quotes from a decision of the supreme court of Wisconsin in *City of Milwaukee v. Miller,* 154 Wis. 652, in which that court construes their statute, which provides that the employer shall furnish medical and surgical treatment, etc., "and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same." This statute is so unlike ours that its construction by that court can furnish us no precedent. It is, of course, necessary that our statute should be substantially complied with, which in this case we think has been done.

The remaining question discussed in the briefs was presented and determined in *Pierce v. Boyer-Van Kuran Lumber & Coal Co., ante,* p. 321. For the reasons there given, we must hold that the trial court could not commute to a lump sum periodical payments found due under the statute, without an agreement to that effect by the parties.

The judgment of the district court is therefore reversed and the cause remanded, with instructions to enter a judgment for periodical payments as provided by the statute. The costs of this appeal will be taxed to the parties incurring the same.

REVERSED.

ALBERT E. EDHOLM, APPELLEE, V. KATHERINE R. J. EDHOLM, APPELLANT.

FILED FEBRUARY 5, 1916. No. 18577.

1. **Divorce:** APPEAL: REVIEW. On appeal from a decree of divorce, the supreme court will examine the evidence, draw its own independent conclusions therefrom, and, if the evidence supports the findings of the district court, the decree will be affirmed.

2. ———: ALIMONY. $25,000, the alimony award to the defendant, together with $50 a month for the support and education of the minor daughter of plaintiff and defendant, under all the conditions as shown by the record, is *held* to be reasonable and should not be either diminished or increased.

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

Brome & Brome and *William G. Stewart,* for appellant.

Carl E. Herring and *Jefferis & Tunison, contra.*

HAMER, J.

This is an appeal from a judgment of the district court for Douglas county granting the plaintiff, Albert E. Edholm, a divorce from his wife, Katherine R. J. Edholm. The plaintiff charged defendant with extreme cruelty toward him, and prayed for a divorce and the custody of their minor child, Camilla. The defendant by her answer denied the allegations of cruelty alleged in plaintiff's petition, and by way of cross-petition charged plaintiff with extreme cruelty and prayed for a divorce. The reply was a general denial of the facts alleged in defendant's cross-petition. The trial court found for the plaintiff and against the defendant, and entered a decree for an absolute divorce in his favor, gave the defendant the custody of her minor daughter, and permanent alimony in the sum of $25,000, with $50 a month for the support of the minor child, and both parties have appealed, and both parties contend that the decree is not sustained by the evidence.

The record recites that the plaintiff was married to the defendant in Omaha, Douglas county, Nebraska, on the 17th day of November, 1900, and that he has since resided in Omaha, and is engaged in the jewelry business in said city, and has been so engaged for more than 23 years, and that he has maintained a jewelry store at 107 North Sixteenth street until January, 1905, when he removed the same to 323 South Sixteenth street, where he is still engaged in the business; that the issue of the marriage is

one child, Camilla, whose age was 12 years on the 19th of November, 1913; that the defendant has been guilty of extreme cruelty toward the plaintiff, consisting of angry words and exhibitions of ill temper, all without excuse or justification of any kind; that the defendant was accustomed to finding fault with the plaintiff, and had frequent outbursts of ungovernable rage and impatience; that she refused to be present in the plaintiff's store during the Christmas holidays, and expressed to the plaintiff in violent language her contempt and detestation of his business as a jeweler, and she criticised trades people in general and condemned them as unworthy of confidence and as belonging to a rank much lower than herself and her family, who associated only with doctors and lawyers and army officers; that she belittled the plaintiff's business and sought to make him abandon it, and ridiculed him for following such a business; that she found fault with the plaintiff concerning money matters, although the plaintiff was generous and kind to her in providing for her present wants, and even went so far as to pay the bills which she had contracted prior to her marriage with the plaintiff; that she continued to find fault with the plaintiff concerning money matters from the time of her marriage with him up to the day of filing the petition; that she charged the plaintiff with failing to provide her with spending money according to her station in life; that these complaints were all unjust, wrongful and cruel, and made without reason or justification; that she constantly found fault with the plaintiff and criticized and condemned him, and exercised her ill-governed temper upon him; that she took a special delight in finding fault with the plaintiff to his friends and acquaintances; that she would quarrel with the plaintiff in public and apparently to attract attention; that she would quarrel without cause with the carpenters and builders at work on plaintiff's proposed residence; that the defendant objected to plaintiff coming home to lunch; that plaintiff was ill much of the time and was afflicted with insomnia, which was greatly aggravated by the

defendant's misconduct; that defendant connived with certain employees in the store and tried to create discord and contention between plaintiff and his employees in his jewelry business, and thereby injured the plaintiff's business; that defendant charged the plaintiff without cause with sustaining improper relations with women employees in the store and also with other women; that she demanded of the plaintiff that he commit acts of infidelity with women; that the defendant would purchase and bring home vile and indecent books; that she was accustomed to use vile and indecent language; that while plaintiff was in ill health and suffering from insomnia the defendant persuaded him to embrace the faith of Christian Science, and that, when the plaintiff purchased and brought home books expressing a belief in Christian Science, she ridiculed that faith and wrote vile and indecent statements on the books and defaced and destroyed the same; that this was done to dishearten the plaintiff and destroy his peace of mind; that defendant would jerk the Christian Science books out of the plaintiff's hands and spit upon them and throw them on the floor.

The petition also sets up numerous acts of physical violence on the part of the defendant toward the plaintiff; that she threatened to kill the plaintiff, and locked him in the basement of the home; that she threw dishes at him when he was seated at the table; that she has thrown the contents of her plate at the plaintiff; that she pointed a loaded revolver at him and threatened to kill him, and on another occasion bit the plaintiff and struck him with great force and violence; that at another time, when the plaintiff accidentally knocked over a bottle of bay rum in the bathroom and spoke about it at the dinner table, the defendant seized a plate and threw it and its contents at the plaintiff, and, when the plaintiff procured for the defendant another plate, the defendant caught it and took it away from the plaintiff and hurled it at him with great force; that on this occasion she called him a "damn fool" and an "idiot," and said just one more word from him and

she would "fix" him; that the defendant neglected her home and home duties and the plaintiff, and gave the greater part of her time to the National Association for the Prevention and Study of Tuberculosis and the sale of Red Cross stamps; that she has also given much of her time to engagements of the nature of matinees, parties, luncheons, women's clubs, and directors meetings; that the defendant has traveled for long periods of time to California, New York, and other places; that she has also estranged the plaintiff's daughter and deprived the plaintiff of her love and affection; that she continually misrepresents the plaintiff to his said daughter and tries to establish in the mind of said child that her father is unworthy of being trusted; that the plaintiff has endeavored to discharge his marital obligations, and has done all things within his power to fulfil his duty to his wife and child.

The decree appealed from recites that the cause came on for further consideration, the same having been heretofore submitted to the court on the petition of the plaintiff, the answer and cross-petition of the defendant, the supplemental answer and cross-petition to the answer and cross-petition and supplemental answer and cross-petition of the defendant, and the evidence and arguments of counsel. The decree is very long, and it will not be necessary to specifically point out the several findings. It is enough to say in a general way the decree is for the plaintiff and against the defendant, except that the court finds that it is proper to award the defendant and cross-petitioner permanent alimony in the sum of $25,000, together with the household goods, except the personal effects and belongings of the plaintiff, now situated in No. 116 South Thirty-sixth street, Omaha, Nebraska. The court also finds that it is proper to award the defendant, in lieu of interest upon permanent alimony, temporary alimony, in some amount for the support of the defendant and the child, Camilla. The court further finds that the plaintiff is possessed of property, real and personal, of the reasonable value of $110,000. The court further finds in favor of the plaintiff

and against the defendant upon the charges of extreme cruelty practiced on the part of the defendant toward the plaintiff, and finds that the defendant has been guilty of acts and conduct toward the plaintiff constituting extreme cruelty without any just cause or provocation therefor, and as alleged in plaintiff's petition and established by the evidence, and that said plaintiff is entitled to an absolute divorce from said defendant on the ground of extreme cruelty practiced by the defendant toward the plaintiff. The court finds against the said defendant generally upon her answer and cross-petition to the plaintiff's petition. We think it unnecessary to further quote from the findings and judgment of the court.

The record discloses that Mrs. Edholm, prior to her marriage to Mr. Edholm, had spent some time in coaching and instructing public readers and platform speakers. Mr. Edholm was a jeweler, and seems to have worked hard at his trade, and also as a salesman in his store. Their occupations had been of a different character and perhaps were not well calculated to make them sympathize with each other. While Mr. Edholm was successful in his line of business, that fact does not seem to have commended him to Mrs. Edholm. She is shown to be a woman of much intelligence and great force of character, but she seems to have a crisp temper that is most easily provoked, and at such times she is subject to ungovernable fits of rage. Mr. Edholm was in feeble health and afflicted with insomnia. He was in a condition that required and demanded the affectionate services of a faithful wife. They lived together as husband and wife about 12 years, and it is not at all in doubt that they led most unhappy lives. Apart from the matter of physical violence, the defendant is shown to have unnecessarily annoyed, disturbed and mistreated the plaintiff. She dominated the husband, and the evidence shows that she made existence utterly miserable for him. Mrs. Edholm claims that the plaintiff was niggardly and mean in the matter of household expenses. They had their own house, and therefore they had no rent

to pay. Their living expenses are shown to have been about $200 a month, which he paid. The evidence clearly shows extreme cruelty on the part of the defendant toward the plaintiff. The plaintiff seems to have treated his wife kindly. She did not permit him to say much, but he was apparently trying as best he could to conciliate her and to get along agreeably. It is not necessary to further dwell upon the details of the evidence. It is fully sufficient to sustain the decree of the district court.

Mrs. Edholm was allowed $25,000 alimony, and all the household furniture, and the additional sum of $50 a month for the support of the child. From this allowance of alimony the plaintiff has taken his cross-appeal. This would seem to be a very liberal allowance, perhaps more than the defendant should have been given. It is for us to remember that the judge of the district court was closer to the parties than we are, and that he had a better opportunity to judge than we have. In this particular we do not care to disturb his findings and judgment.

The judgment of the district court is in all things

AFFIRMED.

MORRISSEY, C. J., and FAWCETT, J.

We think the judgment should be affirmed, except that the amount allowed as alimony should be materially reduced.

SEDGWICK, J., concurring.

I think that the case is not free from doubt, but the evidence before the trial court appears sufficient to establish that these parties cannot reasonably live together as husband and wife. The trouble appears to arise from the conduct of the defendant, amounting to extreme cruelty within the meaning of the statute. The amount allowed the defendant seems large under the circumstances, but it would perhaps be difficult to fix any other amount with certainty that would be nearer to exact justice between the

parties. For the reasons above stated, I agree that the judgment of the trial court should be affirmed.

LETTON, J., concurs in the above.

ROSE, J., dissenting.

With the exception of domestic conduct growing out of marital infelicity, I find nothing reflecting on either of the parties. They have a daughter growing into womanhood. She is not responsible for having been born into an unhappy home. In determining the merits of the controversy between her parents, she should not be subjected to avoidable embarrassment. I hoped the opinion adopted by this court and published by the state would justify itself, and that it would omit unnecessary details of the charges of cruelty made by the father against the mother. I therefore dissent from the form and substance of the opinion.

STATE, EX REL. CHARLES THAYER, APPELLEE, V. SCHOOL DISTRICT OF CITY OF NEBRASKA CITY ET AL., APPELLANTS.

FILED FEBRUARY 5, 1916. No. 19477.

1. **Schools and School Districts:** CONDUCT OF SCHOOLS. What shall be done in the common schools in an educational way is to be determined at school meetings held in each school district, and also by the officers of each school district as the statute may direct.
2. **Mandamus:** INSTRUCTION IN GERMAN: DUTY OF BOARD. Where the parents or guardians of 50 children above the fourth grade residing in such a school district as is referred to in section 6941, Rev. St. 1913, petition the school board of the said district requesting that German be taught in said school as an elective study, it is the duty of the board to comply with the prayer of the petition and to make provision for the teaching of German in said school as required by said section, and it may be compelled to do so by mandamus.
3. **Statutes:** CONSTRUCTION. The fundamental principle of statutory construction is ascertainment of the intent of the legislature. *People v. Weston*, 3 Neb. 312.

4. ———: ———. "In construing a statute, words should be given their usual meaning." *State v. Byrum*, 60 Neb. 384.

5. ———: ———: EXCEPTIONS. The court will not read into a statute exceptions not made by the legislature.

6. ———: ———. "Where a statute is clear and unambiguous in its terms, it is the duty of the court, in construing it, to give the language used by the legislature its plain and ordinary meaning." *State v. Bratton*, 90 Neb. 382.

7. ———: CONSTITUTIONALITY: PROVINCE OF COURTS. It is not for the court to inquire into the motives of the legislature in the enactment of laws, or to determine their wisdom, or the lack of it. *Stewart v. Barton*, 91 Neb. 96.

8. ———: CONSTRUCTION. It is for the legislature to determine the policy of any enactment it may make. The legislature and the courts each act in a separate capacity, and each is independent of the other.

9. ———: REPEAL BY IMPLICATION. "A legislative act complete in itself is not inimical to the provisions of section 11, art. III of the Constitution; and where such an act is repugnant to, or in conflict with, a prior law, which is not referred to nor in express terms repealed by the later act, the earlier statute is repealed by implication." *State v. Hevelone*, 92 Neb. 748.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

William H. Pitzer and *D. W. Livingston*, for appellants.

W. F. Moran and *Jean A. Cobbey, contra.*

HAMER, J.

This is an appeal from the judgment of the district court for Otoe county in favor of the relator in a mandamus case touching the teaching of the German language in the Sixth street division of the school district of Nebraska City. The alternative writ relates that the city of Nebraska City is a municipal corporation having a population of 5,300 inhabitants; that the school district of the city of Nebraska City is a duly organized school district under the laws of the state, and comprises the city of Nebraska City and the surrounding country. It then sets up the names of the members of the board of education, and says that they con-

stitute the respondents. The school district appears to be divided into six divisions. It is alleged that there is one school building in each division in which school from the first to the eighth grades is being taught, and that said schools are under direct control of the board of education of said city. The relator alleges that he is a citizen of the United States and of the state of Nebraska and of the city of Nebraska City; that he resides in that division of said school district known as the Sixth street division, and has resided therein for a great many years, and that one of his children attends the said Sixth street school between the fifth and eighth grades; that on the 15th day of May, 1915, being more than three months previous to the opening of the fall term of said school for the year 1915, and in the said Sixth street division, there was a written request filed with said board of education signed by the relator and the parents or guardians of at least 50 pupils above the fourth grade attending said Sixth street school in said school district, and requesting that the German language should be taught in said division of said school district as an elective study; in the request the names of the pupils above the fourth grade are given, also the names of the parents or guardians, together with the house number and place of residence; that the respondents and the said board of education failed, neglected and refused to provide for the teaching of said German language and refused to comply with the request; that the relator and the petitioners signing said request are without an adequate remedy at law unless the respondents and the board of education are compelled to perform their duty by an order of the court; that the relator and the signers of said request and numerous other persons in the said Sixth street division of said school district will be deprived of the right to have said German language taught in the said division of said school as is provided by the laws of the state of Nebraska.

The respondents filed an answer admitting the population of the city of Nebraska City as alleged, also that the city is duly organized and that the school district is sub-

divided, and that in the subdivision known as the Sixth street school there is one building in which school is taught under the direct control of said board of education; that the relator resides in said Sixth street division of said school; that there was a request filed as set out in the alternative writ, which was signed by the parents or guardians of 50 children who would attend said school during the 1915 fall term; that the said school children were in the grades above the fourth grade; that the respondents, as members of the board of education, refused to provide for the teaching of the German language in said Sixth street school in the grades above the fourth grade, as requested and as petitioned; that Charles Thayer, the relator, is a citizen of the United States and of the state of Nebraska and of Nebraska City, and that one of his children attends said school in the grade between the fifth and eighth grades. It is further alleged that no grade higher than the eighth grade is taught in said Sixth street school; that to provide for the study of the German language in the grades in said school above the fourth grade would require the expenditure of a considerable amount of money both in providing facilities and rooms for class work and the means of giving instruction, and that before incurring this expense the respondents felt justified in canvassing the signers of said petition for the purpose of ascertaining whether or not the persons who had signed the same as parents and guardians of the children mentioned had intended, by so signing, to elect that the children represented by them, and going to make up the number of children set out in said petition, should take instruction in the German language if such instruction was provided for; that the canvass was made by impartial persons under the direction of the respondents beginning about June 20, 1915, and that the same was completed about August 2, 1915; that in making this canvass the committee of the defendants to whom the matter was referred addressed a communication to the signers of said petition. It appears by the communication that an ex-

pression was asked in writing, and that this expression was taken. It is alleged that by reason of this canvass the result is shown that the parents and guardians of 49 pupils signing said petition declared when they signed the same that they did not understand or intend by so doing that they were electing to have their said children study the said German language, and that they did not so elect; that there remained parents and guardians, signers of said petition, actually electing to have their children study the German language in said grades in the fall term of 1915, of not more than 15 children.

The respondents further alleged that the Sixth street school was a common school providing free instruction in the elementary subjects to all pupils of school age in that subdistrict; that the said school was maintained by general taxation and by apportionment from the general school fund of the state; that it had an established course of study in the common branches, including instruction in the English language, but not in any foreign language; that said course of study was in harmony with that prescribed and recommended by the department of education of the state of Nebraska, and corresponds with that in other grade schools in the state; that, according to this course of study, all pupils in attendance at said school were classified; that, as so conducted according to a long-established and universally recognized custom determining and defining common schools and the common branches according to a long-established and universally recognized public policy of the state in the plan and organization of its public schools, particularly as expressed, understood and intended by the Constitution of the state and by the laws of the United States in making provision for the maintenance of such schools as common schools, the said law of the state of Nebraska known as chapter 31, Laws 1913, and now known as section 6941, Rev. St. 1913, in so far as it is sought to be invoked herein to require the said course of study in said Sixth street school to be amended by making provision for an elective

course of study in the German language in the grades of said school above the fourth grade, is contrary to the public policy of the state as declared and understood in sections 3-6, art. VIII of the Constitution of the state of Nebraska, and in sections 7 and 12 of the act of congress of April 19, 1864 (13 St. at Large, ch. 59, p. 47), known as the enabling act, providing the conditions for the admission into the Union of the state of Nebraska; that the effect of the departure from and violation of said policy as contemplated by the said act will be to greatly disturb the general class work in said grades and conflict with equal rights of others than the relator and the said petitioners, interfere with the orderly progress of said school work generally, and greatly detract from the efficiency of the general instruction in the common branches now provided in said grades, besides entailing great expense upon the taxpayers and revenues of the said school district, both in providing for facilities for the giving of said instruction and the expense of said instruction itself; that the effect of the said act of the legislature as applied to the said Sixth street school will be local and special, resulting in special privileges being granted to some individual pupils and patrons to the prejudice of others possessing equal rights in said school, and in an unequal and unfair distribution of the school funds and revenues by the Constitution and laws of Nebraska for the support and maintenance of common schools; that the said act of the legislature is unconstitutional and void in so far as it is claimed to be applicable to the schools of the class in which said Sixth street school falls, and for the following reasons: (1) It is class legislation, and provides a local and special law for the management of certain special and local public schools, in contravention of the express inhibition of section 15, art. III of the Constitution, prohibiting the passage by the legislature of Nebraska of local or special laws providing for the management of public schools, or granting special privileges to any individual. (2) It is violative of the provisions of sections 1, 4, 6, art. IX

of the Constitution, requiring taxation for the support of such schools to be uniform in rate and as to valuation of property. (3) The classification made and contemplated by said act is arbitrary, in that no discretion is allowed or conferred upon the governing authorities of the schools to which it relates concerning the study of the language requested. (4) The said act is not designed to subserve the interests of the public and citizens and residents of the state of Nebraska, but, on the contrary, is distinctly subversive of the public interest and destructive of the plans and organization of the public schools of Nebraska below the high school grades. (5) It is amendatory of section 6949, Rev. St. 1913, but is void because it fails to comply with the constitutional requirements relating to amendatory acts. (6) It creates an additional burden upon the entire property of the school district for the special benefit of a few of the pupils of the district classified arbitrarily, and does not provide for defraying the expense of such instruction, special as it is in its character, so as to relieve those not benefited and to whom the said act does not apply free from the burden of taxation necessary for the support of the same.

The respondents prayed that their amended answer should be deemed and held to be sufficient in fact and law, and that the motion and prayer of the relator for a peremptory writ of mandamus should be denied with costs.

The case was heard upon a demurrer of the relator to the answer, which was sustained, and the respondents elected to stand upon their answer. Judgment was rendered for the relator on the pleadings. It was ordered that a peremptory writ of mandamus issue against the respondents, the school district of Nebraska City, and the members of the school board of the said school district, commanding them to employ a competent teacher and to provide for the teaching in said Sixth street school, above the fourth grade, as an elective study, the German language. There was a motion for a new trial in which it was alleged that the court erred in sustaining the demurrer of the relator to the

answer and in finding the issues in favor of the relator, and in entering judgment in his favor, and in directing the issuance of a peremptory writ of mandamus to the respondents. This motion for a new trial was denied.

We are called upon to determine whether the answer of the respondents is sufficient or insufficient to set up a bar.

It would seem to be the general theory of the law concerning the establishment and maintenance of schools that they are in the hands of the people. What shall be done in the common schools in an educational way is to be determined at school meetings held in each school district, and also by the officers of each district as the statute may direct. The officers of each school district are charged with the obligation of carrying out the will of the people as it finds expression in the school meetings and in the legislature.

The respondents contend that because out of 64 signers of the petition parents or guardians of 49 did not elect to have their children take German, and that those of only 15 did so elect, therefore only those should be counted. The statute (Laws of 1913, ch. 31, Rev. St. 1913, sec. 6941) reads: "An act to provide for and to regulate the teaching of modern European languages as an elective course of study in the schools of the state of Nebraska.

"Be it enacted by the people of the state of Nebraska: Section 1. In every high school, city school or metropolitan school in this state the proper authorities of such school districts shall upon the written request, when made at least three months before the opening of the fall term of such school, by the parents or guardians of fifty pupils above the fourth grade then attending such school, employ competent teachers and provide for the teaching therein, above the fourth grade, as an elective course of study, of such modern European language as may be designated in such request: Provided, that not more than five hours each week and not less than one period each day shall be devoted to the teaching of any such modern European language in any elementary or grade school."

An examination of this section will show that the written request to be made by the parents or guardians of 50 pupils puts upon the parents no burden of stating that the children will study the language requested to be taught. The parents and guardians who desire a school of this kind have only to petition for it regardless of the studies which they intend their own children shall take. The desire to establish a school where more than one language is taught seems to justify the petition, and to put upon the board of education the duty of maintaining the school. It may readily be seen that some years there might be only a few pupils studying the foreign language, and other years there might be an increased number. Guardians or parents of 50 pupils are given the right under the statute of compelling the establishment of the school by presenting their petition for it. The statute is so plain that there appears no doubt about it. The meaning attempted to be attached to the statute by the respondents adds important provisions which the legislature could not have intended. No language is used which in any manner indicates the number of pupils intending to take the study. If it shall be said that only those who intend that their children shall study the language during the present school year can sign the petition, then the answer must be that the legislature said nothing about the conditions sought to be imposed. The contention made by the respondents has nothing in either the letter or the spirit of the act which sustains it. Of course, the only thing to be done is to ascertain the intent of the legislature. That may only be done by considering the words used and the purpose. *State v. City of Lincoln,* 68 Neb. 597.

In *People v. Weston,* 3 Neb. 312, it is held that the fundamental principle of statutory construction is ascertainment of the intent of the legislature. It was not for the school board to say whether it wanted German taught or not. It is required, when the requisite number petition that German should be taught, to make the necessary provision, no difference how many pupils are studying the lan-

guage. The number might start out with 5 and soon grow to 50. By the act of the legislature above quoted the board is required to provide for the teaching of that language. The act requires a petition signed by parents or guardians of 50 pupils. A class containing 50 children studying a foreign language might not be a convenient class as to numbers. It is clear that the legislature meant that the school board should not refuse to establish the class where parents or guardians of 50 pupils petitioned for it. A class of 15 or 20 pupils would probably be preferable to a class of 50, but the exact number is not material.

In *State v. Byrum,* 60 Neb. 384, it is said in the body of the opinion, and also in the syllabus, that, "in construing a statute, words should be given their usual meaning."

In *Siren v. State,* 78 Neb. 778, this court held that "the court will not read into a statute exceptions not made by the legislature."

In *State v. Bratton,* 90 Neb. 382, it was held that, "where a statute is clear and unambiguous in its terms, it is the duty of the court, in construing it, to give the language used by the legislature its plain and ordinary meaning."

The courts have no jurisdiction of matters committed to the legislature. *Cole v. Village of Culbertson,* 86 Neb. 160. It is not for the court to inquire into the motives of the legislature in the enactment of laws, or to determine their wisdom, or the lack of it. *Stewart v. Barton,* 91 Neb. 96.

The respondents object that it is contrary to public policy, as shown in sections 3-6, art. VIII of the Constitution; that instruction in modern languages is repugnant to the idea of a "common school." Every teacher probably knows that a little child can learn a language better than one who is more mature. Children talk to each other almost at once with the same naturalness that they play together, and the language in which they talk together is not very material, as they are able at once to understand. Of course,

the easy place to begin instruction in a foreign language is in the grades. The little ones are always ready to learn and are capable of doing so.

It is contended by the respondents in this case that "common schools" are common property; that they belong to the youth of any defined district. The idea is shadowed forth that the foreign-born resident is not entitled to education in his own tongue furnished at the public expense. To this it may be said that the education is not alone for him. It is for the native-born citizen as well as for the citizen of foreign birth. Both may profit by the study of a foreign tongue. Both do profit necessarily by the study of the foreign language along with the English language. The two languages will be considered and studied together, and the pupil, whether foreign-born or native-born, will profit by the fact that he studies both languages. In this case the only question is whether the legislature did what the statute says it did, and it is for the legislature to determine the policy of the enactment. It is not for the courts to attempt to infringe upon the power of the people as expressed through the legislature.

"A legislative act complete in itself is not inimical to the provisions of section 11, art. III of the Constitution; and where such an act is repugnant to, or in conflict with, a prior law, which is not referred to nor in express terms repealed by the later act, the earlier statute is repealed by implication." *State v. Hevelone,* 92 Neb. 748.

A statute complete in itself is not repugnant to the Constitution, though it may conflict with some other statute. *Nebraska Loan & Building Ass'n v. Perkins,* 61 Neb. 254; *Wenham v. State,* 65 Neb. 394; *Stewart v. Barton,* 91 Neb. 96.

We are unable to find any reason for setting aside the judgment of the district court, and it is therefore

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

CHARLES M. HADLEY, ADMINISTRATOR, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED FEBRUARY 19, 1916. No. 18439.

1. **Damages.** A verdict for plaintiff assessing the total damages at $25,000, under the evidence set out in the opinion, *held* to be excessive.
2. **Statutes: CONSTRUCTION.** In construing a federal statute, this court will follow the construction placed upon it by the federal courts.
3. **Damages: REMITTITUR.** In an action under the federal employers' liability act (35 U. S. St. at Large, ch. 149, p. 65), where the court has instructed the jury that the contributory negligence of deceased has been shown, but the jury makes no deduction in the amount of the verdict because of such negligence, the court may order such remittitur as seems proper under the evidence.
4. **Damages: APPORTIONMENT.** A general verdict for the plaintiff may be returned by the jury in an action brought by the administrator under the federal employers' liability act for the benefit of the widow and minor children of the deceased employee without apportioning the damages among the beneficiaries.

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

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

Wilcox & Halligan, R. W. Devoe and *J. M. Swenson, contra.*

MORRISSEY, C. J.

This is an appeal from a judgment recovered against defendant in an action brought under the federal employers' liability act, 35 U. S. St. at Large, ch. 149, p. 65. Plaintiff is administrator of the estate of Charles M. Cradit, who died March 14, 1913, from injuries received while in the employ of defendant as a railroad brakeman on one of its interstate freight trains. The suit was for the

benefit of the widow and two surviving children. Deceased received his injuries while in the caboose of his train, when it was run into and wrecked by the engine of another of defendant's trains.

This accident occurred at a station known as Mile Post 426, located between Sidney, Nebraska, and Cheyenne, Wyoming. The evening before Cradit left Cheyenne with his train, designated as extra 504 east, for Sidney, Nebraska, which is 102 miles distant from Cheyenne, and this section of the road, constituting a freight division, is known as the fourth district of the Nebraska division. An extra freight train is designated by the number of its engine and the direction in which it is going. When Cradit's train left Cheyenne, the weather conditions were unsettled on that division. They continued to grow worse during the night, and at the time of the accident a severe storm or blizzard was raging. Closely following extra 504 east was another freight train, designated extra 501 east. Defendant's line was double-tracked west to Mile Post 426, and from that point west to Dix its line was single-tracked, where it again diverges into a double track. At all points on its system it is equipped with an automatic block signal system by which the track is divided into blocks, and by which a red light is displayed one block in the rear of every train, and this light remains red until the train has passed out of that block and into another, when the light turns to green. Red lights signify danger, and green lights signify that the track is clear. These two trains appear to have been run in the usual way; extra 501 east being a block behind extra 504 east until they reached Dix. Here extra 504 pulled in on a passing track. And soon thereafter extra 501 arrived, and the two trains stood for some time on the tracks at Dix. The storm had become so severe that the acetylene headlights were extinguished, and common white lanterns were substituted therefor.

It is claimed that, while these trains were waiting at Dix for passenger trains to go through, the deceased and his conductor went to the cab of engine 501 and visited with

the crew of that engine; that conductor Phillips of extra 504 east had a conversation with Engineer Cameron and Fireman Long of extra 501 east, in the presence of Cradit, in which the engineer said that it was hard to see the block signals, and asked Conductor Phillips to do a good job of flagging, and "use lots of fusees all the way down," and also asked that, if stops were made, fusees be thrown out and a torpedo put down.

Cradit's train left Dix at 2:35 A. M., and arrived at Potter, the next station east, at 3:05 A. M., thus clearing the block for extra 501 east, which thereupon left Dix and arrived at Potter at 3:35 A. M., where it took water and departed at 3:45 A. M. The engineer pulled out of Potter without orders from the conductor, and the conductor was left at that station while his train proceeded. While these trains had been proceeding eastward, extra freight 510 west had been made up at Sidney, and started for Cheyenne at 1:10 A. M.; but the storm was so violent that it required 1 hour and 55 minutes to reach Mile Post 426, 11 or 12 miles west of Sidney, arriving there at 3:05 A. M. The engine's supply of water had been exhausted, and this condition was reported to the train dispatcher at Sidney. The dispatcher thereupon ordered extra 504 east to pick up engine 510 west and take it to Sidney. The severity of the storm was such that lanterns could be seen but a few feet. The switch had been left partially open and blocked by snow, and the conductor of the west-bound train testified that in making his way from the caboose to the station he could not face the storm, but was compelled to walk backward, and that it took him 35 minutes to travel the length of his train. Communication with the train dispatcher was had over the telephone, and the conductor testified that the dispatcher was notified that the storm was so severe that the trainmen could not see, and was advised to let extra 504 east proceed and have extra 501 east pick up the engine of the west-bound train. This the dispatcher refused to do, and the engine crews began the work of

clearing the switch to make the necessary couplings to pick up the stalled engine.

Cradit's train had reached Mile Post 426 about 3:35, and the engineer "whistled out a flag." While the engine crews of extra 504 east and 510 west with their head brakemen were endeavoring to clear the switch and couple the stalled engine into the train of extra 504 east, extra 501 east, which left Potter without its conductor, ran past the block signals, and collided with the caboose of extra 504 east, killing Cradit, Conductor Phillips, three stockmen, injuring two others and setting fire to the caboose. This collision occurred 30 or 40 minutes after the arrival of Cradit's train at Mile Post 426.

Under defendant's rules, it was Cradit's duty, when his train stopped and the engineer "whistled out a flag," to go out and put down torpedoes, throw out fusees, and protect his train from a rear-end collision. This he did not do.

There was a verdict for plaintiff in the sum of $25,000, which the trial court reduced to $15,000, and defendant has appealed, urging 38 separate assignments of error.

Plaintiff charges defendant with negligence in operating the three freight trains, heretofore mentioned, while this violent storm was raging, and in permitting extra 501 east to run in such close proximity to extra 504 east. It is claimed that it was negligence on the part of the assistant superintendent at Sidney to send out the west-bound train under the circumstances, and with knowledge of the storm, and that it was negligence on the part of the train dispatcher in directing extra 504 east to pick up the stalled engine, when that train ought to have been permitted to continue into Sidney and let the train which he knew was following in close proximity, and which finally caused the accident, pick up the engine; that it was negligence for extra 501 east to be operated without its conductor, and for its engineer to run past the block signals.

The wind was blowing at the rate of 30 miles an hour or more; snow was falling, or blowing; there was difficulty in observing the block signals, if, in fact, they could be ob-

served at all, and the dispatcher and assistant superintendent knew that it was an unusual storm. But the passenger and mail trains went over the line during the night. None of the trainmen had reported that it was impossible to see the block signals, or that the headlights were not burning. It cannot be said that defendant was guilty of actionable negligence for a mere failure to tie up its trains. On the other hand, it is clear that there was negligence on the part of the engineer of extra 501 east in leaving the station at Potter, without his conductor, and proceeding through this storm without observing the block signals, set at danger, in the rear of extra 504 east. These block signals are admitted to have been working, but the members of the engine crew claim they were unable to see them because of the severity of the storm. However, they knew the distance from Potter to Mile Post 426, and the location of these block signals, and also knew that they were following closely behind another train, and that with the weather conditions prevailing that train was likely to be stalled, and they had been warned by the dispatcher that extra 504 east was at Mile Post 426, "and might not be out before they got there, and to look out for her." The dispatcher knew that it required 1 hour and 55 minutes for the west-bound train to make the run of 11 or 12 miles to Mile Post 426, and that in doing so the engine exhausted its supply of water. He knew that east-bound extra 504 had left Potter only 36 minutes ahead of extra 501 east. When he ordered extra 504 east to stop at Mile Post 426 and do work which would require some time under the existing conditions, he was requested by the conductor of the west-bound train and the engineer of extra 504 east to let the first train proceed and leave the second train to do the switching and pick up the stalled engine. The conductor of the west-bound train testified that, through the operator, he had a conversation over the telephone with the dispatcher, and "told him we could not see, the storm was so severe, and to let extra 504 go." The conductor asked to

have the first east-bound train proceed and leave the second east-bound train to pick up the engine of his train. It would seem that due regard for the safety of the employees would have impelled him to grant this request. Had it been granted, in all probability the accident would have been avoided. "Furthermore, the negligence of the train dispatcher need not have been the sole and only cause of the accident to charge the defendant with negligence. If his negligence contributed to the accident — that is to say, if his action had a share in bringing about the disaster — the defendant will be liable." *Sandidge v. Atchison, T. & S. F. R. Co.*, 193 Fed. 867, 875.

Appellant justifies the action of the dispatcher in this regard by saying that, had he granted this request, it would have delayed the removal of the west-bound train an hour or two, and that by that time the snow would have accumulated around this train in such quantities as to block traffic on its lines. If the dispatcher realized that the storm was of such severity as this, he ought to have known that there was grave danger of train crews being unable to see the block signals, and, as he was running the trains in close proximity, prudence would have dictated that he grant the request of the trainmen, which in itself was warning of danger, and permit the first train to proceed.

Appellant denies that any negligence on the part of the assistant superintendent was shown, or that the acts charged constitute actionable negligence, and says the court erred in refusing its requested instructions withdrawing from the jury consideration of the acts of negligence charged against him. The conductor of the west-bound train testified that he and the assistant superintendent had different conversations before he took out the train. The conductor advised that the train be split in two, because, owing to the severity of the storm, the engine could not pull the train through to Potter, the next watering station. The assistant superintendent assisted in cleaning out the turntable that night, and at the second conversation they had the assistant superintendent stated in the most positive lan-

guage that there was "no use of running the train." It appears that he knew the weather conditions; that the conductor, who was an experienced railroad man, called his attention to the impracticability of sending out the train; that he admitted the lack of necessity for doing so, and yet, in the face of this, he sent it out. Of course, this act alone did not cause the accident, but it formed one link in a chain of incidents culminating in the wreck. The negligence of the engineer of extra 501 east and of Conductor Phillips of extra 504 east and the contributory negligence of the deceased is conclusively shown. It follows that there was no error in submitting these issues to the jury.

It is urged by appellant that there can be no recovery, because Cradit assumed the risk incident to his employment and to the peculiar circumstances under which the trains were operated that night. It is said in the brief that the action of Cameron in running his train past the block signals would constitute actionable negligence, "unless Cradit, by his conduct, had waived his right to predicate a cause of action thereon, or was aware of the fact that Cameron was not depending upon the block signals for the safe operation of his train, and was willing to proceed in the face of that danger, thereby assuming the risk." Engineer Cameron testified that he told Conductor Phillips, in the presence of Cradit, to do a good job of "flagging," and appellant seriously contends that Cradit knew that the engineer in proceeding east from Dix would not depend upon the block signals, but upon the "flagging" to be done by Cradit; that, because of this alleged conversation and understanding, Cameron no longer owed Cradit the duty to operate his train under the block signal system. There was a conflict in the testimony as to this alleged conversation and agreement. The jury made a special finding that the conversation was not had.

In *Grand Trunk W. R. Co. v. Lindsay,* 201 Fed. 836, plaintiff was a switchman on defendant's railroad, and in making couplings was obliged to go between the cars. There was conflicting evidence respecting the giving of a signal to the

engineer. As in this case, the jury found for the plaintiff. In the concluding paragraph of the opinion on rehearing the court said: "Under the employers' liability act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and, if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause — when defendant's act is no part of the causation — that defendant is free from liability under the act."

In *Wright v. Yazoo & M. V. R. Co.*, 197 Fed. 94, the court said: "While the doctrine of assumption of risk sometimes shades into that of contributory negligence, there is a clear distinction between the doctrines, an employee being held to assume the risk of ordinary dangers of his occupation, and also those risks which are known to him, or are so clearly observable that he may be presumed to know of them, while contributory negligence constitutes omission of an employee to use those precautions for his own safety which ordinary prudence requires."

The finding of the jury on this question is conclusive of the question.

It is urged that the verdict is so excessive as to indicate passion or prejudice on the part of the jury. Deceased was 31 years of age, with a life expectancy of approximately 34 years. He was earning from $85 to $100 a month, but used from $15 to $18 a month for his personal expenses while out on his work. The remainder was contributed to the support of his family. No proof was offered to show that deceased's earning capacity would increase with the years. "It ought to be assumed that plaintiff proved his earnings at their best." *Hoffman v. Chicago & N. W. R. Co.*, 91 Neb. 783.

Tables of expectancy and the present worth of judgments are always more or less unsatisfactory. It is never possible to ascertain with mathematical accuracy the pecuniary loss which a family will suffer from the death of the breadwinner, but, taking his wages at $100 a month, the maximum, and deducting therefrom the amount which he spent for his personal expenses, and calculating the present value at the date of the verdict, the evidence will not sustain a verdict in excess of $18,000; but the verdict as returned is not so excessive as to warrant the court in setting it aside. We think $18,000 may reasonably be taken as the gross amount of damages. The court properly directed the jury that deceased was guilty of contributory negligence, and that the damages should be diminished in proportion to the amount of negligence attributable to him. By special finding the jury found that nothing should be deducted, and no deduction was made by the jury. By direction of the trial court a remittitur of $10,000 was entered, and the verdict permitted to stand at $15,000. The record does not disclose the court's reasons for making the remittitur; whether it was because he regarded the original verdict as $10,000 too high; whether he made the deduction ordered because of the contributory negligence of deceased, or whether he thought it ought to be deducted for both reasons. In any event, it is not material to a disposition of the case here.

Having reached the conclusion that without making any deduction because of the contributory negligence the verdict ought to be reduced to $18,000, we are now required to determine what amount, if any, should be remitted because of deceased's contributory negligence. Our right to determine this matter is questioned by appellant, and in place of making the reduction we are asked to reverse the case for a new trial. This being a federal statute, the interpretation placed upon it by the federal courts will be followed. *South Covington & C. Street R. Co. v. Finan's Adm'x,* 153 Ky. 340.

In *Yazoo & M. V. R. Co. v. Wright,* 207 Fed. 281, the refusal of the trial court to instruct that deceased was guilty of contributory negligence was assigned as error, and on the motion for a new trial it was found that he was guilty of contributory negligence. But the court ordered a remittitur, which was accepted, and the court said the railroad company could not complain.

In *Pennsylvania Co. v. Sheeley,* 221 Fed. 901, the court had this very question before it, and disposed of it in the following language: "It seems probable that the jury did not make allowance for contributory negligence as the statute requires. There must, therefore, be another trial, unless this error can be cured by a remittitur. In making to plaintiff an offer of conditions upon which part of a judgment may stand, we cannot take the place of the jury. We must only be sure that no substantial injustice comes to the party against whom the judgment is maintained. If the conditions so fixed seem unjust to the plaintiff, he can protect himself by declining to accept the offer. The utmost which defendant in this case can claim is that the jury made no allowance on account of Sheeley's conduct, and so that the $6,500 represents the total damages. The negligence of the engineer being established according to the theory of the petition, we think there would be no fair room to say that Sheeley's negligence should be considered as more than one-half as much as the engineer's, or more than one-third of the whole. It follows that if plaintiff desires to accept a judgment for two-thirds of the amount found below, and within 30 days files evidence of that acceptance in accordance with our practice, the judgment will be affirmed; otherwise, it will be reversed and remanded for new trial."

In the instant case negligence may be traced to so many different people that it is difficult to determine the proportion that ought to be charged to deceased, but surely it cannot be more than one-fourth of the whole, and this deduction will be made from the $18,000, which we find to represent the total damages.

The point is made in the brief that there is not sufficient evidence to prove the separate pecuniary loss of each of the parties for whose benefit the action was brought. The jury is not required to apportion the damages among the beneficiaries. A general verdict for the plaintiff may be returned. In a very recent case the supreme court of the United States passed upon this question and said: "Under Lord Campbell's act (9-10 Victoria, ch. 93, sec. 2) and in a few of the American states the jury is required to apportion the damages in this class of cases. But even in those states the distribution is held to be of no concern to the defendant, and the failure to apportion the damages is held not to be reversible error (*Norfolk & W. R. Co. v. Stevens, Adm'r,* 97 Va. 631, 46 L. R. A. 367; *International & G. N. R. Co. v. Lehman,* 30 Tex. Civ. App. 3); certainly not unless the defendant can show that it has been injured by such failure. The employers' liability act is substantially like Lord Campbell's act, except that it omits the requirement that the jury should apportion the damages. That omission clearly indicates an intention on the part of congress to change what was the English practice so as to make the federal statute conform to what was the rule in most of the states in which it was to operate. Those statutes, when silent on the subject, have generally been construed not to require juries to make an apportionment. Indeed, to make them do so would, in many cases, double the issues; for, in connection with the determination of negligence and damage, it would be necessary also to enter upon an investigation of the domestic affairs of the deceased—a matter for probate courts, and not for jurors. If, as in the *McGinnis* case, the plaintiff sues for the benefit of one who is not entitled to share in the recovery (*Taylor v. Taylor,* 232 U. S. 363; *North Carolina R. Co. v. Zachary,* 232 U. S. 248), and if her inclusion in the suit might increase the amount of the recovery, the defendant may raise the question, in such mode as may be appropriate under the practice of the court in which the trial is had, so as to secure a ruling which will prevent a recovery for one not

entitled to share in the benefits of the federal act. But no such question was or could have been raised in the present case, since, as matter of law, the wife and minor children were all to be treated as entitled to share in the amount recovered for the death of the husband and father." *Central V. R. Co. v. White,* 238 U. S. 507.

It is not necessary to further extend the discussion of the questions pressed upon our consideration. Those not discussed have been fully considered, but are not thought to be controlling. We are of the opinion that the case was fairly presented to the jury, and that no substantial error of law to the prejudice of appellant was committed, and, it is therefore ordered that, if the plaintiff file a remittitur in the sum of $1,500, leaving the judgment $13,500, within 20 days, the judgment of the district court, as thus reduced, will be affirmed; otherwise, the judgment will be reversed and the cause remanded for further proceedings.

AFFIRMED ON CONDITION.

TRESA MORAN, APPELLEE, V. MARTIN SLATTERY ET AL., APPELLANTS.

FILED FEBRUARY 19, 1916. No. 18614.

1. **Intoxicating Liquors:** ACTION FOR DAMAGES: EVIDENCE. Evidence examined and *held* sufficient to support the verdict.
2. ———: ———: INSTRUCTIONS. Instructions, when taken as a whole and construed together, *held* to have submitted the cause to the jury without prejudice to defendants.

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

T. J. Doyle, H. M. Sinclair and *T. F. Hamer,* for appellants.

W. D. Oldham and *E. B. McDermott, contra.*

MORRISSEY, C. J.

Action by plaintiff, for herself and as next friend for her minor child, against defendant Slattery, a liquor dealer,

and Massachusetts Bonding & Insurance Company, his surety, to recover damages caused by the death of Ralph Moran, the husband of plaintiff and father of her minor child. The trial resulted in a verdict and judgment for $5,000 for plaintiff, and defendants have appealed.

On and prior to April 17, 1913, defendant Slattery was engaged in the liquor business in Shelton, Nebraska, and the Massachusetts Bonding & Insurance Company was his surety. On that date Ralph Moran, a young farmer, rode to the town of Shelton with a neighbor, and together they called at Slattery's saloon. It is testified by Slattery that he served Moran two glasses of beer, and no other liquors of any kind that day, while Moran's companion, Lessinger, testifies that on their first visit to the saloon Moran was served with a glass of beer, and later they called again, and Moran was served to four or five glasses of beer and whiskey mixed; that they also called at another saloon, and that Moran was served either beer or ginger ale. This saloonkeeper was also sued in this action, but on the trial he was dismissed out of the case. These two farmers called at a number of business places while in the town of Shelton, and Lessinger testifies that, before they had completed their business and made ready to leave for home, Moran was under the influence of liquor. The team they were driving belonged to Lessinger and was hitched to an ordinary farm wagon. Although Moran was a mere passenger with Lessinger, he took hold of the lines and undertook to drive the team. The wagon was equipped with an ordinary spring seat set by means of "clips" on the top of the box, and Lessinger says that this seat was pulled well up to the front of the box so that their feet projected over, and that they were driving a gentle team. He says he asked Moran to turn the lines over to him, telling him that his driving made him nervous, but Moran insisted on doing the driving. After they had proceeded some distance on their way toward home, Moran fell forward from the wagon, and the team became frightened and ran. Lessinger jumped out of the wagon and escaped injury, but Moran became en-

tangled in the wagon and harness and was dragged under the wagon until the team ran against a telephone pole, bringing it to a stop. Lessinger soon arrived and removed Moran's body from underneath the wagon. Moran expired soon thereafter.

The theory of the plaintiff is that, by reason of intoxication, deceased fell from the wagon, while the defendant denies the intoxication, and attempts to account for his falling by saying that one of the "clips" which attached the seat to the box was found in the road about the place where deceased fell from the seat, and appellant reasons that if this "clip" broke, or became disconnected, it permitted the seat to suddenly turn and precipitate deceased to the ground. Of course, his fall might have been brought about in either way, but Lessinger testifies that after the accident the "clips" on the seat were in place and in good condition. Assuming that a "clip" of this character was found in the road, it does not establish that it came from the wagon in which deceased was riding. It is unnecessary to review at length the testimony showing the intoxication of deceased. There is the admission of the saloon-keeper that he furnished two drinks of beer; there is the testimony of Lessinger that he saw Moran take four or five drinks of beer and whiskey mixed. On the testimony, the jury were warranted in finding that the liquor procured at defendant's saloon contributed to his death.

Complaint is made of an instruction which told the jury that the liquors furnished by the defendant need not be the sole, or even the principal, cause of the injury. This instruction is in harmony with a long line of decisions of this court, and the exception is not well taken. *Smith v. Lorang*, 87 Neb. 537; *Wiese v. Gerndorf*, 75 Neb. 826.

But the main criticism is directed against an instruction which told the jury: "In this case you are limited to the damages, if any, sustained by plaintiffs to their means of support, and you will allow Tresa Moran, the wife, the present value of the sum, if any, that the deceased, Ralph Moran, would probably have contributed to her support

during the period of their joint expectancy of life, and also the present value of the amount, if any, said Ralph Moran, deceased, would have probably contributed to the support of Alice Moran during her dependency, but not beyond her minority, the same being less than the deceased's expectancy. In no event can you allow damages in a sum exceeding $5,000, the amount named in the bond." Appellees point out that this instruction is too restrictive as to the measure of damages, but they have taken no cross-appeal, and it is unnecessary to discuss this phase of the instruction.

The point which appellant seeks to make is that the court did not leave the jury to determine the deceased's expectancy, but assumed it to be greater than the period of the child's minority. The child was six years of age. This instruction would assume that the expectancy is, at least, twelve years. At the time of his death, deceased was 33 years of age, and is shown to have been in excellent health. The Carlisle table of expectancy had been received in evidence. It showed his expectancy to be over 30 years. Defendant offered nothing in contradiction thereof. The court properly instructed the jury as to the weight and sufficiency of this testimony, and when the whole charge is read together, it must be said that the jury were properly instructed on the law of the case. At least, it must be said that there is no error in the instructions of which defendant may complain.

In the assignments of error, complaint is made of the amount of recovery, but this point does not seem to be further urged in the brief. Deceased was an able-bodied, industrious man, making $80 to $100 a month, which he was contributing to the support and maintenance of himself and his family, with a life expectancy of approximately 32 years. It is evident that the verdict is not excessive. We find no error in the record, and the judgment is

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

HENRIETTA OWENS, ADMINISTRATRIX, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 19, 1916. No. 18505.

1. Witnesses: IMPEACHMENT: COLLATERAL MATTER. A witness cannot be cross-examined as to collateral matters not material to the issue, for the purpose of subsequently contradicting or impeaching him.
2. ———: CROSS-EXAMINATION. A party should not be permitted to cross-examine a witness as to matters outside of the scope of his direct examination.
3. Instructions examined and found to contain no reversible error, and those requested were properly refused.

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

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

James C. Kinsler, contra.

BARNES, J.

Plaintiff's intestate, John S. Owens, was killed by being knocked down and partly run over by a street car at the corner of Fortieth and Hamilton streets, in the city of Omaha. Plaintiff was appointed administratrix of the estate, and brought an action for damages against the defendant, the Omaha & Council Bluffs Street Railway Company. A trial had in the district court for Douglas county resulted in a verdict for the plaintiff, and the court rendered a judgment on the verdict. The defendant has brought the case to this court by appeal.

The plaintiff alleged in her amended petition that the car was wrongfully and negligently propelled backwards against her intestate and caused him to be thrown, with great force and violence, to the pavement of the street and

across the east rail of defendant's street car track, and that he was run upon by the street car of the defendant, and was thereby so seriously bruised and injured that he instantly died as a result of the said injuries.

The defendant filed an answer, alleging, as an excuse for backing up its car, that it was necessary to do this in order to avoid a collision with the east and south-bound car, which, it alleged, had the right of way around the inside of the curve at Fortieth and Hamilton streets. It denied that Owens, when he alighted from defendant's car in the vicinity of Fortieth and Hamilton streets, started to go around the street car to the drug store at the corner of said streets, as alleged in the petition, and averred that he, when he alighted from the car, started to go to his home, in the natural course of which he would have remained on the east side of the car; that the motorman and conductor in charge of the car did not know, and did not have reason to anticipate, that Owens intended to, or would, attempt to go behind the car from which he had alighted. The answer also averred that the injuries to the defendant's intestate were the direct result of his own wilfulness, negligence and carelessness in departing from a place of safety in the street and taking hold of the rear end of the car moving backwards, and in attempting to go behind the street car. Each and all of the averments of negligence charged against defendant were also denied. The reply was a general denial of the affirmative allegations of the answer.

The facts established by the record may be briefly stated as follows: Plaintiff's intestate boarded the car by which he was killed at Twenty-fourth and Cuming streets, in the city of Omaha. The car proceeded westward on the last-named street until it reached Fortieth street, where it turned north on that street, and proceeded as far as Hamilton street, at which point the street car tracks turn west on the street last named. The car was on the east tracks and when it arrived at Hamilton street it ran into the curve about one-third of the distance, being still headed to

the north. The motorman saw a car coming east on Hamilton street to take the curve to Fortieth street. He immediately brought his car to a full stop, and Owens got off from the back steps and started around behind the car toward a drug store on the west side of the street. The motorman backed the car, and Owens was struck and knocked down, the car passing partly over him. He was instantly killed.

Defendant admitted that the crucial and important point in the case was whether Owens was on the street car track to the rear of the car at the time when it started backwards. If so, it would create a case of liability. But it alleges that the trial court erred in excluding the written statement made by the witness Preston to its claim agent, which statement was offered in evidence on Preston's cross-examination, and again in excluding the same statement when it was offered as a part of the defense. The witness testified on his direct examination that Owens stepped off the car immediately ahead of him and turned and went around behind the car; that he said "Good night" to Owens, and then started northeast; that when the car came to a stop Owens' body was under the back end of the car, and when the car was pulled off from him the doctor said he was dead. He was vigorously cross-examined by counsel for the defendant, but adhered to his statement. Defendant then offered the written statement, which differed slightly from the plaintiff's direct and cross-examination, in this: That in the written statement Preston was made to say that he heard some one "holler" when the car started back. Before the written statement was offered Preston had testified that he did not hear any one "holler" at all. The statement was objected to on the grounds that it was improper cross-examination, was irrelevant and immaterial. The objection was sustained, and was renewed when the statement was again offered in evidence as a part of the defense, and was again sustained. As we view the record, the words "when I heard this man holler" were immaterial, irrelevant and collateral, and therefore the court did not

err in excluding the statement. 5 Jones, Commentaries on Law of Evidence, sec. 827; *Johnston v. Spencer,* 51 Neb. 198; *Ferguson v. State,* 72 Neb. 350.

In 5 Jones, Commentaries on Law of Evidence, sec. 827, it is said in part: "A party may impeach the credit and contradict the testimony of an adverse witness by showing that, upon some matter which is relevant and material, he has at other times made statements which are inconsistent with his testimony. But a party cannot, by drawing out, on cross-examination, statements by a witness which are irrelevant and collateral, gain the right to contradict such testimony by showing inconsistent statements of the witness at other times."

In *Johnston v. Spencer, supra,* it was said: "When a witness is cross-examined on a matter collateral to the issue he cannot, as to his answer, be subsequently contradicted by the party putting the question. The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea?"

This rule was followed and approved in *Ferguson v. State, supra.* As we view the record, it was wholly immaterial whether the witness heard some one "holler" at the time the car was started back, and the court did not err in excluding the written statement.

It is also contended that the trial court erred in sustaining objections to questions propounded to the witness Bales on cross-examination relating to what he saw and knew of the accident. It appears that Bales was a passenger riding on the inside of the car which killed Owens. He was called as a witness for the plaintiff merely for the purpose of testifying in regard to the movements of the car when it reached the corner of Fortieth and Hamilton streets. On his direct examination he was not questioned regarding the happening of the accident, nor whether he had seen Owens either before or after the accident. At the beginning of his cross-examination he testified positively that he did not see the accident at all; that he did not see

how Owens was hurt; that he did not see how he got under the car, and did not know how the accident occurred. It is contended, however, that if the defendant had been permitted to further cross-examine the witness it would have demonstrated to the court that the witness was concealing facts which he knew and could testify to concerning the accident. It can scarcely be contended that the cross-examination which defendant sought was either competent or proper cross-examination. The defendant could have made the witness its own if it had desired to do so, but, having declined to avail itself of that right, it is not in a position to complain of the ruling of the trial court.

Defendant complains of insrtuction No. 6, by which the court informed the jury: "And if you believe from a consideration of all the evidence in the case that the employees in charge of the car exercised such care in the movement of the car as to warnings and rate of speed as an ordinary, prudent person would have done, in view of all the conditions and surroundings there present, then you should find that the defendant was not negligent, and your verdict should be for the defendant. But if you believe from a consideration of all of the testimony that an ordinary, prudent person would have taken some precaution which the defendant's employees did not take, or would have done some act which they failed to do, or would have refrained from doing some act or thing which the employees did, then you should find that the defendant was negligent in that particular."

It is argued that under this instruction the jury might find the defendant guilty of some negligence wholly unsupported by the evidence. We think this assignment of error should not be sustained. The only evidence of negligence was that of starting the car backwards suddenly without warning while the plaintiff's intestate was attempting to cross over the track immediately behind the car. That was the issue in the case, and the jury could not have misunderstood that issue nor the effect of the evidence.

Finally, it is contended that the court erred in refusing to give instruction No. 7 which it tendered. The instruction was properly refused, because the narration of the facts set forth therein did not correspond with the testimony of defendant's own witnesses. Frank Pipal, the conductor on the car which killed Owens, testified that the car was about 50 feet long. Joseph Doyle, the motorman, testified that he backed the car about half its length. Witness Pipal stated that Owens did not fall on the pavement until the car was passing him in its backward movement to the south; that Owens then reached toward the handle at the rear platform of the car and fell down onto the pavement as the car passed on to the south. Even if it were true that Owens was on the pavement 3 feet south and 2 feet east of the car when it started south in its backward movement, the car still had over 20 feet farther to move after he fell, and when Owens' body was found, according to the testimony of Pipal, it was partly between the rails back of the hind wheels of the car. It seems perfectly clear that, if Owens had fallen on the pavement on the east side of the car as it passed him going toward the south in its backward movement, it would have been absolutely impossible for him to have been under the rear end of the car when it was brought to a stop. As we view the testimony and the conditions surrounding the accident, the instruction tendered should not have been given. We think it appears quite clear from the record that the accident occurred in the manner described by Preston, who was a wholly disinterested witness.

There appears to be no reversible error in the record, and the judgment of the district court is

AFFIRMED.

FULLER SHELLENBERGER V. STATE OF NEBRASKA.

FILED FEBRUARY 19, 1916. No. 19394.

1. **Criminal Law:** APPEAL: LAW OF THE CASE: ADMISSIBILITY OF EVIDENCE. On a second appeal to the supreme court, where the evidence is substantially the same as that presented on the first appeal, our former opinion on the question of the admissibility of the evidence is conclusive.
2. ———: INSTRUCTIONS. Instructions given by the trial court examined, and held without reversible error.
3. ———: REFUSAL OF INSTRUCTIONS. Instructions requested by defendant examined, and found to have been properly refused.

ERROR to the district court for Nemaha county: EDWARD E. GOOD, JUDGE. *Affirmed.*

John C. Watson and *Max M. Cohn,* for plaintiff in error.

Willis E. Reed, Attorney General, Charles S. Roe and *Ernest F. Armstrong, contra.*

BARNES, J.

Fuller Shellenberger was charged in an indictment with the murder of one Julian Bahuaud. He pleaded not guilty, was tried in the district court for Nemaha county, and the trial resulted in a conviction. Error was prosecuted to the supreme court, where the judgment was reversed and the cause remanded to the district court for a new trial. *Shellenberger v. State,* 97 Neb. 498. On his second trial the jury again found him guilty and recommended that he should be imprisoned in the state penitentiary for life. He was sentenced accordingly, and has again prosecuted error to this court.

It is his first contention that the evidence was not sufficient to warrant a conviction. It is argued that the only evidence before the jury was an alleged confession, which the accused made, acknowledging his participation

in the commission of the crime charged in the indictment. This contention cannot be sustained, because the record contains sufficient corroboration of the confession to warrant the jury in finding the accused guilty of the crime charged. It is unnecessary to refer to the evidence of corroboration in disposing of this appeal. The confession and the evidence corroborating it are fully set out in our former opinion and will not be repeated in disposing of this contention.

Defendant next contends that the trial court erred in rulings on the admission of his confession in evidence, and argues that he was in custody when the confession was made, and therefore it was not voluntary and was not admissible. Our opinion on the former appeal contains the confession, recites the circumstances under which it was made, and the evidence of corroboration. It was there held that it was properly received in evidence, and it is sufficient to say that we adhere to our former opinion on that question.

It is further contended that, if the confession was properly received, then the whole confession should have been introduced in evidence, including all of the confessions made by defendant at different times. On the former appeal one of the grounds of reversal was that confessions of other crimes made at different times and on other occasions should have been received in evidence. The rulings of the court eliminated all questions relating to defendant's confessions, for the record shows that all of them were admitted in evidence on the last trial without limitation or restrictions of any kind.

It is also contended that the record shows that the defendant was addicted to making confessions of the crimes which the evidence shows he did not commit, and therefore no weight should have been given to his confession of the crime with which he was charged in this case.

It appears that, after the alleged confessions of other crimes were received in evidence, defendant was interrogated in relation to them, and testified that they were

not voluntary. In one instance it appears that he was arrested by the chief of police of the city of Omaha; that he was roughly and cruelly handled; was subjected to what they called the "third degree" at intervals for some three successive days, and finally, to end his torture, he made an untruthful confession. It may be said that this whole matter was before the jury, and they having found against the defendant, that question should receive no further consideration.

For the ruling of the trial court excluding a letter written by one Roberts to the county authorities of Nemaha county implicating two parties in the murder of Bahuaud, other than Gibbs and Kopf, who were implicated in the commission of the crime by defendant's confession, error is assigned. This assignment is without merit. The letter was written by one who does not appear to have any connection with the commission of the crime, and its contents are wholly immaterial, as was also the fact that a nolle was entered as to Kopf for the want of evidence to sustain a conviction as against him. We have examined the assignments of error for the exclusion of evidence, and find none in the rulings of the court.

Complaint is made of the admission of the testimony of nonexpert witnesses on the question of the sanity of the defendant, and counsel cite *State v. Thomas,* 154 N. W. (Ia.) 768, among other cases, in support of this contention. Those decisions have been examined, and we are of opinion that they are not in conflict with our rulings in such cases. Again, that question was determined by our opinion on the former appeal, where the testimony was held to have been properly admitted.

Counsel for defendant contends that the court erred in giving the fourteenth, fifteenth and sixteenth instructions upon his own motion. Those instructions related to the question of the mental condition of the defendant. It appears that the defense of insanity was relied on by the accused. That defense related to the mental condition of the defendant both at the time when the crime was committed

and when he made his confessions. The instructions of which complaint is made need not be quoted. They were correct in substance, were the usual instructions given in such cases, and have been often approved by this court. On the question of the sanity of the defendant at the time he made the confession, the court instructed the jury as follows: "The court instructs the jury that the law presumes every one to be sane and responsible for his acts until the contrary appears from the evidence; but, if there is evidence in the case tending to show insanity, then the burden of proof is upon the state to prove by the evidence, beyond a reasonable doubt, that the defendant was sane at the time he made the confession proved in this case."

It is claimed also by the defendant that the court erred in his instructions numbered 5, 6, and 7, in which the meaning of the words "aiding and abetting" were defined, and by which the jury were directed as to how they should be considered as applied to the evidence. The substance of those instructions has been often approved by the courts of this country, and, as no authorities are cited in support of this assignment, it requires no further consideration.

Counsel for defendant also contend that the court erred in refusing to give instructions numbered 9, 11, and 14 at their request. The record discloses that requests numbered 9 and 11 were, by instruction No. 7, given by the court on his own motion, and the substance of request No. 14 was contained in paragraphs numbered 11 and 12, which were given by the trial court.

An examination of the record shows that defendant had a fair trial; that the errors for which the former judgment was reversed were carefully avoided. He was accorded every right for which his counsel contended, and the jury found him guilty a second time. Under the rule in *Lucas v. State*, 78 Neb. 454, the judgment is

AFFIRMED.

FRANK E. MALM, APPELLEE, V. CHARLES STOCK ET AL., APPELLANTS; HANNAH STOCK ET AL., APPELLEES.

FILED FEBRUARY 19, 1916. No. 18388.

1. **Action:** JOINDER: SUIT AGAINST CORPORATION. In a suit against stockholders of an insolvent corporation by a judgment creditor of the corporation, a cause of action for conversion of corporate assets may be joined with one for the statutory liability of stockholders on account of failure to publish notice of the amount of corporate indebtedness.

2. **Corporations:** INSOLVENCY: TRUST FUNDS. Property of an insolvent corporation in the hands of its officers who have taken the same in payment of debts due them, or its proceeds, is held by them in trust for all creditors *pro rata*, including themselves.

APPEAL from the district court for Clay county: LESLIE G. HURD, JUDGE. *Reversed with directions.*

N. P. McDonald and *Stiner & Boslaugh*, for appellants.

Ambrose C. Epperson, for appellee Malm.

Charles H. Sloan and *Paul E. Boslaugh*, for appellees Stock and Elfring.

LETTON, J.

This is an action by a judgment creditor of the Sutton Mercantile Company, an insolvent corporation, to collect the indebtedness of the corporation to him, and was brought against a number of its directors and stockholders.

The first petition filed in this case sought to recover judgment upon the ground that plaintiff is a judgment creditor of the corporation; that the corporation is insolvent; that no notice has ever been published in a newspaper of the debts of the corporation as required by statute; that the defendants were stockholders in the corporation while it was in default, and that by reason of such default the defendants and each of them are personally liable for the debts of the corporation. Apparently two

amended petitions were filed which are not set forth in the transcript.

The third amended petition added to the allegations with respect to the nonpublication of notice further averments to the effect that in May, 1913, the defendant stockholders caused the corporation to go out of business and to exchange the stock of goods it owned for certain real estate which was placed in the name of defendant Ostertag; that the land has since been sold, and defendants have divided among themselves the funds received from the sale without paying the debts of the corporation. A motion was made by Ostertag to require plaintiff to separately state and number the causes of action in this petition, which was overruled. Ostertag then filed an answer, admitting the incorporation, denying a number of the other allegations, pleading that the petition does not state facts sufficient to entitle the plaintiff to the relief asked; that the first cause of action is new and different from that set forth in the original petition and is not germane thereto; that he did not participate in the transaction by which the stock of goods was exchanged for the real estate; that the title was placed in his name without his knowledge or consent; that defendant Charles Stock was president and manager, and defendant Hannah Stock, his wife, secretary of the corporation; that Stock agreed with Ostertag to pay all the debts of the corporation in consideration of the payment of $5,000 by him to Stock; that defendant has received not to exceed $4,000 in land, has paid $5,000 in debts of the corporation; and that the corporation owes him $2,500 in addition. Defendants Stock in their answer also assert that the third petition states a new and different cause of action; allege that in May, 1913, Charles Stock and Ostertag were the owners of all the capital stock of the corporation, and that Ostertag in consideration of the transfer of the land to him agreed to pay all its debts; that thereupon the corporation was dissolved; that Hannah Stock was compelled to pay certain debts of the corporation, amounting in all to about $5,500, of which amount Ostertag

afterwards paid her $3,885 in money from the proceeds of the land conveyed to him.

The court found that Charles Stock and Ostertag were the only stockholders in the Sutton Mercantile Company at the time it ceased business; found generally in favor of the other defendants; that the 480 acres of land was taken in exchange for the goods in the name of Stock and was by him conveyed to Ostertag; that said defendants appropriated the assets of the corporation to their own use and applied the same upon debts owing to them individually; that the property taken was equal in value to all the debts owing by the corporation to persons other than stockholders; and rendered judgment upon its findings against defendants Stock and Ostertag for $1,367 and costs. From this judgment both defendants appeal, and have assigned specific errors.

The first complaint made by Ostertag is that the court erred in overruling his motion to require plaintiff to separately state and number the causes of action in the third amended petition and in permitting this petition to be filed. It seems clear that there were two causes of action stated in the third amended petition, but the defendant was not prejudiced by the refusal to cause the same to be separately stated and numbered. The entire petition is subdivided into numbered paragraphs, and if defendant desired to raise any issue of law or fact with reference to any of the allegations of the petition this could readily and easily have been done as the petition stood. Ostertag, therefore, suffered no prejudice by this ruling. The complaint made by both defendants as to the inclusion by amendment of a new cause of action is not well founded. The purpose of the action was to recover an indebtedness from the stockholders of the insolvent corporation. There was no change in the relief sought in the original and in the third amended petitions. An additional ground of recovery was stated, and both causes of action could properly be joined under section 7657, Rev. St. 1913.

It is apparent that the judgment of the court is based upon the conversion and appropriation of the assets of the corporation by Stock and Ostertag, who were the stockholders and officers of the corporation, and not upon the failure to publish the notice of debts, and therefore the rulings of the court complained of in relation to the latter charge were not prejudicial. As to the assignment that the judgment is not supported by the evidence, the evidence shows that the stock of goods was exchanged for 480 acres of land in Antelope county, subject to a mortgage of $2,500. The land was conveyed to Stock. An arrangement was then made between Ostertag and Stock by which Stock conveyed the real estate to Ostertag, who in consideration for the same agreed to pay the debts of the corporation. At that time the corporation owed both Stock and Ostertag. Some time previous to this, Ostertag and Mr. and Mrs. Stock borrowed money from the Sutton State Bank for the use of the corporation, executing a promissory note for the same as individuals. Certain shares of stock belonging to the corporation were transferred to Mrs. Stock to secure her for signing this note. The bank pressed for payment of the note, and the Stocks paid this debt; afterwards Ostertag paid them $1,885 in money and gave them notes amounting to $3,000, upon which $2,000 has been paid. The purchaser of the stock of goods assumed some of the debts of the company and afterwards paid them. At the time it went out of business the company owned a large number of outstanding book accounts which were subsequently collected and applied on the indebtedness. It seems to be established that at the time of the transfer of the stock of goods the corporation was insolvent and its assets were about equal in value to the debts then owing to persons other than its own officers. The officers had no right to absorb the assets for the satisfaction of their own debts and to fail and refuse to pay the debts of judgment creditors. *Ingwersen v. Edgecombe,* 42 Neb. 740; *Tillson v. Downing,* 45 Neb. 549; *Seeds Dry-Plate Co. v. Heyn Photo-Supply Co.,* 57 Neb. 214; *Sharp v. Call,* 69 Neb. 72.

It is asserted that the recovery is excessive, since the plaintiff's claim must be prorated with those of other creditors. After an exhaustive discussion by counsel of the principles involved, in *National Wall Paper Co. v. Columbia Nat. Bank*, 68 Neb. 47, the rule of *Beach v. Miller*, 130 Ill. 162, that a director of an insolvent corporation who had taken property of the corporation to pay a debt to himself became a trustee for all creditors including himself, is approved. This is decisive of this point.

The judgment is therefore erroneous and is reversed, and the cause is remanded to the district court for the purpose of ascertaining the true and just amount of the indebtedness of the corporation and the *pro rata* share of creditors in the proceeds of the property appropriated, and to render a decree accordingly.

REVERSED.

CHARLES P. SMITH, APPELLEE, V. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 19, 1916. No. 18602.

Railroads: INJURY TO PEDESTRIANS: CONTRIBUTORY NEGLIGENCE. The duty of a traveler upon a public highway approaching a railroad crossing is to exercise ordinary care. A railroad crossing is a place of danger, and if he goes thereupon without first looking and listening for the approach of a train, without a reasonable excuse therefor, and such failure to look and listen contributes to his injury, he cannot recover.

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

W. T. Thompson, Edwin D. Crites and *F. A. Crites*, for appellant.

Allen G. Fisher, Earl McDowell and *William P. Rooney, contra.*

LETTON, J.

This is an action to recover for personal injuries occasioned by the plaintiff being struck by an engine while attempting to cross the track of the defendant at Kennebec, South Dakota, on November 4, 1910. Judgment for plaintiff, defendant appeals.

The plaintiff at the time of the accident was 63 years of age. He had been living near Kennebec, South Dakota, and intended to move to Ardmore, in the same state. A car had been placed upon the side track in which his goods were being loaded. In substance, plaintiff testifies that at that time he was a little hard of hearing, though not as deaf as he was at the time of the trial; that he used an ear trumpet to hear at long distances, but did not use it in carrying on an ordinary conversation, and that he could hear the ringing of bells and the blowing of whistles a distance of a block away if the air was clear. As to the accident, he testified: "Well, I walked from the hotel, and turned upon the sidewalk, and I walked up that way to make the crossing over there, and when I was half way between the hotel and the railway I looked to the east and couldn't see nothing there — couldn't see any train; then I took a few steps more, so I could see by the depot to see if it was clear from the west side, and it was clear over there, and I didn't look back again, but walked right on, and I just stepped over the rail and stepped on the track, and, whiff! — like that; that is all I remember. What happened after that I couldn't tell. Up to that time I knew perfectly well what happened." He further testified that he did not hear any bell rung or whistle blown, nor see any smoke. He was wearing spectacles. His legs were both broken and he was severely and permanently injured. On cross-examination, he testified that it was between 4 and 5 o'clock P. M. when the accident happened; that it was broad daylight; that he was probably 10 or 15 yards from the track when he looked; that there was nothing to obstruct his view from the east, and that he could see a little over a city block and past the next crossing, and

could not see a half mile east because there is a slope to the east. "Q. Well, now, how many rods would you say the coast was clear so you could see if you looked thoroughly and well to the east toward where the train was coming from? A. Seventy or eighty rods, may be." He also said that it was not very cold that day, but it was windy, the wind coming from the north or northwest, but dust was not blowing; that his car was to go out upon the train that struck him, but he did not know when the train was due; that he expected a passenger train first; that he walked upon the sidewalk clear up to the south track where he was struck. He further testified that he was about half way from the hotel to the crossing when he looked; that there were no cars to obstruct his view of the main track, and nothing else, except a few people that might be on the sidewalk. The train records showed that the train arrived at 4:40 P. M., about two hours late.

A number of assignments of error are made, but the only one we think it necessary to consider is that the evidence fails to show that the defendant was guilty of negligence, and that it does show that the plaintiff was guilty of contributory negligence which was the proximate cause of the injury received. It is clearly established that the whistle was sounded at the usual place, but there is a conflict in the testimony with respect to whether the bell was ringing as the train was passing through the yards. There is sufficient testimony to support the finding that it was not rung, and we must assume this fact as established. The engineer's seat was on the north side and the fireman's station was on the south side of the engine, from which latter direction the plaintiff was approaching. The fireman testifies that he was ringing the bell, but says he did not see plaintiff until he was only a few feet from the engine and just about to step upon the track. Other witnesses for the defendant testify that plaintiff was walking rapidly as he approached the railroad. One of them was so impressed by plaintiff's apparent danger that he attempted by running toward him and calling to him to

warn him of his peril. Witnesses who were within the station (which is over 100 feet west of where plaintiff was struck) with the windows closed heard the whistle and saw the accident. Others who were to the south and southeast of the station saw that plaintiff was heading directly toward the place where he was struck. It would seem that ordinary care required the fireman to have observed what so many others saw and to take steps to guard against the threatened danger. Defendant was guilty of negligence in this respect and in failing to give proper warning of the approach of the train.

The scaled plat produced in evidence by the plaintiff shows the distances between objects and places in several instances to be different from the estimates made by witnesses, and in giving distances and direction the plat will be relied upon.

Upon the question whether, as a matter of law, plaintiff was guilty of contributory negligence sufficient to bar a recovery, the evidence shows that the plaintiff was walking rapidly, and, while his speed is not stated more definitely, it is fair to assume that he was probably moving at the rate of 3½ miles or 4 miles an hour. Taking the testimony that the train was going from 6 to 8 miles an hour, as one of plaintiff's witnesses says, it was moving about twice as fast as was the plaintiff. The street is at less than a right angle with the track. Even if at a right angle, when plaintiff was 50 feet away from the track the train must have been 100 feet from the point of the collision, and 111.8 feet in a straight line from where he was. His view was unobstructed. If the train was running 10 or 12 miles an hour, as other witnesses say, the distance would be greater, but the train would still have been in sight. It seems a physical impossibility that he could have looked when he said he did. He must have absent-mindedly kept his eyes or his thoughts elsewhere, or he must have seen the train in ample time to have guarded against the danger.

The case is easily distinguishable from *Wallenburg v. Missouri P. R. Co.*, 86 Neb. 642, upon which plaintiff relies.

In that case there were obstructions on the right of way of the railway so that 50 feet from it an incoming train could only be seen for about 200 feet, though 7 feet from the track it could have been seen for over 500 feet. The train was coasting down grade at an estimated speed of from 35 to 50 miles an hour, and no warning either by whistle or bell was given of its approach. The plaintiff in that case looked and listened about 35 to 37 feet south of the track, and while upon the defendant's right of way. In this case, however, the evidence for the plaintiff shows that, if he had looked to the eastward at the place where he testifies he did, the train would have been in plain sight. He was approaching a dangerous place, as all railroad crossings are, and it was his duty to use ordinary care. His hearing was impaired, and there was therefore the more reason that he should exercise the sense of sight. His condition is deplorable, but we are compelled to the conclusion that he was guilty of such lack of ordinary care for his own safety that he is not entitled to recover. If he had looked at any point in his progress between the hotel and the railroad track, which according to the oral testimony is a distance of about 100 feet, but according to the plat is about 160 feet, he must inevitably have seen the train.

Under these circumstances the verdict of the jury is not supported by the evidence, and the motion of the defendant for a directed verdict should have been sustained. The judgment of the district court is reversed. Since it is apparent that no new and material facts can be produced, and the plaintiff's own testimony does not justify a recovery, the case is dismissed.

REVERSED AND DISMISSED.

NYE-SCHNEIDER-FOWLER COMPANY, APPELLANT, V. BOONE COUNTY, APPELLEE.

FILED FEBRUARY 19, 1916. No. 19445.

1. **Taxation:** PLACE OF TAXATION: PERSONALTY. Under section 6314, Rev. St. 1913, personal property ordinarily is required to be listed and assessed where the owner resides, but "property having local situs, like grain elevators, lumber yards or any established business, shall be listed and assessed at the place of such situs."

2. ——: ——: ——: CREDITS. Where a corporation operates, in several counties, stations for the purpose of selling lumber, fuel, grain and live stock, each station should be assessed as an independent business, and its net credits thereat should be ascertained by deducting the indebtedness incurred in conducting the business at such station from the gross credits thereof. Rev. St. 1913, secs. 6314, 6329.

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

Courtright, Sidner & Lee, for appellant.

W. J. Donahue, contra.

LETTON, J.

This is an appeal from the decision of the board of equalization of Boone county with respect to the assessment for taxation of credits of the plaintiff. The district court sustained a general demurrer to the petition of plaintiff and dismissed the appeal. Plaintiff appeals.

In substance, the petition alleges that plaintiff is a Nebraska corporation with its chief office and place of business at Fremont, in Dodge county; that it is in the business of operating stations for the purpose of selling lumber, building material and fuel, and for the purpose of buying and shipping grain and live stock; that one of such stations is at Albion, in Boone county; that on the 1st day of April, 1915, it had owing to it at Albion on book accounts the sum of $13,769.04; that the purchases of lumber, building material and fuel for all its stations are

made at the chief office in Fremont, and are paid from that office; that in order to carry on the business it is at all times necessary to purchase goods on credit and also to borrow large sums of money; that on April 1, 1915, the total amount owing to plaintiff at all of its stations was less than $110,000, and at the same time it was indebted to persons outside of the state for merchandise in the sum of $25,500, and for money borrowed and payable within the state for use in the business more than $643,000; that its total indebtedness for such purposes was at least $1,500,000; that it filed with the county assessor of Boone county a schedule of its book accounts in Boone county in the sum of $13,769.04, and the schedule also recited that the total amount owing to plaintiff at that time was about $102,000 as stated, and its total liabilities were more than $1,500,000. It is also alleged that the county assessor assessed the value of its book accounts at $5,500, and refused to make any deduction for debts; and that on appeal to the county board of equalization the assessment made by the assessor was approved.

The sections of the statutes which govern the matter are as follows:

Section 6290, Rev. St. 1913: "The term 'personal property' includes every tangible and intangible thing which is the subject of ownership and not real property as defined in the next preceding section."

Section 6291: "The word 'property' includes every kind of property, tangible or intangible, subject to ownership."

Section 6314, governing the place of listing, so far as applies, is as follows: "Personal property, except such as is required in this chapter to be listed and assessed otherwise, shall be listed and assessed in the county, precinct, township, city, village and school district where the owner resides, except that property having local situs, like grain elevators, lumber yards or any established business, shall be listed and assessed at the place of such situs."

Section 6329, provides: "The property of banks or bankers, or other companies, and merchants, except as

hereinafter specifically provided, shall be listed and taxed in the county, township, precinct, city, village and school district where the business is done."

It is elementary that "movables follow the person," in the absence of statutes providing otherwise, and that the credits of plaintiff would be assessable at the domicile of the corporation but for the statute. But the quoted sections provide otherwise, and the idea that personal property shall be listed in the locality where it is found, and not at the residence of the owner, is borne out by section 6315, as to the place of assessment of live stock or personal property connected with the farm; by section 6316, as to live stock in charge of an agistor or caretaker, or brought into the county for grazing purposes; by section 6317, as to property of manufacturers in the hands of agents; by section 6320, as to improvements on leased public lands; by section 6321, as to property in transit intended for a business. In fact, an inspection of the whole law shows the clear intention on the part of the legislature to give the people of the taxing subdivision in which personal property is situated and used for the profit of the owner the right and privilege of collecting taxes upon it, so that it may bear its proper share of the expenses of government at that place.

Plaintiff asserts that, since its general indebtedness incurred in carrying on its business at its head office and at all its branches exceeds the amount of its general credits in such places in the state, it has no net credits to be assessed. This would, undoubtedly, be true but for the provisions of section 6314: "Property having local situs, like grain elevators, lumber yards or any established business, shall be listed and assessed at the place of such situs," and of section 6329, that merchants shall be taxed where the business is done. It seems evident that the legislature intended that each lumber yard or other established business should be considered as a separate entity.

In *Hoagland v. Merrick County,* 81 Neb. 83, the court said: "Under the rule here announced (that net credits alone are taxable), it is clear that any just debts owing by Hoagland at the time the return in question was made, provided the same arose out of, or were connected with, the lumber yard at Central City, should have been set off against the items of credit."

Plaintiff must accept either one horn of the dilemma or the other. If its credits are all taxable at Fremont, then from the general credits should be deducted the general indebtedness. If the credits are taxable in Boone county, the indebtedness to be deducted must arise out of the business in that county. By returning the gross credits for taxation in Boone county, plaintiff conceded that credits are taxable locally. In this event the deductions to which such credits are subject in order to ascertain their net amounts must also grow out of the local business. In this case, without attempting to separate, or apportion, or show the amount of indebtedness which grew out of the business in Boone county, the plaintiff undertook to offset its general credits. The credits of the plaintiff in Boone county are not subject to taxation in Dodge county where its headquarters are situated. Neither are the debts which it has incurred in Dodge county, or any other county in the state, to be deducted from the credits which have accrued to the business in Boone county. Whatever debts may have been incurred in the purchase of grain, lumber, or for any other purpose legitimately connected with the conduct of the business in Boone county, are proper to be deducted from the credits in that county, but this is as far as the deduction of indebtedness may go. Since no such indebtedness was shown to the assessor, he and the county authorities were justified in refusing to make any deduction.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

IN RE GUARDIANSHIP OF LOLA HILTON.

LOLA HILTON, APPELLEE, V. JOSIE NYBERG, APPELLANT.

FILED FEBRUARY 19, 1916. No. 18353.

1. **County Courts:** PROBATE JURISDICTION: ERROR. An error proceeding is available for the review of a final order made by the county court in the exercise of probate jurisdiction.

2. **Guardian and Ward:** DISCHARGE OF GUARDIAN: NEW TRIAL: FRAUD. The discharging of a guardian and the approving of a false, final account may be vacated on a petition for a new trial, where the order was based on a signed statement procured from the ward by the fraud of the guardian. Rev. St. 1913, sec. 8207.

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

L. H. Blackledge and *Bernard McNeny,* for appellant.

W. F. Button, Stiner & Boslaugh, and *J. S. Gilham, contra.*

ROSE, J.

In the county court for Webster county plaintiff filed a petition to obtain a new trial and to vacate an order approving the final account of, and discharging, her guardian. Rev. St. 1913, sec. 8207. A demurrer to the petition was sustained and a new trial denied. After the time for taking an appeal had expired, plaintiff filed in the district court a petition in error to review the county court's order sustaining the demurrer. Defendant interposed objections to the jurisdiction of the district court and also demurred to plaintiff's petition. Jurisdiction was entertained and the demurrer was overruled. Defendant has appealed.

The first contention of defendant is that an error proceeding is not available to review a county court's order, made in the exercise of probate jurisdiction. In principle, this point is met by a former ruling to the contrary.

Engles v. Morgenstern, 85 Neb. 51. The fair import of that decision is that an error proceeding is available for the review of a final order of the county court, made in the exercise of probate jurisdiction, notwithstanding the repeal of section 584 of the Code.

Defendant insists that the petition fails to state facts constituting grounds for setting aside the order of the county court. Plaintiff, the ward, alleged that, within five days after she reached the age of eighteen years, defendant, the guardian, conducted her to the county court and caused her to sign the following statement:

"I am fully advised of the indebtedness of $266.95 charged against me in the report presented by my guardian of this date, and that the same is acknowledged to be just and satisfactory to me, and I hereby agree to make satisfactory settlement of the same, and ask that the said report may be allowed and the guardian discharged from further service in her said capacity as guardian."

The petition is not above criticism, but, considered as a whole, it fairly states facts showing that the statement quoted was false; that the ward, without knowledge of its import or time for investigation, signed it through the fraud of her guardian in whom she still reposed trust and confidence; that on the reverse side of the statement there appeared a purported final account of which the ward had no knowledge; that the order discharging the guardian and finding that her ward was indebted to her in the sum of $266.95 was based on the fraudulent statement; that the items composing the simulated indebtedness were not proper charges against the ward; that the guardian did not account for rents and profits arising from the ward's lands; that no itemized account of the guardian's receipts and expenditures was ever presented to the county court; that the guardian never made a complete disclosure of the amounts received by her, and that such amounts are unknown to the ward, but will be disclosed at the trial.

Considering the petition in its entirety in connection with the duties of the guardian and the confidential relation of the parties, the allegations should not be held insufficient, when tested by a general demurrer. A statutory ground for a new trial is "fraud practiced by the successful party in obtaining the judgment or order." Rev. St. 1913, sec. 8207. The following is a general rule:

"A guardian is bound to make full disclosure to the court of his transactions, and the law requires of him the exercise of the utmost good faith. He must not conceal any material fact, nor untruthfully represent any matter to the court." *Slauter v. Favorite,* 107 Ind. 291, 298.

In *Levi v. Longini,* 82 Minn. 324, it was said: "If the written consent and receipt were obtained by fraud, they were nullities, constituting not only a wrong upon the party injured, but they were an imposition upon the probate court also."

In *Willis v. Rice,* 141 Ala. 168, the opinion contains the following pertinent observations: "It is distinctly charged that an accounting and settlement has never been had. It is true it appears from the bill that the respondent was discharged by the decree of the probate court as on a settlement, but it is shown by the bill in this connection that such discharge was procured by the respondent without an accounting and settlement, and on a paper prepared by himself, which he influenced the complainants to sign, and which in fact was untrue in its statements. * * * There is no merit in the assignment that it is not shown how the respondent took advantage of the complainants in the matter of signing the paper acknowledging full settlement. His relation was one of greatest confidence and trust and called for the utmost of good faith. It was his duty to fully inform them of their rights in all respects. It charged that he took advantage of their youth and inexperience, and of his influence over them in getting them to sign the paper, which, they further charge, was untrue in its statements. This was sufficient. They were his wards, and from tender years had lived with him,

and grown up under his care and control; and it requires no effort to understand how easily they might be influenced by him against their interests."

The judgment of the trial court reflects the proper construction of the petition and the application of correct principles of law.

AFFIRMED.

JOSEPHINE A. KUNCL, EXECUTRIX, APPELLEE, V. ADOLPH J. KUNCL ET AL., APPELLANTS.

FILED FEBRUARY 19, 1916. No. 18627.

1. **Trusts: SUIT TO ENFORCE: PARTIES: WAIVER.** The defense that an executrix cannot maintain an action to enforce, in favor of the estate of testator, a resulting trust against a defendant to whom the legal title to realty in controversy had been conveyed is waived unless interposed by demurrer or answer. Rev. St. 1913, secs. 7666, 7668.

2. **Appeal: IMMATERIAL VARIANCE.** On appeal, a judgment will not be reversed for an immaterial variance between the pleadings and proof.

3. **Trusts: RESULTING TRUST.** Where the purchaser of realty buys it for himself and pays the purchase price with his own funds, but takes the legal title in the name of his brother for the purpose of giving the latter credit and standing in conducting a mercantile business on the premises, equity may declare a resulting trust.

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

Bartos & Bartos and *Hall & Bishop,* for appellants.

George H. Hastings, Robert R. Hastings and *Rolland F. Ireland, contra.*

ROSE, J.

This is a suit to enforce a trust, the property involved being a lot and store building in the village of Lawrence, Nuckolls county. In the petition it is alleged, in sub-

stance, that Frank J. Kuncl bought the property for himself with his own funds, but, September 22, 1908, had the legal title conveyed to Adolph J. Kuncl, defendant, a younger brother, for the purpose of giving him credit and standing in conducting a mercantile business on the premises. In the answer the alleged trustee pleaded ownership of the realty, a settlement and an accounting June 4, 1912, showing an indebtedness of $850 owing by him, and an agreement to pay it January 1, 1913. The reply was a general denial. July 6, 1912, Frank J. Kuncl willed one-third of his property to his wife and the remainder in equal shares to his three children. He died July 19, 1912. His widow, Josephine A. Kuncl, is executrix of the duly-probated will, and sues in that capacity. Alice Kuncl, the wife of Adolph, is joined as a defendant. The trial court found the issues against defendants and required them to convey the disputed title to plaintiff. Defendants have appealed.

The judgment is assailed on the ground that the executrix, as such, has no right to maintain the suit; it being asserted by defendants that the cause of action stated, if any, exists in favor of the widow and the children individually. The point is raised for the first time on appeal. The defense that an executrix cannot maintain an action to enforce, in favor of the estate of testator, a resulting trust against a defendant to whom the legal title to realty in controversy had been conveyed is waived unless interposed by demurrer or answer. Rev. St. 1913, secs. 7666, 7668; *Gentry v. Bearss,* 82 Neb. 787.

Defendants also complain of a variance between the petition and the proof on which plaintiff relies to sustain the judgment. This point seems to be based on the proposition that plaintiff pleaded an express trust which is without support in the evidence, while the trial court enforced a resulting trust. Though the petition contains an averment that the grantee named in the deed had agreed to convey the premises to Frank J. Kuncl upon request, ultimate facts showing a resulting trust are fully

pleaded. Defendants were not misled or prejudiced by allegations applicable to an express trust. Proofs relating to the transactions were adduced on both sides. There was no jury to be confused by unnecessary averments of the petition or by immaterial testimony. The issues were determined according to the facts as understood by the presiding judge. The same course will be pursued on appeal, as directed by the Code, which declares:

"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 principal question argued is the sufficiency of the evidence to justify the relief granted to plaintiff. The conclusion on appeal is the same as that reached by the trial court. The proper deduction from all of the evidence, though conflicting in some respects, is that Adolph J. Kuncl acquired the legal title to the lot in controversy as trustee for Frank, who devised it to his wife and children July 6, 1912. There is convincing proof that Frank bought the lot for himself with his own funds for $1,000; that he afterward constructed a brick store building on the premises with his own funds at an expense exceeding $4,000; that the deed was delivered to him; that he had it recorded; that he received and retained possession of the abstract; that he treated the lot as his own property; and that Adolph, after acquiring the legal title, recognized Frank's ownership. An analysis of the evidence would prolong the opinion without profit. The only proper inference from the relations of the parties, from their methods of doing business, from their attitude towards each other, from the transactions between them, and from the testimony of the witnesses in relation to these matters, is that the legal title was conveyed to Adolph, who was a stranger in Lawrence, for the purpose of giving him credit and standing as a merchant conduct-

ing a general store on the premises. This inference is not overcome by legal presumptions or by testimony of a different import.

When all of the circumstances are considered, proof of the settlement pleaded as a defense is not convincing. The business integrity of Frank is reflected throughout the record. He made a will July 6, 1912, in which he specifically devised the lot in controversy to his wife and children. According to the answer and to Adolph's testimony, the settlement was made June 4, 1912. An impartial examination of the record will not permit a finding that Frank then made a settlement, having the import pleaded in the answer, and a few days later devised the lot in controversy to his wife and children.

There is no error in the proceedings, and the judgment is

AFFIRMED.

LINUS E. SOUTHWICK, APPELLEE, V. ETTA M. REYNOLDS ET AL., APPELLEES; GREAT WESTERN COMMISSION COMPANY, APPELLANT.

FILED FEBRUARY 19, 1916. No. 18629.

1. **Mortgages: FORECLOSURE: PLEADING: PRIORITY.** In a suit to foreclose an unrecorded mortgage, a cross-petitioner seeking to foreclose, as a first lien, a subsequent mortgage, duly recorded, must allege the actual consideration therefor and the payment thereof, and must also allege facts showing that he took his mortgage without notice of plaintiff's interests.

2. ———: ———: **PRIORITY: CONSIDERATION: PROOF.** In a suit to foreclose an unrecorded mortgage, where a cross-petitioner seeks to foreclose, as a first lien, a subsequent mortgage, duly recorded, the presumption that the secured note was issued for a valuable consideration is insufficient for the purpose of showing the actual consideration paid.

3. **Appeal: DENIAL OF CONTINUANCE.** Where a cross-petitioner obtains all the relief to which he is entitled under his pleadings, the denial of a continuance requested by him is not prejudicial error.

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

John D. Ware, for appellant.

R. M. Proudfit and *John N. Dryden, contra.*

ROSE, J.

Plaintiff brought this suit to foreclose a lien on two and a half sections of land in Dawson county. Of the realty in controversy, Etta M. Reynolds had entered into contracts to purchase from the Union Pacific Railroad Company two sections, and from Jesse Good a half-section, and to pay the purchase price in instalments. Before maturity of a number of the payments, she borrowed from plaintiff $6,500, March 6, 1908, gave him a note executed by herself and her husband, defendants, and secured the loan by assigning to the payee the land contracts mentioned. Pursuant to the terms of the assignment, plaintiff, upon default of assignors, paid the deferred instalments and taxes in full, and by deeds from the vendors acquired the legal title to the lands described. The assignment was not recorded in Dawson county. Plaintiff prays for a foreclosure of the land contracts. The proceeding amounts to a suit to foreclose a mortgage. Defendants made no defense. In a cross-petition, however, the Great Western Commission Company pleaded that defendants executed and delivered to it October 12, 1908, their promissory note for $2,338.32 and secured it by incumbering the same lands with a mortgage recorded October 21, 1908, that the assignment of the land contracts was never recorded, and that cross-petitioner "had no knowledge of the existence of said contracts" until May 31, 1911. A lien superior to plaintiff's assignment was asserted by cross-petitioner, and there was a prayer for a foreclosure of the mortgage. The reply admitted that the note and the mortgage pleaded in the cross-petition were delivered to the payee, that the mortgage was recorded, and that plaintiff's assignment was not recorded. The trial court found that plaintiff had the

first lien, and ordered a foreclosure thereof, but granted the cross-petitioner permission to apply for the surplus, if any, after payment of plaintiff's claim from the proceeds of a foreclosure sale. Cross-petitioner has appealed.

It is argued that the pleadings of plaintiff do not state facts sufficient to constitute a cause of action to foreclose a first lien, the defect urged being a failure to plead that cross-petitioner had actual notice of the unrecorded assignment of the land contracts or unrecorded mortgage. On the record presented, the point does not seem to be well taken. Cross-petitioner sought to establish a lien prior to plaintiff's unrecorded mortgage. In this situation the burden was on it to allege and prove facts showing that it was a *bona fide* purchaser or incumbrancer for value. *Sanely v. Crapenhoft,* 1 Neb. (Unof.) 8; *Dundee Realty Co. v. Leavitt,* 87 Neb. 711; *Upton v. Betts,* 59 Neb. 724. In the latter case, quoting from 2 Pomeroy, Equity Jurisprudence (3d ed.) sec. 785, it was said: "The allegations of the plea, or of the answer, so far as it relates to this defense, must include all those particulars which, as has been shown, are necessary to constitute a *bona fide* purchase. It should state the consideration, which must appear from the averment to be 'valuable' within the meaning of the rules upon that subject, and should show that it has actually been paid, and not merely secured. It should also deny notice in the fullest and clearest manner, and this denial is necessary, whether notice is charged in the complaint or not."

Plaintiff insists that the judgment of the district court should be affirmed on the ground that the cross-petition does not state facts showing that cross-petitioner is a *bona fide* purchaser or incumbrancer entitled to a lien superior to plaintiff's unrecorded mortgage or unrecorded assignment. What is urged as a fatal defect is the failure of cross-petitioner to allege a consideration and the payment thereof. Is the position thus taken tenable? Cross-petitioner's answer to the argument on this point is that the cross-petition sets out the note, which recites that, for

value received, the makers promise to pay to the Great Western Commission Company $2,338.32. In this connection cross-petitioner invokes the statutory provision that "every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration." Rev. St. 1913, sec. 5342. This presumption would arise in a suit on the note or in an action to foreclose a mortgage securing it, but the rule seems to be otherwise where the holder of the note is claiming precedence over a prior unrecorded mortgage, as a purchaser or incumbrancer for value without notice. The present controversy over the priority of mortgages is controlled by the rule applicable to deeds. In *American Exchange Nat. Bank v. Fockler,* 49 Neb. 713, it was held that a purchaser seeking to defeat a prior unrecorded mortgage must, among other things, plead and prove "that for the property it parted with or paid a valuable consideration, what that consideration was, and that it paid or parted with such consideration before receiving notice of the mortgage."

The author of the opinion in that case quotes from *Long v. Dollarhide,* 24 Cal. 218, wherein it was said: "Had the defendant, however, shown a deed from Vaca, recorded before that of the plaintiffs, he would have failed in making out this defense; for, aside from the recitals contained in his deed, he offered no evidence showing himself a subsequent purchaser in good faith and for a valuable consideration. The burden of proving this rested upon him, and the recitals of the deed are not, as he contends, *prima facie* proof of a valuable consideration. Such recitals are but the declarations of the grantor, and it has never been held that the declarations of a vendor or assignor, made after the sale or assignment, can be received to defeat the title of the vendee or assignee. A party seeking to bring himself within the statute cannot rely upon the recitals of his deed, but must prove the payment of the purchase money *aliunde.*"

These views have generally been adopted by other courts: *Nolen & Thompson v. Heirs of Gwyn,* 16 Ala. 725;

Lake v. Hancock, 38 Fla. 53; *Roseman v. Miller,* 84 Ill. 297; *Kruse v. Conklin,* 82 Kan. 358; *Shotwell v. Harrison,* 22 Mich. 410; *Richards v. Snyder & Crews,* 11 Or. 501; *Coxe v. Sartwell,* 21 Pa. St. 480; *Robertson v. McClay,* 19 Tex. Civ. App. 513.

The supreme court of the United States, in discussing the plea of purchaser in good faith, said: "The consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed." *Boone v. Chiles,* 10 Pet. (U. S.) *177, *211.

For the reasons stated, the conclusion is that cross-petitioner did not allege facts showing that it was entitled to a lien superior to plaintiff's.

The overruling of a motion for a continuance is also challenged by cross-petitioner as erroneous. It is unnecessary to pass on the merits of this assignment, since cross-petitioner obtained all of the relief to which it was entitled under its pleadings.

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

LEE S. ESTELLE, APPELLEE, V. DAILY NEWS PUBLISHING COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 19, 1916. No. 18120.

1. **Libel:** PRIVILEGED COMMUNICATIONS: CANDIDATES FOR PUBLIC OFFICES. A public statement to the voters in regard to the qualifications and fitness of a candidate for public office made while such candidate is seeking nomination and election is a communication of qualified privilege.
2. ———: TRUTH AS DEFENSE: BURDEN OF PROOF. If such statement is libelous *per se* and is untrue in fact, the burden is upon the party who makes it to prove, not only that he in good faith believed the truth of the statement, but that he had evidence sufficient to justify a reasonable man in belief of its truth.

3. ———: ———. One who publishes of a candidate for office a statement relating to the candidate's qualifications and fitness for the office is not liable in damages if the statement is true and is made with good motives and for justifiable ends, although such statement is libelous *per se*.

4. ———: PRIVILEGED COMMUNICATIONS: MALICE: BURDEN OF PROOF. A defendant is not liable for publishing privileged communications unless there was actual malice on his part, and such malice must appear before there can be a recovery. If, however, the statements published are false and libelous *per se*, malice is presumed, and the burden is upon the defendant to prove that the evidence of the truth of the statements was such as would justify him in making them, and that he did so in good faith, believing them to be true.

5. ———: ———: CANDIDATES FOR PUBLIC OFFICES. A citizen interested in an election has the right to inform other voters of any well-grounded belief which he has as to the candidate's fitness for the office.

6. ———: ———: ———. If the matters stated as facts are true, or if he has reason to believe that they are true upon the evidence that would justify reasonable men in such belief, he would not make himself liable by stating such facts to the voters.

7. ———: ———: ———. If in stating his belief as to existing facts and conditions he does so in good faith, upon sufficient ground to justify a reasonable man in such belief, he would not be liable in damages for expressing to the voters such belief.

8. ———: PLEADING: INNUENDO. The office of an innuendo in a petition for libel is to explain and apply the meaning of ambiguous or doubtful expressions in the alleged libelous publication. If it attempts to give a meaning that cannot be derived from the language used, such innuendo should be stricken out of the petition on motion.

9. ———: INSTRUCTIONS: INNUENDO. If the statement published is a statement of the belief or opinion of the party making it, and the innuendo assumes that it is a statement of fact, and the instructions of the court also assume that such statement was intended as a statement of fact, such instruction will be erroneous.

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

Brown, Baxter & Van Dusen, Elmer E. Thomas and *I. J. Dunn,* for appellants.

Mahoney & Kennedy and *Dolezal & Johnson, contra.*

SEDGWICK, J.

The plaintiff had held the office of judge of the district court for the fourth judicial district for about 15 years, and was a candidate for re-election. The defendant Fellman wrote an article in regard to the plaintiff's candidacy, and the defendant, the Daily News Publishing Company published the article in the Daily News, a newspaper published in Omaha. This action was begun by the plaintiff in the district court for Douglas county, and was transferred to the district court for Dodge county. The trial there resulted in a verdict for $25,000 damages and a judgment upon the verdict, from which the defendants have prosecuted separate appeals.

The article complained of was as follows: "I am opposed to the renomination of District Judge Lee S. Estelle because I believe he is for the special interests and against the people. I am opposed to his renomination because I believe he is for the third ward crowd and against their molestation. I am opposed to his renomination because, in common with many other Omaha citizens, I regard the Erdman case a mere 'frame-up' by the third ward crowd. Erdman's real offense as viewed by them was his interruption of their police protected carnival of crime. The witnesses for the prosecution were for the most part gamblers, bartenders and gay sports who consort with them. The testimony of their more reputable witnesses was swept away by men of such standing as Dr. Rigge of Creighton University and Professor Senter of the high school of Omaha. The first jury disagreed. The second jury returned a swift verdict of guilty in one, two, three order. Mr. J. W. Miller, educational director of the Y. M. C. A., was not allowed to sit on the jury. A single man of his type would have blocked the game. Judge Estelle, in the face of these facts, gave Erdman the full limit of the law—fifteen years. I am not indifferent to the peril of myself and to my little ones if I raise my voice against the cohabitation of the gamblers and the courts in the temple of justice, but that is a secondary

matter to me. Judge Estelle ought to be defeated. I am appealing to decent republicans to defeat Estelle in the primaries Tuesday."

The defendants contend that the petition fails to state a cause of action. After their demurrers to this petition were overruled the defendants each filed separate motions to strike out parts of the petition. These motions related principally to the various innuendoes incorporated in the petition. They also complain that the court refused to give certain instructions requested by the defendants, and that certain instructions given by the court were erroneous. For the most part these criticisms in regard to the instructions depend upon the contention that the innuendoes should have been stricken from the petition, and that the petition does not state a cause of action. The publication was during the campaign for nomination in the primaries, and, as has been before stated, the plaintiff was a candidate for nomination. The defendant, Fellman was a citizen and voter of that judicial district, and was, in common with all other citizens, interested in the nomination and election. The communication was therefore what is commonly called a privileged communication, and must be construed in the light of that fact. One who publishes of a candidate for office a statement relating to the candidate's qualifications and fitness for the office is not liable in damages if the statement was true and was made with good motives and for justifiable ends, although such statement is libelous *per se*. If the statement is untrue in fact, the burden is upon the party who makes it to prove, not only that he in good faith believed the truth of the statement, but that he had evidence sufficient to justify a reasonable man in belief of its truth.

"The extent to which the cases go in relation to a candidate for a public office is that, where a person, knowing or believing that a candidate for public office is guilty of conduct affecting his fitness for the position, communicates that knowledge or belief to the electors whose support the candidate is seeking, the publisher, acting in good

faith in the discharge of his duty to the public, may make such reasonable comments and give such information as comes to him from a reliable source, and which he believes to be true, for the purpose of informing the voters of the fitness of the candidate." *Sheibley v. Huse,* 75 Neb. 811, 821.

But there is a corollary to this proposition. The principle has been stated in *Neeb v. Hope,* 111 Pa. St. 145, and quoted and adopted in *Bee Publishing Co. v. Shields,* 68 Neb. 750: "An occasion of privilege will not justify false and groundless imputations of wicked motives or of crime. The conduct of public officers is open to public criticism, and it is for the interest of society that their acts may be freely published with fitting comments and strictures. But a line must be drawn between hostile criticism upon public conduct and the imputation of bad motives, or of criminal offenses, where such motives or offenses cannot be justly and reasonably inferred from the conduct." *Farley v. McBride,* 74 Neb. 49.

A defendant is not liable for publishing privileged communications unless there was actual malice on his part, and such malice must appear before there can be a recovery. If, however, the statements of fact published are libelous *per se,* proof that such statements were untrue is sufficient to cast the burden upon the defendant to prove that the evidence of the truth of the statements was such as would justify him in making them, and that he did so in good faith, believing them to be true. As an interested citizen, it was the right of the defendant to inform the voters of any well-grounded belief which he had as to the candidate's fitness for the office. "I am opposed to the renomination of District Judge Lee S. Estelle because I believe he is for the special interests and against the people" is a statement of opinion. Even if this statement would bear the construction that he believed the candidate was so much in favor of the special interests that he would intentionally favor them in any litigation

before him, which would, of course, be misconduct in office, still, if the defendant so believed and such belief was well founded, or if he frankly stated the grounds of such belief and fairly submitted the matter to the voters, he would not be liable in damages.

The defendant's motion to strike out the innuendoes alleged in the amended petition was upon the ground that "each of the matters sought to be stricken is redundant, immaterial, and irrelevant, and for the further reason that the publication set out in plaintiff's petition is not capable of a double meaning, and is not capable of the meaning given to it by the innuendo allegations sought by this motion to be stricken from the petition," and was addressed separately to each innuendo alleged.

The first item of the publication and alleged innuendo was as follows: "I (meaning the said defendant Benjamin F. Fellman) am opposed to the renomination of District Judge Lee S. Estelle (meaning this plaintiff) because I (meaning the said defendant Benjamin F. Fellman) believe he is for the special interests (meaning thereby that, in the discharge of plaintiff's official duties as judge of said district court, plaintiff was prejudiced in favor of some litigants) and against the people (meaning thereby that, in the discharge of plaintiff's official duties as judge of the district court, this plaintiff, as such judge, exercised the functions of his office with partiality and favor contrary to law)."

In this clause of the published article the defendant stated his belief, and did not state as a fact that the plaintiff was "for the special interests and against the people." It could not be construed as intending to charge as a fact that "plaintiff was prejudiced against some litigants," or that he exercised his office as judge "with partiality and favor contrary to law."

The court instructed the jury: "If the jury believe from the evidence that said article meant what the plaintiff alleges it to mean and was false, and the plaintiff has suffered some damages thereby, then you should find in favor

of the plaintiff and against both defendants such damages as you believe from the evidence the plaintiff has sustained. The law under such a state of facts would presume that plaintiff has suffered some damage." Also, other similar instructions. By the instruction above quoted it was submitted to the jury to find whether this language, as used by the defendant, should be construed as alleged in the innuendo. The jury must have supposed that the question for them to determine was whether the language charged as a fact that the plaintiff was or had been corrupt in his office. There was properly no such question for the jury upon the statement of the publication, and the jury should have been so instructed. The innuendo in connection with the second statement of the publication is of the same character. Allowing these innuendoes to remain in the petition, and instructing the jury that they were to find whether these statements meant what the innuendoes charged they meant, was clearly erroneous. The jury should have been told that these statements were merely statements of defendant's belief, and that defendant could not be held liable for stating an honest and well-grounded belief as to the qualification and fitness of plaintiff for the office for which he was a candidate. The third statement as to how defendant regarded the "Erdman case," that is, what he believed as to that case, is followed by a statement of the facts upon which he based that belief, and some of his own conclusions drawn from those facts. If he made a true statement of facts as the foundation of his belief as to that case, he could not be held liable for expressing his reasonable belief, and conclusions derived from those facts, and submitting the question fairly to the voters.

The statement upon which he based his characterization of the "Erdman case" is: "The witnesses for the prosecution were for the most part gamblers, bartenders and gay sports who consort with them. The testimony of their more reputable witnesses was swept away by men of such standing as Dr. Rigge of Creighton University

and Professor Senter of the high school of Omaha. The first jury disagreed. The second jury returned a swift verdict of guilty in one, two, three order. Mr. J. W. Miller, educational director of the Y. M. C. A., was not allowed to sit on the jury. A single man of his type would have blocked the game." He considered the conspiracy or "frame up" of the "Erdman case" to be the work of "the third ward crowd." He thinks that, "as viewed by them," Erdman interrupted their "carnival of crime," and that was their motive in his prosecution. There is no intimation that he believed that the judge was in any way connected with these schemes of "the third ward crowd." He states as a fact the character of the witnesses for the prosecution of that case, and it seems to be conceded by both parties that that statement was substantially true. Both parties assert that the "third ward crowd" is a bad organization, as far as the public interests are concerned. Indeed, both parties by their pleadings and their evidence make this very prominent. He then says that the testimony of the witnesses for the prosecution was swept away by the testimony of certain men that he names. That might or might not be construed as a matter of opinion and judgment, rather than a statement of an issuable fact. The next statement, that the jury in that trial disagreed and that the second jury returned a "swift verdict of guilty," is not seriously controverted. He then named a juror that he says was not allowed to sit upon the jury, which is borne out by the record. The innuendo here alleged, "meaning thereby that, in sustaining a challenge of the state to said J. W. Miller on the ground of his incompetency as a juror in said case, this plaintiff corruptly exercised his judicial functions in sustaining said challenge wrongfully and unlawfully for the purpose of preventing said Erdman from having a fair trial," presented a question for the jury. That the trial judge considered the evidence in the "Erdman case" sufficient to justify a submission of the case to the jury does not of itself imply corruption. If Erd-

man was guilty of the crime as found by the jury, a sentence of the full limit of the law does not necessarily mean, and might not be understood to mean, that "plaintiff in the exercise of his judicial office wrongfully and corruptly imposed an excessive sentence upon the said Erdman." These questions should have been submitted to the jury with proper instructions. The following statement, that a "man of his type would have blocked the game," of course, is an expression of opinion. He then says: "Judge Estelle, in the face of these facts, gave Erdman the full limit of the law—fifteen years." That the sentence was 15 years was established by the record. The expression "in the face of these facts" might imply that plaintiff at the time knew all of the recited facts; that the witnesses for the prosecution were for the most part gamblers; that the testimony of their most reputable witnesses was "swept away;" that the first jury disagreed and the second jury returned a "swift verdict," and that the juror named was peremptorily challenged and necessarily therefore excluded. It was a question for the jury to determine whether the meaning was that the plaintiff knew the facts, or merely that the facts existed. The statement then concludes: "I am not indifferent to the peril of myself and to my little ones if I raise my voice against the cohabitation of the gamblers and the courts in the temple of justice, but that is a secondary matter to me. Judge Estelle ought to be defeated. I am appealing to decent republicans to defeat Estelle in the primaries Tuesday." Thus he assumes that, if he is right in his belief that the candidate is for the special interests and against the people, and is for the "third ward crowd" and against their molestation, and that the "third ward crowd framed up" the prosecution against Erdman with the result stated, then there is "cohabitation of the gamblers and the courts in the temple of justice." He appeals to decent republicans and expresses the opinion that the judge ought to be defeated.

The innuendo with the closing statement above quoted is alleged: "Meaning thereby that there existed unlawful relations and intercourse between gamblers and this plaintiff as a judge of the district court of said judicial district, and that such unlawful relations and intercourse wrongfully and corruptly influenced this plaintiff in the discharge of his judicial functions as a judge of said court." The word "cohabitation" may in some connection have a very disgraceful meaning. The jury might well regard it in this connection as an extravagant expression. The primary meaning of the classical words from which it is derived is to have (or have possession of) a common place. Webster's New International Dictionary. Its evident meaning in the connection used is that this plaintiff and gamblers associated together in the building used by the courts. Whether the defendant's meaning was, and the understanding of those who read the article would be, that "there existed unlawful relations and intercourse between gamblers and this plaintiff as a judge of the district court of said judicial district, and that such unlawful relations and intercourse wrongfully and corruptly influenced this plaintiff in the discharge of his judicial functions as a judge of said court," should have been submitted to the jury with proper instructions.

The plaintiff contends that the fact that defendant testified at the trial that he did not believe that the plaintiff was guilty of corrupt practices in his office as judge establishes that defendant did not believe that the plaintiff was "for the interests and against the people," and did not believe the other matters which he stated as his belief in the article complained of, and that therefore his statements of his belief are shown by his own evidence to have been wilful and malicious. The defendant was not asked whether he believed that the plaintiff was "for the interests" when he made that statement, nor in what sense he used that expression. The language used by him, under the familiar vernacular of the times, might mean that he believed that the plaintiff's social or business affili-

ations were with those who represented special, as distinguished from the public, interests, and that he was, or might be, unconsciously, rather than corruptly, influenced thereby. The defendant's denial upon the witness-stand that he believed the plaintiff to be corrupt in his office should be regarded as his construction of the language used by him, rather than an admission that he did not in good faith believe what he stated to the voters that he did believe.

The communication being one of privilege under the circumstances, it follows from what has been said that the question of the liability of the defendant Fellman depends upon his good faith in writing and publishing the articles complained of. If the matters stated by him as facts were true, or if he had reason to believe that they were true upon evidence that would justify reasonable men in such belief, he would not make himself liable by stating such facts to the voters. If in stating his belief as to existing facts and conditions he did so in good faith, upon sufficient ground to justify a reasonable man in such belief, he would not be liable in damages for expressing to the voters such belief. Whether the published comments made as beliefs or conclusions were honest expressions of opinion made in good faith, and not without foundation, and were such as a fair man, though entertaining extreme views, might make honestly and without malice, were questions for the jury. This principle was entirely ignored in the instructions, though defendant suggested several upon the point. By instruction 14 the jury were told unqualifiedly that, if they believe the article was false, plaintiff would be entitled to recover. This excludes entirely the idea of privilege, and of exoneration of Fellman if he believed upon good and reasonable grounds his statement to be true. Those matters should have been made plain to the jury. The questions to be submitted to the jury are: (1) Did the defendant, in the several statements of what he believed and as to what he regarded as a fact, state in good faith what he be-

lieved as to those matters and upon sufficient ground, under all the circumstances, for such belief? (2) If the fact was that the juror in the Erdman trial was challenged for cause, then would this defendant in that connection be fairly understood to charge this plaintiff with an improper motive in excusing said juror, and, if so, did the defendant act wilfully and maliciously in making the statement that the juror was not allowed to sit in the case? (3) Did the language used by defendant suggest to those who read the article that the judge, when he sentenced Erdman, knew the facts recited in the statement as to the conspiracy of the third ward crowd to convict Erdman, and would those who read the article so understand it, and, if so, did the defendant act wilfully and maliciously in stating those facts and the severity of the sentence? (4) Would the expression, "the cohabitation of the gamblers and the courts in the temple of justice," under the circumstances, and in connection with the whole article, be understood by those who read it to charge "that there existed unlawful relations and intercourse between gamblers and this plaintiff as a judge of the district court of said judicial district, and that such unlawful relations and intercourse wrongfully and corruptly influenced this plaintiff in the discharge of his judicial functions as a judge of said court," and, if so, did the defendant act wilfully and maliciously in using that expression?

Of course, the entire article must be considered as a whole, and each distinct statement construed in the light of all other statements; but this does not mean that, when a voter states his belief upon a given subject, it must be construed as a positive statement of fact because there are some matters stated as facts in the article complained of. Common sense dictates that we should ascertain what matters are stated as facts, and not treat mere statements of opinion as statements of fact. The newspaper published the article, without comment, as the views of the defendant Fellman. The instructions referred to, in the

light of the construction placed upon the innuendoes by the rulings thereon, were also erroneous as to that defendant. The defendants requested that separate verdicts be submitted to the jury, which was erroneously refused.

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

REVERSED.

FAWCETT, J., concurring.

I concur in the judgment of reversal, but not in all of the reasoning upon which such reversal is based. I concur in the reversal upon two grounds:

1. The jury were not as concisely instructed as they should have been. I deem it unnecessary to set out the instructions and consider them in detail. The opinion states, succinctly I think, the issues that should have been submitted to the jury, viz.: (1) Did the defendant, in the several statements of what he believed, state what he believed as to those matters upon sufficient ground, under all the circumstances, for such belief? (2) If the fact was that the juror Miller, in the Erdman trial, was challenged for cause, would the language used by defendants in that connection be generally understood by the readers of the publication to charge plaintiff with an improper motive in excusing said juror, and, if so, did defendants act wilfully and maliciously in making and publishing the statement that such juror was not allowed to sit in the case? (3) Would the language used by defendants suggest to those who might read the article that plaintiff, when he sentenced Erdman, knew the facts recited in the article as to the conspiracy of the third ward crowd to convict Erdman, and would those who read the article so understand it, and, if so, did defendants act wilfully and maliciously in publishing those facts and in referring to the severity of the sentence in connection therewith? (4) Would the expression, "the cohabitation of the gamblers and the courts in the temple of justice," under the circumstances, and in connection with the whole

article, be understood by those who read it to charge that there existed unlawful relations and intercourse between the gamblers and plaintiff as a judge of the district court of said judicial district, and that such unlawful relations and intercourse wrongfully and corruptly influenced plaintiff in the discharge of his judicial functions as a judge of said court, and, if so, did the defendants act wilfully and maliciously in publishing the same?

2. The verdict is excessive. Punitive damages are not recoverable in this state. The measure of recovery is the actual damage sustained. The published article was designed to defeat the nomination and re-election of plaintiff. It failed in its purpose. Its failure was plaintiff's vindication. The evidence fails to show actual damages sufficient to sustain the verdict.

After a second careful examination of the record, I am impressed with the conviction that the merits of this important case can be made more clearly and satisfactorily to appear by a retrial of the issues involved.

LETTON, J., concurs.

BARNES, J., dissenting.

I cannot concur with the majority of the court, and my reasons for dissenting, briefly stated, are as follows: The libelous article set out in full in the majority opinion is construed by considering its several words and sentences separately, and in a way that, to my mind, will not bear the test of judicial investigation. The published article should be taken up as a whole, and all of its words and sentences should be construed together. There may be sentences in the article which, standing alone, possibly could not be construed as libelous and might not have caused the institution of a suit like the one we are considering. To my mind, all parts of the publication should be considered as forming the foundation for the concluding charge in the article. All related to plaintiff's manner of discharging the duties of his judicial office so as to favor "the special interests," the gamblers and dis-

reputable persons constituting the "third ward crowd," and to aid them in getting out of the way any member of the gang who should turn against them and attempt to aid in their undoing. When so taken and construed, I am of opinion that it constituted a direct charge of misconduct in office.

It must be borne in mind that what is termed in the article as the "third ward crowd" was understood and believed by the citizens of Omaha to be composed of gamblers, thieves and criminal violators of the laws of this state, together with other persons of disreputable and criminal character. In justification, defendants offered the evidence of one of the "third ward crowd" to prove that fact. The article charged that Judge Estelle was friendly to that crowd. It alleged, in substance, that the police force, acting with that element, had charged one Erdman with a criminal offense; that on the trial of that case, at which Judge Estelle presided, he had prevented one J. W. Miller from serving as a juror in the case, and if Miller had been retained on the jury he would have blocked Erdman's conviction. The article further charged that, notwithstanding the fact that the evidence was insufficient to sustain the conviction, Judge Estelle sentenced Erdman to a term of 15 years in the penitentiary, which was the extreme limit of the law for the offense charged. If this does not charge plaintiff with corruption and misconduct in office, I fail to understand the meaning of the English language.

The article in question starts out with the statement: "I am opposed to the renomination of District Judge Lee S. Estelle because I believe he is for the special interests and against the people." It concludes with the charge: "I am not indifferent to the peril of myself and to my little ones if I raise my voice against the cohabitation of the gamblers and the courts in the temple of justice, but that is a secondary matter to me. Judge Estelle ought to be defeated. I am appealing to decent republicans to defeat Estelle in the primaries Tuesday." Without further ref-

erence to the publication, I am clearly of opinion that it was libelous *per se*.

In determining whether the printed declarations were libelous, the courts will not resort to any technical construction of the language used. The publication should be read in court as it would be read elsewhere. The language itself is to be construed in its ordinary and popular sense, and the question is whether the language, when so construed, would convey, or was calculated to convey, to persons reading it, the charge of misconduct in office. *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb. 64; *World Publishing Co. v. Mullen*, 43 Neb. 126; *Barr v. Birkner*, 44 Neb. 197; *Battles v. Tyson*, 77 Neb. 563; *Thorman v. Bryngelson*, 87 Neb. 53; *Thomas v. Shea*, 90 Neb. 823; *Spencer v. Minnick*, 41 Okla. 613; *Baker v. Warner*, 231 U. S. 588.

By its answer the Daily News Publishing Company admitted the facts alleged in the first seven paragraphs of the petition, admitted publishing the article in question, and set the same out in full in its answer. It pleaded the calling and character of defendant Fellman and the part he was taking in political affairs, and alleged that the answering defendant, at the request of Fellman, published the article and believed the statements contained therein to be true, so far as appears from the ordinary import and meaning of the language used. It was alleged that defendant published the article without comment, except the caption which it prepared, viz., "Fellman Urges the Defeat of Estelle;" that it published the same without malice toward plaintiff, in the public interest, and with good motives and for justifiable ends; and that the publication was privileged. It denied that the words contained in the article had, or could have, the meaning or import alleged by plaintiff in his petition, averred that plaintiff was successful at the primary and election, and denied that he was, or has been, in any respect damaged. Defendant Fellman admitted the writing and publication of the arti-

cle in question, and alleged, in substance, that Dennison, with his "third ward crowd," had sufficient influence with public officials to afford protection to persons and corporations so that gambling, the illegal sale of liquors, disorderly houses, and other vices were rarely interfered with, when operated by followers and members of that crowd; that it was well understood in Omaha that the only way to secure the privilege of violating the law was to do so through the "third ward crowd" and its bosses, and one way to secure such privilege was to obey their commands in voting and working for their candidates at primary and general elections. Fellman's answer further alleged that for years prior to August 4, 1911, the "third ward crowd" controlled the vote of most precincts in that ward; that for years the votes of those precincts had been counted for candidates favored by them; that for years prior to the publication in question there had not been a fair, free or honest primary or election in said precincts, and in many other precincts that were under the control of the "third ward crowd;" that during plaintiff's service on the bench he had not taken any action as a citizen, or as a judge, to interfere with or lessen the political power and influence of said "third ward crowd," but, on the contrary, had rendered decisions as a judge on the bench which have aided the members of that crowd to violate the law and to terrorize those who had interfered with such violation; that the plaintiff, as a judge, had been satisfactory to the "third ward crowd;" and that because of the record made by plaintiff in the Erdman case, and in other cases which came before him as judge, and because of the protection which the "third ward crowd" had been able to give to violators of the law without interference from plaintiff, whose duty it was to interfere, defendant Fellman came to the conclusion that plaintiff was not the proper kind of a man to occupy the position of district judge.

The plaintiff's replies were, in substance, a denial of the affirmative allegations of the answers.

On the trial, plaintiff introduced evidence of his professional standing as a lawyer, of his long and satisfactory service as one of the judges of the fourth judicial district, and also as to how the article affected him when he saw it as published by the defendant the Omaha Daily News Publishing Company. The evidence showed that the effect of the published article upon plaintiff was such that he became severely ill in mind and body; that it caused him such great anguish that he was unable to perform his duties as judge of the district for about six weeks; that the result of the publication was such as to nearly cause his defeat for renomination and election; that he ran many votes behind his associates, and but for the fact that he had served the people of his district for twelve years, and was well known as an upright and conscientious judge, the publication of this article would have accomplished its purpose and he would have been defeated.

The defendants testified in their own behalf, and both stated that, when the article was written and published, neither of them believed that the plaintiff had ever been guilty of corruption or misconduct in office, and it appears that the matters charged in the publication, so far as they related to plaintiff, were untrue. This was sufficient to show malice. *Whiting v. Carpenter,* 4 Neb. (Unof.) 342; *Sheibley v. Fales,* 81 Neb. 795; *Thomas v. Shea, supra.* This also disposes of the appellants' claim that the article published was privileged.

The rule in some courts is that a public statement to the voters during an election campaign as to the qualifications and fitness of candidates for election to office is one of qualified privilege; that one who publishes a statement relative to a candidate's qualification and fitness for office is not liable in damages if the statement be true and is made with good motives and for justifiable ends; and decisions can be found that hold this to be true, although the statement on its face would be what might be termed libelous *per se;* but even those cases hold that, if such statement is in fact untrue, the burden is upon the one who

makes it to prove, not only that he in good faith believed the statement to be true, but that he had evidence sufficient to justify an ordinarily prudent and fair-minded man in believing in its truth. When the published statement is libelous *per se,* that is to say, is untrue when published, and the one who publishes it does not in fact believe that the one against whom the published statement is directed has been guilty of any wrongdoing, or when the person charged is a public official, and the person publishing the article does not believe that he has been guilty of any malfeasance or misfeasance in office, the doctrine of qualified privilege has no application, and the one publishing the statement is subject to the general rule of law in relation to libel. In an action for damages for libel by one holding a public office, where the defendant testifies that at the time of publishing the libelous article he did not believe that the plaintiff had ever been guilty of either malfeasance or misfeasance in office, there is no room for the application of the rule that where one publishing a statement as to another merely states his belief as to existing facts and conditions, in good faith and upon sufficient ground to justify a reasonable man in such belief, he will not be liable in damages for expressing such belief to the voters at a pending election. It is a travesty to hold that a party should be excused on a plea of good faith or upon evidence which might be thought sufficient to justify reasonable minds in believing the truth of his publication, when he himself, in fact, did not believe it was true at the time he made it. Courts should not permit such subtle distinctions to control their decisions.

What are the facts in this case? The defendant Fellman at the trial testified as follows: "Q. Did you at the time you wrote this article believe that Judge Estelle had been guilty of any corrupt acts or illegal acts in the discharge of his official duties as a judge? A. I did not. * * * Q. Did you believe that Judge Estelle had been guilty of any crime in the discharge of his official duties when you wrote this letter? A. I did not. * * *

Q. Did you have in mind or believe at the time you wrote this letter that Judge Estelle had been guilty of any misfeasance or malfeasance in office? A. I did not." Mr. Polcar, who at the time of the publication of the notice was, and for ten years prior thereto had been, managing editor of the defendant publishing company, and who at the time of the trial was the president and only resident director of the company, testified at the trial as follows: "Q. I think you testified in your direct examination that you did not believe Judge Estelle guilty of corruption in office? A. I don't believe so. Q. You don't believe he ever was guilty of any malfeasance in office? A. No, sir. Q. You don't believe he was ever guilty of any misfeasance in office? A. No, sir." This testimony, given by the two men who are responsible for the publication, entirely eliminated from the case the doctrine of qualified privilege. And, there being no evidence in the case showing that the charges made in the published notice were actually true, the defense that the notice was published from good motives and for justifiable ends, as I view the case, entirely failed. It would be an absurdity to hold that a statement which is libelous upon its face could be published for justifiable ends when it in fact was not true, and when the ones who published it did not believe it to be true. In this condition of the record, the trial court should have instructed the jury that the published statement was libelous *per se,* and should have submitted to them the one question only, viz., the amount of plaintiff's damages. If I am correct in this view of the matter, then the discussion of the innuendoes set forth in plaintiff's petition is beside the mark, and the instructions of the trial court which are set forth in the opinion of the majority and which are relied upon for reversal of the judgment, if erroneous at all, could only affect the plaintiff's rights and are most favorable to the defendant.

In *Bee Publishing Co. v. Shields,* 68 Neb. 750, in an opinion by Oldham, C., concurred in by Barnes (myself) and Pound, CC., and by Chief Justice Sullivan and Judges

Holcomb and Sedgwick, we held: "An occasion of privilege will not justify false and groundless imputations of wicked motives or of crimes against public officials in the performance of their duty. While the conduct of such officials is open to criticism, a line must be drawn between hostile criticism upon public conduct and the imputation of bad motives or of criminal offenses to officials."

In *Mertens v. Bee Publishing Co.*, 5 Neb. (Unof.) 592, we held: "The doctrine of qualified privilege applicable to communications in a newspaper regarding a candidate for public office does not extend to statements injurious to reputation or character if such statements are false in fact."

The record shows that the defendants sought to justify the charge relating to the trial and sentence of Erdman by offering testimony as to the vicious and criminal character of what they termed the "third ward crowd." As we view the evidence, it shows that no substantial fact existed which would justify the publication, and the jury were warranted in returning a verdict for the plaintiff.

That Fellman was the writer of the article is admitted; that he wrote it to be published in the Omaha Daily News, and that the editor in chief of that newspaper was vested with complete authority to say whether the article should or should not appear in the paper. He testified that Fellman brought the letter and handed it to him; that he read it and hurried it into the composing room. The purpose of Fellman in writing the letter, and of the editor in publishing it, was to defeat the plaintiff in the primary and at the election; the purpose of one was the purpose of both of the defendants. There could be no separation on the ground of qualified privilege, because neither of the defendants was privileged to write or publish the article in question. There was no ground on which to separate the defendants in determining plaintiff's damages.

That the publication failed to accomplish its purpose in this particular instance should not be urged in excuse

or mitigation. That it did come very near producing the result is true. That it did not entirely do so was doubtless because of the fact that the judge was well known in his district, where he had lived and in which he had served for many years. It will not do to lightly pass over an offense of the kind under consideration, nor to enter into any nice mathematical computation in considering the amount returned by the jury as compensation for the wrong done. The record shows that the trial was had in a district other than the one in which plaintiff resided, before a fair-minded and unprejudiced jury. The presiding judge was a man of many years of experience and well learned in the law. To my mind the instructions contain no reversible error, and the judgment of the district court should be affirmed.

MORRISSEY, C. J., concurs.

HAMER, J., dissenting.

The thing charged in the article published and on which the action for damages is based is, in substance, the cooperation of the courts and gamblers in the temple of justice, that is, in the court house. The Erdman case is referred to, and it was claimed in the article published that that case was a "frame-up," that is, a prosecution for an alleged crime without any evidence or reason upon which to found it. The conclusion must be from these statements that Judge Estelle and the gamblers tried Erdman and secured his conviction and sent him to the penitentiary when they knew he was not guilty; the judge fixing the penalty at 15 years in prison. This is official corruption, and if Judge Estelle is guilty he should be condemned by everybody and be imprisoned and disbarred, and sent to the penitentiary himself. On the other hand, if a great newspaper like the Omaha Daily News makes a charge of this kind against a judge who is a candidate for re-election, and thereby seeks to defeat him, it should know that the charge is well founded, or, at least, have substantial reason to believe that it is well founded. If

such a charge is made without reason, it is indefensible. Of course, the newspaper has a right to defend itself; but if it does the wrong complained of, it should be severely punished. As it is a corporation, there is no way to get at it, except to inflict the payment of damages upon it. If a newspaper publishes a charge of this kind without sufficient justification, it thereby is likely to defraud the voters out of an honest choice. The voter is interested in the selection of the judge. To charge that the judge is corrupt is to tell the voter that the judge is unfit for office, and that he ought to be defeated. Judge Estelle had held the office of judge of the district court in Omaha for a great many years. He desired to be nominated and re-elected, and he became a candidate. While he was nominated and re-elected, the publication of this matter probably cut down his majority very much. Many voters doubtless declined to vote for Judge Estelle and voted against him because of what they saw in the News. There may be something of a belief that, if a man becomes a candidate for any office, the public have a right to make him run the gauntlet and to stick splinters into him which are on fire. The writer remembers that Abraham Lincoln was charged when he was first a candidate for president with being a very bad man, a blackguard, a clown, a man without patriotism. He was held to be a man of low character beneath the consideration of respectable people. Nothing too opprobrious could be said of him. As a matter of fact, he was a leading lawyer in the little city in which he lived. He was a strong politician. He was a born statesman. He was patriotic to an infinite degree. He had superb courage, and with the logic of a statesman he combined that beauty of expression which is seldom found, except with poets and men who love literature in the highest degree. Ever since the day he was assassinated his memory has been eulogized by the people of the United States and the intelligence of the world. I know of no good reason why a candidate should be held up to the public gaze as a malefactor. It is time that there

should be a reform. There will never be a reform unless it commences somewhere. We have just as much right to commence here as our grandsons will have when they become old enough to be charged with the responsibility of government. When we can truthfully charge our judges with official corruption on the bench, we indicate that there is no certainty in government and that the depths of dishonesty are all about us.

In *Battles v. Tyson*, 77 Neb. 563, the article complained of read: "I want it understood that I am not running a gambling house, and that if a girl could not have decent company she has no business to have company at all; that she had three men in her room with her. * * * She was locked up in her room with three men in my house, and after they had gone I found an empty whiskey bottle on her table." In that case it was held that the meaning of the words intended by the defendant and the understanding of those who heard him should be left to the jury. The petition which charged the use of the words above set forth was held to charge a cause of action, and the judgment of the district court sustaining a demurrer to the petition was reversed.

It is contended by the appellant that the several sentences which are preliminary to the main charge of cooperation and dishonesty in the conviction of Erdman are not, taken by themselves, libelous. It is also said that they cannot be used to add a meaning to the words which make up the charge of corruption and dishonesty on the part of Estelle in the discharge of official acts belonging to the office of judge. The contention seems hypercritical. It is not fair to take up these sentences one at a time and discuss them as if they were not connected with each other, and as if they were also not connected with the charge of official corruption. In the article is the language: "I am opposed to the renomination of District Court Judge Lee S. Estelle because I believe he is for the special interests and against the people." It is said that the foregoing is not libelous. Standing by itself, there is no objection to

it. It might state a reason why the voters should not support the candidate. The mere fact that Estelle took sides in his personal belief against one party and in favor of another would not charge anything of a criminal or dishonest nature. But it should be remembered that the apparent purposes of this introductory sentence was to involve Estelle with the "third ward crowd." It is said in the article: "I am opposed to his (Estelle's) renomination because I believe he is for the third ward crowd and against their molestation." This clinches the matter. The purpose of the article is to identify Estelle with the special interests, and then to show that the special interests are the "third ward crowd," and on top of that to show that the "third ward crowd" are living in a "carnival of crime," that is, that they stand for the violation of the law. The Erdman case is described in that article as a "frame-up." It is seemingly meant by that that it is without foundation; that the real offense which Erdman had committed was not a violation of any law, but an interruption of the "third ward crowd" in the "carnival of crime" which it is claimed that they enjoyed. Estelle's co-operation with the third ward people in their alleged "frame-up" against Erdman is inseparably connected with the whole story. Each sentence describes a step in the alleged corrupt purpose and conduct of Estelle in the prosecution, conviction and sentence of Erdman.

Estelle is charged with not allowing Mr. J. W. Miller to sit on the jury. The language used is: "Mr. J. W. Miller, educational director of the Y. M. C. A., was not allowed to sit on the jury. A single man of his type would have blocked the game." The implied charge here is that Miller is an honest man, and that he would have prevented the conviction of Erdman if he had been allowed to sit as a juror, but that Estelle, being dishonest and corrupt, and being engaged in carrying out the plan of the "third ward crowd," sustained the challenge to Mr. Miller on his *voir dire* examination. Nothing could be more libelous than this. Estelle was charged with being the willing tool of

a body of men engaged in carrying out a criminal conspiracy. The article purports to deal with the trial. It was a trial where Estelle presided as judge. He is described as making a ruling in his capacity as judge. This ruling is claimed to be part of the conspiracy. It is a step toward the conviction of Erdman in a case where there is an alleged "frame-up," that is, a charge against a man on trial which is without evidence to support it. Estelle, according to the article, is made a tool of an alleged band of lawless gamblers engaged in protecting vice. The conclusion is that Estelle and the gamblers fixed up the job on Erdman and sent him to the penitentiary for 15 years.

In the opinion it is said, in substance, that the exclusion of Miller as a juror could properly be considered by the public in determining whether the judge acted honestly or corruptly. To leave the uneducated populace to determine whether the exclusion of a proposed juryman is according to law is to rob the courts of the power which they are bound to exercise in the protection of litigants and those charged with the violation of the law. The policy of allowing men who are uneducated in the law to determine whether a proposed juror has been rightfully excluded on his *voir dire* examination may certainly well be doubted, and it should not be permitted where there is no fact upon which to base it.

The case of *Thomas v. Shea*, 90 Neb. 823, is not unlike the instant case. This court held the publication to be libelous *per se* as a matter of law. The same need to protect Thomas in that case and to punish the offender exists in this case. We should be as willing to protect a judge from a charge of dishonesty and corruption as we are to protect a lawyer. Thomas was a lawyer. In that case the libel was published a few days before the general election in 1908. The defendant was a member of the county board of Harlan county, and the plaintiff was a candidate to succeed himself as county attorney. He was the candidate of the democratic, people's independent and repub-

lican parties. The statement in the opinion is that the libel in that case is a six-column document resembling in appearance the front page of a metropolitan daily. The paper was addressed, "To the Taxpayers of Harlan County." There was in it the statement that the plaintiff would never have received the nomination of any party had the honest citizens of Harlan county known how he served them as county attorney during the past two years. There was then a description of five cases, in each of which it was charged that Thomas had neglected his duty and done something which resulted in disaster, and the reason of it was the fault of county attorney Thomas. The article said that he had gone into the five cases, which are described, and had found facts sufficient to "convince any fair man that County Attorney Thomas, in the five cases cited, gave the county, who pays him his monthly salary, the worst end of the bargain. And, as a matter of fact, Mr. Thomas could not have rendered a greater service to the opposition had he been actually retained by them and accepted their money. * * * But history chronicles successful revolutions. Should this revolution be brought about, the taxpayers of Harlan county will witness a grand exodus of jury fixers, political porch climbers and petty criminals such as this county never witnessed before in its history."

The defendant admitted in his answer that he caused the article to be printed and distributed throughout Harlan county. He also did just what was done in this case. He pleaded that the plaintiff was a candidate for the office of county attorney, and that the publication was a "privileged communication." Then there is an allegation that it was published without malice, and that the communication was made to the electors of the county in good faith for the sole purpose of advising them of the real character and qualifications of the plaintiff for the office he was then seeking. It was a little printing office that published the libel in the case of *Thomas v. Shea.* It is a big printing office that publishes the libel, if there is a libel,

in the case of *Estelle v. Omaha Daily News Publishing Co.* The principle is probably very much the same whether the newspaper is big or little, and whether the procurer of the publication is an editor or a member of the county board.

It was said of the facts in *Thomas v. Shea, supra,* that the evidence justified the findings that the plaintiff had not neglected his official duties to the injury of the county, and that all statements reflecting upon his integrity, motives and conduct, or upon his ability and uprightness, were false. "The entire publication was a vicious assault upon the plaintiff in his profession of attorney at law. It strikes at his means of livelihood. If the accusations are true, he is unfit to be county attorney or to act professionally for an honest client. Those who believe the charges will not employ him, if they want honest service." The logic in the *Shea* case is conclusive and unanswerable. The only trouble seems to be that we are less willing to protect Judge Estelle than we were to protect county attorney Thomas. It may be that the refinements of learning make a visible distinction between the two cases.

In *Sucha v. Sprecher,* 84 Neb. 241, the plaintiff requested the court to instruct the jury that the publication in question was libelous *per se,* and to find a verdict for the plaintiff for at least some amount. The request was refused, and the court in paragraph 4 of its own instructions, allowed the jury to determine whether the article, by giving its language a fair, ordinary and reasonable construction, would be understood by the ordinary reader as charging, or intending to charge, the plaintiff with official misconduct, or misconduct in office. The jury returned a verdict for the defendant, and the plaintiff brought the case to this court on appeal. It was stated in the argument that the language of the publication in question was susceptible of two interpretations, one of which would not render it libelous *per se.* This court said: "This being so, its nature and effect, considered in the light of the evidence,

was properly submitted to the jury." This court affirmed the judgment of the court below.

In *Spencer v. Minnick,* 41 Okla. 613, it is said: "A man cannot libel another by the publication of language, the meaning and damaging effect of which is clear to all men, and where the identity of the person meant cannot be doubted, and then escape liability through the use of a question mark."

That the language used in the instant case means dishonesty and official corruption, see the opinion of the United States supreme court in *Baker v. Warner,* 231 U. S. 588. In that case the plaintiff was the United States attorney for the District of Columbia.

In *Bee Publishing Co. v. Shields,* 68 Neb. 750, this court has rendered two instructive opinions. In the first one, which was prepared by Commissioner Oldham, it is said, quoting *Neeb v. Hope,* 111 Pa. St. 145: "An occasion of privilege will not justify false and groundless imputations of wicked motives or of crime. The conduct of public officers is open to public criticism, and it is for the interest of society that their acts may be freely published with fitting comments and strictures. But a line must be drawn between hostile criticism upon public conduct and the imputation of bad motives, or of criminal offenses, where such motives or offenses cannot be justly and reasonably inferred from the conduct." In that case it was further said: "One must not take advantage of a privileged occasion to exhibit malice toward and to unlawfully and wrongfully injure another by publishing false and defamatory matter concerning him, and that if he does so he forfeits the privilege occasioned and becomes a libeler subject to the ordinary rules of law relating thereto."

The business of a lawyer depends largely upon his reputation in the county and state in which he lives and conducts his practice. If he is a man of ill repute, his business is little and insignificant. If he is doing a good business and is a man of high standing, he will have a chance to earn money enough to support his family, to educate

his children, to start them in life, and possibly enough to enable him to travel or to devote a part of his time to literature or politics. These are the things in life which we value. To tear a lawyer's reputation down by the publication of defamatory matter is an affair of the most serious consequences. His business is destroyed. His ability to support his family and to educate his children is taken away from him, and he stands in the community as one of ill repute having no character to protect. Nearly every lawyer has an ambition to occupy the bench. If he becomes one of the judges of a court of general jurisdiction, or of an appellate court, he is flattered because his neighbors have trusted him to settle their disputes. No lawyer may have a higher ambition than the ambition to serve as a judge of one of the courts of general jurisdiction. In order to run for the position of judge, it is too much to ask of a lawyer that he shall be willing to stand up with a list of malefactors and wrongdoers. What right has a man who engages in the publication of a newspaper to rob a lawyer or a judge of all that he has that is valuable to him in a professional way? If a man steals my horse, he only takes away from me a month's labor, perhaps it is only a week's labor, but, if he takes away from me my reputation as a lawyer or a judge, he deprives me of earning a livelihood. If he does that, he costs me thousands of dollars. If he takes away from me my reputation as a judge, I can never recover from the injury. If he sets fire to my house and burns it down, I can rebuild it with the earnings of a year, but, if he takes away from me my reputation for honesty and integrity, I can never rebuild it; I am ruined for life, and my children are scandalized. This sort of thing can be done with any man who is practicing our profession. I do not care how honest or how capable he may be. A big newspaper circulates in all of the 93 counties of the state. It reaches readers in every town and village. It comes every day. If you or I should be attacked by a newspaper of this sort, we have only time in our short lives to see a small portion

of the residents of the state. The man with his big newspaper has capital behind him; he may have $200,000 or $300,000 behind him; with that he can encompass our destruction. If he can excuse himself in an action brought against him for damages by saying that somebody told him that we were bad men, then he can destroy anybody. He can start a lie with his henchmen, and then repeat it in his newspaper. The effect of a decision of the sort sought to be rendered in this case is to license the robber with his newspaper so that he may kill and destroy. One running for a local office in a small territory may be able to defend himself against newspaper attack because there are not so many people but that he may go and see them, but he is powerless as against a newspaper with a big circulation. The voter has a right to know that his candidate will be fairly treated, and that the voter will not be robbed or deceived. It should be an honest fight. Be careful you do not lay down a rule here which will invite and justify the destruction of your sons.

Mr. Fellman in his article speaks of peril to himself and his little ones if he raises his voice "against the cohabitation of the gamblers and the courts in the temple of justice." To draw a picture of himself and his little ones in peril because he lifts his voice against the alleged improper relations of the gamblers and the court (Judge Estelle) in the temple of justice (court-house) is one of the tricks of oratory. No judge except Estelle was spoken of or intended, and Fellman was after Estelle. A libel should be read just like any other printed page, and it is artificial construction to cut it up into alleged innuendoes, and then to profess doubts about what these mysterious innuendoes may mean. The News published the article, and it is clearly libelous, and no condition existed to make its publication one of qualified privilege. According to their own story, Fellman and the editor of the paper did not believe that Estelle was corrupt.

If it was erroneous to permit the plaintiff to prove that the directors of the defendant publishing company

were nonresidents of the state of Nebraska; yet I am unable to see how it could injure the company in any way. Unless there was injury to the company in the admission of this testimony, it was error without prejudice. The evidence is insufficient to justify the rule laid down in the opinion and the syllabus touching the doctrine of qualified privilege. The judgment of the district court should be affirmed.

The record fails to disclose evidence justifying Fellman in writing the letter and causing it to be published, and the News Publishing Company published the letter without having evidence to justify the same. Apparently the defendant publishing company acted maliciously in publishing the letter, whatever the actual fact may be.

The judgment of the district court in favor of the plaintiff should be affirmed. I adopt the dissenting opinion of Justice Barnes, except as it is herein modified.

MARK J. WILBER, APPELLANT, V. LINCOLN AERIE, NO. 147, FRATERNAL ORDER OF EAGLES ET AL., APPELLEES.

FILED FEBRUARY 19, 1916. No. 18607.

1. **Beneficial Associations: EXPULSION OF MEMBER: POWER OF COURTS.** If a judgment of expulsion passed upon a member of a fraternal benevolent association is regular, according to the laws of the order, a court cannot disturb it.

2. ———: ———: ———. Where it was provided in the constitution of a subordinate aerie that an appeal from the decision of the grand worthy president to the grand aerie at its next annual session must be taken within 30 days from the time of the decision, and no such appeal was taken, the decision of the grand worthy president is final, and the courts have no jurisdiction to interfere.

3. ———: ———: CIVIL ACTION. Members of fraternal benevolent associations may lawfully agree, as a part of their scheme of organization, to submit their domestic grievances in the first instance to the internal tribunals of their order, and, having so agreed, cannot, against the protest of the association, maintain a civil action against it.

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

Minor S. Bacon, for appellant.

Strode & Beghtol, contra.

Edwin J. Murfin, amicus curiæ.

HAMER, J.

The plaintiff and appellant brings his action to compel, by a writ of injunction mandatory in its form, his reinstatement as a member in good standing of Lincoln Aerie No. 147, Fraternal Order of Eagles, from an alleged unlawful expulsion from the said order. On the 24th day of November, 1911, the plaintiff was cited for trial on November 25, 1911. November 25, 1911, the alleged trial was had, and the trial committee reported its findings. On November 28, 1911, there was a report to the aerie against Wilber, and he was expelled. When cited to appear, Wilber claimed that he had an engagement to go to the theater, and the proceedings against him were in his absence. Wilber claims that the trial was without jurisdiction. The charge against Wilber is that he "violated section 1, art. 30 of the constitution for subordinate aeries, in that he attempted to use improper means to obtain sick benefits; that he disregarded the constitution of the Fraternal Order of Eagles in attempting to collect sick benefits by threatening the aerie with a suit at law, and threatening to resort to the courts, instead of to the regular means provided by the constitution of the order." It is also charged that Wilber, "as an officer of the aerie, appropriated funds of the aerie to his own use." It is contended by Wilber that these alleged charges do not comply with section 1, article 31 of the constitution of the order. It is said that the above purported charges do not specify time, place and circumstances, nor specify the particular manner of offense; that these are jurisdictional requirements, and that they must be strictly complied with; that the purported charges are simply conclusions,

and that they give no time and no place; that, for all that is stated, the alleged charge of "appropriating funds to his own use" may be barred by the statute of limitations.

The constitution prescribed for subordinate aeries is contained in article 31 of the constitution, which provides:

"Section 1. Whenever the worthy president or any member believes, has knowledge or information that would lead him to understand, that another member of the order has violated the constitution, ritual, or general laws of the order, it shall be his duty to make complaint against such member in writing and present the same to the worthy president, who shall report the same at the next meeting of the aerie, withholding the name of the member making such complaint. The worthy president shall immediately appoint a committee of three members, giving them the name of the complainant, and it shall be their duty to investigate such complaint, and if the committee find the complaint well grounded they shall proceed to file charges in writing against the accused, giving time, place and circumstances, and specifying the particular manner of offense with which he is charged," etc.

"Section 2. The worthy president shall, unless otherwise ordered by the aerie, thereupon appoint a trial committee of five members of the aerie who shall fix the place and time for the trial, notifying the accused under seal, and furnish him with a copy of the charges and specifications, in person, if possible; if not, by mailing to the last known address; and said trial committee shall summon witnesses under seal of the aerie, and any member so summoned must appear and give testimony upon his honor as such, as may be required by said trial committee.

"Section 3. Such committee shall, as soon as practicable, render their report in writing to the aerie, together with their verdict, which shall be either 'guilty' or 'not guilty,' and they shall accompany the same with a synopsis of the testimony taken at such trial. They shall also give the accused at least 24 hours' notice prior to the

meeting of the aerie at which they present their report that the same will be presented, thereby giving him an opportunity to interpose such objections, either in writing, personally, or by representative, as he may elect, and upon the verdict of 'guilty,' if the same be proved, and the aerie approve such verdict, it shall then proceed by a majority vote to impose the penalty provided in this constitution."

The record discloses that under section 1 the investigating committee made a finding and report that the complaint "is well grounded." They then make their charges as above recited. It is not specified when the alleged acts were committed, neither is it alleged by what means Wilber obtained the sick benefits, nor is it alleged how much he obtained.

Wilber seems to have been given 24 hours to prepare for trial. Considering the serious character of the charges made against him, it may well be questioned whether the time given in the notice was sufficient, but, in the view that we take of the matter, we need not further discuss the merits of the proceedings in the aerie. We think it is the law that the party disciplined by his lodge must appeal from any punishment or penalty imposed upon him to the last officer in the lodge or body in the lodge to whom an appeal lies before he can resort to the courts of the state, except where the liability is a simple obligation to pay money. Article 31 of the constitution for subordinate aeries provides that questions arising in a subordinate aerie shall, in the first instance, be decided by the worthy president of the aerie. Then the right of appeal is given from an adverse decision to either party. This appeal lies from the worthy president's decision to the judgment of the aerie, in which case a two-thirds vote of the members present shall be required to overrule such decision. Then from the decision of the aerie an appeal is given to the grand worthy president. In this case that appeal was taken, but no appeal was taken to the grand aerie from the decision of the grand worthy president. The provision disregarded is the one providing for an ap-

peal to the grand aerie at its next annual session. That is the last appeal provided for by the constitution. That this appeal was not taken denies to Wilber the final consideration of his case by the courts. Wilber seems to have been indifferent to his own welfare and negligent in matters of importance to himself. He failed to attend the aerie when cited to appear, and he failed to appeal to the grand aerie after he had been expelled.

Section 1, art. III of the constitution for subordinate aeries, provides:

"Section 1. Questions arising in the subordinate aerie shall in the first instance be decided by the worthy president of the aerie wherein they may occur. Either party shall have the right of appeal from adverse decisions upon such subjects in the following manner: (a) From the worthy president's decision to the judgment of the aerie, in which case a two-thirds vote of the members present shall be required to overrule such decision; (b) from the decision of the aerie to the grand worthy president; (c) from the decision of the grand worthy president to the grand aerie at its next annual session.

"Section 2. In all appeals of any nature, except from the decision of the worthy president to the judgment of the aerie, a written record of the facts in the case must be presented by the appellant within 15 days, and the respondent shall be given due and timely notice and an opportunity to present a written statement in reply, which must also be given within 15 days. After a decision has been rendered by the grand worthy president, if an appeal be not taken within 30 days, his decision shall be final."

As no appeal was taken within 30 days from the decision of the grand worthy president to the grand aerie, the decision must remain undisturbed, and we are without jurisdiction.

The following authorities support the decision which we have reached: *McAlees v. Supreme Sitting, Order of Iron Hall*, 13 Atl. (Pa.) 755; *Ocean Castle, Knights of Golden Eagle v. Smith*, 58 N. J. Law, 545; *Lafond v.*

Deems, 81 N. Y. 507; *Wood v. What Cheer Lodge, Sons of St. George,* 20 R. I. 795; *Levy v. Magnolia Lodge, I. O. O. F.,* 110 Cal. 297; *Oliver v. Hopkins,* 144 Mass. 175; *Connelly v. Masonic Mutual Benefit Ass'n,* 58 Conn. 552.

It follows that the judgment of the district court is right, and it is

AFFIRMED.

LETTON, J., not sitting.

SEDGWICK, J., concurring.

It seems that the plaintiff brought this action to compel the proper officers of the defendant to reinstate him as a member of the order. The regulations of the order give the members of the local lodge power to remove a member for cause and give such member a right to appeal to higher authority, and finally to the grand worthy president of the order. The plaintiff has not availed himself of the right of appeal to the grand worthy president, and so has not exhausted his remedy provided by the regulations of the order to which he has agreed. It seems therefore, under the authorities cited, he cannot maintain an action in the courts. The trial court so decided, and I therefore concur in sustaining the judgment.

EMMA L. PICK, APPELLEE, V. JOSEPH PICK, APPELLANT.

FILED FEBRUARY 19, 1916. No. 18619.

1. **Husband and Wife:** SEPARATE MAINTENANCE. Where a wife is compelled by the misconduct of her husband to live separate and apart from him, she is entitled to a decree for separate maintenance.

2. **Divorce:** SUIT FOR MAINTENANCE: DECREE. In an action by a wife for separate maintenance on the ground of adultery, habitual drunkenness, extreme cruelty, and failure to support, the court may grant a limited divorce from bed and board with suitable maintenance at the prayer of the wife, although it is found that all of the alleged grounds for divorce exist.

3. **Husband and Wife:** SUIT FOR MAINTENANCE: EVIDENCE. The evidence in this case, indicated in the opinion, is found sufficient to support the decree for separate support and maintenance.

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

Byron G. Burbank, for appellant.

Lambert, Shotwell & Shotwell, contra.

HAMER, J.

This is an appeal from a decree of divorce rendered in the district court for Douglas county, Nebraska. The plaintiff, Emma L. Pick, filed her petition in the district court for that county on the first day of May, 1913. She alleged in her petition four grounds for divorce: That the defendant had been guilty of adultery; that he became an habitual drunkard; that he had been guilty of extreme cruelty toward the plaintiff; that he had failed to support the plaintiff. The district court found that the plaintiff "has always conducted herself toward the defendant with propriety, and as a faithful, chaste and obedient wife," and that the defendant "has been and is guilty of extreme cruelty toward the plaintiff in divers and numerous ways, and has been and is guilty of adultery and habitual drunkenness, all as charged in the petition; that each and all of said grounds, and as fully as set out and claimed in the petition, have been sustained by the evidence and so established to the extent of warranting an absolute divorce; that the defendant, Joseph Pick, is not a proper person to be granted the privilege of remarrying, and the plaintiff, Emma L. Pick, neither prays for nor desires the setting aside of the existing marriage bonds, * * * and that the plaintiff, Emma L. Pick, is entitled to a decree of separate maintenance, and that she should be allowed to live separate and apart from the defendant at his expense and charge; * * * that the plaintiff, Emma L. Pick, should be, and hereby is, granted separate maintenance from the defendant, Joseph Pick, and that

she should be, and hereby is, allowed to live separate and apart from said defendant at his expense and charge, and that the defendant should be and hereby is ordered to maintain the said plaintiff separate and apart from himself, and that no divorce be granted." The court also found: "That a reasonable allowance to the plaintiff from the defendant's estate while living separate and apart from him is the sum of $75 per month for herself and $25 per month to her to be expended by her for the care and support of said daughter."

The defendant has appealed. He does not object to the findings of the court as to plaintiff's grounds for a divorce, and presents two questions only. The defendant contends that the plaintiff is not entitled to a divorce from bed and board, and that she is not entitled to any general equitable relief. He also contends that the amount allowed for support of plaintiff and her child is excessive. The defendant claims that, because the evidence shows that he has been guilty of adultery and habitual drunkenness, the plaintiff thereby became entitled to an absolute divorce, and that she must have such absolute divorce whether she wants it or not, and that the court may give her nothing less.

Under section 1567, Rev. St. 1913: "A divorce from the bonds of matrimony may be decreed by the district court: (1) When adultery has been committed by any husband or wife. * * * (5) When the husband or wife shall have become an habitual drunkard."

Section 1568, Rev. St. 1913, provides: "A divorce from the bonds of matrimony or from bed and board may be decreed for the cause of extreme cruelty."

It is clear that, if the plaintiff had only charged extreme cruelty, then the court might grant the divorce from bed and board as prayed in the plaintiff's petition; but it is the contention of the defendant that, because section 1567 justifies a decree of divorce on the ground of adultery, and on the ground of habitual drunkenness, therefore, if those charges are contained in the petition and

findings, the decree must be absolute. It is the contention of the defendant that the district court has no power to grant a limited divorce for either adultery or habitual drunkenness. This brings us to the question of whether any discretion is given the district court, and whether that court is not bound within the restrictions alleged to exist. It may be said that under section 1568, Rev. St. 1913, on complaint of the wife, the husband may be compelled to provide suitable maintenance for her if she shall allege that he grossly or wantonly and cruelly refuses to provide for her. The defendant is the only party seeking to compel the granting of a decree for an absolute divorce. If an absolute divorce should be granted, then the plaintiff would be left without the support and assistance which she had a right to expect when she married the defendant. The defendant would be successful in making his own misconduct serve the purpose of freeing himself from the support of his wife and child. If the evidence is sufficient to justify a decree of divorce, then it is sufficient to justify anything less than that. Extreme cruelty is a ground for absolute divorce, or from bed and board. But, if the plaintiff has made out the right of relief upon the grounds of adultery, habitual drunkenness, and extreme cruelty, then what is the plaintiff entitled to? The question is whether the court, as a matter of public policy, should decree each of the parties to the suit entitled to an absolute divorce followed by suitable alimony to the wife.

In *McKnight v. McKnight,* 5 Neb. (Unof.) 260, this court in the body of the opinion said: "After consideration, and an examination of authorities which we have been able to find by our own research, we conclude that whether the divorce granted shall be absolute or limited rests in the sound discretion of the trial court." *Conant v. Conant,* 10 Cal. 249; *Hacker v. Hacker,* 90 Wis. 325.

In the case first above cited, the suit was brought by the wife, who was seeking an absolute divorce. She failed to get it, and appealed. On appeal she was given a decree from the bonds of matrimony. In the instant case the

plaintiff is not seeking an absolute divorce, she is satisfied with a limited divorce that shall provide a means by which she is permitted to live separate and apart from her husband, but she and her child to be maintained by him. There is a very material distinction between the two cases. But the principle is clearly announced in the case cited, that it is for the court to determine whether the decree shall be absolute or otherwise. If this is true, it is for the court to exercise a wholesome discretion. In this case the husband is evidently desirous of getting rid of his wife as cheaply as possible. He appears to be in unusually good circumstances. He has an abundance of property from which he may support his wife and child without any inconvenience to himself. It is our duty to see that he is not relieved from the support of his wife and child. He seeks to compel the wife to obtain such a divorce as she does not desire. Evidently he does that for the purpose of securing a release to himself. When he has abundantly provided for the wife and child, then he may come to this court feeling that that fact will be considered in making such final order as ought to be made. The husband could not come to this court upon his own application and obtain a divorce from the bonds of matrimony. The guiltier he is the less he is entitled to be free from his wife. He is seeking to make his own misconduct the cause of his freedom from the bonds of matrimony. We discover no good reason why this should be permitted.

In Hacker v. Hacker, supra, it is said in the body of the opinion: "We think that the court acted wisely in granting the relief specified in the judgment appealed from. It sufficiently appears that the defendant does not desire the plaintiff to return to him, but simply that he may be saved the necessity of contributing to her support; and evidently he hopes, by this appeal, to avoid the payment of the very moderate allowance made out of his estate for the plaintiff." It will be noticed that this case gives to the trial court the discretion to exercise its judgment.

The court is invested with discretion to grant a divorce from bed and board and separate maintenance. *Goings v. Goings,* 90 Neb. 148.

In the instant case the trial court correctly found that the defendant has a substantial equitable interest in the York Foundry & Engine Works and the American Supply Company, two corporations doing business at the city of York, in York county, Nebraska. It appears that the legal title to said property has been kept and maintained by the father in his own name because of the instability of the defendant in personal and business affairs, and because of his habits of intoxication, but that the said legal title is held by the father in trust for the son, and that the son is permitted to own the property and enjoy its use the same as if he himself held the legal title and exclusive possession.

The plaintiff testified that the father did not put the defendant on a salary; that he used whatever money he wanted, and that he always called the business his business, and that he spent more than $4,000 a year; that he took money from the York business and invested it in a home, and that he also invested money from the York business in other property, taking the title thereto, and that he had no other source of income; that he placed $4,000 in the building and loan to his account; and that he bought other property from the York business, and that he paid $15,000 or $16,000 for a farm which he purchased with proceeds from the York business, and that he took the title to the farm in his own name; that he had cleared as much as $11,000 in one year in the York business; that the father, Charles Pick, never received a dollar from the York business, and that he never paid any attention to the business or to the books of the concern, and that the son made extensive improvements to the plant without consulting Charles Pick, the father; that Charles Pick, the father, told the plaintiff that he had not conveyed the legal title to the son because he wanted to protect the interest of the plaintiff and her daughter in the

property. This testimony is corroborated by the testimony of several other witnesses, so that there can be no doubt of the fact that the defendant is the actual owner of the property, and that he is in the exclusive possession of it.

In 1 R. C. L., p. 903, sec. 50, the learned editors observe: "A woman who is compelled, through her husband's fault, to live apart from him may, in many jurisdictions, maintain a suit for separate maintenance or permanent alimony, without being forced to seek a divorce. In such a proceeding the court has power to award alimony *pendente lite,* even though the statute contains no express grant of authority to make such an order except in the case of a suit for divorce."

The courts of equity in this state have inherent power to decree separate maintenance and support where such seems appropriate. In *Earle v. Earle,* 27 Neb. 277, it is said in the body of the opinion: "While the statute books of this and other states amply provide for the granting of divorces in meritorious cases, yet we do not apprehend that it is the purpose of the law to compel a wife, when the aggrieved party, to resort to this proceeding, and thus liberate her husband from all obligations to her, in order that the rights which the law gives her, by reason of her marital relations with her husband, may be enforced."

In *Galland v. Galland,* 38 Cal. 265, it is said: "The power to decree alimony falls within the general powers of a court of equity, and exists independent of statutory authority. And, in the exercise of this original and inherent power, a court of equity will, in a proper case, decree alimony to the wife, in an action which has no reference to a divorce or separation."

In *Garland v. Garland,* 50 Miss. 694, it is said: "Courts of equity in America will always interpose to redress wrongs when the complainant is without full, adequate and complete remedy at law."

In *Graves v. Graves,* 36 Ia. 310, it is said in the syllabus: "A court of equity will entertain an action brought for alimony alone, and will grant the same, though no divorce

or other relief is sought, where the wife is separated from the husband on account of conduct on his part justifying the separation."

In *Bueter v. Bueter,* 1 S. Dak. 94, it is said in the syllabus: "In this state a wife, justified by her husband's misconduct toward her in living separate from him, may maintain an independent action against him for her support, without regard to the question of divorce."

In *Baier v. Baier,* 91 Minn. 165, it is said in the syllabus: "A wife who is living apart from her husband for a cause legally justifying her may maintain, independent of an action for a divorce, an equitable action against him for her separate support."

In *State v. Superior Court,* 85 Wash. 72, it is said in the body of the opinion: "It is the settled law of this state that an action for separate maintenance may be maintained by a wife, though we have no statute upon that subject."

In this case the husband by his misconduct entitles the wife to separate maintenance, and it is for the court to say whether it will grant a divorce from the bonds of matrimony, or decline. We decline.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

FAWCETT, J., concurring separately.

I cannot concede that in divorce cases the courts are invested with full equitable powers. The marriage relation cannot be severed, interrupted or abridged except as expressly provided by statute. No divorce can be granted, either absolute or from bed and board, except for the causes and in the forum provided by statute. Section 1567, Rev. St. 1913, sets forth the grounds for which an absolute divorce may be granted. Section 1568 sets forth the grounds for which either an absolute divorce or one from bed and board may be granted. I seriously question the power of the court to grant a divorce from bed and board upon any of the grounds

set forth in section 1567, but freely concede that it may, in its sound discretion, grant a divorce, either absolute or from bed and board, for the causes set forth in section 1568. The petition of plaintiff alleges grounds appearing in both sections, but the prayer of her petition clearly asks for relief under section 1568. As her petition alleges grounds which would entitle her to relief under that section, and the proof is sufficient to sustain those allegations, I concur in the judgment of affirmance.

LAURENCE FORREST, APPELLEE, V. EMIL KOEHN ET AL., APPELLANTS.

FILED MARCH 4, 1916. No. 18569.

1. **Intoxicating Liquors:** LIABILITY OF SALOON-KEEPER. A licensed saloon-keeper is liable to one who becomes intoxicated by drinking liquors furnished by the saloon-keeper and, while in a state of intoxication, suffers injury.
2. **Instructions** examined and found free from error.

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

Willis E. Reed, Jack Koenigstein, T. J. Doyle and *Charles G. McDonald*, for appellants.

Allen & Dowling and *Barnhart & Stewart, contra.*

MORRISSEY, C. J.

This action was brought against five saloon-keepers, and the sureties upon their respective bonds, to recover for personal injuries suffered by plaintiff while in a state of intoxication. The verdict went in favor of two of the saloon-keepers and their sureties and against the other saloon-keepers and their respective sureties. The defendants against whom there was verdict and judgment have appealed.

Plaintiff was 28 years of age and a common laborer earning from $2.50 to $3 a day. He became intoxicated, and, while in this condition, went upon the railroad tracks

and in some way which is not explained was drawn under a passing train. His left arm was so crushed and mangled that it became necessary to amputate the same. One of his feet was also crushed and three of his toes cut off. There is evidence indicating that he threw himself in front of the train with suicidal intent; but this, we think, is immaterial. If the liquor furnished by defendants caused the intoxication and overthrew his reason, defendants' liability would not be lessened because he sought to destroy himself.

One of the defendant sureties, by separate answer, denied liability because it was also surety on the bond of another saloon-keeper and a judgment of $5,000 had been entered against it, for the same license year, in another action which had just been tried in the district court for Madison county. Plaintiff demurred to this and the demurrer was sustained. After assigning the ruling on this demurrer as error and discussing it at some length, appellant says, "but, inasmuch as the verdict is less than $5,000, we do not urge it in this case." This will be treated as a waiver of the assignment and it will not be further discussed.

The court in stating the issues to the jury literally copied the pleadings. Complaint is made of this form of stating the issues, and we are cited to *Hutchinson v. Western Bridge & Construction Co.*, 97 Neb. 439, where the court said: "We are again moved to criticise the practice of copying the pleadings in full as a method of stating the issues to the jury. * * * A clear, concise and terse statement of the issues is much to be preferred to the involved legal verbiage often found in formal pleadings, and is much more easily apprehended."

Appellants argue that, by copying the language of the petition, the court fixed the term of expectancy as alleged in the petition and withdrew that question from the jury. We think, however, that the instruction is not susceptible of that construction. The prejudice, if any, is not sufficient to call for a reversal, but the language used in

Hutchinson v. Western Bridge & Construction Co., supra, is quoted because it points out a better practice than that followed by the trial court.

Complaint is made of other instructions, phrases and paragraphs being singled out for criticism; but, when the whole charge is read together, it does not seem subject to the criticisms made. Taken as a whole, the instructions are plain, explicit, and so framed that a man of common knowledge and ordinary understanding can have no difficulty in understanding them. It is a well-settled rule that instructions are to be considered together, and if when so considered they properly state the law, they are sufficient.

Appellants urge with much force and logic that the petition does not state a cause of action, and that the court erred in overruling the demurrer *ore tenus.* The point sought to be made is that section 3859, Rev. St. 1913, under which the action was brought, was not designed to give plaintiff a right of action against the defendants; that the party who procures liquor from a liquor dealer, becomes intoxicated, and suffers injury, has no cause of action for the injury sustained. This section was first before the court for construction in *Buckmaster v. McElroy,* 20 Neb. 557, and it was held that where the plaintiff became intoxicated on liquor furnished by a licensed dealer, and, because of his intoxication, suffered the loss of his feet, the dealer was liable. The instant case is closely analogous; but counsel undertake to show that the reasoning of the court does not sustain the opinion, which was by a divided court. We do not deem it necessary to supplement the reasoning in that case. That was the interpretation placed on this section of the statute at the time the defendant saloon-keepers were licensed. Defendants executed the bonds with knowledge of the interpretation placed upon this section by the court, and are not in position to insist that it is a harsh rule.

The record is found free from error, and the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.