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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1918
JANUARY AND SEPTEMBER TERMS, 1919

VOLUME CIII

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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WILLIAM B. ROSE, Associate Justice
SAMUEL H. SEDGWICK, Associate Justice
ALBERT J. CORNISH, Associate Justice
JAMES R. DEAN, Associate Justice.
CHESTER H. ALDRICH, Associate Justice

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Harry C. Lindsay	Reporter and Clerk
Henry P. Stoddart	Deputy Reporter
Philip F. Greene	Deputy Clerk

[1]Until July 18, 1919.
[2]After July 18, 1919.
[3]Succeeded Commissioner Shotwell, October 4, 1919.
[4]Resigned October 6, 1919.
[5]Resigned August 31, 1919.
[6]Appointed October 1, 1919.
[7]Appointed September 1, 1919.

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Fourth ...	Burt, Douglas and Washington.	George A. Day ..... Lee S. Estelle ..... Charles Leslie ..... William A. Redick .... Willis G. Sears ..... Alexander C. Troup .. Arthur C. Wakeley	Omaha Omaha Omaha Omaha Tekamah Omaha Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	George F. Corcoran .. Edward E. Good	York Wahoo
Sixth	Boone, Colfax, Dodge, Merrick, Nance and Platte.	Frederick W. Button .. A. M. Post	Fremont Columbus
Seventh ..	Clay, Fillmore, Nuckolls, Saline and Thayer.	Ralph D. Brown	Crete
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Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton and Wayne.	William V. Allen .... Anson A. Welch	Madison Wayne
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Twelfth ..	Buffalo, Custer, Logan and Sherman.	Bruno O. Hostetler	Kearney
Thirteenth	Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln and McPherson.	Hanson M. Grimes	North Platte
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IN MEMORIAM

FRANCIS G. HAMER

At the session of the Supreme Court of the State of Nebraska, January 6, 1919, there being present Honorable Andrew M. Morrissey, Chief Justice, Honorable Charles B. Letton, Honorable William B. Rose, Honorable Samuel H. Sedgwick, Honorable Albert J. Cornish, Honorable James R. Dean, and Honorable Chester A. Aldrich, Associate Justices, the following proceedings were had:

May it Please the Court: Your committee, appointed to draft resolutions in commemoration of the life and services of the late Francis G. Hamer, presents to the court the following:

On August 10th, 1918, Honorable Francis G. Hamer, our beloved brother and friend, died at his home in Kearney, at the age of seventy-five years.

Judge Hamer was a pioneer citizen and lawyer of the state and had been uninterruptedly engaged in the duties of his profession for almost fifty years. His practice was, perhaps, more varied and covered wider fields than that of any of his contemporaries. His clients came from every walk in life, and whether their liberty or their property was involved, Judge Hamer gave them the advantage of an ability and integrity of the highest order. His predominating personal characteristic as a lawyer was his persistence. He never quit nor diminished his efforts on behalf of a client until a final and unappealable judgment had been entered.

As a judge he served upon the bench of this state for nearly twenty years, first as a district judge and subsequently to the time of his death as an honored member of this court, and during his judicial career he served the cause of justice without fear, without favor, and without reproach.

Notwithstanding his professional duties called for unusual and constant labor, still Judge Hamer devoted much of his talent and energy to public affairs, taking a broad and democratic, rather than a partisan, view of all political questions. At no time did he ever shirk or evade in the slightest degree the duties of citizenship.

Judge Hamer had a home life of happiness and sunshine resting on a domestic fidelity natural and sincere.

THEREFORE, BE IT RESOLVED, that in the death of Judge Hamer the bar has lost one of its most active and able members; that the bench has lost a fair and able judge, and the commonwealth a loyal, upright and useful citizen.

BE IT FURTHER RESOLVED, that these resolutions be spread upon the records of the court, and that a copy be transmitted by the clerk of the court to the widow and family of our departed brother.

NORRIS BROWN,
LEE S. ESTELLE,
JOHN B. BARNES,
JOHN L. MCPHEELY,
H. M. SINCLAIR.

HONORABLE NORRIS BROWN:

May it Please the Court: A number of speeches are to be made in support of the resolutions just read. Some of them will deal at length and in detail with the character and ability of our departed and distinguished brother, Judge Francis G. Hamer.

For that reason, with your permission, I will leave the privilege to others to emphasize his virtues as a citizen, and his career as a lawyer, and his eminence as a jurist. I would speak a single word or two of him as a friend. It is known to all who knew him at all intimately that Judge Hamer was partisan and even passionate in his friendships. His personal likes were very strong, so strong, indeed, that he never permitted, without vigorous protest, any hostile criticism of a friend, especially if the friend were not present to defend

himself. To his credit it will be remembered that the Judge was not given to quick or unreasonable forgiveness of any man who had intentionally wronged him. He was steadfastly human in that regard. Some one has said that friendship is the child of the heart. If that be true, Judge Hamer must have had a big and a strong heart, for his friendships were legion.

After all is said, and after all our struggles, whether on or off the bench, whether in public or private service, are over, the one thing worth while, the only thing that makes life beautiful and joyful is the capacity and aptitude for a friendship that rings true. You may applaud justly the life of this man for its usefulness and heap high with praise your estimate of his ability and his character as a citizen and as a lawyer and as a judge; but let me at the shrine of his memory lay a single flower to reflect the story of his devotion to friends. Above all other possessions, his friendships were to Judge Hamer's heart his dearest treasures.

JUDGE JOHN B. BARNES:

May it Please the Court: I first became acquainted with Judge Hamer sometime in the year 1884. He was then a member of the law firm of Hamer & Connor, and I have known him quite well since that time. I remember him at that time as a lawyer in active practice, and I remember that I rated him as an able attorney and a brilliant advocate, one who was always especially vigilant in the interests of his clients. The history of his life-work up to the time he became a member of the Supreme Court shows conclusively that he never deserted the cause on which he was engaged until the final decision of the court of last resort had been announced, and not then, especially in criminal cases, until the last opportunity for a rehearing had been denied him. I am sure the members of this Court will remember his resourcefulness and his persistence in all such cases. He was essentially a fighting lawyer, and one who exhausted every resource in the interests of those who employed him.

He was always courteous in his presentation of his cases and observed all due respect to the courts. After he became a member of this court my association with him became closer, and I knew him better. I always found him to be a man of good judgment, and his efforts seemed to be to do equal and exact justice between litigants. He was fair and open-minded, and in consultation he generally came to correct conclusions; but in the work of writing opinions he was not always felicitous. In his long practice at the bar and in preparing briefs, he formed habits that caused him much trouble in formulating supreme court opinions. He found much difficulty in condensing his views so as to always meet the approval of his associates; but he was always willing to modify his views, unless he felt constrained to disagree with the majority of the court on some important question of law or fact. I think I may say that he relied on me more than any other member of the court to smooth out those difficulties, and I learned to know and appreciate his honesty. He was a man of sincere friendships and honesty of purpose, and he has left an honorable record of an active life-work. He died in the harness, so to speak, and I can truthfully say of him that his work, as a whole, was well done, and reflects credit on him as a man, a lawyer, and a just judge, and on surviving members of his family.

HONORABLE J. L. MCPHEELY:

May it Please the Court: It was my lot to first meet the late Judge Hamer in a courtroom about thirty-five years ago, and very soon thereafter, and from that time until his death, had the opportunity to study and fully understand his character, our acquaintance soon ripening into a very close, personal, intimate and mutual friendship, also very close professional association.

I was associated with him in some quite important litigation and considerable of less importance.

His natural ability as a lawyer was re-enforced by an untiring energy, strong personality, alertness, courage, an unchangeable devotion to his clients' causes and in-

terests; the cause of the poor or indigent client received the same attention as those able to pay the full value of his services, his devotion to his clients in this respect calls to mind the lines written by Hooper:

> "'The Law,' Its seat is the bosom of God, all men on earth do it homage, the weakest as feeling its care and the greatest as not exempt from its power."

Judge Hamer's manner of conducting a trial, to observe and become familiar with same, was helpful to those younger in practice and experience.

His friendship, once obtained, never faltered; knowledge of his high character left an impression not soon to be forgotten; his friends will ever remember and cherish his memory.

HONORABLE H. M. SINCLAIR:

On August 10th, 1918, Judge Francis G. Hamer passed into the Great Unknown, at his home in the City of Kearney, aged 75 years. A long, active and useful life was his heritage. He came to Nebraska in the pioneer days when the state was young. He served the state of his adoption loyally and faithfully as a citizen and the profession as a lawyer for fifty years.

His services to the state were broad and democratic. He stood for equality, and with voice and vote advocated the building of the state, its laws and its institutions along broad and progressive lines; such as would benefit and protect all the people, the rich and poor alike, and this regardless of the race, color or previous condition of the individual. This was the predominant characteristic of his life and work. It was never absent from his mind.

Strong in body and in mind, ready and able in forensic argument; kind-hearted and sympathetic he championed the cause of the poor and needy, the aggrieved and distressed, the weak and unfortunate, with predominant force and unbounded zeal. Coupled with his force and zeal were an indomitable will and preeminent courage.

The sky never became so overcast, nor the clouds so black, as to beget despair. He never doubted, nor did he fear. When other men would give up and despair, it was for him to fight with unyielding and persistent force, if not always wisely, it was always well and thoroughly done.

As a lawyer, Judge Hamer was engaged in much important litigation. He was original in ideas and presented to the court for determination, perhaps, more questions that were new and interesting than any other lawyer of the state. These questions were generally broad and far reaching, based on the fundamental rights of man, and were of such scope and character as to indicate and illustrate the temperament and trend of mind of Judge Hamer as much, if not more so, than any part of his life-work that he has left us.

As a lawyer at the bar he was amiable, courteous and accommodating to his brethren. No one ever requested a professional favor that was refused if it could be granted. To his clients, he was the personification of fidelity and zeal; to his opponents, courteous and fair; and to the court, respectful and helpful. As a friend he was sincere and loyal. He was not a hypocrite, he loved his friends, and did not pretend to love his enemies.

He loved his family. His domestic life was felicity in all that could be asked. He was blessed with a loving and faithful wife, and a son and daughter—splendid specimens of manhood and womanhood. The son, whom we all know, is an eminent representative of his worthy sire. He loved and lived the life of the simple virtues in his home.

As a Judge he served the state for nearly twenty years, and in this capacity he served the cause of justice without fear, without favor and without reproach. No greater eulogy is within the powers of man. But he has left us. To us it is farewell; to the world it is good night.

"Leaves have their time to fall,
And flowers to wither at the north wind's breath,
And stars to set, but all,
Thou hast all seasons for thine own, Oh Death."

CHIEF JUSTICE A. M. MORRISSEY:

To me, Judge Hamer was more than a brother at the bar or an associate upon the bench. He stimulated my youthful ambition to become a lawyer, encouraged my early efforts in the trial of causes, and was my indulgent friend and coworker to the last. Others have spoken of him as the lawyer, the jurist, the pioneer. I concur in all they have said, but I prefer to remember him only as my friend.

The Great Napoleon said the test of friendship was the ability "to love our friends with all their faults." Judge Hamer met the Napoleonic test. Free from petty vices himself, he was considerate of those less strong. If I may paraphrase his own language as applied to another, he carried in his soul a flood of love and tenderness, and of balm and charity for bruised and wounded hearts. He stood for the poor, the weak, the fallen and distressed, and loved them all.

A complete report of these proceedings will be spread upon the journal and published in our reports.

IN MEMORIAM

THOMAS O. C. HARRISON

At the session of the Supreme Court of the State of Nebraska, September 15, 1919, there being present Honorable Andrew M. Morrissey, Chief Justice, Honorable Charles B. Letton, Honorable William B. Rose, Honorable Samuel H. Sedgwick, Honorable Albert J. Cornish, Honorable James R. Dean and Honorable Chester A. Aldrich, Associate Justices, the following proceedings were had:

TO THE HONORABLE SUPREME COURT OF NEBRASKA:

Your Committee appointed to prepare and submit a brief memorial and resolutions on the death of Honorable Thomas O. C. Harrison, late Chief Justice of this court submit the following report:—.

Honorable T. O. C. Harrison was born in Ohio in 1849, and came to this state in 1873, following his admission to the bar in his native state, and making his home in Grand Island, where he resided until his death May 29, 1919, at the age of seventy years.

He served as County Judge, District Judge, Associate Justice and Chief Justice of this court, retiring January 4, 1909. His opinions while on the supreme bench will be found in Volumes 38 to 59 of the Nebraska reports.

He was, during all his judicial career, a patient, painstaking and laborious judge, courteous and considerate to all members of the bar and especially to younger members. He was slow in reaching his conclusions and, while counsel may have sometimes felt that his decisions were wrong, they always felt that they were the result of his deliberate and unbiased judgment.

Upon his retirement from this high tribunal in 1900, he quietly and modestly took up the varied duties of a member of the bar and continued in the practice of the law until one short week before his death. His private life, like his public career, was stainless and without reproach. There was nothing in his career as a public servant or private citizen that should in mercy be covered by the mantle of charity. There was nothing to be concealed from public view—: thing for which apologies should be made, but very much to be commended.

Therefore, Be It Resolved by the bench and bar of this state:

That in the death of Honorable T. O. C. Harrison we have lost a distinguished and worthy citizen, an able lawyer, a just and upright judge, whose memory will ever be an inspiration to his brethren of the bench and bar of this state.

Resolved. That we tender to his bereaved family our sympathy and condolence in the hours of their sorrow.

Resolved. That these resolutions be spread at length on the records of this court and that a copy thereof be furnished to the family of the deceased.

Respectfully submitted,
O. A. Abbott,
T. L. Norval,
A. M. Post,
W. A. Prince.

HONORABLE O. A. ABBOTT:

May it Please the Court: From his early manhood until his sudden and untimely death, covering a period of forty-six years, Judge Harrison was a resident of Grand Island, and retained that residence while serving as a judge of this court. During much the larger part of that period, and until the dawning of the nineteenth century, he stood in the limelight of judicial office, succeeding rapidly from county judge, judge of the district court to the supreme bench, and then quietly and modestly taking up the miscellaneous practice of the

country lawyer, which he continued up to a few days before his death.

Residing in that city before he came, and engaged during all those years in the active practice in all the courts over which he was called to preside from time to time, gave me exceptional opportunities to observe his conduct and character in all those varied relations and in the more important duties of his common civic relations to society and to the community in which he lived and moved.

Uniform courtesy and consideration of the rights, duties and opinions of others with whom he came in contact was always a leading trait in his character. He was not inclined to be disputatious or dogmatic in regard to his own opinions on any given subject of law or ethics, of politics or religion, of morals, or manners—I do not mean to be understood that he entertained no fixed opinions on such matters; but that he was at all times tolerant of the opinions and predilections of others. He did not feel himself called upon to correct the faults or follies of his associates, but to be at all times respectful and tolerant of the opinions and foibles of others. If he ever essayed the role of a reformer, it was by the practice of the moral and social virtues, and not by their profession or proclamation from the housetops.

As a judge on the bench, the same characteristics of toleration and respect for the opinion of others led him to become a patient listener to the most prosy or fallacious arguments of honest and well-meaning counselors at the bar, while retaining unmoved his own opinions on the law or the proved facts in the given case. He sought with untiring industry and patience for precedents of decided cases to guide his opinions. It is but just to say of him that he loved to follow the footsteps of other judges who had spoken on the subject, even though what was said might be foreign to the subject then under consideration by such court. He was deliberate and cautious in the

formation and in the expression of his opinions. His conclusions when reached were his honest opinions, unbiased and uninfluenced by any improper considerations. No breath of suspicion ever tarnished his judicial record. His conclusions might be wrong, but they could not have been wrongfully entertained. They were his deliberate opinions, unbiased and unfettered by any paltry considerations, and were the results of patient and industrious research.

He was a safe and able counselor in the affairs of men, and possessed in a rare degree the confidence of clients, and never betrayed the confidence reposed in him.

He married in early life, and was a devoted, faithful and affectionate husband, but was denied the comfort and consolation that the presence of children in his home would have afforded him. There were no "children round his bed" when the grim messenger of death summoned him from the land of the living.

He was a good citizen, a good lawyer, an upright, conscientious judge. There is nothing in his life that should, in the charity extended to all human frailties, be covered by the mantle of silence today. There is nothing to condemn, but much to commend to all his brethren at the bar.

His conduct and example are still a living force for the guidance and benefit of all. They are the most enduring monuments that can be erected to perpetuate a life of useful activity. The world is better, brighter and happier because he lived in it.

JUDGE A. M. POST:

It was my privilege during a period of nearly two score years to enjoy an intimate acquaintance with Judge Harrison. I knew him as a struggling lawyer at the beginning of his professional career in this state, as county judge of Hall county, and during our service as judges of adjoining districts.

We had frequent occasions for exchange of dockets, which afforded me ample opportunity to judge of the

regard in which he was held wherever known, and it is no exaggeration to say that he was, by all coming within the sphere of his influence, esteemed as a model citizen and a wise and just judge. I later enjoyed four years of intimate companionship with him as a member of this body, which is to me a lasting and cherished memory.

Judge Harrison was richly endowed with the qualities of mind and heart that are the seeds of true friendships, and it may with truth be said he had no recognized enemy. He was in mind singularly pure and simple, disposed to shrink from life's sterner conflicts; yet no Sir Galahad of legendary fame was ever more jealous of his personal honor or more courageous in defense thereof.

In practice he never affected advocacy and shrunk from forensic disputation, but was eminently wise and safe in counsel. He was temperamentally judicial; and, if there were among his contemporaries men of ampler opportunity and wider range of vision or more comprehensive knowledge of precedents, none had a firmer grasp upon, or a finer conception of, the fundamentals of the law.

If his published opinions may be said to lack the literary excellence of some writers, it will be remembered that faultless rhetoric is not the test of legal merit, and the soundness of Judge Harrison's reasoning has rarely been questioned.

He was withal a courteous high-minded gentleman, with a heart ever overflowing with kindness, and whose sterling character and faithful and efficient public service entitled him to an honorable place in the history of the state.

HONORABLE W. A. PRINCE:

To The Honorable Supreme Court of Nebraska.

Having been appointed by your honorable body as one of the committee to prepare and present resolutions upon the death of Honorable T. O. C. Harrison, and

being unable to be present at the memorial exercises to be held, September 15th; at the request of the Chairman, Honorable O. A. Abbott, I have prepared a few remarks and have asked him to present the same at that time.

I first became acquainted with Judge Harrison more than thirty years ago, when I came to Grand Island to enter upon the practice of law. For many years after that time he was district judge of this district, and was afterwards elected to and served a term as one of the judges of the supreme court of this state.

One characteristic that will ever be remembered by all young attorneys, who appeared before Judge Harrison, was his extreme kindness and courtesy to them. We always felt that he would overlook our mistakes and not allow the rights of our clients to be prejudiced by any errors, which we might make, unless they were absolutely vital in the case. He was kind, patient, and considerate.

As district judge, justice was his motto with all classes of people as well as with the members of the bar. All felt that he attempted to hold the scales of justice equal between all parties, corporate or individual, rich and poor alike.

We are familiar with his record as a member of this honorable court. He filled the position with dignity and honor. He chose, perhaps, to follow well beaten paths, rather than to hew a way through untrodden forests. That was extremely characteristic of him as a district judge and also as a practitioner at the bar.

After his term as supreme judge, he and I were partners for many years. His one characteristic that all recognized was his unquestioned personal honor and integrity. Perhaps he did not possess the utmost confidence in his own ability and that self-reliance which are characteristics of great trial attorneys, but he did possess a spirit of fairness and an extreme desire that justice, and only justice, should be done.

He had a host of personal friends, few, if any, enemies. He never harbored resentment. No matter how bitter might be a legal controversy, when he passed from the courtroom all personal feeling disappeared. His faults lie gently on him while his many, many virtues will ever be remembered by those who knew him best.

During the period covered by these reports, in addition to the cases reported in this volume, there were 12 cases affirmed by the court without opinion, and 185 cases disposed of by the supreme court commission.

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THOMAS L. BRIGGS, APPELLEE, V. KEITH NEVILLE ET AL., APPELLANTS.

FILED DECEMBER 14, 1918. No. 20717.

1. **Public Lands:** MINERAL RIGHTS. The decision in *Fawn Lake Ranch Co. v. Cumbow*, 102 Neb. 288, is adhered to.
2. **Constitutional Law:** STATUTE: MINERAL LANDS: LEASES. Chapter 7, Laws of the Extraordinary Session, 1918, does not violate sections 11, 13, or 15, art. III of our Constitution, nor the Fourteenth amendment of the federal Constitution.
3. **Mineral Lands:** LEASES. Under that statute, all leases of mineral lands must be made to the highest bidder in open competition and upon due notice.
4. ———: ———: RIGHTS OF AGRICULTURAL LESSEE. The lessee of mineral rights cannot interfere in any respect with the rights of the agricultural lessee to his damage, without providing for and satisfying such damage. If such claim for damages cannot be otherwise adjusted, a court of equity would take jurisdiction.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD and WILLIAM M. MORNING, JUDGES. *Reversed, with directions.*

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

F. M. Tyrrell, W. A. Dilworth and *J. H. Walker, contra.*

Stout, Rose & Wells, for lessees.

SEDGWICK, J.

These defendants, as the state board of educational lands and funds, were about to lease the mineral rights

in school lands belonging to the state, and this plaintiff, who holds a prior lease of the lands, brought this action in the district court for Lancaster county to enjoin the execution of the proposed lease. The trial court found: "That said plaintiff is raising hay and live stock on said land, and that said lakes furnish water for his stock and to subirrigate his hay land; that by means of such subirrigation he is enabled to grow enough hay to feed his stock during the winter, and that without the same such hay could not be produced. The court further finds that the defendants, as a board, and under chapter 7 of the enactments of the extraordinary session of the legislature of 1918, are about to lease said school land to parties who will immediately drain said lakes in the extraction of potash from their waters, and that thereby the plaintiff will be deprived of valuable property rights in the respect indicated. The court finds with respect to the enactment of said chapter 7 that it is void in so far as it attempts to authorize the defendants to so lease the described land during the term of plaintiff's present lease and that as to plaintiff and as to the land in question it contravenes the provisions of the Constitution against the impairment of contracts and against the taking of private property for public use without just compensation."

The defendants had leased the mineral rights in the lands in question before the decision of this court in *Fawn Lake Ranch Co. v. Cumbow,* 102 Neb. 288, which lease was void under that decision, and the defendants were proposing to execute a preference lease to the same lessee under the provision of section 16, ch. 7 of the Laws of the Extraordinary Session of the Legislature in 1918. In the *Cumbow* case, above referred to, it was held: "The removal of mineral from land lessens the value of the inheritance, and constitutes waste, which is forbidden by the terms of the school land lease under which plaintiff claims and by the statute relating to school lands." And: "Under section 1, art. VIII of the Constitution, the board of educational lands

and funds is vested with the power of sale, leasing, and general management of school lands under the direction of the legislature and in such manner as may be prescribed by law." And that under the statutes as they then existed the state board had no authority to dispose of mineral rights in the school lands of the state, except the right to take sand and gravel therefrom as provided in section 5855, Rev. St. 1913. Without further discussion, therefore, it must be held that this plaintiff by his agricultural lease obtained no right to the potash and other minerals that might exist in the land. As these minerals are much more valuable than the agricultural lease, and all interests of the lessee thereunder, it follows that the state can remove the same from the land after making due compensation to the former lessee for any injury caused thereby to the leasehold estate, there being an implied reservation of the right of entry for that purpose.

The questions now to be determined are : (1) Whether the act of the legislature of 1918 is constitutional and valid; and, if so, (2) what is the meaning and construction of the section of the statute under which the board was proposing to proceed in making the lease in question; and (3) whether by the proposed action of the board the rights of this plaintiff in the lands in question would be unlawfully invaded.

By section 13, art. III of the Constitution, a state officer is not allowed to "be interested either directly or indirectly, in any contract with the state," which is "authorized by any law passed during the term for which he shall have been elected." If it is a fact that one of the members of the legislature is directly or indirectly a party to some of these contracts, this provision of the Constitution would prevent him from claiming any rights under such contract, but it would not necessarily render this act of the legislature void.

The statute in question appears to be complete in itself, and is not an amendment of sections 5845-5875,

Rev. St. 1913, and is therefore not a violation of section 11, art. III of the Constitution.

It does not appear to be an attempt to grant special privileges, immunities and franchises, nor to abridge the rights, privileges and immunities of citizens of the United States, and is therefore not in violation of section 15, art. III of the Constitution, nor the Fourteenth amendment of the federal Constitution in those respects. The act is not invalid for any of the reasons suggested.

Section 16 of the act is as follows: "The holders of mineral leases heretofore granted by the board of educational lands and funds, which leases have been declared invalid, may apply, under the direction of this act, for new leases, and the board may in its discretion determine if the bonus and royalty is equal or better than the *bona fide* competitive bids. If the lessee has made extensive or expensive preparation and is prepared for proceeding with development, the board may in its discretion consider the same and issue new leases to said lessee under and by virtue of this act."

The construction of this section is not without difficulty. Attorneys for other lessees interested in the result of this litigation were granted leave by the court to file a brief in their behalf, and in this brief they have presented a very interesting discussion of the meaning of this section. It is therein argued that this section of the act "intended to vest in the board power to give some measure of relief to the holders of mineral leases previously granted, all of which, the act recites, have been declared invalid—particularly to those who have made either extensive or expensive preparation, and are prepared for proceeding with development." The board has to do with the interest of the state, and as the state was to share in the profits of the undertaking by obtaining a market for its minerals, and as these profits might be much greater by special demand for these products under the circumstances existing when the legislation was enacted, the board might consider those matters in determining the advantage that would come

to the state under the respective bids. If a bidder specifies the extent and expensiveness of his preparation to proceed with the work under a former void contract, the board might "consider the same and issue new leases to said lessee under and by virtue of this act," and should determine upon careful investigation what advantage the state would necessarily derive from the fact that the work might be sooner and more effectively done because of their extensive and expensive preparations. The provision that the board may "determine if the bonus and royalty is equal or better than the *bona fide* competitive bids" cannot be complied with unless there have been "*bona fide* competitive bids." Therefore we must determine how the bonus and royalty is to be compared with the competitive bids, to determine whether it is equal or better. By section 9 of the act, when there is more than one applicant for the same land, "the rights thereon may be awarded to the legally qualified applicant paying the highest and best bid, to be determined by taking into consideration both the bonus and royalty, the award being made after proper legal notice in such manner as the state board shall determine best calculated to protect public interest." The board should call for competitive bids as the statute contemplates, and the holders of these invalid leases may bid with others, and specify in their bids the bonus and royalty provided for in their former contracts. If the lessees have paid money into the state treasury under the contracts that have been declared void, such payments would, as a matter of course, be taken into consideration and allowed by the board as payments upon their lease if they were successful bidders. If they were not successful bidders, money so paid on their former void contracts would be returned to them. The legislature would make appropriation for that purpose if necessary. As the statute now is, the board might include more than one tract of land in a proposed lease of mineral rights, if in their reasonable discretion the state would realize larger returns by so doing. If the

respective tracts were offered sperately in separate proposed leases, and at the same time offered collectively in one proposed lease, it could readily be determined which bids were more advantageous to the state.

The briefs, so far as we have noticed, do not refer to the particulars of any legal notice given, and it seems to be conceded that this plaintiff was offering more for these mineral rights than the parties to whom the board was proposing to make the lease, and the plaintiff's offer was being refused without any investigation on the part of the board as to the relative advantages that would accrue to the state under the respective offers. This was a violation of the statute, and should have been enjoined by the court.

Some of the provisions of the statute are not as clear as perhaps might be desired, but it appears to make provision for compensating the agricultural lessees for damages they may suffer under these leases of mineral rights. Section 8 of the act contains provisions as to the terms of leases of mineral rights, and contains a clause: "Lessee shall pay for all damages to growing crops, caused by his operations, and for the use of the land necessarily occupied." It is contended that the act does not contain any provision for ascertaining the amount of these damages, but if the lessee of these mineral rights is not authorized under his lease to interfere in any respect with the rights of the agricultural lessee without providing for and satisfying such damages, and if he is willing to accept the lease upon those terms, the rights of the agricultural lessee are not injured by this statute. The lessee of the mineral rights would rely upon being able to make reasonable adjustment with the former lessee, and he could not be wholly and arbitrarily deprived of his right to extract these minerals by unreasonable demands of the former lessee. It is suggested in the briefs that the state might exercise its right of eminent domain, and provide some adequate method of ascertaining the damages of the agricultural lessee, and protecting him in

all his rights under his lease until such damages are paid, and so make the mineral lease effective. The legislature will soon be in session and may see proper to amend the statute in that respect. If there is no other method provided for adjusting such claims of damage, a court of equity might provide a method. The trial court, therefore, was wrong in enjoining the defendants from issuing mineral leases "to any person save the plaintiff until the present agricultural and grazing lease shall have expired, or been duly forfeited, or renounced according to law."

The decree of the district court is reversed and the cause remanded, with instructions to enter a decree enjoining the defendants from leasing the mineral rights of the state without competitive bids as herein indicated.

REVERSED.

MORRISSEY, C. J., and ROSE, J., took no part in this decision.

BANK OF WAVERLY, APPELLEE, V. JOHN W. DAILY, APPELLANT.

FILED DECEMBER 14, 1918. No. 20774.

1. **Corporations: STOCK: EXECUTORY CONTRACT OF SALE: DIVIDENDS.** In the case of an executory contract to sell stock, binding on both purchaser and seller, where nothing is said about the dividends, dividends declared while the contract is executory belong to the purchaser, and not to the seller.
2. ———: ———: ———: ———. Evidence examined, and *held* that the contract under consideration, as construed by the parties to it, entitled the purchasers of stock sold to all dividends declared upon the stock after the sale, including that on the 20 shares in controversy.

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

B. F. Good and *A. M. Bunting,* for appellant.

Lincoln Frost and *H. W. Baird, contra.*

CORNISH, J.

Action against defendant as guarantor of the payment of 80/100 of certain notes held by plaintiff. Defendant admits his liability as guarantor, but alleges a counterclaim, in which he asks judgment against plaintiff for certain dividends on 20 shares of stock. From a judgment against defendant on his counterclaim, he appeals.

Defendant's liability as guarantor and his claim for dividends grow out of a certain contract, dated July 8, for the sale of 80 of the 100 shares of the plaintiff bank, had between defendant, vendor, and R. M. Beale and E. W. Negus, vendees. The contract is, in part, substantially as follows:

(1) Vendor (the defendant) "agrees to sell" and vendees "agree to purchase" 60 shares (par value $100 each) for $12,000, "to be paid * * * on or before August 1, 1913."

(2) Vendor guarantees payment of all notes of the bank "in proportion to the amount of stock sold under this contract."

(4) The vendees "shall acquire, as of the date of the" contract, "their proportionate beneficial interest, to wit, sixty one-hundredths (60/100) part of the entire assets of said bank."

(5) "It is further agreed, and is a part consideration for this contract, that parties of the second part shall buy of party of the first part the remaining 20 shares of stock held by him after said 60 shares have been sold, at any time they may want them. Ten shares in six months and ten shares on or before one year, and at the same price paid for the said 60 shares, and party of first part agrees to sell at any time.

(6) "All shares of stock herein provided to be sold by party of the first part to parties of the second part shall, upon payment therefor as herein provided, be duly assigned and transferred to the said second parties or as they may direct; it being understood that all transfers and payments shall be made at the Bank of Waverly, Waverly, Lancaster county, Nebraska.

(7) "It is further expressly agreed and understood by first party that it is a part of the consideration for the second parties' purchasing the foregoing shares of stock that, in addition to all other stipulations and agreements herein, parties of the second part are to receive all earnings and profits of said bank on and after this date, accruing on the stock sold."

The parties took 60 shares and possession of the bank. On January 9 following, the bank declared a dividend. The next day 10 of the 20 shares of stock were paid for. On July 6 the bank declared another dividend. On July 15 the remaining 10 shares were paid for. Up to the times of these payments the 20 shares were listed by the bank in defendant's name.

On a former appeal this court adopted the report of the commission recommending a reversal of judgment of the trial court sustaining a demurrer to defendant's counterclaim. In the adopted report, which defendant contends is the law of the case, the inquiry was whether by the terms of the written contract defendant was entitled to dividends on the 20 shares before they were paid for and transferred on the books of the bank. The conclusion was reached that the parties did not understand the 20 shares to be sold at the time of the contract, else paragraph 4 of the contract would have read differently, and the vendees would then have acquired 80/100, instead of 60/100, of the assets of the bank. This construction was reasonable, although the contract showed that the 60 as well as the additional 20 shares were to be paid for in the future. If "stock sold" in paragraph 7 of the contract could not refer to an executory transaction, then the paragraph was useless. The words "foregoing shares of stock" in paragraph 7 might refer to all the stock.

The question was not free from doubt, but the court at that time had not before it the construction which the parties themselves placed upon the contract. It is plain that the purchasers of the stock in control of

the bank understood they were entitled to the dividends, else they would have declared the dividends just after, instead of just before, paying for the stock.

The evidence shows that defendant, after the contract was entered into, but before the 20 shares were paid for, voluntarily paid 80/100 of notes held by the bank. If the parties did not consider the 20 shares as stock sold, then the defendant's liability was only 60/100 of the notes. The evidence also shows that the contract, as originally drawn, provided, in paragraph 5, for only an option to buy; that the words containing the option were stricken out; and that by interlineation in the handwriting of defendant the sale agreement was made absolute. The defendant himself testifies in one place that the change was made "to make it an absolute sale" of the 20 shares. The purchasers swear that the defendant required that they should take the whole 80 shares at the time. This explains the ambiguity in paragraph 4 of the contract. We are of opinion that the trial court was justified in finding that it was the understanding of the parties that the whole 80 shares should be treated alike. *Wilhoit v. Stevenson,* 96 Neb. 751; Rev. St. 1913, sec. 7909.

If, however, we interpret the agreement merely as an executory contract for the sale of stock, we are of opinion that the purchaser of the stock, not the defendant vendor, was entitled to the 24 per cent. dividends declared. As said by an English judge, in considering this very question: "I think it would be very strange if the matter were determined otherwise; for we know that the value of such property falls immediately a dividend is paid." *Black v. Homersham,* 4 L. R. Exch. Div. (Eng.) 24. The purchaser is entitled to the thing which both the parties must have contemplated was being contracted for. Otherwise, half of the value of the stock might be taken out of it. It is for this reason that this court has twice held that dividends on stock held for security go to the holder. *Farmers &*

Merchants Nat. Bank v. Mosher, 63 Neb. 130; *Central Nebraska Nat. Bank v. Wilder,* 32 Neb. 454. This is not in conflict with the general rule that, in the absence of agreement to the contrary, dividends belong to the owner of the stock at the time they are declared. The purchaser is the equitable owner; the vendor is "a trustee *sub modo* for the vendee." Nor are cases where merely an option to buy is given in point. In such case the purchaser may take, or not. Ordinarily the parties would contemplate the payment of current dividends to the owner; but even then, it would seem, much might depend on the circumstances of the case and understanding of the parties. *Currie v. White,* 45 N. Y. 822; *Phinizy v. Murray,* 83 Ga. 747, 6 L. R. A. 426; *Johnson v. Underhill,* 52 N. Y. 203, 214.

It appears that, in the commissioners' report adopted by the court, we held to the contrary; but, inasmuch as the case does not turn upon this question, further comment is unnecessary.

AFFIRMED.

STATE OF NEBRASKA V. HERMAN KRASNE.

FILED DECEMBER 14, 1918. No. 20145.

1. **Criminal Law:** VOLUNTARY CONFESSION. A voluntary confession, standing alone, is insufficient to prove the commission of a crime, but such confession may, with slight corroborative circumstances, be sufficient to warrant a conviction. *Sullivan v. State,* 58 Neb. 796.

2. ———: EVIDENCE: PROOF OF A NEGATIVE. In a criminal prosecution, if a negative is an essential element of the crime, and is "peculiarly within the knowledge of the defendant," it devolves upon him to produce the evidence, and upon his failure to do so, the jury may properly infer that such evidence cannot be produced.

3. ———: FRAUDULENT ADVERTISEMENT: SUFFICIENCY OF EVIDENCE. Defendant was charged under section 8896, Rev. St. 1913, with causing to be inserted in a newspaper an advertisement that "con-

tained statements of fact which were untrue, deceptive and misleading" and that related to certain goods offered by him for sale at a price named and on a day designated in the advertisement. The evidence examined, discussed in the opinion, and *held*, that the court erred in sustaining a demurrer to the evidence of the state.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Exceptions sustained.*

George A. Magney, County Attorney, T. J. McGuire, Assistant City Attorney, and *Gurley & Fitch,* for plaintiff in error.

Benjamin S. Baker, contra.

DEAN, J.

The defendant was engaged in retailing men's and women's furnishing goods at Omaha. He was found guilty in the police court of that city under section 8896, Rev. St. 1913, of having caused to be published on Saturday, July 15, 1916, in an Omaha daily newspaper a misleading advertisment, which the complaint charged "contained statements of fact which were untrue, deceptive and misleading," and that related to certain goods offered by him for sale. On appeal to the district court for Douglas county a jury was waived, and when the state rested a demurrer to the evidence was interposed by defendant and sustained and he was discharged. Alleging error, the state brought the case here under section 9185, Rev. St. 1913, for a decision upon the points presented in the bill of exceptions.

The statute (section 8896) makes it "unlawful for any person, * * * with intent to sell or in any wise dispose of merchandise * * * offered by such person * * * to the public for sale, * * * to * * * place before the public * * * in a newspaper * * * an advertisement regarding merchandise * * * so offered to the public, containing any assertion, representation or statement of fact which is untrue, deceptive, or misleading." The advertisement complained of occupied about a quarter of a newspaper page and

was partly in display type. It was in evidence, and the proof was clear, that on the 15th day of July the defendant advertised for sale, among other articles, "$1.00 B. V. D. Union suits, now 49c." The necessary question of fact to require conviction was that this advertisement was "untrue, deceptive, or misleading."

In the present case the negative allegation that defendant did not have for sale the goods advertised involved a matter peculiarly within his knowledge, and very difficult, if not impossible, to prove by any one other than the defendant himself, and, as he could not be compelled to incriminate himself, his evidence upon that point could not be produced by the state. Only two witnesses were called, Mr. Searles and Mr. Garrett, who testified on the part of the state. Searles said that on August 16, 1916, he talked with the defendant at his store. He testified: "I remarked to him that about a month ago he had some B. V. D. underwear advertised for 49 cents a suit; and asked him if he still had that underwear on sale. He said 'Yes, sir;' and started to wait on me; and a young man, * * * Bernstein, was standing close by, and he told the young man to show this gentleman that underwear. * * * I said, 'Is this the B. V. D. underwear? Did you sell out everything except that?' He said, 'Yes, sir;' spread the underwear out; I looked for the brand B. V. D. * * * and I did not find the B. V. D. brand on it." The witness at the time purchased a suit for 49 cents, which it was stipulated was not the B. V. D. underwear garment. Garrett testified that on August 8, 1916, he was approached by one of the clerks in defendant's store and said to him: "Have you got any of those B. V. D.'s left that you advertised on July 15? And he said, 'Yes; we have.' And he led me over to a counter and showed me some of the garments. I looked them over, and I did not see anything left like that." That is, the defendant told the witness Searles that he had on hand the same goods that he had advertised July

15 as B. V. D., and instructed his clerk to show them to the witness. When the goods were examined, they were found not to be the B. V. D. goods. This evidence clearly tended to prove that defendant did not have the well-known B. V. D. underwear for sale as advertised, and that the advertisement was for the purpose of misleading the public. Garrett's testimony is that in defendant's store he was shown goods that were said by those in charge of the goods to be the goods advertised as B. V. D., and that they were not B. V. D. goods.

Defendant invokes the familiar rule that one cannot be convicted of a crime on his own unsupported statement or confession made out of court that a crime has been committed, and cites *Sullivan v. State,* 58 Neb. 796. That case does not seem to be in point. No material negative element of the crime there charged was "peculiarly within the knowledge of the defendant." In the *Sullivan* case it was held that, "while a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is competent evidence of that fact, and may, with slight corroborative circumstances, be sufficient to warrant a conviction."

It is a familiar rule that a *prima facie* case of theft is made out by showing the defendant in the recent and unexplained possession of stolen goods. Ordinarily where a negative is an essential element of the crime, the burden is on the state to prove it. "But where a negation is peculiarly within the knowledge of the defendant the burden is on him to establish that fact. Thus, where a charge is that the defendant carried on a certain business without a license, the fact that he has a license is peculiarly within his knowledge and he must establish that fact or suffer conviction. Likewise the burden of proving that a certain offense against property was committed without the owner's consent rests on the accused, that being a fact peculiarly within his knowledge." 8 R. C. L. 173, sec. 165.

The district court erred in sustaining the demurrer of defendant to the evidence. The opinion in this case under the provisions of section 9185, Rev. St. 1913, only determines the law of the case. The exceptions of the state are sustained.

EXCEPTIONS SUSTAINED.

MORRISSEY, C. J., LETTON AND ROSE, JJ., dissent.

HUGO BILZ V. STATE OF NEBRASKA.

FILED DECEMBER 14, 1918. No. 20597.

Intoxicating Liquors: UNLAWFUL POSSESSION: EVIDENCE. Defendant was convicted of violating the prohibitory law and prosecutes error. The evidence, though circumstantial, supports the verdict. The court did not err in overruling the motion for a new trial.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

John M. Macfarland, and *Forrest S. Macfarland,* for plaintiff in error.

Willis E. Reed, Attorney General, and *Orville L. Jones, contra.*

DEAN, J.

Hugo Bilz was convicted under the prohibitory act, namely, chapter 187, Laws 1917, of having "unlawful possession of certain intoxicating liquor." He was fined $100 and costs, and brings the case here on error. He contends that the verdict is not sustained by sufficient evidence.

Section 10 of the act under which defendant was convicted provides: "It shall be unlawful for any * * * restaurant, * * * or any place of public entertainment or resort, or for any of their * * * owners, managers, * * * servants or employees to keep, or to aid and abet in keeping, or to have in his or its possession, in lockers, or in any other manner,

any intoxicating liquor for the purpose of barter, sale, use or gift as a beverage, or for the delivery, division, or distribution of the same in any manner whatsoever."

Defendant conducted a restaurant and soft drink establishment at the corner of Sixteenth and California streets, Omaha. In the front room there is a bar, lunch counter, dining tables, and the like, and in the rear a kitchen, used exclusively by defendant and his employees in connection with the lunch counter as occasion required. Two bottles of whiskey were found by the officers who made the search under an ice box in the kitchen. The ice box was in the southwest corner of the kitchen and remote from both doors. One of the doors is at the northwest corner of the kitchen. It opens into an areaway that leads to the foot of a hotel stairway. The officers found this door locked, and just inside stood two empty whiskey bottles. Another door is at the northeast corner of the kitchen that leads across a narrow passageway to the front room. Defendant's occupancy of the premises began almost four months before his arrest. In the basement under defendant's premises a varied assortment of empty bottles was found. Among them were whiskey and beer and near-beer bottles. The key to the basement was obtained by the officers from an employee of defendant, who was in the absence of defendant, in charge of the soft drink department and the establishment generally.

George Elbert, the employee from whom the basement key was obtained, testified that the fireman of the building and an employee of a transfer company slept in the basement. It is not shown that they left any bottles there. Aside from these it does not appear that any other persons had access to the basement except defendant and his employees. Mr. Elbert testified: "Q. You were down in the basement quite often? A. I came down there to see about the beer, and see how much was, sometimes, I didn't go very often, but about sometimes about once in two days." One of the

officers testified that some of the bottles that were found in the basement "were pretty clean; they didn't look as though they had been there very long."

Mr. Bilz and his employees denied bringing the liquor to the premises, and denied that they ever saw or heard of the liquor until it was found by the officers. He and three of his employees testified that they frequently found empty bottles of various kinds, such as whisky and alcohol and ginger bottles, in the passageway between the front room and the kitchen and that is equally accessible to both rooms, and that such bottles were apparently left there by strangers and without the knowledge or consent of defendant or his employees. But the record does not show, nor does defendant argue, that strangers at any time left either whiskey or empty bottles of any sort in the kitchen.

Upon a review of the record we conclude that the trial court did not err in overruling defendant's motion for a new trial. *Smith v. State,* 94 S. E. (Ga. App.) 62. Notwithstanding the evidence is circumstantial, it supports the verdict. The case was fairly submitted, and defendant has made no complaint respecting instructions. The judgment is

AFFIRMED.

STATE, EX REL. GEORGE W. SHIELDS, RELATOR, V. THOMAS L. HALL, RESPONDENT.

FILED DECEMBER 14, 1918. No. 20785.

State Railway Commission: BOND. A state railway commissioner holding office under the constitutional amendment creating the state railway commission is not required to give an official bond.

Original proceeding in *quo warranto* to oust respondent from the office of state railway commissioner. *Writ denied, and action dismissed.*

G. W. Shields, for relator

Hugh LaMaster, contra.

DEAN, J.

This is an original action in the nature of *quo warranto* brought in this court by relator in the name of the state, by permission of the attorney general, to oust defendant from the office of state railway commissioner for failure to give an official bond. Defendant was elected for a six-year term beginning in January, 1915, and ending in January, 1921. It is admitted that no bond was given. It is argued by defendant that a bond cannot be lawfully required. That is the sole question for decision in this case.

When the Constitution became operative in 1875, article V enumerated the then elective executive officers of the state, fixing their terms of office, salaries, and the like. Section 25 of that article provides: "The officers mentioned in this article shall give bonds in not less than double the amount of money that may come into their hands, and in no case less than the sum of fifty thousand dollars, with such provisions as to sureties and the approval thereof, and for the increase of the penalty of such bonds, as may be prescribed by law." Relator bases his argument in large part on the requirements found in section 25.

The state railway commission was created by a constitutional amendment that was adopted November 6, 1906. The amendment follows: "There shall be a state railway commission, consisting of three members, who shall be first elected at the general election in 1906, whose terms of office, except those chosen at the first election under this provision, shall be six years, and whose compensation shall be fixed by the legislature. Of the three commissioners first elected, the one receiving the highest number of votes, shall hold his office for six years, the next highest four years, and the lowest two years. The powers and duties of such commission shall include the regulation

of rates, service and general control of common carriers as the legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

The amendment appeared in the Session Laws of 1907, 1909, and 1911, and in the Compiled Statutes and in Cobbey's Annotated Statutes for those years, immediately following the body of the Constitution, as an unnumbered and separate section of that instrument. In the Session Laws of 1913, and in the Revised Statutes for 1913, the amendment in question first appeared in article V of the Constitution as section 19A, and it has appeared in the same relative position in the succeeding Session Laws of 1915 and 1917. By the amendment being placed in article V, it is thereby made to appear by section 25 of that article that the railway commissioners must give bonds.

Relator says that the amendment was incorporated in article V of the Constitution by the code commission in pursuance of section 3719, Rev. St. 1913, namely: "The Constitution, with amendments, of Nebraska and of the United States, and the Declaration of Independence shall be incorporated in the statutes in such part thereof as the commission deems best."

It is also said by relator that the code commission very properly placed the amendment in article V because that article has to do with executive officers, and, he says, the functions of the railway commission are solely executive, a point we do not decide. It is sufficient answer to say that the people did not place the amendment there. The legislature had no power to place the amendment there, nor in any article of the organic law that might cause its meaning to be misconstrued or that would even seem to change its legal effect. Much less could the legislature delegate such exercise of power to the code commission.

Relator points out that the amendment creating the "board of commissioners of state institutions" took

the place and section number of former section 19, of article V of the Constitution. But that section was expressly proposed by a joint legislative resolution as an amendment to "section 19 of article five (5) of the Constitution," and of course it follows that upon its adoption it would appear as section 19. Laws 1911, ch. 225. That amendment is also different in another important respect from the one involved here, in that it expressly and in direct terms provides that the members composing the board "shall each give bonds."

There are no such provisions respecting the railway commission amendment. That amendment was not proposed by the legislature as a substitute for any specific section of the organic law. Laws 1905, ch. 233. It was adopted by the people as a separate amendment, and, unlike the amendment that created "the board of commissioners of state institutions," it does not even by implication require a state railway commissioner to give an official bond.

For the reasons appearing herein, we decline to hold that under the Constitution an incumbent of the office of state railway commissioner is required to give an official bond.

The writ is denied and the action

DISMISSED.

ROSE, J., not sitting.

STATE, EX REL. GEORGE W. SHIELDS, RELATOR, V. HARRY G. TAYLOR, RESPONDENT.

FILED DECEMBER 14, 1918. No. 20786.

Original proceeding in *quo warranto* to oust respondent from the office of state railway commissioner. *Writ denied, and action dismissed.*

George W. Shields, for relator.

Hugh LaMaster, contra.

DEAN, J.

In this case the defendant assumed the duties of state railway commissioner in January, 1913, and his term of office will expire in January, 1919. With the exception of the foregoing facts respecting the term of office, the pleadings and the material issues that are involved here are the same as those in *State v. Hall*, *ante*, p. 17. The decision in that case controls in the present case.

The writ is therefore denied and the action is

DISMISSED.

UNITED STATES FIDELITY & GUARANTY COMPANY ET AL., APPELLEES, v. EMMA WICKLINE, APPELLANT.

FILED DECEMBER 14, 1918. No. 20833.

1. **Master and Servant:** EMPLOYEES' LIABILITY ACT: X-RAY EXAMINATION. A claimant for compensation under the employers' liability act pursuant to section 3675, Rev. St. 1913, cannot be denied a recovery because of a refusal to submit to an X-ray examination or to have an X-ray photograph taken of the person, where the uncontradicted evidence shows that neither was necessary.

2. ———: ———: COSTS: ATTORNEY'S FEES. In an action under the employers' liability act in which a recovery is had, the district court cannot tax an attorney fee as a part of the costs. Laws 1917, ch. 85, sec. 24.

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

R. J. Greene, for appellant.

Strode & Beghtol, contra.

DEAN, J.

This action originated in the office of the compensation commissioner, before whom Mrs. Wickline, who is defendant here, recovered an award on August 7, 1918, in the sum of $81 as compensation for personal in-

juries sustained while in the employ of the Northwestern Iron & Metal Company. Plaintiffs here answered jointly before the commissioner, denying liability and asserting matter of affirmative defense. On August 8, 1918, they filed with the commissioner a notice of appeal to the district court, where they appeared as plaintiffs, and where judgment was rendered against them for $18 and costs. Defendant's motion for a new trial was overruled, and a demand for an allowance of "overtime" compensation and for attorney's fees to be taxed as costs was denied. Defendant appealed.

The findings and decree of the district court fairly reflect the material issues. The court found that defendant was injured on January 25, 1918; that the employer was insured against liability for such injuries by the guaranty company; that the guaranty company paid defendant compensation for 8 weeks at $6 a week which was in full to March 22, 1918; that on April 10, 1918, the guaranty company requested defendant "to submit to a further physical examination, the same to include the taking of an X-ray photograph of the injured portion of her body;" that she expressed willingness to submit to a physical examination, but "refused, and still refuses, to submit to the taking of an X-ray photograph, and that the compensation herein sought to be recovered has all accrued since the said request and refusal, with the exception of that portion which accrued between the 22d day of March, 1918, and the date of the request for said X-ray photograph, viz., April 10, 1918, or about three weeks; that there was due her and unpaid at the time of said request April 10, 1918, slightly less than three weeks' compensation at $6 a week, amounting with interest to $18, to which amount I find she is entitled to a judgment against plaintiffs. I further find that the request upon said Emma Wickline to submit to the taking of said X-ray photograph was a reasonable request, which was advised by the physician of her own choice, as well as

by the physician furnished by her employer, and that she should have complied therewith, and that by failing so to comply she has forfeited her right to all of the compensation sued for except that which accrued prior to April 10, 1918, and which is still unpaid, to wit, the sum of $18."

Section 3675, Rev. St. 1913, so far as here applicable, follows: "After an employee has given notice of an injury, * * * he shall, if so requested by the employer or the insurance company carrying such risk, submit himself to an examination by a physician or surgeon * * * furnished and paid for by the employer, or the insurance company carrying such risk, as the case may be. * * * The refusal of the employee to submit to such examination shall deprive him of the right to compensation under this article during the continuance of such refusal and the period of such refusal shall be deducted from the period during which compensation would otherwise be payable."

Defendant was the only witness who testified respecting the nature of the injury. Upon being called by plaintiff's counsel, she testified that she and one or more women in the employ of plaintiff, Northwestern Iron & Metal Company, were ordered by the employer to lift a bale of paper from the floor to a table, and that in doing so she, as informed by her physician, Dr. Hanson, "tore the lining in my right side loose and tore the kidney." Plaintiffs' contention that Dr. Hanson, defendant's lady physician, advised her to submit to the taking of an X-ray photograph is not supported by the record. On this point defendant testified in response to a question by the opposite party: "Q. And she said you ought to have an X-ray picture taken? A. She didn't really say I ought to have it; she said it would give more satisfaction to my home folks; and I went to talk with Dr. Bogan, and he laughed at the idea of my having an X-ray picture taken, he said—(interrupted)." In answer to a question by the court defendant said: "Dr. Bogan examined me

twice and Dr. Hanson twice. * * * Dr. Bogan was the company doctor." Defendant was asked if Dr. Hanson suggested the X-ray. She answered: "No; Dr. Bogan wanted the X-ray first, he thought it was necessary. Afterwards I proposed an X-ray to him, too; when I was to him in his office, I proposed an X-ray picture, and he said it wasn't necessary. Q. (by Court) Why did you change your mind? A. I didn't feel as though I wanted an X-ray after I got up again, because I talked with several, and they said it was dangerous; they said there had to be medicine injected into my kidney."

Under the statute the request for an examination must be reasonable, but it does not appear to have been so in this case. The testimony before us shows affirmatively that neither an X-ray examination nor an X-ray photograph was necessary. No physician nor other person testified that either was necessary, nor does it appear that a request was made by plaintiffs to the court to require defendant to submit to either. In the present advanced state of the science of X-ray examinations and X-ray photographs of the person, there appears to be no reason why such examination or photograph should not be permitted by a claimant for compensation under the employers' liability act, upon request by the employer or insurer, unless the request is shown to be unreasonable.

The defendant, under section 3666, Rev. St. 1913, as amended in Laws 1917, ch. 85, sec. 116, demanded extra compensation for "waiting time." The statute follows: "Except as hereinafter provided, all amounts of compensation payable under the provisions of the article shall be payable periodically in accordance with the methods of payment of the wages of the employee at the time of the injury or death. Provided fifty per centum shall be added for waiting time for all delinquent payments after 30 days' notice has been given." Plaintiffs say that this section is ambiguous. When the scope of the employers' liability act is

considered in its entirety, it seems that the legislature intended by the language creating a penalty to make it thereby reasonably certain that the payments would not be delayed for trivial reasons and the act be thereby nullified. When the section under consideration is considered together with all the other parts of the act, it seems reasonable to believe that the "delinquent payments" therein mentioned mean such payments as are contemplated or created by the terms of the act.

Plaintiffs argue that "in other portions of the statute it is stated that the compensation paid shall in no event be more than $12 a week," and that to impose the 50 per cent. penalty would conflict with the compensation act, section 3662, Rev. St. 1913, as amended, Laws 1917, ch. 85, sec. 112. This objection seems to be inapplicable, because the 50 per cent. additional payment that is provided by the act does not make the payment in the present case more than $12 a week. The compensation for "waiting time" seems to be reasonable.

Complaint is also made that the statute violates the constitutional guaranty that no person shall be deprived of property without due process of law. We cannot sustain the plaintiffs' argument on this point. Speaking generally, it may be borne in mind that an injured person who comes within the purview of the act is deprived of the right to have a jury pass upon any of the questions that pertain to the injury or to pass upon the measure of damages, and for this reason, among others, the statute, which is remedial in its nature, should be liberally construed. *Parson v. Murphy,* 101 Neb. 542, 16 Negligence and Compensation Cases Annotated, 174. The act is not apparently open to the objection that it is violative of the Constitution in the particular noted by plaintiffs.

The court properly declined to assess an attorney fee as costs under section 3212, Rev. St. 1913, that was invoked by defendant. The compensation act as amended (Laws 1917, ch. 85, sec. 24) provides: "It shall be the

duty of the county attorneys of the several counties and the attorney general of the state to appear as counsel for claimants for compensation and benefits under this article, and to assist and act in an advisory capacity to the compensation commissioner, upon his request." The employers' liability act in its entirety is a summary proceeding. One of its main objects is to facilitate an inexpensive and speedy settlement of controversies between employer and employee that arise out of personal injuries. It does not appear that the county attorney was requested to appear as counsel for claimant or that he refused to appear. That such official would perform his duty in the premises when called upon to act in his official capacity is presumed.

The judgment of the district court is reversed and the cause remanded for a new trial in harmony with the views herein expressed.

REVERSED.

CLARK IMPLEMENT COMPANY, APPELLANT, V. WILLIAM E. WALLACE, APPELLEE.

FILED DECEMBER 14, 1918. No. 20165.

1. **Set-Off**: CODE. The provisions of the Code of Civil Procedure, with respect to set-off, are not exclusive.
2. ———: INSOLVENCY: EQUITY. Insolvency of a party, against whom set-off is sought, may be sufficient ground for a court of equity to allow a set-off which is not provided for by statute.
3. ———: PRICE PAID FOR NOTE. The price paid for a note or claim, sought to be offset in equity, is immaterial.

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

Bernard McNeny, for appellant.

L. H. Blackledge, contra.

ALDRICH, J.

Action in equity to have offset against a judgment, which the defendant Wallace has against the plaintiff, in the sum of $404 and costs, the balance due on a certain note, given by defendant and assigned to the plaintiff by the surety thereon, one Cox, who had paid it and become the holder, on the ground that the defendant is insolvent.

It is contended by defendant, Wallace, that the plaintiff is not the owner of the note and not the real party in interest. The evidence shows that the ownership of the note must be either in the plaintiff or in Cox, who is also a party to the lawsuit, and who asserted no claim of ownership, but the contrary. Inasmuch as, under such circumstances, any judgment had upon the note would forever extinguish the note, so that both Cox and the plaintiff would be estopped to afterwards assert any rights thereunder, it follows that the defendant will not be heard to raise the question which of these two parties, the plaintiff or Cox, is the real owner, when they agree that the plaintiff is.

Cox was a surety upon the note sought to be offset. When he paid it he became the equitable owner thereof and had a right to assign it to the plaintiff. The defendant being insolvent, the plaintiff was entitled in equity, although not under the statute relating to counterclaim and set-off, to have the two payments offset each other, so long as the defendant, Wallace, had no offset or counterclaim against the note in the hands of Cox. The fact that the plaintiff purchased the note from Cox at less than its face value can make no difference.

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

REVERSED.

LETTON and ROSE, JJ., not sitting.

C. E. STEWART, ADMINISTRATOR, APPELLANT, V. C. L. TATE ET AL., APPELLEES.

FILED DECEMBER 26, 1918. No. 20161.

Vendor and Purchaser: RESCISSION. Where, with knowledge of all the facts on which a rescission of a contract may be based, the vendee does some act which prevents him from placing the vendor in *statu quo* he cannot claim a rescission of the contract.

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

Sutton, McKenzie, Cox & Harris and *W. W. Bulman*, for appellant.

Courtright, Sidner & Lee, contra.

MORRISSEY, C. J.

Action to rescind and recover back a payment made on the purchase price of farm lands. From a judgment for defendants, plaintiff appealed. Plaintiff having died, the suit is now prosecuted in the name of the administrator, but wherever the term plaintiff is used in this opinion it refers to the original plaintiff.

Under a written contract, plaintiff purchased two quarter sections of land from defendants, and paid $1,000 on the purchase price at the signing of the contract; $1,100 was thereafter paid and a promissory note for $1,000 executed and delivered. Plaintiff established his home on the land and cultivated it for one season. The contract, as written, required defendants to convey title to plaintiff; but this provision was subsequently modified by an oral agreement, whereby it was agreed that one Parks, who was mutually believed to be the holder of a good record title to the land, should execute the conveyance to plaintiff. It developed that Parks held a perfect title to one quarter section, but that there was an apparent defect in the

title to the other quarter section. The writing provided that time was of the essence of the contract; but the district court found, and the evidence sustains the finding, that plaintiff knew of this apparent defect in the title before making the second payment, and before taking possession of the land. The title was afterwards quieted and perfected in Parks.

In September, 1911, plaintiff removed from the land. Before leaving, he entered into an agreement with one Scow, under which he delivered possession of the land to Scow, and agreed that he might occupy the same until the following March. In November following, through his agent and attorney, he relinquished all his interest in the deeds then on deposit in the Lodgepole bank, and Parks surrendered to plaintiff the $1,000 note that had been given as part of the purchase price, and also paid over to him the $500 which Parks had received from defendants as part of the purchase price. The decree of the district court, which was afterwards affirmed in this court, quieting title to the disputed quarter section in Parks, had not then been entered.

Plaintiff claims that defendants had agreed at the time of the oral modification of the written contract that on or before November 1, 1911, they would furnish an abstract showing a perfect title of record in Parks, and that because this abstract was not so furnished he might elect to rescind the contract and recover back all payments made. In this regard, the evidence does not seem to sustain his contention. Plaintiff was in possession of the land; a deed had been deposited which conveyed good title, although there was an apparent defect in the chain of title which required a decree of court to remedy. There was no eviction of plaintiff. He did not tender back the possession to defendants but delivered possession to another. The conduct of the parties was such as to warrant the court's conclusion that time was not of the essence of the oral agreement.

Having made substantial payments on the purchase price to the parties entitled thereto, and the deeds having been delivered in escrow, and plaintiff being in possession, he became the equitable owner. In place, however, of surrendering up possession to defendants and waiving his rights under the deeds deposited, he placed a tenant in possession, and, for the redelivery of his $1,000 note and $500 in money, he surrendered all rights to Parks that he had under the deed, and thereby estopped himself from making a rescission.

Prior to the entry of the judgment from which this appeal is prosecuted, plaintiff's cause of action was submitted to a jury. There was a verdict returned in favor of plaintiff, which, on defendants' motion for a new trial, was set aside. A jury was then waived and a trial had to the court. Plaintiff now complains that the court was guilty of an abuse of discretion in disturbing the finding of the jury. Since, under the facts disclosed, defendants were entitled to a directed verdict, the court was not guilty of an abuse of discretion. The judgment is

AFFIRMED.

SEDGWICK and ALDRICH, JJ., not sitting.

MARGUERITE RAPP ET AL., APPELLEES, V. PETER MOSCREY ET AL., APPELLANTS.

FILED DECEMBER 26, 1918. No. 20411.

Intoxicating Liquors: ACTION FOR DAMAGES: PETITION. The salient paragraph of the petition, together with the construction placed upon it in open court by its author, set out, and *held* to charge the shooting of plaintiffs' intestate to have been done by one of his companions, by himself, or by an unknown third party.

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

Arthur F. Mullen and *A. S. Ritchie,* for appellants.

W. W. Slabaugh and *Joseph Rapp, Jr., contra.*

MORRISSEY, C. J.

Action for damages under the Slocumb liquor law, now obsolete. From a judgment for plaintiffs, defendants appeal.

Defendants' brief says: "The ten errors relied upon for reversal are all based on the same proposition; that is, the trial court erred in permitting the plaintiffs to recover on evidence that established a different cause of action than the one that was stated in the pleadings."

July 15, 1914, William Rapp, in company with Fred Schroeder and Peter Schroeder, drank intoxicating liquors at the saloon of defendant Moscrey. They also procured at that saloon a quantity of beer, which they carried with them to a point on the south side of Pacific street, in Omaha. There they remained for some time talking together in a noisy, boisterous way. While at this place each of the men named was shot, and, from the wounds there received, each subsequently died. The shooting took place in the darkness of the evening, and there is uncertainty as to how it occurred. After the shooting the Schroeders walked to their home, a short distance from where the shooting occurred, while Rapp walked to the home of a Mr. Hannah, 70 or 80 feet from the scene of the shooting. Before death, each of the parties stated that he had been "shot by Dagoes."

There is nothing to indicate any motive on the part of any person to take the lives of these men. They were friends, and no reason has been suggested for their quarreling, except their intoxication. The petition alleges that "William Rapp was shot, and that the said intoxicating liquors so sold, given and furnished to said William Rapp, Fred Schroeder and Peter Schroeder, and to each of them, and by each of them drunk, * * * caused and rendered the said William Rapp, Fred Schroeder and Peter Schroeder, * * * to become and to be intoxicated, and caused said William Rapp, Fred Schroeder and Peter Schroeder, and each of them, to loiter and delay on their way home from said

saloon, and caused each of them to be unable to protect himself from injury from another or others, and caused each of them while so intoxicated to become boisterous, noisy, careless, reckless, annoying and quarrelsome, * * * to another person, or persons, which other person or persons are unknown to plaintiff, and which intoxicating liquors so causing said William Rapp, Fred Schroeder and Peter Schroeder, and each of them, to become boisterous, rude, noisy, careless, reckless, annoying and quarrelsome and to quarrel with such other person, or persons, caused such other person, or persons, to shoot said William Rapp, and to cause said William Rapp to be shot, * * * and which intoxicating liquors so sold, given and furnished the said William Rapp, as aforesaid, caused and rendered him to be unable to protect himself from injury by or from the said person, or persons, shooting, and caused said William Rapp to be shot and to die."

The phraseology of the petition was called to the attention of the trial court at the close of the plaintiffs' case in chief by motion for a directed verdict.

Defendants pointed out that "the petition is drawn on the theory that the deceased, William Rapp, was killed by some person or persons other than the Schroeders, and the proof is that William Rapp was killed by the Schroeders, or by himself; that plaintiffs' evidence clearly establishes that the deceased, William Rapp, was not killed by a person other than the Schroeders or himself," and a variance was alleged between the allegations of the petition and the proof.

Thereupon attorneys for plaintiffs gave the following as their construction of the allegations of the petition: "The plaintiffs' attorneys, who drew the petition, drew it to apply to the shooting of each one by the other of those three persons or by any other person, as it states that each one was shot by another or others who is not known. That is, it was not known, the name of the person who did the shooting of each of these persons,

whether it was one of the Schroeders, or Rapp, or any other person."

In the brief defendants argue that the petition alleges the shooting to have been done by some person not named therein. It may be that the allegations of the petition are susceptible of the construction contended for by either party; perhaps it might have been more happily phrased. But plaintiffs' theory of the case was fully explained and made known by the statement made in court before defendants had offered any proof. If they were taken by surprise, or in any way prejudiced, in making their defense, they then had an opportunity to apply to the trial court for a suitable order, but they elected to proceed with the trial.

Plaintiffs' theory is that these men engaged in a drunken quarrel and were shot while so engaged, and that it is immaterial whether each shot himself, was shot by one of his companions, or was shot by some person unknown. Notwithstanding the statement of defendants, in their motion for a directed verdict, that plaintiffs' proof showed "that William Rapp was killed by the Schroeders or by himself," it is here argued that the proof shows "that these men, while chatting with each other, were assassinated by some unknown third person," and it is said that this is the theory upon which defendants tried their case. It may be said that there is evidence to support this theory, as well as evidence to support the theory that these men quarreled among themselves, and, during the quarrel, shot one another, or that each shot himself. The court left the jury to determine whether the conduct of these three men was influenced by their intoxication, and whether their intoxicated condition contributed to, or caused, the killing of Rapp. The verdict is an affirmative answer, and there is ample evidence to sustain the verdict.

Criticisms are made of instructions given, and refusal to give instructions requested, but these criti-

cisms are based on the claimed variance between the petition and the proof. Construing the petition as we do, no error appears in the instructions, and the judgment is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

BERYL V. SWANBACK, APPELLEE, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLANT.

FILED DECEMBER 26, 1918. No. 20624.

1. **Insurance:** APPLICATION: CONSTRUCTION: WARRANTIES. When, in an action on a fraternal benefit life insurance certificate, it becomes necessary to determine whether the statements made in the written application are warranties or mere representations, the court will take into consideration the situation of the parties, the subject-matter, and the language employed, and, when it clearly appears that it was the understanding of the parties that the statements should be construed as warranties, the contract will be so construed.

2. ———: WARRANTIES: PLEADING AND PROOF. In order that such warranties shall constitute a defense to such action, it is incumbent upon defendant to plead and prove that the answers were made substantially as written in the application, that they were false in some particular material to the risk, and that defendant relied upon and acted upon them.

3. **Trial:** DIRECTION OF VERDICT. "Where the evidence on the trial in the district court is not conflicting, and reasonable minds cannot differ as to the conclusion to be derived therefrom, it is the duty of the court, when requested, to direct a verdict in accordance with such conclusion." *Nebraska Transfer Co. v. Chicago, B. & Q. R. Co.*, 90 Neb. 488.

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

Tibbets, Morey, Fuller & Tibbets and *D. E. Bradshaw*, for appellant.

J. E. Willits, contra.

MORRISSEY, C. J.

This is an action on a fraternal benefit life insurance certificate. Plaintiff prevailed, and defendant appeals.

The defense relied upon is based on the alleged false representations made by the insured in his application for membership. Such part of the application as is material, reads: "Did you ever fail to obtain life insurance applied for? A. No." The proof shows beyond dispute that, but a short time prior to the making of this application, the insured made application to another company and was rejected. Subsequent to that rejection he talked with an agent of an accident insurance company, and inquired if his rejection by the life insurance company would affect his application for accident insurance. He died within a year after becoming a member of defendant association, of the disease from which he was said to be suffering when he was rejected by the company to which he first applied.

Plaintiff, in reply, alleges that this question was not propounded to the deceased, but the answer was filled in without his knowledge by the defendant's physician. The only testimony in the record on this point is that of the physician. His testimony, on direct examination, is: "Q. Did you read to him this question, 'Did you ever fail to obtain life insurance applied for?' A. I wouldn't swear that I asked him that question. I usually ask the question this way, * * * 'Have you ever been rejected for life insurance?'" On cross-examination he testified: "Q. Did you ask him this question, 'Did you ever fail to obtain life insurance applied for?' A. I wouldn't swear that I asked him that question. I usually ask the question this way, 'Have you ever been rejected for life insurance applied for?' * * * Q. And did you ask him that? A. Yes, sir; there is no question about that."

Giving this testimony a reasonable construction, it appears that the deceased was, in fact, asked, if not the identical question involved, at least one of similar im-

port, which a man of ordinary intelligence could not fail to understand. Furthermore, the deceased had been an insurance agent; this was not his first application for insurance; he was familiar with the business, and there is nothing in the record to warrant the presumption that he was in any way imposed on, or did not understand the contents of his application.

The application forms a part of the contract. We are committed to the rule that, for the purpose of determining whether the statements made in the written application were representations or warranties, the court will take into consideration the situation of the parties, the subject-matter, and the language employed, and, when it clearly appears that it was the intention of the contracting parties to make the statements warranties, the contract will be so construed. But, in order that such warranties shall constitute a defense to an action upon the contract, it is incumbent upon the defendant to plead and prove that the answers were made as written in the application, that they were false in some particular material to the insurance risk, and that defendant relied and acted upon the answers.

In the instant case, defendant, by its pleading and proof, brought itself strictly within the rule. There was no disputed question of fact for the jury, and the court ought to have directed a verdict for defendant.

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

REVERSED AND DISMISSED.

LETTON and ALDRICH, JJ., not sitting.

EMMA SWAN, APPELLEE, V. LINCOLN TERMINAL COMPANY, APPELLANT.

FILED DECEMBER 26, 1918. No. 20868.

1. **Master and Servant:** RELEASE: AVOIDANCE: BURDEN OF PROOF. When the plaintiff in a suit under the employers' liability act has exe-

cuted a release in writing of all further claims for compensation, and received a consideration therefor, but seeks to avoid the release on the ground that it was obtained by fraud and deception, the burden is upon her to establish the fraud.

2. ———: ———: EVIDENCE. In such case, when the amount paid is but a trifling part of the amount for which defendant is liable, that fact may be considered, with other evidence, as tending to show unfair practice, that plaintiff has been overreached, and that the minds of the parties never met in the consummation of a valid and binding settlement.

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

F. M. Hall and *H. W. Baird,* for appellant.

J. C. McReynolds, contra.

MORRISSEY, C. J.

Appeal from a judgment of the district court for Lancaster county in favor of plaintiff, in an action brought under chapter 35 (sections 3551-3696), Rev. St. 1913, as amended by section 127, ch. 85, Laws 1917, known as "Employers' Liability Act."

Plaintiff, while employed as a janitress, sustained a fracture of the right wrist. She immediately called upon the physician and surgeon of the surety company, which is defending in the name of the employer. The surgeon bandaged the arm, apparently without discovering the fracture, and without informing plaintiff of the true condition thereof. In due season plaintiff made application for, and was paid, compensation at the rate to which she was entitled under the statute—$6 a week.

Plaintiff was injured March 5, 1918. Compensation was paid to June 4, 1918, when she was paid $12, and executed a final release differing in form and phraseology from the receipts she had theretofore executed. This receipt was filed with, and approved by, the compensation commissioner. Defendant relies upon this release as a defense to this action. Plaintiff alleges that she was ignorant of its true import and meaning at the time of its execution, and that she was induced to sign

the same because of fraud practiced upon her by the agent of the surety company.

Defendant asserts that the settlement was made in good faith for a valuable consideration and with full knowledge on the part of plaintiff as to the contents of the receipt. There is no special complaint made of the amount of recovery, provided plaintiff is entitled to recover at all. The main question presented is: Will plaintiff be held to the terms of the receipt, or will the receipt be disregarded and she be permitted to recover notwithstanding its execution? Plaintiff suffered a severe and permanent injury. She was entitled to compensation for 150 weeks. There is a dispute between the parties as to the date the release was executed. The paper is dated June 4. Defendant claims it was executed the day it bears date. Plaintiff says it was signed one week later, but we do not regard this as material. There never was any dispute as to the amount she should receive per week. On one or two occasions she was given a check for one week's compensation and signed a receipt prepared and presented by the surety company. At other times she was paid two weeks' compensation and signed a receipt for the proper amount. The receipt relied upon is for $12. It differs somewhat in appearance from the other receipts she had signed, but the amount is the same as the amount named in one or two of the other receipts. She testifies that the agent led her to believe that she was signing a receipt for two weeks' compensation such as she had theretofore signed, while the agent testifies that he allowed her full compensation up to date of receipt, and, by way of compromise or inducement to make a full settlement, paid her for one additional week. The agent is corroborated to some extent by two disinterested witnesses who were present when the receipt was signed. Their testimony, however, is of such character that it is easy to believe that, having no interest in the matter, their recollection of what took place may be at fault. As

bearing upon the weight to be given plaintiff's story, it may be mentioned that at the signing of this release she said to the agent that she was about to leave the city to make a visit. Upon her return two or three weeks later she called upon the agent of the surety company in the usual way and demanded compensation as she had done before. She was then informed that she had made a complete settlement, and further payments were refused.

Considering the character of her injury, and that she was entitled to collect a total compensation of $900, while she received only $84, is it probable that she understood the nature of the receipt at the time of its execution? She was a woman of limited education, 56 years of age, engaged in hard labor, and not likely to examine the papers presented for her signature. This seems especially true when she had theretofore signed receipts for the weekly indemnities paid, and the amount received on this occasion was for no greater amount than that received on other occasions. The agent testified that he informed her that she was making a final settlement. Assuming that he spoke the words, it is not probable she comprehended their meaning, or the purport of the paper. If she did not, the minds of the parties never met in the consummation of a valid contract. *Perry v. Omaha Electric Light & Power Co.*, 99 Neb. 730.

Assuming that there was a valid consideration, the burden is on plaintiff to prove the fraud and deception alleged; but, in reaching a conclusion upon this issue, we must not only consider the statements made by the witnesses, but we must also consider the undisputed facts disclosed.

Upon a consideration of the whole record, we find that the judgment is fully supported, and it is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

STATE, EX REL. P. C. JENSEN ET AL., APPELLEES, V. OMAHA & SOUTHERN INTERURBAN RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 26, 1918. No. 20155.

1. **Railroads:** CROSSING: STATE RAILWAY COMMISSION: POWERS. In a certain sense the railway commission has jurisdiction concerning the crossing of a railway by a public highway. It may in reason prescribe the method in which the crossing shall be made, but it has no power to determine whether or not the highway shall extend across the right of way. The right to determine whether a highway shall extend across a railroad belongs to the county board.
2. **Eminent Domain:** PROCEEDINGS: OBJECTIONS. Objections that there is no legally established highway connecting with the road petitioned for, that there is no necessity for the condemnation, or that the road is sought to be established merely as a driveway for scenic purposes, should have been presented to the county board at the date set for filing objections, and come too late after the road has been established and when it is sought by mandamus to compel the construction of a highway crossing.
3. ———: DAMAGES: OBJECTIONS. This principle also applies to the contention that the damages allowed were inadequate, and that the construction of an overhead crossing by the railroad company would greatly exceed the amount of the damages allowed. The claim for damages should have been presented to the county board, and if the allowance was unsatisfactory, an appeal might have been taken.

Appeal from the district court for Sarpy county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

John L. Webster and *William R. King,* for appellant.

Elmer S. Nickerson, William R. Patrick and *E. H. McCarthy, contra.*

LETTON, J.

This is a proceeding in mandamus brought by the road overseer of district No. 3, in Sarpy county, against the defendant, an interurban railway company, to compel the building of a bridge over the defendant's track

where it is alleged a public road crosses a deep cut on the railroad line. The petition alleges in detail the proceedings for the location and opening of a road 50 feet wide across the right of way, the final establishment of the road and the refusal of respondent to construct a crossing over its tracks.

The respondent answered that the facts alleged in the petition did not justify the issuance of the writ; that the writ is too vague and indefinite, and does not advise the character or material out of which the bridge was to be constructed; that the proposed road is not a public highway, but intended for pleasure riding or driving, and terminates at a point where there is neither a town, city or village, and that neither the county commissioners, nor the court can compel the respondent to erect a bridge for a road to be used only as a pleasure road for driving, and that if required to construct a proper steel structure of sufficient strength to be safe for public travel, it will cost respondent $4,500, for which there has not been awarded adequate damages.

After a hearing, the court awarded a peremptory writ of mandamus. Respondent appeals.

The brief of appellant assigns five errors. The first three of these assignments are based upon the alleged invalidity of the proceedings had in 1909 to establish the "Boulevard Road." The others are, that the writ did not specify the character of the bridge to be constructed, and that the railway commission, or the court alone, has jurisdiction in the matter.

The first point argued is that, after a legal highway has been established, application for a railroad crossing should be made to the railway commission. Several cases are cited in which language is used implying that the railway commission has jurisdiction as to railway crossings over highways. This is true in a certain sense. If crossings were about to be built in such a manner as to jeopardize the running of trains, or to affect the convenience or safety of operation of the

railroads, there can be no doubt that the railway commission would have power to require a different method of crossing to be installed. But it has no power to determine whether or not a highway shall extend across the right of way of a railroad company. This is the function of the county authorities. To give the commission such power would allow it to veto the opening of any public highway which crossed the right of way of a railroad. Neither the constitutional amendment creating the commission, nor the statute defining its powers, confers such authority upon it.

Some years ago a road was established leading from Omaha to Bellevue running along the crest of a ridge near the Missouri river, and descending from the ridge to the lower land occupied by a portion of the village of Bellevue, south and westward of the respondent's right of way. This is known as the "Boulevard Road." The railway line cuts through this ridge at a point north of the west portion of the village, and in order to reach the northwest portion of the village and the college buildings by this road, it was necessary to follow it from the ridge to the low lands, pass through a portion of the village, across the track on one of the streets leading westward, and return up the hill toward the north and west. The buildings of Bellevue College lie almost directly south of the proposed bridge, and are contiguous to the road of which the new road forms a part.

In 1909 a petition was presented to the county board asking for the establishment of a county road 50 feet wide, commencing at a point on the Boulevard Road mentioned, crossing the railroad and terminating at or near the intersection of Nineteenth avenue and Wayne street in the village of Bellevue. Waivers of damages were filed, and the road was located and established. The respondent did not file its consent, and in 1915 proceedings were had in due form to open a highway across the right of way and thus complete the road. Damages

in the amount of $100 were allowed respondent and directed to be paid from the funds of the county. So far as the record shows no objections were made by respondent to the establishment of the road and no appearance made by it at the hearing.

If there was no legally established highway connecting with the road petitioned for across the right of way, and no necessity for the condemnation, as respondent now asserts, it should have appeared and objected on this ground when the establishment of the latter road was under consideration by the county board. It is too late to raise this question now. Neither can the cost of the bridge be considered. This goes to the question of damages. If the amount of damages allowed by the appraisers and county board was insufficient, an appeal might have been taken.

It is said the county board had no jurisdiction to establish this road as it is a mere pleasure drive. The discretion of the county board in the establishment of the road cannot be attacked in this collateral manner. This question also should have been raised at the hearing.

The judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

PATRICK DORCEY, APPELLANT, V. THURSTON COUNTY, APPELLEE.

FILED DECEMBER 26, 1918. No. 20266.

1. **Appeal:** ADMISSION OF EVIDENCE: PRESUMPTION. In a trial to a court without the intervention of a jury, the presumption is that only competent evidence is considered by the court, and if there is sufficient proper evidence to sustain the finding, the admission of other will not be considered prejudicial.
2. **Officers:** SHERIFFS: COMPENSATION OF JAILER. When a man is employed as jailer by the county board with the knowledge and

consent of the sheriff, and is permitted by that officer to have the keys of the jail, to care for the prisoners, and to perform most of the duties of a jailer, knowing that the county is paying for such services, the sheriff is not entitled to the statutory jailer fee. *McFadden v. Cedar County*, 95 Neb. 318.

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

Arthur F. Mullen, for appellant.

R. E. Evans and *Archie M. Smith, contra.*

LETTON, J.

Plaintiff, who was sheriff of Thurston county from 1909 to 1913, presented a bill for $2,025 to the county board for jailer fees for the years 1909 to 1913 inclusive. The bill was disallowed and an appeal taken to the district court. An amended petition was filed, setting forth that the plaintiff acted as jailer during the years named; that prisoners were confined in the county jail during that period to the aggregate number of 960 days, and that he is entitled to recover the sum of $1.50 per day for said services, amounting in all to $1,440. The defendant denies the allegations of the petition as to the number of days prisoners were confined in the jail; denies that at any time during said years plaintiff acted as jailer, or performed the duties of jailer; and alleges that during all of these years one Thomas Head was employed and acted as jailer. It also pleads the statute of limitations as to claims accruing in the year 1909. The reply was a general denial.

A jury was waived, and the case tried to the court, which found there were prisoners confined in the jail during the years 1910, 1911, 1912 and 1913, to the total amount of 960 days, and that the portion of the claims accruing prior to February 3, 1910, is barred by the statute of limitations.

The court further found that Thomas Head, with the knowledge of plaintiff, was employed by the county board on September 23, 1910, as jailer and janitor, and

that ever since said date he has possessed the keys to the jail and performed the services of jailer, except for a few days on account of illness and absence on his part.

The court also found that in 1910 the plaintiff performed services as jailer for a total of 137 days, for which he was entitled to receive $205.50 with interest, and rendered judgment accordingly. Plaintiff appeals.

Errors are assigned as to the admission of certain evidence. In a trial to a court without the intervention of a jury, the presumption is that only competent evidence is considered by the court, and if there is sufficient proper evidence to sustain the finding, the admission of other will not be considered prejudicial.

The evidence sustains the finding as to the employment of Head by the county board. Head testifies that the sheriff spoke to him about being employed as jailer and janitor, said they were going to appoint one, and wanted to know if he would accept the position. He also testified that he did the janitor work, took care of the prisoners, had the keys of the jail, furnished food and water to the prisoners, and looked after light, heat and sanitary conditions; that the sheriff was frequently absent when there were prisoners in the jail; that he was never appointed jailer by the sheriff, never took oath as jailer, but looked to the sheriff for general directions as to his work at the jail. One of the county board testified that the employment of Head was with the knowledge and consent of the sheriff.

On the other hand, the sheriff denies knowledge of the resolution of the county board, and testifies that he acted as jailer, was in charge of and in control of the jail; that he had his office in the jail; that it was a building about 24 by 60 feet with a board partition between the cell rooms and the office; that the writs of mittimus were delivered to him, and whatever records were kept, were made by him, but also admits the rendition of services as testified to by Head. The sheriff had

no deputy, and while he was absent Head had entire charge of the jail and the prisoners. When he was on hand, Head still did all the work about the jail with the assistance of the prisoners. It is true he took no oath, had not been appointed by the sheriff, and there were some portions of the duties of a jailer that he did not perform, but at the same time, as the district court found, the sheriff knew that Head was being paid by the county to act as jailer, and that he was acting in that capacity. It would be manifestly unjust to allow plaintiff to draw compensation for services which the county was paying another man to render. If he expected remuneration, he should have performed the duties of the position, and protested or objected to any one else being appointed, or acting as jailer in any degree.

The court ascertained which portion of the time the plaintiff actually acted as jailer, and rendered judgment accordingly. We find no error therein.

AFFIRMED.

ROSE, J., not sitting.

MARTIN LUTHER ET AL., APPELLANTS, V. MARTIN C. LUTHER, APPELLEE.

MARTIN LUTHER ET AL., APPELLANTS, V. AUGUST F. LUTHER, APPELLEE.

MARTIN LUTHER ET AL., APPELLANTS, V. EDWARD M. LUTHER, APPELLEE.

FILED DECEMBER 26, 1918. No. 20105.

1. **Parol Evidence: DEEDS.** Where a deed reserving a life estate in a farm does not contain the entire contract resulting in the conveyance, grantee may prove by parol that he accepted title on the condition that he should occupy and use the farm for a specified annual rental during the lifetime of grantor, the latter having previously made an oral promise to give grantee a farm for services which he subsequently performed.
2. **Trial: PROFFERED INSTRUCTIONS.** Offered instructions to a jury should be in writing.

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

George L. Loomis and *Courtright, Sidner & Lee,* for appellants.

Frank Dolezal and *J. C. Cook, contra.*

ROSE, J.

Martin Luther, plaintiff, acting for himself and as guardian for Wilhelmene Luther, his second wife, now deceased, commenced three separate actions April 16, 1915, to recover in the aggregate $1,526.25, alleged to be due for farm rentals for the year ending March 1, 1915. June 29, 1910, plaintiff and his second wife had deeded to each defendant a 160-acre farm in Dodge county. Each deed contained a reservation in the following form:

"Subject to a life estate of an undivided three-fourths (¾) of the income of the above described property in favor of Martin Luther and an undivided one-fourth (¼) of the above described property in favor of Wilhelmene Luther which grantors reserve to themselves."

Defendants are sons of plaintiff by his first wife. For several years before the deeds were executed each defendant had occupied and farmed the land conveyed to him and had paid plaintiff annually $2 an acre. In addition to the land conveyed to Martin C. Luther, defendant, he had farmed about 65 acres. The claim against him is based on an annual rental of $4 an acre for the deeded land and $3.50 an acre for the additional tract, the amount demanded from him being $867.50. In addition to the land conveyed to August F. Luther, defendant, he had farmed about 12½ acres of adjoining land. The claim against him is based on an annual rental of $4 an acre for the deeded land and $3.50 an acre for the additional tract, the balance demanded from him being $338.75. The amount of the claim against Edward M. Luther, defendant, is $320, the difference

between the annual rental of his deeded land at $4 an acre and $2 an acre.

At the time of the trial the ages of defendants were approximately as follows: Edward M. Luther, 53; August F. Luther, 49; Martin C. Luther, 47. In defense they pleaded in substance that, after arriving at majority, they performed an oral contract to work for their father on his lands in Dodge county, the consideration being a promise on his part to give to each a farm; that they thus acquired the right to use and to permanently occupy the deeded lands; that the deeds were delivered and accepted under an oral agreement to pay to their father during his lifetime an annual rental of $2 an acre. The reply was a general denial. The actions were consolidated and tried together. The jury found the issues in favor of defendants. From a dismissal of the actions plaintiff has appealed.

Did the trial court err in permitting defendants to prove by parol an oral agreement granting them the right to occupy and use the lands during the lifetime of their father by paying him annually $2 an acre? This is the controlling question presented by the appeal. Plaintiff argues that the trial court violated the rule excluding parol evidence to contradict, change or vary the terms of a written instrument and also disregarded the statute declaring that a lease for a longer period than one year is void unless in writing. Rev. St. 1913, sec. 2625. Defendants were in possession of the deeded lands when the deeds were executed. For many years they had continuously performed for their father the work of farmers on his lands in this state. Later they farmed tracts of his lands for themselves. Their mother died. Their father remarried, lived in Iowa and there raised a second family, but eventually returned to Dodge county. He had acquired considerable property in both states. From the time the deeds were executed in 1910 until plaintiff brought these suits in 1915 defendants paid their father annually $2 an acre.

A half-brother, who had been raised in Iowa, but who had become a neighbor of defendants in Dodge county, Nebraska, aided plaintiff in this litigation. Plaintiff had promised each defendant a farm for services which were subsequently performed. The deeds were executed under the circumstances narrated. The evidence is conclusive that the deeds did not contain the entire contract resulting in their execution. All parties so understand the transactions. Each of two defendants, for the benefit of a half-sister, subsequently executed a mortgage on the land described in his deed. These obligations had been in contemplation but the deeds make no reference to them. The deeds were accepted only on condition that the right to occupy and use the deeded lands should continue for the annual compensation of $2 an acre during the lifetime of plaintiff. This condition does not contradict the terms of the written instrument. Under such circumstances, the oral testimony showing the condition on which the deeds were accepted by the sons in part performance of the original promise of their father to give each a farm and the oral evidence showing the agreement not reduced to writing do not violate the statute of frauds nor the rule that a written contract cannot be varied or contradicted by parol. 4 Wigmore, Evidence, sec. 2439; *Jordan v. Estate of Warner,* 107 Wis. 539; *Bever v. Bever,* 144 Ind. 157; *Slocum v. Bracy,* 55 Minn. 249; *Smith v. Pfluger,* 126 Wis. 253, 2 L. R. A. n. s. 783; *Birks v. Gillett,* 13 Ill. App. 369. The defense thus established defeats also the cause of action in favor of plaintiff's second wife, now deceased.

Plaintiff contends further that defendant Martin C. Luther still owes $77.50 and August F. Luther $18.75 even if plaintiff did by contract limit the annual rental for the deeded land to $2 an acre. On the record presented the point does not seem to be well taken. Specific sums for full compensation based on a higher rental were demanded by plaintiff in his petitions and

in his requests for peremptory instructions. Plaintiff pursued this course throughout the trial. This was the theory on which the cases were contested. The feature of a partial recovery applicable to two defendants only in consolidated actions against three defendants was not called to the attention of the trial court by the offering of an instruction in writing as required by statute. Rev. St. 1913, sec. 7850. This phase of the case, however, was called to the attention of the trial court by an oral statement after the written instructions had been given to the jury, but such a method does not meet the statutory requirements. There is no substantial ground for reversing the judgments.

AFFIRMED.

SEDGWICK and ALDRICH, JJ., not participating.

GEORGE H. GILLAND, APPELLEE, v. HOMER HONEYWELL, APPELLANT.

FILED DECEMBER 26, 1918. No. 20137.

1. **Bills and Notes:** RENEWAL: DISCHARGE OF OBLIGATION. "A note taken for a pre-existing debt or as a renewal of another note is not a payment or discharge of the debt, unless by express agreement it is accepted as such payment or discharge." *Harvey v. First Nat. Bank*, 56 Neb. 320, followed.

2. ———: ———. Nor will the fact that the renewal note was not signed by the original maker, a corporation, but by its successor, a corporation, which took over its business and assets and assumed its liabilities, make any difference in the absence of such agreement.

3. ———: ———: PAYMENT. "Whether it is payment or not is to be determined from the intention of the parties as shown by the acts, facts, and circumstances accompanying and attendant upon the transaction in question." *Harvey v. First Nat. Bank*, 56 Neb. 320.

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

Strode & Beghtol, for appellant.

Burkett, Wilson & Brown, contra.

CORNISH, J.

On June 1, 1908, plaintiff loaned the La Prele Ditch & Reservoir Company $12,000, taking as collateral the notes sued on and others. On February 1, 1912, the North Platte Valley Irrigation Company which had taken over the business and the assets of the La Prele Company, assuming its liabilities, made payments upon the note, reduced the amount due to $6,023.68, and gave its renewal note to the plaintiff for that amount; the plaintiff surrendering to it the old note and part of the collateral and retaining part. From a judgment against the defendant as maker of four of the collateral notes, above mentioned, given to the La Prele Company, he appeals. The jury found that the plaintiff was holder of the collateral in good faith and without notice of defendant's claim that the notes were without consideration.

Defendant contended, and requested instructions accordingly, which were refused, that the transaction of 1912 amounted to a discharge of the La Prele Company's obligation and released the collateral, or constituted a repledging of the collateral notes, so that, as to the notes maturing before February 1, 1912, plaintiff could not under the negotiable instrument act be an innocent purchaser. Primarily, the question is: What was the contract betwen the two companies? What did they intend and agree to? Defendant, not being a party to the agreement, could have no greater rights than the La Prele Company would have. It is no doubt true that, if in the transaction of 1912 the parties intended a payment and discharge of the original debt, then its effect would be to release the collateral and entitle the pledgor to its return.

We held in *Harvey v. First Nat. Bank,* 56 Neb. 320: "A note taken for a preexisting debt or as a renewal of

another note is not a payment or discharge of the debt, unless by express agreement it is accepted as such payment or discharge." Here there is no evidence of such agreement, but the contrary. No new consideration was paid, and plaintiff retained and was permitted to retain part of his collateral security.

Nor should the fact that the renewal note was given by the new company be permitted to impair the plaintiff's rights. The new company stood for and was the old company. No repledging of the collateral was necessary. The plaintiff had a right to hold the collateral until the debt, which it was pledged to secure, was finally discharged. It was pledged to secure the indebtedness, rather than any particular evidence of it. In the absence of an agreement to the contrary, the taking of the new note, signed by the maker or his successor, is only the taking of new evidence of the old indebtedness. *Young v. Hibbs,* 5 Neb. 433; *First Nat. Bank v. McGrath & Sons Co.,* 111 Miss. 872; 7 Cyc. 877; *Pinney v. Kimpton,* 46 Vt. 80; *Housum v. Rogers,* 40 Pa. St. 190.

The renewal note was signed by the company's treasurer. The defendant, without having pleaded it as a defense, suggests that the record does not show the treasurer's authority. We do not think this question was in issue. The evidence, however, does show that the new company received the benefits of the note, has knowingly retained the proceeds, and acquiesced in it as its obligation. It would be estopped to deny that the note was its obligation. *Willow Springs Irrigation District v. Wilson,* 74 Neb. 269; *Barber v. Stromberg-Carlson Telephone Mfg. Co.,* 81 Neb. 517; *Second Nat. Bank v. Snoqualmie Trust Co.,* 83 Neb. 645.

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

NEMAHA COUNTY BANK, APPELLANT, V. COUNTY BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

FILED DECEMBER 26, 1918. No. 20180.

Taxation: ASSESSMENT: BANK STOCK. In making the assessment of the total value of shares of stock for purposes of taxation, in a banking institution, as provided for in section 6343, Rev. St. 1913, as amended in chapter 108, Laws 1915, the assessor should include all the property of the bank and assets of every description at their true value. Mortgage securities, mentioned in the section, upon which the mortgagor has agreed to pay the tax, should not be excluded; nor should they be deducted from the total valuation of the shares of capital stock, in arriving at the value of each share which is the unit of taxation.

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

Lambert & Armstrong, for appellant.

Ernest F. Armstrong, contra.

L. M. Pemberton, amicus curiæ.

CORNISH, J.

The inquiry is whether, in the assessment of the shares of stock in a banking corporation, there should be deducted from the total valuation of the shares the real estate mortgage securities, forming part of the bank's assets. The bank, plaintiff and appellant, might say that the question would be more fairly put as follows: Should such assets be considered at all by the assessor in assessing the value of the shares of stock to the owners thereof? In view of the constitutional provision that all property must be taxed in proportion to value, it is difficult to say that any of the property of the bank shall not be "considered at all." If considered in arriving at the value of shares, then, as a matter of simple arithemetic, it must be either included in or deducted from that total valuation of the bank's assets, which, divided by the number of shares, constitutes the value of each share.

Section 6343, Rev. St. 1913, as amended in chapter 108, laws 1915, prescribes the method of taxing banks. The assessor is required to determine "the true value of each share of stock," assessing it "as similar property belonging to other corporations and individuals" is assessed, taking into account its market value. The names of the owners of the stock should be shown. The bank is required to pay the taxes, having a lien upon the stock for the same. The section also contains a provision as follows: "Whenever any such bank, association or company shall have acquired real estate which is assessed separately, the assessed value of such real estate shall be deducted from the valuation of the capital stock of the association or company. *Provided,* mortgages, trust deeds and all other liens or interests in real estate less than a fee title and held as security for loans shall not be considered or assessed as part of the capital stock for purposes of taxation, and shall not be deducted from the capital, surplus or undivided profits." The last sentence of this quotation constituted the amendment of 1915.

Sections 6349-6353, Rev. St. 1913, enacted in 1911, provide for the taxation of real estate mortgages. They are declared to be an "interest in real estate for the purposes of assessment and taxation." Rev. St. 1913, sec. 6350. If the mortgagor agrees to pay the tax on the amount of the mortgage interest, then the mortgagee is not taxed thereon; otherwise, he is. In the instant case, the mortgages in controversy, held by the bank, contained provisions that the mortgagor should pay the tax.

Under the statute as it was from 1911 to 1915, we held that, mortgage securities being declared real estate, the assessor, in arriving at the true value of the shares of stock, should deduct from the total valuation of the (shares of) capital stock the amount of such securities held by the bank. *First Trust Co. v. Lancaster County,* 93 Neb. 792, 795. Following this deci-

sion the amendment above noted was passed in 1915. We are called upon to construe the meaning of this amendment.

The federal national bank act, while not bearing directly upon the issue, is instructive in the matter of interpretation. Under the federal decisions, national banks are regarded as agencies of the government, impossible to be taxed by the states except as taxation is permitted by the federal law. *State v. Fleming,* 70 Neb. 529, 536; 3 U. S. S. A. 900; 6 Fed. St. Ann. 796, sec. 5219, and cases cited. The federal law permits taxation of the shares of stock to the stockholder, to be paid by the bank, and taxation of real estate owned by the bank to the bank itself. Taxation of the assets or capital stock of the bank to the bank is not permitted except in the case of real estate. For that reason an attempt by the state to tax mortgage securities to a national bank, if the federal courts would consider them as personal property, not real estate (as they probably would), would be contrary to the federal law. The states, wishing their local banking institutions to be upon as favorable a footing as national banks, have uniformly followed the federal law. In this state however, unlike other states we have never, in a strict sense, taxed real estate to the bank, as we might have done. When we have taxed real estate belonging to the bank, we have considered it as part of the value of the (shares of) capital stock otherwise assessed, and, accordingly, have deducted it from the total valuation of the shares in accordance with the direct provision of our statute above quoted.

In the absence of laws, state or federal, forbidding it, there is no reason in the law why the entire capital stock of the corporation, consisting of its cash, personalty or realty, may not be taxed to the bank, in addition to a tax on the shares to the owner. Shares of stock and capital stock represent different property rights and may be separately assessed. Shares of

stock represent a liability of the bank. The words "capital stock" in the statute mean shares of stock which are the unit of taxation. The context shows it, and such must have been the meaning, because, under the federal law, a tax on what is technically capital stock is not permitted.

Consistent with the law and our decisions, assessors heretofore, in assessing shares, have considered all the assets of the bank, "including all property and assets of every description." *First Trust Co. v. Lancaster County, supra.* How else could he do it under the Constitution and his oath to assess at the true value? If among the assets was included real estate to be assessed separately, he considered it as part of the shares of stock and deducted it from the total valuation. If not included, then how could it be deducted? When, as in *City Trust Co. v. Douglas County,* 101 Neb. 792, mortgages were taxed to the bank as real estate in another county, we held that the deduction must be made; otherwise, the shareholders would be taxed twice on the same property, thereby clearly holding that the mortgages had been considered and assessed as part of the shares of capital stock.

It may be urged that there is something fictitious in calling what is left after the deduction the true value of the stock. That is true, unless we consider the values deducted as part of the stock. So considered, no oath is broken and the stock is truly assessed.

And now comes the amendment of 1915, saying that such securities shall no longer "be considered or assessed as part of the capital stock for purposes of taxation," and then, to make it emphatic, adding the words, "and shall not be deducted from the capital, surplus or undivided profits." This means that these securities shall not be separately assessed as part of the capital stock, and hence no occasion for deduction arises. The intent is to forbid assessing them as real estate of the bank. When, however, they were so as-

sessed as in *City Trust Co. v. Douglas County, supra,* and the bank was made to pay the tax, the deduction must be made for two reasons: First. As stated in the opinion, not to do so would be double taxation on the shares, or, rather, an overvaluation of the stock, contrary to the constitutional provision of taxation in proportion to value. Second. As applied to a national bank, it would violate the federal law in not permitting taxation on personalty or capital stock, as such.

When, as in the instant case, no attempt is made to tax the bank or shareholders on the securities, no deduction should be made, and the action of the taxing authorities in Nemaha county should be upheld.

If it is contended that, equitably considered, the owners of the shares are the owners and proprietors of the bank, and that not to make the deduction amounts to double taxation, since the valuation of the shares includes the mortgages assessed to the mortgagor, it must be answered that, if this is double taxation, then such taxation is common. The two interests represent separate property rights and therefore each is taxable. This was always the rule until the mortgage tax law was enacted. It is the rule to-day, if the owner of a farm has given only a note for the remainder due upon it. A chattel mortgage is taxed against the holder and the mortgaged chattel against the owner. The farmer's implement is taxed against him and what he owes on it is taxed against the implement dealer. The owner of a bunch of fat hogs must pay taxes on their full value, even though he could show that the corn which fattened them was purchased from a neighbor, who had paid his taxes upon the corn. Objectionable double taxation occurs when the property assessed is overvalued. Banks have no good reason to complain. They deal in these securities voluntarily. This state has never attempted to tax the bank itself upon any of its property, not even its real estate. An individual cannot deduct his debts and liabilities from his assets

so as to be taxed on net worth alone, as these institutions may do. An individual cannot go into the banking business. A bank with $100,000 capital may have $1,000,000 from its depositors, which it is permitted to use without paying taxes thereon. Under the contrary rule, a bank, by investing its capital in these securities, might do a business from year to year and never pay a cent of taxes to the state. This is not consistent with the spirit, nor, we think, with the letter of our Constitution.

What we decide is that, in assessing shares of stock for taxation, everything that enters into value must be included, unless it has been separately assessed. In so deciding, we say nothing as to how mortgage securities should be assessed for taxation. It is the shares of stock which are being assessed. The mortgage security, owned by the corporation, is one thing; the share of stock, owned by the individual, is another and distinct thing. The corporation's right to resist taxation upon its mortgage securities, contrary to the mortgage tax statute, if it were attempted, is one thing; the right of an individual shareholder to resist taxation on his shares of stock, according to true value, is an altogether different thing. In legal contemplation, it is the shareholder and not the bank which is being taxed. We leave banks and individuals, as holders of mortgage securities, upon the same footing.

It appears that among the mortgages which were sought to be deducted there were some, amounting in all to $12,700.88, upon which the bank was liable to pay the taxes in the county where the land lay. These fall under the rule announced in *City Trust Co. v. Douglas County, supra,* and hence the assessor should have deducted this amount from the value of the stock.

The judgment of the district court is modified so as to require the reduction of the assessed value to the extent of $12,700.88, and is affirmed as thus modified.

AFFIRMED AS MODIFIED.

SEDGWICK, J., dissenting.

I think that there are matters in the decision in this case that may mislead those whose interests are affected, and may cause difficulty in applying the law in the future.

"Double taxation is common," but it is always avoided if practicable. Prior to the act of 1911, the farmer who could not make full payment for his farm was compelled to mortgage it. He still paid taxes on the full value of his farm, although he virtually owned only a part interest therein. His creditor also paid taxes on the mortgage interest, and, of course, he added this tax to the rate of interest he exacted on the loan. This was double taxation on the farmer who paid taxes on the value of the farm, and paid an additional interest equal to the tax on the mortgage. As a mortgage is a conveyance of real estate for a specified purpose and is an interest in real estate, and made a matter of public record the same as an unconditional deed, it was thought that this double taxation might be avoided, and the act of 1911 (Laws 1911, ch. 105), entitled "An act to provide for the taxation of mortgages of real property and to prevent double taxation on encumbered property in the state," was enacted for that purpose. It provides: "The words 'real property' 'real estate,' 'and lands,' shall include all property a conveyance whereof may be recorded by a register of deeds or county clerk under existing laws" (section 1); and that any recorded instrument conveying or retaining an interest in real estate should be regarded as a mortgage. It further provides: "A mortgage on real estate in this state is hereby declared to be an interest in real estate for the purposes of assessment and taxation. The amount and value of any mortgage upon real estate in this state shall be assessed and taxed to the mortgagee or his assigns, and the taxes levied thereon shall be a lien on the mortgage interest; and the excess in value of the real estate above the mort-

gage or mortgages thereon shall be assessed and taxed to the mortgagor or owner of the premises and be a lien on the owner's interest." Section 2. If the land is sold for taxes, "the holder of either the interest of the mortgagor or mortgagee may redeem from such sale the interest sold; and the amount paid in redemption shall be treated and cause the same rights to accrue in favor of the party making the payment as if payment had been made before sale." Section 2. The proper county officer shall "examine the records of mortgages filed, and make a record in the assessment book against the land covered thereby, of any mortgages and the amount of such mortgage and the name of the mortgagee, or assignee. The assessor shall at the time the property is assessed, assess the mortgage interest and the value of the real property above the mortgage interest separately. * * * Provided, that the total assessed value of any real property, including the interest of the mortgagor and mortgagee, shall not be changed excepting when all the real property of the county is assessed, unless the value of said property is changed by reason of a change in the improvements thereon. * * * When it is provided and agreed in any mortgage, that the mortgagor shall and will pay the tax levied upon the mortgage, or the debt secured thereby, that such assessor or county clerk shall not enter said mortgage for separate assessment and taxation, but both interests shall be assessed and taxed to the mortgagor or owner of the property mortgaged." Section 3. "Mortgages on lands in this state filed on and after said date (July 1, 1911) shall not be taxed in any other manner than herein provided." Section 5.

The suggestion that "an attempt by the state to tax mortgage securities to a national bank, if the federal courts would consider them as personal property, not real estate (as they probably would), would be contrary to the federal law," is confusing, since

a mortgage is a deed of real estate executed with all the formalities of any deed, and entitled to record as such. If state laws cannot tax such interests in land as real estate, there must be some principle in the mind of the court that is not made clear.

Section 6343, Rev. St., 1913, provided for the assessment of the property of banks and similar institutions, and chapter 108, Laws 1915, amended that section. The change related only to "interests in real estate less than a fee title." It did not repeal nor refer to the act of 1911, which provided specifically how such interests should be taxed, and that they "shall not be taxed in any other manner than herein provided." Therefore, it must not be considered to amend or change the former act, nor to make an unconstitutional attempt to do so, if it is capable of a construction either auxiliary to or in harmony with that statute. In construing these two statutes, we are limited to the language of the statutes themselves, and if there are ambiguities we may consider the record of their enactment. We cannot consider uncertain and possibly interested reports as to what certain members of the legislature then thought the effect and result of their legislation might be. The former act provided specifically (section 3) that the interest conveyed by the mortgage, and of course the remaining estate, should both be taxed in the county where the land lay, and the tax thereon should be paid there. It is the only statute we have that does provide specifically for assessing and taxing them. The amendment does not attempt to provide for assessing or taxing them. It contains nothing but two negatives—that such interests in real estate "shall *not* be considered or assessed as part of the capital stock for purposes of taxation, and shall *not* be deducted from the capital, surplus or undivided profits." Laws 1915, ch. 108. This is in entire harmony with the former act. The tax is paid on these interests in another county, and if the purpose of the entire

legislation on the subject is to be accomplished to "provide for the taxation of mortgages of real property and to prevent double taxation on encumbered property in the state," they cannot be taxed "as a part of the capital stock," and should neither be counted as part of the capital stock for taxation nor deducted therefrom. The distinction between taxing real estate to the bank, and taxing it to the stockholders who own the bank and all of its assets, is confusing, especially in connection with the theory that, "in the absence of laws, state or federal, forbidding it, there is no reason in the law why the entire capital stock of the corporation, consisting of its cash, personalty, or realty, may not be taxed to the bank, in addition to a tax on the shares to the owner." Almost anything can be done "in the absence of laws" forbidding it. But our Constitution requires that "every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises." Const., art. IX, sec. 1. And the statutes we are construing forbid the taxation of such interests in land "in any other manner" than those statutes provide. The general provision of section 6343, Rev. St. 1913, as amended by the act of 1915, that the capital stock shall be listed by the assessor as assessed by him, and returns made as other returns are made, and the language of the exception expressed in the proviso added to the section that interests in real estate less than a fee title shall not be "assessed as part of the capital stock," nor deducted therefrom, are construed as requiring that such interest shall be assessed as a part of the capital stock. The reason suggested is that "assessors heretofore, in assessing shares, have considered all the assets of the bank, 'including all property and assets of every description.' * * * How else could he do it under the Constitution and his oath to assess at the true value? If among the assets was included real estate to be assessed separately, he considered it as part of the shares of stock and deducted it

from the total valuation. If not included, then how could it be deducted?" This language seems to need explanation. To assess is to fix the valuation for taxation. The valuation returned by the assessor for taxation does not include the value of the real estate separately assessed, whether it is first included in the value of the shares and then taken out to find the value assessed, or is not included in the value of the shares and therefore not deducted. In neither case is real estate, which is assessed separately, assessed in the shares of stock.

It is also said: "Shares of stock represent a liability of the bank. The words 'capital stock' in the statute mean shares of stock which are the unit of taxation. The context shows it, and such must have been the meaning, because, under the federal law, a tax on what is technically capital stock is not permitted." It is not made clear why real estate values must be assessed in shares of stock when "under the federal law, a tax on what is technically capital stock is not permitted." When this statute requires that such property shall not be assessed as part of the capital stock, "the words 'capital stock' in the statute mean shares of stock," and are not used technically by the legislature. But what is the difference between "capital stock" and "shares of stock," either commonly or technically? Heretofore generally it has been considered that there may be for some purposes a difference between the capital of a bank and the stock or shares representing the property and assets of the banking corporation, but that "bank stock," "bank shares," shares of stock," "capital stock," "shares of capital stock," and other similar expressions have the same meaning commonly and technically. That is, there may be for some purposes a technical difference between capital and stock, but stock is stock for all purposes. The statute says that such interest in real estate "shall not be considered or assessed as part of the capital stock for purposes of taxation." Laws 1915, ch. 108. Is the

word "not" in the statute canceled? Why is it that the supposed technical difference between "capital stock" and "shares of stock" requires that the word "not" shall be disregarded?

What is the difference to the shareholders whether any particular piece of property is taxed to the bank, or in the shares of stock? I suppose it is still true that the shares of stock represent all of the assets, real and personal, of the bank, and the shareholders own the bank and all of its property, so that, if any article of property is injured or taxed, the loss falls upon the shareholders. If property then is taxed to the bank, and its value is also included in the shares that are assessed to the stockholders, they suffer taxation twice on the same valuation. This property is assessed in the county where the land lies. If the banking business is in a distant county, the assessor must still assess the shares of stock and now must include this property in its valuation.

I am afraid that it is not made clear which assessor has jurisdiction. They might both assess the mortgage interest, but, of course, this is not intended, as that would be triple taxation. There are two distinct methods of assessing banks. If banks or shares of banks are assessed upon their tangible property only, and their franchise to do business given them by the state is not included, some courts have intimated that if we tax their shares of stock which include all property and also tax real estate to the bank, if the value so doubly taxed is not too great, the bank will after all not be paying to the state more than a reasonable tax on the real value of the franchise and the value of the property of the bank. Some of the states tax upon that theory, and the federal statute allows them to so tax national banks, if they tax their state banks in that way. This is all that there is to the federal statute upon the subject of taxing shares of national banks by states. Our state has adopted and con-

tinually practiced a more equitable plan. The franchise must be valued by the assessor in valuing the shares for assessment. The banks are required to furnish information for that purpose. They must return the amount of capital, the dividends received thereon, reserve, etc., from which the assessor must find the value of the right to do a banking business and the protection of such business by the state. There is no occasion in our state to resort to double taxation or any subterfuge to get even on that score. It is not necessary "to say that any of the property of the bank shall not be 'considered at all.'" But it is fair to say that any interest in real estate shall be taxed in the county where the land is, and that such interest shall not be included in or deducted from the shares of stock, which include the franchise and all tangible property represented by and included in such shares.

It might be desirable to explain whether it is intended to revert to the old practice before the statute of 1911 was enacted to "prevent double taxation on encumbered property in the state." It is said that we are committed to the rule that, when "mortgages were taxed to the bank as real estate in another county, * * * the deduction must be made." But, if the mortgagor has agreed to pay the tax on the mortgage interest, it must also be taxed to the shareholders. In that case the money loaner would add the tax to the interest charges and in that way the borrower would pay it twice. He would gain nothing by agreeing to pay the tax, and of course would not make such agreement. Would this bring us back to the old way of double taxation of the debtor, or would it merely prevent borrowing from banks and similar institutions, and yet enable the debtor to obtain his money to finish paying for his farm from private parties who will be more favorably situated to make such loans?

The majority opinion says that in *First Trust Co. v. Lancaster County*, 93 Neb. 792, 795, "we held that,

mortgage securities being declared real estate, the assessor, in arriving at the true value of the shares of stock, should deduct from the total valuation of the (shares of) capital stock the amount of such securities held by the bank." And, in the recent case cited, *City Trust Co. v. Douglas County,* 101 Neb. 792, it is held that the mortgage interest is real estate if the mortgagee is to pay the tax thereon, and, being then real estate, it must not be taxed as a part of the shares. And this present decision requires the assessor to deduct mortgages of real estate in assessing shares of stock if the bank is to pay the tax thereon. This, I suppose, is because such mortgage interests are real estate; there could be no other reason. Is it really intended to decide that a conditional deed will convey real estate if one party is to pay the tax upon the property conveyed, but if the other party is to pay the tax then the property conveyed is not real estate?

We all understand that, "in assessing shares of stock for taxation, everything that enters into value must be included, unless it has been separately assessed." But if the interest in land conveyed by a mortgage is real estate when the tax thereon is paid by one of the parties to such conveyance as well as when it is paid by the other party, then the interest we are considering is real estate. This, we have now three times decided. And, if the assessor shall "assess the mortgage interest and the value of the real property above the mortgage interest separately," where the land is, though in a far distant county, and cannot assess it in any other manner, is it separately assessed? What is meant by the statement that, "In so deciding, we say nothing as to how mortgage securities should be assessed for taxation?" when it is also said, "It is the shares of stock which are being assessed?" Is the share of stock something distinct from value? We have heretofore supposed that it was the value of the share that was being assessed. If the value of real estate is

included in the assets of the bank, as shown upon its books, then the total value of the shares is not assessed at all, but the value of such real estate which has already been assessed is deducted from the book value of the assets, and it is the remaining value of the shares that is assessed. To comply with the statute, real estate securities must be kept in an account by themselves, and must not be mingled with general assets, and therefore are not included in nor deducted from the general assets for taxation.

A new principle is introduced into our law by the decision that "the corporation's right to resist taxation upon its mortgage securities, contrary to the mortgage tax statute, if it were attempted, is one thing; the right of an individual shareholder to resist taxation on his shares of stock, according to true value, is an altogether different thing." Does the shareholder not own the "mortgage securities?" Does he own the banking house? Does he own anything but a piece of paper? The fiction that the shares of stock can be assessed at their full value, which included all property of the corporation of whatever nature, and certain specified articles of property may also be assessed again to the bank, has not been allowed in any jurisdiction except when the value of the franchise or other valuable rights have not been supposed to be included in the general value of the property and assets. This has in some places been used as a subterfuge to get even with the banks. Heretofore our state has never resorted to such practice. The assessor, regarding the reserve, etc., and especially the net earnings and the dividends, can make a fair estimate of the value of the franchise, etc., and must include such value as value to be assessed. The value of the franchise is not deducted from the book value of the assets, but other property separately assessed is either not included in the book value of assets, or, if it is mingled with the value of the assets generally, it is deducted before assessing the

shares, and it is only the remaining value that is assessed.

Why say, "In legal contemplation, it is the shareholder, and not the bank, which is being taxed," when we know that all taxes, whether nominally assessed against the shares or against the bank, must be borne by the shareholders?

Deciding that "we leave banks and individuals, as holders of mortgage securities, upon the same footing," means, I suppose, either that individuals who hold mortgage interests in lands must pay taxes thereon, although the mortgagor pays taxes on the entire value of the land, or else it means that the statute which requires that such interests must be assessed in a distant county where the land is, and so pay local as well as general taxes, and that such interests "shall not be taxed in any other manner," is void as to banks. But, if the latter, how will it be with individuals? Will they be taxed on such securities in the county where they reside, or in a distant county where the land is? This last question is important, as it will be a hardship to require one who is not a resident of a city to pay city taxes, if banks are not so required.

So far as I can see, this decision as a whole introduces abstract theories of economy and taxation into our statutes in such a way as to create great confusion, and I cannot concur.

FRANCES F. WILEY ET AL., APPELLEES, V. NATIONAL SURETY COMPANY ET AL., APPELLANTS.

FILED DECEMBER 26, 1918. No. 20158.

1. **Partnership: TORTS: VENUE.** The liability of the members of a partnership for a tort that grows out of the partnership business is joint and several, and they may be sued in the county where one of the members resides, and summons may be issued to other counties for any person participating in the tort.

2. **Intoxicating Liquors:** VERDICT: JUDGMENT. In an action against licensed saloon-keepers and their sureties for damages for loss of support on account of intoxicants sold to plaintiff's husband, in which the jury returned a verdict against all defendants for an amount in excess of the sum stipulated in the bond, the district court has power to render judgment against the principal defendants for the full amount of the verdict, and may also render judgment against the sureties for the sum stipulated in the bond. The rule announced in *Bergmann v. Koehn*, 99 Neb. 525, and reaffirmed in *Hauth v. Sambo*, 100 Neb. 160, is adhered to.
3. ———: LOSS OF SUPPORT: LIABILITY. Saloon-keepers who contribute by the sale of even a small quantity of intoxicants to a person while he is forming the drink habit and their sureties are liable in damages to the parties named in the statute for the loss of support.
4. **Evidence:** MORTALITY TABLES. In an action by a wife against licensed saloon-keepers for loss of support occasioned by her husband becoming totally incapacitated by intoxicants sold to him by such saloon-keepers, and from which he subsequently died, *held*, the Carlisle table of mortality is competent evidence of the life expectancy of the decedent.
5. **Damages.** The evidence examined, discussed in the opinion, and *held*, a verdict for $6,000 is not excessive.

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

T. J. Doyle and *Barnhart & Stewart*, for appellants.

Kelsey & Rice and *O. S. Spillman, contra.*

DEAN, J.

Mrs. Frances F. Wiley, in behalf of herself and two minor children, sued certain licensed saloon-keepers and the sureties on their respective bonds in Madison county, under the Slocumb law (Rev. St. 1913, ch. 40), to recover damages for total loss of support said to have been suffered by plaintiffs because of the sale of intoxicating liquors to her husband from May 1, 1910, to September 1, 1912, from the effects of which he subsequently died. Plaintiffs recovered judgment for $6,000 against the principals named in the bonds and $5,000 against the sureties; the latter sum being the amount of the liability named in each bond. All defendants appealed.

The defendants who were held liable for the judgment, except Ray Weber, are nonresidents of Madison county. The saloons of all principal defendants were located in Pierce county. Weber was the only defendant who was served with summons in Madison county. All defendants appeared specially and objected to the jurisdiction of the court on the ground that they were not lawfully served with summons. Defendants argue that the jurisdiction of the court depends alone on the service on Ray Weber, a member of the partnership of Smith & Weber, then doing a saloon business in Pierce county, and they insist that the partnership of which Weber was a member could lawfully be served with process only in the county where the partnership is located, and that the service on Weber was therefore void. We do not believe that the law contended for by defendants is applicable to the present case. The objections to jurisdiction were properly overruled.

The liability of the members of a partnership for a tort growing out of the partnership business is joint and several, and when the partners are sued and served with summons as individuals, as happened in this case, they may be sued in the county where one of their members resides, and summons may be issued to other counties against any person participating in the tort. 20 R. C. L. 914, sec. 126; 1 Bates, Partnership, sec. 471; *Rogers v. Ponet,* 21 Cal. App. 577; *Mathre v. Story City Drug Co.,* 130 Ia. 111, 8 Ann. Cas. 275; *In re Peck,* 206 N. Y. 55, 41 L. R. A. n. s. 1223.

Plaintiff's husband was a physican. They were married in 1904 when they were each about 25 years of age. From that time the family home was at the village of Osmond until after Dr. Wiley died. He successfully practiced his profession there until about one year before his death. At first they lived in rented property, but in 1909 they bought a home for $1,500, on which they paid $500. When they came to Osmond the doctor was of good physique and mentality, college bred, and well

equipped for a sucessful professional career. That he acquired and persisted in the drink habit at the respective saloons of the principal defendants at Osmond and at Pierce in the years 1910, 1911, and 1912, until he became totally incapacitated from earning a livelihood for his family, and that he subsequently died of alcoholism, is amply supported by the evidence. It would be impossible, nor is it required under the law, to determine from the evidence the degree of guilt of the respective saloon-keepers. Under the sweeping terms of the Slocumb law, all are alike guilty whether they furnished much or but a small quantity of intoxicating liquor to Dr. Wiley while the drink habit was being formed. *Juckett v. Brennaman,* 99 Neb. 755. In a like case it was held that a saloon-keeper who furnished intoxicants to plaintiff's husband would not be released from liability even though the liquor was not furnished until after the husband had become a confirmed inebriate. *Yechout v. Tesnohlidek,* 97 Neb. 387. This was on the ground that under such conditions the furnishing of intoxicants would tend to hold the husband in his unfortunate state and prevent restoration.

A fruitless effort was made to show that the doctor was addicted to the morphine habit, but the proof was confined to a single instance in which a witness testified that on one occasion he saw him take two tablets of morphine, and that shortly thereafter he became drowsy and finally slept.

Besides his practice Wiley had an interest in a drug store at Osmond. An offer was made to prove that in the years 1909, 1910, and 1911, he was seen drinking whiskey in the drug store. On objection both offers were properly excluded. *Acken v. Tinglehoff,* 83 Neb. 296; *Yechout v. Tesnohlidek,* 97 Neb. 387. Under the act in question it became immaterial whether plaintiff's husband acquired the drink habit and then ceased the use of intoxicants before 1910, or that he sold some liquor

to others, or that he drank some liquor in the drug store when the important fact is established that, beginning in 1910, and almost until the day of his death, he was a frequent patron of the licensed saloons of the principal defendants, and that his destruction was finally accomplished by the excessive use of intoxicants.

Defendants' objection to the introduction of the Carlisle table of expectancy was properly overruled. There is nothing in the record to show that Wiley had any mental or physical infirmity that would tend to shorten his life or impair earning capacity that was not induced by the excessive use of intoxicants. *Acken v. Tinglehoff*, 83 Neb. 296.

The rule invoked by defendant that "an action on a saloon-keeper's bond is joint, and no greater judgment can be rendered against the principal than against the surety," does not prevail in this state. *Hauth v. Sambo*, 100 Neb. 160.

Defendants introduced a copy of a decree of divorce obtained by Mrs. Wiley from her husband on September 24, 1912, less than two months before he died. The sole finding on which the decree is based is "that the defendant is an habitual drunkard." In the divorce case Mrs. Wiley recovered one-half the value of her husband's property, $1,600, as alimony. The custody of his two daughters, Phyllis and Miriam, aged 4 and 6 years respectively, was awarded to the mother because Dr. Wiley was "not a suitable person to have the custody" of the children, but no provision was made for the maintenance, care or education of his daughters.

Defendants argue that the decree was a settlement of property rights of the parties, and that plaintiff therefore had no cause of action against them for loss of support. No authorities are cited to sustain this argument. It seems that the fact that Mrs. Wiley was compelled on grounds of drunkenness to obtain a divorce did not tend to minimize the damages, particularly in view of the fact that no provision was made,

nor under the circumstances could adequate provision be made, in the decree for the maintenance and education of Dr. Wiley's daughters. That burden was cast on her. Defendants complain because the court instructed the jury in substance that the divorce was not to be considered in determining the amount, if any, of plaintiffs' recovery, the decree not being absolute until the expiration of six months. Reversible error does not appear in the giving of the instruction, the cause of action having accrued before the divorce was granted.

In this connection it is argued that the verdict for $6,000 is excessive. We do not think so. Dr. Wiley was 33 years of age, with an expectancy of 31 years. The amount of money that he contributed to the support of his family before he became weakened and debauched in body and mind by the excessive use of intoxicants obtained from defendants was approximately $2,000 a year. A verdict of $17,000 was held not to be excessive in a similar case where the expectancy of the decedent was about 24 years and the contributions to the support of his family up to the time of death were shown to be about $1,500 a year. *Juckett v. Brennaman,* 99 Neb. 755.

Defendants complain of the giving of other instructions and also because instructions offered by defendants were refused. The instructions given seem fairly to reflect the evidence. The material objections urged in defendants' brief on the question of instructions given and refused are covered by the discussion herein. We do not believe it is necessary to extend this opinion by discussing them in further detail.

Finding no reversible error, the judgment is

AFFIRMED.

ROSE, J., not sitting.

CORNISH, J., dissenting.

Although the opinion speaks of "degrees of guilt" of the saloon-keeper, the Slocumb law under considera-

tion (as of course the writer of the opinion well understood) was in no sense a criminal statute. It recognized the lawful selling of intoxicating liquors. In our ready condemnation of the saloon-keeper and his business, we are liable to forget this. The law limited recovery to compensatory "damages sustained," attributable to the sale. Recoverable "damages" is and must be a loss sustained by reason of the act or default of another. It follows and is caused by the act. It is unthinkable, it would be a contradiction in terms, to consider as recoverable "damages" a loss sustained or a damage already accrued before the commission of the act. I cannot see how this proposition is debatable.

It appears in the evidence that the plaintiffs' intestate had been an habitual drinker and had kept a drug store; that he had twice been to an asylum for inebriates before the defendants ever sold to him. The defendants asked an instruction that his mental and physical condition, acquired as a result of his debauchment in previous years, should be considered by the jury in estimating the amount of the damages, so that, if the jury believed that any part of the damages, sustained by reason of his drinking habits, had already accrued they could take that into account. The instruction was refused.

Can it be doubted that such might be the condition? Undoubtedly not. The opinion itself recognizes the possibility of a "confirmed inebriate." The liquor habit might so undermine the physical constitution of the drinker that any doctor would say that he could not live a year longer. During that period he might as a stranger, and without the saloon-keeper or bar-tender knowing the condition, purchase a single drink. Should the saloon-keeper, under such circumstances, be liable under the law for 30 years' loss of support to the wife, indicated by his age merely, when, in fact, she had not lost a year's support? Of course, where the sale tends to make the condition worse, when it continues

him in a habit which he might otherwise stop, or when it prevents a reform, the situation is different. The jury should consider all the facts so as to discover the actual damages sustained. The law made all saloon-keepers who made sales during the period jointly liable. It was analogous to the liability of joint tort-feasors. Joint tort-feasors are liable, however, as if participating in one act, and are not liable for previous, distinct and unconnected acts.

In *Stahnka v. Kreitle,* 66 Neb. 829, we held that saloon-keepers are "not liable for damages resulting from a like traffic before they engaged in the business." In the opinion it is suggested that a law attempting to make the saloon-keeper liable for "damages attributable to such traffic (the saloon traffic) by his predecessors in the business" would be unconstitutional, if enacted. In *Yechout v. Tesnohlidek,* 97 Neb. 387, in an opinion by Judge Reese, we said that "the fact that such husband and father was a drinker, or even a drunkard, before the time charged as the beginning of the sales would not of itself defeat a recovery, if liquors sold to him after such time by defendant contributed to keeping him in that condition." The opinion recognized that the drinker's condition at the time of the sale was proper to be shown and considered by the jury.

MOLLIE J. WATKINS ET AL., APPELLEES, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 26, 1918. No. 20254.

1. **Evidence:** VALUE OF CROPS. It is competent for a farmer who is actively engaged in raising farm crops to testify respecting their money value.

2. **Appeal:** CONFLICTING EVIDENCE. When the testimony conflicts on a material point, the verdict will not be disturbed unless clearly wrong.

3. **Trial: INSTRUCTIONS: VALUE OF CROPS.** In an action to recover the value of farm crops, destroyed by the alleged negligence of another, it is competent for the court to instruct the jury as to the value of such crops as shown by the undisputed testimony, leaving the jury free to determine by their verdict, from the evidence of the parties, whether defendant is liable for all or any part of such damage.

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

Edson Rich, C. A. Magaw, Martin & Bockes and *Thomas F. Hamer,* for appellant.

Elmer E. Ross, contra.

DEAN, J.

Plaintiffs sued defendant to recover for damages to wheat and alfalfa crops said to have been destroyed by the negligent diversion of surface water to and upon their land by defendant in July, 1915. They recovered a verdict and judgment. Defendant appealed.

Defendant's railroad tracks run over a part of plaintiff's farm from the southwest to the northeast. The natural drainage of the land is in the same direction. A short distance west of the farm defendant maintains a 36-inch culvert under the railroad track to carry water from the south to the north side of the right of way. This culvert was installed to replace a twelve-foot bridge formerly at or near where the culvert is located. It is conceded that the rainfall in that vicinity was excessive in the months of June and July, 1915. Defendant admits the inadequacy of the culvert to permit the water to flow through when the rainfall is in excess of the normal, and also admits that it is responsible for part of the damage to plaintiffs' crops, but contends that it cannot "be determined what portion of the damages resulted from defendant's act and what part from causes for which it is not responsible."

Defendant argued that the natural rainfall in the vicinity caused land of the same general character

as plaintiffs' to become so wet that the crops could not be harvested, and on this is based the argument that it is not liable for all of the damage. On request of defendant the jury were instructed that if they found that damages were occasioned in part by defendant's negligence, "but were contributed to and in part occasioned by natural causes," it then became their duty "to ascertain from the evidence what proportion of the plaintiff's damage was occasioned by the negligence of the defendant, and you will allow the plaintiffs nothing for such damages as you may find were occasioned by natural causes."

On the cross-examination one of plaintiffs' witnesses testified respecting the overflow on plaintiffs' farm: "Q. The land on the north side of the track was water soaked, and the land on the south side of the track was water soaked? A. Not to the extent that this was where this water came over it, for there was a marked difference there. * * * In explanation I will say all the land around there had no actual water flowing on it from outside sources. It was cut with apparent ease that year. That is my experience." There was other testimony of like import. A civil engineer testified on the part of defendant that he was on the farm at the time, and that the low land in the vicinity that was subject only to natural rainfall was covered with water from six inches to a foot in depth, and that the wheat on such ground was not cut. The testimony conflicts, but it supports the verdict.

One of the plaintiffs is a practical farmer. He was the only witness called by plaintiffs to testify as to value. No objection was made as to competency. On the direct and on the cross-examination he testified that the value of the destroyed crops was "about $368." The verdict was for approximately that amount with interest added. Defendant argues that the verdict respecting the value of the crops that were destroyed was practically directed, and in any event was not

supported by sufficient evidence. It has been held by this court that a farmer who is actively engaged in the growing of crops is a competent witness to testify as to their value. *Anderson v. Chicago, B. & Q. R. Co.*, 84 Neb. 311. The evidence was clear and unequivocal on value and the defendant offered no testimony on this point.

The case seems to have been fairly submitted. Finding no reversible error, the judgment is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1919.

THEODORE LARSEN, APPELLEE, V. WALTER SAVIDGE ET AL., APPELLANTS.

FILED JANUARY 4. 1919. No. 20162.

1. **Pleading: REPLY: AMENDMENT.** Where a plea in the answer is tried by the parties and submitted to the jury as though traversed by the reply which, before judgment, is amended to raise the issue in fact tried, the defect in the original reply is not a ground of reversal.
2. **Trial: QUESTION FOR JURY.** A substantial conflict in evidence on an issue of fact presents a question for the jury.
3. **Harmless error** in the admission of evidence is not a ground for reversing a judgment.
4. **Trial: INSTRUCTIONS.** A party desiring a more explicit instruction than that given should offer such an instruction.

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

A. R. Davis and *F. S. Barry,* for appellants.

M. D. Tyler, H. E. Siman and *L. A. Kiplinger, contra.*

ROSE, J.

This is an action to recover $10,000 for personal injuries resulting from alleged negligence of defendant,

while conducting a show in a tent at a street fair in Wayne. Plaintiff, having purchased a ticket, entered the tent and occupied a seat in a section of elevated tiers of seats which fell and broke both of his legs. The answer was a general denial and a plea that plaintiff was injured through his own negligence in taking a seat, with full knowledge of existing conditions, in violation of the instructions of defendant, while the seats were being prepared for reoccupancy, after they had sagged and had been temporarily vacated for readjustment. The jury rendered a verdict in favor of plaintiff for $1,650. From a judgment thereon defendant has appealed.

The first question is raised by an assignment that the trial court erred in overruling a motion to direct a verdict in favor of defendant. This question seems to be presented in two aspects: Failure of plaintiff to deny in his reply the truth of the allegations constituting the plea of contributory negligence, and insufficiency of the evidence to sustain a judgment in favor of plaintiff.

In disposing of the first proposition it is not necessary to inquire whether the reply in its original form was technically sufficient in the particular mentioned. The issue of contributory negligence was in fact tried by the parties and submitted to the jury, and the trial court, before entering judgment on the verdict, properly permitted an amendment curing the defect. Defendant was in nowise misled or prejudiced by the course thus pursued.

The other proposition seems to be based on a misapprehension of the evidence. The proofs are sufficient to justify the following inferences: Plaintiff was invited to the show, purchased a ticket, entered the tent and properly occupied a seat among many other persons. The seats were in three sections with tiers ascending from front to rear. Recent rains had softened the earth beneath. After the crowd had been seated, the

lower ends of the legs of the seat-jacks sank into the ground, causing the seats to sag. The occupants complied with a request by defendant to vacate temporarily for the purpose of allowing him to readjust the seats. He gave assurance the seats would be safe in that event. After the first and second sections had been leveled up and the seat-boards replaced, plaintiff and others, without any objection or warning by defendant, reoccupied the seats before the third section had been repaired. Five minutes later the occupied seats collapsed, fell and broke plaintiff's legs. These are reasonable inferences, and the evidence from which they are drawn, with proofs of damages, fully sustains the verdict, though there is contradictory evidence tending to show that defendant was not guilty of actionable negligence and that plaintiff was injured through his own negligence. The issues of fact having been settled by the jury, this assignment of error is overruled.

Another objection to the verdict is based on the admission of evidence that plaintiff had pneumonia while suffering from his broken legs. Testimony of this nature came out on cross-examination of plaintiff and he pursued the subject further. Prejudice to defendant in this respect, however, is not shown. The trial court instructed the jury to disregard such evidence and not to consider it in estimating damages. This cured the error, if any.

Complaint is also made of an instruction that the burden of proving the defense of contributory negligence is on defendant. No fault is found with the instruction as far as it goes, but it is argued that the trial court should have stated in addition that the alleged conduct of defendant, if proved, "is such contributory negligence and is such disregard of one's own safety as will prevent recovery in this case." The charge as a whole included the statement that contributory negligence was pleaded as a defense and that issue was submitted to the jury. To make error

available, a more explicit instruction should have been requested; but this was not done. The ruling hereon applies also to criticism of an instruction relating to comparative negligence. An error prejudicial to defendant has not been found in any instruction or in any other part of the record.

AFFIRMED.

LETTON and ALDRICH, JJ., not participating.

AGNES MCARDLE, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE; RICHARD L. BAKER, APPELLANT.

FILED JANUARY 4, 1919. No. 20183.

Excessive Damages. Record examined, and, it appearing that the judgment is excessive, *held* that, unless within 15 days plaintiff files her remittitur in the amount of $1,000 and interest from the date of the judgment, the same is reversed; otherwise, affirmed.

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

Brome & Ramsey and *Joseph P. Uvick*, for appellant.

George W. Pratt and *James E. Rait, contra.*

CORNISH, J.

Appeal from a judgment for personal injuries sustained by plaintiff while riding in a street car, going north on Twenty-fourth street, Omaha. Defendant Baker was driving his automobile east on Harney street when a collision occurred, causing the injury. Negligent rate of speed and failure to sound the alarm as the car approached Harney street are alleged against the street railway company, and negligence in driving his automobile down grade over a slippery street, in January, at such rate of speed that it was impossible for him to control it, against the defendant Baker. The automobile going forward turned around so that its rear end collided with the street car.

When the jury returned a separate verdict of $1,000 against each defendant, the court refused to receive it and instructed the jury that there must be a joint verdict if the finding was against both defendants; whereupon the jury retired and returned with a verdict of $2,000 against both defendants.

Separate motions for a new trial were filed. The trial court, on the ground that the verdict against the street railway company was not sustained by the evidence, sustained its motion, and entered judgment against defendant Baker alone for $2,000 and costs.

Defendant Baker, after judgment, moved its vacation, for the reason that he was a resident of Buffalo county and there was no joint liability between defendants. The trial court properly overruled this motion as coming too late after trial and judgment. *Porter v. Chicago & N. W. R. Co.*, 1 Neb. 14; *Exeter Nat. Bank v. Orchard*, 43 Neb. 579.

The instruction that, as between plaintiff and the street railway company, negligence could not be predicated upon its failure, if it did fail, to sound the gong, would not take from the jury the evidence upon that issue of fact as it might bear upon the question of defendant Baker's negligence. Being liable individually for the proximate results of his own negligence, he cannot complain of this instruction, whether erroneous or not.

It is urged that the damages awarded by the jury are excessive. When we consider the evidence bearing upon this question and the manner in which the verdict complained of was arrived at, we are of opinion that a new trial should be granted, unless the plaintiff shall, within 15 days, file a remittitur in the amount of one-half of the judgment, and interest, in which case the judgment is

AFFIRMED.

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

ADOLPH RADIL, APPELLANT, V. MORRIS & COMPANY, APPELLEE.

FILED JANUARY 4, 1919. No. 20847.

1. **Master and Servant:** INJURY TO SERVANT: MEDICAL SERVICES. Under section 3661, Rev. St. 1913, as amended, section 6, ch. 85, Laws 1917, an employer who offers to furnish without charge to an injured employee the reasonable services of a competent physician and medicines as and when needed, and within the value and for the time contemplated by the act, cannot be held liable for such services procured by such employee, who has unreasonably refused such offer by the employer and has obtained such services and medicines elsewhere.
2. ———: ———: ———: STATUTE: CONSTRUCTION. The general purpose of a proviso in a statute is to qualify the statute in part or in whole, but it is not always so used. The word "provided," as it is first used in section 3661, Rev. St. 1913, as amended by section 6, ch. 85, Laws 1917, has the same meaning that the conjunction "and" or "but" would have if used in its place.

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

Anson H. Bigelow, for appellant.

James C. Kinsler, contra.

DEAN, J.

Plaintiff recovered an award from the compensation commissioner on account of an accidental injury sustained while in the employ of defendant at its packing house, and also $129 for expenses incurred for medical and surgical treatment by a physician other than the one regularly furnished by the employer. On appeal to the district court by defendant, the award for compensation was affirmed, but the medical service bill for $129 was disallowed. From that ruling plaintiff appealed to this court.

As a result of the accident a part of the second finger of plaintiff's left hand was bruised and fractured and

afterwards amputated at the first joint by the physician whose bill is the subject of inquiry here. It is conceded that amputation was necessary, and it is agreed that the only question to be decided is this: Did the court err in disallowing the bill for medical and surgical treatment under section 3661, Rev. St. 1913, as amended by section 6, ch. 85, Laws 1917? For relief both parties rely on section 3661, as amended, which follows:

"During the first twenty-one days after disability begins the employer shall be liable for reasonable medical and hospital services and medicines as and when needed, not, however, to exceed two hundred dollars in value, unless the employee refuses to allow them to be furnished by the employer: Provided, however, in cases of dismemberment or injuries involving major surgical operations, the employer shall be liable for reasonable medical and hospital services and medicines as and when needed beyond as well as within the twenty-one day period, not however, to exceed two hundred dollars in value: Provided, further, that where the injured employee refuses or neglects to avail himself of such medical or surgical treatment, the employer shall not be liable for any aggravation of such injury due to said neglect or refusal."

Plaintiff argues that, because an operation became necessary, he was therefore at liberty to make his own selection of a physician, and that defendant under the act became liable for the reasonable expenses so incurred. His argument is based in part on the 1917 amendment that begins with the word "provided," where it first occurs in the section under consideration, and ends with the word "value." He contends that the amendment is a proviso, and hence operates to except the clause covered by it from the enacting clause or to qualify it in some way. We do not think the authorities sustain his argument. It does not always follow that an amendment operates as a proviso in a technical sense merely because it is preceded by the term "provided." Wheth-

er it is a proviso in effect or merely a conjunction must in part be determined from the context and from all the provisions of the act relating to the same subject-matter. With this in mind, it seems that the word "provided," as used in the act, has the same meaning that the conjunction "and" or "but" would have if used in its place. With this interpretation, section 3661, as amended, seems to be in harmony with the entire act of which it forms a part. *Georgia Railroad & Banking Co. v. Smith,* 128 U. S. 174; 3 Words and Phrases (2d series) 1321.

The employer having been made liable for the services contemplated by the act, it seems from the language used that it must have been the legislative intent that he should be permitted to furnish a physician of his own choice, and if his selection is such as would satisfy a reasonable man under like circumstances the employee would not then be heard to complain. That is the general rule in manufacturing centers where employers' liability acts with provisions similar to ours were in effect before our act was adopted. *Pecott's Case,* 223 Mass. 546; *Keigher v. General Electric Co.,* 158 N. Y. Supp. 939; *Davidson's Case,* 228 Mass. 257; *In re McCaskey,* —Ind. App.—, 15 N. C. C. A. 113, note III, 116; *City of Milwaukee v. Miller,* 154 Wis. 652, Ann. Cas. 1915B, 847, 4 N. C. C. A. 149, L. R. A. 1916A, 1. The record shows that the physician furnished by the company and his assistant who administered first aid are in all respects competent physicians and surgeons.

Was plaintiff's conduct reasonable in the premises? It appears that immediately after the accident, at about 5 o'clock in the evening, plaintiff went with a foreman of defendant to the nearby office of the company physician, where, in his absence, first aid was administered by the assistant in charge, who told plaintiff to return that evening between 7 and 8 o'clock for further treatment by defendant's physician. Plaintiff never returned, and denied that he was requested to do so, notwithstand-

ing both the foreman and the assistant physician testified that the request was made. The next morning at 9 o'clock, on advice of his mother, he went to their family physician, and he from that time retained the case. Plaintiff attempted to justify his employment of a physician by criticising the first aid treatment that he received, but on this point he called a physician as a witness who approved the treatment so received in all essential particulars.

It seems to us that plaintiff's conduct was in effect and within the meaning of the act an unjustifiable refusal to allow defendant to furnish the reasonable services and medicines that the act contemplates, and that defendant is not therefore liable for the medical expenses that he incurred. We have examined the case *de novo*, and our conclusion is the same as that arrived at by the trial court. The judgment is therefore.

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

HOWARD LEE V. STATE OF NEBRASKA.

FILED JANUARY 4, 1919. No. 20535.

1. **Larceny:** VERDICT: VALUE OF PROPERTY STOLEN. Under section 9129, Rev. St. 1913, Criminal Code of Nebraska, it is mandatory that a jury, on conviction, shall declare in the verdict the value of the property stolen.
2. ———: ———: ———: SENTENCE. The jury failed to find any value for the property taken; then it follows the trial court had no jurisdiction to pass sentence.
3. **Criminal Law:** INDETERMINATE SENTENCE ACT: POWER OF TRIAL JUDGE. Under the indeterminate sentence act, a district judge is only a ministerial officer whose authority is limited simply to pronouncing a minimum and maximum sentence, as provided by statute, and a trial judge has no discretion to change the maximum sentence provided for in the statute.
4. ———: ———: POWER OF PRISON BOARD. The prison board determines the duration of term the prisoner shall serve.

ERROR to the district court for Hitchcock county: ERNEST B. PERRY, JUDGE. *Reversed.*

J. L. Rice and *Lambe & Butler,* for plaintiff in error.

Willis E. Reed, Attorney General, and *John L. Cutright, contra.*

ALDRICH, J.

The defendant was convicted of the crime of stealing a Ford automobile of the value of $200, and was sentenced to serve a term of from one to seven years in the penitentiary. Defendant appealed.

The verdict follows: "We, the jury duly impaneled and sworn in the above entitled action, do find and say that we find the defendant guilty as charged."

The sole question presented here is: Does this verdict meet the requirements of the statute? In view of section 9129, Rev. St. 1913, it appears to us that the conviction cannot stand.

The statute is as follows: "When the indictment charges an offense against the property of another by larceny, embezzlement or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in their verdict the value of the property stolen, embezzled or falsely obtained."

This court has held that in a larceny case it is imperative that the jury comply with the terms of the foregoing statute, and declare in their verdict the value of the property stolen, embezzled, or falsely obtained. This the jury failed to do, and it follows the court had no jurisdiction to sentence defendant. In support of these views, we cite section 9129, Rev. St. 1913; also *Fisher v. State,* 52 Neb. 531; *Holmes v. State,* 58 Neb. 297; *Hennig v. State,* 102 Neb. 271. This court affirmed and reiterated the doctrine that it is mandatory that a jury, on conviction, shall declare in their verdict the value of the property falsely obtained. It is obvious in the case on trial, or review, when the

jury failed to find any value for the property, that then the trial court had no jurisdiction to sentence the defendant.

It has been suggested that the defendant could just as well be considered as having been tried under chapter 200, Laws 1917, and thus avoid the error the jury made in fixing no value as is required in section 9129, Rev. St. 1913. The last named statute fixes a maximum penalty of seven years, and a minimum penalty of one year, while the automobile statute as found in chapter 200, Laws 1917, fixes as a maximum penalty ten years. The difficulty with this position is that the trial judge is simply a ministerial officer in this respect, and can only pass sentence from the minimum to the maximum. The legislature conferred no discretion in the indeterminate sentence act, for this act, among other things, says: "But the court imposing such sentence shall not fix the limit or duration of the sentence." Then is it not plain that the trial judge is simply before the jury to administer the edicts of the statute without any discretion whatever? Then, to quote the remainder of the statute, we have: "But the term of imprisonment of any person so convicted shall not exceed the maximum nor be less than the minimum term provided by law for the crime for which the person was convicted and sentenced." Then, to make the meaning clear, this statute closes with these words: "The release of such person to be determined as hereinafter provided." Rev. St. 1913, sec. 9152. Then the following section (9153) provides a prison board, and defines the qualifications, and how this board shall be created, and the terms of office of the respective members of this board. Then section 9154 provides as to how the board can be informed as to the nature of the crime committed. In short, it provides for a biography of the criminal career of the prisoner. In this way the board is informed of its duties as to the welfare and best interests of the prisoner.

We find in section 9156, Rev. St. 1913, the powers and duties of this prison board defined, and so on throughout the entire act is provided ways and means for the management, punishment, and all regulation of prisoners. Thus it is the policy and scheme in this state to take the charge of prisoners out of the hands of the district court the moment he has administered his duties in following out the mandate of the state with respect to fixing the minimum and maximum sentence named in the statute.

It needs but a casual search into governments of the various states to discover that it is the trend of judicial decision respecting the powers of the legislature, to authorize boards and commissions to make rules and to enforce them in respect to the subject committed to them. In short, chapter 34 (secs. 9152-9171) Rev. St. 1913, is a complete act providing for the control, length of term of imprisonment, and many other details.

Thus it is provided that the board of pardons fixes the length of term which a prisoner shall serve. The trial judge names the maximum and minimum sentence only, then the prison board of pardons and parols determines the duration of the term of imprisonment, and, when any district judge pronounces any sentence but a maximum or minimum, he is acting without jurisdiction. The prison board fixes this. Then, in view of all this, it follows that in the case at bar, where the defendant was convicted on the charge of grand larceny, and sentenced under the indeterminate sentence act for from one to seven years, and no value found by the jury, as provided by statute, the court had no jurisdiction to pronounce sentence, and it follows that the sentence pronounced could not apply to or come under chapter 200 of the Laws of 1917, because this act provides for a maximum sentence of ten years. Therefore the maximum sentence pronounced by the trial judge is surplusage when applied to this chapter 200, Laws 1917. This must be so because, as before mentioned, the trial

judge under this indeterminate act is only a ministerial officer. In support of these views this court in *Williams v. State,* 91 Neb. 605, explains the meaning and workings of this indeterminate sentence act.

This indeterminate act as a method of punishment, and in the control and regulation of prisoners, has been passed upon by many leading courts of this country. For instance, the state of Michigan has a statute slightly different from this state, but, like Nebraska, holds the trial judge a ministerial officer passing sentence from the maximum to the minimum, as provided by the statute. As substantiating these views, we cite *Berlin v. Belle Isle Scenic R. Co.,* 141 Mich. 646; *In re Evans,* 173 Mich. 25; *In re Campbell,* 138 Mich. 597; *Williams v. State, supra.* In Illinois they have on this subject a statute similar to Nebraska. Then what the Illinois supreme court has to say is both instructive and interesting. We cite *People v. Roth,* 249 Ill. 532, and 2 Ill. St. sec. 4160. This Illinois Criminal Code, like Iowa, Wisconsin and Michigan, simply makes the trial judge a ministerial officer. Then it follows that, having failed to convict defendant of grand larceny, as provided by statute, chapter 200, Laws 1917, this finding must be reversed.

REVERSED AND REMANDED.

SEDGWICK, J., dissenting.

I cannot concur in reversing the judgment of conviction. The grand larceny statute and the automobile statute describe the same offense, except that, if the article stolen is an automobile, then value need not be proved. The information (which referred to no statute) alleged facts which, if true, made the defendant guilty under either statute. The information charged every element of the crime of stealing an automobile under the statute. The crime which defendant committed, if guilty, was properly charged under either the grand larceny or the automobile statute. The information was good under either.

The majority opinion cites cases from other states which, in construing statutes entirely different from ours, decide that "the trial judge is simply a ministerial officer," under their indeterminate sentence act, and from these cases the opinion concludes that the judge is "simply before the jury to administer the edicts of the statute without any discretion whatever;" and that, therefore, the "maximum sentence pronounced by the trial judge is surplusage." These conclusions are derived from cases like *In re Evans*, 173 Mich. 25, cited in the majority opinion. In that case the trial court made the maximum sentence less than that fixed by their statute, and when the time fixed by the trial court had expired, the defendant applied for discharge from imprisonment on the ground that his term had expired. The supreme court said: "The duty imposed on the trial court was not one in which he had any discretion, but was simply a plain ministerial duty. This being so, it would follow that the maximum period of 5 years, fixed by the trial court, is a nullity, and should be rejected as surplusage, and the remainder of the sentence read in connection with the statute, which fixes the maximum period at 15 years. * * * As soon as sentence was pronounced upon the petitioner, the statutory maximum penalty became a part of it. It was a legislative fixing, with no power in the trial court to make it more or less, and the fact that he did make it less, either through inadvertence of misapprehension, could no more alter the statutory period than as though he had named a longer period than 15 years." If our statute is to be construed to have that meaning and effect, which seems doubtful to me, and if the act of the trial judge in attempting to fix the maximum penalty "through inadvertence or misapprehension" was "surplusage," and the statute fixed the maximum, as the majority opinion holds, why should this judgment be reversed? The Michigan case relied upon decides that such surplusage in the sentence is immaterial, and it

is clearly right in refusing to regard such a technicality. If the law itself fixed the maximum sentence, as the opinion holds, the sentence is definite. Even if it was necessary that the trial judge should state in the record the sentence which the law fixes, there is no necessity for another trial. The record should be returned to the trial court for correction in that respect, as was done in *McCormick v. State,* 66 Neb. 337. In that case the court said: "The error in passing judgment on the defendant having occurred subsequent to the verdict of the jury on which the judgment was rendered, the same must be reversed and the cause remanded for the rendition of a valid judgment; following *Dodge v. People,* 4 Neb. 220; *Tracey v. State,* 46 Neb. 361; *Griffen v. State,* 46 Neb. 282; *Hornberger v. State,* 47 Neb. 40."

It seems to me that under our statute the judgment entered by the trial court should "not exceed the maximum" provided by the statute, but the trial court may make the maximum less when the plain facts in the case require that the defendant should be protected against the possibility of cruel and unusual punishment. And, if the statute makes the maximum absolute, and "the trial judge is simply a ministerial officer," so that "the maximum sentence pronounced by the trial judge is surplusage," as held by the majority opinion, that act of the judge should be disregarded, as was done in the cases cited from other states in obedience to their statutes. In that case, the judgment should be affirmed. But if the judgment is reversed, the case should be remanded, not for a new trial, but to correct the supposed technical defect in the sentence, as this court has uniformly heretofore done.

ROSE and CORNISH, JJ., concur in this dissent.

WILLIAM L. WHITNEY v. STATE OF NEBRASKA.

FILED JANUARY 20, 1919. No. 20401.

1. **Forgery:** INSTRUCTION: EVIDENCE. Evidence examined, its substance set out in the opinion, and *held* to warrant the giving of the instruction quoted.
2. ———: ———. An instruction defining the essential elements of the crime of uttering a forged instrument given in substantially the language of the statute is sufficient.

ERROR to the district court for Thayer county: RALPH D. BROWN, JUDGE. *Affirmed.*

J. P. Baldwin, M. H. Weiss and *Anderson & Baylor,* for plaintiff in error.

Willis E. Reed, Attorney General, and *Orville L. Jones, contra.*

MORRISSEY, C. J.

Defendant prosecutes error from a conviction in the district court for Thayer county. The information contains two counts: The first charges the forgery of a promissory note; the second charges the uttering and publishing of the note, knowing it to have been forged.

For many years defendant has been a resident of Hebron, and has held a number of offices, including that of county judge. He does not appear to have been admitted to the bar, but he was called in to assist in the settlement of the estate of the deceased husband of one Sylvia Stauber. During the settlement of this estate, defendant learned that Mrs. Stauber desired to loan money, and in May, 1916, he undertook to loan for her $500. She delivered to him a certificate of deposit for $500. Subsequently he delivered to her a promissory note dated Hebron, Neb., May 6, 1916, payable one year after date to the order of defendant, and signed "J. M. Gumble, S. R. Gumble," together with his own note of the same date, and for the same amount, pay-

able to Mrs. Stauber. He did not indorse the note signed "J. M. Gumble, S. R. Gumble," or make it payable to Mrs. Stauber. He represented to Mrs. Stauber that the Gumbles lived near Daykin in the adjoining county of Jefferson, and were financially responsible.

Subsequent to the delivery of the notes to Mrs. Stauber, her grandson, acting for her, called upon defendant and, procured his indorsement to the note bearing the name Gumble, and surrendered to defendant the note which he had executed. About the time the note bearing the names J. M. Gumble and S. R. Gumble fell due, it was delivered to defendant for collection. Defendant held the note for some time without making collection, but, from time to time, informed Mrs. Stauber, or her grandson, that he had received a letter from one of the makers stating that the note would soon be paid. Finally Mrs. Stauber caused inquiry to be made in Jefferson county for the parties whose names appeared on the note. In the neighborhood where defendant said the makers of the note resided were found one J. M. Gumble, and his mother, Sarah R. Gumble; but these persons denied the execution of the note. No other persons named J. M. Gumble or S. R. Gumble were found.

The state proved by J. M. Gumble and Sarah R. Gumble that they did not sign the note, and also proved by them and other witnesses that no other parties so named were known to live in Jefferson county. No expert evidence as to penmanship was offered by the state.

Defendant admitted that neither J. M. Gumble nor Sarah R. Gumble was the party from whom he procured the note. He claimed to have formed the acquaintance some years before of a man named Gumble, who represented himself to be the son of an old acquaintance of defendant, and that he procured the note from this acquaintance. Defendant testified that, May 4, 1916, he met this acquaintance at Fairbury, Jefferson county, and the making of the loan was talked over between them,

and that defendant examined the records of Jefferson county to ascertain the financial standing of the party desiring to procure the loan; that he found the title to a quarter section of land to rest in John Gumble; that, upon examination of the records in the office of the county judge, he found that John Gumble was dead, and that this quarter section of land had descended to his seven children, subject to the interest of the widow, Sarah R. Gumble; that defendant believed the party with whom he was dealing was one of the sons of John Gumble; that he wrote the note at Fairbury, and delivered it to the party with whom he was dealing, telling him, that if he and his mother would execute the same, defendant would meet him at Fairbury two days later and let him have the money; that, pursuant to this agreement, defendant returned to Hebron, procured a certificate of deposit from Mrs. Stauber, returned again to Fairbury, cashed the certificate of deposit, delivered to this party $500 in money, and received the note. He denies the forgery, and asserts that he loaned the money and took the note in good faith. He also offered in evidence a letter, signed J. M. Gumble, which referred to this note and promised payment. He claims to have received still another letter, but did not produce it at the trial. There is also in evidence the testimony of witnesses to the effect that the signatures to the notes are not in the handwriting of defendant. The probative force of this testimony was somewhat weakened under cross-examination.

The court gave the following instruction: "You may find the defendant guilty on both counts of the information, or not guilty on both counts, or guilty on one of the counts and not guilty on the other count, as you may conclude that you are justified in finding from the evidence." After verdict, defendant's counsel filed a motion in arrest of judgment, and alleged that as to the first count—the count charging forgery—there was a total failure of proof of the crime having been com-

mitted in Thayer county; that, if there was any forgery committed, it was in Jefferson county. Without passing directly on the motion in arrest of judgment, the court found that it could not impose sentence on both counts of the information, and then pronounced sentence under the second count thereof.

On the question of venue, it may be said that the note appears on its face to have been executed in Thayer county and is made payable there. True, defendant testifies that he wrote the note in Jefferson county, but on that point he is without corroboration. He was in Thayer county, as well as in Jefferson county, on the day that the note bears date. His home was in Thayer county. No witness, except defendant, testifies to having seen the note in Jefferson county. It was delivered to Mrs. Stauber in Thayer county, and it was there she parted with the consideration for its delivery. The circumstances were such that the court might well leave the jury to determine where the note was executed.

Perhaps it is more difficult to say whether the evidence is sufficient to warrant a conviction of forgery. The story told by defendant is unusual. He claims to have dealt honestly and to have exercised caution in looking up the financial standing of the party with whom he dealt, but made no effort to ascertain his identity or to determine his moral worth. Defendant claims to have given Gumble currency at the hotel in Fairbury. The more usual method would be to give a check, or draft, or to have taken Gumble to the bank, where the currency was procured on Mrs. Stauber's certificate of deposit, and there have paid the money. Defendant appears to have been a man of good standing in his community. He was trusted by Mrs. Stauber to make the loan, and afterwards had this note in his possession for a considerable time. It is argued that he might easily have destroyed the note. These matters are entitled to consideration, but they were all before the jury, and we cannot say that the jury were not warranted in re-

solving all doubts against the defendant.

It is urged that the court erred in instructing the jury that they might find the defendant guilty on both counts. If the evidence were not sufficient to sustain the charge of forgery, it might be prejudicial to so instruct, but, as we have pointed out, we cannot say that the evidence was not sufficient to warrant a conviction on that count of the information. It is sufficient to sustain the verdict on the second count. It follows that the instruction was properly given.

An instruction defining the elements of the crime alleged in the second count of the information is criticised. This instruction told the jury that one of the essential elements of the crime was "the uttering of the same as true and genuine, knowing it to be false." It is said in the brief that the court failed to give the jury the definition of the word "uttering," and that he ought to have told the jury that uttering "is to declare or assert directly or indirectly, by words or actions, that it (the instrument) is good." Defendant sets out the general definition, but the language employed by the court is of the same general purport and meaning. It follows the language of the statute, and no clearer or fuller definition was requested. When the entire instruction is read, it clearly states the issue, and it is without prejudice to defendant.

While the evidence of the state is not entirely satisfactory, we are unable to say that it is not sufficient to sustain the verdict, and the judgment is

AFFIRMED.

LETTON, J., not sitting.

GRAND LODGE, ANCIENT ORDER OF UNITED WORKMAN, APPELLANT, V. INSURANCE BOARD OF THE STATE OF NEBRASKA, APPELLEE.

FILED JANUARY 20, 1919. No. 20577.

1. **Insurance:** FOREIGN ASSOCIATION: RIGHT TO TRANSACT BUSINESS. Where a foreign fraternal beneficiary society fails to show that it has complied with its own laws as to the right to do business in this state, it is not entitled to admission.
2. ———: ADMINISTRATIVE BOARD: POWERS. An administrative board may exercise only those discretionary powers given it by statute. When it is its duty to act, the statutory requirements having been complied with, it has no discretion. *State v. Morehead*, 100 Neb. 864.

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

Byron G. Burbank, for appellant.

Fawcett & Mockett, E. J. Lambe and *J. J. Ledwith, contra.*

LETTON, J.

Appeal from an order of the state insurance board refusing the appellant a license to do business in Nebraska for the year 1918. The time limit having expired, a decision will be of no avail, except perhaps to indicate our views on the points discussed in the opinion.

The record in this case shows that the appellant filed a certified copy of its charter, articles of association, and a copy of its constitution and laws, certified by its secretary; it appointed the secretary of the insurance board to be its attorney in fact, on whom all process should be served; it paid the fees provided for by the statute, and filed a certificate of the insurance commission of the state of Iowa that it was authorized to do business in that state, that being the state under the laws of which it is incorporated.

The Grand Lodge of the Ancient Order of United Workmen of Nebraska is a similar organization which has been doing business in this state for many years. Apparently its affairs had become involved. After the filing of the application of appellant, the insurance board, at several meetings, discussed the affairs of the Nebraska order, and suggested tentative proceedings to reinsure the members of the A. O. U. W. of Nebraska in the appellant association. Finally, it adopted the following resolution:

"Whereas, the report of the special examination conducted by the actuary of the insurance department indicates a favorable possibility of the A. O. U. W. of Nebraska being able to rehabilitate itself by the payment of pending death claims and of meeting its future obligations, and

"Whereas, because of the similarity in names of the A. O. U. W. of Nebraska and the A. O. U. W. of Iowa, the admission of the latter order to this state would cause confusion in the minds of many present and prospective members, and thus still further retard the efforts of the Nebraska order to fulfil its obligations to its members: Therefore be it

"Resolved, that the application of the A. O. U. W. of Iowa for a license to operate in this state be rejected." From this order this appeal is taken.

Sections 3303-3305, Rev. St. 1913, governing the admission to do business in this state of a fraternal beneficiary association organized under the laws of another state, provide, in substance, for the filing with the insurance board of duly certified copies of its charter, articles of association, and of its constitution and by-laws, together with an appointment of the insurance board and its secretary as a person upon whom service of process may be made. It is also provided that the board may examine into the condition, affairs, character, business methods, accounts, books, and investments of such society at its home office, and "if the board

* * * is of the opinion that no permit should be granted * * * it may refuse to issue the same." Section 3303 provides, in substance, that, on making such an application, the board shall issue a permit, and provide a fee for the issuance of the same.

Several contentions are made by the appellant. First, that, having complied with all the requirements of the statute, the insurance board has no discretion to refuse the license.

When the statutory requirements are met and no examination is made, it is the duty of the board to issue a permit. *State v. Morehead,* 100 Neb. 864. But it is also the duty of the board to examine the charter and laws produced, and if the applicant is not complying with, or acting in accordance with its own laws and regulations necessary in order to entitle it to do business in another state, it may refuse to issue a permit equally as well as if the examination had been made at the home office. If after an examination has been made at the home office, as provided by the statute, the board has just and reasonable grounds to believe that it is not for the best interests of the people of the state that the applicant be admitted here, it is vested with power to refuse to issue the permit. The right to refuse, however, is not an arbitrary one which may be exercised without right or reason. It must be based upon some fact or circumstance based on the examination under the statute, which would appeal to a disinterested and fair-minded man as furnishing a reasonable ground for such refusal.

In this court the insurance board insists that the facts set forth in the application of appellant are not sufficient to justify the issuance of a permit.

An inspection of the application and of the evidence shows that section 1, ch. 1, of its by-laws, is as follows: "This society shall be known as the Grand Lodge, Ancient Order of United Workmen of Iowa. Its principal office shall be at Des Moines, Iowa. It may do busi-

ness in any territory in the United States designated by the Grand Lodge or its board of directors, *provided that the consent of the Supreme Lodge, or its board of directors, has first been obtained.*"

Section 2. "This society exists under authority of a charter granted by the Supreme Lodge of the Ancient Order of United Workmen, and articles of incorporation, duly adopted under the laws of the state of Iowa, as a fraternal beneficiary society."

There is no showing in the record that the appellant has ever obtained the consent of the Supreme Lodge or of its board of directors to do business in Nebraska. It is not authorized, therefore, by its own laws to do business in this state, and, without regard to the reason given by the board, its order refusing the permit was proper.

The insurance board maintains that the title of the insurance act (Laws 1913, ch. 154) indicates that its purpose is "to regulate, supervise and control the business of insurance in Nebraska, to provide penalties for its violation, to provide for an insurance board and define its duties and powers;" and that by section 3, art. II of the act, "It shall have power to make all needful rules and regulations for the purpose of carrying out the true spirit and meaning of this act and all laws relating to the business of insurance."

It also contends that, since by sections 3169-3209, 3311, Rev. St. 1913, of the insurance code governing the organization of new societies and associations, the board is authorized to refuse to grant a charter to a new organization whose name is the same, or so nearly resembles a title already in use as to have a tendency to mislead the public, it has the right to deny admission to an existing foreign society for the same reason.

There are two answers to these contentions. First, sections 3294-3321 of the insurance code treats of the subject of fraternal beneficiary associations. Section 3299 provides: "Such societies shall be governed by

this article and shall be exempt from the provisions of the statutes of this state relating to life insurance companies except as hereinafter provided." General provisions of the insurance code relating to life insurance do not therefore apply to such societies. Second, there is no statute giving the board power to refuse admission to an organized foreign company merely on account of similarity of name to that of another company already doing business. The right to the use of a business name is a right which is protected by law. If any insurance company, or fraternal beneficiary association already using a name, suffers, or is about to suffer, damage from the unwarranted use of its name by a rival organization, it is within the power of the courts, upon proper application, to protect it in its proprietary right to its business cognomen. The power given the board to require persons desiring to form a new insurance corporation, or a new fraternal beneficiary association within this state, to adopt such name as may not interfere with existing rights, is expressly conferred by the statute, probably for the reason that the right to engage in such business is a privilege which may be granted subject to conditions.

In the case of a foreign insurance corporation, or a foreign fraternal beneficiary association having an existing name, a different condition exists. It cannot change its name to suit local circumstances, and, if it does not violate a property right of another citizen, why should it? The legislature has not conferred the power upon the board to exclude such a corporation merely on account of similarity in names. It probably considered that, since the power of the courts to protect existing business is ample, it would be wiser to leave the matter to the parties interested, which is the case with respect to all other classes of business.

The judgment of the district court is

AFFIRMED.

ROSE, J., concurring in affirmance.

In my opinion the judgment of the district court should be affirmed on a ground other than those mentioned in the opinion. The chapter of the statute conferring power upon the insurance board contains the following provisions:

"Such board shall have general supervision, control and regulation of insurance companies, associations, and societies and the business of insurance in Nebraska including companies in process of organization. It shall have power to make all needful rules and regulations for the purpose of carrying out the true spirit and meaning of this chapter and all laws relating to the business of insurance." Rev. St. 1913, sec. 3139.

The power to investigate insurance companies has also been committed to the insurance board. A statutory provision relating to names of insurance companies is as follows:

"No company, association or society organized under this chapter shall take any name in use by any other company, association or society or so closely resembling such name as to mislead the public as to its identity." Rev. St. 1913, sec. 3209.

Under powers granted by the legislature the insurance board, in acting upon an application for a license to transact insurance business in Nebraska may exercise a legal discretion as to similarity of applicant's name and that of other societies already licensed. As I view the law, the insurance board exercised a legal discretion in refusing the license on the ground stated in its order. In my opinion, the grant of legislative power is unduly restricted in *State v. Morehead,* 100 Neb. 864.

CORNISH, J., concurring.

With some hesitation I have concurred in the opinion, because it holds in accordance with the previous decisions of this court that administrative bodies, such as the insurance board, have no powers except those ex-

pressly granted them by the legislature. Legislative or judicial powers could not be granted to them. Such boards belong to the executive department of the state. The question, whether the use of the name, "A. O. U. W. of Iowa," can be denied to the Iowa company when it attempts to do business in Nebraska, in competition with the A. O. U. W. of Nebraska, is a judicial question, to be determined in the courts. Inflexible rules of law are likely, in course of time, in their application, not to serve the ends of justice in particular cases or situations. This is because our social growth represents life and is not altogether mechanical. Yet the principles of the law are ample for all difficulties. In order to meet the ends of justice, there is a temptation to turn over certain subjects to commissions. This raises the danger that we come to have a government by men and not by law. Commissions in their very nature cannot do well the work of courts. Aristotle pointed out the danger of lodging lawmaking powers in the executive department of government. As free institutions have developed, men have been more insistent upon recognizing the distinct functions of the legislative, executive, and judicial departments provided for in our Constitution.

JOHN W. MYLET, APPELLEE, V. PLATTE COUNTY ET AL., APPELLANTS.

FILED JANUARY 20, 1919. No. 20675.

Counties: COURT HOUSE FUND: PETITION. Under the statute granting to the county board power to create by levy a courthouse building fund, "when requested so to do by a petition signed by at least 55 per cent. of the legal voters," the request is invalidated by an unauthorized condition designating the courthouse site, where the power to select the location is vested in the county board. Laws 1915, ch. 18.

APPEAL from the district court for Platte county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

Peterson & Devoe, for appellants.

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

ROSE, J.

This is a suit by a taxpayer to enjoin the supervisors of Platte county from entering into a contract for the wrecking of the courthouse at Columbus and for the erection of a new courthouse on the old site. The application for the injunction is based in part on the plea that the petition of the electors for annual levies to create the fund for the contemplated improvement is fatally defective. The injunction was resisted on the ground that defendants proceeded regularly under authority of law. The injunction was granted, and defendants have appealed.

The controversy grows out of different views of the statutes relating to the construction of a courthouse and to the creation of funds for that purpose. Defendants asumed to act under the following grant of power:

"Provided, that the county board of any county in this state is hereby authorized and empowered, when requested so to do by a petition signed by at least fifty-five per cent. of the legal voters in said county based on the average vote of the two preceding general elections, to make an annual levy not exceeding five mills upon the dollar on all taxable property in said county for the purpose of providing a fund for the erection of a courthouse or jail, said fund to be used only in the construction of a courthouse or jail or to pay the expenses of tearing down an existing courthouse or jail or making improvements thereon; provided further, the total estimated amount to be raised by such special levy shall not exceed the sum of one hundred thousand ($100,000) dollars and said levy may be spread over a term of years not exceeding five to produce such sum,

but in no case shall the levy of taxes made by the county board for all purposes, including the taxes levied herein provided for the erection of a courthouse or jail, exceed in any one year the sum of fifteen mills of the dollar of the assessed valuation of said county." Laws 1915, ch. 18.

The petition containing the request for an annual levy to provide a building fund is in the following form:

"We, the undersigned legal voters of Platte county, Nebraska, hereby request the board of supervisors of Platte county, Nebraska, to erect and provide a suitable county courthouse and jail in and for said county. To provide a fund for that purpose, we further request said county board to make an annual levy, not exceeding 5 mills on the dollar on all taxable property in said county, provided that the total estimated amount to be raised by such special levy shall not exceed the sum of $100,000 and said levy may be spread over a term of years not exceeding five to produce such sum, but in no case shall levy of taxes made by the county board for all purposes including the taxes levied for said courthouse and jail exceed, in any one year, the sum of 15 mills on the dollar of assessed valuation of said county.

"It is agreed and understood that said courthouse is to be located in its present location, viz., block No. D. Columbus, Nebraska."

The petition required by statute is jurisdictional. Without it the county board has no authority to levy the necessary taxes. In making the request the petitioners were not authorized to impose terms as a condition of authorizing a levy. An unconditional petition is required. In requesting the levy the petitioners departed from the statute and assumed to impose the following terms as a condition of conferring power to make the levy: "It is agreed and understood that said courthouse is to be located in its present location." Was the petition containing this restriction sufficient to confer on the county board jurisdiction to make the levy?

The power to select the courthouse site had been conferred upon the county board. The statutory grant has not been amended or repealed. Under the petition the authority to select a new location is taken away from the county board. The restriction in regard to the location cannot be treated as surplusage, because the statutory request for the levy depends on the condition. In other words, authority to make the annual levy is not granted unless the old location is retained, thus depriving the county board of its power to select a new site. There is nothing to indicate that the jurisdictional petition would have been signed by the requisite number of electors with the condition as to location omitted. The petition, therefore, was insufficient to confer upon the county board jurisdiction to make an annual levy for the purpose of creating a courthouse fund. For this reason the injunction was properly allowed.

AFFIRMED.

CORNISH, J., concurring.

I have hesitated to hold that a board's action, in accordance with the expressed wish of a majority of the people, is void. If, however, we assume it to be the board's prerogative and duty to exercise its own judgment, and not the judgment of others, in selecting the site, I do not see how we can hold otherwise. The words spread upon the record, "We deem it unwise to take up the question of a change of site," appear to show an abdication of this duty.

The petition is jurisdictional. The signatures required were conditioned upon location. A petition to a superior power, which, to be effective, must deprive the superior of free action in the exercise of the power invoked, is to that extent (if only to that extent) a demand or dictation, and not a petition. What would we say of a petition in court which (if we can indulge the supposition) can be treated as a petition only upon con-

dition that the judge forego his judicial powers? Would the fact that the required condition and the judge's judgment might coincide, alter the situation? Supplications and directions are distinct things. I think such a petition does not really invoke the powers of the superior body as a matter of law, and would probably lead to a reliquishing of its powers in practice.

SEDGWICK, J., dissenting,

It is perhaps unfortunate that the statute has not provided some simple method of ascertaining the wishes of the citizens of the county as to the location of a courthouse. The statute does not provide any such method, and therefore, of course, leaves it to the discretion of the county board. The board is supposed, as all such officers are supposed, to be governed by what they think is the wish of the largest number of citizens of the county, and perhaps it is not a serious matter that it is left to the discretion of the county board.

The petition required is not that they erect any building, but that they make a levy to raise a fund, and that is what the board acts upon, and, when the board is authorized to collect this money from the property of the county, the rest seems to be left largely to the discretion of the board. I suppose it must be conceded that the county board should exercise an independent discretion as to the location, and the brief states that the record shows that the county board did exercise such discretion. They placed upon the record a resolution: "Whereas, it appears that the sentiment of the people of Platte county, Nebraska, are strongly in favor of the present location for the erection of our new proposed county courthouse: Therefore be it resolved, by the board of supervisors of Platte county, Nebraska, that we deem it unwise to take up the question of a change of site at the present time and hereby instruct our architect to proceed with the plans as contemplated." That was exactly what the county

board should do—ascertain as near as they could the sentiment of the people and then act accordingly. Having done so, they concluded to continue the courthouse where it was and had been for years. The plaintiff put the members of the county board upon the witness-stand, and they testified that they considered themselves morally bound to locate the courthouse as designated in the petition. Their resolution, above copied, is conclusive that they did not consider themselves legally bound to do so, and that they found that they ought to have put it there anyhow, and it would not seem that the fact that they thought they would be morally bound to do it, when nobody was objecting, would deprive them of exercising their discretion, which they plainly did. I do not see what difference it makes if we conclude that the petitioners would not have signed the petition without the suggestion as to location. The suggestion, as it turns out, was in accordance with the facts. The county board has so determined, and there is no evidence to the contrary. It will be noticed that the suggestion in the petition as to location of the new building is not in terms made a condition of signing the petition to levy a fund for a new building. The record recites that "the people of Platte county, Nebraska, are strongly in favor of the present location for the erection of our new proposed county courthouse." And, while the matter was being considered by the county board, and during the time that more than two-thirds of the $100,000 necessary for the building was being levied in two annual levies, no objection was made by any citizen, and all acquiesced in the finding of the board that all the people wanted it so located. This establishes, for the purpose of this action, that when the location was selected by the county board they acted in accordance with the unanimous wishes of the voters, and made a proper selection. The petition is only for the purpose of authorizing the levy, but the unnecessary suggestion of the petition, "It is agreed

and understood that said courthouse is to be located in its present location," being only a well-known and established fact, was not even improper. It would have been entirely proper for any citizen who preferred some other location to have petitioned the board accordingly. In fact, it would have been much better to have done so, than to wait until the principal levies had been made and then attempt, by injunction, to tie up these funds and defeat the completion of the improvement.

There is a further sufficient reason for denying the writ of injunction. The opinion holds that the petition for the levy was so imperfect that it amounts to no petition, and the board was without jurisdiction to make any levy. Under such circumstances, there was a complete remedy at law by a review in the courts of the order of the board; and that remedy would be available now, if it was not barred by laches. Certainly an objector could not wait until his legal remedy was barred by time, and important levies had been made, and then resort to the extraordinary writ of injunction because he had allowed his legal remedy to lapse.

CHARLES CHANDLER, APPELLANT, V. L. E. SIPES, APPELLEE.

FILED JANUARY 20, 1919. No. 20682.

1. **Habeas Corpus; RETURN.** In making return to a writ of habeas corpus, an officer detaining petitioner is required by statute to set out a copy of the warrant of arrest and detention. Rev. St. 1913, sec. 9263.
2. **———: WARRANT.** In habeas corpus a warrant of arrest and detention in the hands of the officer executing it is *prima facie* evidence of the cause of detention. Rev. St. 1913, sec. 9265.
3. **———: EXTRADITION: COMPLAINT: BURDEN OF PROOF.** The burden of proving that a complaint in a requisition is not certified according to federal law is on a prisoner who demands his freedom

on that ground, where he is detained by an officer under a warrant of extradition regular on its face.

4. **Extradition**: COMPLAINT: CERTIFICATE. In a requisition the copy of the complaint and the authenticating certificate required by the federal law may be written on different papers.

5. ———: ———: SUFFICIENCY. Where the complaint in a requisition charges all of the elements of a crime under the laws of the demanding state, its sufficiency, from the technical standpoint of pleading, presents a question for the courts of that state.

6. **Habeas Corpus**: EXTRADITION: COMPLAINT: EVIDENCE. In habea corpus to release a prisoner detained under a warrant of extradition, the fact that a complaint was filed against him in the demanding state is *prima facie* evidence that he was there charged with a crime.

7. ———: ———: ———: BURDEN OF PROOF. Where a prisoner detained under a writ of extradition regular on its face demands his freedom on the ground that the complaint against him does not charge a crime under the statute of the demanding state, the burden is on him to maintain his position by producing the statute.

8. ———: WARRANT: PRESUMPTION. The issuance of a warrant of extradition creates a presumption that the prisoner detained under it is a fugitive.

9. ———: CONFLICT OF EVIDENCE. In habeas corpus, where there is a substantial conflict in the evidence as to petitioner's presence in or absence from the demanding state at the time the offense is alleged to have been committed, petitioner is not entitled to his freedom on that issue.

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

C. C. Flansburg and *J. G. Thompson,* for appellant.

L. F. Randolph, contra.

ROSE, J.

Charles Chandler petitioned for a writ of habeas corpus, alleging that he was unlawfully deprived of his liberty by L. E. Sipes, who was about to take petitioner to Missouri to answer the charge of assaulting Mary Marnell with intent to kill her. The writ of habeas corpus was issued and petitioner was taken before the district court for Lancaster county. Sipes stated in his return that petitioner was detained under a war-

rant of extradition issued by the governor of Nebraska on a requisition from the governor of Missouri. On a trial of the issues, the proceeding to release petitioner was dismissed, and he has appealed.

The grounds on which petitioner demands his liberty are that the complaint against him is not authenticated, that he is not charged with any crime under the laws of Missouri, and that he is not a fugitive from justice.

Is petitioner entitled to his freedom on the ground that the complaint against him is unauthenticated? In making return to the writ of habeas corpus, Sipes, as officer, or agent of the state of Missouri, was required by statute to set out a copy of the warrant under which he detained petitioner. Rev. St. 1913, sec. 9263. In performing his duty in this respect Sipes presented to the trial court a copy in the following form:

"THE STATE OF NEBRASKA. EXECUTIVE DEPARTMENT.

"TO L. E. SIPES:

"WHEREAS, Frederick D. Gardner, Governor of the State of Missouri, has demanded of the Governor of this State Charles Chandler charged with the crime of assault with intent to kill as a fugitive from justice from said State of Missouri and complied with the requisites in the case made and provided:

"Now, therefore, I, KEITH NEVILLE, Governor, in the name and by the authority of the State of Nebraska, do issue this my warrant and authorize you to forthwith arrest the aforesaid Charles Chandler anywhere within the limits of this state and transport him, the said Charles Chandler, to the line of this state, he the said L. E. Sipes paying all fees and charges for the arrest of the said Charles Chandler.

"And I do hereby command all sheriffs, constables and other officers in this state, to whom this warrant may be shown, to aid in the execution thereof, and furthermore, that you certify to me your proceedings under the same.

"IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Nebraska.

"Done at Lincoln, this 4th day of March in the year of our Lord one thousand nine hundred and eighteen, the fifty-first year of the state, and of the independence of the United States the one hundred and forty-second.

"KEITH NEVILLE."

(Great Seal of the
State of Nebraska,
March 1st, 1867.)

"By the Governor: Charles W. Pool, Secretary of State."

This warrant in the hands of the officer acting for the governor of Missouri was *prima facie* evidence of the cause of the detention of which complaint is made. Rev. St. 1913, sec. 9265; *McIntyre v. Mote*, 77 Neb. 418. The burden, therefore, was on petitioner to prove that the complaint was unauthenticated, and for that purpose he relies on the complaint itself, which follows:

"State of Missouri
County of Buchanan } ss.

Before Lyman W. Forgrave. Justice of the Peace within and for Washington Township in Buchanan County, State of Missouri.

"State of Missouri
Plaintiff,
v.
"Charles Chandler,
Defendant.

Felony Complaint.

"Before me, the undersigned Justice of the Peace, personally came John Marnell, Jr., who says that on or

about the 23d day of September, A. D. 1917, at said county, Charles Chandler, upon the body of one Mary Marnell then and there being, feloniously, on purpose and wilfully with a dangerous and deadly weapon, to wit, a chair, which he the said Charles Chandler then and there had and held, did then and there make an assault, with the intent, the said Mary Marnell then and there to kill, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the state.

"John Marnell, Jr.

"John Marnell, Jr., first being duly sworn according to law, deposes and says that the facts stated in the above complaint are true.

"John Marnell, Jr.

"Subscribed and sworn to before me, a justice of the peace within and for Washington township, Buchanan county, state of Missouri, this 26th day of November, 1917.

"L. W. Forgrave, Justice of the Peace."

While this complaint, as thus reproduced, does not show that it was certified by the governor of Missouri according to the requirements of the federal statutes, the warrant of extradition is *prima facie* evidence of that fact. 11 R. C. L. p. 749, sec. 45; *Farrell v. Hawley*, 78 Conn. 150, 112 Am. St. Rep. 98, note XV. Did petitioner, in seeking his liberty by means of habeas corpus, disprove the *prima facie* cause of detention shown by the officer's return containing a copy of the warrant of extradition? The federal law does not require an executive, in making a requisition, to confine the complaint and the authentication thereof to a single document. They may properly appear separately among the requisition papers. The complaint was admitted in evidence under the following offer by petitioner himself: "I want to offer in evidence a copy of the complaint contained among the requisition papers which was presented to the governor of the state of

Nebraska as a basis for extradition." This offer shows that the requisition contained other papers. They were not introduced in evidence, and they may have contained the necessary certificate. The complaint, as introduced, therefore, does not disprove the *prima facie* evidence that the governor of Nebraska acted on a proper requisition when he issued his writ of extradition, reciting as it did that the governor of Missouri "complied with the requisites in the case made and provided." It follows that petitioner is not entitled to his liberty on the ground that the complaint against him is unauthenticated.

Should petitioner be released because he is not charged with any crime under the laws of Missouri? The sufficiency of the complaint, when tested by the technical rules of pleading, is a question for the Missouri courts. 11 R. C. L. p. 741, sec. 37. On its face the complaint charges all of the elements of the crime of "assault with intent to kill." In habeas corpus such a complaint is *prima facie* evidence that a crime has been charged in the demanding state. *In re Van Sciever,* 42 Neb. 772; *Farrell v. Hawley,* 78 Conn. 150, 112 Am. St. Rep. 98, note XII; 11 R. C. L. p. 735, sec. 29, p. 741, sec. 37. The burden was on petitioner to show by producing the statute the insufficiency of the complaint. 11 R. C. L. p. 735, sec. 29, p. 749, sec. 45. In the present case there is nothing in the record to refute these presumptions.

Is petitioner entitled to be released on the ground that he is not a fugitive from justice? On this issue the contention of plaintiff is that he was not in Missouri at the time the crime is alleged to have been committed. The issuance of the warrant of extradition created the presumption that petitioner was a fugitive. *Dennison v. Christian,* 72 Neb. 703. The evidence as to petitioner's presence in or absence from Missouri when the offense is alleged to have been committed is conflicting. In this condition of the record the rule is that

petitioner should not be discharged. *Munsey v. Clough*, 196 U. S. 364.

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

ROSE ELLEN FOX, APPELLANT, V. SCANDINAVIAN MUTUAL AID ASSOCIATION, APPELLANT.

FILED JANUARY 20, 1919. No. 20206.

1. **Trial**: CONFLICT OF EVIDENCE: SUBMISSION OF ISSUES. When, in a jury trial, the evidence is substantially conflicting upon the issues presented, so that different minds might reasonably reach different conclusions thereon, the cause must be submitted to the jury with proper instructions.
2. **Appeal**: EXCLUSION OF EVIDENCE. Offered evidence, indicated in the opinion, is *held* to have been erroneously excluded.

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

Thomas Lynch, for appellant.

J. L. McPheely, contra.

SEDGWICK, J.

The court instructed the jury to find a verdict for the defendant. The question to this court is whether the evidence was in such a condition that the case should have been submitted to the jury. The defense was that the insured had made false answers in her application for insurance. The brief says that the burden of proof is on the defendant who asserts that, to prove that the answers were false, and that the insured knew what the questions were and the force and effect of the answers, and answered them falsely for the purpose of obtaining the insurance wrongfully. Perhaps the case was not tried strictly upon that theory. The evidence is in somewhat of a confused condition, but there is evidence that the first application was taken by one Sikes, as agent for the company; and that Sikes intended to and did impose upon the in-

sured; but there is no contention by the defendant that the policy should be avoided because of answers in the application taken by Sikes. Sikes was not called as a witness by the defendant, and we have not observed in the evidence any reason why he was not called. The defendant seeks to avoid the fact that Sikes deliberately planned to defraud the insured, and probably deceived the doctor who made the examination and led him to make a superficial examination. The evidence tends to show that Sikes did that.

Dr. Curry made the physician's examination for the company, and testified at large as a witness. He was asked, on the witness-stand, "Now, Doctor, you may state whether or not, aside from these several answers, you know whether or not you propounded the questions to the applicant at that time?" and answered, "I think I did. I always have; that was my custom to do so, and unless there happened to be a question I knew by just seeing the applicant, or something of that kind, I would always ask the question, these I could not see without asking." His whole evidence shows, as this answer shows, that he relied upon his custom in examining applicants for insurance, and had no distinct recollection himself of any question that he asked. It also shows that a great many things that he answered, or rather represented that the insured answered, were things that he "knew by just seeing the applicant, or something of that kind;" and he testified that he saw the applicant and made a thorough physical examination, and that she appeared to be in good health and appeared to be all right.

Proof was offered that about two years before that time this same doctor had examined this same applicant for insurance, and had, according to his custom, probably asked the questions that he thinks he now asked in this second examination. In the meantime, between the two examinations, the insured had been in a tuberculosis hospital. This evidence of the former ex-

amination was excluded, and it seems erroneously. It tends to throw light upon the accuracy of the doctor's recollection in regard to what questions he asked. He testified that he thought that the insured was a first class risk, and her general appearance was good, and that if she had had tuberculosis sufficient to go to a hospital her appearance would show it, and that she had no such appearance. He also said that he did not ask the questions when he could answer them himself by observation. He admits that he did not read the application to the insured, and that he did not instruct the applicant to read it.

The witness Jackson, who was in the next room at the time, with "no door * * * just a large opening," testified that he heard all that was going on, and stated positively that the doctor was not there fifteen minutes. The witness thought that it was not more than ten minutes. This is not denied by the doctor. If he examined the insured physically, as he said he did, it would have taken the whole of the fifteen minutes at least. Jackson also testified that the insured had returned from the hospital some time before, and appeared to be perfectly well, and considered herself perfectly well. There is no evidence contradicting this, and the defendant's own evidence supports this theory.

It does not seem to be clearly proved by this evidence that the doctor asked her the questions that he should have asked her and that he seems to suppose he did ask her, or that the insured knew that such questions were in this application covering a whole sheet, some of it of the very finest print, which was never read to her. He was not in her room altogether more than fifteen minutes during which he was making his observations and his physical investigation. It is not usual for an insurance company to send a physician to examine an applicant for insurance, who will form a custom of asking different questions from those in the written application and then writing down the answers to the

written questions in the application as though those were the ones that had been answered, and not suggest to the applicant to read the application, nor read it to the applicant himself, and then undertake to avoid the insurance because the answers written in the application were not correct.

This case ought to have been submitted to the jury, and there was error in excluding the evidence of the former examination by the doctor.

REVERSED.

CORNISH, J., dissents.

LETTON and ROSE, JJ., not sitting.

HENRY WEHNES ET AL., APPELLANTS, V. HENRY MARSH ET AL., APPELLEES.

FILED JANUARY 20, 1919. No. 20264.

1. **Contracts**: CONSIDERATION: FORBEARANCE TO SUE. Forbearance to sue, where no cause of action exists and the claim is groundless, is not a consideration to support a promise.
2. ———: IMPLIED CONTRACT: CONSIDERATION. Where the law implies a contract, a promise to do something else different from or in addition to that which the law implies is *nudum pactum*.
3. **Frauds, Statute of**: CONTRACT: PART PERFORMANCE. "Performance of services of such a character that their value cannot be estimated by a pecuniary standard, so that the court cannot restore the promisee to the situation in which he was when the contract was made, or compensate him in damages, is sufficient to take such an agreement out of the statute of frauds." *Teske v. Dittberner*, 70 Neb. 544.
4. ———: ———: ———. Where the services were not rendered in pursuance of an agreement made, and in reliance upon it, but had already been rendered at the time of entering into the agreement, the past performance of such services is not sufficient to take the agreement out of the statute of frauds.

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

John C. Hartigan and *M. A. Hartigan*, for appellants.

C. H. Denny and *Hazlett & Jack, contra.*

CORNISH, J.

Plaintiffs ask specific performance of a contract for a two-sevenths interest in the estate of William Marsh, deceased, and assign error in the trial court's sustaining of a demurrer to their petition.

The petition shows that in 1870 Dora Wehnes, mother of the plaintiffs, then small children, having in her possession $420 of the $700 or $800, proceeds of the sale of the personal property of the estate of her deceased husband (which estate also included a 160-acre farm), married William Marsh father of defendants Marsh and a widower, and came to live with him on his homestead; that defendant Frank Marsh was born of the marriage, and the other defendants were then small children; that the homestead was but slightly improved, and with little stock upon it; "that the said Dora Wehnes turned over to the said William Marsh" the $420, above mentioned, "and which belonged to these plaintiffs and the said Dora Marsh;" that "William Marsh became and was a kind and considerate father to these plaintiffs;" that they continued to live at the home of William Marsh and their mother, working upon the lands in company with the other children, until they became of age, when they left to seek fortunes for themselves; that by reason of the profitable investment of the $420 and the aid furnished him by the children (including his own) and plaintiffs' mother, the said William Marsh, at the time the plaintiffs became of age, had accumulated a fortune of $30,000; that at that time the plaintiffs received their share of the proceeds of the sale of the real estate belonging to their father's estate, and, in company with their mother, desiring a complete settlement of affairs of their father's estate, requested William Marsh "to repay to the said plaintiffs the sum of four hundred twenty ($420) dollars, together with an equitable division of the profits that had accrued by reason of the judicious investment and the labors of these plaintiffs;" that William Marsh "recognized" that the $420 and the services rendered had been the

foundation of his fortune and entered into a verbal contract with the plaintiffs, agreeing that, to equalize the amount that the plaintiffs had received out of their father's estate, he would give to each of his children $1,500 out of his property; that the remainder of his property should remain intact, he and his wife to have the use of it during their lives, and that upon the death of William Marsh, in compensation for the said $420 and its profits and the labor of the plaintiffs upon the farm, and in consideration of the forbearance of the plaintiffs in not requiring any settlement with him, "all the estate which he should leave at the time of his death should be equally divided between the children of the said William Marsh and these plaintiffs, * * * share and share alike," to be paid out of his estate at the time of his death; that afterwards William Marsh gave each of his children $1,500; that the plaintiffs performed the said contract upon their part, permitting the said William Marsh to retain the $420 and accumulations thereof, and forbearing, in reliance upon such promise, an accounting or final settlement of the affairs of Fred Wehnes, deceased, their father; that on June 8, 1901, the mother, Dora Marsh, died; that William Marsh died in February, 1915; that in 1909 William Marsh made a will, attempting to dispose of all of his property, in disregard of the contract entered into with plaintiffs; that in making the will he was unduly influenced; that the defendants claim to be the owners of the estate of William Marsh. It is prayed that the defendants be held to hold the property in trust, so that the contract, under which two-sevenths of the same would go to the plaintiffs, may be specifically enforced.

The will, mentioned in the petition, is attached, showing that William Marsh, deceased, gave to each of the defendants, who are his heirs-at-law, one-fifth of his property, consisting of real estate and personal property.

We are of opinion that the trial judge did not err in sustaining the demurrer to the petition.

1. The contract would seem to be without consideration. According to the petition, the services rendered by the plaintiffs were performed as members of the family of William Marsh and wife, without any word or circumstance shown from which a presumption could arise that either Marsh or the plaintiffs expected compensation to be paid. In such case, there is no liability for compensation. *Bell v. Rice,* 50 Neb. 547; *Pierce v. Coffee,* 160 Ia. 30,

It is alleged that the $420 was "turned over" by Mrs. Marsh to her second husband. What part, if any, of it belonged to the plaintiffs and what part to the mother is not shown; nor that the husband knew plaintiffs might be interested in it. In the two years since their father died, their portion of the $700 or $800, proceeds of the sale of the personalty, might properly have been expended by her in their behalf. Prior to the married women's act in 1871 (Laws 1871, p. 68), the wife's chattels became those of the husband, and her choses in action became his when reduced to possession; so that neither the mother nor the children, through her, could base a claim upon the $420 turned over. *Eggleston v. Slusher,* 50 Neb. 83. Forbearance to sue, where no cause of action exists and the claim is groundless, is not a consideration to support a promise. *Palfrey v. Portland, S. & P. R. Co.,* 86 Mass. 55; *Dunham v. Johnson,* 135 Mass. 310; *Cline & Co. v. Templeton,* 78 Ky. 550; *Harris v. Cassady,* 107 Ind. 158.

2. Assuming that when plaintiffs became 21 years old the situation was such that the law would imply a promise in favor of the plaintiffs, the question arises: What promise would the law imply? It would be, first, a promise to pay reasonable compensation for the services rendered; and, second, a return of the $420 and interest which Marsh "took over" from his wife. In the absence of some agreement between Marsh and his wife that he would hold the money and invest it for her and the children, the law will not imply it. Where the law implies a contract, a promise to do something else

different from or in addition to that which the law implies is *nudum pactum*. Beach, Modern Law of Contracts, sec. 161; *Merrick v. Giddings*, 12 D. C. 294; *Murtha v. Donohoo*, 149 Wis. 481, 41 L. R. A. n. s. 246; Pollock (Wald's) Contracts (3d ed.) pp. 199, 200.

Where the claim or liability is one which can be liquidated in money, an action in equity for specific performance, such as we have here, does not lie. *Kofka v. Rosicky*, 41 Neb. 328, 350; *Teske v. Dittberner*, 70 Neb. 544; *Baumann v. Kusian*, 164 Cal. 582; *Haubrich v. Haubrich*, 118 Minn. 394; *Grindling v. Rehyl*, 149 Mich. 641, 15 L. R. A. n. s. 466, and note; *Kelly v. Kelly*, 54 Mich. 30; *Cooper v. Colson*, 66 N. J. Eq. 328.

3. Aside from the above consideration, however, there is another reason why plaintiffs cannot recover in this action. Section 2623, Rev. St. 1913, provides that no estate or interest in land, such as is sought here, can be created unless by deed of conveyance in writing, subscribed by the party. The agreement alleged was oral; therefore void if within the statute. The statute is intended to protect valuable property and estates from fraudulent claims. Certain exceptions, or apparent exceptions, to the provision may arise, such as where the promisee is to occupy some peculiar relation to the promisor; agrees to render a service, to be recompensed upon death of the promisor, where it is apparent that the service was not intended to be and could not be recompensed in money. In such cases, where the parties cannot be placed *in statu quo*, and no adequate compensation in damages could be allowed, the courts, exercising a sound discretion, the evidence being clear and unequivocal, may allow specific performance of the oral contract. In such cases, we say that not to enforce the contract would amount to a fraud upon the promisee. The right to the specific performance results from the acts done in the execution of the contract, referable to it. In the case in hand, the consideration of the plaintiffs, if any existed, was a past consideration. The services had been performed when the contract was

made. The situation and relation of the parties as to the future were not altered. We know of no decision where a court has ordered specific performance when the services were not rendered in pursuance of the contract, but before it was made, and were not accompanied by possession. *Teske v. Dittberner, supra; Kofka v. Rosicky, supra; Riddell v. Riddell,* 70 Neb. 472; *Grindling v. Rehyl, supra; Price v. Lloyd,* 31 Utah, 86, 8 L. R. A. n. s. 870; *Haubrich v. Haubrich, supra; Flood v. Templeton,* 148 Cal. 374; *Robertson v. Corcoran,* 125 Minn. 118; *Oles v. Wilson,* 57 Colo. 246; *Hamlin v. Stevens,* 177 N. Y. 39.

Plaintiffs cite several Nebraska cases. None of them, we believe, is contrary to the rule as above stated. The statute is a beneficial one to both the living and the dead and should not be emasculated by judicial interpretations. Especially should estates after death not be subject to a fraudulent diversion from their legitimate distribution by reason of oral testimony, possibly influenced or changed by greed, sympathy, or uncertain memory of long-past conversations.

AFFIRMED.

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

FRANK ST. CLAIR V. STATE OF NEBRASKA.

FILED JANUARY 20, 1919. No. 20528.

1. **Receiving Stolen Goods:** INTENT. The element of guilty knowledge, necessary to constitute the crime of receiving stolen property, is contained in section 8630, Rev. St. 1913, providing that the property must have been received from the robber, "with intent to defraud the owner."
2. **Criminal law:** EVIDENCE: OTHER ACTS. "To make evidence of other acts available in a criminal prosecution, some use for it must be found as evidencing a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality which is of itself evidence bearing upon the particular act charged." *Clark v. State,* 102 Neb. 728.

ERROR to the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

W. D. Oldham and *Henry B. Fleharty,* for plaintiff in error.

Willis E. Reed, Attorney General, and *Orville L. Jones, contra.*

CORNISH, J.

Defendant (plaintiff in error) was convicted of receiving stolen property.

Section 8630, Rev. St. 1913, on which the information was based, is in part as follows: "Whoever receives or buys any goods or chattels of the value of thirty-five dollars, or upwards, that shall be stolen or taken by robbers, with intent to defraud the owner," etc.

It is argued that, although guilty knowledge is an element of the crime charged, neither those words nor their equivalent are contained in the statute. The charge that goods were received from A. (the robber), with intent to defraud B. (the owner), by necessary implication means that the receiver did not believe that A. had good right and title to the goods; else how could he have intended to defraud the owner.

It is said that the statute, as originally passed, had no comma after the word "robbers," and that the present punctuation, made without legislative authority, changes the meaning so as to give the statute a validity it would not otherwise have. This is doubtful. We think that, to avoid the tautological effect of the words used, the meaning must be the same. Besides, the present punctuation was used in the Revised Statutes, ratified by the legislature in 1913.

Several errors are assigned, based on the introduction of certain evidence and an instruction dealing with it. There was evidence that one Faser bought from the accused the automobile stolen, and it appears that the state, without direct evidence as to how he got possession, sought to show, as bearing upon guilty knowledge, that the defendant was in the business of receiving stolen automobiles and selling them. This was proper. It shows a plan or scheme and might be independent evi-

dence bearing upon knowledge or intent. His possession of the automobile, recently stolen, might be a suspicious circumstance, but explainable and not convincing. When we learn that he was in the business of receiving stolen automobiles and disposing of them in the same way and through the same man (Faser), the probabilities of guilty knowledge are greatly increased.

The fact that there were found on defendant's premises dies or stencils for stamping numbers on Ford cars is significant, as was also the evidence of a curtain, found upon his premises, which the owner positively identified as having been attached to his car, stolen from another county.

The evidence, that three of the cars which defendant sold were not shown to have been stolen, does not appear to have been objected to, but, even if objected to, it would be proper as illustrating the defendant's plan of doing business.

The evidence, that three strange men were frequently seen at his place of business, was proper, as their presence there tended to explain his possession of the stolen automobiles.

Of course, the defendant could not be charged with one crime and convicted of another. Evidence of this character is only admissible as it may throw light upon the question whether defendant knew, when he got possession of the automobile involved, that it was stolen. The trial court so instructed the jury, and, so far as we can see, fully protected defendant's rights. *Goldsberry v. State,* 66 Neb. 312; *Clark v. State,* 102 Neb. 728; 17 R. C. L. p. 75, sec. 80; Roscoe, Criminal Evidence (7th ed.) *96; *State v. Antonio,* 2 Const. Rep. (S. Car.) 776.

We find no prejudicial error.

AFFIRMED.

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

CUSTER TOWNSHIP, ANTELOPE COUNTY, APPELLEE, v. BOARD OF SUPERVISORS OF ANTELOPE COUNTY, APPELLANT.

FILED JANUARY 20, 1919. No. 19912.

1. **Paupers: PETITION: SUFFICIENCY.** An averment in a petition of circumstances showing destitution and inability to procure necessaries or to have them provided by others is a sufficient allegation of dependence upon the public, under section 5797, Rev. St. 1913, when assailed by demurrer. *Meyers v. Furnas County*, 93 Neb. 313.
2. ———: **SUPPORT BY TOWNSHIP.** In counties under township organization in which a poorhouse has not been established, the burden of supporting the poor in the respective townships, under chapter 20, Laws 1915, devolves upon such townships.

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

Lyle E. Jackson, for appellant.

Williams & Kryger, contra.

DEAN, J.

Antelope county is under township organization. Custer township, located therein, began this mandamus proceeding to compel the county to provide for the support of certain paupers resident in and theretofore supported by the township. The county has not established a poorhouse. A demurrer to plaintiff's petition was overruled, and, defendant electing to stand thereon, the writ was granted and defendant was required "to provide the paupers of plaintiff with support." The county appealed.

Defendant urges in support of the demurrer that the petition does not allege that the paupers in question were without relatives of sufficient ability to support them, and that the duty of supporting paupers in counties under township organization, who do not have such relatives, devolves on the township, and not on the county. Section 5797, Rev. St. 1913.

In *Meyers v. Furnas County,* 93 Neb. 313, it was held that an averment of circumstances showing destitution and inability to procure necessaries or to have them provided by others is a sufficient allegation of dependence upon the public when assailed by demurrer. The allegations in the petition come within the rule announced in the *Meyers* case.

Section 1008, Rev. St. 1913, provides: "The electors present at the annual town meeting shall have power: * * * Eight. To direct the raising of money by taxation for the following purposes: * * * 5. For the support of the poor within the town: Provided, 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."

That act, as a part of the township organization law, was enacted in 1895 (Laws 1895, ch. 28), and has remained substantially unchanged. Under that statute, in counties under township organization where no poorhouse has been established, the duty of supporting the poor seems clearly to devolve on the township, and not on the county. *Rock County v. Holt County,* 78 Neb. 616. The word "town" as there used evidently means "township." In *Waltham v. Town of Mullally,* 27 Neb. 483, the word "town" is frequently used for township.

Section 5798, Rev. St. 1913, as amended, Laws 1915, ch. 20, sec. 4, reads: "The county board of each county shall be the overseers of the poor and are vested with the entire and exclusive superintendence of the poor in such county, excepting in cases of corporate towns or cities to which superintendence and jurisdiction shall be by law granted: Provided, the county board may employ a physician by the year to furnish such medical service as may be required by the poor of their county, excepting in corporate towns or cities as herein provided."

If the word "towns" as used in section 5798 is construed to include "townships," then of course "townships" are excepted from the jurisdiction of the county, and the township must support the poor. But if the word "town" is construed to mean "villages," then townships would not be excepted, and so construed the section would be inconsistent with section 1008 and subsequent re-enactments, and, if inconsistent, chapter 20, Laws 1915, would be held to repeal section 1008 by implication.

It has been held that the word "town" as used in legislative acts is without fixed significance, and the legislative intent must ordinarily be gathered from the occasion and necessity of the act. 4 Words and Phrases (2d ed.) 945.

To hold that the legislature in section 5798, Rev. St. 1913, as amended, Laws 1915, ch. 20, sec. 4, by the use of the word "towns," intended thereby to limit the statute to villages instead of making it general for all self-governing municipal organizations less than a city or county and thereby make this statute inconsistent with section 1008, Rev. St. 1913, and repeal it by implication, suggests that if the legislature so intended it would have used the word "villages" instead of the word "towns." We conclude that the legislature intended to except from the jurisdiction of the county all self-governing localities that were by other statutes given jurisdiction, and so used the general word "town" that has been frequently so construed. 4 Words and Phrases (2d ed.) 945.

Section 5798, Rev. St. 1913, being an act of 1875, provided that justices of the peace should be overseers of the poor in their respective precincts in counties without township organization, and this apparently continued to be the law until the 1915 amendment. It would seem then that the purpose of the 1915 act was to confer jurisdiction over the poor in counties in which there was no township organization upon the county board instead of justices of the peace. This construction seems to make the provision of section

5798, as amended, Laws 1915, ch. 20, sec. 4, that excepts corporate towns or cities from the jurisdiction of the county boards reasonable and intelligible. We therefore conclude that, under chapter 20, Laws 1915, in counties under township organization in which a poorhouse has not been established, the burden of supporting the poor in the respective townships devolves upon such townships.

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

REVERSED.

DAVID MILLIGAN V. STATE OF NEBRASKA.

FILED JANUARY 20, 1919. No. 20671.

Criminal Law: SALE OF WHISKEY: SUFFICIENCY OF EVIDENCE. The evidence is sufficient as to the first count, but insufficient to sustain the charge in the second court.

ERROR to the district court for Madison county: WILLIAM V. ALLEN, JUDGE. *Affirmed in part, and reversed in part.*

Barnhart & Stewart and *William L. Dowling,* for plaintiff in error.

Willis E. Reed, Attorney General, and *Orville L. Jones, contra.*

ALDRICH, J.

The state of Nebraska prosecutes one David Milligan on two counts for the alleged sale of whiskey on November 4 and 5, 1917. At the trial the jury returned a verdict of guilty as charged in the information. The defendant appeals. The testimony amply supports the verdict as to the offense charged in the first count of the information, but the second count presents a more serious situation. To this second count, the defendant interposes the defense of an alibi. This defense is recognized in law, and has many times been approved by this court. Then the question presented here is: Did the defendant establish an alibi? Was the evidence sufficient?

It seems that at, or about, 9 o'clock in the forenoon, defendant started in an automobile in company with his sister to their father's home, about six miles north of Hartington; that they arrived there about 12 o'clock, noon, and had dinner there; that in the afternoon defendant spent the entire time up to and until 4 o'clock with his brother building a corncrib there on their farm north of Hartington; that he then ate an early supper with his sister, and started for Norfolk at 4:30 in the evening, and arrived there, according to the testimony of his wife, some time after 6 o'clock. Then defendant's evidence with respect to an alibi is corroborated by his sister, brother, and his wife; and also by Jacob Nitzemburg. It is clear that defendant was not at the place where he was charged with committing the crime. The record examined and held that the evidence supports the verdict as to the first count in the information, but that the verdict as to the second count is not supported by the evidence. The judgment is affirmed as to the first count, and reversed and dismissed as to the second count.

AFFIRMED ON FIRST COUNT, AND REVERSED AND DISMISSED AS TO SECOND COUNT.

CLEMMA ELLWANGER, APPELLEE, V. MINNIE R. W. GOSS ET AL., APPELLANTS.

FILED FEBRUARY 1, 1919. No. 20255.

Fraud: INSTRUCTION. Instruction set out in the opinion *held* free from error under the pleadings and proof as shown in the record.

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

T. F. A. Williams, for appellants.

C. C. Flansburg, contra.

MORRISSEY, C. J.

This is an action for damages, for false representations, made in negotiating certain notes and mortgages

to plaintiff. There was judgment for plaintiff, and defendants appeal.

Defendants, who are wife and husband, were the holders of certain notes and mortgages, aggregating $2,450, which had been executed by one Asbury and wife. The mortgages constituted second and third liens upon 80 acres of land in Nuckolls county. Defendants indorsed these instruments to plaintiff, without recourse, in exchange for property owned by the latter. At the time the transfer was made, defendants represented that the mortgages were ample security for the notes, and made specific statements relative to the quality and improved condition of the land.

The petition alleges that these representations were false; that the land was not ample security for the notes; and that its value, subject to the first mortgage thereon, did not exceed $900. This action is brought to recover the loss resulting to plaintiff from the inadequacy of the mortgaged premises to satisfy the indebtedness secured.

While plaintiff was holding the notes and mortgages in question, the land was sold by the Asburys to one Mitchell, who assumed the mortgages, paid plaintiff $600 on the principal, and then defaulted. Plaintiff thereupon instituted foreclosure proceedings, procured a decree and order of sale, and, in competitive bidding, purchased the equity in the premises, subject to the first mortgage, for $925. A deficiency judgment for $1,320 was entered against Mitchell. An execution was issued thereon and returned, "No goods found." Thereafter plaintiff brought this action, still having in her possession the original notes, which the Asburys had executed.

The principal errors assigned by defendants center about the following instruction, given by the trial court:

"If, under the evidence and these instructions, you find for the plaintiff, then you will, from the evidence before you, ascertain and determine, as best you can, the difference, if any, between the actual value of said

notes and mortgages at the time plaintiff traded for them and the value they then would have had if said representations had been true. You will then deduct from this difference the $600 which plaintiff collected on the principal of said notes, and the $925 which she bid on said land at sheriff's sale, making a total to be deducted of $1,525, and, if there is any of said difference remaining, such remainder, together with 7 per cent. interest thereon from the 9th day of October, 1916—the date of said sheriff's sale—will be the true amount of plaintiff's recovery, if you find she is entitled to recover."

It is contended that this instruction is erroneous, in not allowing the jury to consider the value of the Mitchell judgment, or the Asbury notes, in determining to what extent plaintiff was damaged by defendants' fraud. The opening paragraph of the instruction directs the jury to determine from the evidence the difference, if any, between the actual value of the notes and mortgage and the value they would have had if defendants' representations were true. Had defendants desired a more explicit statement, a suitable instruction ought to have been tendered, but this was not done.

The instruction is further attacked on the ground that it limited the deduction to be made from plaintiff's damages to the exact sum bid by her at the sheriff's sale. It is claimed that plaintiff subsequently sold the land, at private sale, for an amount greater than that paid by her, and that defendants were entitled to have this fact considered in the determination of the damage sustained. The pleadings do not aver, nor does the proof show what the net profit, if any, was. If defendants desired a finding on this question, it was their duty to put the matter in issue and then show by competent proof the net sum realized by plaintiff on the sale.

The record being free from error, the judgment is

AFFIRMED.

STATE OF NEBRASKA v. RUDOLPH STAPEL.

FILED FEBRUARY 1, 1919. No. 20729.

1. **Criminal Statutes:** CONSTRUCTION. Criminal statutes must be strictly construed, but courts will not narrow their terms so as to give them a strained or unnatural construction, and, where the language is ambiguous, that sense will be adopted that best harmonizes with the context and with the apparent policy and object of the legislature.
2. **Chattel Mortgages:** SALE OF PROPERTY. Section 534, Rev. St. 1913, construed, and *held* to apply to the sale or transfer of mortgaged chattels to a partnership.

ERROR to the district court for Saline county: RALPH D BROWN, JUDGE. *Exceptions sustained.*

Charles F. Barth, for plaintiff in error.

Glenn N. Venrick, contra.

MORRISSEY, C. J.

Section 534, Rev. St. 1913, makes it a felony for the mortgagor of personal property to sell or dispose of any part thereof "to any person or body corporate" without the written consent of the mortgagee. Defendant was charged with a violation of this statute. The state proved that he had, without the consent of the mortgagee, sold and transferred a mortgaged automobile to a partnership. The trial court held that a partnership was not a "person or body corporate," and dismissed defendant. The county attorney brings the case here for a review of this ruling.

It is apparent that the legislature intended by this statute to protect the interests of the mortgagee by guarding against any disposal of the property without the latter's consent. In the accomplishment of this purpose it would be immaterial to whom the sale or transfer was made.

Defendant argues that criminal statutes must be strictly construed. This is fundamental. But it is not proper to give them a strained or unnatural construction. They should be so construed as to give effect to the plain meaning of the words employed, and, where they are of doubtful meaning, the court should adopt the sense that best harmonizes with the context and the apparent policy and objects of the legislature.

Within the contemplation of the statute, the sale or transfer of the property was a sale or transfer to several persons jointly. It follows that the ruling of the trial court was erroneous.

EXCEPTIONS SUSTAINED.

SUTHERLAND STATE BANK, APPELLANT, V. M. F. DIAL ET AL., APPELLEES.

FILED FEBRUARY 1, 1919. No. 20310.

1. **Bills and notes:** ACTION: PARTIES. A bank which furnishes the consideration for a negotiable promissory note, but takes it payable to a third party, expecting it to take over the note for the consideration, which it failed to do, and which note remains the property of the bank, may without indorsement or assignment maintain an action in its own name on the instrument when such facts are stated in the petition.
2. **Contracts:** REFORMATION. In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing and satisfactory, and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties.
3. ———: ———: BURDEN OF PROOF. The burden of proof is upon those who seek to reform and change the terms of a written instrument. Evidence examined, and *held* that this burden has not been met in this case.

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

Beeler & Crosby, for appellant.

Albert Muldoon, contra.

LETTON, J.

Action upon a promissory note signed by the defendants, Dial and Laubner, as makers, payable to the Welpton Investment Company, and not assigned or indorsed to plaintiff. The defendants admit they signed the note, but plead, in substance, that the money for which the note was given was not borrowed by them, but by the Farmers Alfalfa Milling Company; that the note was signed by them as officers of that company, and the money was credited to and checked out by it. They pray that the note be reformed by striking out their names and attaching the name of the milling company. The court transferred the case to the equity side of the docket, tried it without a jury, found for the defendants, and dismissed the action. Plaintiff appeals.

The officer of the plaintiff bank, who made the loan, was not present at the trial, but it was admitted he would testify as set forth in an affidavit for continuance. In substance this is as follows: That in December, 1909, he loaned the sum of $2,500 to the defendants; the note taken was made payable to the Welpton Investment Company, with the expectation of the bank to deliver the note to the Welpton Investment Company, but this was not done, and it remained the property of the bank; that defendants tried to sell him a number of notes of the milling company, but he refused to buy them, or to make a loan to that company because it was then in financial disrepute; that part of the debt has been paid, leaving still due the amount of $1,586.48.

Defendants testify, in substance, that they were directors of the Farmers Alfalfa Milling Company; that this company owned $3,300 worth of notes given in payment for stock subscriptions; that at a meeting of the company in December, 1909, a motion was carried that the treasurer be instructed and given power to borrow $2,500 or more on the notes of the Farmers Alfalfa

Milling Company. Dial was treasurer of the company. He and Laubner took these notes to the plaintiff bank and attempted to sell them to Mr. Worrell, the cashier. Worrell asked Dial for his authority, and he told him the board had directed him to do this. Worrell then told Dial to get a copy of the minutes. In about two weeks they went back with a copy of the minutes, Worrell read them, looked the notes over, said they were all good except one, and said he would loan the money on the notes. Dial says: "I asked him if the president shouldn't sign (the note), and he said, 'There is none of you here but you and Leonard (Laubner). You and Leonard just sign.'" He (Worrell) put the minutes of the meeting and the $3,300 worth of notes all together, laid them on the table, and said, "That clears you."

The money was deposited to the credit of the Milling company and was drawn by it. Dial testified that Worrell said, "'You are treasurer and director, and Leonard (Laubner) is director,'" and "'this here protects you,' pointing to the minutes." Both defendants deny that Worrell told them he would not loan the money to the milling company. The original note was renewed. The note in suit is for $2,000, and is dated July 22, 1910.

A witness for defendants, apparently disinterested, testified that he heard a conversation in the bank in December, 1909, that "Mr. Dial had a bunch of notes he wanted to sell to Mr. Worrell, and Worrell looked through the notes and told Mr. Dial he wouldn't buy them, but would loan him, I think, $2,500 and take the notes as collateral." "Q. Was there any other conversation as to any statements Mr. Dial made to Mr. Worrell with reference to the money and what he wanted it for? A. Yes, he said he wanted it for the Alfalfa Milling Company. Q. Anything else you remember? A. That is about all."

Another witness, apparently equally disinterested, testified for plaintiff that he heard Worrell say to defendants, "I won't loan the Alfalfa Milling Company any money, but I will loan you and Laubner the money."

Plaintiff relies on the rule that parol evidence will not be received to vary or contradict the terms of a written instrument. Defendants concede this to be the general rule, but insist that in equity they are entitled to show what the actual agreement was, and that they were only acting as agents for the milling company. Assuming without deciding, that, where there is nothing on the face of the instrument to show that the signers were acting for another, this right exists, do the facts warrant a decree of reformation? The minutes of the corporation meeting of December 13, 1909, recite: "Motion made by W. D. Linden, that the treasurer be instructed and is hereby given power to borrow $2,500 or more on the Farmers Alfalfa Milling Company notes, of Hershey, Nebraska. Seconded by Anderson. Motion carried."

Laubner is not mentioned in the motion, hence he had no authority to act for the corporation, and his signature could not bind it. It could only bind him personally. Even as to the treasurer, when it is remembered that the milling company had about $3,300 in farmers' notes on hand, this motion is ambiguous. Does it mean that the treasurer is authorized to borrow on notes to be executed by the corporation, or that he is authorized merely to pledge the notes then held by it?

The Negotiable Instruments Act provides: "Where the instrument contains or the person adds to his signature words indicating that he signs for or in behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character without disclosing his principal does not exempt him from personal liability." Rev. St. 1913, sec. 5338.

It is settled law that, in order to justify the reformation of a written instrument, the proof that it does not conform to the intention of the parties, and was made by mistake, must be clear, convincing and satisfactory. While a preponderance of the evidence is all that is required, the fact that the note bears no evidence upon its face that it is other than the individual obligation of the men who signed it raises a strong presumption, and under the statute almost an unrebuttable, that the defendants did just what they intended to do, and that it is their individual obligation. Unless this presumption is overcome by convincing proof, the instrument must stand as it was written. This court has stated these principles repeatedly. *Topping v. Jeanette,* 64 Neb. 834, and cases cited in opinion. Also, *Baker v. Montgomery,* 78 Neb. 98; *Bingaman v. Bingaman,* 85 Neb. 248.

It is a significant circumstance that the note sued upon is not the original note, but a new obligation given after its maturity, and at a time when the evidence indicates it was well known that the corporation was in financial straits. Moreover, the direct testimony by an apparently disinterested witness that he heard the banker refuse to make the loan to the corporation, but offer to make it to the defendants themselves, seems to us entitled to much weight.

We are of the opinion that the surrounding circumstances, when all the testimony is considered, tend to weaken rather than strengthen the defendants' testimony, and that the evidence is not sufficient to justify the reformation prayed.

Defendants insist that the judgment should stand, for the reason that the note was on its face payable to the Welpton Investment Company, and there is no indorsement or assignment from that company to the plaintiff. They objected to its introduction in evidence on that ground. As a general rule, an action on a negotiable promissory note must be brought in the

name of the payee, indorsee or assignee, but the petition pleads that, though the note was made payable to the Welpton Investment Company, and plaintiff intended to deliver the same to it, this was never done, and plaintiff is now the owner and holder of the note, and entitled to the money due thereon.

It is in evidence that the note was made payable to the Investment Company, "with the expectation, as was customary, for said plaintiff bank to deliver said note to said Welpton Investment Company, and with the expectation that said Welpton Investment Company would refund to said plaintiff the consideration for said note, but that said note was not delivered to said Welpton Investment Company, and that said note remained the property of the Sutherland State Bank, and that said Sutherland State Bank furnished the consideration."

The petition sets forth a good and valid reason in equity why the suit was brought in the name of plaintiff, and the evidence supports its allegations. 3 R. C. L. p. 991, sec. 199. No one else had any real or actual interest in the instrument, and the action must be brought in the name of the real party in interest. It has been held: "The owner of a promissory note, in which a third party by mistake or inadvertence is named as payee, may sue on it without indorsement, on proof of such ownership by evidence other than the note." *Spreng v. Juni*, 18 Am. & Eng. Ann. Cas. 222, 109 Minn. 85. This principle applies.

Considering the whole transaction, we are satisfied that plaintiff is entitled to maintain the action in its own name, and that the defendants have not sustained the burden of proof in their cross-action to reform the instrument. The judgment of the district court is therefore reversed, with instructions to ascertain the amount due upon the note, and render judgment accordingly.

REVERSED.

SEDGWICK, J., not sitting.

STATE, EX REL. WILLIS E. REED, ATTORNEY GENERAL, RELATOR, V. GARDEN COUNTY ET AL., RESPONDENTS.

FILED FEBRUARY 1, 1919. No. 19387.

Counties: BOUNDARIES. The boundary between Grant county and Garden county *held* to be the section line running north and south three miles west of the range line between ranges 40 and 41, in townships 21, 22, and 23.

Original application for writ of ouster. *Writ allowed.*

Willis E. Reed, Attorney General, George W. Ayres, A. D. Fetterman, W. H. Thompson and *D. F. Osgood,* for relator.

H. J. Curtis and *F. A. Dutton, contra.*

ROSE, J.

This is an original action in the nature of *quo warranto* brought in the supreme court by the state of Nebraska, on the relation of the attorney general, to oust Garden county and its officers from exercising jurisdiction over a strip of land about 18 miles long and about three miles wide running north and south in townships 21, 22, and 23 north, range 41 west of the sixth principal meridian; it being alleged that the territory in controversy is in Grant county. Respondents in their answer deny the allegations on which relator bases his prayer for the writ. To the answer relator demurred. In an opinion overruling the demurrer there is a statement of the case. *State v. Garden County,* 99 Neb. 807. Hon. William Mitchell was appointed referee to take the testimony and to report his findings of fact and conclusions of law. Upon a full hearing, after taking testimony at great length on both sides, the referee found the issues in favor of relator. Defendants excepted, and the case is presented on the exceptions. The controversy be-

tween Grant county and Garden county is described by the referee in his report as follows:

"The question involved is whether the territory three miles west from the east side of range 41, in townships 21, 22, and 23, west of the 6th P. M., is in Grant or Garden county, Nebraska. It is contended by Grant county that the 25th degree of longitude west from Washington is the west line of Grant county. Garden county contends that the west line of Grant county is the range line between ranges 40 and 41 in said townships. Just where the 25th degree of longitude was located on the earth's surface no one seemed to know prior to 1912. Grant county claimed that it was at or near the west line of the aforesaid disputed territory. In 1912, at the request of Grant county, E. C. Simmons, deputy state surveyor, established by survey the aforesaid degree of longitude approximately three quarters of a mile east of the west line of said disputed territory, and Grant county, admitting the correctness of said survey, has since claimed the line established by said survey as the 25th degree of longitude as and for the west line of said county.

"Grant county claims said disputed territory because it contends that it has long exercised jurisdiction and authority over same, and also because it is east of the 25th degree of longitude found and established by the Simmons survey. Garden county claims said disputed territory, without regard to where said 25th degree of longitude is located, because it contends that it and Deuel county have long exercised jurisdiction and authority over same. Garden county was formed in 1910 from a part of Deuel county.

"Where the 25th degree of longitude west from Washington is located and whether or not the different acts defining the boundaries of Grant county, passed by the legislature of Nebraska, are unconstitutional are not the vital questions in issue. The moving consideration for the decision in this case necessarily in-

volves the question of jurisdiction over the territory in question.

"Each county contends that it has always exercised exclusive jurisdiction over said disputed territory. This case, in my opinion, should be decided solely in favor of the county whose equitable claim of jurisdiction over the territory in question preponderates, if the record discloses such a state of facts. In order to do this it will be necessary to examine the evidence. It would not be possible to present within reasonable bounds any condensation of the great mass of evidence given at the trial that would materially aid the court in dealing with exceptions to this report. To give a just impression of its value, it would be necessary to set out an abstract of same. While it may be improper, yet, for the purpose of showing the court the reasons for my decision in this case, I am going to cite to the court, in a limited way, the evidence on which I base my findings of fact and conclusion of law."

Following this statement the referee makes specific findings on the issues of fact and concludes as follows:

"I therefore find that the 25th degree of longitude west from Washington is the boundary line between Grant and Garden counties, Nebraska, and that said 25th degree of longitude is located in townships 21, 22, and 23, range 41, at the place where the survey of said territory made by E. C. Simmons, deputy state surveyor, in 1912, establishes and locates same.

"I further find that a writ of ouster should issue against Garden county and its officials, and that they be ousted from all parts of said territory east of the 25th degree of longitude west from Washington in townships 21, 22, and 23, range 41, and that Garden county pay the costs of this action.

"My conclusion of law is that Garden county is prevented by the equitable doctrine of estoppel or laches from now claiming that the boundary line between

Grant and Garden counties is the range line between ranges 40 and 41 in townships 21, 22, and 23.

"In view of the fact that said 25th degree of longitude west from Washington dismembers farms and ranches and places them in different counties, and that without regard to section lines as established by government survey, I recommend that the court fix the west line of said disputed territory, as claimed by Grant county, three miles west of the range line between ranges 40 and 41 in townships 21, 22, and 23 as the boundary line between Grant and Garden counties, Nebraska."

It is argued on behalf of respondents that the findings on which the referee bases his conclusions are not supported by the evidence. The testimony is too voluminous for analysis in an opinion, but the findings which control the decision are amply supported by the evidence. It follows that the exceptions are overruled, and that the report of the referee is confirmed.

It is therefore adjudged that the boundary between Grant county and Garden county is the section line running north and south three miles west of the range line between ranges 40 and 41 in townships 21, 22, and 23. Writ of ouster allowed to prevent defendants from exercising county jurisdiction beyond the boundary described.

WRIT ALLOWED.

The following opinion on motion for rehearing was filed April 4, 1919. *Rehearing denied.*

PER CURIAM.

On the motion for rehearing, it is contended that, as the finding is that the 25th degree of longitude west from Washington is the boundary line between the two counties, the order fixing the line three miles west of the range line amounts to an arbitrary change of the county line, which of course the court is not author-

ized to do. The court understood the finding to be that the 25th degree of longitude was originally fixed by the legislature as the boundary line, but that Garden county is prevented by estoppel, as is explained in our former opinion, from now claiming that as the practical boundary line, and as both counties have ignored that as the boundary and the townships have been organized and farms and ranches located with reference to a different boundary line, the line so established by the practice of the public and of the farm owners should be regarded as the true line, and it was therefore so adjudged in the decision.

IRVIN F. CROSS, APPELLANT, V. FRANK L. PROHASKA ET AL., APPELLEES.

FILED FEBRUARY 1, 1919. No. 20336.

Appeal: BILL OF EXCEPTIONS. A purported bill of exceptions not allowed by the trial court or not authenticated by the clerk of the district court will be disregarded on appeal.

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

George W. France and *F. C. Power,* for appellant.

E. A. Gilbert, contra.

ROSE, J.

This is an action to recover a commission of $500 for the sale of land. From a judgment on a verdict in favor of defendants, plaintiff has appealed.

The assignments of error are based on misconduct of a witness and of the jury. The evidence has not been preserved by a bill of exceptions, and without the evidence the merits of the assignments cannot be determined. What purports to be a bill of exceptions was filed in this court, but it was not allowed as

such by the trial judge or authenticated by the clerk of the district court. It must therefore be disregarded on appeal. *Dugger v. Smith*, 94 Neb. 552; *Gay v. Reynolds*, 57 Neb. 194.

AFFIRMED.

STATE, EX REL. WILLIAM TOOP ET AL., APPELLANTS, V. ALBERT V. THOMAS, COUNTY ATTORNEY, APPELLEE.

FILED FEBRUARY 1, 1919. No. 20210.

1. **Aliens: INHERITANCE: ESCHEAT.** Under sections 6273, 6274, Rev. St. 1913, nonresident aliens cannot inherit title nor right of possession of lands in this state; but, the same must be forfeited to the state as provided in those sections.
2. **Mandamus: PARTIES: FORFEITURE OF LANDS.** It is the duty of the county attorney of the county in which the lands lie to proceed under the statute to forfeit the lands to the state, and, if he refuses or neglects to do so, such nonresident alien heirs may enforce such action by mandamus.
3. **Escheat: RIGHTS OF NONRESIDENT ALIENS.** When lands of a decedent, from whom such aliens would inherit if residents of the state, are so forfeited to the state, they are entitled to the value of such portion as they would, if residents, inherit; such value to be ascertained as provided in the statute.

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

Crane, Boucher & Sternburg and *Bulkley, More & Tallmadge*, for appellants.

R. C. Roper, C. M. Skiles and *A. V. Thomas, contra.*

SEDGWICK, J.

John Toop, a resident of Butler county, in this state, died, leaving a widow and no children. At the time of his death, he was the owner of a farm in that county. Some time after his decease his widow also departed this life, and these relators, who are his nieces and nephews, being children of a deceased brother and

sister, and are residents of Great Britain, began this action in mandamus in the district court for Butler county, to require the respondent, as county attorney of that county, to proceed under article V (secs. 6272-6276), Rev. St. 1913, relating to escheats, to forfeit to the state the title in this land. The respondent filed a general demurrer to the petition, which was sustained by the court, and the action dismissed; and the relators have appealed to this court.

There is no contention but that the petition alleges facts sufficient to require the determination of the question whether the relators as nonresident aliens have any interest in the real estate in question, or in the proceeds thereof when the title is forfeited to the state. Section 6273, Rev. St. 1913 provides: "Nonresident aliens and corporations not incorporated under the laws of the state of Nebraska are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase, or otherwise, only as hereinafter provided; * * * it shall be the duty of the county attorney in the counties where such lands are situated to enforce forfeitures of all such lands as provided by this article." The next section, 6274, Rev. St. 1913, repeats the provision that it shall be the duty of the county attorney to proceed to forfeit the title to the state, provides how the action shall be begun and summons shall be served "upon the nonresident alien defendants," and continues: "And the court shall have power to hear and determine the questions presented in such cases and to declare such lands escheated to the state. * * * The heirs or persons who would have been entitled to such lands shall be paid by the state of Nebraska the full value thereof, as ascertained by appraisement upon the oaths of the judge, treasurer and clerk of the county where such lands lie, and such lands shall then become subject to the law, and shall be disposed of as other lands belonging to the state. * * * The

widow, heirs and devisees, or either of them, of deceased nonresident aliens, may, * * * instead of the forfeiture herein provided for, have the lands sold as in partition" and in such case the land shall be sold and the proceeds "shall be divided according to the respective interests of the parties the same as if there had been no escheat."

Under these provisions such nonresident alien heirs do not acquire the legal title to the land, and cannot take or hold the land, that is, they cannot enforce possession of the land. But when the county attorney has performed his duty, and the lands are sold as in partition, they take their portion of the proceeds "according to the respective interests of the parties." The heirs of this estate, or some of them, have been interested in several actions in which they attempted to assert title in this land, and have failed because under this statute they cannot by descent take title nor right of possession. This article V was enacted in 1889 (Laws 1889, ch. 58); and former acts in regard to interests of nonresident aliens in real estate were by that act repealed. Since the enactment of that statute, there have been several decisions of this court in which the statute was referred to and some of its provisions were construed. In *Glynn v. Glynn,* 62 Neb. 872, the provision of the statute that "the provisions of this act shall not apply to any real estate lying within the corporate limits of cities and towns" was construed, and it was held that nonresident alien heirs could inherit the title to real estate situated in cities and towns, and that a resident alien within the meaning of the Constitution was one who resides in the state of Nebraska. What interest they would take in lands in the state not in cities and towns was not involved in the case, but the opinion recited that they were "prohibited from acquiring or holding any lands or real estate in this state by descent, devise, purchase, or otherwise" which is strictly true so far as acquiring by descent the title or right of posses-

sion of lands. In *Dougherty v. Kubat,* 67 Neb. 269, the same question was involved as to the right to inherit the title and right of possession of lands situated in corporate limits of cities and villages, and *Glynn v. Glynn, supra,* was followed and adhered to. In neither of these cases was anything involved or even stated in regard to the right of these heirs to have the title transferred to the state and be paid the value thereof, as provided in the act. In the more recent case, brought by some of the heirs of John Toop (*Toop v. Palmer,* 97 Neb. 802), the judgment of the district court was affirmed, in which it was held that the resident heirs of John Toop, who could inherit the legal title and right of possession, could maintain an action to set aside a deed which they had been induced to execute upon the false representations that the alien nonresident heirs had the same rights of inheritance and possession that they themselves had. There is perhaps some language in that opinion that might be considered as derogatory to the rights of these parties to the relief herein demanded, but nonresident aliens, who are not parties to that proceeding, would not be bound by such expressions, particularly as they do not seem to have been necessary to the decision in that case. In *Glynn v. Glynn, supra,* it was held that the proviso in the statute, that it should not apply to lands within cities and towns, "by implication at least, is a legislative declaration that lands within the corporate limits of cities and towns should remain unaffected by the common-law doctrine of inheritance, and that the general law of descent should apply." By the same reasoning the provision of the statute that they should take no interest "only as hereinafter provided," and that the lands should be sold and the proceeds "divided according to the respective interests of the parties the same as if there had been no escheat," is, by implication at least, the legislative declaration that the right to the value of the "respective interests" "should re-

main unaffected by the common-law doctrine of inheritance," and that so far the general law of descent should apply.

The county attorney should have proceeded under the statute to forfeit the title and right of possession to the state, and the judgment of the district court is reversed and the cause remanded, with instructions to allow all persons claiming any interest in the lands to become parties to the proceedings, and to ascertain their interests, and, at the request of any interested party, proceed as in actions for partition, and enter judgment accordingly; the costs now incurred to be paid by the parties incurring them, and subsequent costs to abide the result as in partition.

REVERSED.

LETTON and ALDRICH, JJ., not sitting.

The following opinion on motion for rehearing was filed May 17, 1919. *Rehearing denied.*

PER CURIAM.

In the briefs upon the motion for rehearing it is assumed that chapter 58 of the Laws of 1889 has no application to nonresident alien heirs of a resident of this state. The first section of the act applies to all nonresident aliens, and provides that they shall not take or hold lands by descent. So far as they are prevented from inheriting, their rights would, of course, revert and escheat to the state; and the purpose of the act is to provide for such cases where the rights of nonresident alien heirs revert and escheat to the state. And, so, the nonresident alien heirs of a resident of the state are in the same position as are such heirs of a nonresident of the state. It would be strange indeed if the legislature had intended to discriminate against the heirs of a resident and in favor of the heirs of a nonresident. "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property." Const., art. I, sec. 25. And, so, in *Glynn v. Glynn*, 62

Neb. 872, it is said: "The record also discloses that Robert Glynn, deceased, was an alien; but, in view of our constitutional provisions respecting alien residents, that fact is not of importance."

The motion for a rehearing is

OVERRULED.

LETTON, J., not sitting.

EDWARD F. DIETER, APPELLEE, V. DOOLITTLE PRODUCE COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 1, 1919. No. 20268.

1. **Master and Servant:** ASSUMPTION OF RISK. An employee by his contract of employment assumes the ordinary risks and dangers incident to his employment. If, however, the machinery or appliances furnished by the employer are known to the employee to be defective and dangerous, but he is induced to continue in such service on the promise of the employer to remedy such defect, and he relies on such promise, he does not thereby assume the risk of an injury he may sustain by reason of such defective machinery or appliance.
2. **Evidence** examined, discussed in the opinion, and *held* sufficient to support the verdict.

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

Hoagland & Hoagland and *George N. Gibbs*, for appellants.

Beeler & Crosby, contra.

DEAN, J.

Plaintiff is a baker by trade. He sued defendants to recover for personal injuries sustained by the bursting of a hot-water tank in defendants' bakery while in their employ. He recovered a verdict and judgment thereon for $1,300, and defendants appealed.

The bakery consists of a salesroom fronting on the street with a bakeroom in the rear. The tank in

question was an ordinary 30-gallon hot-water kitchen range tank, formerly used in connection with a kitchen range, that was converted by defendants into a steam boiler and installed by them in the bakeroom before plaintiff's employment began. It was used to generate the steam used by bakers to keep the bread moist. The force of the explosion carried the tank through the ceiling of the bakeroom, the ceiling of the room immediately overhead, and through the roof. When the tank exploded plaintiff was alone in the bakeroom. He sustained severe face and body burns. A leg was broken in two places. A rib was broken and an eardrum punctured. Some of his injuries are permanent; the broken leg being two inches shorter than normal.

Plaintiff pleaded generally defendants' negligence in supplying neither a steam gauge nor "a proper boiler of sufficient strength" and "in allowing said boiler to remain in its defective condition." In view of plaintiff's allegations and evidence on this point that will be presently noted, the court did not err in overruling "defendants' motion to withdraw from the jury the issue of a defective boiler outside of the question of a steam gauge."

The plumber who was employed by defendants to convert the tank into a steam boiler and install it testified that he did so under protest, and that he told one of the defendants at the time that the tank as installed was unsafe. He said that the 40 feet of steam coil was sufficient to heat a boiler of 300 gallons capacity, and that the 30-gallon tank to which the coil was attached would generate too much steam for safety, and that the small tank was not of sufficient strength to withstand the ordinary pressure.

It is admitted by defendants that no steam gauge was ever attached to the tank, but considerable stress is laid on the fact that a "pop-off valve" was attached thereto before plaintiff entered their employ.

On this point Frank T. Sullivan, a plumber, as disclosed in defendants' brief, testified: "Q. Is there any accuracy as to the pressure your pop-off is withstanding, unless it is tested by a steam gauge? A. No; you can't tell a thing about it without you compare it with the steam gauge." On the cross-examination by defendants, W. T. Green, a plumber, testified: "Q. What benefit would a steam gauge have been on the tank, with a pop-off that was working there that would pop off at about 10 pounds, to prevent a blow-out? A. There would be no way of telling, unless this pop-off would be set by a steam gauge, to tell whether it was set at 10 pounds or 100 pounds, and by using a steam gauge it would indicate the amount of pressure on the boiler at all times."

Defendants argue that the testimony respecting installation has no bearing on the issues. It seems to us that the court did not err in admitting it. The evidence bore on the question of defendants' negligence as to whether they installed and retained a defective boiler without a steam gauge. The evidence was explanatory of the accident. It is reasonable to believe that the jury concluded that, had there been a steam gauge on the boiler, a reasonably prudent man would have discovered the danger in time to have prevented the explosion, or in any event to have made his escape. It was not shown in the premises that plaintiff was other than a reasonably prudent and careful man, and the jury after seeing and hearing him testify were better able to pass on that question than a reviewing court can be with only the typewritten page for its guidance. There is testimony from which the jury could find that plaintiff was not placed in charge of the bakery with instructions or permission to procure such fixtures or safety appliances as he deemed necessary.

Plaintiff was a baker. It does not appear that he was conversant with steam fitting or plumbing. In defendants' brief it is said: "It appears that in mak-

ing bread it is necessary to use a small amount of steam or vapor in the proof-box in order to moisten the bread, and this can be secured in various ways. In some bakeries the steam is generated by heating a pan of water on a gas stove, or by placing a heated brick in a pail of water, or by conveying the steam from the mouth of a teakettle through a rubber hose to what is called the proof-box." This statement naturally suggests that, if any of the agencies for creating steam so pointed out had been used by defendants, there would have been no explosion. It is also said: "In the instant bakery a pipe extended from the top of the boiler to the proof-box with a stop-cock near the end, through this pipe the small amount of steam was conveyed as needed in the baking of bread."

Defendants maintained their living rooms over the bakery. It was shown that the rooms were heated by steam radiators that were attached to the hot-water tank in question, and that they were so installed to relieve in part the steam pressure in the tank. It is not in evidence that in May, when the explosion occurred, that steam was permitted to circulate in or escape through the radiators, and without proof the jury would not, of course, assume that such was the case. So that the radiators at the time of the explosion afforded no relief from excessive steam pressure in the tank.

Defendants argue that plaintiff assumed the risk of his employment. On the cross-examination plaintiff testified: "Q. You never went up and told her that you were going to quit work unless she fixed it and got a steam gauge, did you? A. No; I didn't think it was necessary. She had promised to put it on." It is in evidence that on two or more occasions one of the defendants told plaintiff in response to an inquiry by him that a steam gauge had been ordered. Defendants complain because the petition does not in direct terms allege a reliance by plaintiff on the promise, but the

attention of the district court was not challenged on this point, and the case was apparently tried on the theory that reliance on the promise was pleaded. It is in evidence that plaintiff repeatedly requested and defendants as often promised to install a steam gauge, and that he remained in their employ in reliance on their promise. The jury were justified in finding from the evidence that plaintiff did not assume the risk attendant upon his employment, but that he remained in defendants' employ in reliance on their promise to furnish needed safety devices. *Sapp v. Christie Bros.*, 79 Neb. 701; 18 R. C. L. 696, sec. 180.

Milton Doolittle, one of the defendants, testified that immediately after the accident he examined the faucets that permitted the steam to escape from the bakeroom and permitted it to enter the bread box, and they were both closed, and the faucet of the intake water pipe was open. Defendants asked for this instruction: "The jury are instructed that, if you find from the evidence that the explosion of the boiler and the injury to the plaintiff thereby was caused by plaintiff turning cold water into such boiler and pipes connected therewith, while the same was very hot and without sufficient water therein, then such act would be deemed gross negligence on the part of the plaintiff, and he cannot recover in this action." The court did not err in refusing to give the instruction, because this point was apparently covered by the court's instruction on the rule of comparative negligence. In view of the injuries that plaintiff sustained and the amount of the verdict that he recovered, it seems to us that the jury must have taken into account the negligence, if any, that was contributed to the accident by plaintiff.

Objections are made to certain instructions given and the refusal to give other instructions offered by the defendants. We have examined the points raised on this question and on all of defendants' assignments, and do not find that error can be predicated thereon.

The testimony conflicted on every material point, but, having been fairly submitted to the jury under proper instructions, we are not disposed to disturb the verdict. Finding no reversible error, the judgment is

AFFIRMED.

LETTON, J., not sitting.

CASPER F. RAASCH ET AL., APPELLEES, V. LUND LAND COMPANY ET AL.: DANIEL S. ROCKWELL ET AL., APPELLANTS.

FILED FEBRUARY 1, 1919. No. 20295.

1. **Constructive Trust.** When the record title of land is obtained from a grantor by the fraud of a grantee, a constructive trust is thereby created, and such grantee becomes a trustee for the grantor.
2. **Attachment:** VALIDITY. In such case, an attachment levied on the land by a creditor of such trustee cannot be upheld.
3. **Constructive Trust:** PAROL EVIDENCE. A constructive trust is excepted from the operation of the statute of frauds, and parol testimony is admissible to prove the circumstances under which an alleged fraudulent conveyance of land was made.
4. **Fraud:** GUILTY KNOWLEDGE. It is elementary that one who knowingly and at any stage of its development participates in the commission of a fraud against another is chargeable with guilty knowledge.
5. **Quieting Title:** SUFFICIENCY OF EVIDENCE. The evidence examined *de novo*, and *held*, the judgment of the district court must be affirmed.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

D. O. Dwyer, A. L. Tidd, Cook, Cook & Cook, C. A. Robbins, C. E. Tefft, H. H. Claiborne, Wayne E. Sawtell and *A. C. Pancoast,* for appellants.

Matthew Gering and *Bryant & Bryant, contra.*

DEAN, J.

Plaintiff brought this suit to quiet title to 814 acres of farm land in Cass and Saunders counties. It is

charged that a conveyance was obtained from him by the fraud of defendant Lund Land Company, its officers and agents. Frank H. Warner, now deceased, was an employee of the company. His estate appears as a defendant and cross-petitioner claiming title by virtue of an alleged conveyance from Raasch. Six attaching creditors of defendant Oscar Lund and of the company filed answers and cross-petitions and sought to have the land subjected to the payment of their respective claims, aggregating about $35,000, on the alleged ground that the company or Lund, its president, either owned or had some attachable interest in the land. Plaintiff obtained judgment quieting title in himself, and the suits of all cross-petitioners were dismissed. The attaching creditors and the estate of Warner appealed. The judgment must be affirmed.

Casper Raasch is a farmer advanced in years. Prior to forming the acquaintance of the land company and its agents, he never had any active business experience. H. F. Levenick was an agent, a stranger to Raasch, who called at his farm home near Ashland, where he remained about two days, and while there succeeded in interesting him in a tract of 2,580 acres of North Dakota land that the company was offering for sale or exchange. Before Levenick went away, Raasch agreed to meet him at Sioux City in a few days and go with him to examine the land.

In less than a week Levenick and Raasch together arrived at Valley City, North Dakota, where plaintiff was introduced by Levenick that evening to Mr. Lund, another stranger. The three spent the evening together, and the next morning, October 14, 1915, Levenick and Lund took plaintiff out about three miles in a car to inspect the land, returning that evening. The following morning Herbert Weston was introduced to Raasch by Mr. Lund as a prospective purchaser of land adjoining the 2,580-acre tract that was visited by Raasch the day before. Naturally Mr. Weston

wanted to examine the land before buying, and to the suggestion that plaintiff again accompany his two companions of the day before, and Mr. Weston, to the land, he readily assented.

On return of the party of four to the company's office that evening, Weston executed a contract for the purchase of 640 acres at $65 an acre, giving his check to the company for $1,000 as a first payment. Raasch immediately thereafter signed a contract of exchange agreeing to convey his 814 acres of Nebraska land to the company, subject to a mortgage of $28,500, in exchange for a deed to the 2,580-acre tract at $65 an acre; the difference in value of the respective tracts was to be met by plaintiff turning over to the company one-half of the crops raised on the 2,580-acre tract each year until payment was made in full.

When the exchange contract was executed, and as a part of the same transaction, another contract was entered into wherein the company agreed to sell 960 acres of the North Dakota land for plaintiff at $65 an acre within one year, or, failing to do so, the company was to purchase the 960-acre tract at $65 an acre.

The same evening a contract of employment was entered into under which Raasch was employed at $1,500 a year as an agent of the company beginning April 1, 1916. The employment contract provides, among other things, that Raasch should "move his family to Valley City, * * * work from the office of the Lund Land Company, * * * travel in search of land buyers, take care of stocks of goods, inspect properties," and that he should do "any work that is honorable and necessary in connection with the general land business." Comment may be spared respecting this contract, other than to say that the feature providing that Raasch should "travel" is not without significance. The contracts being executed, Raasch left Valley City at midnight for his Nebraska home.

As an inducement to execute the agreement of exchange the company represented to Raasch that, with the exception of a comparatively small final payment yet to be made to the vendor, the company owned the North Dakota land free of incumbrance, when in fact neither the company nor any of its officers or agents had any title or interest either legal or equitable in any portion of it, George O. Goulet being the owner. This of course was studiously concealed from Raasch. Plaintiff testified that he relied upon all the fraudulent representations respecting the trade and ownership made by defendants, believing them to be true, and that in reliance thereon the agreement for the exchange of lands was executed by him.

Herbert Weston was not a party defendant, but he was an interesting witness whose evidence is uncontradicted. He testified that Frank H. Warner, then an agent and employee of the company, and whose estate is a cross-petitioner, drove out to his place, about 20 miles from Valley City, to see him one or two days before plaintiff contracted with the company. He said that Warner told him the company had a big deal on; that a prospective customer would be in Valley City shortly; that, "if I would come in and help them to put it through, there was a thousand dollars in it for me;" that he returned with Warner to Valley City, and on arrival there Lund confirmed Warner's statement; that Lund engaged him to go through the form of examining and purchasing a tract of 640 acres at $65 an acre, that was worth about $30, and that adjoined the 2,580-acre tract, to the end of course that Raasch, the prospective customer whose presence had already been arranged for, might be stimulated and encouraged to close a trade with the company.

Weston testified: "I done it for $1,000 and I never got it either. * * * Q. Was this contract, in which you agreed to pay $65 an acre for land which was not worth to exceed $30, signed in Raasch's presence and

shown to him? A. Yes; that is what I was getting my thousand dollars for." Such was the inception of the fraudulent arrangement, in which Warner knowingly participated, that preceded the pretended negotiations between Weston and the company. Every fraudulent detail of the deception was impressively staged as a good faith transaction in the presence of the unsuspecting plaintiff. Three days after Raasch went home the Weston check and the contract, having served their purpose, were both destroyed.

As a part of its scheme the company induced Raasch and his wife, on March 30, 1916, to execute a conveyance of their land to its employee, Warner, without any consideration therefor. This was done, as represented by the company to Raasch, merely as a convenience in procuring a loan; Warner representing himself to be a single man and a correspondent of a loan company in Iowa. It transpired, however, that Warner had a wife and 5 adult children living in Minneapolis at the time. It was explained to Raasch that out of the money so to be obtained the $28,500 mortgage on his Nebraska land would be paid off and the remainder would be paid to Goulet on the North Dakota land. The Nebraska land was inspected by John F. Webber and the loan was made by him.

He tesified that Raasch and Warner came together to his office at Ottumwa, Iowa, to procure the $35,000 loan, and that the arrangements for the loan to be made in Warner's name were made by Raasch. Webber made out a check for $5,000 payable to Warner and mailed it to the land company at Valley City, where it was cashed by the company. No additional money was ever advanced by Webber on the $35,000 mortgage. The court established Webber's mortgage lien of $5,000 on plaintiff's land.

The finding of the district court that on April 22, 1916, Warner executed and delivered to Lund a deed in blank as to grantee is supported by the evidence.

Afterwards Lund caused the name of H. C. Aamoth, a North Dakota agent of the company, to be inserted as grantee, with the understanding that Aamoth, as he testified, was to reconvey to Raasch if the company failed to make the title good to the Goulet land. It was while the record title stood in the name of Aamoth that the attachments were levied.

Error cannot be predicated on the court's refusal to continue the case to permit Warner's adult children to be made parties and to procure evidence. Counsel says that, if the continuance had been granted, the estate would have shown that Warner exchanged certain property for the equity that the company or Lund had in the Raasch land. No offer of such proof was made. Warner's procurement of Weston to act the part of a pretended buyer charged him, not only with guilty knowledge but of active participation in the fraud. In view of the fraud of the ancestor, can the estate now assume the attitude of an innocent purchaser? It is elementary that one who with knowledge of the fraudulent transaction knowingly participates in it at any stage of its development is chargeable with guilty knowledge.

About four months after the date of the exchange agreement, namely on February 16, 1916, the company contracted with Goulet for the purchase of the same 2,580-acre tract at $40 an acre that it had made a pretence of agreeing to exchange with plaintiff at $65 an acre. The $5,000 obtained from Webber on plaintiff's land was paid over by the company to Goulet as a payment on their contract with him which, with an additional payment of $6,000 at some time made by the company, constituted all of the payments that were ever made to Goulet. The Goulet contract with the company was subsequently forfeited for nonpayment.

Raasch, as an employee of the company, moved to Valley City in March, 1916, and lived in town. While there he furnished seed wheat to the value of about

$2,100 and paid for some improvements placed on the Goulet land by the company's tenants that cost him about $400. These expenditures were incurred in reliance on the representations of the land company that the title to the Goulet land would shortly be perfected and the tract conveyed to him pursuant to agreement. The wheat was not yet harvested when the Goulet contract with the company was forfeited.

Plaintiff did not live on nor have possession of the North Dakota land, nor did he ever receive any rent share, nor did he recover any of his expenditures nor any part of the Webber $5,000 mortgage lien that was placed on his Nebraska land. All of this outlay and the mortgage lien was apparently a part of the fraudulent scheme that was devised by the company. The Nebraska tract of land was rented by Raasch to five tenants with whom separate lease contracts were made, and with one exception the leases were taken by Raasch in his own name as lessor. In one lease at Lund's request he inserted the name of the land company, and this too seems to have been one of the fraudulent devices of the company. Except to the tenants Raasch did not part with the possession of any part of the Nebraska land.

Defendants charge that plaintiff waived the fraud and is therefore bound by his contract. But he cannot be charged with a waiver because he did not discover the fraud until sometime in September, 1916, and on October 3, 1916, or as soon as it could reasonably be done, he began this action. During the time that the record title stood in the name of Warner and Aamoth as grantees, the land was, by operation of law, held in trust for Raasch. The record title to the land held by the respective grantees was obtained by fraud, hence a constructive trust was created with Raasch as beneficiary. *Pollard v. McKenney,* 69 Neb. 742; 1 Perry, Trusts (6th ed.) sec. 166. Such a trust is excepted

from the operation of the statute of frauds. Section 2624, Rev. St. 1913.

Plaintiff's land having been held in trust by Warner and Aamoth as agents of the land company, the respective attachments of the creditors of Lund and the company cannot be upheld, because neither the company nor Lund ever had any title or claim either legal or equitable to the land. *Chicago, B. & Q. R. Co. v. First Nat. Bank,* 58 Neb. 548. The case before us must be distinguished from one where a person by his own indiscreet act creates a condition wherein either himself or an innocent purchaser must suffer loss. The question of innocent purchaser is not involved here. "The private creditors of the trustee have no claim on trust property where the trust has been created by or the fund has proceeded from some person other than the debtor, and their attachment of it will not hold, though the title stands in the name of the trustee as an individual, and the creditor has no notice of the trust." 2 Perry, Trusts (6th ed.) sec. 815*b*.

This is an equitable action, and as such we have tried it *de novo* and have reached the same conclusion as that arrived at by the district court. Finding no reversible error, the judgment is

AFFIRMED.

LETTON, J., not sitting.

SEDGWICK, J. The levy of an attachment or execution creates a lien only on the title or interest of the judgment or attachment debtor. I therefore concur in this conclusion.

PAUL GENGO, ADMINISTRATOR, APPELLANT, V. JOHN C. MARDIS ET AL., APPELLEES.

FILED FEBRUARY 1, 1919. No. 20128.

1. **Death, Action for:** LIMITATIONS. Section 1429, Rev. St. 1913, creates a right of action which did not exist at common law. It

is a condition precedent to the right of recovery granted in this section that the action be brought within two years after the cause of action accrues.

2. ———: ———. The limitation imposed in this section 1429 is independent of the statute of limitations as found in section 7577, Rev. St. 1913.

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

Gurley & Fitch, for appellant.

Brogan & Ellick, contra.

ALDRICH, J.

On the 15th day of November, 1911, one John Butera came to his death at Omaha, while employed as a workman on what is known as the Flatiron Building. Afterwards one Paul Gengo became administrator *de bonus non* of the estate of the said John Butera, deceased, and as such administrator, on December 5, 1913, filed an amended petition against the said John C. Mardis, doing business as the J. C. Mardis Company, charging them with the wrongful death of the decedent. This action was commenced under and by virtue of the provisions of section 1429, art. VIII, ch. 17, Rev. St. 1913: "Actions by or against executors." A demurrer was filed to this petition, and after submission and argument was sustained, the decision being that the petition did not state a cause of action, as more than two years had elapsed from the accruing of said cause to the beginning of the action. The purpose of said section 1429, commonly known as Lord Campbell's Act, was to prescribe limitations and a remedy for a cause of action which did not exist at common law, for at common law the cause of action died with the death of the claimant. This statute was enacted to provide a remedy and to entitle representatives of the deceased person to begin a cause of action because of wrongful death of the deceased, and that it should be commenced by an administrator, duly

qualifying, and acting; so that said injured relative might obtain a pecuniary benefit resulting from said wrongful injury, or death.

It is also provided in said act that every such action shall be commenced within two years after the death of said person. This provision is contrary to the general statutory provision with respect to limitations, for that section of said general statute provides that when the party wanted places himself without the jurisdiction of the court, absconds, or stays in hiding so that service cannot be had upon him, then in that case the statute shall cease to operate; while in the case at bar the section of the statute under which this action is brought has its provisions checked and hemmed in as hereinbefore stated, and every action brought under it must be commenced within two years. Then the proposition is: As this action was not commenced for more than two years, does the petition state a cause of action? We are met with the proposition that we should construe the statute of limitations as provided for in section 1429, together with section 7577, Rev. St. 1913, and the toll for the time which defendant stayed away from the jurisdiction of the court should be allowed, and, if this was done, then the petition states a cause of action. We are deciding the proposition and construing section 1429 for the purpose of ascertaining whether the limitations provided in said section should be construed so as to give it effect, or whether it should be construed so as to modify and limit its provisions so as to bring it under the general statutes of limitations in section 7577. While it is true that section 7577 provides that the statute of limitations will not run during the time the defendant is absent from the state, absconds, or keeps himself from the jurisdiction of the court, it is also true that in square contradiction to this and against it is the section of the statute of limitations provided in section 1429. The question is: Which shall prevail? This is an important question,

because it contains a proposition that is decisive of this case.

It is our opinion that as section 1429 is a mere paragraph that comprises an entire act beginning with 1420, and was made with reference to this principal act and independent of any other, it was made to control and provide absolutely a time within which an action shall be commenced. If it were not so, then it would have been very easy for the legislature to have the same saving clause that is found under section 7577; but inasmuch as it does not contain any exception, or any such provision, and no saving clause whatever, it is evident that it means just what it says; and, if it does, then the demurrer in this case was rightly sustained, and the action properly dismissed. If there was any saving clause provided for in this section 1429, why was it not placed there? If it intended to provide a condition which modifies and stops the statute of limitations, then why did it not say so? The answer is: It was never intended to be any other way than the way that we find it. This statute is not alone peculiar to Nebraska in this provision, but is a provision that has been enacted in many other states of the Union. Lord Campbell's Act is in force to-day, and has been for many years in the states of New York, Arkansas and Kansas, and we have interpretations given by the supreme courts of each of these states with reference to the particular matter in hand. See *Kavanagh v. Folsom,* 181 Fed. 401. Also it may be stated that both by principle and analogy the legislature meant to put in this statute the limitation which it did, and which has been interpreted as above stated by the courts. Whenever the legislature makes a law to meet a situation not met by the common law, the legislature has the inherent right to provide whatever it may deem proper and essential to meet a particular situation not heretofore met. For instance, the Nebraska legislature has enacted statutes fixing

the limitation thereto different from the general statutes of limitations. For instance, the common law did not provide a remedy for one receiving an injury while traveling over a county bridge, and to meet this demand the legislature passed an act, section 2995, Rev. St. 1913 (Laws 1889, ch. 7), for the purpose of making counties liable for damage to person or property. Section 2995 reads in part: "Provided, however, that such action is commenced within thirty days of the time of the injury or damage occurring." Then here in this statute is another statute with reference to the county's liability in an action growing out of defective bridges that makes a statute of limitations peculiar to and especially provides for the very act itself. Then when the legislature passed Lord Campbell's Act, and gave it a statute of limitations peculiar to itself, it simply was doing what it had heretofore done, and so has been and is recognized as peculiar to the inherent power of the legislature itself. This act, with this special provision of the statute of 30 days' limitation, has been held by this court to be constitutional. If then it is constitutional to enact a statute of limitation limiting liability to within 30 days, why is it not constitutional and proper to pass a statute limiting an act to 24 months? The same authority or body of lawmakers that enacted section 2995 enacted section 1429, and each lawmaking body operated and worked and passed this law under the same Constitution, and if, as has been held, it was constitutional to do the one, under the same, or similar circumstances, it would be constitutional to do the other under a like situation. In the case of the *City of South Omaha v. McGavock*, 72 Neb. 382, it is held:

"Where a statute grants a new remedy, and at the same time places a limitation of time within which the person complaining must act, the limitation is a limitation of the right as well as of the remedy, and, in the absence of qualifying provisions or saving clauses,

the party seeking to avail himself of the remedy must bring himself strictly within the limitations."

Now by analogy this case is absolutely pat, and on the proposition that the legislature is making a special act has a right to attach to this provision a statute of limitation that will provide for a different time than the time provided for in the general statute, this court has sustained that proposition and the constitutionality of such law. Then the plaintiff in this action, it follows, is bound in seeking his remedy to bring himself strictly within the limitations provided in Lord Campbell's Act. See *Swaney v. Gage County,* 64 Neb. 627. In the case of *Ellis v. City of Kearney,* 80 Neb. 51, we have by analogy a case absolutely in point. We have in that case the situation where plaintiff was physically incapacitated to perform a duty enjoined by law; that is, in bringing the action within a certain time. This court held that the law does not excuse nonperformance, and that such a situation is not available to extend the time, or offer an opportunity to fix statutory liability upon another, and in support of this proposition cites *Schmidt v. City of Fremont,* 70 Neb. 577. In that case, which by analogy is the precise situation we have here, we find this court following the same and approving it. In *Ellis v. City of Kearney, supra,* the court say:

"The plaintiff asks this court to hold that the oral notice would suffice. To do so would be to nullify the statute. It is not the province of the courts to make the law, or read into it exceptions not intended by the lawmakers."

Where is there a scintilla of an excuse to read something into Lord Campbell's Act that was not intended by the lawmakers, nor is there directly, or indirectly, any intention to do the thing which they did not do. To do so would be to nullify the statute and place a construction and meaning upon it that was never intended by the legislature. In *Madden v. Lan-*

caster County, 65 Fed. 188, we have a case that went to the federal court on the question of the statute of limitations in the special statute in the special road act, which provided that an action must be "brought within thirty days after the injury." The court held: "It does not violate the Constitution of that state, either by granting to counties a special immunity, or by amending the general statute of limitations without containing or repealing the section amended, since, before the passage of said act, counties were not liable to suit, and the act imposed a new liability, which might be limited in any way the legislature saw fit."

That is the precise situation in the case at bar. Before the passage of the Lord Campbell Act, there was no provision for damages growing out of injury by death, and this act meets that situation. Therefore the legislature had the right to limit it in any way it saw fit. It always follows that where a statute creates a new right of action, as Lord Campbell's Act does, a provision and limitation of time within which an action must be brought, an objection cannot be made that the time is unreasonably short and cannot be entertained. In *Madden v. Lancaster County, supra,* we find a very learned discussion and the statute upheld, in an opinion by Judge Sanborn. It has also been held by this court in the case of *Woods v. Colfax County,* 10 Neb. 552, that a county is not liable for an action, or negligence of action by its officers, unless made so by legislative enactment, and sustain the action under the act of 1889 making counties liable. Then the proposition looks, both from the standpoint of principle and analogy, that these decisions settle the question at bar, and it cannot be denied that the legislature has the right to fix any time it pleases in the matter of limitations to any special act passed by it.

In the case of *Anthony v. St. Louis, I. M. & S. R. Co.,* 108 Ark. 219, it was held: "In an action against a railway company for damages for the wrongful killing

of plaintiff's father, when the complaint shows on its face that the action was not brought within the two years required by the statute, the defendant may avail himself of the objection by demurrer." Now this is a case in which the statute of limitations requires the action to be brought within two years, and if in that case, under a statute similar to our own, a defendant may avail himself of the objection by a demurrer, why can he not do it in this case? In the Arkansas case the court also held: "In actions for wrongful death, such actions shall be commenced within two years after the death of such person, since the two statutes relate to different subjects, and there is no necessary repugnance between their provisions." Then we have a case here that is the same, or similar, with respect to statutes of limitations, that we find in the case at bar, wherein in the state of Arkansas we have a general statute of limitations providing for a longer and different time than under Lord Campbell's Act. We find the Arkansas supreme court upheld absolutely the limitation of two years as provided for in Lord Campbell's Act.

In the case of *Rodman v. Missouri P. R. Co.*, 65 Kan. 645, we have the same situation, the same question that we have in the case at bar, and that is: What are the limitations of actions growing out of death by wrongful act? In section 422 of the Civil Code (Gen. St. Kan. 1901, sec. 4871), we have what is known as the Lord Campbell's Act, providing for damage growing out of death by wrongful act which did not exist at common law. Therefore it is interesting to note what the Kansas supreme court holds upon that point. The Kansas court say: "The limitation of two years prescribed in the act in which such action must be commenced is a condition imposed upon the exercise of the right of action granted, and this time is not extended by the pendency and dismissal of a former action, as provided in section 23 of the Code."

Thus these courts hold wherever Lord Campbell's Act has been interpreted, that the right conferred in such statute is a conditional one, and that plaintiffs in such actions must bring themselves clearly within the prescribed conditions necessary to conferring the right of action. So the plaintiff in this case, in seeking remedy under the provisions of Lord Campbell's Act, had to bring himself clearly within the prescribed conditions necessary to conferring the right of action. In support of these views, see *Bretthauer v. Jacobson*, 79 N. J. Law, 223, *Anthony v. St. Louis, I. M. & S. R. Co.*, 108 Ark. 219, and *Beebe v. Doster*, 36 Kan. 666. Therefore both from fact and analogy, and from the plain provisions of Lord Campbell's Act, we conclude that as the plaintiff, John Butera, was killed on November 15, 1911, and this action was instituted on December 5, 1913, that more than two years have elapsed from the death to the filing of the petition, and the issuance of the summons.

Lord Campbell's Act is denominated by the New Jersey supreme court as the "death act," and that court say: "But this provision of the death act is not an ordinary statute of limitations. It operates, not only as a limitation of the remedy given the plaintiff, but also is a limitation of the liability which it creates against defendants." See *Bretthauer v. Jacobson*, 79 N. J. Law 223, 225. This is the real tenor of this act, and this interpretation is put upon it by all the courts speaking with respect to the provisions of the act. New York, Kansas, and Arkansas, without qualification, have held, in cases precisely like the one at bar, that the statute of limitations here involved fixed, not only the limitation of the liability, but the time in which cases may be brought, and by analogy, in a state having a special limitation, this court has held the same thing.

Then, in view of this discussion herein submitted, we conclude that section 1429, Rev. St. 1913, creates a

right of action for damages by death by wrongful act, which did not exist at common law. The enactment of Lord Campbell's Act provides a rule for the statute of limitations which must operate as a condition precedent to a right of action; this time the statute fixes is two years, and the provision is absolute; as it has no saving clause, it must be strictly adhered to.

The finding of the trial judge is in accordance with law and must be

AFFIRMED.

ROSE, J., took no part in the decision.

SEDGWICK, J., dissenting.

Ancient rules for construing statutes were more or less arbitrary, but formerly they were pretty strictly followed by some courts. In some cases those rules resulted in giving to statutes a meaning that clearly the lawmakers never intended. In modern times the courts, at least some of them, are more careful to ascertain the real intention and meaning of legislation. If, from the purpose of the statute, that is, the defect in the law that it was proposed to remedy, in view of existing conditions that are known by everybody, and the form and language of the statute itself, the real intention and meaning of the legislature can be ascertained, that intention and meaning should control the courts.

Under the present decision, a defendant who has laid himself liable for damages under the statute construed can defeat the claim for damages and relieve himself from all liability by absconding or concealing himself until the limitation named in the statute has expired. No other statute of limitations is construed to permit this result. Did the legislature intend such a result? They reduced the limitation for ordinary actions for which there is no specific limitation provided in the general Code from four to two years, which is a longer period than is provided for various actions particularly specified. They gave the injured party a new right of action, a remedy which he did

not have before, and we all agree that he must accept the limitation which the legislature saw fit to place upon that remedy. Did the lawmakers intend to make that remedy depend upon a contingency that might be under the control of the very party against whom the remedy is given? There is a general provision of the Code: "If, when a cause of action accrues against a person, he be out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the state, or while he is absconded or concealed." Rev. St. 1913, sec. 7577. The act we are construing has a special limitation, which is in positive language: "Every such action shall be commenced within two years after the death of such persons" (Rev. St. 1913, sec. 1429) and will not admit of an exception or qualification. This is an established rule of construction and has been frequently applied in this state, and in fact the plaintiff concedes in his brief that this rule applies in this case; but the majority opinion is entirely devoted to its discussion. Conceding then that such actions "must be commenced within two years," what shall we say as to the intention of the legislature as to when such action shall be deemed to be commenced. There is a general provision of the Code that "An action shall be deemed commenced, *within the meaning of this chapter,* as to the defendant, at the date of the summons which is served upon him." Rev. St. 1913, sec. 7580. This is in derogation of the common law. The general rule is that an action is deemed commenced, within the meaning of the limitation statutes, when the pleadings are filed in court and summons issued, and a good faith attempt to get service is made. 1 Cyc. 747; 1 R. C. L. p. 338, sec. 20. In enacting the statute we are construing, did the legislature intend that this special statute should apply to the new act, or was the act made complete in itself as to this as

well as the other special provisions of the Code, relying upon the common-law rule? This is the question discussed and relied upon by the plaintiff in his brief, but ignored in the majority opinion which discusses at large, and with some repetition, the point which is conceded. The statute expressly names and fixes the period of limitation, and although so much depends upon the meaning which it was intended to give to the words, "shall be commenced," there is no express explanation or provision upon that point in the act. The defendant properly urged this fact as indicating that it was intended that the special provision of the Code as to when an action is deemed to be commenced shall apply to this act. But this suggestion is not, as it seems to me, sufficient to determine the matter. Section 7580 expressly limits its application to the actions specified in the chapter of which it is a part, "An action shall be deemed commenced, *within the meaning of this chapter,*" thereby expressly limiting its application to statutes under which the limitation is not allowed to run while the defendant conceals himself and cannot be served. Since, in this act, the two years' limitation is absolute whether service can or cannot be made, it begins to run when the action is *commenced.* As to when an action should be deemed commenced, a peculiar provision, not one generally recognized, expressly made applicable to a particular chapter of the Code, would not necessarily be thought to apply to a separate and distinct act which disregarded other important provisions of the general Code. If the thought had occurred to the lawmakers that the courts might technically apply some ancient rules of construction and hold that one special provision of the general Code had been rejected and another retained, and so their remedy would be rendered nugatory whenever the defendant could evade service, they would have declared more definitely the intention of the statute. When we consider the defect in the law which this

statute was intended to remedy, the conditions then existing which are well known by all, and the statutes then existing, we must conclude from a consideration of this statute itself that the intention of the legislature was that under this statute an action is deemed commenced as the common law declares. In this case the plaintiff acted in good faith and commenced an action before the two years expired, had summons issued, and had a summons in garnishment also issued. The garnishment summons was properly served, and the garnishee appeared specially and made some objections to the form of the petition, and a new garnishment summons was issued, so that if Lord Campbell's Act is complete in itself and an action is deemed to be commenced as at common law and without reference to the special provisions of the Code, the action was in time.

The legislature never intended that a just cause of action could be defeated, as this action is now defeated.

TEOFIL NOVAK, APPELLEE, V. OMAHA & LINCOLN RAILWAY & LIGHT COMPANY, APPELLANT.

FILED FEBRUARY 1, 1919. No. 20337.

Street Railways: OPERATION: ACTIONABLE NEGLIGENCE. It is the duty of the motorman of an interurban car, who sees a frightened team upon the highway close to the track in ample time to prevent damage, to slow down his car so as to bring it either to a stop, or under control as he approaches the team, and if he fails to take such precaution, and as a consequence damages result, his failure will constitute actionable negligence.

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

Brome & Brome and *Joseph P. Uvick,* for appellant.

Jamieson & O'Sullivan, contra.

ALDRICH, J.

The jury in this case have found upon conflicting testimony, and being the triers of fact, that they not only had the right to do this, but it was their duty to determine what was the truth after all testimony had been submitted, and on their conscience and judgment, and the instructions of the court, determine as to which party should prevail; "and this finding of fact, unless clearly wrong," will not be disturbed, because the jury in the realm of fact is absolute so long as it finds consistently with truth and justice: and their finding in this case, as to whose carelessness and negligence is responsible for the injury complained of, in our judgment, is correct.

It is admitted that the car was going east, and the plaintiff and his team were going west, and the team, upon seeing the car, became frightened and unmanageable. This occurred when the car was at least one block or more (that being 300 feet or more) away from the team. Then it devolved upon the motorman to stop his car, or to bring its speed under absolute control so that said car could be brought to a standstill within 25 or 30 feet; but, instead of doing this as a prudent and cautious man would naturally do, he proceeded to let the car run, and never at any time during the whole trouble did he stop it at all, but only slightly slackened its speed. The motorman then having seen the car when a block away, and being on a level track could absolutely have stopped the car and prevented this accident but instead he chose to keep on moving and at considerable speed and by so doing ran down and injured the plaintiff herein. This situation, the record discloses, is obvious, and not in any way contradicted. The motorman, and a companion, a disinterested witness, and all parties, so far as that is concerned, admit the car was not stopped at all, and it is agreed that it could have been stopped to a dead standstill, and have avoided the accident. The motor-

man, it appears, is responsible for this accident, and the injury resulting therefrom. The only question for us to determine is: To what extent were these injuries inflicted, and is the judgment reasonable and just? This question presents some difficulty.

The question we are deciding herein, after finding appellant liable, is: Was the verdict excessive, and does the evidence sustain the amount of recovery found by the jury? To this proposition we answer: There is no sufficient and competent evidence to sustain a verdict of $4,000. The evidence does not clearly show any permanent injury. The attending physician says a callous had formed on the hip joint, but an X-ray examination disclosed no such callous, nor any permanent injury. The man making this X-ray examination qualified as an expert, says that, had such injury been permanent, it would be ascertained, and that the examination disclosed no permanent injury. On this statement, and other evidence, it seems clear that the verdict is excessive. After the examination of the record and the testimony, we conclude the verdict excessive, and find that the amount entitled to be recovered by the plaintiff herein is $1,500. Unless the plaintiff files his remittitur in the sum of $2,500 within 20 days, then the judgment is reversed and the cause remanded for a new trial.

AFFIRMED ON CONDITION.

SEDGWICK, J., dissenting.

The plaintiff, while driving west alongside of the street car tracks, had some trouble with his horses. At this time the car was approaching from the west at a distance of several hundred feet, and the plaintiff contends that the noise of this approaching car frightened his horses. The defendant concedes that, when the plaintiff and his horses were first observed by the motorman, the car was running at a speed of from 20 to 30 miles an hour. The plaintiff testified that it was going from 35 to 40 miles an hour. The plaintiff also

testified that the car did not slacken its speed until the accident complained of occurred. Plaintiff's witness Grabowski also so testified. These two witnesses testified through an interpreter, and either because of this fact, or because they were reckless, their testimony seems peculiar and possibly in some respects inconsistent. The defendant's witness Westover, who was riding with the motorman, testified that, before the plaintiff was observed by the motorman, the car was moving at not to exceed 25 to 30 miles an hour, and that the speed was reduced when about two blocks from the team, and that, when the car came in contact with the cultivator, it was moving 10 or 12 miles an hour. The motorman testified to the same condition. Critchfield, a passenger on the car, testified that, when the car was about 600 feet from the accident, it was going about 15 miles an hour, and when the car was 2 or 3 rods from the team it seemed to rather suddenly stop, and that then "the team turned around a little bit to the south, looking away from the car; and then he (plaintiff) kind of slapped them a little with the line, I thought, and then, when the motorman started the car up a little bit—it was slowed up a little, and then he started up like they were going off; I supposed everything was all right again, and they started on. They made up until they came about even, and then the team backed up, and started backing up, and they backed clear down into the car. Q. How far was the cultivator, the rear end of the cultivator, from the track when the horses were turned to the south, and before they started to back? A. They were back in the middle of the road; I should think it would be 15 feet, probably;" and that when the collision took place the speed of the car was from 5 to 8 miles an hour. Walker, another witness, testified that, when the car passed him about 500 feet from the place of the accident, it was going "from 10 to 12 miles, somewhere along in there." The car conductor testified that at the

time of the collision the car was going from 8 to 10 miles an hour. The speed of the car when it was 1,000 or more feet from the place of the accident could not be the proximate cause of the injury, and there is very little contention in the briefs upon that point. The theory of the defendant, which seems to be fairly well supported by the evidence, is that, when the motorman first saw this team so near the track, he immediately reduced the speed of the car to 8 or 10 miles an hour, and, as he approached the plaintiff, the team had crossed the track and was standing quietly with the cultivator between them and the track some 10 or 15 feet from the track; that there was then no appearance of danger to the plaintiff or his team; and, as the car was passing them, they suddenly backed the cultivator against the side of the car. This was the substance of the defense, and it was contended that the evidence entirely failed to show that the conditions were such as to make it reasonably appear necessary to stop the car entirely, in order to avoid injuring the plaintiff. This defense and some questions of errors occurring at the trial and in the instructions are the matters discussed in the defendant's brief, but they are not mentioned in the majority opinion.

I cannot concur in this disposition of the case.

GEORGE O. DODGE, APPELLEE, V. CLARA I. HEALEY, APPELLANT.

FILED FEBRUARY 1, 1919. No. 20291.

1. **Appeal in Equity: TIME.** Under the provisions of section 8186, Rev. St. 1913, as amended by the legislature in 1917 (Laws 1917, ch. 140), the time for taking an appeal in an equity cause begins to run from the date of the entry of the decree or final order if no motion for a new trial is filed. When a motion for a new trial is filed in an equity cause, the time for taking an appeal begins to run from the date of the overruling of the motion. *Smith v. Silver*, 58 Neb. 429, distinguished.

2. **Husband and Wife:** NOTE OF MARRIED WOMAN: PRESUMPTION. When a married woman signs a note there is no presumption that she intended thereby to fasten a liability upon her separate estate. *Grand Island Banking Co. v. Wright*, 53 Neb. 574.

3. ———: ———: DEFICIENCY JUDGMENT. In an action in equity to foreclose a real estate mortgage given to secure notes signed by husband and wife, judgment for deficiency cannot be rendered against the wife when it appears by the pleadings that she was a married woman when she signed the notes, unless the issue as to her liability to a deficiency judgment is raised by proper allegations in the pleadings.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Reversed, with directions.*

J. E. Daly, for appellant.

C. E. Abbott, contra.

McGIRR, C.

This is an action in equity to foreclose a real estate mortgage. The cause was tried to the court and a decree in favor of the plaintiff was entered. The mortgaged property was sold by the sheriff and the sale was confirmed. Thereafter the plaintiff filed his motion for deficiency judgment against the defendants, Michael T. Healey, Clara I. Healey, and Mary E. Nichols. Order to show cause why a deficiency judgment should not be rendered was entered and was served upon the defendants. The defendants Michael T. Healey and Clara I. Healey filed objections to deficiency judgment against them. On May 16, 1917, a hearing was had upon the motion for deficiency judgment and the objections thereto, and judgment for deficiency was entered against the defendants, Michael T. Healey, Clara I. Healey, and Mary E. Nichols. On May 18, 1917, the defendants Michael T. Healey and Clara I. Healey filed a motion for a new trial, which motion was, on June 11, 1917, overruled by the trial court. The defendant Clara I. Healey appealed from the deficiency judgment rendered against her, and filed her

transcript in this court on August 21, 1917. The plaintiff has filed a motion to dismiss the appeal on the ground that the transcript was not filed within the time required by statute.

The plaintiff relies upon the decisions rendered by this court in *Smith v. Silver,* 58 Neb. 429, and *Ogden v. Garrison,* 82 Neb. 302. In *Smith v. Silver, supra,* it is said in the syllabus:

"A motion for a new trial is not essential to a review of an equity cause. The filing of a motion for a new trial will not extend the time for prosecuting an appeal. The time for taking an appeal begins to run from the date of the entry of the decree or final order, and not from the overruling of the motion for a new trial."

When the decision in that case was rendered the statute provided for a review in this court by proceedings in error in actions at law, and for a trial *de novo* in this court upon appeal in suits in equity. Appeals in suits in equity were governed by section 675 of the Code (Comp. St. 1897). We quote a portion of that section as follows:

"That in all actions in equity either party may appeal from the judgment or decree rendered or final order made by the district court, to the supreme court of the state; the party appealing shall within six months after the date of the rendition of the judgment or decree, or the making of the final order, procure from the clerk of the district court and file in the office of the clerk of the supreme court, a certified transcript of the proceedings had in the cause in the district court."

In *Smith v. Silver, supra,* section 675 of the Code was construed to mean just what it said in plain language, that the party appealing shall within six months after the date of rendition of the judgment or decree, or the making of the final order, procure and file in the office of the clerk of this court a certified transcript.

In the year 1905 the legislature repealed section 675 of the Code, and other sections of the Code providing for a review in this court by proceedings in error of actions at law adjudicated in the district courts, and, in lieu of all these sections of the Code, passed a new act to provide for appeals to the supreme court in all cases except criminal cases. Laws 1905, ch. 174. Section 1 of this act, being section 8186, Rev. St. 1913, provides:

"The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, except judgments and sentences upon convictions for felonies and misdemeanors under the Criminal Code, shall be by filing in the supreme court a transcript certified by the clerk of the district court, containing the judgment, decree or final order sought to be reversed, vacated or modified, within six months from the rendition of such judgment or decree or the making of such final order or within six months from the overruling of a motion for a new trial in said cause; the filing of such transcript shall confer jurisdiction in such cause upon the supreme court."

In the year 1917 (Laws 1917, ch. 140) the legislature amended this section by changing the time for filing the transcript from six months to three months. By the act of 1905 the legislature provided a uniform procedure to obtain a reversal, vacation or modification of judgments and decrees rendered, or final orders made by district courts in all cases except criminal cases. This procedure is applicable alike to actions at law and suits in equity. Under the long-established practice in this state, a motion for a new trial must be filed and overruled before an appeal can be taken to the supreme court in an action at law; while in a suit in equity a motion for a new trial is not a necessary precedent to an appeal, yet a motion for a new trial may properly be filed in a suit in equity, and, if such

motion is filed, the time for taking an appeal commences to run on the date of the overruling of the motion for a new trial, the same as in an action at law. A motion for a new trial not being a necessary precedent to an appeal in a suit in equity, if no such motion is filed, the time for taking an appeal commences to run on the date of the entry of the decree or the making of the final order appealed from. The decision in *Ogden v. Garrison, supra,* is not in conflict with our construction of the statute. In that case it was held: "To secure a review of an equity case in this court, the filing of a motion for a new trial in the court below is not required." In the case at bar the transcript was filed in this court within three months from the overruling of the motion for a new trial, and therefore this court obtained jurisdiction of the cause on appeal.

In the case at bar the defendant Clara I. Healey contends that the trial court erred in rendering a deficiency judgment against her for the reason that when she signed the notes and executed the mortgage sued on she was a married woman and that she did not contract with reference to her separate property, trade or business, or upon the faith or credit thereof, and with the intent on her part to thereby charge her separate estate. In answer to this contention the plaintiff says that Mrs. Healey was precluded from pleading her disability to contract by a finding made by the trial court in the decree of foreclosure, that plaintiff would be entitled to a judgment against her for any deficiency, citing in support of his proposition the decisions of this court in *Devries v. Squire,* 55 Neb. 438; *Stover v. Tompkins,* 34 Neb. 465; *Brand v. Garneau,* 61 Neb. 287, and *Patrick v. National Bank of Commerce,* 63 Neb. 200. The rule relied upon by plaintiff is most clearly stated in the syllabus of the case last cited, as follows:

"Where, in a petition filed to obtain the foreclosure of a mortgage, facts are alleged showing a personal liability on the part of the defendants for the payment of the debt, and judgment for deficiency is asked against them, and where the court, in its decree, finds that they are personally liable for the payment of any deficiency that may exist after a sale of the mortgaged premises, they cannot, while such decree remains in force and unmodified, be permitted, when judgment for deficiency is sought, to set up facts which existed when the original decree was obtained, to show that they are not liable."

That rule is not applicable to the instant case, for the reason that no facts are alleged in the petition showing a personal liability on the part of the defendant Clara I. Healey. The petition is an ordinary petition for the foreclosure of a real estate mortgage. The notes secured by the mortgage are set forth in the petition. There is no recital in the notes, or in either of them, that Clara I. Healey intended thereby to bind her separate estate. It is alleged in the petition that at the time of the execution and delivery of the notes the defendants Michael T. Healey and Clara I. Healey, his wife, made, executed and delivered to the plaintiff their mortgage deed. The married state of Mrs. Healey was thus alleged in the petition, but the petition contains no allegation of fact that would make Mrs. Healey liable to a deficiency judgment regardless of her married state. In their answer the defendants Michael T. Healey and Clara I. Healey admit that at the time of the execution and delivery of the notes and mortgage they were husband and wife. The evidence taken at the trial was not preserved, and is therefore not before us for consideration. The finding in the decree that Mrs. Healey would be liable to a deficiency judgment is not, however, aided by the presumption that evidence was taken at the trial to sustain it, for the reason that evidence tending to prove Mrs.

Healey's liability to a deficiency judgment, regardless of her married state, would have been inadmissible under the pleadings. It will not be presumed that such evidence was erroneously admitted by the trial court, and, if it had been admitted and was now before us, it would not be considered in this court on a trial *de novo*. The finding in the decree of foreclosure that the plaintiff would be entitled to a deficiency judgment against Mrs. Healey is not sustained by the pleadings, and did not preclude Mrs. Healey from pleading her disability to contract, when deficiency judgment was sought by the plaintiff. In her showing of cause why deficiency judgment should not be rendered against her, Mrs. Healey alleged that she was a married woman, "the wife of Michael T. Healey, and that at no time has she been engaged in business in any manner whatsoever, save and except as the housewife and mother in the home of Michael T. Healey, and that she has not carried on trade or business on her sole and separate account; that in the transaction upon which the above entitled action is based Clara I. Healey did not bind her separate estate, nor was the consideration for the necessaries of life such as would render her liable for the payment thereof." The plaintiff moved to strike Mrs. Healey's showing of cause from the files on the grounds "that the allegations thereof are redundant and immaterial," and "that the same does not show any reason why deficiency judgment should not be rendered." By this pleading the plaintiff confessed the truth of Mrs. Healey's allegations of cause why deficiency judgment should not be rendered against her, but sought to avoid the force of the allegations on the grounds that they were immaterial and insufficient. We think that Mrs. Healey's showing of cause was material and amply sufficient to show that she was not liable to a deficiency judgment. In rendering a judgment for deficiency against the defendant Clara I. Healey the trial court erred.

"The common-law disability of a married woman to contract is in force in this state, except as abrogated by statute. She may make contracts only in reference to her separate property, trade or business, or upon the faith and credit thereof and with the intent on her part to thereby charge her separate estate. * * * When a married woman signs a note there is no presumption that she intended thereby to fasten a liability upon her separate estate." *Grand Island Banking Co. v. Wright,* 53 Neb. 574.

The judgment for deficiency rendered against the defendant Clara I. Healey should be reversed, and plaintiff's motion for a deficiency judgment against said defendant should be overruled.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment for deficiency rendered against the defendant Clara I. Healey is reversed, the cause is remanded, with direction to said district court to enter an order overruling plaintiff's motion for deficiency judgment against said defendant, and the foregoing opinion is adopted by and made the opinion of the court.

REVERSED.

ANNA MCWILLIAMS ET AL., APPELLANTS, V. LEWIS ANDERSON ET AL., APPELLEES.

FILED FEBRUARY 15, 1919. No. 20315.

1. **Deeds: CANCELATION: EVIDENCE.** Plaintiffs sue to cancel, on the ground of fraud and undue influence, a deed executed by their father conveying a farm to defendants. The evidence has been examined and found insufficient to support the allegations of the petition.
2. **Costs: BRIEFS.** When a party fails to conform to rule 12 (94 Neb. XI) in the preparation of his brief, the court may on its own motion refuse to allow a fee to be taxed for the brief, or so much thereof as fails to conform to the rule.

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

Berge & McCarty, for appellants.

George A. Adams and *J. J. Ledwith, contra.*

MORRISSEY, C. J.

This is a suit in equity wherein plaintiffs pray that a contract made by their father, now deceased, with defendants, for the sale of an 80-acre farm, and a deed thereafter executed in fulfilment of the contract, and a note and mortgage executed by defendants as a part of the purchase price, be canceled and set aside, and the title to the real estate quieted in the heirs of Andres L. Anderson, deceased. Plaintiffs and defendant Johanna Anderson are the daughters and only heirs at law of Andres L. Anderson. There was judgment for defendants. The appeal presents only a question of fact.

In 1905 Andres L. Anderson, then 75 years of age, executed a written contract, whereby he agreed to convey to his son-in-law, defendant Lewis Anderson, the family homestead of 80 acres for $3,600. There was then a mortgage on the farm for $1,000. By the terms of the contract defendants assumed this mortgage and agreed to execute a second mortgage for $2,600 as the remainder of the purchase price. The contract was not signed by the wife of Andres L. Anderson. Subsequent to the execution of the contract the parties were advised that, because of the homestead character of the land and the failure of the wife to join in its execution, the contract was void. The contract reserved to the owner and his wife the right to occupy the house and about one-fourth of the land during the lifetime of either. Andres L. Anderson continued to occupy the premises until 1907, when, under an arrangement between him and the son-in-law, there was a small house erected within a few feet of the son-in-law's house, and the old gentleman and his wife, who

was then 84 years of age, removed thereto and defendants have since used the entire 80 acres. In 1910 the deed, now sought to be canceled, was executed by the old people in fulfilment of the contract theretofore made, and defendants executed and delivered to Andres L. Anderson a note in the sum of $2,600, secured by mortgage on the real estate conveyed by the deed. In 1911 Andres L. Anderson executed a will bequeathing the major portion of his property to defendant Johanna Anderson. This will has been denied probate. It is not involved in this suit, and appears to have been brought in only for the purpose of showing the general dealings between the parties. An earlier will is mentioned, but we do not find it in the record, and it is not involved. Andres L. Anderson and his wife both died in January, 1913.

It is claimed that the price fixed in the contract is less than the value of the property. The price fixed was $3,600 while plaintiffs assumed in their hypothetical question that the true value was $4,500. This is a difference of only $900, and we may assume the plaintiffs made claim for as great a value as their evidence would warrant. A banker who took the acknowledgment to the deed in 1907 was examined at great length on the question of values. He had followed the banking business in that vicinity for many years, had bought and sold farms, and showed a familiarity with farm values. He placed the value of the land in 1905 at not to exceed $40 an acre. The land appears to have advanced somewhat between 1905 and 1907 when the deed was executed, but, after making allowance for such advance as had taken place, the consideration paid appears fair and reasonable.

There is an effort made to show that the old gentleman was incompetent because of his lack of business training and his advanced age, and that the son-in-law had taken undue advantage in procuring the deed. Andres L. Anderson was a native of Norway. He

came to this country after reaching the age of 50. In Norway he was a common laborer. In this country he never engaged in any business other than the operation of this farm, which he inherited from his father subject to an obligation to pay $1,350 to his sisters. This was paid in part from the money represented by the $1,000 mortgage which the son-in-law finally assumed. He does not appear to have had much business experience. Nevertheless he maintained himself and wife at their advanced ages without adding to the incumbrance, and this, too, at a time when farmers were much less prosperous than they are to-day. He appears to have been a man of some education. He was secretary of his church, and the record of the church, which is in evidence, shows him to have been a high-class penman. The translation of one of his letters, written shortly before his death, shows good scholarship. It is conclusively shown that defendants were kind and considerate of the wants of their parents. Our attention has been called to no instance where the old gentleman betrayed weakened mentality, except, of course, plaintiff's complaint of his dealings with defendants.

The banker heretofore mentioned, who drew the deed, testified that he had known Mr. Anderson for many years; that Anderson had done some business at his bank, and he had seen him from time to time; that, while witness was unable to speak the Norwegian language and Andres L. Anderson was unable to speak English, except to use a few words in disconnected sentences, nevertheless witness was able to understand Anderson when he tried to transact business in English; that it was from Andres L. Anderson that witness got the data from which to draw the papers; that Anderson appeared to fully understand the nature of the business he was doing; that, subsequent to the execution of the deed, Anderson had called at the bank a few times, transacted business there, and witness regarded him as fully able to transact the business.

When we consider the lack of any direct proof of the allegations contained in the petition, we are constrained to hold that the judgment of the trial court ought to be affirmed.

Appellees are guilty of a violation of rule 12 of this court, in that, in place of making a concise statement of the substance of the evidence bearing upon the points presented and referring with particularity by question and page to the evidence in the record supporting the contention made, they have filled 90 pages of the brief with verbatim copy of evidence, and this is printed in such form as to make it more difficult and laborious to read than it is to read from the original bill. Because of this violation of the rule, no fee will be taxed against appellants for the printing of the 90 pages mentioned.

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

ANTON J. KAREL, APPELLEE, v. FRANK P. BASTA, APPELLANT.

FILED FEBRUARY 15, 1919. No. 20342.

1. **Mechanics' Liens:** PROVISION IN SURETY BOND: PAYMENT OF LIENS. A bond given to secure the execution of a building contract contained the direct provision that, "Now if all of said conditions of contract are carried out * * * and the building is secured from all liens arising from the execution of said work, this bond to be null and void." *Held*, that this constitutes an independent agreement as to the payment of liens, and is not affected by a provision in the building contract which requires the owner to procure architect's certificates before making payments to the contractor.

2. ———: PAYMENT OF MATERIALMEN: SUBROGATION. Under the building contract, it was the duty of the contractor to furnish all material, and if there was any evidence of liens for which the owner might become liable, he had the right to retain an amount sufficient to indemnify him, and the contractor was bound to refund to the owner any money he might be compelled to pay in discharging liens. It was therefore the duty of the contractor to pay the

materialmen, and the owner who paid the liens is subrogated to the right of materialmen to recover upon the contractor's bond.

APPEAL from the district court for Colfax county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

N. H. Mapes and *W. C. Hronek,* for appellant.

George W. Wertz, contra.

LETTON, J.

This is an action brought by the owner to recover from a surety upon a contractor's bond on account of the breach of certain conditions of the bond. Judgment was for plaintiff, and defendant appeals.

Rudolph P. Basta, the contractor, agreed to erect a brick building for plaintiff under a written contract. The bond contained the provision, "Now if all of said conditions of contract are carried out * * * and the building is secured from all liens arising from the execution of said work, this bond to be null and void. If otherwise, that any or all the conditions of said contract should not be strictly fulfilled, this bond to remain in full force and effect."

The contract provided that, if there shall be evidence of any liens for which the owner might become liable, "the owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim. Should there prove to be any such claim after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor's default." It is undisputed that $6,457.50 was paid by Mr. Karel for material and labor that went into the construction of the building.

After the building was completed, judgments were obtained against the owner by laborers and materialmen, aggregating the sum of $3,211.97, and costs. The aggregate of these payments, aside from costs, amounted

to over $414.41 more than the contract price, which is the amount of plaintiff's judgment.

It is insisted that plaintiff ought not to recover because there is no showing that the money was paid upon architect's certificates as the contract provides. This is true, but at the same time the evidence shows that the surety, Frank P. Basta, was fully advised of these payments, and was present when most of them were made, and that he made no objections. In fact all parties seem to have treated this part of the contract as being of no force or effect.

One of the conditions in the bond itself is that the building be "secured from all liens arising from the execution of said work." This is a direct obligation resting upon the contractor. It constitutes a separate obligation for the benefit of third persons aside from the terms of the building contract, and is not affected by the provision in such a contract that requires the owner to procure architect's certificates before making payments.

Furthermore, the building contract makes it the duty of the contractor to repay the owner all moneys which he may be compelled to pay to discharge liens, but since the owner retained nearly enough money in his hands to pay all liens, the contractor was only bound to repay the excess. The lienholders could have compelled this payment by the surety under the rule laid down in *Doll v. Crume*, 41 Neb. 655, and *Des Moines Bridge & Iron Works v. Marxen & Rokahr*, 87 Neb. 684. The same rule is adopted in Iowa and by other state and federal courts. *Getchell & Martin Lumber & Mfg. Co. v. Peterson & Sampson*, 124 Ia. 599, and cases cited. The owner is entitled to be subrogated to the rights of the materialmen to that extent, and may recover from the contractor and the surety on his bond.

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

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

STATE OF NEBRASKA, APPELLEE, V. FARMERS STATE BANK ET AL., APPELLEES: OAKLAND STATE BANK, INTERVENER, APPELLANT.

FILED FEBRUARY 15, 1919. No. 20821.

1. **Parties:** INTERVENTION. Under the method of intervention provided for by section 7609, Rev. St. 1913, the petition must be filed before the trial. Such intervention is a matter of right, and does not require leave of court.
2. ———: ———. This method, however, is not exclusive, and in a proper case, where the person desiring to intervene files a petition before the entry of final judgment in the district court of the county where the action is pending, which petition sets forth good and sufficient reasons for his failure to file before the trial, and shows no laches on his part, and a *prima facie* right to intervene, and his claim is of such a nature that relief cannot be obtained unless it be granted him upon intervention, leave to intervene should be granted by a court of equity.
3. ———: ———: TIME. The petition in this case examined, and *held*, in substance and effect, to be a petition for leave to intervene, and not a petition counting upon the statute. Such a petition may be filed at any time during the pendency of the action.
4. ———: ———: RIGHT: PUBLIC FUND. When public officers are engaged in litigation to protect public rights, and their pleadings and procedure maintain the public interest, no private person is entitled to intervene; but, when the contrary appears, any person interested in the preservation and proper administration of a public fund which is under the control of a court of equity has a right to intervene.
5. **Banks and Banking:** DEPOSITORS' GUARANTY FUND: INTERVENTION. The state depositors' guaranty fund is created by contributions from all banks of deposit organized under state authority. Each of such banks has an interest in the proper administration and distribution of the fund. If it appears that, by reason of an error or mistake of law on the part of a public officer, the depositors' guaranty fund is about to be depleted, any such bank may intervene to protect itself and all other banks contributing to the fund.
6. ———: ———: PAYMENT TO DEPOSITORS: SUBROGATION. Under section 332, Rev. St. 1913, after money has been drawn from the depositors' guaranty fund and paid to depositors, the state banking board, for the use and benefit of such fund, is subrogated

to the rights of depositors to participate in the assets. The board therefore becomes a general creditor of the insolvent bank, and is entitled to prorate with all other nonpreferred creditors in the net assets. It is error to prefer a general creditor over the right of the guaranty fund to reimbursement.

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

J. A. Singhaus, for appellant.

Willis E. Reed, former Attorney General, and *Clarence A. Davis, Attorney General, John L. Webster* and *Arthur F. Mullen, contra.*

In June, 1916, the Farmers State Bank of Decatur was declared insolvent, and, upon the application of the state by the attorney general, was placed in the hands of a receiver.

In 1915, Frank Iams deposited certain sums of money with this bank, and received certificates of deposit aggregating $12,000. A judgment was rendered for said sum with interest, but the transaction was also held to be a loan, and not entitled to be paid from the bank guaranty fund. *Iams v. Farmers State Bank,* 101 Neb. 778. A petition in intervention was afterwards filed by Iams in the receivership proceedings, asking that the money due him be paid from the assets of the bank in the receiver's hands. The state of Nebraska, by the attorney general, answered, in substance, that the total amount which can be realized from the assets of the bank is insufficient to reimburse the guaranty fund for money paid to depositors, and that the right of such fund to reimbursement is prior to the claim of Iams.

On June 17, 1918, the attorney for Iams and the attorney general, in behalf of the state, entered into an agreement with respect to the case, and a form of judgment in favor of Iams was prepared and presented by them to Judge Troup of the district court for Douglas county, which is in the same judicial dis-

trict as Burt county. This was signed by him at Omaha and retained by him, with the intention of taking it to Burt county, where he intended to hold a session of court a few days thereafter.

On June 27, 1918, the Oakland State Bank, in behalf of itself and all other banks contributing to the state guaranty fund, filed an answer and petition in intervention, in substance alleging that the bank guaranty fund is a trust fund created for the purpose of paying depositors of insolvent state banks, and cannot be diverted or used for any other purpose; that there is still due the guaranty fund from the receiver over $35,000, which had been paid to depositors; that the petitioner knew the state of Nebraska was resisting the claim of Iams to priority, but was not aware that it had consented to the payment of the claim in full, until June 24, 1918; that no judgment had been rendered in Burt county, and praying that the net assets in the receiver's hands be paid to the state banking board for the reimbursment of the bank guaranty fund.

On July 6 a motion was filed by Iams to strike the intervening petition from the files. The motion sets forth that a judgment in favor of Iams had been agreed upon between the state and Iams in good faith; the signing of the judgment by Judge Troup on June 17, 1918; that the petition of intervention of the Oakland State Bank was neither drafted nor filed until after that bank had been informed that the judgment had been signed on the 17th day of June; that the petition of intervention came too late; that the intervener was without right or authority to file it, for the reason that the questions of fact and law presented by it attach to the state in its sovereign capacity, are subject to the control of the attorney general, and not subject to be interfered with by the bank in its individual capacity; and that it does not appear that the bank has any direct interest in the subject-matter as to entitle it to intervene.

On July 25, 1918, an amendment was filed to the petition of intervention alleging coercion of the attorney general, and that the agreement was made without the knowledge or consent of the state banking board. On July 30, 1918, the motion to strike the petition and supplemental petition of intervention was submitted to Judge Redick, sitting in the district court for Burt county, and sustained, for the reason that the same were not filed in time, to which ruling intervener excepted. The court at this time also entered the judgment in favor of Iams, which had formerly been signed by Judge Troup, and ordered the same entered on the judgment docket as of the date of June 17.

The Oakland State Bank has appealed, and the matter is now before us for consideration.

LETTON, J.

Although many matters not relevant to the real issues in the case, nor within the record, were presented at the oral argument, and are contained in the briefs, the determining questions presented by the record are few.

In the first place the contention of the appellee that a statutory petition in intervention must be filed before trial must be conceded. But there are two kinds of intervention—that provided by section 7609, Rev. St. 1913, which, we have decided in common with the courts of other states having like provisions, is a matter of right, and which requires no leave to be granted by the court. In such a case the intervener can only file as a matter of right before the trial, and the authorities cited by the appellee on this point are applicable.

The other kind of intervention is that which prevailed in this state before the enactment of the statute mentioned, and which, while not an ancient procedure in courts of equity (note at page 281, 123 Am. St. Rep.), has been adopted by many courts as essentially equitable in its nature, and which may be allowed by a court

of equity in its discretion in a proper case. Van Zile, Equity Pleading and Practice, sec. 294 *et seq.* The petition for this relief may be filed at any time during the pendency of the action. It is not governed by the statute, but falls under the general principles of practice in courts of chancery.

In a petition in intervention, under the statute, it is unnecessary to set forth any reasons why it is not filed sooner. The allegations in the petition excusing the delay virtually admitted that the petition came too late as a statutory intervention, and were for the purpose of showing why a court of equity should permit the petition to be filed under its general equity powers.

Even though the petition presented does not in literal terms request that leave to intervene be granted, it prays "that this petition of intervention be allowed." It appears to us that the object of the pleading was to present matter for the consideration of a chancellor, that the petition should have been treated as being a request for leave to intervene, and that the omission by the pleader of a formal request ought not to defeat his right to have the petition considered.

We know of no rule of procedure in a court of equity which denies an interested party, who has been compelled by circumstances beyond his control to be placed in a position in which it was impossible for him to assert his rights at an earlier time, the right to call the attention of the court to the circumstances, and the right to intervene, if the facts set forth in his petition warrant his being made a party, and the more especially if made at the same term and before the entering of judgment in the case. *United States Trust Co. v. Chicago T. T. R. Co.*, 110 C. C. A. 270.

Does the petition set forth a sufficient excuse for not being filed before the trial? Where public officers are engaged in litigation to protect public rights, and their pleadings maintain the public interest, no private

person is entitled to intervene. *Buffalo County v. Kearney County,* 83 Neb. 550.

The bank had no right to appear as long as the state was denying the right of Iams to recover. Court was not in session in Burt county, and no proceedings were had in that county at the time that the form of judgment was signed by Judge Troup in Douglas county. The statute allows a judgment to be entered by a judge of the district in an equity case in any county in his district upon notice and by agreement of parties. The agreement was made, not in open court where the intervener might have had information of it and an opportunity to object or protest, but in another county than the one where the case was pending.

It is alleged that, as soon as the intervener discovered the facts, it filed its petition. At that time the judgment was incomplete in that it could not be enforced or be used as a basis for appeal until duly made a matter of record in the district court for Burt county. If the allegations are admitted or sustained by proof, they afford sufficient excuse for the delay, and good ground for allowing the intervention.

We conclude, therefore, that, if the petition upon its face sets forth an interest in the subject-matter adverse to Iams and a *prima facie* defense to his claim, the intervener is entitled to be heard.

The right of the Oakland State Bank to intervene at all in this matter is challenged on the ground that it has no interest in the controversy. It is true that its interest is not direct, but neither the statute nor the rules of equity procedure make a direct interest a condition to the right to intervene. Has the bank shown *prima facie* an interest in the subject-matter? It prays for itself and for all other banks contributing to the state depositors' guaranty fund. This fund is created by assessments made upon all state banks in proportion to the amount of their average deposits. Any depletion of the funds must be made up by these banks. The

banks occupy to the fund a similar position that taxpayers bear to the public funds. While the interest of a taxpayer in such funds may be small, he has the right to apply to a court of equity to enjoin any wrongful diversion of the public moneys. Under the statute, when the guaranty fund reaches 1½ per cent. of the average daily deposits of the banks, assessments cease until it falls below 1 per cent. of such deposits, so that the depletion of the fund requires a new assessment, just as the diversion of public funds requires additional taxation to restore the money thus diverted.

Section 332, Rev. St. 1913, provides, in substance, that, if the money in the hands of the receiver of an insolvent bank is insufficient to pay the claims of depositors, the court in which the receivership is pending, or the judge thereof, shall determine the amount necessary to supply the deficiency, and that the state banking board, when this amount is certified, shall draw the amount from the guaranty fund and transmit the same to the receiver.

By section 333, Rev. St. 1913, the state banking board, for the use and benefit of the guaranty fund, is subrogated to the rights of the creditors paid from the fund to participate in the assets. After the payment of the depositors, the state banking board, for the use of the guaranty fund, became a general creditor of the insolvent bank to the extent of the contribution from that fund. The claim of Iams, the claim of the guaranty fund, and the claim of all other creditors not preferred by the statute are entitled to share *pro rata* in the net assets after paying the costs and expenses of the receivership. The effect of the judgment agreed upon and rendered in this case is to make the claim of Iams a preferred claim, and give it precedence in payment over that of the guaranty fund and other creditors. This is in direct contravention of the statute. Where the direct provisions of the statute with reference to the disposition of a trust fund are

ignored to the injury of a contributor to the fund, it occupies a like position to that of a stockholder in a corporation whose directors are diverting the property of the corporation to its damage. In such case he has a property right which a court of equity will protect if the proper officers of the corporation refuse or neglect to protect his interest. An analogous situation is presented here if the proof bears out the charges made, and the contributors to the fund are entitled to apply to a court of equity to protect their interests if they are not taken care of by the officers of the state.

It is a general principle that, where a person has an interest in a fund which is in control of a court of equity, but which is in danger of being dissipated or diverted from its purpose, and he desires to secure its proper administration and distribution, he is entitled to intervene for that purpose.

To sum up, if this had been an ordinary petition in intervention under the statute, its filing would, as the district court held, have come too late, but since it set forth sufficient reasons for the delay in filing, and showed *prima facie* sufficient interest in the subject-matter, it was in substance and effect an application to the equity powers of the court for leave to intervene, and should have been so considered, and the motion to strike overruled. While there may be scandalous and redundant matter in the pleading subject to be stricken, if attacked, we think it was prejudicial error to strike it as a whole.

For the foregoing reasons, the judgment of the district court is reversed, and the cause remanded, with directions to set aside the judgment in favor of Iams, to allow the petition in intervention to be filed, and for such further proceedings as may be necessary.

REVERSED.

SEDGWICK and CORNISH, JJ., not sitting.

FORBURGER STONE COMPANY, APPELLEE, V. LION BONDING & SURETY COMPANY, APPELLANT.

FILED FEBRUARY 15, 1919. No. 20273.

1. **Principal and Sureties:** ACTION BY MATERIALMEN: PARTIES. One who has furnished labor or material used in the construction of a building can maintain an action against the contractor and his sureties who have agreed with the owner to pay for the same.
2. **Contracts:** BUILDING CONTRACT: CONSIDERATION: MATERIALMEN. In such case, the contract with the owner of the building is dual in its nature, and the agreement to pay laborers and materialmen is distinct from the contract to erect the building. The building contract is the consideration for the agreement to pay laborers and materialmen.
3. ———: ———: RIGHTS OF MATERIALMEN. And, in such case, when the rights of the laborer or materialman are fixed by furnishing the labor or material used in the building, no act or neglect of the contractor will defeat such rights.

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

A. G. Wolfenbarger and *Ross P. Anderson,* for appellant.

Burkett, Wilson & Brown, contra.

SEDGWICK, J.

1. A building contractor entered into a contract to construct a building, and gave a bond for the faithful performance of the contract. This defendant was surety on the bond. The plaintiff furnished material to the contractor which was used in the construction of the building, and he brought this action against the surety on the bond to recover the value of the material. The bond required the contractor to perform all of the conditions of his contract, and one of the conditions of his contract was that he should pay for all the materials which he used in the building. Therefore, this contractor's bond contained an agreement for the bene-

fit of this plaintiff, and it has been frequently held by this court that, under such circumstances, a party for whose benefit the contract was made can maintain an action directly against the party who has contracted for his benefit. *Doll v. Crume,* 41 Neb. 655, and cases cited, and various other decisions of this court are to this effect.

2. This bond contained the following provision: "That the said surety shall be notified in writing of any act on the part of said principal, which shall involve a loss for which the said surety is responsible hereunder, immediately after the occurrence of such act shall have come to the knowledge of the duly authorized representative or representatives of the obligee herein, who shall have the supervision of the completion of said contract." It is conceded that no notice was given the surety as provided in the bond, and the serious, and perhaps difficult, question in this case is whether the third person, who is a beneficiary under this contract, can recover without having given the notice specified. In *Doll v. Crume, supra,* it was held: "That the contract between the city and Davis (the contractor) and his sureties, and the promises and liabilities of the latter thereon, were of a dual nature—a promise to the city that Davis should perform the work in the time and manner he had agreed, and a promise, in effect, to Crume to pay him for the labor he should perform for Davis." This proposition of law is discussed at length in the opinion. In *Knight & Jillson Co. v. Castle,* 172 Ind. 97, 27 L. R. A. n. s. 573, it was held that under a similar contract the beneficiary could not recover without having given the notice provided for in the contract. The note in the L. R. A. is exhaustive, in which it is said: "A contractor's surety bond to a public corporation is dual in its nature, being for the benefit and protection of the obligee against loss or damage from a failure of the contractor to perform his contract, and also for the

benefit of laborers and materialmen who do work and furnish materials in the performance of the contract. And when the rights of the latter are once fixed, no act of the corporation will destroy or impair them"—and cites our case of *Doll v. Crume, supra,* and other authorities upon this proposition. In *Doll v. Crume, supra,* the contract was with a public corporation, but the opinion does not consider that fact as material, as would be seen from a reading of the opinion, in which it is said: "Suppose that Davis (the contractor) had borrowed $100 for 90 days from a bank, and given his note therefor, which note had been signed by the plaintiffs in error as sureties. Now if the bank, without the knowledge of the plaintiffs in error, had extended the time of the payment of this note, then such extension would have released the sureties from liability thereon; but in the case supposed, if at the time Davis borrowed the money plaintiffs in error had promised the bank that, in consideration of its lending the money to Davis, they would pay a debt of $10 which he owed to C., then any agreement between Davis and the bank for an extension of the time of payment of the note would not affect C." That is to say, that the surety on the contractor's bond has agreed that the contractor will pay the materialman. The contractor, of course, was under obligation to pay the materialman, and the contract, being for the benefit of the materialman, is distinct, according to the authority of this decision, from the contract that the contractor shall perform his work as he agreed to do. There are two contracts—one that the materialman shall be paid, and the other that the contractor shall perform his contract with the owner of the property. The entering into the contract with the contractor by the owner is the consideration for the agreement to pay the materialman for the material. In the L. R. A. note, above referred to, it is said that the decisions are not unanimous, and "a majority incline to hold that such conduct (conduct

of the nominal obligee) does not and cannot affect them (the materialmen) after their rights become fixed." The rights of laborers and materialmen to be paid for their labor and material are "fixed" when they have faithfully performed the labor or furnished the material; and, under these decisions, no failure of the contractor thereafter can invalidate the rights so fixed. That the duty to give the specified notice is placed entirely upon the obligee named in the contract, and relates only to his performance of the work he has contracted to do, appears from the words of the contract. The surety is to be notified "of any act on the part of said principal * * * immediately after the occurrence of such act shall have come to the knowledge of" the representatives of the obligee "who shall have the supervision of the completion of said contract." This plaintiff did not have any representative in this business, and neither the plaintiff nor any one for him had supervision of the completion of the contract. The plaintiff could not know when some act of the contractor came to the knowledge of the owner of the building. It would be impossible for the plaintiff to give the notice to the surety. Laborers and materialmen are in the same position with respect to such contracts. If a laborer who has performed a few days' work for the contractor would be in danger of losing his wages unless he keeps himself posted as to the doings of the contractor and the owner of the building, and sees that they perform their respective duties, he would not be protected as perhaps sound public policy would require.

As said in *Des Moines Bridge & Iron Works v. Marxen & Rokahr*, 87 Neb. 684: "It is better that the law with respect to contracts should be certain than that it should in all particulars conform to the views of the courts of some of our sister states. The defendants in the case at bar must have contracted with reference to the law as announced in the cited cases,

and the defendant bonding company must have known that it was assuming an obligation to pay the subcontractors and materialmen as well as the laborers and mechanics engaged in constructing the courthouse referred to. The plaintiff in contracting to furnish material for the courthouse also had a right to rely upon the law repeatedly stated by this court, and should not be deprived of the defendants' obligation to pay for that material because a like bond could not be enforced in the state of New York. We are not convinced that we should overrule a long line of our decisions, and shall not to do so in the instant case." That was an action for material furnished a contractor for a public building, and was before the statute making the contractor's bond responsible for materials (Laws 1913, ch. 170), and yet it is said: "The defendant bonding company must have known that it was assuming an obligation to pay the subcontractors and materialmen as well as the laborers and mechanics engaged in constructing the courthouse referred to."

We think that, under our former decisions, the parties interested must know that the surety on a contractor's bond, in which it is agreed that the contractor will pay laborers and materialmen, is directly liable for labor and material used by the contractor in the construction of the building under his contract; and we think we ought to adhere to that principle.

The judgment of the district court is

AFFIRMED.

ALDRICH, J., dissents.

LETTON, J., concurring.

The basis of the conclusion reached by the majority of the court in this case is, that the bond in question contains a dual obligation, and that the obligee named in the bond is, as to laborers and materialmen, a mere trustee. Under the settled law of this state, it is immaterial whether such a bond is executed in pursuance of a statute, or whether it is a mere common-law bond.

Sample & Son v. Hale, 34 Neb. 220; *Lyman v. City of Lincoln,* 38 Neb. 794; *Doll v. Crume,* 41 Neb. 655; *Korsmeyer Plumbing & Heating Co. v. McClay,* 43 Neb. 649; *Kaufmann v. Cooper,* 46 Neb. 644; *Fitzgerald v. McClay,* 47 Neb. 816; *King & Co. v. Murphy,* 49 Neb. 670; *Rohman v. Gaiser,* 53 Neb. 474; *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.,* 98 Neb. 27.

The bond contains two contracts, one with the owner, and the other for the benefit of those who supply labor or materials. "The surety becomes bound for the performance of the work by the principal in accordance with the stipulations of the contract, and for the prompt payment of the sums due to all persons supplying labor and material in the prosecution of the work provided for in the contract." *Equitable Surety Co. v. United States,* 234 U. S. 448, 34 Sup. Ct. Rep. 803. The laborers and materialmen are the beneficiaries in the bond. A majority of the courts take the view that the conduct of the nominal obligee cannot affect their rights after the same are once fixed. 27 L. R. A. n. s. note on pages 596 *et seq.*

The purpose of the bond would be defeated so far as the beneficiaries are concerned if, by some act or omission on the part of the obligee named therein, their rights should be destroyed. Their right of action, as said in *Getchell & Martin Lumber & Mfg. Co. v. Peterson & Sampson,* 124 Ia. 599, 615, "is not derived from, nor held under, the owner of the building, but is an independent right, of which they are not to be deprived save by their own act or default."

The following cases, in addition to the cases cited from this court, are in point upon the question whether any act or omission of a nominal obligee may release the surety as to laborers or materialmen for whose benefit such a provision is made in the contract. *Texas & P. R. Co. v. Eason,* 92 Fed. 553; *United States Fidelity & Guaranty Co. v. Omaha Building & Construction Co.,* 116 Fed. 145; *Griffith v. Rundle,* 23 Wash.

453; *School District v. Livers*, 147 Mo. 580; *Kansas City v. Schroeder*, 196 Mo. 281; *Federal Union Surety Co. v. Commonwealth*, 139 Ky. 92; *United States Fidelity & Guaranty Co. v. American Blower Co.*, 41 Ind. App. 620. See, also, cases cited in note VII, 27 L. R. A. n. s. 581-595.

The surety company entered into this contract with full knowledge and notice of the laws of this state as declared by the decisions of this court, and should abide by its terms.

CORNISH, J., dissenting.

The fact that the beneficiary is a laborer or materialman can, I take it, make no difference. If public policy or the status of laborers or materialmen is to give them rights superior to other beneficiaries under similar circumstances, the opinion should make that clear and tell the reason why.

What right can an entire stranger to a contract have in it? The English and Massachusetts courts say none. The contractual relation requires a meeting of minds and a consideration. Hence, only the parties or privies to a contract can enforce it, say they.

When the contract's promise is to save the promisee from a possible loss, it may easily happen that its enforcement will be directly beneficial to a third person, because the promisee's loss, provided against, may be the promisee's liability to the third person. Many courts, including this, have, in such case, enforced the contract at the suit of the third party (beneficiary), the same as if he were a promisee or obligee named in the contract. They have likened the case to novation. Really, the right comes to the stranger to the contract by a sort of unexpected grace. The liability of the obligor to him can hardly be said to be contractual. The courts see in the situation and relation of the parties a duty which the promisor ought not to refuse to perform, and they permit to be done by direct means the

thing that would ordinarily come about anyhow by indirect means.

Just as the stream can never rise higher than its source, nor the less include the greater, nor the accidental be more regarded than the intentional, nor one reap where he has not sown, so the promisor is never bound to more than his promise, and the stranger to the contract can have no better nor higher rights in the contract than the parties to it. He gets any possible right he may have through the promise made to the obligee, and that is the promise that must be left as made and only as made.

Such has been the holdings of these courts.

In this opinion we are announcing the law to be: That an entire stranger to a contract, who (probably) did not know of it when made, for whose fortunes neither of the parties cared except as his own interest might be affected, who never did a thing in reliance on the contract (save commencing this action), who paid no consideration for a promise, to whom none was made and who made none himself, may, notwithstanding these facts (undisputed), not only recover on the contract, but recover regardless of its conditions.

Is there any precedent for this? None. In *Getchell & Martin Lumber & Mfg. Co. v. Peterson & Sampson,* 124 Ia. 599, cited, the promise was made in words to the third party as well as to the principal obligee, and the opinion states that material was furnished in reliance upon the promise.

In statutory bond cases the law makes the laborer and materialman, in terms, a party to the contract in his own, separate and independent right.

Municipal bond cases are distinguishable in this: The officials act in a representative capacity; the laborer or materialman has no lien for his protection. He should be protected by the municipality who gets the benefit of his work. It does no extreme violence to the contract to say that the parties must have in-

tended his protection as the main purpose of the bond, that the city was acting as his agent, and that a promise was made to him, just as subsequently enacted statutes provide. 21 R. C. L. p. 1016, sec. 64.

In the instant case, no contention can be made but that the contract is a private contract, the parties at the time owing no duty to any third person.

Under the rule announced, if A, having faith in the character and ability of young Mr. B, who is seeking employment under C, promises C that, if he employs B, B will make the payments of funds coming into his hands from time to time to the persons to whom the funds should go, on the perfectly reasonable condition, however, that when C learns of a default of B he will inform A, and, if afterwards C neglects to give A the information of B's default, which he knows, so that A is released from his promise to C, still A is liable to the persons to whom the payments should have been made by B. When one of such persons sues as beneficiary, and A sets up the promise that he should be notified of defaults, and shows that, with notice, he could have saved half, or all, of the loss, we are holding that the third person (beneficiary) makes a good reply as follows: "How could you expect me to give you notice? I never knew of your contract with B until immediately before commencing this action."

It seems to me that the reasoning is unsound and the conclusion unjust. No court will adhere to the rule in its general application. The entertaining of doubts about a proposition, plain and simple in itself, always invites confusion. We should pray to be delivered from temptation to do so. Hard cases make bad law.

When the meaning of a valid contract is plain, *that* is the *law* of the contract. When courts go contrary to its intent, they legislate. Once we agree that the promise defendant made to the obligee was that the

contractor would make the payments, and that promise was on condition that defendant should be notified by the obligee of defaults, there is no need for discussion.

But is there room for good-faith dispute that such was the promise made in terms only to the obligee and that notice was not given? One might, with some show of equity, argue (as has been held in certain insurance cases) that the condition precedent ought not to defeat plaintiff's recovery unless the obligee's breach damaged defendant. This contention, however, is not made. The defendant can complain: "I am held, contrary to the only promise I made, which was to the obligee, to save him harmless upon condition."

The argument by analogy quoted in the opinion from *Doll v. Crume,* 41 Neb. 655, can have no possible application here. Here the promise, that "$10 which he owed to C" would be paid is unquestionably coupled with a condition, and is not absolute as in the supposed case. Besides, in the analogy quoted, the argument assumes A's promise to C, made to the municipality as his agent or representative. In the case in hand, it cannot be said that more than one contract, more than one promise (which is what the opinion probably means), or more than two parties to the contract, were contemplated.

The right of the citizen to freely contract, and to be held only in accordance with his promise as made, is one of the foundations and safeguards of civil liberty.

DEAN, J., dissenting.

Plaintiff pleaded the bond and offered it in evidence, but it entirely ignored the requirement respecting notice. To state it another way: Plaintiff elected to accept the benefits of the contract sued on, but it repudiated its burdens. The situation is anomalous.

The surety bond contains this condition: "Provided, that the said surety shall be notified in writing of any act on the part of said principal, which shall involve a loss for which the said surety is responsible hereunder,

immediately after the occurrence of such act shall have come to the knowledge of the duly authorized representative or representatives of the obligee herein, who shall have the supervision of the completion of said contract, and a registered letter mailed to the surety, at its principal office in Omaha, Nebraska, shall be deemed sufficient notice within the meaning of this bond."

The obligee named in the bond is a private corporation. The only contested point is whether service of notice by plaintiff, also a private corporation, on the surety as specified in the foregoing provision of the bond is a condition precedent to its right to recover. The bond is primarily for the benefit of the owner who is the sole obligee named therein. Fairly construed the bond requires plaintiff to perform the condition as to notice, because plaintiff stands in the place of and derives its rights under the bond from the obligee, and it follows can have no other or greater rights than the obligee. The consideration that supports plaintiff's right to recover is that such recovery operates to release the obligee, the owner, from some contingent liability to the third party, in this instance the plaintiff. 71 Am. St. Rep. note at page 189 (*Baxter v. Camp,* 71 Conn. 245); *Frerking v. Thomas,* 64 Neb. 193.

In *Barnett v. Pratt,* 37 Neb. 349, Judge Irvine concisely states the reason for the third party rule: "The purpose of the American rules seems to have been largely to avoid circuity of action. It may probably be assumed that, in order to permit such third person to sue, the contract must be one which might be enforced between the immediate parties thereto; in fact, many of the cases state the rule in these terms." In 2 Elliott, Contracts, sec. 1415, it is said: "One is not entitled to the benefits of a contract made in his behalf without complying with the conditions and assuming the liability that the original parties have attached thereto. The rights of a party for whose benefit a

promise is made must be measured by the terms of the agreement between the principal parties."

The present case is distinguished from one where a surety bond is given by a contractor to a municipal corporation as in *Doll v. Crume,* 41 Neb. 655, and *Des Moines Bridge & Iron Works v. Marxen & Rokahr,* 87 Neb. 684, that are cited in the majority opinion. Both cases were suits on surety bonds given to guarantee the performance of building contracts entered into between building contractors and municipal corporations. Clearly they are not in point. In the *Doll* case it is said that a surety bond that guarantees the performance of a building contract entered into with a municipal corporation is dual in its nature; that there is a promise both to the municipality and to materialmen. It is at once apparent that this is on grounds of public policy. 21 R. C. L. 1016, sec. 64; *Equitable Surety Co. v. United States,* 234 U. S. 448. It is obvious that if the rule were otherwise, as applied to municipal corporations, the third party would be remediless because it is not permissible in this class of cases that the citizen should have a lien on the property of the sovereign. It seems that duality of contract has not been rocognized as the principle that permits the third person who is not a party to a contract to sue upon it, except in municipal corporation cases. The general principle that permits a third party to sue is that a recovery will release the promisee from some liability to the third party, thus avoiding circuity of action.

The majority opinion exonerates plaintiff from giving notice because: "The plaintiff could not know when some act of the contractor came to the knowledge of the owner of the building. It would be impossible for the plaintiff to give the notice to the surety." It is not altogether clear upon what theory the majority conclude, in an entire absence of pleading or proof to support the conclusion, that the plaintiff could not bring

"some act of the contractor" relating to nonpayment "to the knowledge of the owner of the building." What was there to prevent plaintiff from informing the owner that the contractor was in default? Who knew better than plaintiff as to the time when the contractor failed to pay for the building stone? Who but the plaintiff, whose knowledge was first hand, would be expected to bring the fact of nonpayment "to the knowledge of the owner of the building?" Nor is it clear why, in the absence of proof, the court should conclude that there was something or that there was anything that made it "impossible for the plaintiff to give the notice to the surety."

Under a fair construction of the surety bond, and on principle and on authority, notice of the failure of the contractor to pay plaintiff should have been communicated by plaintiff to "the duly authorized representative or representatives of the obligee" having "supervision of the completion of said contract," or to the owner itself. And in the event of the refusal or failure of the representative or of the owner to serve the required notice, plaintiff, standing in the place of the obligee, itself should have served the notice on the surety. Failing in this it should have been nonsuited. Notice in this class of cases is not an idle ceremony, but a matter of prime importance, a material part of the contract: Notice would have enabled the surety to have stopped the payment or to have caused the owner to pay plaintiff instead of paying the defaulting contractor. The provision for notice is reasonable, merely providing that "a registered letter mailed to the surety, at its principal office in Omaha, Nebraska, shall be deemed sufficient notice within the meaning of this bond." And this the majority opinion concludes was impossible of performance by plaintiff. Escape from a plainly expressed obligation of a contract should not be permitted upon a pretext so trivial.

The majority opinion cites no authority involving the question of notice that supports its conclusion. It may therefore be assumed that, aside from the majority opinion, there is no such authority. In 21 R. C. L. 986, it is said: "To entitle a materialman to maintain an action on the contractor's bond, he must comply with a provision of the bond that notice in writing must be given to the surety of any act which may involve a loss for which the surety may be liable a certain time after the occurrence of the act, and the failure of a materialman to give such notice is not a matter of defense to an action on the bond, but he has the burden of showing compliance to make out his cause of action." *Knight & Jillson Co. v. Castle,* 172 Ind. 97, 27 L. R. A. n. s. 573, is a leading case in point, and in which the reason for the rule requiring notice is admirably stated: "In adopting a part of the obligation as running to it, appellant was bound to adopt it according to its terms and conditions, upon the plainest principles of construction. In the absence of an agreement for time, the price of materials purchased by the contractor was due when delivery was made; if time was given, the price was due at the expiration of the time agreed. In either event, it was peculiarly within the knowledge of the appellant as to when the obligation was due which is here sought to be enforced against the surety, and there could be no adoption of so much as was favorable to appellant, and that which was for the benefit of the surety be ignored."

Men must be left free to make their own contracts, and in the absence of fraud or mistake the binding obligation of a lawful contract cannot be too insistently urged. The progress toward the attainment of a high type of civilization has been marked by an observance of this principle. The fathers of the Republic thought it worth while to provide that no state shall pass any law impairing the obligation of contracts. Doubtless those venerated men presumed that a general admonition on this point was sufficient.

LOUISA MENTZ, ADMINISTRATRIX, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 15, 1919. No. 20323.

1. **Appeal:** INSTRUCTIONS: THEORY OF CASE. A party is entitled to have his theory of his case, as disclosed by the evidence, submitted to the jury, under proper instructions, and where such an instruction is tendered to the court the refusal to give it is reversible error. *Omaha Street R. Co. v. Boesen*, 68 Neb. 437.
2. **Evidence:** MORTALITY TABLES: ADMISSIBILITY. Proof of disease or of ill health or hazardous employment may impair or destroy the effect of mortality tables as evidence, but does not make them inadmissible. *Broz v. Omaha Maternity & General Hospital Ass'n*, 96 Neb. 648.

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

John L. Webster and *William R. King*, for appellant.

Sutton, McKenzie, Cox & Harris, contra.

DEAN, J.

Fritz Mentz sued the defendant company to recover for personal injuries said to have been sustained on March 9, 1916, because of the negligence of its employees, while he was a passenger on one of its street cars. He died on December 28, 1916, after the case was begun, but before it was tried. He left a widow and a daughter as his sole surviving heirs. The action was revived in the name of the daughter, Louisa Mentz, administratrix. The estate recovered a verdict and judgment in the sum of $4,400, and defendant appealed.

The deposition of Mr. Mentz was taken November 21, 1916. He was by trade a painter. He testified, in substance, that he and about 12 others boarded a northbound car that stopped at the north side of the Farnam and Sixteenth street intersection at about 6 o'clock in the evening; that he was almost the last passenger to

board the car; that immediately the car started, and just as he dropped his fare in the box the car stopped suddenly and with such violence that he was thereby thrown against the fare box and the iron rail supports on the platform with such force that he received the injuries complained of. He testified that, though he suffered intense pain from the injury at the time, he made no complaint to any person; that both car and platform were crowded. He was the only witness on the part of plaintiff to testify respecting the immediate facts surrounding the alleged accident.

The motorman called by defendant testified that just as he started his car at Farnam street he saw an automobile come out of the alley and stop on the track; that the street car was not then "going over four miles an hour;" that it was on a down grade and the car was stopped to avoid a collision; that the stop was neither sudden nor violent, but "just an ordinary stop."

The conductor testified on the part of defendant that when the car left Farnam street it "ran about a car length and stopped in the usual manner, no jolt at all. * * * An automobile had stopped on the track;" that the street car was stopped about midway in the block north of the starting point at Farnam street; that he saw the motorman get off and help push the automobile off the track; that he recalled a man of Mentz's general description boarding his car at Farnam street at about the time indicated by plaintiff, but he was unable to definitely give the date; that the man whom he took to be Mentz carried a small leather bag with the handle of a paint brush protruding from the end; that he was apparently ill; that "he held us there about a minute, crawling on;" that a passenger jostled and pushed Mentz as he passed him on the platform, and that he heard Mentz say to him "you come near hurting me then;" that almost immediately thereafter the car was stopped to avoid colliding with the automobile. The conductor said that Mentz did not

complain of an injury, and that he rode on the platform approximately 15 minutes, when he got off at his stopping place.

Even if Mentz was injured as he testified, the company is not chargeable with negligence if the motorman used reasonable care in stopping the car to avoid colliding with an automobile that was stalled on the track. Defendant requested the court to give this instruction, which was refused: "You are further instructed that it was the duty of the defendant's motorman to use reasonable and ordinary care to stop the street car so as to avoid a collision with the automobile upon the track in front of the street car, and if you believe from the evidence that the plaintiff was injured while the motorman was using such reasonable and ordinary care in bringing the street car to a stop, then the plaintiff cannot recover and your verdict must be for the defendant." It seems clear to us that the court erred in refusing to so instruct the jury.

Defendant says that the court erred in giving instruction numbered 8 on the measure of damages, and argues: "By said instruction the court ignored the important fact in the case, to wit, that the plaintiff, prior to the accident, had been suffering from a disease which had a tendency to, and in all probability would have, shortened his life notwithstanding this accident, and that by reason of said prior infirmity of the deceased the Carlisle table was not competent or proper evidence of the length of time a person so afflicted would probably live."

The instruction is not erroneous in the respect noted in defendant's brief so far as the argument relates to the introduction of the Carlisle table in evidence. *Broz v. Omaha Maternity & General Hospital Ass'n,* 96 Neb. 648.

Other questions have been presented that we do not find it necessary to discuss. The judgment of the district court is reversed and the cause remanded.

REVERSED.

CORNISH, J., not sitting.

The following opinion on motion for rehearing was filed June 28, 1919. *Rehearing denied.*

PER CURIAM.

In the brief upon the motion for rehearing it is contended that the instruction recited in the opinion was erroneous and properly refused because it assumed that there was an automobile stalled on the track. If it was erroneous in that particular in view of the evidence then before the court, the remainder of the instruction was proper and necessary in any view of the evidence, and such an instruction should have been given when the necessity therefor was suggested by the request. The motion for rehearing is

OVERRULED.

MARY A. DAILEY, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 15, 1919. No. 20324.

1. **Eminent Domain:** CONDEMNATION: PETITION: DESCRIPTION OF LAND. A petition to condemn the land of another for the use of a railroad is the basis of the proceeding and must accurately describe the tract sought to be condemned.

2. ———: ———: ———: ———. A petition containing inaccurate statements that are material respecting the dimensions of the land affected will render condemnation proceedings void that are held thereunder.

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

J. A. C. Kennedy, Yale C. Holland and *George L. DeLacy,* for appellants.

Charles Battelle, contra.

DEAN, J.

Plaintiff obtained a judgment vacating certain condemnation proceedings that involved a city lot owned by her. Title to the lot was quieted in plaintiff. Defendant appealed.

Mrs. Dailey contends, among other things, that the petition for condemnation contained inaccurate statements that are material respecting the dimensions of the lot, and because of that and other irregularities the proceedings complained of are void. Defendant insists that the proceedings were regular.

In district court it was stipulated that lot number 11 was 66 feet wide from the north to the south line, and from east to west, at the north line, it was 139.5 feet deep, and at the south line, from east to west, it was 140 feet deep. In the petition for condemnation filed with the county judge the company alleged, among other things, that "lot 11, block 6, Paddock's Place, * * * is of uneven dimensions, but is approximately 115 feet deep by 66 feet wide." The expression "uneven dimensions," as used in defendant's petition, might lead an appraiser to believe that it related to a variance in dimension much greater than the six inches difference in length of the east and west lines of the lot that is shown by the stipulation. The depth of the lot as given in defendant's petition is 25 feet less than that shown by the stipulation, a circumstance that could hardly fail to be of considerable importance to an owner, the market valuation of whose real estate, for appraisement and other purposes, is based in large part both on foot frontage and depth.

A petition containing statements so inaccurate respecting dimensions would be very apt to mislead the appraisers in the assessment of damages under the statute. Rev. St. 1913, sec. 5946. It seemse to us that the district court did not err in holding that the condemnation proceedings were void. *Omaha & R. V. R. Co. v. Rickards,* 38 Neb. 847; *Bay City B.—L. R.*

Co. v. Hitchcock, 90 Mich. 533. A petition to condemn the land of another for the use of a railroad is the basis of the proceeding, and before an owner over his protest can be compelled under the sovereign power of eminent domain to part with the title to his land, it is essential to the validity of the proceedings that the petition filed with the county judge under section 5946, Rev. St. 1913, accurately describe the tract sought to be condemned.

The language of the decree quieting title is perhaps a little too broad if taken literally, since it forever enjoins defendant from asserting title or interest in or to the property and from using it. Properly construed, we take its meaning to be that the defendants are enjoined only from asserting any rights to the real estate under the present condemnation proceedings, and not from exercising any rights thereto that may be lawfully derived in the future. So construed, the judgment is without reversible error and is

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

FRANK O. KUCERA, APPELLEE, V. FRED H. ALLEN ET AL., APPELLANTS.

FILED FEBRUARY 15, 1919. No. 20856.

Officers: DE FACTO OFFICER: INJUNCTION: TITLE. The right of a *de facto* officer to avail himself of a writ of injunction to enjoin interference or disturbance while in the possession of his office exists and is a proper remedy, and this procedure does not prevent adverse claimants from trying the right of title to the office in question.

APPEAL from the district court for Saline county: RALPH D. BROWN, JUDGE. *Affirmed.*

Charles F. Barth, for appellants.

Glenn N. Venrick, contra.

ALDRICH, J.

This action was brought by the plaintiff against three members of the board of trustees of the village of Tobias, and one Mastin, to restrain them from interfering with him in the discharge of his official duties as one of the trustees of that village, from disturbing him in the exercise of the duties of his office, and to restrain Mastin from participating in any meetings of the village board.

In November, 1917, plaintiff was appointed trustee to fill a vacancy. He duly qualified and entered upon the discharge of his duties. The annual election was held the next April. At that time Mastin and himself received the same number of votes, and it was declared by the village board that neither was elected. The petition alleges that afterwards an alleged recount was had, and a certificate of election issued to Mastin, but that the same was void and of no effect. The plaintiff duly filed his oath as a hold-over officer and continued to act until Mastin and the other defendants refused to allow him to take part in the proceedings of the board, although he attempted to do so. The district court found for the plaintiff, and defendants appeal.

The main question in the case is whether plaintiff was entitled to bring this action, or whether he can only maintain proceedings in *quo warranto*. In *Hotchkiss v. Keck*, 86 Neb. 322, it was said: "Of course, an action of injunction is not the proper remedy to try title to public office. The many authorities cited by defendants in their brief establish that proposition, if indeed there was ever any doubt in regard to it. The law is just as clear that, where one is an incumbent holding the office under a *prima facie* legal right and performing the duties thereof, a court of equity will restrain an intruder from interfering with the proper exercise of those duties." Plaintiff was in possession of the office and exercising his functions and duties as a *de facto* officer until after the alleged recount. This

being the case, he was in possession of the office, and Mastin claiming under the recount was not entitled to take forcible possession. He is entitled to prosecute his action in *quo warranto* to ascertain by what right the plaintiff is holding the office. If that suit be determined in his favor, the court will at once place him in legal and orderly manner in possession of the same.

The appellee, being a *de facto* officer, has no need to try a controversy over the title to the office in order to protect his position. See *Ekern v. McGovern,* 154 Wis. 157; *Blain v. Chippewa Circuit Judge,* 145 Mich. 59. A *de facto* officer has the right to avail himself of a writ of injunction to enjoin interference while in possession of the office. 2 High, Injunctions, sec. 1315. Appellee is simply resorting to the remedy by injunction for the purpose of protecting his position against interference of adverse claimants whose title is disputed. *Remelin v. Mosby,* 47 Ohio St. 570. The appellee herein, it seems, is holding the office in question under a *prima facie* legal right, and as he is holding his position by virtue of holding over, and his successor not having been elected and qualified, he is a *de facto* officer notwithstanding the existence of a *bona fide* dispute between him and a claimant as to the title of the office. Thus it seems clear that, while appellee is acting as a *de facto* officer, he should not be disturbed in the exercise of this right, or in doing or performing all of the duties attendant upon his position, and is entitled to every protection necessary in the fulfilment of his position. "It is a proper exercise of discretion to restrain interference * * * in the performance of duty" until one's title while acting is determined in a proper proceeding instituted therefor. See *Blain v. Chippewa Circuit Judge,* 145 Mich. 59. It is contended that the certificate of election is conclusive evidence of the right of Mastin to the office under *State v. Frantz,* 55 Neb. 167. The alleged certificate was not made by the proper body, nor at the

proper time, nor in accordance with the law; hence the above principle is not applicable.

The finding and judgment of the trial court is free from errors and should be

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

UNION STOCK YARDS COMPANY, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.

FILED MARCH 1, 1919. No. 20230.

1. **Statutes:** CONSTRUCTION. When a statute is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that construction which makes sure its validity will ordinarily be given.
2. ———: CONSTITUTIONALITY: STOCK-YARDS. Section 134, Rev. St. 1913, construed to apply to all public stock-yards in the state, and, as thus construed, *held* not to deny to appellant the equal protection of the law under the Fourteenth Amendment.
3. **Stock-Yards:** REGULATION. Under its general police power, the state may regulate charges at public stock-yards.
4. ———: ———: CONSTITUTIONAL LAW. The legislature may delegate to the state railway commission power to fix and regulate charges at public stock-yards.
5. ———: RATES: VALIDITY. An order of the state railway commission fixing a charge to be made for corn furnished by a public stock-yards company to its patrons, which does not make allowance for the use of the property engaged in the service, as well as compensation for the corn furnished, *held* erroneous.

APPEAL from State Railway Commission. *Reversed.*

Brown, Baxter & Van Dusen and *Frank T. Ransom*, for appellant.

Willis E. Reed and *Clarence A. Davis, Attorney-Generals*, and *Hugh La Master, contra.*

MORRISSEY, C. J.

This is a proceeding, in the nature of an appeal, to vacate an order of the Nebraska state railway commis-

sion, fixing the rate which the Union Stock-Yards Company may charge for grain and feeding service at its yards in Omaha. The order was made under the authority of sections 134 and 135, Rev. St. 1913, which read as follows:

Section 134. "The term 'stock-yards' as used herein shall mean and embrace all corporations, individuals, associations of individuals, their lessees, trustees or receivers (appointed by any court of lawful authority, whatsoever), that now or hereafter may own, operate, manage or control any yards and pens, railroad tracks, switches, engines or other motive power, for the purpose of handling live stock in transit and for sale; and all stock-yards are hereby declared to be common carriers."

Section 135. "The state railway commission shall have power to issue orders regulating service and charges of all kinds at all stock-yards."

The stock-yards company insists that the order in this case is invalid because the provisions of the statute upon which it is based are unconstitutional. It is claimed that the sections set out deny to appellant the equal protection of the law, and constitute class legislation. The contention is that the statute in question does not allow the railway commission to regulate the service charges of all public feeding and shipping yards in the state, but only of those which also maintain common carrier facilities; that appellant is the only stock-yards company in the state doing a common carrier business; that this fact furnishes no basis for a classification in the regulation of yard or pen charges; and that it is therefore discriminatory to allow the fixing of service rates at appellant's yards, and not at those of other companies engaged in the same line of enterprise.

While it is true that section 134 may be susceptible of the interpretation placed upon it by appellant, it is equally capable of another and less questionable con-

struction. No reason is apparent why the terms of this statute should not be read disjunctively, so as to subject to state regulation the service charges of all companies maintaining either feeding pens and yards, tracks, switches, or all of these facilities, "for the purpose of handling live stock in transit and for sale." There is nothing inharmonious with this view of the statute, unless it be the final clause of section 134, which provides that "all stock-yards are hereby declared to be common carriers." If, however, the power to regulate feeding charges at stock-yards cannot be conferred upon the railway commission, except by reason of a common carrier capacity, it cannot be conferred at all in this case, since mere legislative denomination cannot constitute an enterprise a common carrier. And certainly feeding, watering and caring for shipments of live stock, for an independent consideration, are not within the scope of a common carrier's duty, nor subject to regulation as such. *Union Stock Yards Co. v. United States*, 169 Fed. 404. Since the right of the state in this case must be determined without regard to the common carrier designation of the legislature, this provision of the statute may be disregarded.

The construction of the statute announced is effectuative of legislative intent, and will therefore be adopted in preference to that suggested by appellant. It is the policy of the courts to uphold rather than overthrow legislative action. Hence, sections 134, 135, Rev. St. 1913, cannot be said to violate the Fourteenth Amendment, by denying to appellant the equal protection of the law.

But though the statute in question is nondiscriminatory as between the stock-yards companies of the state, the question arises whether it is constitutionally within the power of the state thus arbitrarily to fix the charges in this particular line of business. That stock-yards are so affected with a public interest as to be subject to the inherent police power of the state, and

to a regulation of charges by governmental authority, seems to us uncontrovertible. *Ratcliff v. Wichita Union Stock Yards Co.*, 74 Kan. 1.

If, then, the state has the power to regulate these charges, how may it exercise such power? Appellant urges that the fixing of rates is wholly a legislative function which cannot be delegated. While this is true as a general proposition, yet statutes delegating to an administrative commission power to fix rates for public service corporations have generally been held not to violate any principle of constitutional law. *State Public Utilities Commission v. Chicago & W. T. R. Co.*, 275 Ill. 555, Ann. Cas. 1917C, p. 50, and notes; *Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 191 N. Y. 123, 18 L. R. A. n. s. 713, and notes, 14 Am. & Eng. Ann. Cas. 606, and notes following. In this state, however, the railway commission is a body organized under the Constitution for the purpose of supervising and regulating common carriers, and it is said that this constitutional authority cannot be extended by statute so as to make it an administrative body for the purpose of stock-yards regulation. But there is nothing in the constitutional duties of such commission incompatible with its serving as a body for the fixing and control of stock-yards charges. And, indeed, the legislature, having the power to create a body for this purpose, might well appoint the members of the railway commission to serve in such capacity.

We now pass to a consideration of the order itself. By the terms thereof the railway commission directed appellant to "determine the price of corn to be charged to feeders of corn at its yards in South Omaha for the current calendar month, on the average price paid by said Union Stock Yards Company for the corn received at South Omaha for the calendar month immediately preceding the current month for which the price per bushel of corn is determined." In its

finding of fact the commission found: "In addition to the price paid for corn at South Omaha, there is an actual out-of-pocket cost to the applicant for the handling and placing of the corn in the feeding pens, which for the purpose of this temporary arrangement the commission places at ten cents per bushel. The amount just named may be added by the applicant to the price of the corn for the current month."

Thus it will be seen that under this temporary order, which on final hearing was made permanent, appellant was allowed no profit whatever for handling the corn, nor reimbursement for the use of the property employed in feeding and distributing the corn. It is suggested that in finding "out-of-pocket" cost, the commission took into consideration the value of the use of the property employed in feeding the corn, but the finding itself does not seem to bear out this contention. The company furnished proof of the usual charges in stock-yards in other states, and insists that that is *prima facie* proof of what is a reasonable rate in this case. The statute so provides. Rev. St. 1913, sec. 6127. An order that permits appellant to make a charge having regard for the market price, plus such sum as the commission may find from all the evidence will allow a proper net return on the investment, is more likely to do justice to all parties than an order based on a monthly average. Appellant is entitled to the value of its corn at the time of sale, without regard to what it may have cost at the time of purchase. If the price has advanced appellant is entitled to the advance. On the other hand, the shipper is entitled to have the market price taken as the basis, without regard to the price at which the corn may have been purchased at some remote date. The mere fact that the stock-yards, a month before, paid more for the corn than it is worth when sold to the shipper is no reason why he should be charged more than the commodity is worth on the day he buys.

The order in this case was made during the war period, when abnormal conditions were prevailing. In furtherance of justice the order is set aside and the cause remanded so that the commission may make such further investigation and enter such order as may be proper.

REVERSED.

CORNISH, J., not sitting.

The following opinion on motion for rehearing was filed May 3, 1919. *Former opinion modified, and rehearing denied.*

PER CURIAM.

On motion for rehearing our attention has been called to the following statement in the opinion:

"The company furnished proof of the usual charges in stock-yards in other states, and insists that that is *prima facie* proof of what is a reasonable rate in this case. The statute so provides. Rev. St. 1913, section 6127."

The point is made that the statute cited was passed in 1907 as part of the legislation applying to railroads, and that the stock-yards statute (Rev. St. 1913, 134-138) was not passed until 1911. It appears that section 6127 does not apply to stock-yards unless they are performing the functions of common carriers. Our opinion is modified to this extent, and the motion for rehearing is

OVERRULED.

IN RE LINCOLN TRACTION COMPANY (two cases). LINCOLN TRACTION COMPANY APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED MARCH 1, 1919. Nos. 20743, 20842.

1. **Constitutional Law:** STATE RAILWAY COMMISSION AMENDMENT. In adopting the constitutional provision creating the state railway commission, it was made an independent part of the Constitution, and not as an amendment to the executive, legislative or judicial articles thereof.

2. **Carriers:** STATE RAILWAY COMMISSION: POWERS. The state railway commission has independent legislative, judicial and executive or administrative powers so far as necessarily involved in the "regulation of rates, service, and general control of common carriers;" and such exercise of power may be controlled or limited by the legislature.

3. ———: ———: ———. Unless there has been specific legislation that might limit or affect this power given to the commission, it would seem that the people have given this commission all the control over common carriers that they themselves could exercise.

4. ———: RATES. The rates of a public service corporation must be based upon the value of the property devoted to the public use.

5. ———: ———. Rates allowed in other similar cities may be considered by the commission, but would not be controlling.

6. ———: ———: EMERGENCY RATES. If the evidence tending to show that rates are not remunerative, "while based upon actual experience in the operation of the road, relates only to a brief period when conditions were abnormal," it will not necessarily require a change of rates. *Darnell v. Edwards*, 244 U. S. 564. If it is uncertain whether conditions will become more favorable for adequate earnings in the near future, and it seems improbable that they will, the propriety of emergency rates would seem to be indicated.

7. ———: ———: GOOD WILL. When rates are in question, the item of good will is not to be considered.

8. ———: ———: EVIDENCE. In determining the sufficiency of present rates, it would be proper to consider the dividends that had been declared in the recent past under ordinary conditions, but the distribution of these dividends among the stockholders would not throw any light upon the earning power of the property.

9. ———: ———: DIVIDENDS. If the dividends paid were not greater than a fair return on the actual value of the property would justify, and did not exceed the net earnings, the disposition of those dividends among the stockholders would not affect the public interest.

10. ———: ———: ———. If the dividends paid to the various stockholders were more than a fair return upon the property, or in excess of the net earnings of the company, it would devolve upon the company to make good the deficiency, and render such service as is due the public, and is required by the commission.

11. ———: ———: SERVICE. If the earnings are sufficient, the company must be prepared to render proper service as required by the commission.

12. ———: ———: ACCOUNTING. When a public utility, which is under the control of the railway commission, owns or is interested in subsidiary utilities in the city which are under the control of the city authorities, it is proper for the railway commission to require the utility under its control to keep full and accurate accounts of all services rendered to its subsidiary companies, and all values received therefor at prices fixed by the railway commission; and such values so received must be accounted for as other earnings.

13. ———: ———: VALUATION. It is the duty of the company to keep their accounts as required by the commission, and to render all possible assistance to enable the commission to ascertain true values. If the company fails in these respects, it is not in a position to complain of reasonable findings of the commission as to value.

14. ———: ———: COMPLAINT. If the company does not obey the orders of the commission in that regard, and act upon these principles, it cannot complain if the commission is as liberal in dealing with the affairs of the company as it can reasonably be and make sure that it is properly protecting the public.

15. ———: ———: INCREASE. If, owing to changed conditions, the net earnings of the company, properly managed, are not a fair return upon the value of its property, the rates should be increased without imposing impossible or unnecessary conditions.

16. **Street Railways**: CANCELATION OF STOCK. The commission properly decided that it cannot under existing conditions order the cancelation of the common stock of the company, and when under existing conditions an order canceling stock is not authorized, it cannot be canceled by indirection by withholding from the company that to which it would be otherwise entitled.

17. ———: AUTHORIZATION OF BOND ISSUE. The commission should know how the proceeds of the bonds are used by the company, and in authorizing the issue of stocks or bonds may determine the price and conditions of their sale, but in a proper case cannot indirectly prevent such issue by imposing impossible or unnecessary conditions.

18. **Carriers**: RATES: DEPRECIATION FUND: DIVIDENDS. Money raised to pay for depreciation should not be considered as capital upon which a return is to be made to stockholders as dividends in the future. But, when, under the rates allowed, dividends are fairly earned and declared, such dividends become the property of the stockholders, and if used to make proper additions to the property, such additions should be considered in adjusting rates.

19. **State Railway Commission**: FINDINGS: REVIEW. This court upon appeal cannot disturb findings of the commission, unless it ap-

pears that some requirements of the law have been violated or disregarded, or that the result reached cannot reasonably be derived from the facts proved.

APPEAL from the State Railway Commission. *Reversed.*

E. J. Hainer, F. M. Hall, Field, Ricketts & Ricketts and *George A. Lee,* for appellants.

C. Petrus Peterson, Charles R. Wilke, W. G. Kline and *C. E. Matson, contra.*

SEDGWICK, J.

The plaintiff applied to the state railway commission for permission to raise its rates of service and for authority to issue and sell securities, and also made an application for an emergency rate. The commission, after an extended hearing and apparently an exhaustive investigation of the matters presented, granted the respective applications in part and refused them in part; and the applicant has appealed to this court from the ruling on each application. The applications were heard together, reserving the motion to consolidate the cases for further investigation.

Questions are raised and discussed as to the extent and the limits of the jurisdiction and authority of the state railway commission. In *Prentis v. Atlantic Coast Line Co.,* 211 U. S. 210, the court said in the syllabus: "So far as the federal Constitution is concerned, a state may, by constitutional provision, unite legislative and judicial powers in the same body." And, in the opinion: "Among its (the commission's) duties it exercises the authority of the state to supervise, regulate and control public service corporations, and to that end, as is said by the supreme court of Virginia and repeated by counsel at the bar, it has been clothed with legislative, judicial and executive powers." And that if the state Constitution "sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned."

In adopting the constitutional provision creating the state railway commission, it was made an independent part of the Constitution, and was not designated as an amendment to the executive, legislative or judicial articles of the Constitution. The fact, therefore, that it has, by the compilers, been placed in article V, which relates to the executive department of the government, affords no assistance in its construction. Its language is clear, as follows: "There shall be a state railway commission, consisting of three members, who shall be first elected at the general election in 1906, whose terms of office, except those chosen at the first election under this provision, shall be six years, and whose compensation shall be fixed by the Legislature." Its powers and duties include "the regulation of rates, service and general control of common carriers." The legislature may make provision as to these powers and duties, but the commission, "in the absence of specific legislation, shall exercise the powers and perform the duties enumerated." It was submitted to the people by the legislature of 1905. Laws 1905, ch. 233. Unless there has been specific legislation that might limit or affect this power given to the commission, it would seem that the people have given this commission all the control over common carriers that they themselves could exercise. While this power must be exercised in harmony with the provisions of the federal Constitution, and the general provisions of our own Constitution that affect all branches of the government, it is plainly not limited by the special provisions of the Constitution which distinguish between the legislative and judicial departments of the government. The functions of this commission are largely administrative, but, as is stated in *Prentis v. Atlantic Coast Line Co., supra,* the commission necessarily has independent legislative, judicial, and executive or administrative powers. This does not mean that the commission is made a court with general judicial powers, but only such judicial

powers as are necessarily involved in performing its duty to supervise, regulate and control public service corporations; and such exercise of power may be controlled or limited by the legislature.

The company appears to contend that the following questions are involved in this appeal: (1) That the rates should be based entirely upon the actual value of the company's property devoted to the public service. (2) That the value of the property, as found by the majority of the commissioners, entitled the company to "an emergency rate of fare." (3) That the schedule of rates should not be lower than "in other cities of the same class, and should be sufficient to pay operating expense, providing for upkeep of the property, and pay a fair return upon the value of the property used and useful in the public service." (4) The order of the commission "requiring the cancelation of the common stock of the traction company is void and should be held for naught." (5) The order "requiring proceedings to be instituted to recover into the treasury dividends paid on the common stock is also null and void and should be so held." (6) "The limitations placed on the use of the proceeds realized on the sale of the stocks and securities authorized is both contrary to law and unjustified."

That the rates should be based upon the present value of the property is thoroughly established by the decisions of the federal courts and other courts. In the famous case of *Smyth v. Ames*, 169 U. S. 466, 546, the court said: "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks, the present as compared with the

original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience." This holding has been adhered to in subsequent decisions of that court, and has been generally followed by public service commissioners. It was followed in some of our decisions, and was recognized as the basis of rates by this court in *State v. Lincoln Traction Co.*, 90 Neb. 535, in which it was said: "Nor will the valuation by implication fixed by the promotors of the consolidation concerning the value of the property of the constituent corporations and of their stocks and bonds bind the railway commission in determining in a proper case the investment upon which the respondent's stockholders should receive a return in the way of dividends, or the exact amount of the charges that may be exacted for transporting passengers"—citing *Smyth v. Ames, supra,* and other cases.

It is not always easy to fix accurately the present value of such a property, and for that reason resort may be had to the various matters recited in *Smyth v. Ames, supra,* and, as there said, perhaps to other matters. Rates allowed in other similar cities will be considered, but they, of course, would not be controlling. When rates are in question, the item of good will is not to be considered. The value of the good will depends upon dividends, and the certainty of receiving them, and they in turn depend upon the rates allowed. To consider good will as value in fixing rates would lead to the most confusing uncertainties. The commission in August, 1918, increased the rates upon an application of the company, and these applications are for a further

increase. If the evidence tending to show that rates are not remunerative, "while based upon actual experience in the operation of the road, relates only to a brief period when conditions were abnormal," it will not necessarily require a change of rates. *Darnell v. Edwards,* 244 U. S. 564. If it is uncertain, and seems improbable, that conditions will become more favorable for adequate earnings in the near future, the propriety of emergency rates would seem to be indicated. The commission appears to have so regarded existing conditions.

It was said by the Wisconsin railway commission: "A street railway will be permitted to discontinue the sale of 6 tickets for 25 cents where the return for the last 20 months was only about 5 per cent., although the average return for the preceding 6 years was 8.8 per cent., it appearing that the loss during the 20 months from the competitive operation of private automobiles, and jitneys to a less extent, and from higher prices for materials, supplies, and wages is not temporary, that large outlays must be made for paving and for improvements and extensions, that any increase in gross earnings therefrom will be offset by expenses, and that it is doubtful whether an abnormally low cost of injuries and damages can be maintained." *Re Duluth Street R. Co.,* P. U. R. 1916D, 614.

The evidence in this case discloses that no comprehensive and authentic valuation of the present property was before the commission at the time of this hearing. The attempt seems to have been to ascertain its present value from a consideration of the history of the company, and its investments and expenses from the time of the organization of the so-called "Old Traction Company," in 1898, to the present time, and the findings and valuations made by the railway commission itself since the consolidation in 1909. Some of the transactions of the predecessors of the so-called "Old Traction Company" appear also to have been considered.

The present company was organized in February, 1909. Prior to that time companies were operating three street car lines, which were then consolidated. This was before the enactment of the statute known as the "Stocks and Bonds Statute." Laws 1909, ch. 108. The stocks and bonds of the companies so consolidated forming the present company (called in the briefs "The New Company") appear to have been greatly in excess of the actual values of the properties involved. In order to effect a consolidation of the interests of the various stockholders in the different companies, there appears to have been extravagant uses of stocks and bonds of the new company. Preferred stock was used apparently without much regard to values that it represented, and was distributed to induce former stockholders to consent to the consolidation. Also, a large amount of common stock was used and generally disposed of in the same way. These conditions were stated more fully, and the results in some respects considered, in *State v. Lincoln Traction Co., supra.*

The commissioners were not entirely agreed as to the disposition of these applications. A majority apparently formed a conclusion as to the present value of the property, and appear to have concluded that the present rates were insufficient to pay a fair return upon that valuation, but refused to increase the rates because of the present conditions of the stocks and bonds of the company, and perhaps for other reasons. In the opinion of the commission it is said: "It is true that the operating revenues for the calendar year 1917 were insufficient to pay the dividends on the preferred stock by $22,305.83. The increase in operating expenses for the calendar year 1918, by reason of increased wages, cost of materials and supplies, and freight rates may create a greater deficiency, even though the gross operating revenues remain constant. We do not advocate the policy of allowing a depletion of the entire surplus reserves, and we are of the opinion that, should the

reserves continue to be reduced by reason of high cost of operation, the commission should take time by the forelock and raise the rates; but certainly the commission should not raise the rates and place a greater burden upon the people until the company itself has done its full duty. The commission will, through the medium of the monthly reports of the applicant, keep in close touch with the operating results for the future, and when the company has done its duty by making good to the public the operating revenues properly belonging to the surplus account, should the surplus account, together with the future operating revenues, not be sufficient adequately to take care of the company, the commission will immediately raise the rates."

The commission found that they did not have authority to cancel the excessive issue of common stock, but refused to increase the rates until the company, by its own acts, should cancel the stock. They also found that the company had paid the last few years a large amount of money as dividends upon that common stock that represented no value, and ordered that the company should, by legal action, recover the money so paid out as dividends on the common stock, together with interest thereon. The cancelation of this common stock, with other similar matters, was considered in *State v. Lincoln Traction Co., supra,* and it was held: "If, in a consolidation of constituent street railway companies which theretofore satisfactorily served the public all of their tangible property is conveyed to the consolidated corporation and subsequently improved, the mere fact that the stock and bond issues of the constituent corporations were doubled by the consolidated corporation, without greatly adding to the tangible assets, will not justify a cancelation of that stock. And if to cancel one class of that stock will take from part of the stockholders the consideration for their agreement to consolidate the constituent corporations and will not interfere with the consideration received by other stockholders,

none of the stock should be canceled if the consolidation be permitted to continue."

The same reasoning applies here. The patrons of this utility are not especially interested in the division of the dividends among the stockholders. They should not be required to pay greater fares than actually necessary to pay a fair return on the value of the property devoted to the public use. If the commission could not directly cancel the common stock, it could not do so indirectly by withholding from the company that to which it would be otherwise entitled.

In determining the sufficiency of present rates, it would be proper to consider the dividends that had been declared in the recent past under ordinary conditions; but, as already stated, the distribution of these dividends among the stockholders would not throw any light upon the earning power of the property. If the dividends paid to the various stockholders were more than a fair return upon the property, or in excess of the net earnings of the company, it would devolve upon the company to make good the deficiency, or run the risk of a receivership in case it was impossible to render such service as is due the public and is required by the commission. But if, owing to changed conditions, the net earnings of the company, properly managed, are not a fair return upon the investment, the rates should be increased without driving the company to remedies so doubtful as suits to recover dividends long ago declared and paid. If the company has paid dividends to stockholders beyond the net earnings, and so failed to accumulate a reserve for maintenance and emergencies, it has assumed a risk that common prudence would suggest should be immediately remedied; for if the earnings are sufficient the company must be prepared to render proper service as required by the commission. If it fails to do so through an unlawful dissipation of its funds, the public would necessarily use drastic remedies to secure proper service. If the dividends paid were not greater than a fair return on the actual

value of the property would justify, and did not exceed the net earnings, the disposition of those dividends among the stockholders would not affect the public interest.

Since the consolidation the commission has had occasion several times to investigate the property of the company and adjust the rates. One of the first questions investigated arose from the fact that other public utilities are operated in connection with the traction company, which are not under the control of the commission, but under the city authorities, and in 1910 the commission determined some of the questions so presented. In the Third Annual Report of the commission, p. 133, it is said: "At the hearing in this case an attempt was made to find the value of the street railway proper, in order that rates might be so fixed that the income from the same would be fair to the street railway company and to the general public as well. * * * It was contended by the city attorney of Lincoln that the commission should not segregate these properties, but should take them as a whole, and determine what rate should be charged to produce a reasonable income on the entire property. The commission found itself in this predicament: The state Constitution and legislature have given it power to fix rates and service of common carriers, which includes street railways, but nowhere has it been delegated any authority over public utilities such as heating, lighting and power plants. * * * The commission agrees with the contention of the city attorney that there should be a fixed and compensatory charge made by the Lincoln Traction Company for all services rendered to any other or subsidiary company for services, and all such amounts so earned must be made a part of its income account. * * * If the heat and light which are being furnished to these subsidiary lines of business are furnished by the railway company at a rate that is not compensatory to it, the commission has jurisdiction and authority to do full justice in that respect by adjusting such charges."

And again in the same year, in another matter, the commission found and ordered as follows (Third Annual Report p. 142): "That from and after July 1, 1910, the accounts pertaining to the railway shall be kept in books separate and distinct from the books and accounts of the light or power or heating departments; that all operating accounts shall on the books show the actual amounts of expenditures, accurately and fully set out, and not altered by any apportionments to other departments (excepting only from material account), or by any method or subterfuge; that there shall be charged to the commercial light and power and heat departments all expenditures made for their account, and, in lieu of charges heretofore made by apportionment of certain operating expenses, there shall be charged by the railway to the light and power departments two and one-half (2 1/2) cents per kilowatt hour for each kilowatt hour of current furnished to said commercial light and power departments, which shall be accurately and faithfully measured by meter at the power house, and the railway shall charge to the commercial heating department twenty-seven (27) cents per one thousand (1,000) pounds of condensation furnished, as shown by monthly readings of customers' meters, all of which records shall be strictly kept and retained for reference and examination, if desired, and the amounts so charged by the railway to the commercial light and power and heating departments shall by said departments be paid over to the railway in cash monthly, and the amounts so charged shall in the railway books be treated as earnings and accounts opened and kept to set forth such earnings."

In a former hearing of an application by this company, the commission found: "It is very unfortunate that, in the presentation of this case, so much that is in no way material to the solution of the problem has been injected into the evidence. * * * No hard and fast rules can be established in respect to a fixed rate of income

upon investments of this nature, but we have no hesitancy in saying that under ordinary conditions, where the good faith of the company and its fairness with respect to its patrons appears, the maximum return to such investors (provided the rate charged is not an unusual one) should not exceed 3 per cent. in excess of the customary and existing rate of interest received by those whose investments are represented in fixed interest-bearing securities. In other words, the building of electric lines should be encouraged, and the returns upon such investments should be sufficiently large to attract capital to such enterprises. If the rate of interest on fixed interest-bearing securities in any given locality is 5 per cent., a maximum return to the investors in electric railways would not be unreasonable or excessive at 8 per cent." Fourth Annual Report, pp. 92, 96.

A year later, in another case, the commission determined what they said was a fair valuation as a basis for earnings and depreciation. In the Fifth Annual Report, p. 96, it is said: "Preliminary and prior to the hearing, this commission had caused a further and exhaustive investigation and examination of the affairs of the Lincoln Traction Company to be made by its accountants, Messrs. Powell and Wettling, whose report was presented to the commission and placed on file on March 7, 1912. * * * The value so shown in the report to be used as a basis for earnings is $2,244,639.54. * * * Taking all these matters into consideration, the commission is of the opinion that the amounts stated are a fair valuation as bases for earnings and depreciation." The commissioner dissenting from the opinion of the majority said that the rate of return "must be sufficient, under all circumstances, to attract capital to that particular enterprise."

Money raised to pay for depreciation should not be considered as capital upon which a return is to be made to stockholders as dividends in the future, but "that it was right to raise more money to pay for deprecia-

tion than was actually disbursed for the particular year there can be no doubt, for a reserve is necessary in any business of this kind, and so it might accumulate; but to raise more than money enough for the purpose and place the balance to the credit of capital upon which to pay dividends cannot be proper treatment." *Louisiana Railroad Commission v. Cumberland Telephone & Telegraph Co.*, 212 U. S. 414. But when dividends are fairly earned under the rates allowed, and are declared, such dividends become the property of the stockholders, and, if used to make proper additions to the property, such additions should be considered in adjusting rates.

These findings and orders seem to be justified and necessary. It would appear that, if these orders are complied with, the commission from the books of the company, can find the amount that the company has received from the subsidiary companies for services rendered, and such sums will, of course, be added to its other revenues to determine its earnings. These subsidiary companies should be treated as are other patrons of the traction company. The commission will see that all values received from them are fully accounted for.

It is the duty of the company to keep their accounts as required by the commission, and to render all possible assistance to enable the commission to ascertain true values. If the company in maintaining subsidiary companies, or for any other reason, fails to so regulate its business and so keep its accounts that its receipts from such subsidiary companies can be accurately determined, or fails to submit to the commission an accurate and approved inventory and valuation of its property, it is not in a position to complain of reasonable findings of the commission as to value, if the commission is as liberal in dealing with the affairs of the company as it can reasonably be and make sure that it is properly protecting the public. This court upon appeal cannot disturb such findings of the commission, unless it appears that some requirements of the law

have been violated or disregarded, or that the result reached cannot reasonably be derived from the facts proved.

The application to issue bonds, or preferred stock, was allowed upon condition "that said bonds or stock, or both collectively, shall be issued and sold for money only, and for not less than 85 per cent. of the par value thereof." If the company can issue bonds bearing 6 per cent. interest, and the stockholders are allowed to purchase the bonds for a nominal price, they can obtain almost any rate of interest they desire on such an investment, to the prejudice of the common stock, and perhaps to the public also. The commission should know how the proceeds of the bonds are used by the company, and the foregoing restrictions are, so far as is shown by this evidence, within the reasonable discretion of the commission.

The conditions that the company shall bring actions to recover dividends heretofore paid, and shall pay no more dividends on certain common stock, and shall take steps to cancel such stock, cannot be upheld.

The commission has evidently devoted great care in an attempt to do justice to the company and to the public. We have found it wrong in regard to some difficult constructions of the Constitution and statutes, above specified; when these are corrected there is no doubt that just conclusions will be reached. As these several applications have been by us considered together, it seems best that the commission shall have an opportunity to consider the whole contention "*de novo*" in the light of the construction of the law that we have indicated; and for that reason the orders in the three several applications are reversed and all remanded for the further consideration of the commission.

REVERSED.

ALDRICH, J., dissents.

CORNISH, J., not sitting.

JOHN T. FAHEY ET AL., APPELLANTS, V. UPDIKE ELEVATOR COMPANY, APPELLEE.

FILED MARCH 1, 1919. No. 20825.

1. **Sales:** BREACH OF CONTRACT: MEASURE OF DAMAGES. Upon a counterclaim for damages resulting from a breach of a contract of sale of grain, the measure of damages is the difference between the price agreed upon and the price at the time of the breach of contract complained of.
2. ———: SHIPPING PERMITS: WAIVER: BREACH OF CONTRACT. When the breach of contract complained of consists in failing to furnish certain permits which were necessary to enable the defendant to ship the grain under the contracts, the defendant may waive the time named in the contracts for furnishing the permits. If, in waiving the time, it is insisted that the permits must be furnished so that the grain can be shipped within the time limited for that purpose, the breach of contract by plaintiffs must be considered to occur when the defendant duly declares a forfeiture, for the reason that the time has expired in which the contract can be performed.
3. ———: BREACH OF CONTRACT: MEASURE OF DAMAGES. In such case, the measure of damages would be the difference between the contract price and the market price on the day the contracts were declared forfeited; and, as the price then was higher than the contract price, the defendant suffered no damages.

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

Montgomery, Hall & Young and *R. E. Lee Marshall,* for appellants.

Smith, Schall & Howell, contra.

SEDGWICK, J.

After the former judgment in this case had been reversed upon the plaintiffs' appeal (102 Neb. 249), the plaintiffs filed an amended petition in the district court and the defendant filed an amended answer. In this answer the defendant alleged a counterclaim asking damages against the plaintiffs for an alleged failure to per-

form four several contracts in which the plaintiffs agreed to purchase from the defendant grain to be shipped as specified in the contracts. When the evidence was completed, each party made such requests for an instructed verdict that the court discharged the jury and determined the case upon the pleadings and evidence. The court found that there was due from the defendant to the plaintiffs $47,934.32, and that there was due from the plaintiffs to the defendant upon its counterclaim $28,610.81, and entered judgment in favor of the plaintiffs for the difference, $19,323.51. From this judgment the plaintiffs have again appealed, insisting that the amount allowed upon the defendant's counterclaim is too large.

By these four contracts, upon which the counterclaim was based, the defendant sold to the plaintiffs wheat and corn as therein specified to be shipped from Omaha, the defendant's place of business, to Baltimore. One of these contracts contained the sentence, "Shipment Jan. Feb. open port or permit by Feb. 1st." The others contained words of similar import, and the difference in the wording is not material perhaps to our discussion. From the evidence it appears that this provision of the contracts meant that the defendant could ship the grain any time during the months of January and February, and that, because of conditions existing during the war, the ports for shipment were at times closed by the government, and consequently the railroads would not receive grain for shipment from Omaha to Baltimore unless the shipper first obtained a special permit for that purpose.

The defendant contends that the contracts should be construed to mean that the plaintiffs agreed, in case the port was not open, to obtain these permits at the times named in the contracts; that the plaintiffs failed to perform that part of the contracts, so that the defendant was unable to ship the grain, and in the meantime the market declined in price to the defendant's damage. The trial court found: "That defendant's

counterclaim should be and is sustained, and that the market price of the grain involved in such counterclaim should be taken as of the day after the respective dates on which permits for the shipment of such grain were under the respective contracts to be furnished by plaintiffs to defendant.". The plaintiffs contend that the contracts should not be construed to be an absolute agreement on their part to procure and furnish the permits at the time specified; and that the court erred in finding that the price of the grain should be taken as of the day on which the permits were to be furnished, and that the price should be taken as of the day when the defendant declared the contracts canceled because of the failure to furnish the permits; and that in the meantime the market price had advanced so that the defendant suffered no damages.

It appears to be conceded that, owing to the existing conditions, it was impossible for the plaintiffs to procure the permits, and it might become a very important question whether these contracts should be construed as absolute agreements binding upon the plaintiffs to procure these permits at the times specified, so as to make them liable for any loss the defendant might suffer because of the refusal of the railroad companies to issue the permits. When, at the times specified for procuring these permits, it was found that they could not be obtained, the market price of grain was rapidly declining, so that it would be largely to the financial interest of the plaintiffs to delay the shipments and equally to the interests of the defendant to make as early shipments as possible, if the contracts were to be enforced. It appears that a lively correspondence between these parties ensued in regard to obtaining the permits. This correspondence and the conditions then existing are very much discussed in the briefs. It seems clear from this correspondence, under the existing conditions, that the defendant was insisting that the plaintiffs were bound by the contracts to furnish the permits as specified in the contracts,

and that any failure to do so would make the plaintiffs liable for any loss that the defendant might suffer on that account; and the plaintiffs were as strongly insisting that, under the circumstances, the failure to procure the permits was not a breach of the contracts on the part of the plaintiffs, but was a misfortune that affected both parties alike, and that the plaintiffs were not liable for any loss that might occur to the defendant by reason of such failure. We do not find it necessary to determine the construction of these contracts upon that point. If we accept the defendant's theory of the absolute guaranty by the plaintiffs that the permits would be procured—which is by no means clear—the question whether, in considering the defendant's damage, the market price of the grain should be taken as of the day named in the contracts for furnishing these permits, or of the day when the defendant declared a cancelation of the contracts, becomes a very material question.

The parties have agreed and stipulated in the record the market price of the grain on each of the days named for furnishing the permits, and on the day the contracts were canceled by the defendant. The market price was so high on the last named date that, if that day is taken as the time of the alleged breach of the contracts by the plaintiffs, the defendant suffered no damage, but rather made a profit by the delay in shipments.

After the day named in the contracts for procuring the permits, the defendant continued to insist upon procuring the permits, if possible, and some permits were obtained and further shipments made by defendant under the contracts. This continued until the time for shipments made by defendant had terminated, and the defendant thereupon declared the contracts terminated. This was March 3, 1917, and in May, 1918, the defendant filed in the district court the counterclaim for damages.

If the failure on the part of plaintiffs to obtain and furnish the permits on the day named in the contracts

is to be regarded as a breach of the contract, it was immaterial when these permits were obtained, provided they were in time to satisfy the defendant to continue the shipments. Therefore, without waiving the procuring of the permits, the defendant might waive the time of procuring them. This was clearly done by the conduct of the defendant. On January 30, 1917, defendant wrote plaintiffs, "At the present moment the open sales that are now due are waiting for permits to ship and are past due." Plaintiffs answered by telegraph, "Our hands are tied until railroads give more relief." As late as February 14, 1917, defendant wired, "Have you anything for us to-day?" and February 19, 1917, "What prospects furnishing permit of wheat and hundred corn?" and February 20, 1917, "Can complete your last permit corn to-day if you will furnish permit balance hundred due advise immediately give us some wheat." And then, as the time for shipment would expire on March 1, defendant began to correspond looking to a cancelation of the contracts; and on Sunday, March 2, the defendant formally, for the first time, declared the contracts forfeited, "because of your failure to furnish railway permits" (under the contracts specifying particularly all of the contracts involved), "or make other disposition, we have canceled all of the above contracts." This was followed on Monday, the 3d, by a letter confirming the cancelation. The measure of damages in such case is the difference between the price agreed upon and the price at the time of the breach of contract complained of. The precise day of furnishing the permits being of no importance, except as it delayed shipment, might be waived by offering to receive the permit at a later date, and the correspondence amounted to such offer. It follows that the breach of contract on plaintiffs' part was in failing to furnish permits within the time that defendant offered to receive them as a compliance with the contracts, which was March 2, or, as that was Sunday, March 3. It follows that the

measure of damages would be the difference between the contract price and the market price on the 3d day of March. The market price advanced after the date named in the contracts for furnishing the permits, so that the defendant suffered no damage.

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

REVERSED.

LETTON and CORNISH, JJ., not sitting.

CHARLES C. PETERSON, APPELLEE, V. WILLIAM O. BRUNZELL, COUNTY TREASURER, APPELLANT.

FILED MARCH 1, 1919. No. 20351.

1. **Taxation:** ASSESSMENT: INCREASE: POWER OF BOARD OF EQUALIZATION. Under article X, ch. 69 (sections 6436-6443), Rev. St. 1913, a county board of equalization has no authority to increase the valuation of an assessment of all the real estate in a precinct in the absence of a finding that the valuation of such real estate does not bear a just relation to the valuation of the real estate in all townships, precincts, or districts in the county.
2. ———: BOARDS OF EQUALIZATION: STATUTES: CONSTRUCTION. "Statutes in regard to powers and duties of boards of equalization are to be strictly construed, and in the exercise of their powers and duties the mode of procedure prescribed must be followed." *Grant v. Bartholomew*, 58 Neb. 839.

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

Willis E. Reed, Attorney General, A. J. Shafer, W. A. Dilworth and *W. P. Hall*, for appellant.

James I. Rhea and *G. Norberg, contra.*

DEAN, J.

Plaintiff began this action for himself and others similarly situated to enjoin the county treasurer of Phelps county from proceeding to enforce the collection

of certain taxes, a portion whereof were alleged to have been illegally assessed and levied upon certain real estate in Holdrege precinct in 1916. The collection of the portion of the tax alleged to be illegal was enjoined, and the defendant county treasurer appealed.

The assessment complained of was made in pursuance of a resolution by the county board adopted June 14, 1916, containing this among other recitals: "That, whereas, the finances of the schools of Holdrege, and the city as well, would be crippled by reason of the low assessed valuation of real estate in Holdrege precinct as returned by the precinct assessor for the year 1916: Therefore, be it resolved that we do not accept the assessment of Holdrege precinct as returned by the precinct assessor, but order his real estate assessment book returned to him for reappraisement of valuations, with the recommendation that he use the year 1912 assessment as a basis for such reappraisement in the valuation of lots with a slight decrease in the valuation of improvements, approximately 10 per cent., and return his books, as amended, to the board of equalization by July 3, 1916."

S. P. Carlson was deputy assessor for Holdrege precinct in 1916, and on May 27 of that year he made his return to the county assessor, which the board refused to accept. On June 14 following, five members of the county board called at Carlson's home, and on their invitation he attended a meeting of the board of equalization. At this meeting, as shown by the court's finding, the board "directed him to revalue the real estate in Holdrege precinct, basing the valuation 10 per cent. less than the valuation placed on the property for the assessment of 1912."

The deputy assessor made the changes in the assessment roll pursuant to the direction of the board, and returned the roll, as changed, to the county assessor, by whom it was delivered to the board of equalization before their meeting on July 3, 1916. On that date

the board accepted and approved the changed valuation as made by the deputy assessor, and subsequently made the tax levy on the real estate in Holdrege precinct that is complained of. The levy so made was based on the changed and increased valuation. The revaluation of the real estate in Holdrege precinct, as found by the court, "raised the values from 10 to 100 per cent."

Plaintiff tendered $43.41 to the county treasurer in payment of the taxes on his property; that being the amount due "under the valuation as returned by the precinct assessor in May, 1916." This sum was refused, and $54.36 was demanded by the treasurer; that sum representing "the taxes on the valuation as subsequently raised." Plaintiff did not appear before the board, and had "no actual personal knowledge of such increased valuation until some time in December, 1916."

Article X, ch. 69 (sections 6436-6443), Rev. St. 1913, prescribes the duties of a county board of equalization. Section 6437, Rev. St. 1913, being a part of article X, provides, among other things, that such board shall: "Third—Ascertain whether the valuation of one township, precinct or district bears just relation to all townships, precincts or districts in the county; and may increase or diminish the aggregate valuation of property in any township, precinct or district, by adding or deducting such sum upon the hundred as may be necessary to produce a just relation between all the valuations of the property in the county."

That the board of equalization exceeded its authority in the premises is clear. The assessment complained of was increased in a manner that is not recognized by the statute for raising the valuation of an entire precinct. Nor can the increased assessment be sustained on any of the other grounds that are named in the statute because the notice that the statute contemplates was not given to plaintiff. Rev. St. 1913, sec. 6437. It is elementary that statutes conferring powers upon a county board of equalization are to be strictly construed, and

the procedure therein pointed out must be followed. *Grant v. Bartholomew*, 58 Neb. 839.

The judgment of the district court is right and is in all things

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

FLORA R. FISHER, APPELLEE, V. NELLIE WOODARD ET AL., APPELLANTS.

FILED MARCH 1, 1919. No. 20356.

1. **Fraudulent Conveyances:** BULK SALES LAW: CLAIMS. There must be a valid and enforceable claim as a basis for recovery by a creditor for an alleged violation of the bulk sales law, namely, section 2651, Rev. St. 1913.
2. **Limitation of Actions:** DOMESTIC JUDGMENT. A domestic judgment is a specialty within the meaning of section 7567, Rev. St. 1913, and an action thereon is barred by the statute of limitations after five years from the date of the judgment.

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

E. D. Crites, F. A. Crites and *Fawcett, Mockett & Walford*, for appellants.

John B. Barnes, Allen G. Fisher, William P. Rooney and *George W. Plantz, contra.*

DEAN, J.

Plaintiff recovered a judgment for $3,044.16 against Mrs. Hayward, for alleged violation of the bulk sales law, namely, section 2651, Rev. St. 1913. The defendants appealed.

The principal facts appear in the excerpts from the court's findings that are hereinafter noted. The defendants are sisters. Mrs. Woodard was for many years engaged in the retail dry-goods business at Chadron. On May 12, 1911, she sold her stock of merchandise in

bulk to Mrs. Hayward, a creditor, "for *bona fide* indebtedness, then subsisting and unpaid, in the sum of $2,500." The merchandise was then of the reasonable value of $3,000. It was pointed out by defendants that the testimony of Mrs. Hayward to the effect that she made her purchase in good faith, for full value and without knowledge of plaintiff's claim, was not disputed by any witness.

On January 24, 1908, plaintiff became the owner by assignment of "a judgment on deficiency against the defendant Nellie Woodard in the sum of $2,277.60." The debt represented by the judgment was "contracted prior to the said Woodard having engaged in the mercantile business, and was not contracted for merchandise furnished or money used by her in such mercantile business." The Woodard judgment, as the language of the court implies, was rendered in a foreclosure proceeding. The court specifically found that "the said judgment became dormant on the 31st day of January, A. D. 1913, and has ever since remained dormant, and that no revivor proceedings have ever been instituted or prosecuted thereon, and said judgment has not been revived."

The court found that Mrs. Woodard was owing $2,410.30 to wholesale dealers for merchandise at the time she sold her stock of goods, and that these debts were subsequently paid by Mrs. Hayward, but the plaintiff's judgment debt was not paid, nor was the notice of the sale to Mrs. Hayward served on plaintiff that the bulk sales law contemplates shall be given to creditors.

The court also found that, "Notwithstanding the fact that such judgment is dormant, the said plaintiff is entitled to enforce the same in this suit, and is a creditor of the defendant Woodard, and that said sale to the defendant Hayward was void as against the plaintiff under said 'Bulk Sales Law;' that plaintiff is entitled to a judgment or decree against the defendant Hayward for the value of said goods so converted."

In *Armstrong v. Patterson*, 97 Neb. 871, it was held that a domestic judgment is a specialty under section 7567, Rev. St. 1913, and that an action thereon is barred by the statute of limitations after five years. To the same effect is *Holmes v. Webster*, 98 Neb. 105. The *Armstrong* case involved the status of a dormant deficiency judgment that was obtained in a foreclosure proceeding. The record in the present case supports the court's finding that the deficiency judgment involved here was dormant before this action was commenced. In fact the Woodard judgment became dormant more than two years before plaintiff's petition was filed. It follows that this suit cannot be maintained. In view of our former decisions, the court erred in rendering a judgment in favor of plaintiff.

The judgment is therefore reversed and the cause remanded.

REVERSED.

SEDGWICK and CORNISH, JJ., not sitting.

The following motion to modify judgment was filed April 7, 1919. *Former judgment of reversal modified and judgment of district court reversed and cause dismissed.*

PER CURIAM.

A motion has been made by defendant Woodard to modify the judgment in this court by providing that the action be dismissed here instead of being remanded to the district court. Since the opinion demonstrates that the judgment on which the action was based is dormant, and that no cause of action under the bulk sales law exists, the motion is sustained and the judgment modified accordingly.

ACTION DISMISSED.

CHARLES E. ALLEN ET AL., APPELLEES, V. A. J. WHITE ET AL., APPELLANTS.

FILED MARCH 1, 1919. No. 20292.

1. **Corporations: PURCHASE OF STOCK: ELEMENTS OF CONTRACT.** Articles of incorporation and the statutes relating thereto are by construction material parts of the contract executed when a person becomes a stockholder by purchasing stock of the corporation.
2. **———: AMENDMENT OF ARTICLES: RIGHTS OF MINORITY.** A majority of the stockholders of a corporation cannot, by amending the articles of incorporation, deprive the minority, without their consent, of their contractual rights to dividends under the articles as originally adopted.

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

H. M. Sullivan and *Cook & Cook*, for appellants.

George C. Gillan and *Wilcox & Halligan, contra.*

ALDRICH, J.

This is a suit for an injunction. Plaintiffs are stockholders in the Farmers Elevator Company, and sue in their own behalf and in behalf of other stockholders similarly situated. Defendants are the Farmers Co-operative Mill & Elevator Company of Cozad and its officers. The latter are managing the corporation with the understanding that, by an amendment of the articles of incorporation, the corporate name was changed from the Farmers Elevator Company to the Farmers Co-operative Mill & Elevator Company, and that the original method of dividing profits by means of dividends on stock had been changed to make the amount of a stockholder's business transactions with the corporation a basis for distribution of profits. Plaintiffs allege that the amendment relating to profits is illegal and void, and defendants plead that the amendment and their action thereunder are regular and

valid. During the year 1916 the net profits were $9,481. The purpose of the suit is to prevent the distribution of profits under the amendment. From an injunction in favor of plaintiffs, defendants have appealed.

Was the injunction properly allowed? The question subjects the amendment in controversy to judicial scrutiny. The Farmers Elevator Company was organized in 1906 as a business corporation. The original articles and the laws then in force made dividends on stock the means of distributing profits. On this basis plaintiffs bought stock and invested money. They thus entered into a contract of which the original articles of incorporation and the laws applicable thereto were by construction material parts. *Enterprise Ditch Co. v. Moffitt*, 58 Neb. 642. In this way plaintiffs acquired the contractual right to share the net profits in the form of dividends on stock. In 1911 the legislature passed an act permitting the organization of a co-operative association "which authorizes the distribution of its earnings in part, or wholly, on the basis of, or in proportion to the amount of property bought from or sold to members, or of labor performed, or other service rendered to the corporation." Rev. St. 1913, sec. 733. In 1916 there was an attempt to amend the articles of incorporation by changing the Farmers Elevator Company to a co-operative association within the meaning of the statute cited. Later defendants planned to distribute profits under the amendment. Such a course, if pursued, would deprive plaintiffs of dividends to which they were entitled under their contracts as original stockholders and would destroy their contractual rights. This neither the legislature nor the defendants can lawfully do. 10 Cyc. 355; *McLeod v. Lincoln Medical College*, 66 Neb. 555.

It follows that the amendment and defendants' proceedings thereunder are void. It is well known that powers of corporations recognized under legislative charters are only such as the statute confers, con-

ceding what is fairly implied is as much granted as what is expressed. It remains that the charter of a corporation is a measure of its powers, and the enumeration of these powers implies the exclusion of all others. The amendment here sought changes the fundamental arrangement and plans of the corporation as organized in 1906, and hence the amendment sought is violative of the fundamental law of contracts. *Thomas v. Railroad Co.*, 101 U. S. 71.

It appears that this purported arrangement of the articles of incorporation was never presented at a stockholders' meeting, nor at any time considered or passed at a stockholders' meeting, and was never made a part of the records of the corporation, and it is void because it changes vested rights given in the articles and by-laws of 1906. We hold the name of the corporation under the circumstances cannot be changed by a board of directors as was attempted to be done. *Lange v. Royal Highlanders*, 75 Neb. 188, 121 Am. St. Rep. 786, 800, and note.

There was no acquiescence or other conduct on the part of plaintiffs to prevent relief by injunction. The amendment was void for other reasons which, in view of what has already been said, need not be stated. The injunction was properly allowed.

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

STATE, EX REL. JAMES H. EDMISTEN ET AL., APPELLEES, V. JESSE HIGHBERGER, APPELLANT.

FILED MARCH 1, 1919. No. 20326.

Habeas Corpus: CUSTODY OF MINOR. In habeas corpus proceedings to determine the right to the possession of a child, as between the father and the grandparents, where the evidence is conflicting as to the fitness of the respective claimants, and as to the agreement whereby the possession of the child was formerly committed to the grandparents, the controlling consideration is what is for the best interests of the child.

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

Hoagland & Hoagland and *George N. Gibbs,* for appellant.

Wilcox & Halligan and *W. T. Thompson, contra.*

ALDRICH, J.

The respondent in a habeas corpus proceeding seeks to reverse a judgment in the district court for Lincoln county awarding the custody of respondent's minor child to James H. and Belle Edmisten, the relators, until further order of the court. From this finding the respondent appeals.

Corinne E. Highberger, upon the death of her mother, when she was 18 months of age, was taken possession of by family arrangement and turned over to relators, her grandparents, where she was kept and nurtured and tenderly looked after from that time until a short time before the action was begun, when the father took her into his possession. The father, Jesse Highberger, is a successful farmer and well-to-do, has a good home and can provide well for his child. Some few years ago the respondent married, and in due course of time had another child by the second wife, and, feeling that he is now in a position to afford the care and comforts of a good home for the child in question, he resists these proceedings in habeas corpus to obtain possession of her. The relators are prominent people living in comfortable circumstances at North Platte. The child, Corinne E. Highberger, has a lovely home, and the privileges of church, Sunday school, and the public school. During the first years of her life, this child was delicate and frail, and at times her life was despaired of. During all of this time the grandparents lavished all the love, affection and tender care that they could have done upon the dead daughter had she been living, and the grief that the death of the child's mother caused these grand-

parents was assuaged by the presence of the little granddaughter, and all the natural affection which the grandparents had for the dead daughter was given this child. She was tenderly nursed through sickness and given the best medical attention and all the tender nursing that a loving mother would have bestowed. This child is now budding into young girlhood; has a pleasant home, the advantages of church, Sunday school and the public school, and associations that can but be conducive to happiness, good cheer, and right development. The child is happy in these surroundings, and to break these relations would not only be dangerous, but cruel in the extreme. In a situation where prior arrangement for possession of a child are in dispute, and the terms and conditions strenuously contended between the foster parents and the real parent, it is not only dangerous but inhuman to break these ties between the child and the foster parents.

In a situation like this, there is only one sensible thing to do, to wit, consider what is the best interests of the child. Are her surroundings at present happy and conducive to the right development of character, mind and body? Should we, under the circumstances, change these happy relations? Should we hazard the happiness and welfare of the child to satisfy the abstract right of the father? Has the father shown such love and effection for this child as to make his possession imperative? The record discloses that the father (a busy man), accumulating property and waging a battle for position, had but little time, if any, to devote to this child. On the contrary, he has turned her full possession and control and the entire responsibility for her bringing up into the hands of the grandparents, and so well did they perform their task that he had but little occasion to give himself any worry or assume any responsibility in behalf of the child. Now, after the grandparents have learned to love this child as they did the dead daughter, they are called upon to give her up; but we are uncertain as to the

precise terms and conditions of the agreement originally entered into concerning the possession of this child: We are loath to disturb the happy relations as they exist at the present time, and under the facts, as we understand them from the record, will only determine what is for the best interests of the child. We shall follow the doctrine or rule laid down in *In re Burdick*, 91 Neb. 639, and *State v. Nebraska Children's Home Society*, 94 Neb. 255. This is the only safe rule under the circumstances. We feel that we should adhere to it, as the child has not been permanently turned over to the grandparents, but only in possession subject to the further order of the trial court. Therefore, we feel that the judgment of the trial court was right and must be

AFFIRMED.

JOSEPH H. MILES, APPELLEE, V. HELEN M. MARTIN, APPELLANT.

FILED MARCH 27, 1919. No. 20278.

1. **Venue:** EQUITABLE MORTGAGE. An action to establish an equitable mortgage on real estate is properly brought in the county where the real estate is situated; and summons may issue to any other county in the state where a defendant may be found.
2. **Liens:** ENFORCEMENT: PLEADING AND PROOF. In an action to enforce a specific lien on real estate, it is not necessary to allege or prove that plaintiff's claim had been reduced to judgment and execution issued and returned unsatisfied.
3. **Homestead:** EQUITABLE MORTGAGE: ACKNOWLEDGMENT. A widow, not the head of a family, signed and delivered, but did not acknowledge, an instrument creating an equitable mortgage on the fee title to real estate occupied as the family homestead in which she held a homestead life estate under the statute and held the fee title under her husband's will. *Held*, the instrument is not void for want of an acknowledgment.
4. **Supplemental Pleading.** The court may, on proper terms, allow supplemental pleadings to be filed while a cause is pending. Rev. St. 1913, sec. 7716.

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

Virgil Falloon and *S. P. Davidson,* for appellant.

Kelligar, Ferneau & Gagnon, contra.

MORRISSEY, C. J.

This is a suit in equity to establish a lien upon certain real estate in Falls City. From a decree for plaintiff, defendant appeals.

The property had belonged to Mrs. Francis Martin, a widow. Mrs. Martin signed a note as surety on a loan made by plaintiff to her sons, and at the same time executed an instrument "as security for said note," in which she agreed not to alienate or dispose of the property mentioned without plaintiff's consent, until the note had been paid. The note was a joint and several obligation, dated April 5, 1911, and maturing on or before five years from its date.

Mrs. Martin died in November, 1914. A short time before her death she executed a conveyance of the property to defendant Helen M. Martin, her daughter, for the consideration of "love and affection," without plaintiff's knowledge or consent. In January, 1915, plaintiff brought suit. Summons was issued to Douglas county and served upon Helen M. Martin, who appeared and objected to the jurisdiction of the court on the ground that the action was improperly laid in Richardson county. The objection was overruled, and the point is again raised by this appeal.

This is not a personal action, but one to establish an equitable mortgage and to foreclose the same against a grantee not a purchaser for value. The fact that the instrument relied upon specifically designates the property, that it refers to it "as security for said note," and that it binds Mrs. Martin not to make an alienation or disposition without plaintiff's consent, sufficiently imports an intention to create an equitable lien. This lien could only be enforced by suit in

Richardson county where the land was situated. Rev. St. 1913, sec. 7612.

The question is presented, as it was by demurrer in the district court, whether the petition states a cause of action, because it fails to allege that plaintiff was a judgment creditor of the widow, Mrs. Martin, and that he had execution issued and returned unsatisfied against her. Since this is not a creditor's bill, but only a suit to enforce a specific lien, these allegations are unnecessary.

There is the further objection that the instrument was not acknowledged. It is alleged in the answer and admitted in the reply that when the instrument was signed Mrs. Martin occupied the premises as a homestead, but no fact necessary to make her the "head of a family," as defined in section 3090, Rev. St. 1913, is alleged, admitted, or proved. As the surviving spouse she took a life estate in the premises under the statute, but in addition to this she became the owner of the fee under the terms of the husband's will. Whatever homestead right or life estate she had lapsed at her death. The instrument in suit did not purport to mortgage the homestead interest—indeed, this was in effect reserved—and an acknowledgment was not indispensable.

The remaining assignments relate to plaintiff's pleadings. The original petition, filed in January, 1915, sought merely to have a lien established on the property. While the case was awaiting hearing the note matured, and plaintiff, by leave of court, filed a supplemental petition asking as additional relief a foreclosure of the lien. Defendant contends that it was error to allow the supplemental petition to be filed. The supplemental petition was only incidental to the granting of complete relief. It was therefore proper to allow it to be filed. Rev. St. 1913, sec. 7716.

The judgment is

AFFIRMED.

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

FERD SOPPE ET AL., APPELLANTS, V. M. J. MECHALEY, DEFENDANT: LAMRO STATE BANK, APPELLEE.

JESS BURNS, APPELLANT, V. M. J. MECHALEY, DEFENDANT: LAMRO STATE BANK, APPELLEE.

FILED MARCH 27, 1919. No. 20330.

1. **Bill of Exchange:** ASSIGNMENT OF FUNDS. "A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof." Rev. St. 1913, sec. 5444.
2. ———: ———. In order that a draft or order may operate as an equitable assignment of moneys belonging to the drawer in the hands of the drawee, it must be drawn against a specific fund or debt with such particularity as will clearly show the intention of the parties to charge the special fund.
3. ———: PROMISE TO HONOR NONEXISTING BILL. In order that a promise to honor a nonexisting bill shall be enforceable, the promise must so describe the bill that there can be no doubt of its application to it.

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

Crane, Boucher & Sternberg and *Frank C. O'Hollaren,* for appellants.

Switzler, Goss & Switzler and *Windsor Doherty, contra.*

MORRISSEY, C. J.

Defendant Mechaley was a purchaser of live stock at Winner, South Dakota. January 6, 1917, he purchased hogs of each of the plaintiffs. and also from other parties, who have assigned their claims to plaintiff Burns. He gave checks upon the Lamro State Bank for the respective amounts. The checks were subsequently dishonored. The hogs purchased were shipped to the Omaha Live Stock Commission Company, which sold them and credited the proceeds, viz. $3,234.74, to Mechaley's account.

Prior to this time Mechaley applied to the Lamro State Bank for a loan, or extension of credit, to be covered by a draft on the commission company. January 4, 1917, the bank inquired of the commission company, by telephone, if it would honor Mechaley's draft. The company replied, both by telephone and by letter: "We will pay Mr. Mechaley's drafts for the net proceeds of any stock billed to us, but will not pay these drafts ahead of shipment."

The bank took Mechaley's draft for $3,000 and presented it to the commission company. The draft was in terms as follows:

"Winner, S. D., Jany. 6, 1917.

"Pay to the order of Lamro State Bank $3,000 three thousand and no/100 dollars. With exchange. Value received and charged to account of

"M. J. Mechaley.

"To Omaha Live Stock Com. Co., Omaha, Nebr."

The commission company refused to accept, or pay, the draft because it had been notified that a third party was claiming an interest in the proceeds of the shipment. The draft was presented a second time and payment again refused. A few days later plaintiffs sued Mechaley and the commission company, as garnishee, and the bank intervened. The commission company thereupon filed an affidavit asking for a determination of the rights of the adverse claimants, and offered to pay the money into court, or to such person as the court should direct. The company voluntarily agreed to pay, and did pay, to the bank so much of the fund held by it as was not necessary to safely cover the attachments and costs of suit.

The contention of the bank is that the draft operated as a valid assignment of $3,000 of the funds held by the commission company, and to this extent constituted a superior lien to that of the attaching creditors. It is argued that the draft was drawn against a special fund; that the drawee had agreed to pay the draft

out of this fund; and that the draft therefore carried title to the fund against the attaching creditors.

Did the bank have a valid and enforceable assignment of the fund in the amount of the draft? The district court held that it did.

Section 5444, Rev. St. 1913, provides: "A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof." In order that a draft or order may operate as an equitable assignment of moneys belonging to the drawer in the hands of the drawee, it must be drawn on a specific fund or debt. The draft or bill in this case did not specify the fund out of which it was to be paid, nor was there anything to show that it was intended by the drawer to be drawn against a particular fund. It was chargeable to Mechaley's general account, and did not even cover the total amount due Mechaley from the commission company. Had Mechaley made subsequent consignments to the commission company, we see no reason why the bill might not have been paid, with equal propriety, out of such proceeds as out of the funds in question.

The bank did not have such interest in the fund as would defeat plaintiffs' attachments, unless some force can be given to the letter of the commission company, previously referred to, in which it expressed its willingness to honor Mechaley's drafts when it should hold sufficient funds with which to pay them. But such promise could not of itself operate as an assignment of the fund in suit or an acceptance of the draft in question. A promise to accept, or honor, a nonexisting bill must clearly identify the bill, or it is not enforceable. 1 Daniels, Negotiable Instruments (6th ed.) sec. 560.

The judgment of the district court is reversed, and the cause remanded, with directions to enter judgment in accordance with this opinion.

REVERSED.

The following opinion on motion for rehearing was filed December 15, 1919. *Former judgment of reversal vacated, and judgment of district court affirmed.*

1. **Bill of Exchange:** ASSIGNMENT OF FUNDS. A written promise by a stock commission company to a bank to accept nonexisting bills of exchange to the amount of the net proceeds of stock shipped to it by the drawer—when the bank has taken a bill of exchange from the shipper for a valuable consideration, and live stock has been shipped to and sold by the drawee with proceeds in excess of the amount of the bill—binds the drawee and acceptor and operates to transfer the proceeds in its hands to the payee, to the amount of the bill, and the same are not liable to attachment or garnishment by other creditors.
2. ———: ———. Where in such a transaction neither the drawer nor drawee is asserting any right to the fund as against the payee no other creditor of the drawer, in the absence of fraud, has any right to such proceeds.

LETTON, J.

Plaintiffs are creditors of M. J. Mechaley, being holders of bank checks issued by him in payment for live stock purchased on the 2d and 6th of January, 1917, and presented after January 8, 1917, payment of which checks was refused by the Lamro State Bank upon which they were drawn, on account of lack of funds.

Mechaley was a stock buyer and shipper at Winner, South Dakota. It was his custom to purchase hogs and cattle, ship them to commission firms, and draw a sight draft for the proceeds upon the firm to which the cattle were shipped. Mechaley's account was overdrawn and he was denied further credit. On January 4, 1917, the Lamro State Bank telephoned to the Omaha Live Stock Commission Company, inquiring if it would pay drafts issued by Mechaley for the net proceeds of any stock shipped to it by him. The company replied both orally and by a letter written that day: "We will pay Mr. Mechaley's draft for the net proceeds of any stock billed to us, but will not pay these drafts ahead of ship-

ment." On Saturday, January 6, a car of hogs and one of cattle purchased by Mechaley were being delivered in the yards of the railway company at Winner to be loaded the next day. On that day Mechaley delivered to the bank a draft upon the commission company for the sum of $3,000 in favor of Lamro State Bank. The live stock was shipped on Sunday, January 7, and arrived in South Omaha on Monday morning, January 8. After its arrival that morning, the commission company received the following telegram:

"January 7, 1917.

"Omaha Live Stock Commission Co.,
"Omaha, Neb.

"Calling your attention to shipment two cars stock by Mechaley today, car number nine O five nine three, eighty hogs, car number two five one seven five, twenty-four cattle.

"We have M. J. Mechaley draft on you for three thousand, will be presented by Live Stock National Bank, also hold mortgage on stock. Pay Mechaley no money under any circumstances.

"Lamro State Bank."

Later in the day the commission company were informed by another commission man that a bank at Winner had sent him word that some persons in Winner, South Dakota, were claiming part of the proceeds of the sale. The draft was presented to the commission company that day through a local bank at South Omaha, and payment was refused on account of this notice. Afterwards, on January 29, an action was begun against Mechaley by Soppe, one of the creditors mentioned, and the commission company was served with garnishee process. The garnishee answered, stating that it had sold stock for Mechaley to the net amount of $3,233.74; that Mechaley had drawn a sight draft for the proceeds in favor of the Lamro State Bank which had been presented for payment, and that it had been notified that

$148.66 was claimed on an account by Ferd Soppe against Mechaley; that it has no interest in the money, but offers to bring it into court so that parties may interplead. The Lamro State Bank then filed a petition in intervention, claiming the sum of $3,000 by virtue of the draft and its acceptance. The answer to the petition in intervention admits that on February 2 the Live Stock Commission Company paid to the Lamro State Bank $2,342.18 from the proceeds of the sale, so that it is undisputed that the company has retained in its hands, or paid into court, $657.79 to meet the claims of plaintiffs in case it should be found that their right to the money was superior to that of the Lamro State Bank.

The commission company, drawee of the draft, is raising no question as to its validity or acceptance, and makes no objection to the payment of the draft. The only question presented is whether the garnishment by the creditors can take precedence of the transfer of the funds made by the drawing and acceptance of the draft.

Section 5449, Rev. St. 1913, provides that the acceptance of a bill must be in writing and signed by the drawee.

Section 5451 recognizes the validity of an acceptance written on paper other than the bill itself, and provides that "it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value."

Section 5455, provides: "A bill may be accepted before it has been signed by the drawer or while otherwise incomplete."

Section 5456. "An acceptance is either general or qualified."

Section 5458. "An acceptance is qualified which is: First—Conditional, that is to say, which makes payment by the acceptor dependent upon the fulfilment of a condition therein stated. * * * Fourth—Qualified as to time."

The bank delivered Mechaley's note to him, relying upon the delivery of the draft, and the written promise to pay in the letter of the commission company. The promise to accept and pay is an acceptance, says Lord Ellenborough in *Wynne v. Raikes*, 4 East (Eng.) 514, followed in *Scudder v. Union Nat. Bank*, 1 Otto (U. S.) 406, 23 L. ed. 245. The acceptance was qualified in that it made payment by the acceptor dependent upon the shipment and receipt of stock. As soon as the stock was shipped and received, if the proceeds in the hands of the commission company equalled or exceeded the amount of the bill, the conditions and qualifications were fulfilled, and the bill operated as an assignment of the money in the commission company's hands. This is admitted by the drawee, since it paid $2,342.18 to the bank upon the sole ground that it was authorized to do so by the draft, and its acceptance.

Mechaley having received a valuable consideration in good faith for the draft, he and those claiming under him are estopped to assert that, upon its acceptance by the drawee, it did not transfer the fund *pro tanto*. The transaction between the bank and the commission company was completed by the letter of acceptance, the notification to the commission company that the stock was shipped in accordance with the conditions of its acceptance, and by the receipt of the proceeds of the sale. Since the title to the fund had passed from Mechaley, and an attaching creditor can only reach the property of the debtor, the garnishment could only affect the interest of Mechaley in the excess of the proceeds of sale over the amount of the draft.

In *Scudder v. Union Nat. Bank, supra*, it is said: "It is a sound principle of morality, which is sustained by well-considered decisions, that one who promises another, either in writing or by parol, that he will accept a particular bill of exchange, and thereby induces him to advance his money upon such bill, in reliance upon his promise, shall be held to make good his promise. The

party advances his money upon an original promise, upon a valuable consideration, and the promisor is, upon principle, bound to carry out his undertaking. Whether it shall be held to be an acceptance, or whether he shall be subjected in damages for a breach of his promise to accept, or whether he shall be held to be estopped from impeaching his word, is a matter of form merely. The result in either event is to compel the promisor to pay the amount of the bill with interest."

The following cases support the conclusions reached in the opinion: *Nelson v. First Nat. Bank,* 48 Ill. 36; *Hall v. First Nat. Bank,* 133 Ill. 234; *McCausland v. Wheeler Savings Bank,* 43 Ill. App. 381; *Milwaukee Corrugating Co. v. Traylor,* 95 Kan. 562; *Storer v. Logan,* 9 Mass. 55; *Putnam Nat. Bank v. Snow,* 172 Mass. 569; *First Nat. Bank v. First Nat. Bank,* 210 Fed. 542; *Fourth Street Bank v. Yardley,* 165 U. S. 634; See, also, 7 Cyc. 776, 777.

The district court found that the $657.79 remaining in the hands of the commission company belonged to the intervening bank. This judgment was right. The former judgment and opinion in this case is vacated, and the judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., and ROSE, J., dissent.

ROBERT L. BROWN V. STATE OF NEBRASKA.

FILED MARCH 27, 1919. No. 20854.

1. **Larceny:** DESCRIPTION OF PROPERTY. "The use of the generic term 'hog' is a sufficient description under the statute providing punishment for stealing a 'sow, barrow, boar or pig.'" *Clark v. State,* 102 Neb. 728.
2. **Criminal Law:** INDORSEMENT OF NAME ON INFORMATION. The true name of a witness for the state was Hughes William Hughes. He frequently signed his name as H. W. Hughes, and signed the complaint as William Hughes. The county attorney indorsed the name on the information as William Hughes. *Held,* in the absence

of a showing of prejudice, it was not error to permit him to testify as a witness in chief for the state.

3. **Larceny**: INFORMATION: ALLEGATION OF OWNERSHIP. When property belonging to several partners or owners is stolen, the information for such offense is sufficient if it alleges the property belongs to any one or more of such partners or owners.

4. ———: INSTRUCTION: POSSESSION BY ACCUSED. Where recently stolen property is found on the premises owned and occupied by defendant, and it is not shown that any one other than defendant has had access thereto, an instruction allowing the jury to assume possession in defendant is not erroneous.

5. **Criminal Law**: SENTENCE. The district court cannot fix the minimum of a criminal sentence at a greater period than that fixed by statute.

ERROR to the district court for Pierce county: WILLIAM V. ALLEN, JUDGE. *Affirmed as modified.*

C. B. Willey, for plaintiff in error.

Willis E. Reed, Attorney General, and *Orville L. Jones, contra.*

MORRISSEY, C. J.

Robert L. Brown was convicted of larceny under section 8640, Rev. St. 1913, and brings error.

The complaint charged the stealing of a "hog." The statute under which the prosecution was brought uses the terms "sow, barrow, boar or pig." After the preliminary hearing was had, the state filed an amended information, substituting the word "pig" for "hog," to conform to the language of the statute. To this amended information defendant filed a plea in abatement, alleging a variance between the crime thus charged and that contained in the original information, and averring the want of a preliminary examination under the new charge. The trial court overruled defendant's plea, and this ruling constitutes the first error assigned.

The amended information did not charge a crime different from that contained in the original complaint, and hence did not entitle defendant to a new

preliminary hearing. In the case of *Clark v. State,* 102 Neb. 728, we held that the use of the generic term "hog" was sufficient to charge an offense under section 8640, Rev. St. 1913, even though the statute uses the words "sow, barrow, boar or pig." The substitution of the word "pig" for "hog" in this case did not, therefore, change the nature of the offense charged, nor prejudice defendant's rights, and no reversible error can be predicated thereon.

The next two assignments of error are somewhat interwoven. The pig was owned jointly by Hughes William Hughes and J. W. Stageman. Hughes was known generally in the neighborhood by the first name of William and also as H. W. Hughes. He signed the complaint as William Hughes, and the county attorney indorsed that name as a witness on the information. On the trial it developed that his full name was Hughes William Hughes, and objection was made to his testimony because the name was not so indorsed on the information. The purpose of the statute requiring the indorsement of the name of a witness on the information is to enable defendant to know the names of the persons who are to testify against him, so that he may properly prepare his defense. It is not shown that defendant was taken by surprise, or that he was in any way deceived as to the real party whose name was indorsed, and the court was not guilty of error in permitting this witness to testify.

But a second point is sought to be made because of this variance in the name in the matter of proving ownership of the property alleged to have been stolen. It is admitted that the name of Stageman, one of the owners, is properly given. This is sufficient without the name of Hughes appearing. Rev. St. 1913, sec. 9056.

Complaint is made by defendant of the following instruction given by the trial court: "The possession of recently stolen property by a defendant charged with larceny thereof immediately or shortly after the

theft, if there was a theft in this case, is a circumstance which you may properly consider in connection with other testimony and facts in determining the question of defendant's guilt." It is said that this instruction assumed possession of the property in defendant, whereas the question was one of fact for the jury to determine. The evidence shows that the carcass of a dressed hog was found at defendant's home on the morning following the alleged offense. One of the state's witnesses testified to having assisted defendant in taking, dressing and placing the hog in the defendant's coal house. Defendant denied any part in, or knowledge of, the transaction. He claims first to have discovered the hog on his premises the next morning. He did not, however, inform any one of this discovery until after his arrest; nor is it shown that any other person had the use of, or access to, the coal house. Under the circumstances the court was warranted in assuming that there was no question of possession to submit to the jury.

The only remaining question is that of the sentence imposed upon defendant. The court fixed the minimum time of his imprisonment at two years. Under section 8640, Rev. St. 1913, the minimum sentence for the offense is one year. "It is not within the power of the district court to fix the minimum of the sentence at a greater period than that fixed by law." *Griffith v. State*, 94 Neb. 55, 61.

The minimum penalty of two years fixed by the district court is reduced to one year to conform to the statute. In all other respects the record is free from error, and as modified the judgment is affirmed.

AFFIRMED AS MODIFIED.

SEDGWICK and CORNISH, JJ., not sitting.

ALBANY COUNTY NATIONAL BANK, APPELLEE, v. E. D. GOULD, APPELLANT.

FILED MARCH 27, 1919. No. 20177.

1. **Bills and Notes:** INDORSEMENT. "Except where an indorsement bears date after maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue." Rev. St. 1913, sec. 5363.
2. ———: ACTION: PLEADING. Where a petition upon a promissory note pleads that the plaintiff purchased the note in the usual course of business and for a valuable consideration, without notice of any defense thereto, and that the note was indorsed and delivered to him, this plea, when considered in connection with section 5363, *supra*, and section 5370, Rev. St. 1913, defining a holder in due course, constitutes an affirmative plea that the note was sold and indorsed before maturity.
3. **New Trial:** FILING REPLY WITHOUT LEAVE: TRIAL. It was alleged as ground for a new trial that before the trial, without leave of court, and without the knowledge of defendant's counsel, until after the trial, a reply setting up the purchase of the note before maturity was filed. It appeared that some time before the reply was filed the deposition of the principal witness for plaintiff was taken, and his examination was directed to the facts as to the purchase of the note before maturity, and without notice of any defense. Counsel for defendant appeared and cross-examined fully. This evidence was introduced at the trial. *Held*, that the case was tried as if such a reply had been filed, and that it was not erroneous to refuse to grant a new trial upon the grounds set forth.

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

W. P. McCreary and *Warren Pratt,* for appellant.

John A. Miller, contra.

LETTON, J.

Action upon a promissory note. Defense, failure of consideration. Trial by jury, judgment for plaintiff, defendant appeals.

The petition alleges that the defendant made and delivered his promissory note in the sum of $2,000 to one J. M. Herbert; "that thereafter, and in the usual course of business, and for a valuable consideration, and without notice of any defense thereto, this plaintiff purchased said note, and is now the lawful owner and holder thereof, and that at said time the said J. M. Herbert and the Herbert Stock Farm Company indorsed and delivered said note to this plaintiff, who has ever since been the owner thereof." Default in the payment of the note was alleged, and judgment prayed for the amount thereof. The answer admits the execution and delivery of the note to Herbert, pleads that it was given for the purchase of certain mares, as to which false and fraudulent representations were made by the vendor, and alleges an entire failure of consideration. A reply was filed on November 29, 1916, which contained a general denial of the new matter in the answer, and an allegation that plaintiff acquired the note before maturity for a valuable consideration, without notice of any infirmity or defense thereto. The case came on for trial on December 11, 1916. The court instructed the jury in accordance with the pleadings, and a verdict was rendered for plaintiff.

One of the grounds set forth in the motion for a new trial is that the defendant was surprised by the filing of a reply setting forth the purchase of the note before maturity, which reply was filed out of time, without leave of court, and after the case had been set down for trial, and as to which he had no notice until after the close of the evidence, so that he was unable to make any preparation to refute the new allegations. On the same day a motion to strike that portion of the reply was also filed. Both of these motions were overruled and judgment rendered upon the verdict.

The evidence supports the allegations that the note was purchased before maturity and without notice of any defense. The only material question in the case is whether it was prejudicial error to refuse to grant a

new trial because the reply was filed out of time, and, as alleged, without the knowledge of defendant and his counsel. It appears that the deposition of C. B. Spalding, cashier of the plaintiff bank, was taken on the 28th of October, 1916, before the reply was filed. His testimony was directed to the facts concerning the purchase of the note, which he testified was sold and indorsed to the bank before maturity, without notice of any defense. Mr. Pratt, one of the counsel for defendant, appeared at that time, and cross-examined fully and particularly as to the time of the purchase and the consideration given. It appears from these facts that before the reply was filed defendant was fully informed as to the testimony which would be produced at the trial with reference to the purchase of the note.

Moreover, the allegations of the petition as to the purchase of the note hereinbefore set forth, when considered in connection with section 5363, Rev. St. 1913, "Except where an indorsement bears date after maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue," and section 5370, Rev. St. 1913, defining a holder in due course, constitute a plea that the note was sold and indorsed before maturity, so that, even if no reply had been filed, the pleadings raised this issue.

We find no erroneous statement of law in the instructions. The cases cited by the appellant are so different in their facts that they afford no light upon the question before us. No prejudicial error occurred, and the judgment of the district court is

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

ADDIE O. JAMES, APPELLEE, v. DAVID D. JAMES, APPELLANT.

FILED MARCH 27, 1919. No. 20354.

1. **Divorce:** CONDONATION: AVOIDANCE. The conduct of a husband towards his wife, which would not alone support a decree of divorce on the ground of extreme cruelty, may nevertheless be sufficient to avoid a condonation extended to the husband by the wife for such cruelty.
2. ———: ALIMONY: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* to sustain the decree of divorce and the amount allowed for alimony.

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

E. J. Clements and *A. S. Moon,* for appellant.

J. A. Douglas and *J. A. Donohoe, contra.*

LETTON, J.

This is an action for divorce brought by a wife on the ground of extreme cruelty. A decree of divorce was awarded her, with permanent alimony in the sum of $7,500. Defendant appeals from the decree of divorce and from the judgment for alimony.

At the time of the marriage, defendant was a widower about 44 years of age, a farmer and ranchman living in Rock county. He had two children, twins, about 5 years old at that time. Plaintiff was a widow about 37 years of age. She had been married twice before. She had three children by her first husband, two daughters of the ages of 16 and 8 years, respectively, and one son of about 14 years. About 18 months after the death of her first husband, plaintiff married again, but a few years afterwards obtained a divorce on the ground of desertion. At the time she was married to defendant, she had little or no property, except a Kinkaid homestead and some household furniture.

At the time of the marriage, defendant had a ranch of about 1,800 acres, and a large amount of personal

property. At the trial it was stipulated that defendant's net worth at that time was $47,500; his property consisting of 2,400 acres of unincumbered real estate in Brown and Rock counties, and a small amount of live stock and implements.

After the marriage plaintiff with her children lived upon the ranch. Trouble soon occurred between the parties. Both seem to be of strong will and determination, somewhat high tempered, and neither was very choice in the use of language toward the other. Each accuses the other of using foul language and physical violence in some of their altercations, but the evidence seems to show that the husband provoked the trouble in most instances. On one occasion the plaintiff with her children left the home on account of his cruel treatment, but afterwards, upon his earnest solicitation, and upon his payment to her of $3,000, she consented to return on his agreement to treat her more kindly in the future.

After her return matters seemed to be pleasant enough until early the next year, when he would occasionally become sullen and refuse to speak to plaintiff, sometimes for a week or longer. He would become angry, and would not speak to the children, would ignore them, and after one of these disagreements, plaintiff went to Long Pine and remained there a few weeks, living in a house she had purchased with a part of the money she had received from him. When she went back to the ranch trouble again ensued, he swore at her, used opprobrious epithets, and finally matters became so unpleasant that plaintiff was compelled to leave with her children.

Defendant insists that there is not sufficient testimony to justify the granting of a decree of divorce, mainly for the reason that, even though he might have been guilty of cruelty before his wife left the first time, this was condoned by her returning to his home and resuming marital relations, and there is not sufficient evidence of cruelty thereafter to sustain a decree.

It is a well-known principle that after a condonation a recurrence of the same offenses will revive the acts condoned so far as their legal effect is concerned. *Heist v. Heist,* 48 Neb. 794. Considering the testimony as to conduct after the condonation, while it does not show physical violence to the extent shown before the reconciliation, we are convinced that there is enough evidence of cruelty to justify the court in considering defendant's conduct during the whole time of the marriage relation, and to justify a decree of divorce.

It is unnecessary to restate the principles governing the allowance of alimony, but, unless there has been an abuse of discretion on the part of the district court, this court will not ordinarily interfere with the amount awarded. *Wilde v. Wilde,* 37 Neb. 891; note 2 to *Van Gorder v. Van Gorder,* 44 L. R. A. n. s. 998 (54 Colo. 57). Considering all the facts and circumstances in evidence, proper to be considered in determining the amount of alimony, a majority of the court are of the opinion that the amount allowed is not excessive.

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

STATE OF NEBRASKA ET AL., APPELLANTS, V. FIRST NATIONAL BANK ET AL., APPELLEES.

FILED MARCH 27, 1919. No. 20893.

1. **Banks and Banking**: SHARES OF STOCK. Shares of stock in a banking corporation are a distinct entity from the capital stock, or property and assets of the corporation.
2. **Taxation**: BANKS: SHARES OF STOCK. The tax contemplated by section 6343, Rev. St. 1913, as amended, Laws 1915, ch. 108, relating to the taxation of banking corporations, is a tax upon shares of stock in the hands of stockholders, and is not a tax upon the property of the corporation.
3. ———: ———: ———. The words "capital stock," as used in section 6343, *supra*, does not mean capital stock in the aggregate,

but shares of capital stock in the hands of stockholders which are subject to taxation.

4. ———: NATIONAL BANKS. The laws of the United States permit the taxation of shares of national banks in the hands of the shareholders. Taxation of the capital stock of the bank, or other property of the corporation, to the bank itself, is not permitted except in the case of real estate.

5. ———: ———: SHARES OF STOCK: DEDUCTIONS. If a tax is laid upon the property of a banking corporation, in assessing the value of capital stock, a deduction may be made of the value of tax free securities owned by the corporation, but, when the tax is laid upon shares of stock in the hands of the stockholders, no such deduction is required to be made by the laws of this state, or by the laws of the United States.

6. ———: ———: ———: GOVERNMENT OBLIGATIONS. Under the decisions of the supreme court of the United States, that which determines whether a taxing law interferes with the right of the United States to borrow money, is the subject of taxation. A tax on the property of a banking corporation, if the property consists of obligations of the United States, is not permitted, but a tax upon the value of its shares in the hands of the stockholders is not a tax upon the bank, and may be laid. The fact that the value of the United States obligations are considered in ascertaining the value of the shares does not render the tax unlawful.

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

J. L. Cleary and *Charles L. Whitney,* for appellants.

Hainer, Craft & Edgerton and *T. S. Allen, contra.*

L. M. Pemberton, amicus curiæ.

LETTON, J.

In its statement to the assessor of Hamilton county made for the year 1918, the First National Bank of Aurora showed that its capital stock was $50,000, surplus $50,000, and undivided profits of $2,887.51, making a total book value of its shares of $102,887.51. The bank claimed that it was entitled to deduct from this aggregate amount certificates of indebtedness, war stamps and liberty bonds of the United States held by it to the amount of $75,473.77, and real estate belonging to the bank of the value of $6,000.

It alleged that the obligations of the United States were acquired before April 1, 1918, and were exempt from taxation either by state, county or municipal authorities. A list of the stockholders, with the number of shares held by each, the value of each share, and the residence of each shareholder was also included, as required by the statute.

The assessor refused to allow any deduction from the statement on account of the tax exempt obligations of the United States mentioned. On appeal being taken, the county board of equalization also refused to do so. An appeal was taken from this decision to the district court for Hamilton county. The facts were set forth in the petition. The state of Nebraska was allowed to intervene, claiming that the securities involved were subject to taxation for state purposes. A demurrer was filed to the petition on behalf of the state and the county. The United States appearing also intervened by Honorable Thomas S. Allen, district attorney for the district of Nebraska, claiming that the federal securities mentioned are not either directly or indirectly subject to state or local taxation. The district court overruled the several demurrers. The demurrants electing to stand on the demurrer, the court found upon the allegations of the petition that the federal securities involved are wholly exempt from taxation by either state, county or municipal authorities, and ordered that the amount of the same be deducted from the gross amount of the statement made by the bank. From this judgment the state and the county of Hamilton have appealed.

The issues involved in the case are narrow. The first essential inquiry is: What is the *res,* or thing, which is the subject of taxation under the provisions of the statute. If it is the property of the bank which is taxed, it is admitted by the state and county under the decisions in *M'Culloch v. State of Maryland,* 4 Wheat. (U. S.) *316, and *Weston v. City Council of Charleston,* 2 Pet. (U. S.) *449, that the value of the securities

must be deducted from the total assets, because otherwise there would be a direct tax imposed upon obligations which the congress of the United States has declared to be exempt from such impositions.

Prior to the enactment of the present revenue law in 1903, the stockholders of every bank within the state, whether state or national, were assessed and taxed on the value of their shares of stock in the county, town, precinct, village or city where the bank was located, whether the stockholders resided in such places or not. It was required that the bank keep on file a correct list of the names and residences of stockholders, and the number of shares held by each, and it was the duty of the assessor to report to the county clerk a correct list of the names and residences of such stockholders with the number and assessed value of the shares. The county clerk was required to enter the valuation of the shares in the tax lists in the name of the owner, and to extend the tax in the same manner as against other property. It was the duty of the bank and its officers to retain so much of any dividend or dividends belonging to the stockholders as necessary to pay taxes levied on the shares of stock, and, if the tax was not paid, the collector of taxes had the right to sell the shares to pay the same "like other personal property." Comp. St. 1899, ch. 77, art. I, secs. 33-37.

In 1903 the legislature revised the law in regard to assessment and collection of taxes, condensed it, and changed it in several minor respects. As relating to the taxation of banks, the essential element that the assessment should be on the shares of stock was left untouched. Section 6343, Rev. St. 1913, as amended in 1915 (Laws 1915, ch. 108), is the law which specifies the manner in which the shares of stock in such institutions shall be taxed. This section is as follows: "The president, cashier or other accounting officer, of every bank or banking association, loan and trust or investment company, shall, on the first day of April of each year,

make out a statement under oath, showing the number of shares comprising the actual capital stock of such association, bank or company, the name and residence of each stockholder, the number of shares owned by each and the value of the shares on the first day of April, and shall deliver such statement to the proper county assessor. Such capital stock shall thereupon be listed as assessed by him, and return made in all respects the same as similar property belonging to other corporations and individuals. Whenever any such bank, association or company shall have acquired real estate which is assessed separately the assessed value of such real estate, shall be deducted from the valuation of the capital stock of the association or company. Provided mortgages, trust deeds and all other liens or interests in real estate less than a fee title and held as security for loans, shall not be considered or assessed as part of the capital stock for purposes of taxation, and shall not be deducted from the capital, surplus or undivided profits. The county assessor shall determine and settle the true value of each share of stock after an examination of such statement, and in case of a national bank, an examination of the last report called for by the comptroller of the currency; if a state bank, the last report called for by the state banking board; and if the county assessor deem it necessary, he may make an examination of the officers of such bank, association or company, under oath, in determining and fixing the true value of such stock, and shall take into consideration the market value of such stock, if any, and the surplus and undivided profits. Such association, bank or company shall pay the taxes assessed upon its stock and shall have a lien thereon for the same."

This section first came up for consideration in the case of the *State v. Fleming*, 70 Neb. 523, 536. In this case an attack was made upon the constitutionality of the entire act, and objections were also made to the validity of certain specific provisions. It is said in

the opinion: "There are numerous banks in this state of the class known as national banks. These banks are authorized and chartered by the national government. By the law of their creation, their capital stock cannot be taxed, but the individual shareholders may be taxed upon the value of the shares held." The section is then set forth in the opinion, and the court continues: "The last clause of the section is as follows: 'Such association, bank or company shall pay the taxes assessed upon its stock and shall have a lien thereon for the same.' This clearly contemplates an assessment, not upon the capital stock of the bank itself, but upon the value of the shares held by the stockholders and against the stockholders. This is the only method in which a revenue may be derived from national banks. It is the only procedure authorized by the laws of the national government. It surely cannot be made an objection to this act that other banks and banking associations are taxed in the same manner and method provided for the taxation of national banks. Neither is it an objection that the bank is required to pay the tax due from its shareholders." The court then quoted from *National Bank v. Commonwealth of Kentucky*, 9 Wall. (U. S.) 353, and said: "This, we think, is a full answer to the objection made."

The court was evidently of the opinion that the slight changes in the former act did not affect the design of the statute to lay the tax upon the shares of stock of the individual stockholders, and not upon the property of the bank.

In *First Nat. Bank v. Webster County*, 77 Neb. 815, it is said: "Shares of stock in a national bank are assessed to the individual stockholder at the place where the bank is located, but the bank is liable in the first instance for the payment of the tax, and is given a lien on the stock to secure repayment from the shareholder. The bank is made the agent of the shareholder, not only for the payment of the tax, but for the purpose of listing the stock for taxation."

State v. Fleming, supra, was followed in *Nemaha County Bank v. County Board of Equalization, ante,* p. 53. In the opinion in this case it is said: "Shares of stock and capital stock represent different property rights and may be separately assessed. Shares of stock represent a liability of the bank. The words 'capital stock,' in the statute, mean shares of stock which are the unit of taxation. * * * The two interests represent separate property rights, and therefore each is taxable. * * * The corporation's right to resist taxation upon its mortgage securities, contrary to the mortgage tax statute, if it were attempted, is one thing, the right of an individual shareholder to resist taxation on his shares of stock, according to true value, is an altogether different thing. In legal contemplation, it is the shareholder and not the bank which is being taxed."

A consideration of the whole of section 6343, as amended, shows that in the second sentence of the section, the words "such capital stock" refer to the shares of capital stock belonging to the shareholder, and not to the entire capital stock of the bank, or banking association. A full discussion of the terms "capital stock" and "shares of stock" in a similar statute with reference to taxation may be found in *First Nat. Bank v. Moon,* 102 Kan. 334, L. R. A. 1918C, 986, where a like conclusion is reached. *Head v. Board of Review,* 170 Ia., 300.

We see no reason to depart from the construction that the tax provided for is levied upon the shares of stock in the hands of the individual stockholders, and is not levied upon the property of the bank.

Having reached this conclusion, the question remains: Was the bank, on behalf of its stockholders, authorized to deduct the value of the tax exempt securities of the United States from the statement made to the assessor. The question must be considered in the light of the adjudications of the supreme court of the United States.

In *Van Allen v. The Assessors,* 3 Wall. (U. S.) 573, the question was whether a state had the right to tax shareholders in national banks where the capital of the bank was invested in tax free securities of the United States. It was held that a tax of the state of New York upon such shares would have been legal but for a defect in the New York statute, which failed to provide, in accordance with the act of congress, that the tax should "not exceed the rate imposed upon the shares of any of the banks organized under the authority of the state." The defect in the New York law was afterwards remedied by that state, both state and national banks being given the same status as to the taxation of the shares. It is said: "This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of *The Queen v. Arnaud,* 9 Ad. & E. n. s. *806. The question related to the registry of a ship owned by a corporation. Lord Denman observed: 'It appears to me that the British Corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in no legal sense are the individual members the owners.'

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of congress has left subject to taxation by the states, under the limitations prescribed as will be seen on referring to it."

In this case three of the justices dissented but the dissenting judges clearly did not take the view that shares of stock, as distinguishable from the property of the corporation, were not a proper subject of taxation.

This was followed in *Cleveland Trust Co. v. Lander,* 184 U. S. 111, in which case it was held, without dissent, that a tax on the shares of stock in an Ohio trust company, under the laws of Ohio, is not a tax on the property of the corporation, therefore no deduction was allowed for the amount of the capital stock invested in tax free bonds of the United States. See, also, *Bank of Commerce v. Tennessee,* 161 U. S. 134; *Delaware, L. & W. R. Co. v. Commonwealth of Pennsylvania,* 198 U. S. 341-354; *Citizens Nat. Bank v. Commonwealth of Kentucky,* 217 U. S. 443; *Mechanics Nat. Bank v. Baker,* 65 N. J. Law, 113.

In *People v. The Commissioners,* 4 Wall. (U. S.) 244, it appears that the capital of the National Bank of Commerce of New York consisted of 100,000 shares of $100 each, all of which was invested in United States securities exempt from state taxation. In the interim between the decision in *Van Allen v. The Assessors* and the levying of the assessment in this case, the statute had been changed so that a like tax was imposed on the shares in both state and national banks. The commissioners of taxes valued the shares at par and made no deduction on account of the investment of the capital of the bank in tax exempt securities. The action of the commissioners in refusing the deduction was affirmed in the courts of New York. On writ of error the supreme court of the United States affirmed the judgment on the authority of the *Van Allen* case. See, also, note to *Re First Nat. Bank* (25 N. Dak. 635), in L. R. A. 1915C, 386.

Much stress has been placed by the appellee upon the decision in *Home Savings Bank v. City of Des Moines,* 205 U. S. 503, and in *Iowa Loan & Trust Co. v. Fairweather,* 252 Fed. 605. It is insisted that under these

decisions the judgment must be affirmed. It appears, however, that the statute of Iowa, at the time *Home Savings Bank v. City of Des Moines* was decided, made a clear distinction between the taxation of shares of stock in national and state banks. A portion of the Iowa Code, sec. 1322, as it then stood, is as follows: "Shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located. Shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies, and not to the individual stockholders."

In the *Home Savings Bank* case it is said: "The only claim of violation of federal right which need be considered here is that bonds of the United States have been taxed. It is conceded, and cannot be disputed, that these securities are beyond the taxing power of the state, and the only question, therefore, is whether, in point of fact, the state has taxed them. The first step useful in the solution of this question is to ascertain with precision the nature of the tax in controversy, and upon what property it was levied, and that step must be taken by an examination of the taxing law as interpreted by the supreme court of the state. A superficial reading of the law would lead to the conclusion that the tax authorized by it is a tax upon the shares of stock. The assessment is expressed to be upon 'shares of stock of state and savings banks and loan and trust companies.'"

The court then points out that the shares are to be "assessed to such banks, * * * and *not to the individual stockholders.*" And it is said: "When this is read, the doubt instantly arises whether the law intended to tax the corporation for property which it does not own, but which on the contrary is owned by the stockholders." It is pointed out that by other sections national bank shares are assessed to the stockholders, the corporations are made liable to pay

the tax, and are secured by a lien on the stock and dividends which may be enforced by sale, while state banking corporations have no right of reimbursement, since there are no taxes assessed to the stockholders of such corporations, and it is said that the taxes are not paid by the banks as agents of the stockholders, but as their own debt.

The court also said: "The *Van Allen* case has settled the law that a tax upon the owners of shares of stock in corporations, in respect of that stock, is not a tax upon the United States securities which the corporations own. Accordingly, such taxes have been sustained by this court, whether levied upon the shares of national banks by virtue of the congressional permission or upon shares of state corporations by virtue of the power inherent in the state to tax the shares of such corporations." The court then cites a number of its decisions to that effect, and proceeds: "The theory sustaining these cases is, that the tax was not upon the corporations' holdings of bonds, but on the shareholders' holdings of stock, and an examination of them shows that in every case the tax was assessed upon the property of the shareholders, and not upon the property of the corporation."

Holding that the tax was directly upon the property of the bank, it logically followed that the value of the bonds of the United States owned by the banks should have been deducted in order to ascertain the value of the taxable property of the bank. Three of the judges dissented.

After the decision a change was made in the statute of Iowa, whereby the statute was made to read that shares of stock "shall be assessed to the individual stockholders." Judge Wade based his opinion in the *Fairweather* case on the proposition that this was an attempt to do that indirectly which could not be done directly, and held that in substance the tax was upon the property of the bank, and not upon the shares of stock, and therefore that the deduction of the value of

the bonds of the United States should have been made. This seems to be in line with the views of the dissenting judges in the *Van Allen* case. The case at bar is easily distinguishable from the *Fairweather* case. Long before any question of the deduction of the value of tax exempt securities had arisen, this court had declared that the tax was upon the shares of stock, and not upon the property of the bank, and we are adhering to these decisions.

In commenting on the dissenting opinion of Chief Justice Chase in the *Van Allen* case, and while somewhat questioning the practical effect of the decision in that case, Mr. Justice Moody says in the *Home Savings Bank* case: "But the distinction between a tax upon shareholders and one on the corporate property, although established over dissent, has come to be inextricably mingled with all taxing systems, and cannot be disregarded without bringing them into confusion which would be little short of chaos." We think this is true, and that to hold otherwise could serve no good purpose.

The recent case of the *Bank of California v. Richardson,* 248 U. S. 476, 39 Sup. Ct. Rep. 165, is cited by appellee as sustaining its views, and as indicating a modification of the earlier views of the supreme court of the United States. It seems to us that in the majority opinion the reasons for the conclusion reached are not as clearly stated as in former cases in that court involving similar questions, but the court does not indicate any intention to modify or change its reasoning or its conclusions in the cases hereinbefore cited, or in those cited and quoted from in the case of *Owensboro Nat. Bank v. Owensboro,* 173 U. S. 664, 677, 682, where a review is made of prior decisions. Since the former cases are neither criticized nor disapproved, and since the court cited with approval *Bank of Redemption v. Boston,* 125 U. S. 60, 8 Sup. Ct. Rep. 772, we conclude that it intends to adhere to its former decisions.

To sum up, we are of the opinion that the tax is laid upon the shares of stock, the property of the stockholders, which are a distinct entity from the property of the bank, and that, under the rulings of the supreme court of the United States, the taxing authorities were not required to deduct the value of United States securities belonging to the bank from the statement required to be made to the assessor when ascertaining the value of the shares of stock for the purpose of taxing the owners of such shares. The judgment of the district court is therefore.

REVERSED.

CORNISH, J., not sitting.

SEDGWICK, J., dissenting.

I am not sure that I understand the various decisions of the federal courts bearing upon the question herein involved. Some of these decisions would seem to require the conclusion reached by the majority. That shares of stock of National banks may, under some circumstances, be assessed as such to the shareholders at their full value, although that value includes government bonds, is clearly held in various of those decisions. The reason is that the franchise, the right to do a public banking business, is valuable, and, when privileges of this character are accepted from the state, and the value of such privileges is so mingled with other values that it cannot be determined with certainty whether the state has taxed the values of the exempt government securities, the shareholders cannot complain that the tax is upon exempt property. Our statute requires the assessor to "determine and settle the true value of each share of stock," and to "take into consideration the market value of such stock, if any, and the surplus and undivided profits." Rev. St. 1913, sec. 6343, as amended by Laws 1915, ch. 108. This would seem to bring this case within the federal decisions above referred to, and may be finally so held. But the purpose of the federal statute allowing taxation

of shares of National banks is briefly stated in *Bank of California v. Richardson*, 248 U. S. 476: "Preservation of the taxing power of the several states so as to prevent any impairment thereof from arising from the existence of the national agencies created, to the end that the financial resources engaged in their development might not be withdrawn from the reach of state taxation, but on the contrary that every resource possessed by the banks as national agencies might in substance and effect remain liable to state taxation." Other decisions of that court are to the effect that when it is clear that all values owned by the bank are taxed, including the value of the privileges given by the state, and the value of the government securities are clearly added as a distinct unit of assessment, such assessment of the exempt securities is not necessary for the "preservation of the taxing power of the several states."

In the case at bar there can be no doubt that the exact value of the exempt securities is added to the otherwise complete valuation of all property and privileges assessed. The result is as clearly a taxation of the government securities as though they were specifically named for taxation. I do not believe that the federal court will uphold this method of obtaining revenue at the expense of the general government.

JAMES P. CARR ET AL., APPELLANTS, V. CITY OF LEXINGTON ET AL., APPELLEES.

FILED MARCH 27, 1919. NO. 20899.

Municipal Corporations: PAVING: PETITION TO ENJOIN: SUFFICIENCY. The material allegations of the petition in this case examined, and *held* not to state facts sufficient to constitute a cause of action.

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

T. M. Hewitt and *H. D. Rhea,* for appellants.

D. H. Moulds, Cook & Cook, and *J. H. Linderman, contra.*

LETTON, J.

Action to enjoin the city of Lexington and its municipal officers from entering into a paving contract, and from levying or collecting taxes for the payment of such improvements. A general demurrer to the petition was sustained by the trial court and the action dismissed. Plaintiff appeals.

The brief of appellant was not prepared in accordance with rule 12 (94 Neb. XI) of this court, and it has been difficult to ascertain the points on which appellant relies. The petition alleges the invalidity of the ordinance establishing the paving district, and a number of other facts which are alleged to constitute fatal defects in the proceedings are set forth. Attached to the petition as an exhibit is a copy of the record of the proceedings of the board with reference to the proposed paving.

It is alleged that no ordinance has been passed authorizing such paving to be made, or such a contract to be entered into. An ordinance for that purpose appears in the record, and appellant has not pointed out any particular defect in it or in its passage, except that he contends that it was not read three times, and that the description of the paving district therein is too indefinite. The record recites that the ordinance was introduced and read, that afterwards a motion to suspend the rules as to reading on three separate days was adopted, and it was then read a second and third time and passed. This is sufficient.

It is also claimed that the ordinance is not sufficiently definite in its description of the paving district, or of the property included therein.

Section 1 provided that the paving district "shall include all that portion of Washington street from the north line of Eighth street to the north line of Pacific

avenue," describing other streets in like manner, "paving of said streets in said districts to be from curb line to line as now established." Section 2 provides that "said paving district No. 1 shall include all lots and blocks within the above-named descriptions of streets, and shall also include all lots or parts of lots 150 feet east from the lot line on that part of Grant street required to be paved," describing the lots upon the other streets within the district in similar fashion. This is sufficiently definite, since it points out the streets upon which the lots benefited face, and the depth to which they extend from the lot line.

It was objected that no petition was filed for this paving. The ordinance was passed under the provisions of chapter 102, Laws 1917, which provides, in substance, that unless three-fourths of the resident owners of the property subject to assessment petition the council to make the same, such improvement shall not be made until three-fourths of all the members of the council shall by vote assent to the making of the same. The ordinance was passed by the affirmative vote of all of the six councilmen, which authorizes the making of the improvement without the filing of a petition.

The brief asserts that no estimate was made by the city engineer, but the record recites that the city engineer filed an estimate, and also shows that the plans, specifications and estimates of the city engineer for paving that part of Washington street within paving district No. 1 were approved, and the city clerk was ordered to advertise for bids.

The petition alleges that no ordinance was passed specifying the material to be used. No section of the statute has been pointed out to us which prevents the city authorities from specifying the kind of material to be used by resolution, as was done in this case. The plans, specifications and estimates specified the kind of material to be used, and the published notice was also specific in this regard.

It is contended that the act (Laws 1917, ch. 102) amending section 5110, Rev. St. 1913, is unconstitutional because it contains more than one subject. The amendment was germane to the subject of the section and act amended, and is not vulnerable to the attack. The section of the statute attacked was passed upon in the recent case of *Fitzgerald v. Sattler,* 102 Neb. 665, and held to be valid. A number of other contentions are made which are so obviously unsound that it is unnecessary to specify them.

We agree with the district court that there is no cause of action stated in the petition. Its judgment is therefore

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

HOWARD COUNTY ET AL., APPELLEES, V. GEORGE C. PESHA, DEFENDANT: AMERICAN BONDING COMPANY, APPELLANT.

JAMES SCHEE ET AL., APPELLANTS, V. HOWARD COUNTY ET AL., APPELLEES.

FILED MARCH 27, 1919. No. 19986.

1. **Contracts:** BUILDING CONTRACT: ESTIMATES BY ARCHITECT. Under a building contract designating the architect as the sole arbitrator concerning estimates for labor and materials furnished during the progress of the work, and making his decision final, the power thus granted cannot be used arbitrarily to defeat other provisions requiring him to make proper estimates justly due.
2. ———: ———: ———. Unchallenged estimates for labor and materials furnished during the progress of building operations are conclusive in the absence of fraud or mistake, when regularly made by an architect under a building contract designating him as sole arbitrator in such matters and making his decision final.
3. ———: ———: REFUSAL TO MAKE ESTIMATES: FRAUD: EVIDENCE. In an action by a building contractor to recover the amount justly due for labor and materials for which the architect ar-

bitrarily refused to make estimates, proof tending to show that the architect had said he did not deny but what an estimate was due, but that he would not make it, and proof tending to show that he arbitrarily refused to do so, may be admitted on the issue of fraud.

4. **Counties:** BUILDING CONTRACT: DUTY OF ARCHITECT. An architect employed by a county board to superintend the construction of a courthouse under a contract with a building contractor who is entitled to estimates as the work progresses is a fiduciary of the county, and if the architect knows any reason why an estimate demanded should not be made, he should state the facts to the county board without being asked.

5. **Contracts:** FORFEITURE: ACTION FOR MONEY DUE: DEFENSE. Where a county wrongfully forfeited a contract for the construction of a courthouse partially constructed by a contractor not in default, the county cannot justify its failure to pay the amount justly due under the contract as the work progressed by proving that what had been paid to the contractor and what it cost to finish the job exceeded the contract price.

6. ———: BUILDING CONTRACT: REFUSAL TO MAKE ESTIMATES. A building contractor is not bound by the arbitrary and unreasonable refusal of an architect to make an estimate justly due under the terms of the building contract, though in such matters he is designated as the sole arbiter with the power of final decision; such conduct being in law a fraud upon the building contractor.

7. ———: ———: ESTIMATES BY ARCHITECT. Under a building contract designating the architect as sole arbiter with the power of final decision in matters relating to estimates for labor and materials furnished, he must exercise his power with reasonable discretion, and not arbitrarily or unreasonably.

8. ———: RIGHT TO RESCIND. Generally the right to rescind or forfeit a contract exists only in favor of a party who is not himself in default.

9. ———: BUILDING CONTRACT: RESCISSION. Under a building contract requiring payments to the contractor as the work progresses, the failure of the owner, upon demand, to make a payment known by both parties to be due may justify the contractor, if not himself in default, in refusing to proceed further with the work of construction.

10. **Counties:** BUILDING CONTRACT: PAYMENT: PLEA OF ULTRA VIRES. Where a county enters into a valid contract for the construction of a courthouse, it cannot, by pleading want of power, escape the payment of just claims for labor and materials accepted and used under the terms of the building contract.

11. ———: LOAN TO CONTRACTOR: LIABILITY OF SURETY. A loan of money to a building contractor to pay for labor and materials is not secured by a bond given by him and his surety for the protection of persons furnishing labor and materials.

12. **Contracts:** CANCELATION: RECOVERY. Where the owner of a partially constructed building wrongfully cancels a building contract requiring him to pay 85 per cent. of the estimates for labor and materials as the work progresses and permitting him to retain 15 per cent. of such estimates, the contractor may recover both percentages.

13. **Assignment by Contractor:** ENFORCEMENT. An accepted assignment of the "first $10,000" awarded to the contractor under a building contract requiring payments on estimates as the work progresses, *held* enforceable as to an estimate for a less sum than that mentioned.

14. **Appeal:** DISMISSAL OF CROSS-PETITION. A judgment dismissing the cross-petition of a defendant who did not appeal therefrom will not be disturbed on an appeal by another defendant from a judgment conforming to the prayer of plaintiff's petition.

APPEAL from the district court for Howard county: JAMES R. HANNA, JUDGE. *Reversed in part, and affirmed in part.*

Fawcett & Mockett, C. G. Ryan, Claude S. Wilson and *S. S. Bishop,* for appellants.

T. J. Doyle and *Charles Dobry, contra.*

ROSE, J.

Four suits growing out of controversies relating to the construction of a courthouse at St. Paul, Nebraska, were consolidated below for trial. The appeals herein involve two of those cases, which, for the purposes of review, will be stated separately.

In one of the cases in which an appeal is taken, Howard county sued George C. Pesha, the original contractor, and his surety, the American Bonding Company, to recover damages in the sum of $25,000 for alleged breach of the building contract. Pesha agreed to construct a courthouse in keeping with plans and specifications prepared by Berlinghof & Davis, architects, and adopted by the county board. The price of

construction recited in the contract was $69,510, payments to be made from time to time to the extent of 85 per cent. of estimates of the architects during the progress of the building operations. Pesha obligated himself to commence work immediately and to complete the courthouse by January 1, 1914. To secure performance of the contract on the part of Pesha, the American Bonding Company became his surety November 14, 1912, in the penal sum of $25,000, on the following terms:

"If the said George C. Pesha shall well and truly keep and perform all the conditions of this contract and pay off and settle in full with the person or persons entitled thereto all accounts and claims that may become due by reason of laborers' or mechanics' wages, or for material furnished, or services rendered said George C. Pesha in executing or performing the obligations of said contract, so that each of such persons shall receive his just dues in that behalf, then this obligation shall be of no effect; otherwise it shall remain in full force and effect in law."

The county, in its petition, pleaded in detail that on and prior to June 18, 1913, Pesha failed to pay his laborers, who, for that reason, refused to work; that he thereafter neglected his duties and refused to perform his contract; that Pesha and his surety were notified of the former's default, were warned of a forfeiture in the event of further delay, and were directed November 20, 1913, to complete the courthouse; that nevertheless Pesha and his surety refused to proceed further with the work, and abandoned the contract when there was nothing due the contractor; that by reason of the default the county, acting under the contract, took the unfinished job out of the hands of Pesha and his surety, and directed the architects to complete the building for the county; that the county paid Pesha $32,527.69, and expended in addition for completing the courthouse $57,206.64, making a total cost of $89,734.33, or $20,224.33 in excess of Pesha's

contract price. Including stipulated damages of $25 a day for Pesha's delay, the county prayed for judgment against him and his surety in the sum of $25,000.

Pesha filed an answer and a cross-bill, denying that he had violated his contract in any respect, and pleading, in substance, among other things, that the delays of which the county complained were caused by the county board and the architects; that the architects illegally and fraudulently refused to make estimates or certificates of progress to which Pesha was entitled under the contract, and thus prevented him from receiving compensation justly due; that the county board knowingly refused to make payments due him; that he did not delay the work or abandon the contract, but that he was wrongfully prevented by the architects and the county board from completing the building; that the forfeiture of the contract was illegal and was declared without his consent; that the county board, over his protest, unlawfully and forcibly took possession of the partially constructed building, and wrongfully seized and used his materials and machinery. He prayed for the dismissal of the county's suit and for a judgment in his favor for damages in the sum of $30,445.56.

The substance of the principal defense pleaded by Pesha's surety, the American Bonding Company, is that Pesha did not violate the building contract in any respect justifying the forfeiture; that the architects arbitrarily and fraudulently refused to make estimates and to issue certificates of progress showing the sums justly due under the contract; that the county board with full knowledge of the facts acquiesced in the fraud of the architects, wrongfully refused to make payments known to be due, and thus violated the contract and released the contractor and his surety from further liability thereunder.

The trial court rendered a judgment in favor of Howard county and against Pesha and his surety for $20,156.49, and dismissed the cross-petition of Pesha.

From this judgment the surety, the American Bonding Company, alone has appealed.

In the other case in which an appeal is taken Schee & Callahan are plaintiffs, and Howard county, George C. Pesha, and his surety, the American Bonding Company, are defendants. The claims of Schee & Callahan arose in the following manner: June 24, 1913, Pesha, to procure money to continue his work on the partially constructed courthouse, assigned to Schee & Callahan his right to receive from Howard county future payments to the extent of $10,000, the county accepting the assignment. The building contract, the suretyship of the American Bonding Company, the assignment, the acceptance, the furnishing of $10,000 to Pesha, the use of $8,782.36 for labor and material in the work on the courthouse, and the failure of the county to pay any part of the claims of Schee & Callahan are pleaded in detail. Two causes of action are stated. The first is an unpaid claim of $5,509.30, with interest from November 13, 1913, established by an estimate of the architects, and the second is an unpaid claim of $3,273.06, with interest from November 13, 1913, and is like the first, except that the amount due was not determined by an estimate of the architects, who, as it is alleged, failed to perform their duty in that particular.

Howard county pleaded, in substance, as a defense that Pesha violated his building contract; that he abandoned the job when partially completed; that the contract was properly forfeited by the county after default of Pesha and notice to him and his surety; that the county completed the unfinished courthouse; that there was nothing due Pesha when he defaulted or afterwards; that Schee & Callahan acquired by the assignment no greater rights than those of Pesha, and that there was nothing due either from the county.

The trial court dismissed the suit as to Howard county and as to the American Bonding Company, and entered a judgment in favor of Schee & Callahan and

against Pesha for $11,902. From this judgment Schee & Callahan have appealed.

Questions common to both appeals may be stated as follows: Who first broke the contract? Did Pesha abandon it? Did the architects fraudulently refuse to make or to properly certify estimates for labor and materials as the work progressed? Did the county wrongfully refuse to make payments justly due under the terms of the contract? On the part of the county was there a breach of contract to justify the contractor in refusing to proceed further under it? These questions are raised by the pleadings in both cases. An examination of the evidence is necessary to a decision.

The building contract was executed October 26, 1912, and among other provisions therein are the following:

"Estimates will be made and progress certificates will be issued by the architect from time to time as the work progresses, for materials furnished, on the ground or incorporated into the building, and for labor performed thereon in accordance with the meaning of all the plans, and both the technical and general specifications; and the amount to be paid to the contractor shall be eighty-five per cent. (85%) of the amount of such estimate on the presentation of the progress certificate."

Pesha commenced his building operations under the contract and proceeded therewith until June 6, 1913, when he had used in the work of partial construction $38,267.35, and had received 85 per cent. thereof, or $32,527.69, on estimates and progress certificates. By June 24, 1913, he was financially embarrassed, and the laborers quit work temporarily because wages due them had not been paid. The architects declined to make any further estimate, and Pesha, to procure funds to comply with his contract, according to its terms, executed the following assignment:

"For a valuable consideration to me in hand paid, receipt of which is hereby acknowledged, I, the under-

signed, hereby sell, assign and transfer to James Schee and D. R. Callahan of College View, Neb., the first ten thousand dollars ($10,000) that is awarded and made payable to me by reason of the contract and construction and erection of the county courthouse in St. Paul, Howard county, Nebraska.

"And I, the undersigned, do hereby authorize and direct the board of county commissioners of Howard county, Neb., to pay the said James Schee and D. R. Callahan all sums of money that may now be due to me or that may become due and payable to me from time to time for the construction of said courthouse until the sums so paid shall aggregate the sum of $10,000 with 8% annual interest thereon from date hereof, and this instrument shall be your receipt for all moneys so paid by you as a board of county commissioners to the said James Schee and D. R. Callahan.

"This instrument is given to said James Schee and D. R. Callahan for the purpose of securing the payment of one certain promissory note of mine, to them, of even date herewith and for the sum of $10,000 bearing 8% annual interest from date hereof. The money represented by said note is this day advanced to me for the purpose of and will be used for the payment of labor and material that have been and will be used in the construction of said county courthouse at St. Paul, Neb., for Howard county.

"This instrument is to take effect from this date and to be and remain in full force and effect until its terms are fully complied with and shall stand as security for the payment of the note above referred to until the same is fully paid with all accrued interest and that it shall secure any renewals of said note as fully as the one of even date herewith."

This assignment was executed June 24, 1913, and was promptly filed in the office of the county clerk. The official acceptance thereof by the county board is in the following form:

"George C. Pesha appeared before the county board and presented to the county board the within assignment of future estimates in the sum of $10,000 upon the courthouse construction fund to J. Schee and D. R. Callahan of College View, Neb., for the purpose of obtaining from said parties an advancement to him of said sum to be used in paying for labor and material in the further construction of the courthouse and to facilitate said work. The board after due consideration hereby expresses its willingness to pay to the said James Schee and D. R. Callahan the said sum of money on estimates so assigned hereafter to be made by the architect from time to time with the understanding and upon the conditions that said money shall be used to pay for labor now performed and due and hereafter to be performed, and for material hereafter to be furnished, and put into said building, receipts to be filed with the board for such labor and material before any estimate is made and money paid out."

Under the assignment and the acceptance, Schee & Callahan were to furnish Pesha with funds to complete the courthouse. This was to be done in the following manner: On vouchers showing the performance of labor and the furnishing of materials, Schee & Callahan were to furnish Pesha with money from time to time to pay the claims therefor to the extent of $10,000. Funds paid to Schee & Callahan by the county on estimates of the architects were to be returned to Pesha to be again used by him in the manner indicated. Evidence that Schee & Callahan were financially able to carry out this plan and had agreed in good faith to do so is uncontradicted. The members of the county board were familiar with the understanding between Pesha and Schee & Callahan, and the architects had been advised in regard to it. After Schee & Callahan had furnished Pesha with several thousand dollars which actually went into the courthouse in the form of labor and materials, the architects refused to make any estimate whatever for the benefit of either Pesha or

Schee & Callahan. Under the circumstances was the conduct of the architects fraudulent in law? Some of their powers and duties were defined by the building contract as follows:

"The architect shall be sole arbitrator concerning disagreements, delays, suspension, abandonment, estimates, general interpretation of both the general and technical specifications."

"The estimate, certificate or final acceptance of work by the architect, and his decision in any way concerning the same shall be final and conclusive; and such estimate, or decision, or both, in case any question shall arise shall be a condition precedent to the right of the contractor to receive any money or compensation for anything done or furnished under this agreement."

The county relies on these provisions, but the powers granted by them cannot be used arbitrarily by architects to defeat the provisions requiring them to make proper estimates as the work progresses. The evidence must be considered in the light of the contract as a whole. Before the claims of Schee & Callahan arose, the architects had made in favor of Pesha, and the county had paid to him, estimates numbered consecutively from 1 to 6 as follows:

	Estimate.	Less 15%.	Payment.
January 29, 1913,	$6,000.00	$ 900.00	$5,100.00
February 25, 1913,	5,882.35	882.35	5,000.00
April 7, 1913,	8,000.00	1,200.00	6,800.00
May 10, 1913,	9,000.00	1,350.00	7,650.00
June 5, 1913,	8,000.00	1,200.00	6,800.00
June 6, 1913,	1,385.00	207.82	1,177.18
	$38,267.35	$5,740.17	$32,527.18

The foregoing estimates were regularly made by the architects, who issued progress certificates thereon, and the county paid 85 per cent. thereof as shown by the tabulation. These estimates are not challenged, and are therefore, under the terms of the building con-

tract, conclusive for the purpose of making payments during the progress of the work. 9 C. J. 703, sec. 23. It is thus established that by June 6, 1913, Pesha, under the contract to construct the courthouse for $69,510, had put into the work in the form of labor and materials $38,267.35, and had received therefor $32,527.18, only. What had thus far been done by Pesha was accepted by the county and is now a part of the completed structure. The building contract was then in force. The work of Pesha proceeded without substantial interruption from June 25, 1913, until October 13, 1913. In the meantime Schee & Callahan, concededly, had put into the building under the assignment and the county's acceptance, without any estimate or payment in return, more than $5,000. No estimate therefor having been made, the county board, October 13, 1913, directed the county attorney to examine the receipts filed in the office of the county clerk by Pesha under the Schee & Callahan assignment, to see that such receipts were for materials bought and put into the building after June 25, 1913, and for unpaid labor before and after that date. The county attorney made a detailed report November 4, 1913, showing the expenditures in labor and materials for the period mentioned to have been $5,509.30. The next day the county board made the following order:

"The report of Charles Dobry was taken up for consideration. The board investigated said report. Finds that the items reported as correct are for labor performed on courthouse and for material furnished and used in the courthouse since June 25, 1913, and the architect is requested to make an estimate on $5,509.30, the amount so found expended according to the resolution of date June 25, 1913."

The architects, in a communication embodying the foregoing order of the county board, executed the following document November 5, 1913:

"We hereby make an estimate of five thousand, five hundred nine and 30/100 dollars ($5,509.30), less 15% which equals four thousand six hundred eighty-two and 90/100 dollars ($4,682.90) in favor of the contractor George C. Pesha. We make this pursuant to your order and disclaim personal responsibility.

"Berlinghof & Davis, Architects and Supts."

By the use of the expression, "We make this pursuant to your order and disclaim personal responsibility," the architects defeated the purpose of the estimate to which both Pesha and Schee & Callahan were entitled. After repeated requests for the elimination of such statement, the architects refused to take it out of the estimate, and with it in, the county board refused to make any payment to either Pesha or Schee & Callahan. No other estimate or payment was ever made under the assignment, though Schee & Callahan put into the courthouse through Pesha, according to the literal terms of the county's acceptance, $8,154.76. While these funds were going into the courthouse without any compensation to those who provided them, there was no attempt to stop work on account of delays or to cancel the building contract for any reason. It was after the architects and the county board had prevented further estimates and payments for labor and materials and had thus destroyed Pesha's means of procuring funds to carry on his work that the forfeiture of the building contract was declared by the county. In addition, there is evidence that the architect Berlinghof had said he would not deny but what there was an estimate due, but that he would not issue the certificate; that he refused to give the reasons why; that he would not make another estimate unless coerced by the court into doing so; that in reply to the assertion, "There was $12,000 or $15,000 due Pesha," he had said, "There was no more than $12,000 due him;" that he would not issue a certificate; that he had stated the courthouse could be finished for $42,000. Though there were efforts to contradict

some of the proofs of this nature, the preponderance of the evidence is against the architects. Such proof is admissible on the issue of fraud. On this subject the supreme court of New Jersey said:

"It is evident that the question of fact in each case where a certificate has been withheld is whether such withholding by the architect was a fraud upon the builder. How fraud in this respect may be proved must depend upon the circumstances of individual cases. One of the ways in which it is conceived that the fraudulent conduct of the arbiter might be made to appear is by proving that he stated that the builder was in his opinion entitled to his certificate, followed by proof of an arbitrary refusal to furnish the certificate itself." *Bradner v. Roffsell,* 57 N. J. Law, 32.

The circumstances under which the architects refused to make a proper certificate November 5, 1913, have already been narrated. Pesha, financially embarrassed, had put into the building contract at least $38,267.35 and had received from the county $32,527.18 only. He had made an assignment under which Schee & Callahan had agreed to finance him to the end. Under that assignment $5,509.30, concededly, had also gone into the building in the form of labor and materials without any compensation to the contractor or to those who had furnished the money. The county had received the benefits. The county attorney and the county board had examined and approved the vouchers. The county board, Pesha and Schee & Callahan had demanded an estimate. It was justly due. When the architects, under such circumstances, wrote on their estimate, "We make this pursuant to your order and disclaim personal responsibility," without giving any reason therefor, they furnished in writing *prima facie* evidence of their fraud. *Chism v. Schipper,* 51 N. J. Law, 1. In law and equity their duty to make a proper estimate justly due was as imperative as their fidelity to their principal. They were the fiduciaries of the

county. If there was any reason why an estimate should have been withheld, their agency required them to disclose it without being asked. The evidence adduced at the trial after the courthouse was completed does not show a good reason for the withholding of the estimate. Berlinghof was asked on the witness stand, "Why didn't you give Pesha another estimate?" The answer was: "Under various conditions at that time: First, we had gone the limit; and, second, on account of his financial condition, the amount of money in sight to be expended, the work to be performed, it was useless to proceed any more. Couldn't be done." Facts which justify the withholding of the estimate are not stated in the answer quoted and are not to be found elsewhere in the record. It has already been shown that Schee & Callahan were able to finance Pesha and had agreed in good faith to do so. Proof that the courthouse, when completed by the county, cost about $20,000 more than the contract price does not justify the failure to make the estimate required by the contract. That is not the stipulated method of ascertaining the amounts due from time to time during the progress of the work, while the contract is in force. If the contract price was too low, the county was protected by a bond in the penal sum of $25,000 and by the right to retain 15 per cent. of estimates for labor and materials as furnished. There was no justification whatever for the failure of the architects to make and certify unconditionally in due form the estimate justly due, and their conduct in that respect was unreasonable and arbitrary and amounted in law to a fraud upon Pesha and upon Schee & Callahan. The law applicable to the facts in these cases has been stated in various forms by courts, text-writers and annotators as follows:

"The contractor will not be bound by the decision of an architect, * * * in case of fraud or mistake so great as to imply bad faith on his part." *Edwards v.*

Hartshorn, 1 L. R. A. n. s. 1050, and note (72 Kan. 19).

"The arbitrary or unreasonable refusal to issue a certificate of performance will, however, constitute such fraud as to render the production of such certificate unnecessary, though made a prerequisite to recovery by the contract." *Edwards v. Hartshorn,* 1 L. R. A. n. s. 1050, and note (72 Kan. 19); *Crane Elevator Co. v. Clark,* 26 C. C. A. 100; *Parlin & Orendorff Co. v. Greenville,* 61 C. C. A. 591; *Bradner v. Roffsell,* 57 N. J. Law, 32; *Pittsburg Terra-Cotta Lumber Co. v. Sharp,* 190 Pa. St. 256; *Bently v. Davidson,* 74 Wis. 420.

"Case will lie at the suit of a builder against an architect who wrongfully withholds a certificate required under the contract to be given by him upon satisfactory performance." 5 C. J. 278, sec. 45.

"Where payment of the builder is dependent upon a certificate, decision, or estimate of the architect or engineer, it is the duty of the latter to give the certificate, upon being satisfied that the builder is entitled thereto, and must exercise his power of withholding a certificate with reasonable discretion and not capriciously, and is only justified in refusing where there is a real and substantial failure on the part of the builder to fulfil his duty under the contract." 6 Cyc. 35, and notes.

"The whole grievance of appellant, as set out in his assignments of error, is based on failure of plaintiff to produce the written certificate of the architect that the work was completed to his satisfaction and within the time stipulated in the contract. We fear appellant misapprehends the purpose of this provision; evidently, it was inserted to protect the owner against any unjust or unfounded claim by the contractor, and in that view of it, it was a reasonable provision; but if the contractor honestly performed its covenants, it was not intended to protect the owner from an honest payment of the price by a capricious or fraudulent with-

holding of the certificate." *Pittsburg Terra-Cotta Lumber Co. v. Sharp,* 190 Pa. St. 256.

"The architect does not seem to have exercised an independent judgment touching the performance of the contract. He appears to have contented himself with forwarding the objections of the owner of the building, without judgment by him of the correctness of those objections. Indeed, he entertained an erroneous idea of his duty. He was not an arbiter between the owner of the building and the plaintiff. He was a judge between the plaintiff and the defendant, and it was his duty to investigate and to decide, with respect to the contract in question, whether its terms had been performed, and, failing in performance, to point out wherein there was failure to perform, or defective performance, that the plaintiff might have opportunity to complete performance according to the terms of the contract." *Crane Elevator Co. v. Clark,* 26 C. C. A. 100.

"An agreement in a building contract that there shall be no liability to pay for work except upon the architect's certificates is valid; but if such certificates are arbitrarily and dishonestly withheld the builder may recover on showing that fact and that he has performed the contract according to its terms." *Bently v. Davidson,* 74 Wis. 420.

The law, therefore, is that the arbitrary and unreasonable refusal of the architects to make estimates did not defeat the right of Schee & Callahan to recover from the county the amount due them under their assignment. The county board, acting for the county, investigated the facts and knew that an estimate should have been made. In failing to pay what was honestly due they acquiesced in the wrongful conduct of the architects, and in behalf of the county violated the building contract and released both the contractor and the surety from further liability thereunder. The county thus lost the right to cancel the contract on account of the subsequent failure of Pesha to proceed under it.

On this phase of the controversy the controlling principles have been stated as follows:

"The rule is general that the right to rescind a contract rests only with the party who is without default. One party cannot violate the contract himself, and then seek a rescission on the ground that the other party has followed his example." *Fairchild-Gilmore-Wilton Co. v. Southern Refining Co.*, 158 Cal. 264.

The consequence of violating a building contract by a refusal to pay the contractor the amount due under it as the work progresses has often been discussed by courts and law-writers. The following excerpts indicate the course of the law:

A failure of the owner to pay an instalment due under the terms of the contract may justify the builder in abandoning the contract, where the builder himself was not in default. 9 C. J. 725, sec. 61, note 69; *South Fork Canal Co. v. Gordon*, 6 Wall. (U. S.) 561; *Fairchild-Gilmore-Wilton Co. v. Southern Refining Co.*, 158 Cal. 264; *Clark v. Gulesian*, 197 Mass. 492; *Bean v. Miller*, 69 Mo. 384; *Condon v. Church of St. Augustine*, 98 N. Y. Supp. 253; *Worden v. Connell*, 196 Pa. St. 281; *Dobbins v. Higgins*, 78 Ill. 440; *Harton v. Hildebrand*, 230 Pa. St. 335.

"In a contract to make and complete a structure, with agreements for monthly payments, a failure to make a payment at the time specified is a breach which justifies the abandonment of the work, and entitles the contractor to recover a reasonable compensation for the work actually performed." *South Fork Canal Co. v. Gordon*, 6 Wall. (U. S.) 561.

"Where work is done under a contract which provides for payment by instalments at stated periods, and the payments are not made, the contractor may quit the work, and he will then be entitled to recover for all that he has done at the contract rates; and this notwithstanding the contract provides in express terms that the work shall be steadily prosecuted without

intermission to final completion." *Bean v. Miller,* 69 Mo. 384.

"Where it is stipulated in a contract that the work to be done under it is to be paid for upon the estimates of an engineer, to be made at stated times, if the engineer makes only approximate estimates, and the contractor is prevented from completing the work through the fault of the other party, he may recover for the whole amount of work done, as well that of which no estimate has been made as that which has been estimated." *Bean v. Miller,* 69 Mo. 384.

It is no answer to these propositions that the county is without power to pay the claims of Schee & Callahan for labor and materials furnished in the construction of the building. The county agreed to do so and broke the contract in that particular after accepting its benefits. Like others exercising the power to make a contract, it is answerable for a failure to comply with its obligations.

After its breach of contract the county, under the assignment, was not only liable to Schee & Callahan for 85 per cent. of their loans which went into the courthouse in the form of labor and materials, but was liable for the percentage which might have been retained had the contract remained in force.

Schee & Callahan furnished money to Pesha on a note secured by the assignment, and did not furnish labor or materials within the meaning of the contract or the surety bond. *Independent School District v. Mardis,* 106 Ia. 295. The American Bonding Company, therefore, is not liable to Schee & Callahan for the county's indebtedness to them.

The county cannot escape liability on the ground that it was not required to make any payment to Schee & Callahan until they in fact contributed the full sum of $10,000. The county's acceptance and the understanding of all of the parties show conclusively that payments under the assignment were to be made from

time to time on estimates, and this was in harmony with the building contract.

In the suit brought by Howard county to recover damages from Pesha and his surety for breach of the building contract, the joint judgment against them for $20,156.49 is reversed. Pesha did not appeal from the separate judgment dismissing his cross-petition, and the dismissal as to him will not be disturbed.

In the suit of Schee & Callahan against Howard county, Pesha, and the American Bonding Company, the dismissal as to Howard county is reversed, and the district court is instructed to enter a judgment in favor of Schee & Callahan and against Howard county for $8,154.76, with interest from November 13, 1913. The judgment in favor of Schee & Callahan and against Pesha for $11,902 is affirmed. The judgment dismissing the suit as to the American Bonding Company is affirmed. The costs in both suits in both courts will be taxed to Howard county.

JUDGMENT ACCORDINGLY.

LETTON, CORNISH and ALDRICH, JJ., not sitting.

WILLIAM V. UNZICKER, APPELLEE, v. LENA UNZICKER ET AL., APPELLANTS.

FILED MARCH 27, 1919. No. 20329.

1. **Appeal:** EXCESSIVE VERDICT. Excess in the amount of a verdict, to be available as error, should be called to the attention of the trial court by the motion for a new trial, and is not reviewable in the supreme court under the assignment in the motion for a new trial that the verdict is not sustained by sufficient evidence.

2. **Landlord and Tenant:** ACTION FOR RENT: EVIDENCE. Where the existence of the relation of landlord and tenant is an issue in an

action to recover the reasonable value of a year's use and occupancy of a farm owned by plaintiff, a judicial record showing that he had collected from defendants for the preceding year rentals for the same land may be admitted in evidence.

3. **Evidence:** COMPETENCY. Where the entire testimony of a witness shows that he is qualified to testify to rental values of land, his testimony on that subject should not be excluded merely because some of his answers to questions tend to indicate a lack of necessary knowledge.

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

L. O. Pfeiffer, for appellants.

Rolfson & Hendricks, Wilcox & Halligan and *R. H. Beatty, contra.*

ROSE, J.

Plaintiff brought this suit to recover from defendants the rental value of a half-section of land in Deuel county for the years 1913, 1914, 1915 and 1916, the aggregate of the rentals demanded being $2,400. Under instructions to which no exceptions were taken, the jury were permitted to find in favor of plaintiff, if he proved by a preponderance of the evidence that defendants, during any of the years mentioned, used and occupied the land with his knowledge and consent, and that the use and occupancy were of some value.

Defendants denied the existence of the relation of landlord and tenant, and pleaded in defense other matters eliminated by instructions to which there were no exceptions. The jury rendered a verdict in favor of plaintiff for $601.50, and from a judgment for that sum defendants have appealed.

The errors assigned in the brief of defendants are: The findings and judgment are not sustained by sufficient evidence, and are contrary to law, and the court erred in admitting testimony offered by plaintiff. These assignments are also found in the motion for a new trial.

Defendants concede that the evidence is sufficient to sustain a verdict in favor of plaintiff for $234. The question of excess in the amount of the verdict is argued by defendants, but it was not specifically called to the attention of the trial court by the motion for a new trial, and was not raised indirectly by the assignment that the verdict is not sustained by sufficient evidence. *Hammond v. Edwards,* 56 Neb. 631. The judgment, therefore, is not reversible on this ground.

It is contended that a judicial record showing plaintiff had collected from defendants rentals for the year 1912 for the land in controversy was erroneously admitted in evidence. The point does not seem to be well taken. The proofs show that defendants remained in possession of the land after 1912, while plaintiff was the owner. The relation of landlord and tenant during the year 1913 was a controverted issue. Evidence that plaintiff had collected from defendants rentals for the same land for the preceding year tended to prove the existence of a tenancy, which, under the circumstances, carried with it the presumption of continuance. *Montgomery v. Willis,* 45 Neb. 434; *Lazarus v. Phelps,* 156 U. S. 202. It follows that there was no error in admitting the judicial record in evidence.

It is also argued by defendants that a witness called by plaintiff was permitted to testify to rental values without having shown the necessary qualifications. While some of his answers indicate a lack of knowledge on this subject, his testimony as a whole seems to justify the rulings of the trial court.

There are also objections to other items of testimony, but no prejudicial error has been found.

AFFIRMED.

CORNISH, J., not sitting.

JAMES C. FORD, APPELLEE, v. BENJAMIN F. BUSH, RECEIVER, APPELLANT.

FILED MARCH 27, 1919. NO. 20340.

Damages. A verdict in favor of plaintiff for $2,000 for personal injuries resulting from the negligence of defendant *held* sustained by the evidence outlined in the opinion.

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

J. A. C. Kennedy, Yale C. Holland and *G. L. De Lacey,* for appellant.

James E. Rait, contra.

ROSE, J.

This is an action to recover damages in the sum of $25,000 for personal injuries resulting from negligence. Plaintiff was a switchman in the employ of defendant. While attempting to mount a coal car for the purpose of releasing a brake, plaintiff took hold of a grabiron which broke loose from its fastenings, and in consequence he fell and was injured. The negligence imputed to defendant was the failure to provide a safe grabiron for the use and protection of employees in mounting the car in the performance of their duties. Defendant denied negligence on his part, and pleaded contributory negligence and assumption of risk. On a trial of the issues the jury rendered a verdict in favor of plaintiff for $2,000. From a judgment thereon defendant has appealed.

The only question presented is raised by the assignment that the verdict is excessive.

There is evidence of the following facts: Plaintiff, when injured, was a strong, active, able-bodied man, 40 years of age, earning $4.80 a day. He fell from a coal car and lit on his back, which was severely wrenched, discolored and swollen. There was a con-

cussion of the spine, causing pain. One kidney was ruptured and there were hemorrhages therefrom at intervals for perhaps two weeks. He was confined to his bed for a week and to his room for five weeks. He was treated by his physician for several months. From the time he was injured, February 8, 1916, until the trial, April 5, 1917, he was unable to work at anything requiring physical strength. He paid his physician $100. He was physically weak at the time of the trial. Whether his earning capacity was permanently impaired is left in doubt, but the jury evidently did not find in his favor on that issue. In considering proofs tending to establish the facts narrated, in connection with the uncertain element of pain in estimating damages, there does not appear to be a substantial ground for setting aside the verdict, when the familiar rules of law applicable to the facts are considered.

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

STEPHEN SCHULTZ, APPELLANT, V. CALVIN S. ROGERS, EXECUTOR, APPELLEE.

FILED MARCH 27, 1919. No. 20357.

Guaranty: VALIDITY. A verdict for defendant in an action on a guaranty may be sustained by proof showing that he refused to become guarantor when sober, but signed it when, by drunkenness, he was so far deprived of his reason as to render him incapable of understanding the character and consequences of his act, and that he rescinded the contract within a reasonable time after recovering his senses.

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

J. W. James and *Charles A. Chappell,* for appellant.

J. L. McPheely and *L. C. Paulson, contra.*

ROSE, J.

This is an action against Albert Abrams on his guaranty that William C. Wise, as agent, would perform a contract to sell for plaintiff during the year ending January 1, 1910, farm implements, vehicles and harness at Heartwell. Provision for the agent's compensation was made as follows:

"Agent shall receive one-half of the net profits of the business as he shall conduct it, the net profits to be that amount that represents the difference between the cost of the goods and that amount received from them as sold, less the expense of conducting the business."

In a former suit against the agent for an accounting, plaintiff recovered a judgment against him for $5,022.72 November 1, 1913. In the present suit plaintiff seeks to recover from the guarantor, Abrams, the amount of that judgment with interest. The guaranty on which the present action is based is indorsed on the back of the contract of agency, and is as follows:

"In consideration of the appointment of W. C. Wise as selling agent for Stephen Schultz for the year 1909, ending January 1, 1910, we, the undersigned, hereby guarantee unto Stephen Schultz the fulfilment of every part of this contract by W. C. Wise, that all money and notes received from the sale of goods will be turned over to Stephen Schultz except that which rightfully belongs to W. C. Wise, that is, his one-half the commission on sales made. Should W. C. Wise fail to properly turn over to Stephen Schultz, or his assigns, all notes and money received for the sale of goods, less one-half the commission, we do hereby agree and bind *myself* to make good unto Stephen Schultz such shortage. Signed this 1st day of February, 1909. Albert Abrams, W. C. Wise."

Abrams, in his answer herein, among other things, pleaded in substance that, at the time he signed the guaranty, he was incapacitated by intoxication from binding himself by contract, and, upon learning that he had signed the guaranty, he gave notice that he

would not be bound by it. Guarantor died during the pendency of the action, and the cause was revived in the name of Calvin S. Rogers, executor of the estate of Albert Abrams, deceased, defendant. Upon a trial of the issues the jury rendered a verdict in favor of defendant, and from a judgment of dismissal plaintiff appealed. Stephen Schultz became a bankrupt, and in the supreme court William Westering, trustee, was substituted as plaintiff.

It is argued by plaintiff that the defense of intoxication is without support in the evidence. On this issue the proofs are challenged as showing that drunkenness, of which there is proof, occurred after the guaranty had been signed. It is insisted, further, that proper notice of rescission was not given. There is competent testimony tending to show that Abrams was drunk at the time he signed the guaranty; that by reason of his drunkenness he did not then know what he had signed; that he had previously refused to become guarantor for plaintiff's agent; that he renounced the guaranty within a reasonable time and disclaimed liability thereon. Evidence of this kind and other proofs of a similar nature, when considered with all of the circumstances surrounding the transactions, were sufficient to justify the jury in finding that Abrams, at the time he signed the guaranty, was so far deprived of his reason as to render him incapable of understanding the character and consequences of his act, and that within a reasonable time after recovering his senses he disclaimed liability on the guaranty and rescinded it.

With these issues of fact thus determined, an examination of the entire record, in the light of the arguments and briefs, fails to disclose any error prejudicial to plaintiff.

AFFIRMED.

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

WILLIAM J. PETERSON, APPELLANT, V. BELIND KOUTY, APPELLEE.

FILED MARCH 27, 1919. No. 20384.

1. **Adverse Possession.** A person who has been in the open, notorious, exclusive, continuous, adverse possession of realty under a claim of right for ten years is vested with a valid title.
2. **New Trial:** NEWLY DISCOVERED EVIDENCE. The granting of a new trial on the ground of newly discovered evidence is within the sound judicial discretion of the trial court.

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

Morsman, Maxwell & Crossman, for appellant.

Thomas B. Murray and *C. J. Southard, contra.*

ROSE, J.

This is an action of ejectment. The defense was adverse possession. From a judgment of dismissal on a verdict in favor of defendant, plaintiff has appealed.

Two questions are presented—the sufficiency of the evidence to sustain the verdict, and the right of plaintiff to a new trial on the ground of newly discovered evidence.

An examination of the evidence shows that it is sufficient to justify the finding that defendant had been in the open, notorious, exclusive, continuous, adverse possession under a claim of right for ten years.

The question of diligence on the part of plaintiff was a factor in determining his right to a new trial on the ground of newly discovered evidence. On this issue an abuse of discretion on the part of the trial court in refusing to grant a new trial is not shown by the record.

AFFIRMED.

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

OLIVIA C. DILLON, APPELLANT, V. ANDREW J. DILLON, APPELLEE.

FILED MARCH 27, 1919. No. 20453.

1. **Husband and Wife:** SEPARATION CONTRACT: ABROGATION. In the absence of a divorce, a separation contract between husband and wife is abrogated by the renewal of the marital relations.
2. **Homestead:** RIGHT OF SURVIVING WIFE. A wife by living apart from her husband without fault on her part does not thereby divest herself of her homestead rights in his property at his death.
3. **Executors and Administrators:** HOMESTEAD: POSSESSION. Upon the death of a husband, the homestead in which he was living at the time vests in his widow and heirs, and the administrator of decedent's estate cannot take it into account in administering the estate.
4. ———: ———: EJECTMENT. An administrator who takes possession of a decedent's unincumbered homestead, leases the property, collects the rents, and thus prevents the widow from exercising her homestead rights, acts unlawfully in those respects, and a demand on him by her for possession is not a condition of her right to maintain an action of ejectment against him.

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

W. R. Starr, for appellant.

J. L. Rice, contra.

ROSE, J.

The action is ejectment for a lot in McCook, with a plea for three month's rent at $8 a month. Plaintiff alleges in her petition that she has a legal estate in and is entitled to the immediate possession of the lot, and that defendant has unlawfully kept her out of possession since March 28, 1917. The answer is a general denial. The jury returned a verdict in favor of defendant, and from a judgment of dismissal plaintiff has appealed.

Plaintiff contends that the verdict and the judgment are contrary to law, and that on the undisputed evidence she is entitled to the relief demanded. Briefly stated, plaintiff's case, as indicated by the proofs, is: George W. Dillon owned the lot, which was unincumbered, lived in a cottage thereon, occupied the premises as his homestead, and held the title thereto at the time of his death in March, 1917. Plaintiff was then, and since November 20, 1906, had been, his wife. Upon his death she was entitled to occupy and use the premises as her homestead. She was at Grand Island when her husband died, and at the time was not notified of his death, though she had intended to return to his home in McCook. During her absence her furniture was removed from her homestead, and Andrew J. Dillon, a son of her husband by a former wife, took possession of the lot, leased it, put his tenant in possession and collected the rents.

The nature of the defense is indicated by evidence tending to prove that plaintiff and George W. Dillon separated as wife and husband pursuant to a written contract in which she renounced her homestead rights; that she abandoned her homestead, and that defendant took possession of the lot and rented it as administrator of the estate of his deceased father. This defense fails for the following reasons: There is undisputed evidence that, at the time of the marriage of plaintiff to George W. Dillon, she had four children which he had agreed to support, but that he subsequently refused to do so. The separation was brought about by the husband. There was no divorce. Afterward he said that the contract had not been recorded and that he would destroy it. He persuaded his wife to renew their marital relations, and she returned to his home and lived with him for some time. Later she again left in compliance with his wishes, but returned from time to time. Before his death he invited her to return, and she intended to do so; her household goods being in the cottage on the lot in controversy.

On these undisputed facts, the law which defeats the defense outlined may be stated as follows: In the absence of a divorce, a separation contract in which the wife renounces her homestead estate in the property of her husband is abrogated by the renewal of the marital relations. *Gaster v. Estate of Gaster,* 90 Neb. 529. A wife by living apart from her husband without fault on her part does not thereby divest herself of her homestead rights at his death. 13 R. C. L. 681, sec. 142. Immediately upon the death of the husband, the unincumbered homestead vested in his widow and could not be taken into account in the administration of his estate. *In re Hadsell,* 82 Neb. 587. The administrator, therefore, had no right whatever to possession or rentals. In overruling the motion for a new trial and in dismissing the action, the trial court, however, made findings as follows:

"It appears from the evidence that it is undisputed that plaintiff has made no effort to secure possession of the property involved herein," and that there is "no evidence that defendant unlawfully withheld possession of said property from the plaintiff."

There seems to be error in these findings. In his answer defendant denied that plaintiff had a homestead estate in the property and that she was entitled to possession. At the trial he attempted to prove that she had no homestead right in the property of her deceased husband. As administrator of the estate he took possession of the premises, leased the property, collected the rents, and thus excluded her from her homestead. According to the undisputed evidence he asserted a title and exercised a dominion hostile to the established homestead rights of plaintiff and thus kept her out of possession. By his tenant he was in possession. In these respects his acts were, in a legal sense, unlawful. Under such circumstances a demand on defendant for possession was unnecessary. 15 Cyc. 57, note 11. On the undisputed evidence, as the case stood when submitted to the jury, plaintiff was entitled

to relief as prayed in her petition. The judgment below is therefore reversed and the cause remanded to the district court, with directions to enter a judgment in favor of plaintiff for the possession of her homestead as against defendant and for three months' rent at $8 a month with interest and costs.

REVERSED.

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

ALLEN VINCENT GRAMMER V. STATE OF NEBRASKA.

FILED MARCH 27, 1919. No. 20610.

1. **Jury**: QUALIFICATIONS: OPINIONS. An opinion of a juror on the merits of a criminal charge, if based solely on rumor or report, does not of itself disqualify him, where his *voir dire* examination shows that he can return a fair and impartial verdict upon the evidence adduced at the trial under the instructions of the court.
2. **Criminal Law**: INSTRUCTIONS: OPINIONS OF TALESMEN. Failure to instruct the jury specifically to disregard opinions expressed by rejected talesmen on their *voir dire* examination will not require a reversal, where the instructions as a whole direct the jury to base their verdict alone on evidence adduced at the trial.
3. ———: JOINT INFORMATION: SEPARATE TRIALS. Under an information charging two defendants with murder in the first degree, one as principal and the other as accessory before the fact, failure of the trial judge, on his own motion, to require separate trials *held* not error.
4. ———: CONFESSIONS: PROOF. Testimony that a confession was voluntary, or that there were no promises, threats, or inducements to influence defendant to make it, is not objectionable as being an opinion or a conclusion, where the circumstances under which the confession was made are in evidence.
5. ———: ———: FOUNDATION. A foundation for admitting in evidence a confession of guilt may be established by testimony of a witness that it was made to him and that neither he nor any one else in his presence or hearing made any promises or threats.
6. ———: ———: ADMISSIBILITY. Where two defendants are charged with murder in the first degree, one as principal and the other as accessory before the fact, a confession by the principal, if ad-

mitted by the accessory to be true, may be admitted in evidence against the latter.

7. ———: TRIAL: APPLAUSE. Laughter and applause by the audience during the trial in a felony case, *held* not ground for setting aside the verdict, where the presiding judge vigorously rebuked the misconduct and directed the jury to disregard it, prejudice to the complaining party not being shown by the record.

8. ———: INSTRUCTIONS: ORAL MODIFICATION. An oral statement from the bench directing the jury that testimony of the witness being examined by counsel applies alone to one of two joint defendants is not an instruction within the meaning of the statutes requiring instructions to be in writing and forbidding oral modifications thereof.

9. **Homicide**: SENTENCE. Under an information charging two defendants with murder in the first degree, one as principal and the other as accessory before the fact, the duty of fixing the punishment of each at death or life imprisonment, if both are convicted, is imposed by the Criminal Code upon the jury.

ERROR to the district court for Howard county: BAYARD H. PAINE, JUDGE. *Affirmed.*

Sterling F. Mutz, for plaintiff in error.

Willis E. Reed, Attorney-General, Orville L. Jones and *W. A. Prince, contra.*

ROSE, J.

In the district court for Howard county, Alson B. Cole and Allen Vincent Grammer, defendants, were charged in a single information with murder in the first degree, Cole as principal and Grammer as accessary before the fact. The state's case may be summarized as follows: Lulu Vogt, a widow having considerable means, was the mother-in-law of Grammer, who was prompted by a desire for an inheritance from her to his wife. He planned the murder and agreed to give Cole $500 for committing it. During the night of July 5, 1917, Cole, pursuant to a previous understanding with Grammer, went to the home of Lulu Vogt, made the false statement that her daughter had been accidentally injured, enticed Lulu Vogt into an automobile, took her from her home and feloniously shot and

killed her in Howard county. Grammer aided and abetted the murder.

It appears that, at different times and places, each made a confession giving details of the parts played by both. Defendants were arraigned, pleaded not guilty, and went to trial together without any demand by either for a separate trial. After the jury had been impaneled, Cole changed his plea to guilty. The trial court held it was the province of the jury to fix at death or life imprisonment, the punishment for murder in the first degree, and for that purpose proofs showing the details of the homicide were admitted in evidence against Cole after he had pleaded guilty. Grammer was tried and convicted. The jury fixed the extreme penalty for both defendants, and the trial court imposed upon each the sentence of death. Grammer alone prosecutes error.

In addition to complaints that disqualified jurors were erroneously impaneled, there is an assignment of error in the following form:

"The court erred in failing to instruct the jurors that they must not be prejudiced by the *voir dire* examination of talesmen."

The published confessions of defendants and other reports of their guilt had reached many excused talesmen, some of whom, during the course of the *voir dire* examination, expressed the opinion that defendants were guilty. Statements of this nature were made in the presence of jurors already selected for the trial. The procedure in this respect, the disqualifications of jurors, and the failure of the trial court to instruct the jury to disregard such expressions of guilt are subjects of extended argument. Notwithstanding opinions of guilt based on rumors or reports, each juror qualified himself by his answers on his *voir dire* examination, and the record fails to show an abuse of discretion on the part of the trial court in ruling on the qualification of jurors. Besides, Grammer did not exhaust his peremptory challenges. A juror may serve impartially

and base his findings alone on evidence admitted at the trial under proper instructions, though he had been prompted by rumors or reports to express the opinion that accused was guilty, and such expressions of opinion by excused talesmen under the same circumstances are not necessarily conclusive proofs of prejudice or disqualification. From the charge as a whole, the jury knew that preconceived prejudice or rumor outside of the evidence adduced at the trial should have no place in their deliberations or verdict. There was no prejudicial error in the impaneling of the jury or in the failure to warn them directly "not to be prejudiced by the *voir dire* examination of talesmen."

It is insisted that the failure of the trial judge to order separate trials for Cole and Grammer is a ground for reversal. There was no demand for separate trials, and there was no error, therefore, in the failure to grant them.

Error in overruling objections to questions propounded to witnesses for the state in laying the foundation for the admission of Grammer's confession is assigned as a ground for reversal. The nature of these questions is indicated by those following: "State whether or not any force was used to get him to make that statement." "You may state whether or not any promises were made to him to get him to make that statement." "You may state whether or not any inducements were held out to Mr. Grammer to get him to make that statement." The objections are that the questions are leading, suggestive, and call for a conclusion. The circumstances under which the confession was made are disclosed by the evidence. Grammer exercised the privilege of cross-examination. The law applicable has been recently stated as follows:

"It is not error to permit a witness to testify that a confession was voluntary, as being an opinion or conclusion, if the circumstances of the confession are in evidence. Similarly, a question whether any promises, threats, or inducements were made to defendant,

before he made the statements sought to be proved, is not objectionable as calling for a conclusion." 16 C. J. 733, sec. 1510.

This assignment of error is therefore overruled.

Assigned error in the overruling of objections to the admission of the confession of Grammer is argued at some length. The substance of the objections is there was no foundation excluding the hypothesis that the confession was involuntary, it being asserted that the state's witnesses were erroneously permitted to testify to mere conclusions in answering incompetent questions. The confession is in writing. It gives the details of Grammer's connection with the homicide. It was signed by him in presence of witnesses who testified that it was voluntarily made. There is ample proof that it was obtained without threats or promises to inspire either hope or fear. The foundation, therefore, was sufficient. *State v. Kilduff,* 160 Ia. 388; *Sparf v. United States,* 156 U. S. 51, 15 Sup. Ct. Rep. 273; 2 Wharton, Criminal Evidence (10th ed.) sec. 646; 16 C. J. 728, sec. 1494. The trial court properly admitted Grammer's confession under the following rule:

"A proper predicate for the admission of a confession is laid where the witness to whom it was made testifies that neither he, nor any one else in his presence or hearing, made any promises or threats to defendant." 16 C. J. 734, sec. 1512.

Testimony inculpating Cole, including his confession, is condemned as prejudicial to Grammer. Each made a confession in writing. The facts were set out at length. In most essential respects the details were the same. Corroborating circumstances confirmed the truth of the confessions. Cole was first to confess. With his confession Grammer was confronted. When Grammer knew its contents, reciting as it did that Cole had been hired by Grammer to commit the murder, Grammer, according to the testimony of one of the witnesses, said that it was true. If the witness told the truth—a ques-

tion for the jury—Grammer admitted the truth of Cole's confession and made it his own. It was therefore admissible in evidence against Grammer. Since the jury were called upon to fix the penalty, details of the felonious acts of Cole were admissible in evidence against him, though he had pleaded guilty. In protecting Grammer from the testimony against Cole, the trial court went further than the requirements of the law.

Laughter and applause by auditors during the trial are condemned as grounds for a new trial. Such misconduct should not be tolerated; but under a constitution requiring a public trial it is sometimes difficult to prevent all manifestations of feeling on the part of the audience, where the public interest is aroused by a prosecution for a homicide. In the present case the trial judge announced from the bench a rule forbidding any demonstration of feeling on the part of the audience in regard to incidents of the trial. There were no doubt changes among the auditors during the protracted trial and an occasional recurrence of the offense, attributable perhaps to those who had not heard the admonitions from the bench. The rule, however, was frequently repeated. Misconduct on the part of the audience was severely condemned and the jury were directed to disregard it. At one time the trial judge said:

"Those in *the room must* understand absolutely no laughter will be permitted under any circumstances. You must absolutely remain silent. Any sallies made by a witness must be received without any applause or laughter. The jury are instructed to disregard any signs of merriment on part of anybody, however given. This must be strictly observed."

It is argued that the trial judge, in addition, should have punished the offenders, but the record does not show prejudice to Grammer in what occurred. The trial court was vigilant in protecting his rights and in

cautioning the jury to disregard laughter, applause and other expressions of public feeling.

The following is another assignment: "The court erred in giving oral instructions to the jury during the trial that certain evidence applied to the defendant Grammer."

In a single information it was charged that Cole feloniously shot and killed Lulu Vogt, and that Grammer hired, aided and abetted Cole. Defendants were tried together. To prevent one from being prejudiced by evidence against the other, the presiding judge, during the introduction of the proofs on part of the state, made a number of oral statements, the nature of which is indicated by the following:

"Jury instructed that the evidence of the conversation that the witness is about to give, relates only to Cole and does not bear upon Grammer."

It is argued that these rulings violated the statutes requiring written instructions and forbidding oral modifications thereof. Rev. St. 1913, secs. 7850, 7854, 9119. Oral expressions like that quoted, when uttered by the trial judge during the examination of a witness, should be considered as limitations of the rulings on evidence. They are not generally classified as oral instructions within the meaning of the statutes. They are not principles of law applicable to the evidence. They are not erroneous merely because they are oral. *Metcalf v. Commonwealth,* 27 Ky. Law Rep. 702; *State v. Becton,* 66 Tenn. 138; *State v. Moore,* 117 Mo. 395; *State v. Good,* 132 Mo. 114; *Littell v. State,* 133 Ind. 577. A recent summary of the controlling principles follows:

"The charge or instruction required by law to be reduced to writing is only that which the court may have to say to the jury in regard to the principles of law applicable to the case and to the evidence; and hence an oral statement or communication by the court to the jury, which is rather in the nature of a caution-

ary direction, and not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, need not be in writing." 16 C. J. 1032, sec. 2468.

One of the assignments of error is based on an instruction to the jury as follows:

"In the case of the defendant Grammer, you can find him guilty or not guilty; and, in the case you find him guilty, you should then fix his punishment at death or life imprisonment."

The argument of Grammer is that he was accused of abetting the murder, and that in such a case the jury had no authority to fix the punishment; responsibility in that respect resting on the trial judge. The punishment of a guilty accessory whose principal is found guilty of murder in the first degree is prescribed by the Criminal Code as follows:

"If such principal offender would on conviction, be punishable with death, or be imprisoned for life, then such aider, abettor, or procurer shall be punished with death or be imprisoned for life, the same as the principal offender would be." Rev. St. 1913, sec. 8579.

"The principal offender" having been found guilty of murder in the first degree, his punishment is determinable under the following provisions of the Criminal Code:

"Whoever shall purposely and of deliberate and premeditated malice or in the perpetration of or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done, kill another; or, whoever by wilful and corrupt perjury or subornation of the same, shall purposely procure the conviction and execution of any innocent person, every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury." Rev. St. 1913, sec. 8581.

The latter section, as originally enacted, made death the penalty for murder in the first degree. By amendment in 1903 punishment by life imprisonment or death was left to the discretion of the jury. The amendment did not change the provision that the "aider, abettor, or procurer shall be punished with death or be imprisoned for life, the same as the principal offender would be." The "principal offender," under the amendment, is, upon a finding of guilty of murder in the first degree, punishable by life imprisonment or death, in the discretion of the jury. The legislature, by amending the Criminal Code in the manner indicated, evidently intended to confer upon the jury the power to fix life imprisonment as punishment of either principal or accessory upon a conviction for murder in the first degree, and the Criminal Code is so construed. A different conclusion is not required by that part of the Criminal Code declaring:

"In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter; and if such person be convicted by confession in open court, the court shall proceed by examination of witnesses in open court, to determine the degree of the crime, and shall pronounce sentence accordingly." Rev. St. 1913, sec. 9130.

These provisions relate to the degree of crime, and not to the fixing of the penalty for murder in the first degree. The decision of the trial court was in harmony with this view of the law.

All of the assignments of error have been considered without finding an error prejudicial to Grammer. In view of what has been said, further discussion of the points argued is unnecessary. The evidence leaves no basis for a reasonable doubt of Grammer's guilt. There was a fair and impartial trial. There is no reason to disturb the verdict of the jury. The judgment of the district court is affirmed, and Friday, June 6, 1919, is

fixed as the date for carrying into effect the sentence of the district court.

AFFIRMED.

LETTON and CORNISH, JJ., not sitting.

The following dissent to an order overruling a motion for rehearing was filed September 15, 1919.

SEDGWICK, J., dissenting.

Even if defendant was absolutely innocent of planning or designing the death of Mrs. Vogt, his conduct when he heard of her death was unusual and unnatural. When he found that Cole, his comrade and associate, had murdered his wife's mother, instead of delivering the murderer up to justice, he helped to prevent his apprehension and punishment. This looks bad for Grammer, and is entirely consistent with his being guilty as charged. I suppose we would not admit that these facts alone would justify his conviction. In order to support his conviction, reliance must be had upon his confession. The state did not put Cole upon the witness-stand. His statements are not sworn to. The only evidence of Grammer's guilt, then, is Grammer's confession. The record doesn't show that Cole now makes a more reasonable statement than the statements in any of his former confessions. It is said that the statements that he now makes exonerate Grammer entirely. I suppose a court cannot consider it in examining this record, and, if we could consider it, I do not know what effect the fact that he now does make such statements would have to counteract his former unverified statements.

There are a few important questions presented by this record:

1. Several of the jurors who sat upon the case were objected to on the ground that they had formed and expressed an opinion of the defendant's guilt, based upon reading his purported confession. In answer to that the state quotes the statute and leaves out the

vital point. Rev. St. 1913, sec. 9109, says it shall be a ground for challenge for cause that the proposed juror "has formed or expressed an opinion as to the guilt or innocence of the accused." This is a direct statement, and ordinarily a man who has formed an opinion that the accused is guilty should not sit as a juror; but, under the proviso of the statute, he may still be allowed to sit under certain circumstances. If he states that he has formed an opinion "upon reading newspaper statements, communications, comments or reports, or upon rumor or hearsay, *and not upon conversations with witnesses of the transactions or reading reports of their testimony*" (the statute does not provide that if the juror has formed his opinion upon reading the testimony of witnesses), he may still be allowed to sit as a juror if he swears that he can render an impartial verdict upon the law and the evidence, and if the court is satisfied from all the circumstances that the juror is impartial. These witnesses had read the purported confession of Grammer, which was all the evidence that there was against him; and, if the statute is applied as it reads, after forming an opinion that he was guilty upon this testimony of the defendant himself, upon which they afterwards convicted him, they were not competent to sit as jurors. The defendant used all his peremptory challenges but one. With this one he might have excluded one of these six or seven jurors but that would not have helped matters any.

2. This alleged confession of Grammer's, upon which alone he is convicted, is very much discussed in the brief upon the motion for rehearing. The officers arrested Cole, told him that Grammer had given him away, and Cole then placed the burden of the crime upon Grammer himself. Cole, under the conditions, was compelled to confess that he had murdered the woman, and he got even with Grammer by his confession. The officers then took Cole in custody in another state, and started to Lincoln, and wired the officers at St. Paul,

Nebraska, to bring Grammer to Lincoln. A detective had been placed in the next cell to Grammer in the jail to work Grammer up if he could, and the officers brought this detective, Garrett, and Grammer, and with the help of a couple of Pinkerton detectives they took Grammer, in irons, to a room in the Lincoln Hotel. They locked the door, and the officers there labored with him, according to their statements, from 2½ to 3½ hours. Grammer then signed a detailed typewritten statement covering six or seven pages. I suppose the law is that a confession cannot be offered in evidence until it is proved to have been voluntary. This can ordinarily be done if it is voluntary, and the circumstances surrounding it are so simple and natural that the witnesses can tell all that was said and done before the alleged confession is made. These detectives had already discussed the division they would make of the reward that was offered, and while they had Grammer in this room and he was standing in the center of the room, they stood around him, but it was impossible for them to tell, and they make no attempt to tell, in a general way all that took place during those hours. Under those circumstances, was it competent for them to say in general terms that they did not use any duress, neither did they offer any reward or any hope of reward? Some of them testified that they told him it would be better for him to confess; others said what they told him was that it would be better for him to tell the truth. Of course Grammer, while these officers were surrounding him, knew what they considered to be the truth, and that the only way for him to tell the truth, in their estimation, was to tell it the way they wanted it. If there was other evidence of Grammer's guilt, if Cole had faced the jury and testified under oath to any facts incriminating Grammer, so that we had some evidence outside of this supposed confession of Grammer's that he was guilty, the case would be different. But now we have him convicted

and ordered to be executed on no other evidence than that contained in his supposed confession, which clearly is not his language, but is the language of these detectives.

3. The syllabus of our opinion says: "Failure to instruct the jury specifically to disregard opinions expressed by rejected talesmen on their *voir dire* examination will not require a reversal, where the instructions as a whole direct the jury to base their verdict alone on evidence adduced at the trial." When the jury heard this general instruction that they must base their verdict alone on evidence adduced at the trial, would they suppose that the trial was the matter that took place in court, including the formalities of impaneling the jury and all? If they did, then the statements of these "rejected talesmen" would be, in their thought, a part of the trial. It would be better if the court had specially warned them against being influenced by the sworn statements of men that were called as jurors, as to their having read the confession and their conclusions of the defendant's guilt.

4. Instruction No. 21, given by the court, is a new thing in the criminal jurisprudence. The jury were told plainly that they would "be warranted in convicting the defendant," and then are told further that it would be their duty to convict the defendant if they found certain things. The jury should be instructed that they cannot find the defendant guilty unless they find certain things. But they are told that it would *be their duty* to convict him if they do find so and so, and are also told that, without regard to such findings, they are warranted in finding the defendant guilty. Unless we felt confident beforehand that the defendant must be guilty, would we justify the giving of such an instruction? If there is any duty that devolves upon a jury in the trial of a capital charge, it is to acquit unless all of the facts necessary to a conviction are proved beyond a reasonable doubt.

5. It is pointed out in the brief that in *Thompson v. People,* 4 Neb. 524, this court decided that "no man's life should be forfeited because of the omission of his counsel to take exception." In this case we have said: "Failure of the trial judge, on his own motion, to require separate trials *held* not error." When the court knew that the evidence in the case was to be exclusively a realistic and extensive recital of details prepared by the detectives and in their language, purporting to be the confession of Cole, and the court also knew that there was no doubt of Cole's conviction, and the most important question that could ever devolve upon the court was to find out whether the defendant Grammer had procured Cole to commit this crime, should he have allowed the defendants to be tried together? The authorities cited in the brief seem to be to the effect that he should not.

6. Under these circumstances, when Cole, in the midst of the trial, withdrew his plea and entered a plea of guilty, the brief cites authorities to the effect that that works a separation of the defendants. If it was necessary that Cole's confession should be put in evidence for the purpose of showing the degree of his guilt, and the nature of his punishment, that matter should have been heard by itself, and should not have been allowed to have gone before the jury that were to determine the question of Grammer's guilt. When Cole's confession was offered in evidence the court sustained an objection to it as evidence against Grammer, and gallantly informed the jury that this document prepared by the detectives should not be considered as evidence against Grammer, but only as evidence against Cole. The question is seriously discussed as to whether it was necessary for the jury to hear any evidence against Cole at all, and whether it was not the duty of the court to determine the degree of his punishment. However, that may be, the reading of this so-called confession of Cole was very prejudicial

in the minds of the jury to the interests of Grammer.

A good many other questions are discussed in the brief that I will not take time to examine. I suggested the foregoing, and hoped that the judges would give them consideration.

FORREST SPIELER, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED MARCH 27, 1919. No. 20118.

1. **Trial**: NEGLIGENCE: INSTRUCTION: EVIDENCE. It may be reversible error to submit to the jury, as grounds for recovery, alleged acts of negligence which are wholly unsupported by the evidence.
2. ———: INSTRUCTIONS: QUOTING PLEADINGS. It is generally not commendable practice, in stating the issues to the jury, to quote at large from the pleadings. It may, and frequently does, mislead or prejudice the jury so as to require a reversal.
3. **Street Railways**: INJURY TO CHILD: LAST CLEAR CHANCE. If a street car is moving at about four miles an hour, and is stopping for passengers standing near the track at its stopping place apparently intending to enter the car, it is not proof of negligence under the doctrine of the last clear chance that the motorman saw a five-year old boy running towards a man and woman among such passengers, and assumed that the boy was in their care and would enter the car with them, although the boy was in fact intending to cross the track in front of the car, and ran against, or was struck by, the car and injured.
4. ———: ———: NEGLIGENCE: SUFFICIENCY OF EVIDENCE. It is *held* that the evidence indicated in the opinion was not sufficient proof of the various charges of negligence submitted to the jury.

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

F. M Hall, H. W. Baird and *F. D. Williams,* for appellant.

Jacob Fawcett and *Strode & Beghtol, contra.*

SEDGWICK, J.

Forrest Spieler, a boy about five years old, was injured by one of the defendant's street cars so that he

lost his foot and ankle by amputation. His father brought this action in the district court for Lancaster county to recover damages in behalf of the boy. The petition alleged negligence on the part of the defendant in several particulars. The plaintiff, in his brief, in stating the case, says: "It was conclusively shown by the evidence that this boy lost his left leg by the gross carelessness of the appellant in operating a street car over one of the most populous street crossings in the city of Lincoln without a proper brake, or properly using the brake at hand, and without a proper fender as required by a safety ordinance of the city of Lincoln." While the brief discusses other allegations of negligence to some extent, which we will have occasion to mention, we consider that the foregoing are the principal grounds relied upon and call for more particular examination on the part of the court. The accident happened at the crossing of Twelfth and N streets in the city of Lincoln. The defendant operates a street car line on each of these streets, and the car which injured the plaintiff was at the time going eastward on N street. The boy was going north on the east side of Twelfth street to his father's place of business in the next block. The defendant contends that there was no evidence sufficient to support any allegation of negligence on the part of the defendant which was, or could have been, the proximate cause of the injury.

As to the allegation that the car was moving at a negligent rate of speed under the circumstances, it is said and assumed in the briefs of both parties that the car was moving at a speed of four miles an hour; and the plaintiff in his brief says: "This point about the speed is not worthy of lengthy consideration by the court, since there is ample evidence on other matters to sustain the jury's finding of negligence."

The question of negligence on the part of the motorman in failing to warn the boy of his danger is somewhat discussed. There were two persons, a man and

a woman, waiting at the far (east) side of Twelfth street to take passage on this car. Another man was also waiting a short distance farther east for the same purpose. Mr. Schafer, the man nearest Twelfth street, was an important witness for the plaintiff. He was asked, "Did the gong on the street car sound?" while the boy was approaching the track, and answered, "Not that I know of." Another of plaintiff's witnesses who saw the accident testified that the gong was sounded, and he was supported by several witnesses. We do not regard this question as very material, since when passengers were waiting to take the car and it was approaching at about the speed a man would walk, it is incredible that any one would fail to see the car, and it could not be found from this evidence that a failure to sound the gong was the proximate cause of the injury.

Whether the evidence shows that the motorman knew, or ought to have known, that the boy was about to step on the track is considerably discussed in the briefs. The evidence shows that the boy when he was at some considerable distance from the car track, left the sidewalk and picked up some article of interest to him in Twelfth street. He then went immediately toward the car track. Jeffers, one of plaintiff's witnesses, testified as follows: "Q. Did you see the little boy when he—just before he got run over by the street car? A. Yes, sir. Q. And where was he at the time the car struck him? A. You mean when the car struck him? Q. Yes, sir. Where was he at the time the car struck him? A. You mean when the street car struck him? Q. Yes, sir. Where was he in the street? A. Well, he was kind of running on a little bit of a walk, and the car hit him on the southeast corner, or he struck the car. Q. Where was he with reference to the—was he on the crossing going across the street where there is a crossing where people cross the street there? A. Well, just about the east end of the crossing, and maybe a little this side of it. Q. It goes across N street

there? A. Yes, sir. Q. Going across over to the north side? A. Yes, sir. Q. Did you see him as you came up? A. No; I just seen him as he came around the woman or lady who was standing there." *Cross-examination*: "Q. When did you first see this boy? A. Well, when he darted around that lady that was standing there. Q. What is that? A. There was a lady standing there waiting to get on the car, and he came right around that lady. Q. Running? A. I should judge it was on a run. Q. Why didn't you holler to him and call him when you saw that he was going to collide with the car, or the car collide with him? A. Because it happened so quick. Q. How far was he from the car when you first saw him? A. Two or three feet. Q. Which side of the lady did he pass on? A. On the east side. Q. About how far east of the lady? A. Well, not very far. Q. Two or three feet perhaps? A. No; I do not think it was that far. Q. Well, did he stop when he got to the woman or did he just keep going? A. Well, he kind of darted and dodged around there. Q. From behind the woman? A. Yes, sir. Q. He came up from behind the woman, as you say, and dodged around her on her right? A. Yes, sir. Q. And in an instant he was against the car? A. Yes, sir. Q. So quickly you did not have time to holler to him or the motorman? A. Well, just as soon as I saw he was going to hit the car, I hollered at the motorman. Q. But you did not have time to holler before that, it was done so quick? A. No. Q. What would you say in your judgment as to whether or not the motorman could see this child on account of his being so small and so close to the car? A. I would say he could not see him. * * * Q. Did the motorman back up as soon as he was asked to? A. Well, I don't remember just now, but I think he did. Q. Do you know when somebody hollered whether the motorman knew what had happened or not? A. Well, I think, yes, sir; he must have, because he went after that brake wheel pretty hard. Q. Well, do you think he knew who he had struck? A.

Well, I don't know whether he knew what he struck or not. Q. You think he knew something had happened? A. Yes, sir. Q. Could you see the motorman from where you stood? A. Yes, sir. Q. Well, tell the jury whether or not when you or somebody hollered, he instantly applied the brake? A. Well, I seen him go through the motions of turning that wheel. Q. Well, did he do that instantly, as soon as some one hollered? A. Yes, sir. Q. You think the car moved, after some one hollered, about the length or distance from the front end of the car to the front of the wheel? A. Yes, sir. Q. Whatever that may be, whether it is six or seven or eight feet? A. Yes, sir. Q. Well, what would you say from what you saw as to whether or not the motorman made every effort, as far as you could see to stop the car as soon as he could? A. I think he did. Q. Do you know of anything the motorman could have done to prevent this accident that he did not do? A. No; I do not know of anything the motorman could have done." *Redirect examination*: "Q. And you saw him (the injured boy) in a position where he would be struck before he was struck didn't you? A. No; the way I mean that was where he would have been—I did not mean that he was struck; he practically run into the car."

Evidence to the same effect was given by several other witnesses, both for plaintiff and defendant, and is not disputed by any. The motorman testified that he saw the boy as he left the walk, and saw him approach the track; that he walked toward the man and woman who were waiting to take passage on the car, and that he supposed that the boy was in the care of this woman and was about to take the car with her. It appears that the boy, instead of stopping with these intending passengers who were standing very close to the track, attempted to cross the track in front of the car. The evidence is conflicting, or perhaps uncertain, as to just how far he had proceeded when he struck the car, or the car struck him. He did not fall between the

rails, but his left foot was on the rail and was crushed by the wheel. The motorman testified that he did not see the boy attempt to pass the car. One of plaintiff's witnesses testified that he saw the boy make this attempt, and was asked, "Now, state whether or not there was anything there to prevent the motorman from seeing the boy the same as you did?" and answered, "Not that I know of." This street crossing is much frequented, and this fact and other circumstances required the attention of the motorman, so that it cannot be found from this evidence that the motorman knew, or ought to have known, that the boy was about to attempt to cross the track in front of the car, instead of taking the car with these other intending passengers.

We do not find any evidence in the record justifying the application of the doctrine of the last clear chance, which requires that, when one by his own act causes his injury, the evidence that the conditions were such that the defendant knew, or ought to have known, of the probability of danger to the injured party shall be clear and definite. The evidence in this case will not justify the finding that the motorman knew, or ought to have known, of this boy's intention, or that he failed to use all reasonable efforts to stop the car and prevent the injury. Evidence that the motorman, without leaning forward and "just as he stands," would probably see the track within two feet of the car, under such circumstances, is not applicable. If the motorman was the guardian of this boy and had no other duties to perform, he might, and probably would, have prevented the injury. There is no doubt that the motorman saw the boy coming toward the track as other passengers did who expected to take the car, but there is no evidence that, after the boy had reached the place where other passengers were standing, the motorman saw, or should have seen, any action of the boy indicating that he intended to cross in front of the car. The city ordinance, which is in evi-

dence, is not much different from the common-law rule in such cases. Without such ordinance the motorman would be required to use reasonable diligence in watching for "teams, carriages, persons on foot, and especially children, either on the track or moving toward it, and on the appearance of danger to such teams or person or other obstructions, the car shall be stopped as promptly as possible." Of course, this does not mean that all street cars must be stopped when boys are moving toward the track under all conditions and circumstances. If that was the rule, a street car would have difficulty in going across the city. It is only when such movement presents "the appearance of danger," and the motorman is not bound to assume that every one who is walking toward the track will attempt to cross in front of the car. It is not usual to allow children of five years of age to roam business streets alone, and it was not unreasonable to suppose that he was accompanying these intending passengers and would be cared for by them.

Another claim of negligence on the part of the defendant is that the motorman made no attempt to stop the car after he realized, or should have realized, that the boy was in a dangerous position. We have already indicated that we cannot find that there is evidence in this case sufficient to justify a reasonable conclusion that the motorman knew, or should have known, that this little boy was without protection and was not accompanying these passengers that were expecting to enter this car; and it appears that the evidence shows that the supposition that this child was being cared for by its parents, and that they were intending to take him with them upon the car, was not an unreasonable supposition; and there is no evidence from which it could reasonably be found that the motorman should have anticipated that this boy would attempt to run in front of the car when the car was about to stop; and he was so near the car that it is doubtful whether he was struck by the car or himself run against the side

of the car. The evidence is clear that when this happened a witness who saw it shouted to the motorman, and that the motorman immediately applied his brakes, and the car, which was going so slow that it would have stopped of its own lack of momentum in a very short distance, continued to move for about two-thirds of its length at the utmost.

This car was equipped with a hand brake, and it is contended that it was negligence *per se* to operate a car with that style of brake. The evidence shows that some ten years before this accident happened the street car company had purchased a number of cars equipped with hand brakes, and that later, and shortly before this accident, some much larger cars with air brakes had been purchased and were being operated. These larger cars make the longer runs, and the ordinary smaller cars are in a large majority of the cars used by the company. They are known as single-truck cars, and the larger cars are known as double-truck cars. The evidence will not support the conclusion that the air brakes are in any general use anywhere on the smaller single-truck cars, or indeed that they are practicable for use upon such cars. It seems to follow that the evidence fails entirely to show negligence on the part of the defendant in failing to equip this car with air brakes.

There is an ordinance of this city that "It shall be unlawful for any person, firm or corporation to operate any electric street car in or upon any street railway within the corporate limits of the city of Lincoln, unless such car, or in case of trains, the first car, be provided with a fender of the type known as the 'Saginaw fender,' or one equally as efficient." And it is contended that the fender on this car was not a Saginaw fender or one equally as efficient, and that this was the proximate cause of the injury. The evidence shows that the fender was in fact a Saginaw fender, but it is contended that it is not sufficient to show that the fender is of that character, but it "must be in

proper operating condition so as to accomplish the purpose for which it is attached to the street car," and it is claimed that, "if this fender would work, it would be impossible for an accident to happen in the way this accident happened, and if the fender on this car had operated the way it is supposed to operate, the boy's leg would have been saved." We have already seen that it was a doubtful question whether the boy succeeded in getting in front of the car or ran against the side or corner of the car; that is, whether he was in front of the car so that the fender could have worked, or whether he was not. Therefore, the fact that the boy was not taken up by the fender was equally consistent with the contention that he was not in front of the car at all, as it is with the theory that the fender was not a proper fender. There is positive evidence that the fender was a proper fender and was in working condition, and apparently no evidence to the contrary, except a circumstance that the boy was not saved by the fender. Under such circumstances it must be found that there was in fact no evidence from which it could be said that the fender was not a proper fender. Evidence that it might be prevented from working by the motorman, by inserting plugs in certain places, etc., is immaterial, since there is no evidence of any such condition. The evidence is that it was in good working order, and the only thing urged as rebutting that is the fact that it did not save the boy, which tends to prove that the boy was not in front of the car so that he could have been saved by a proper fender. If it is true, as stated in the brief, "that a Saginaw fender in proper condition never fails to operate," then, in the absence of any evidence that this fender was not in proper condition, the fact that it did not operate tends to prove that it had no opportunity to operate, and will not of itself overcome the positive evidence that it was in proper condition.

The evidence is conflicting as to how soon the car could be stopped if the brake was in good condition. Some

of the witnesses testified that it could be stopped within four feet, moving at four miles an hour; and others testified that it would require eight or nine feet. The witness Johnson testified as follows: "Q. And what does it show the distance on the outside, from the southeast corner of the body of the car, back to the center axle of the front wheels? A. It does. Q. And what is that distance? A. Nine feet and seven inches." And plaintiff's witness Liston testified as follows: "Q. State whether or not the car continued to move after it hit the boy? A. Yes, sir. Q. How far? A. Well, I should say probably from the time I saw it, it must have passed from the front end of the car to the wheels, that distance. Q. Do you know whether or not it dragged the boy's foot any distance on the rail, or did you see any of that? A. I believe it did, from the mark of the rail. Q. You saw the marks on the rail? A. Yes, sir. Q. And how far did those marks indicate that the boy had been dragged? A. Not very far; perhaps a foot and a half." This testimony is not contradicted.

Can a motorman, under the doctrine of the last clear chance, be charged with negligence in not stopping his car sooner, if being surprised with a sudden shout of danger, he succeeds in realizing the danger and stopping the car before it moves more than from 10 to 14 feet?

In stating the case to the jury, the court gave a comprehensive instruction reciting many, if not all, of the allegations of the petition in regard to the different alleged grounds of negligence, which would, of course, be erroneous if any of the allegations of negligence were unsupported by the evidence, and following this the court gave instructions on each of the different allegations, submitting them all to the jury. It seems clear that the court also erred in submitting evidence that on some cars at different times the motorman had either maliciously or ignorantly manipulated the fender so that it would not work properly. There

was no evidence that the fender on this car had been so treated.

It is not necessary to discuss the amount of the verdict, although it is complained of as excessive, as it is not presumed that another jury will consider, or even know, the amount of this verdict.

For the various reasons stated, the judgment of the district court is reversed and the cause remanded.

REVERSED.

DEAN, J., dissenting separately.

It seems that, even though the evidence does conflict, there is sufficient under the rule to sustain the verdict. A few points will be noted.

Motorman Craig who drove the car testified on the part of defendant: "I set the brakes and the car stopped almost immediately. * * * I consider I had my car under perfect control, and had the slack up out of my chain because I was expecting to make a stop, and the car was drifting slowly out so that I made an easy stop." He said he thought the boy "belonged to the lady." He also said: "If I was looking out of the south window of my vestibule from where I stand in the vestibule I would never see a child as small as that, so that if he was within three feet of the corner of the car I could not see him until I knew he was there and looking extraordinary for him. * * * In order to stop a car like that moving, say at four miles an hour, I think a man would make a good stop if he made it between eight or twelve feet." Craig's testimony was discredited by three or four witnesses.

William Schafer testified on the part of plaintiff. He said the lady was at no time between the boy and the approaching car. "Q. Did the boy get on the track? * * * A. Yes, sir. Q. And was he on the track when he was struck? A. Yes, sir; on the first rail; that is the south rail." He said the boy was struck by "the curve of this flange" on the front of the car at a point over the south rail. I made an attempt

to get the boy after the car had struck him, but failed, and the next attempt I made, I caught the boy, but his foot was caught under the wheel. Q. And what did he do? A. Well, I could not pull the boy loose, and I was afraid of pulling his foot off, and so I hollered to the motorman * * * to give me slack, so that I could get the boy's foot loose." He testified that he stepped on the track about two feet in front of the car, and that it ran about ten or twelve feet before it stopped after it struck plaintiff. "Now, what did you do as soon as you got to the boy while he was lying there on the track? A. I picked him up. * * * I held the boy and hollered at the motorman, and waved and tried to attract his attention to get slack, or reverse the car. * * * Q. How far did it move while you had hold of the boy? A. About four feet." On the cross-examination he testified that he saw nothing to indicate that the boy accompanied the woman. That the fender did not drop is not denied.

R. G. Jeffers, called by plaintiff, testified: "Q. Well, where was he (plaintiff) with reference to the south rail? A. Well, he was just by the corner when the car got him. * * * Q. Well, how far did the car go after it struck him? A. About ten feet." He told about the car wheel pushing the boy's foot along the rail. "Q. Do you know when somebody hollered whether the motorman knew what had happened or not? A. Well, I think, yes, sir; he must have, because he went after that brake wheel pretty hard. * * * I seen him go through the motions of turning that wheel. * * * Q. Well, did you see him go around more than once? A. Yes, sir, he went around more than once I think." This evidence of Craig's unusual exertion at the wheel at a place where a slight turn, perhaps a quarter turn or less, would have stopped the car if he had it under control doubtless convinced the jury that he was grossly negligent.

It is obvious that Jeffers' testimony discredits Craig's version of "perfect control" of the car and of

having "the slack up" in his chain and of making "an easy stop." It may well be that, when Craig finally "set the brakes, the car stopped almost immediately." Evidently the wheels slid when the brake was applied because, as Schafer testified, "the wheel never ran over the foot; it just shoved the foot along the rail." If Craig, when he last saw plaintiff "out of the right-hand front vestibule window, and not out of the side window," as he testified, had used reasonable diligence in setting the brakes, it is not likely the boy would have been seriously injured. It is apparent from his own testimony that he saw the boy at the same time and place that Schafer and Jeffers saw him, namely, almost or quite on the south rail just before the car struck him. It was for the jury to determine whether the motorman was using "all reasonable diligence in watching for all * * * persons on foot, and especially children, either on the track, or moving toward it," as the ordinance provides.

R. C. Liston was called by plaintiff, and testified that he was about fifty feet away, and saw the boy struck by the front of the car "probably about two or three inches to the right of the track," and that the part of the car that struck him was about on a level with the boy's shoulders. From the marks on the rail he believed the boy's foot was dragged about a foot and a half.

Two former motormen testified in substance that without leaning forward an object on the ground can be seen by a motorman within two feet of the front of the car from the place where he stands in the vestibule. They also testified that the car in question when running four or five miles an hour could be stopped within four or five feet if, as Craig testified, the slack was taken up. Defendant's superintendent of transportation made a test of the car in question when it was running "as close as possible to four miles per hour." He testified: "I had the slack taken up in my chain. * * * I made four tests with car No. 243.

I stopped it from nine to ten and one-half feet." The distance on the outside of the car from the front center of the vestibule to the center of the front axle is eleven feet and ten inches. The front of the platform curves from the center to the corners so that the part that is directly over the track is a little over ten feet from the center of the front axle.

Nearly all of the testimony quoted in the majority opinion is that of Mr. Jeffers. Though called by plaintiff his testimony plainly shows that he was a hostile witness. His cross-examination by defendant as reproduced in the majority opinion appears in a series of leading questions and willing answers. This is mentioned merely because the case seems to be reversed on the ground that the testimony conflicts and that there is not sufficient evidence to support the verdict.

The court instructed the jury on the question of comparative negligence, thus invoking a rule in defendant's interest that is not applicable in a case involving a child under six years of age. 29 Cyc. 560. The jury being so instructed, it will be assumed that, if it found that plaintiff by any negligence of his own contributed to the happening of the accident, the rule was applied by the jury to the facts. Rev. St. 1913, sec. 7892.

Craig says that he saw the boy before the car struck him. The boy was struck by the car platform at a point almost immediately over the south rail. From that part of the platform to the center of the front wheel is a little more than ten feet. In view of the testimony of the former motormen that the car, under the circumstances attendant on this case, could have been stopped in from four to six feet, it seems difficult to escape the conclusion that, if the motorman had used reasonable diligence and care, he could have stopped the car before the wheel reached plaintiff. It would seem that there is sufficient evidence to support the verdict.

MORRISSEY, C. J., and ALDRICH, J., concur in this dissent.

STATE OF NEBRASKA, APPELLEE, V. JONES-HANSEN CADILLAC COMPANY, APPELLANT.

FILED MARCH 27, 1919. No. 20864.

1. **Intoxicating Liquors**: PROHIBITORY LAWS: CONSTRUCTION. The purpose of chapter 187, Laws 1917, is declared to be "for the immediate preservation of the public peace, health and safety." Section 58. Such legislation must be liberally construed in furtherance of the high moral purposes aimed at.
2. ———: ———: ———: FORFEITURES. In ascertaining the legislative will, it must be borne in mind that forfeitures are not favored in the law, and even this statute must not be construed to forfeit the property of innocent citizens, unless, from the statute in the light of its object and existing conditions, it is manifest that the legislature considered such forfeiture necessary for the "preservation of the public peace, health and safety."
3. ———: TRANSPORTATION: AUTOMOBILES: NUISANCE. An automobile used in the unlawful transportation of liquors is declared to be "a common nuisance and may be abated as in this act provided." Section 42.
4. **Nuisance**: ABATEMENT: INTOXICATING LIQUORS. Sections 28 to 33, relating to buildings or places where liquors are kept for sale or for some unlawful purpose, define a nuisance, and declare that such nuisance shall be abated by an action in equity, and that personal property which is condemned shall be sold and the "proceeds of the sale of the personal property * * * shall be applied in payment of the costs of the action and abatement, and the balance, if any, shall be paid to the defendant."
5. **Intoxicating Liquors**: TRANSPORTATION: NUISANCE. The provision in regard to the unlawful transportation of liquors also declares that a vehicle so used is a nuisance, and that such nuisance shall be abated as in this act provided.
6. ———: ———: CONFISCATION OF AUTOMOBILE: RIGHTS OF MORTGAGEE. Under these provisions, if an automobile so used is declared a nuisance, it must be disposed of as so provided, and the interest of the owner or mortgagee who has notice of such unlawful use thereof must be sold and the proceeds applied as provided in section 33 of the act.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Reversed.*

Kennedy, Holland, DeLacy & Horan, for appellant.

A. G. Cole, contra.

SEDGWICK, J.

The defendant company, a dealer in automobiles, sold an automobile to one Ford for $3,350. Ford paid $1,000 of this purchase price in cash, and gave the defendant a chattel mortgage on the automobile for the remaining $2,350, payable $250 per month. Soon afterwards Ford delivered the car to one Finsod, who used it in illegally transporting intoxicating liquors into this state. Within about two weeks after the automobile was sold by the defendant to Ford, Finsod was arrested for a violation of the prohibition laws, and the automobile was seized. Finsod pleaded guilty, and was fined by the county court of Cass county, and an order entered that the automobile "be sold at public sale on ten days' notice and the proceeds thereof paid into the school fund, as provided by law." The defendant had no notice that Ford intended to use or allow the automobile to be used unlawfully, or that it was being so used by Finsod, and claimed an interest in the automobile by virtue of the chattel mortgage. This action was then begun in the district court for Cass county by the county attorney in the name of the state, alleging that "said motor vehicle became a common nuisance when it was used for transportating (transporting) intoxicating liquor as above set forth and immediately became the absolute property of the plaintiff free and clear of all incumbrances of every nature and kind," and asking that "defendant's lien be canceled, and that plaintiff's title to said motor vehicle be quieted against the claim of the defendant, and for such other relief as to the court may seem proper." The defendant answered, alleging the lien, and that the mortgage was taken in good faith, and asked that "the court find that said notes and mortgages above stated constitute and are a first lien upon said

property, and order and direct the plaintiff above named to sell the said car subject to the lien of this defendant." The court found in favor of the plaintiff, canceled the defendant's mortgage, and decreed that the automobile be sold and the proceeds paid over to the school fund of the county, and the defendant has appealed.

After the adoption of the prohibitory amendment of the Constitution, the legislature enacted a comprehensive statute of 60 sections (Laws 1917, ch. 187), the purpose of which is to prevent the manufacture and sale of intoxicating liquors in this state, and to discourage, and as far as practicable prevent, the use of intoxicating liquors as a beverage, or for any purpose other than those specifically named in the statute, and to that end to prevent the unlawful importation of intoxicating liquors into this state.

The able and exhaustive briefs of counsel, which have been of great assistance to the court, are principally devoted to a discussion of the intention of the legislature and the meaning of the statute as to the question herein involved.

The purpose of this important statute is not only to prevent intoxication, but also to do away with the manufacture and sale of liquors for beverage purposes, and to discourage, and, as far as practicable, to prevent its use for any other purposes than those expressly permitted by the statute. Such legislation must be liberally construed in furtherance of the high moral purposes aimed at. Indeed, the statute so expressly provides: "The legislature hereby declares this act to be for the immediate preservation of the public peace, health and safety, and all its provisions shall be liberally construed for that purpose." Section 58.

But, in ascertaining the legislative will, it must be borne in mind that forfeitures are not favored in the law, and even this statute must not be construed to forfeit the property of innocent citizens, unless, from

the statute itself in the light of its object and existing conditions, it is manifest that the legislature considered such forfeiture necessary for the "preservation of the public peace, health and safety."

The statute deals with three different phases of the evil aimed at: First, the buildings or places where liquors are kept for sale or for some unlawful purpose; second, the liquors themselves, "together with the vessels containing it and any other personal property actually and directly used in connection therewith" (section 41); and, third, "the unlawful transportation of intoxicating liquors" (section 42). Sections 28-40 relate to "buildings, tenements, or places where intoxicating liquors are manufactured, sold, stored, kept for sale, or barter, or given away in violation of law, or where persons resort for purposes of drinking intoxicating liquor as a beverage, and all such intoxicating liquors, bottles, lockers, glasses, jugs, kegs, pumps, bars, containers, fixtures and other property used in maintaining such place, contrary to law or in violating any provisions of this act." These are "declared to be common nuisances, and may be penalized, abated, and enjoined as hereinafter provided." Section 28.

Section 41 considers the liquors themselves, and provides for a search of suspicious places under a warrant issued upon complaint of an officer or "credible resident freeholder;" and, if intoxicating liquor is found, it is to be seized, "together with the vessels containing it and any other personal property actually and directly used in connection therewith." If a person is found in possession of the liquors, "final judgment of conviction in such proceedings shall be in all cases a bar to any suits for the recovery of the same, or other personal property actually and directly used in connection therewith, or the value of the same, or for damages alleged to arise by reason of the seizing and destruction thereof, and, on conviction, judgment shall be entered directing that containers or other

receptacles hereinbefore mentioned, and other personal property actually and directly used in connection with the said violation, shall be ordered sold by the court at public sale on ten days' notice and the proceeds paid into the school fund as in case of fines and forfeitures."

The first part of section 42 continues the same subject, and provides that, if no one is found in possession, the officer "shall post in a conspicuous place on the building or premises a copy of his warrant, and take possession of the liquors and the containers or vessels containing the same, and other personal property used in connection therewith." If no one appears at the hearing, or if any one appears and is found guilty, the "liquors, containers and vessels mentioned hereinbefore shall be immediately destroyed."

The remainder of section 42 deals with transportation of liquors: "Any car, automobile, vehicle or means of transportation which shall be engaged in, or used for, the unlawful transportation of intoxicating liquors is hereby declared a common nuisance and may be abated as in this act provided. Any peace officer having probable cause to believe that such vehicle is being used for the unlawful transportation of intoxicating liquors, shall make search thereof with or without a warrant, and in every case where a search is made without a warrant the officer shall take the vehicle and the persons in charge thereof into custody and forthwith shall file a complaint and a warrant shall issue and the case thereafter shall proceed in all respects as is provided in this and the preceding sections."

The procedure in "this and the preceding sections" is not in all respects the same, and this presents one of the difficulties in ascertaining the meaning of the legislature.

The provision in regard to unlawful transportation of liquors is very brief. The intention of the legislature as to the liability to forfeiture, and manner of en-

forcing that liability, must be derived from its reference to "preceding sections."

The fact that the provision as to the seizure of liquors and any other personal property actually and directly used in connection therewith and the provision as to transportation of liquors are found in the same section is an indication that the procedure is to be the same in both. But the force of this suggestion is weakened by the fact that there are inconsistent provisions for the disposition of the articles seized in connection with the liquors kept unlawfully where no nuisance is declared. In one place they are required to be sold and the proceeds paid into the school fund, and in another place the provision is that such articles shall be "immediately destroyed."

An automobile used in the unlawful transportation of liquors is declared to be "a common nuisance and may be abated as in this act provided." That part of the act that provides specifically how a nuisance is to be abated is section 28 and the following sections relating to the buildings or places where liquors are kept for sale or for some unlawful purpose, etc. Section 29 provides: "Whenever a nuisance is kept, maintained or exists, as defined in this act," proceedings shall be begun in equity, as was done in this case. And section 32 provides how a nuisance shall be abated: "If the existence of a nuisance be established in an action as provided in this act, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, * * * and shall direct that all intoxicating liquors and the receptacles in which said liquors are kept with unlawful intent shall be seized and held subject to the order of the court. * * * For removing and selling movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling property on execution." The next section (section 33) provides: "The proceeds of the sale of the personal

property, as provided in the preceding section, shall be applied in payment of the costs of the action and abatement, and the balance, if any, shall be paid to the defendant."

These provisions for disposing of personal property found in buildings which are condemned because intoxicating liquors are unlawfully sold or disposed of therein, and the provisions in regard to the unlawful transportation of such liquors, are the only provisions declaring a nuisance and providing how it shall be abated. The bars, counters, furniture and like property are apparently considered of too much importance and value to be forfeited to the state, as are the "containers or vessels containing the same, and other personal property used in connection" with the liquors unlawfully kept, when the building and more valuable articles are not condemned. That is, if no unlawful trade or business is carried on in the place where the liquors are kept, the containers and other articles in which the liquors are stored are of comparatively little value, and are at once forfeited; but in running a secret saloon, or trade in liquors, the building and furniture, being of more consequence, are declared to be a nuisance, and the abatement is more formal and the values differently disposed of. An automobile or car may (as in this case) be of more value than some buildings so used, and it is not unreasonable to treat such property accordingly. In such case, the owner, which would include a mortgagee, is not to have his property rights affected by the proceedings, except as stated in connection with the abatement of a nuisance under the act. "If the owner appears and pays all costs of the proceedings and files a bond with sureties to be approved by the clerk of the district court in an amount to be ascertained by the court, or, in vacation by the judge or clerk of the court, conditioned that he will immediately abate said nuisance," it may release the building, if a building is involved in the proceedings,

but "the release of the property under the provisions of this section shall not release it from any judgment, lien, penalty or liability to which it may be subject by law." Section 34. When a nuisance is abated under the act, the penalty or liability to which personal property is subject is plainly specified in sections 32 and 33.

The statute provides for making chattel mortgages a matter of public record, and contemplates that, when properly executed and filed for record, subsequent interests acquired therein shall be subject to the mortgagee's lien. If the forfeiture of the property extends under all circumstances to the mortgagee's title, hen this statute is so far a modification of the chattel mortgage statute. If it was intended to forfeit the interest of an innocent mortgagee, instead of declaring the automobile a nuisance and subjecting it only to the cost of abatement, as in other cases of property of such value, it seems probable that the chattel mortgage statute would have been mentioned and some further provision made with reference thereto. Some provision might have been inserted requiring the mortgagee to take certain specified precautions against the use of the property in violation of the act, or providing a severe penalty for using mortgaged property for such purposes without the knowledge of the mortgagee, or some similar additional provision.

Construing the statute as a whole, we cannot find that the legislature considered that it was necessary to forfeit the property of an innocent party, in the amount of $2,350, for the "preservation of the public peace, health and safety."

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

REVERSED.

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

ALDRICH, J., dissenting.

This opinion lays great stress about the courts not favoring forfeiture. That is true; but there is not an instance on record in a case like the one at bar where the question of police regulation is the issue, when it views with disfavor this general provision of police power and forfeiture. Courts do not under any circumstances for a moment stop to parley or listen to the technicalities of the casualist when the issue is to stop pestilence and famine, and to promote good health and to prevent contagious disease. Under such circumstances the doctrine of forfeiture is not out of place, or a mere empty jargon, and to object to it, in a case like the one at bar, is a subterfuge which repeals a statute enacted in behalf of good health and good morals.

When property is employed in a business that is productive of crime and debauchery, it is subject to this despised doctrine of forfeiture. This is the policy recognized and pursued by our federal government in its revenue laws and in all of its operations against nuisances, such as the illicit traffic in liquor. 22 Cyc. 1643. The law for controlling the distillery, for frauds, is constitutional. *United States v. McKinley*, 4 Brewst. (Pa.) 246; *United States v. Distillery*, 25 Fed. Cas. 866. No. 14965. Also it is federal law as well that forfeiture of spirits at a distillery fraudulently operated extends to the interest of the mortgagee, although ignorant of the frauds. 22 Cyc. 1644, and *United States v. Seven Barrels of Distilled Oil*, 27 Fed. Cas. 1025. No. 16253.

When this majority opinion railed at the policy of forfeiture resorted to by the government, it simply is criticising a policy adopted by our government more than a century ago, and adopted also by every state in the Union to promote better morals, better health, and to keep in check the lawless element in every community in this entire country. This same policy, so

long having the approval of our federal government, has been adopted by the state government of Nebraska, and to interfere with it in a situation like the case at bar is certainly bad public policy, for it turns the automobile loose upon every community in this state to be an instrument of law breakers, as is desired in the illicit traffic of liquor. This places a premium upon lawlessness. Better protect morals and health than an automobile dealer who is selling his machine on credit to criminals as an agency to debauch and promulgate crime.

This Nebraska statute, as found in chapter 187, Laws 1917, is declared to be for the immediate preservation of public peace, health and safety. Thus this chapter is brought squarely under the head of police regulation, and was enacted for the purpose of aiding and abetting that feature of the law in this state; and for one to interpret the object and purpose of this law so as to make it nugatory and to abort legislative intent is assuming a responsibility which the court surely ought to hesitate to do. The general purpose, aim and object of this chapter 187 is a mathematical demonstration of the lofty purpose of legislative intent, and the despised doctrine of forfeiture is the government agency usually employed in cases of this kind to protect society, to promote good morals and general sobriety everywhere. In a situation like the case at bar, to hide behind forfeiture and refuse to give the legislature an honest and intelligent intent is to defy decency, to aid and abet lawbreakers, and to open wide the doors to bootleggers, and to put a premium upon lawlessness everywhere, and trample under foot the intention of the legislature that enacted a law in good faith intended to make a general nuisance out of an automobile when used in unlawful transportation of liquor.

The opinion argues that, to take this automobile and confiscate it, and thus deprive an innocent mortgagee

of his holdings, is wrong and should not have the sanction of the courts. The enactment of this liquor statute in Nebraska, which provides for declaring an automobile engaged in the illicit traffic of liquor as being a nuisance, and for confiscating and selling it, the proceeds of the sale to be used in first paying costs, and the remainder turned into the school fund, has the approval of federal law, as the revenue policy of the United States demonstrates. This is an action in a sense *in rem* and proceeds against the automobile, declaring it a public nuisance, and abates it by ordering it sold. This proceeding is not against the defendant personally, but to determine the ownership of the automobile for the purpose of giving a good title, when the state sells it, to abate a nuisance, and to promote good health and morals.

It is a policy of civil government to protect society against the lecherous, criminal influence of the outlaw liquor traffic, and the state of Nebraska, proceeding along statutory lines to do this, should not, in our opinion, be molested or prevented from so doing. It seems to us this majority opinion should have taken into consideration such cases as are found in *United States v. One Black Horse,* 129 Fed. 167. This is a case where a horse and buggy was hired by a liveryman to a man who used them in smuggling liquor across a state line, and just as in the case at bar, without the knowledge of the mortgagee, and also in that case, as in the case at bar, the issue was to evade the law under sanction of the courts, and afford protection to the innocent mortgagee, but in that case, as in this one, the court ought to have said: "The redress of the innocent claimant (as in the case of the innocent mortgagee) is from the wrongdoer himself or by application to the officers of the government usually vested with authority to remit forfeiture." *United States v. Two Bay Mules,* 36 Fed. 84; 22 Cyc. 1681. This wrongdoer had a credit of $2,350 to buy an automobile to transport liquor from

a wet into a dry state, so these defendants were not without protection.

Viewed in the light of federal and state authority, the legal conclusion of all this is that the unlawful acts of the owner of this automobile finds the mortgagee, the defendant herein, just the same as if he had committed the crime himself. *Dobbins Distillery v. United States,* 96 U. S. 395.

Courts have said: "Every owner of property holds title thereto subject to the authority of the state to so regulate its use and enjoyment as to prevent and abate public nuisances, and the enforcement of that authority works no legal wrong." *City of Waterloo v. Waterloo, C. F. & N. R. Co.,* 149 Ia. 129.

When an automobile is used illegally to transport liquor from wet into dry territory, it is a violation, not only of state law, but is in defiance of federal statute, and this majority opinion refuses, not only to give effect to this state law, but turns down federal law upon this same subject and enacted for the same purpose that this law, found in chapter 187, Laws 1917, was enacted to protect health and good morals. It seems to us that it is the duty of this court to recognize this federal law and not turn it down on some technical construction. *Mugler v. Kansas,* 123 U. S. 623; *New Orleans Gas Co. v. Louisiana Light Co.,* 115 U. S. 650.

In the interpretation of the provisions of the statute, a court should take them to mean what they say, and that the legislature intended to say what it did. If in making an interpretation we find the law susceptible of two meanings, one which carries out what the law was enacted to cure, and the other which makes the law inadequate to do what was desired to be accomplished, then the rule is to give it the meaning that accomplishes the original purpose. "The fallacy of the argument lies in part in disregarding the distinction between a proceeding to abate a nuisance, which looks

only to the property that in the use made of it constitutes the nuisance, and a proceeding to punish an offender for the crime of maintaining a nuisance. These two proceedings are entirely unlike. The latter is conducted under the provisions of the criminal law, and deals only with the person who has violated the law. The former is governed by the rules which relate to property, and its only connection with persons is through the property in which they may be interested. That which is declared by a valid statute to be a nuisance is deemed in law to be a nuisance in fact, and should be dealt with as such. The people, speaking through their representatives, have proclaimed it to be offensive and injurious to the public, and the law will not tolerate it. The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance." *Carleton v. Rugg,* 149 Mass. 550.

These two proceedings are entirely unlike. We have had many statutes enacted in the name of police regulation. Among the many prominent and recent ones, we find an apt discussion of this court in *State v. Fanning,* 97 Neb. 224, and it is especially in point because it is written by the author of the opinion from which we are dissenting. The provisions of our prohibition law declaring automobiles a nuisance when used in the transportation of liquor are not unlike our game law, which provides for the forfeiture of fish nets and their destruction. It certainly is unfortunate for the people of Nebraska that the author of the opinion in *State v. Fanning, supra,* did not have the same light and the same inspiration when he wrote the opinion in the *State of Nebraska v. Jones-Hansen Cadillac Co.*

We do not care to pursue this matter further, believing that we have pointed out the fallacy of the majority opinion and the errors adopted, and that the legislature still has time to pass a law that will soon remedy the errors of this majority opinion. We be-

lieve it is erroneous and contrary to law, and is plainly wrong from the standpoint of public policy. Wrong, because it gives the wrong construction to legislative intent, and further wrong because it is in square conflict with the United States statute upon the same subject and enacted for the same purpose, and therefore is against the policy of the federal government and of good morals; and we feel it incumbent upon us to do our little bit in pointing out the errors we believe the court has fallen into. This opinion from the standpoint of law, good morals, history, fact, and precedent should have upheld Cass county and the state of Nebraska.

We now face this situation in enforcing the liquor law. The owner of an automobile can use his machine to transport liquor into Nebraska with impunity. All he has to do is to have some one of his gang produce a chattel mortgage, and under the authority of the Nebraska supreme court this selfsame mortgagee can claim his machine while it is being used to transport liquor in violation of law. And because of this situation, and because when an automobile is so used it is a nuisance and should be abated as the statute provides by invoking the law of forfeiture, for these reasons, and for other points in this dissenting opinion, I cannot concur in the opinion as adopted.

FRANCIS M. W. PRICE ET AL., APPELLANTS, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED MARCH 27, 1919. No. 20208.

1. **Municipal Corporations:** PAVING: INTERSECTION. Under section 4524, Rev. St. 1913, the term "intersections" as applied to streets means that space occupied by two streets at the point where they cross each other.
2. ———: ———: PETITION. When a petition to pave a certain street by its terms refers to the number of a paving district created by ordinance, such petition will be held to relate to the paving district as created.

3. ———: BOARD OF EQUALIZATION: NOTICE. "A notice of the sitting of the city council as a board of equalization for the purpose of equalizing a proposed special assessment, correcting errors, hearing complaints, etc., is sufficient if it comply substantially with the provisions of the statute requiring such notice." *Medland v. Linton*, 60 Neb. 249.

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

W. T. Thompson and *F. M. W. Price*, for appellants.

C. Petrus Peterson and *Charles R. Wilke, contra.*

DEAN, J.

Plaintiffs sought to enjoin the city of Lincoln from proceeding to collect a paving assessment levied upon certain city real estate owned by them. The suit was dismissed, and plaintiffs appealed.

The record consists of the pleadings, the court's special findings of fact and conclusions of law, and the judgment. A bill of exceptions has not been filed. Plaintiffs concede that the findings of fact are "warranted by the evidence," but they except to the conclusions of law.

Ordinance No. 873, creating paving district No. 190, provides generally, among other things, that the district "shall include that part of Washington street from the west line of Seventh street to the east line of Sixteenth street." The ordinance then describes by metes and bounds the property in the district subject to assessment, including that of plaintiffs, and continues: "Grading to be from lot line to lot line. The width of the roadway to be paved in said district shall be 30 feet, and the cost of the paving the same including the cost of paving the intersections shall be assessed against the property in said district benefitted in proportion to the benefits not exceeding the cost of paving."

Under the ordinance and pursuant to the petition, Washington street, that extends east and west, was

paved from the east line of Seventh street to the east line of Sixteenth street, and, as pointed out in plaintiffs' brief, "the city council caused to be guttered, curbed and paved a thirty-foot roadway on each side of the thirty-foot roadway on Washington street, on Eighth, Ninth, Twelfth, Thirteenth, Fourteenth and Sixteenth streets from lot line to lot line and on Tenth street a roadway paved forty feet wide from lot line to lot line, and that the cost of this extra work wa $2,881.72."

The argument of plaintiffs is that the ordinance contemplates a continuous pavement from Seventh to Sixteenth street of a uniform width of thirty feet. We are unable to so construe the language of the ordinance. The term "intersections," as applied to streets, is defined as "the space occupied by two streets at the point where they cross each other." *City of Crowley v. Police Jury of Acadia Parish,* 138 La. 487. Under plaintiffs' construction of the ordinance the words, "including the cost of paving the intersections," would be meaningless.

Plaintiffs say the petition is insufficient, and argue that "there is a material variance between the ordinance creating and defining the district and the petition praying for the work." The validity of the ordinance is conceded. The ordinance provides "that paving district No. 190" shall extend "from the west line of Seventh street to the east line of Sixteenth street." The petition prays that Washington street be paved "from Seventh to Sixteenth street in paving district No. 190." The language of the petition adopts the boundaries of paving district No. 190. It is obvious from an examination of the record that in this respect plaintiffs have no just cause for complaint.

Plaintiffs say that the notice of the sitting of the council as a board of equalization is invalid because it was a blanket notice and designates, not only district No. 190, but five or six other districts as well. Inas-

much as paving district No. 196 is the first one named in the notice, we do not see how plaintiffs were prejudiced. In support of their contention they cite *Ambler v. Patterson,* 80 Neb. 570, 575, and *Patterson v. Reiter,* 91 Neb. 56. These cases do not seem to be in point. The blanket notices there referred to were with respect to suits under the "Scavenger Act," and it was held that, as each tract involved a separate suit, the notices should therefore be separate. The notice in the present case seems substantially to comply with the requirements of section 4535, Rev. St. 1913. *Medland v. Linton,* 60 Neb. 249.

Among other things, the court found that plaintiffs, having failed to appeal from the action of the board of equalization, were therefore estopped from maintaining this action and from attacking collaterally the proceeding therein. It is not necessary to decide this point because of the view we have taken upon the merits.

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

AFFIRMED.

LETTON and CORNISH, JJ., not sitting.

PETER C. ENGAARD, APPELLANT, V. CHARLES P. SCHMIDT, APPELLEE.

FILED MARCH 27, 1919. No. 20402.

Homestead: LOAN: LIEN. Where a married man borrowed money and at the time informed the lender that he intended to use a part or all of it to pay for a homestead previously purchased and conveyed, and the money is actually so used, such fact is not sufficient, when standing alone, to entitle the lender to a lien for the purchase price.

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

M. D. King, for appellant.

J. L. McPheely, contra.

DEAN, J.

This is an action to foreclose a real estate mortgage on three town lots in Minden. Defendant is a married man. His wife did not join in the execution of the mortgage. The court granted a decree as to lot 1, because it was not a part of defendant's homestead. From that part of the decree denying relief as to lots 2 and 3 on the ground that such lots with their appurtenances constitute defendant's homestead, plaintiff appealed.

The homestead was of less value than $2,000. The two lots in question here were apparently bought by defendant and deeds delivered in March and July, 1905. He borrowed money from plaintiff, a part whereof, namely $80, he paid to the vendor for the lots in February and September, 1906. The note and mortgage sued on bear date of November 17, 1906, and are in the principal sum of $200.

There is an entire absence of proof of an agreement or understanding between the parties that plaintiff would use the money to pay for the lots. So far as the record discloses, defendant was at liberty to use the money for any purpose that he chose. It was shown that he did apply some of the money to other purposes. The transaction appears to have been only a general loan. In such case the weight of authority seems to be that in the absence of agreement the lender does not stand in the place of the vendor so as to be entitled to a vendor's lien on the homestead of the borrower. 13 R. C. L. 604, sec. 67. The fact that a married man borrowed money and told the lender at the time that he intended to use the money, or a part of it, to pay for a homestead previously purchased, and the money is actually used for that purpose, is not sufficient, when standing alone, to entitle

the lender to a lien for the purchase price. In the present case the parties did not stand in the relation of vendor and purchaser, nor was a vendor's or other lien created. The debt was created and conveyances delivered long before the loan was made. Plaintiff did not pay the debt at the instance of the debtor, but merely loaned money directly to him without agreement respecting the use to which it was to be applied. *Rodman v. Sanders,* 44 Ark. 504; *Griffin v. Proctor's Adm'r,* 14 Bush (Ky.) 571; *Carey v. Boyle,* 53 Wis. 574, 581.

Plaintiff not having acquired a vendor's lien upon defendant's premises, and defendant's wife not having joined in the execution of the mortgage upon the homestead, the property herein claimed as a homestead is not therefore subject to execution or forced sale in satisfaction of plaintiff's judgment. Rev. St. 1913, sec. 3078.

We do not find reversible error. The judgment is therefore in all things

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

FRANK O. JOHNSON, APPELLEE, V. MARYLAND CASUALTY COMPANY, APPELLANT.

FILED MARCH 27, 1919. No. 20432.

1. **Insurance:** LIABILITY INSURANCE: SUPERSEDEAS BOND. A "contractors' employers' policy," insuring an employer against loss arising from personal injury to employees, which stipulates that the insurer "will, at its own costs, * * * investigate all accidents and defend all suits even if groundless, of which notices are given to it," obligates the insurer on appeal from a judgment recovered by the employee against the employer to protect such employer pending the appeal by furnishing a supersedeas bond.
2. ———: ———. In an action on a contractors' employers' bond, if the insurer appeals and does not furnish a supersedeas bond, the insured may pay the judgment and maintain an action against

the insurer for an amount not exceeding the liability stipulated in the policy.

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

Montgomery, Hall & Young, for appellant.

Lambert, Shotwell & Shotwell, contra.

DEAN, J.

Plaintiff is a contractor engaged in wrecking buildings. He recovered a judgment against the Maryland Casualty Company, hereinafter called the company, on a "contractors' employers' policy" for $6,215.21, and an additional sum of $300, as an attorney's fee taxed as costs. Defendant appealed.

P. J. Culver, an employee of plaintiff, recovered a judgment against him for $5,000 for personal injuries sustained while engaged as a workman in wrecking the old courthouse at Omaha. That judgment is the basis of the present case. The company having been notified, as the policy provided, took charge of the trial of the case in the district court. When the judgment was rendered there against this plaintiff, the company informed him that it intended to appeal the case to this court, but that it would not furnish a supersedeas bond. They wrote him that they had "no doubt but that the plaintiff (Culver) will now cause execution to issue, and levy it upon your property if any possible levy can be made, and so, in order to have a review of the judgment, it will be necessary to furnish a bond in double the judgment and costs, which would be about $10,500 or $11,000, to be absolutely on the safe side. * * * Kindly let me hear from you at an early date relative to the supersedeas bond, and oblige."

On the day following the receipt of this letter plaintiff notified the company, in substance, that he would not furnish a supersedeas bond. Thereafter the company appealed, but, having failed to furnish a bond,

Culver, the judgment creditor, while the case was pending in this court, caused two or more executions to issue, and finally levied on certain property of plaintiff. To protect his property from forced sale, and to preserve his credit generally, plaintiff settled the judgment by giving Culver his promissory note for the full amount of the recovery. Shortly thereafter plaintiff and Culver, without notice to the company, by stipulation, caused the appeal to this court to be dismissed. On refusal of defendant to pay plaintiff the amount of the Culver judgment with interest and costs, this action was commenced.

The policy contains these provisions that are material to this inquiry: "The company's liability for loss from an accident resulting in bodily injuries, including death resulting therefrom, to one person is limited to five thousand dollars ($5,000). * * * In addition to these limits the company will, at its own cost (court costs, and all interest accruing after entry of judgment upon such part thereof as shall not be in excess of the limits of the company's liability as hereinbefore expressed, being considered part thereof) investigate all accidents and defend all suits even if groundless, of which notices are given to it as hereinafter required. unless the company shall elect to settle the claim or suit. * * * The company is not responsible for any settlement made, or any expenses incurred by the assured, unless such settlements or expenditures are first specifically authorized in writing by the company."

Defendant argues that it is not liable because the appeal of the Culver case was dismissed by stipulation without the consent of the company. Defendant's argument is not tenable. The liability of the company under the policy became absolute when the time expired for filing a supersedeas bond. Hence notice was not required. The Culver judgment was a source of great embarassment to plaintiff, in that it prevented him from obtaining contracts, his prospective patrons informing

him that they would not give him employment while the Culver judgment remained unsatisfied because they did not want to be annoyed by garnishment proceedings and the like.

A fair construction of the policy, which, if ambiguous, we are required to construe most strongly against the company, leads us to conclude that the judgment must be affirmed. Clearly it was not incumbent on plaintiff to supercede the Culver judgment. It is equally clear that defendant was obligated by the terms of the policy to satisfy the judgment, or, if it desired to appeal, to furnish a supersedeas bond to the end that plaintiff's property might be protected from execution and his credit remain unimpaired. The premium on the policy was the consideration that plaintiff paid for this protection. Defendant's contract with plaintiff, as expressed in the policy, that it would "at its own cost * * * investigate all accidents and defend all suits" was not complied with by defendant when it refused to furnish a supersedeas bond. Plaintiff was left naked to his enemies while the company speculated on the result of an appeal. The language of the policy does not prevent an appeal by the company, but it seems clear to us that it owed to plaintiff the protection afforded by a supersedeas bond while such appeal was pending. The company having failed to supersede the Culver judgment, error cannot be predicated on plaintiff's settlement and stipulation with Culver to dismiss the appeal without notice. *Upton Cold Storage Co. v. Pacific Coast Casualty Co.*, 147 N. Y. Supp. 765; *Rochester Mining Co. v. Maryland Casualty Co.*, 143 Mo. App. 555. In the present case the recovery did not exceed the amount stipulated in the policy.

Finding no reversible error, the judgment is

AFFIRMED.

CORNISH, J., not sitting.

MINERVA OVERLANDER ET AL., APPELLANTS, V. PETER WARE ET AL., APPELLANTS: JOHN L. CLARK, APPELLEE.

FILED MARCH 27, 1919. No. 20778.

Judgment: SUPPLEMENTAL PROCEEDINGS: ISSUES. In supplemental proceedings upon a judgment, the parties to the action cannot relitigate the findings upon which the original judgment is based.

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

Byron G. Burbank, for appellants.

Alvin F. Johnson, contra.

DEAN, J.

This proceeding was instituted to obtain a supplemental decree in the case of *Overlander v. Ware,* 102 Neb. 216, to which reference is had for the main facts, which need not be repeated here. In this proceeding John L. Clark, hereinafter called appellee, prevailed in the district court, and all parties adversely interested, hereinafter called appellants, have appealed.

In their application for a supplemental decree, appellants asked an accounting for the rents, issues and profits of the land involved during the time the case was pending in this court on appeal. Appellants say in their brief: "This appeal involves the correct method of accounting by Clark for the 120 acres for the years 1916 and 1917." They also argue that appellee was a cotenant of appellants, and that: "The court erred in not requiring the appellee, John L. Clark, to account to the appellants for the rents, issues and profits received by him from the 120 acres of land, in the form of the cash received by him and shares of the crops raised by tenants under him and sold by him and received by him and for the fair market value of the landlord's share of the corn raised by the said John L. Clark on the land. * * * The court erred in re-

quiring the appellee, John L. Clark, to account for only the reasonable rental value of the land."

The decree in the main case, in which Clark was defendant and the appellants were either plaintiffs or cross-petitioners, provided that Clark should pay for the use of the land from the time that he came into its possession until the rendition of the decree, namely, for the years 1914 and 1915, on a cash rental basis approximating $3 an acre. The decree in the main case also makes provision that if Clark appealed to the supreme court he would "pay the value of the use and occupation" of the land involved herein during the pendency of such appeal. To the same effect was the condition of the supersedeas bond that was executed by Clark on appeal. To the foregoing provisions in the decree and supersedeas bond respecting a cash rental basis of settlement, appellants took no exception, and, the judgment of the district court having been affirmed by this court, it seems to us that the judgment is final, and that appellants' argument for a settlement on a different basis, namely, a tenant's share basis while the case was pending in this court on appeal, is not tenable. The issue in question has been determined by the decree of the district court in the main case and by its affirmance here. Appellants, with knowledge of the facts, and in the absence of mistake or of fraud having acquiesced in the judgment, cannot now in a supplemental proceeding in the same case, where the parties and the issues are the same, take a different position that is prejudicial to the adverse party. It follows that the basis of settlement that appears in the decree is binding on all parties alike, and all are alike estopped from substituting a different basis. 16 Cyc. 796-799; 10 R. C. L. 702, sec. 29.

We find no reversible error. The judgment is

AFFIRMED.

CORNISH, J., not sitting.

HARRY E. WOOD, APPELLEE, V. ADVANCE RUMLEY THRESHER COMPANY, APPELLANT.

FILED MARCH 27, 1919. No. 20269.

Appeal: REPLEVIN: EVIDENCE: SUFFICIENCY. In a trial before a jury where the finding is based on conflicting evidence, the verdict will not be disturbed unless clearly wrong. The evidence examined, and *held* sufficient to support the verdict of the jury.

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

J. L. McPheely, for appellant.

M. D. King and *F. L. Carrico, contra.*

ALDRICH, J.

This cause of action is one in replevin for the possession of a threshing outfit. Plaintiff purchased a threshing outfit from the defendant and gave a mortgage on same to secure payment of three promissory notes, to wit, one dated August 1, 1914, for $250, due August 1, 1915, one for $400, due September 1, 1915, and one for $316, due September 1, 1916, and, in addition to securing payment on the machine, plaintiff assigned and gave permission to collectors of the defendant to take over threshing bills and to apply the same on the notes. Neither plaintiff nor defendant, as the record discloses, kept any book accounts of the payments that were made on the notes in this way. At the close of the threshing season of 1916, defendant took over the threshing outfit and proceeded to advertise it for sale. The plaintiff then commenced this action in replevin.

At the trial of the case, defendant introduced three notes (above mentioned) in evidence which bore indorsements amounting to only $156.99, claiming there was due it $939.20 instead of $97.14, found to be defendant's special interest in the threshing outfit. The defendant claimed

the burden of proof in support of payment was upon the plaintiff. The plaintiff assumed this burden and undertook to prove payment, and the record discloses this proof was unsatisfactory and not at all clear because his statement as to payments was only general: For instance, he was asked the question as to how much he had paid on the $400 note. His reply was: "I don't know for sure if I have or not." On the other hand, the showing and the evidence on behalf of the defendant was just as haphazard, careless, and indefinite, and unsatisfactory as was that of the plaintiff. There is also evidence in the record that there were other notes because of a former transaction for another threshing outfit from this same company. There is another instance in this case which may have helped the jury to disbelieve the defendant and to believe the plaintiff. A witness by the name of Thorp swore he found these notes sued upon in the files of the defendant company's office at Lincoln; and he also swore that he did not take possession of defendant's office in Lincoln until September 1, 1916, and that nothing had been paid on the notes since he had taken charge of the business. It is evident, therefore, that the defendant knew but little, if anything, and placed but little value upon these notes, and knew scarcely anything about the entire matter, and its showing is just as unsatisfactory in the record as is that of appellee. There was no effort at all made to show that anything was done by the agents of the appellant to collect these notes sued upon. Neither was there any effort made to show that any payment was made on these notes other than those shown by indorsement heretofore referred to. As the record stands, the plaintiff had sworn as to the manner in which he had paid the $1,000. Then it was incumbent upon the defendant and it ought to have met that testimony by showing through its agents that such payments had never been made.

The entire issue resolves itself down to the square proposition: Should we disturb the verdict of a jury based upon a square conflict of evidence, where the weight of the evidence preponderates in favor of plaintiff? This court has many times held that, where the issue is clearly one of a finding of fact, the verdict will not be disturbed unless clearly wrong. As there was no error in the instructions, and the verdict being based squarely upon the conflict of evidence, we adhere to the former holding of this court.

The judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

JOSHUA MUNCASTER, APPELLANT, V. GRAHAM ICE CREAM COMPANY ET AL., APPELLEES.

FILED MARCH 27, 1919. No. 20421.

Master and Servant: WORKMEN'S COMPENSATION ACT: ACTION AGAINST THIRD PARTY. Under the provisions of section 3659, Rev. St. 1913, an employee has the right to sue a third party for damages, even though his employer has settled with the employee in accordance with the provisions of the workmen's compensation act, if he make his employer a party to the action.

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

Gray & Brumbaugh, for appellant.

J. E. von Dorn, contra.

ALDRICH, J.

Plaintiff commenced an action against defendant to recover damages for personal injuries received growing out of the alleged negligence of the Graham Ice Cream Company. Plaintiff was an employee of the Baker Ice Machine Company, who had contracted to install some

machinery for the Graham Ice Cream Company. The Ice Machine Company settled with the plaintiff under the provisions of the workmen's compensation act, and refused to proceed further and to commence an action for damages against the Graham Ice Cream Company on behalf of the plaintiff. So plaintiff, as is his right under the statute, commenced an action against both defendants to recover damages.

Now the issue is: Can the plaintiff maintain this action under the provisions of section 3659, Rev. St. 1913? It is claimed that plaintiff suffered his personal injuries and damages growing out of the carelessness and negligence of the Graham Ice Cream Company, which is a third party to the provisions of the workmen's compensation act. In other words, after having received compensation under this act, does that bar plaintiff from commencing an independent action in damages against the Graham Ice Cream Company? Under the provisions of section 3659, the legislature intended, beyond question, to give to the injured employee a right of action where the injury complained of grew out of carelessness or negligence of a third party, and we hold that plaintiff has the right to maintain this cause of action under section 3659, and is bound under its provisions to strictly follow the procedure provided for, and, in case of recovery of damages, the funds must be distributed in the matter of expense, etc., under the provisions of this act. Evidently the intent of the legislature was not to limit an employee to the recovery only of the workmen's compensation act; but when, as a matter of justice, the employee was entitled to recover a greater compensation than is provided for in the act, then he had the right to proceed under the provisions of section 3659, and to recover as much as a jury would warrant for his damages and injuries, and, after so recovering, to deduct therefrom the necessary

expenses which his employer had been to in paying out under the provisions of the act. In other words, the plain provisions of this act must be carefully and accurately followed in all of its provisions. It is valid, and the plaintiff is entitled to whatever provisions of compensation there may be growing out of this act. The Baker Ice Machine Company is simply subrogated to the position of the plaintiff herein, and in case the Baker Ice Machine Company, after having settled with the employee under the workmen's compensation act, refuses to go ahead any further, and washes its hands of the whole proceeding, then plaintiff should not be prevented from proceeding under the provisions of this act, as he has done in this case.

This case, therefore, is reversed and remanded for further proceedings.

REVERSED.

CORNISH, J., not sitting.

LETTON, J., concurring.

I concur for a different reason. My view is that plaintiff's right of action, if any, against the Graham Ice Cream Company, a third person with whom he had no contractual relations, is not given by the workmen's compensation act, and that section 3659, Rev. St., 1913, allowing the subrogation of the employer, is merely to provide for the reimbursement of the employer for payments made by him to the injured person, under the provisions of that act.

If the employer, after paying the amount of the statutory compensation, refuses or neglects to bring his action against the negligent third party, this does not deprive the injured person of his right of action against the wrongdoer, but he should, as in this action, make his employer and the alleged wrongdoer both parties to the action. In such case, he is entitled to recover his damages from the third party, less the compensation

paid, as provided in section 3659, and the employer, if he asks for the relief, will be entitled to a judgment equal to the amount of the compensation he has paid. *Smale v. Wrought Washer Mfg. Co.*, 160 Wis. 331; *Otis Elevator Co. v. Miller & Paine*, 240 Fed. 376.

This section should be construed, not to defeat the injured person, but to do justice between him and his employer.

SEDGWICK, J., agrees with this concurrence.

JAMES C. KINSLER, APPELLANT, V. CASUALTY COMPANY OF AMERICA, APPELLEE: JESSE S. PHILLIPS, INTERVENER, APPELLEE.

FILED MARCH 27, 1919. No. 20644.

1. **Insurance:** NEW YORK CORPORATION: INSOLVENCY: ADMINISTRATION OF ASSETS. In case of the insolvency of an insurance corporation organized under the statutes of New York, the intervener, who is the insurance commissioner of that state, has the right by virtue of the insurance laws of that state, and it is his duty, to take charge of all the property and credits of the insolvent corporation in this state, and to administer them in behalf of its creditors.
2. ———: ———: ———. By virtue of the chartered rights of appellee which Nebraska recognized and accepted, this intervener has the title to all the property and credits of the defendant in Nebraska as well as New York, for the purpose of settling with creditors.
3. **Corporations:** INSOLVENCY: ASSETS: ADMINISTRATION BY STATE OFFICER. When a legislature provides for a state officer to administer the affairs of a corporation, and to settle with its creditors in case it becomes insolvent, this condition is a charter right of the corporation, and this right follows a corporation wherever it goes.

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

James C. Kinsler, pro se.

Morsman, Maxwell & Crossman and *Crane, Boucher & Sternberg, contra.*

ALDRICH, J.

The appellee herein is a foreign corporation, with its principal place of business in the city of New York, in the state of New York. The appellant is a resident of the city of Omaha, and he begins this action to recover an attorney fee in the sum of $654.73, and attaches and garnishees. One Jesse S. Phillips, insurance commissioner of the state of New York, intervened on the the 4th day of May, 1917, by virtue of section 63 of the general statutes on insurance in the state of New York. The court found for the intervener, and plaintiff appeals.

It is admitted that appellant herein performed the services for which he brings this cause of action. In fine, this is a case where there is no dispute about the facts. The question is: What is the proper application of the law to an admitted situation?

Appellant contends that the Casualty Company of America, appellee, herein, came into the state of Nebraska from its home state of New York to do a general casualty insurance business; that at the time it came here and obtained a license to do business it submitted itself to the laws of the state of Nebraska; that it made a contract with the appellant (a Nebraska lawyer) to perform certain legal services: that, by reason of performing these duties, the appellee became indebted to appellant. This is admitted by appellee. Then in determining the liability here we are met with the proposition: Why the intervention of the insurance commissioner of New York? Can he take over and manage in behalf of the creditors of Nebraska the property of the appellee herein?

The state of New York, under whose authority the insurance commissioner intervenes, gets into this case

by a New York statute. He has the power, and it is his statutory duty, to take charge of the insolvent appellee herein, and to administer all of the credits and pay off the indebtedness out of the assets of the insurance company. By virtue of the charter rights of appellee herein, which Nebraska recognizes and accepted, this intervener has the exclusive and absolute title to all property involved the same as though he were an individual owner, and anything that an individual can do in managing his own property this insurance commissioner, intervener herein, can do under and by virtue of its charter rights which it gets from section 63 of the New York statutes. When the intervener became a party by virtue of statute to the case herein, then all the rights, powers and authorities that the casualty company have exercised under its charter, are now subrogated to the intervener herein. In summarizing, then, we say all the rights and interests in every respect have been taken over, and all the titles to property involved, by this intervener, by virtue of statutory authority which Nebraska has recognized and accepted. This New York statute upon which this insurance company is based, and which is a part of its charter, was enacted in the first place for the purpose of liquidating insolvent insurance companies, and this appellee was insolvent and in the hands of the insurance commissioner of New York, the appellee herein, before these attachment proceedings were commenced. The intervener then is here by statutory authority to wind up the affairs of this corporation, and this is the purpose for which the title to the property of the appellee insurance company is taken over, and it is all done for the benefit of creditors. Nebraska recognized this right when it issued a license for this company to do business in this state, and there is nothing to prevent the enforcement of this condition in the state of Nebraska. It follows that every con-

dition and every restriction of the state of New York which gave the power of existence to the appellee herein is now taken over and must be respected and followed by this state. The state of Nebraska, when it issued the license to appellee herein, was charged with notice of the terms and conditions and the basis of authority upon which appellee did business, and thus entering into contract, and performed service for the appellee, was charged also with notice that these contracts and all business done with the company were subject to the fundamental law of its existence, and this charter provision, and it was a condition precedent to its entering business in the state of Nebraska that it was based on section 63 of the New York statute, and this charter went with the company wherever it went and into whatever state it obtained license to do business, and notified the respective state in which it was doing business that, if the company should become insolvent, or neglected to pay its debts, all of the property, assets, and credits of every character should be taken over and become the absolute property of the insurance commissioner of New York. This property and these rights are subject to every provision of its charter right. Then it follows that the insurance commissioner is the trustee of an express trust, and in this capacity and this relation holds all of the property of the insurance company for and in behalf of the creditors thereof. The statute which clothes this commissioner with this trust, in legal effect, constitutes part of the charter of the corporation to do business which Nebraska assented to at the time it granted license. *Bockover v. Life Ass'n of America*, 77 Va. 85.

Appellant strenuously contends that in an action of this kind an attachment will be sustained to protect a resident creditor against the claim of a receiver of a foreign corporation. That position is qualified and

limited by circumstances, and is not absolute. This position is not in point here because it overlooks the proposition that Nebraska accepted the condition and limitations and authority of this charter when it came with the company into the state to get license to do business. In support of this proposition, counsel cites *Willitts v. Waite,* 25 N. Y. 577. This is not decisive of any proposition herein involved, because the enactment of section 63 of the New York statute in 1875 overruled this case, because this was handed down in February, 1871. The statute governing the situation here was enacted in 1875, four years later. Also *Kelly v. Crapo,* 45 N. Y. 86, is likewise not in point, for the reason that the statute of 1875 has overruled this case. The case of *Corn Exchange Bank v. Rockwell,* 58 Ill. App. 506, is not in point here, because there is no statute in the state of Illinois providing for a situation like the New York statute. In the absence of statutory regulation, counsel's cases would be absolutely in point and would be decisive of the issue; but the issue is not controlled by common law or court decisions, but rather is a plain rule provided by statute which we ought to follow. Then counsel cites a discriminating case in *Zacher v. Fidelity Trust & Safety-Vault Co.,* 106 Fed. 593, but it does not reach the situation we have here, because we have the *title* to the property vested in the insurance commissioner absolutely. We admit that the state owes a duty to its citizens to protect them against the removal from our jurisdiction of property here located of insolvent foreign corporations, but foreign corporations came here with their charters limited, checked and hemmed in by a foreign statute, the statute of their home state; and, when this state admitted a corporation under these conditions and specific provisions, it is bound by it, and has entered into solemn contract to recognize the powers therein conveyed, and, under a situation like this, the only relief a domestic creditor can have is to comply with the

terms and conditions under which they were granted license to do business. When the appellee obtained license and entered into contract with this state to do business herein, it expressly reserved the right to have its affairs and all property interests adjudicated with reference to the insurance commissioner of New York. Chief Justice Waite has held this New York law, which creates this trust, makes of the intervener herein the statutory successor of the corporation, for the purpose of winding up its affairs. This intervener is an officer of the state of New York, and represents in this court the sovereign authority of a sister state in the performance of these duties, and he appears in the courts of Nebraska, not as an appointee, but as the statutory successor of this corporation to wind up its affairs. The corporation proper, by statute, is eliminated. *Relfe v. Rundle,* 103 U. S. 222.

Nebraska, in dealing with this corporation, must deal with it subject to the rights and privileges which the state of New York conferred. It is true that this statutory successor has no extraterritorial power, and his acts and official duties must be confined within the borders of the state of New York. It is also true that a corporation is a creature of legislation and is endowed with whatever powers its creator desires to give it, and it is again true that the legislature can provide how and when an officer shall be called into being for the purpose of managing and directing certain affairs. Then it follows that, when the legislature create a state officer to administer the affairs of a corporation, and to settle with its creditors when it becomes insolvent, this condition is a basis of the charter rights of the corporation, and this right follows the corporation wherever it goes. Nebraska recognized this when it issued a license for the appellee herein to do business. If Nebraska did not want to recognize this right, or this condition upon which appellee entered into business in this state, it should have withheld the license. This

state was not compelled at any time to permit it to do business, but, having done so, without restriction, it is bound by the conditions of the corporate existence of the appellee to recognize and did recognize the New York statute, and said to this corporation, in recognition of its charter rights, that Nebraska, as a condition precedent to issuing a license, recognized the power and authority of the statute that forms the basis of its existence.

This is an attribute of its charter and governs absolutely. All of these things being true, there is but one thing this court can do, and that is, to affirm the decision of the court below, and in support of these views herein expressed, see *Converse v. Hamilton*, 224 U. S. 243; *Bernheimer v. Converse*, 206 U. S. 516; *Martyne v. American Union Fire Ins. Co.*, 216 N. Y. 183.

AFFIRMED.

SEDGWICK, J., not sitting.

ANTONIA PITELKA, PLAINTIFF, V. FRANK PITELKA, APPELLEE: MAMIE G. BEAL, APPELLANT.

FILED MARCH 27, 1919. No. 20771.

1. **Attachment:** JURISDICTION: IRREGULARITIES. The rule obtains in Nebraska that, by an affidavit for and publication of notice of the pendency of an attachment suit, the court obtains jurisdiction by the levy of the attachment; and subsequent irregularities in a proper proceeding render the proceedings voidable, but not void. *Crowell v. Johnson*, 2 Neb. 146.
2. ———: ———. *Held*, in the instant case, that affidavit for service by publication and published notice, when construed together, gave the court jurisdiction to sell this property at sheriff's sale.

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

Murphy & Winters, for appellant.

Morsman, Maxwell & Crossman, contra.

ALDRICH, J.

The plaintiff some years ago recovered a judgment against the defendant in the court of common pleas of Cuyahoga county, Ohio, for $1,200. The Ohio court is a court of general jurisdiction and it is admitted that personal service was regularly had upon the defendant. The judgment is valid in all respects and no part of it ever has been paid. Suit was commenced in Douglas county on the judgment. On July 21, 1917, an affidavit for attachment was filed, which is in words and figures following:

"Comes now Antonia Pitelka, plaintiff in the above entitled action, and being first duly sworn on oath deposes and says that the claim in this action is for support of minor children of the defendant based upon a judgment of the court of common pleas in Cuyahoga County, state of Ohio, for the amount of $2,500, being the amount of judgment with interest thereon. Affiant further says that said claim is just, and that plaintiff ought, as affiant believes, to recover thereon the sum of $2,500. Affiant further states that said defendant is a nonresident of the state of Nebraska, and for that reason personal service cannot be had upon him. Affiant further says that the defendant is a joint owner of lot 14, block 86, South Omaha, Douglas county, Nebraska, as surveyed, platted and recorded, and lot 5 block 64, South Omaha, Nebraska. Plaintiff being a nonresident of the state, this verification is made by her attorney, Henry J. Beal. (Signed) Henry J. Beal."

An order of attachment was subsequently issued and service was had by publication. The followng notice was published in a newspaper from August 9, 1917, to August 30, 1917, both days inclusive. The notice follows:

"To Frank Pitelka, nonresident defendant: You are hereby notified that on the 21st day of July, 1917, the clerk of the district court of Douglas County, Nebraska,

issued an order of attachment for the sum of $2,500 and costs of suit, in an action pending in the district court of Douglas county, Nebraska, wherein Antonia Pitelka is plaintiff and Frank Pitelka is defendant, and that your interest as an heir of Frank Pitelka, deceased, in the following described real estate has been attached, to wit: Lot 14, block 86, and lot 5, block 64, South Omaha, now a part of Omaha, Douglas county, Nebraska, as surveyed, platted and recorded. You are required to answer this petition on or before the 24th day of September, 1917. (Signed) Antonia Pitelka, Plaintiff."

It is admitted that, after the publication was completed, the sheriff of Douglas county levied upon and sold the undivided one-ninth interest of defendant herein to lot 14, block 86, city of South Omaha, Douglas county, Nebraska, to one Mamie G. Beal, for the sum of $1,340, she being the highest and best bidder; and also, at the same time and place, Mamie G. Beal, one of the parties herein, purchased the undivided one-ninth interest of Frank Pitelka, defendant, at sheriff's sale, to lot 5, block 64, city of South Omaha, Douglas county, Nebraska, for the sum of $45, she being the highest and best bidder.

These in the main are the admitted facts. The defendant insists that the court was without jurisdiction to sell the real estate in question. He argues: (1) That the service by publication is insufficient; and (2) that the affidavit filed by plaintiff on July 21 is insufficient under the statute for constructive service; and (3) the published notice by plaintiff is not sufficient under the statute to give the court jurisdiction. These are the propositions that we are called upon to determine.

This defendant was a nonresident of Nebraska at the commencement of these proceedings. Service was had upon him as provided by section 7641, Rev. St. 1913. Upon the sufficiency of this service depends the

jurisdiction of the court to render proper judgment in the proceedings.

No fault is found with the affidavit for order of attachment. When the sheriff levied on the real estate he took possession of it under an attachment, and, the proceeding being purely an action *in rem,* it follows that the court had jurisdiction over the property.

There has been for many years past a conflict on the question of what constitutes a sufficient service by publication. In *Westcott v. Archer,* 12 Neb. 345, it was held that a strict and technical description of property in the notice is necessary to give the court jurisdiction. while the rule now seems to be to take into consideration all of the affidavits and proceedings had in the order of attachment, and, if all the proceedings taken together meet the requirements of the statute, then the service is complete and the court has acquired jurisdiction.

This court, in *Crowell v. Johnson,* 2 Neb. 146, held that the court obtained jurisdiction *in rem* by a levy of attachment, and that subsequent irregularities did not render judgment in a proper proceeding void.

It would appear from the rule laid down in the *Crowell* case that the court in the present case had jurisdiction *in rem* where it acquired possession of the property attached, and this judgment was therefore only erroneous, and never at any time void. To the same effect is *Jones v. Danforth,* 71 Neb. 722, although Judge Maxwell in several important cases has strenuously contended for the other rule; that is, *Westcott v. Archer, supra.* The majority opinion in the *Westcott* case holds that the judgment is void for the reason that the published notice of the bringing of the suit was defective in the omission of a description of the property levied upon. That is the rule contended for in this *Westcott* case, wherein Justice Lake dissented, and the

rule pointed out in the dissent is the rule that seems now to prevail in this state.

The case of *Westcott v. Archer* has been overruled or distinguished, and it has been held that the court has obtained jurisdiction by publication if the proceedings, affidavit and published notice for service substantially contain the elements and provisions of the statute; that, if in an attachment proceeding some element is contained in the affidavit which was left out in the published notice, then the showing is sufficient and service is complete.

This court has held in *McCormick v. Paddock,* 20 Neb. 486: "An affidavit for service by publication is sufficient if it states the nature of the cause of action, * * * and that service of summons cannot be had upon the defendant, or defendants, within the state." This follows the rule laid down in *Crowell v. Johnson, supra.* This rule above quoted was again followed in *Fouts v. Mann,* 15 Neb. 172.

It is axiomatic that the notice complained of in the instant case was sufficient to advise the defendant of his interest sought to be affected by the proceedings instituted.

In the case of *Greebe v. Jones,* 15 Neb. 312, Judge Maxwell insisted upon the rule laid down in *Westcott v. Archer, supra.* Justice Lake, dissenting, again says that notice will be entirely conformable to the requirements of the statute if it contains "summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served, when they are required to answer." This the notice in the instant case accomplished completely.

Thus this contest went on until the rule contended for in the *Westcott* case, *supra,* has finally been so often distinguished as to completely overrule it.

Now, it is admitted that no complaint is made but that the writ of attachment levied upon this real estate

was regularly issued; that the court acquired jurisdiction over the property "so far at least as to render its proceedings lawful." Then it is true that jurisdiction to this extent is not lost, and thus we follow *Crowell v. Johnson, supra,* and *Darnell v. Mack,* 46 Neb. 740. This court in the *Darnell* case again overruled the *Westcott* case.

The chief defect in the notice was that it did not properly describe the property attached. In *Grebe v. Jones, supra,* the court rendered judgment in an action in which the land had been attached. The defendants being nonresidents, the published notice did not properly describe the land attached. In that case upon appeal the majority court again held that the notice was sufficient, and thus overruled *Westcott v. Archer, supra.*

Thus it would appear that, so far as a minor defect in description of land in notice is concerned, it is the rule in this court that, if the notice substantially complies with the statute and notifies the party of the kind and character of the proceeding and when the judgment will be taken, and for how much, and in what county the land is located, then the statute has been sufficiently complied with.

Thus we conclude, after a careful examination of many Nebraska cases, decisive of the point here, that an affidavit and notice by publication is sufficient to give the court jurisdiction. The sale was regular in all respects so far as the record discloses, and we believe the rule laid down in *Jones v. Danforth,* 71 Neb. 722, is the rule that should be followed in the instant case, so far as it applies.

Defendant raised another question, namely, that of *custodia legis.* This question was raised after the sale was had. It would seem that the only person who could properly raise that question was the administrator. The record does not disclose that these proceedings affected in any way the property being administered upon. The instant case is not an attempt

to levy upon the interest of a deceased person, but rather upon the interest of the defendant in this case. The administrator made no objection. There is no property of a deceased person here against which this plaintiff has a claim, but the object and purpose of this action, if the question of *custodia legis* were involved, would be to levy upon the identical property in the hands of the administrator, and the rule is for one who has a claim to file it with the probate court; and the property levied upon here is in no sense of the word in custody of the law but simply is the property of this defendant.

The court, then, having full and complete jurisdiction, the purchaser and appellant in this case is entitled to the sheriff's deed conveying to her whatever interest or title the defendant had in the real estate involved. The appellant, Mamie G. Beal, being the highest and best bidder at the sheriff's sale, which was regular and legal, is entitled to a conveyance of the interest or title of the defendant by the sheriff of Douglas county, Nebraska.

The finding and judgment of the trial judge is reversed and the cause remanded, with instructions to enter judgment in accordance with the holding of this opinion.

REVERSED.

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

UNION CO-OPERATIVE COMPANY, APPELLANT, V. FRED ADOLFSON ET AL., APPELLEES.

FILED APRIL 4, 1919. No. 20389.

1. **Specific Performance: SALE OF PERSONALTY: INSOLVENCY.** Ordinarily insolvency is not of itself a sufficient ground for the specific performance of a contract for the sale of personal property.
2. **———: ———: SUFFICIENCY OF EVIDENCE.** Suit to enforce specific performance of a contract for the delivery of corn. The evidence has been examined and found insufficient to warrant the granting of the relief prayed.

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

Charles H. Slama, for appellant.

W. W. Wenstrand and *P. P. White, contra.*

MORRISSEY, C. J.

Plaintiff sues for the specific performance of a contract to deliver corn. There was judgment for defendants, and plaintiff appeals.

Plaintiff was operating a grain elevator. Defendants were farmers. January 26, 1917, the parties entered into a written contract whereby it was agreed that between January 26, 1917, and March 15, 1917, "buyer's option," defendants should deliver at plaintiff's elevator 3,000 bushels of corn for the agreed price of 90 cents a bushel. The corn was described as then being in defendants' possession and free from incumbrance. The contract further provided: "Should the elevator be full or incapacitated in any way when grain is tendered, it shall be delivered as soon thereafter as elevator can receive it." Defendants offered to deliver the corn from time to time during the term specified in the contract, but plaintiff would not receive it. Defendants continued to offer to deliver until the close of the month of April when they declined to be further bound by the contract. May 8, plaintiff brought this action for specific performance, alleging that corn had advanced in value until it was then of the value of $1.50 a bushel, and that defendants' were insolvent. Defendants' demurrer to the petition was overruled. Defendants then answered, alleging that plaintiff had breached the contract by its refusal to receive the corn when tendered and denying insolvency and the advance in the market price of corn. On a trial of the issues the court found generally in favor of the defendants,

found the allegations of the answer to be true, and that plaintiff's petition was without equity.

Although plaintiff alleges that the market price of corn had advanced, it offered no proof to support this allegation of the petition, and there is nothing in the record to indicate the condition of the market, or the value of the corn. An effort was made to prove insolvency of the defendants, but we do not deem it important whether plaintiff sustained the burden of this allegation, or not. A majority of the adjudicated cases seems to hold that insolvency, of itself, is not an independent ground for the relief here prayed. Where a contrary doctrine is asserted, other equitable circumstances have usually been present. *Southern Iron & Equipment Co. v. Vaughan,* L. R. A. 1918E (Ala.) 594, 611, and note; 36 Cyc. 564. The application of the foregoing doctrine may dispose of plaintiff's case; but, inasmuch as the trial court heard the evidence and entered a judgment calculated to finally dispose of the controversy, we deem it proper to follow the course pursued by the trial court. We shall not review the evidence at length. It may be summarized by saying that the proof shows that, during the period from the making of the contract till the close of the month of April, defendants were ready and anxious to deliver the corn according to their contract. Plaintiff seeks to excuse itself for refusing to accept the corn because of a shortage of cars and the overcrowded condition of its elevator. It appears, however, that plaintiff from time to time received corn from other farmers with whom it was under no legal obligation to deal, and that, had it in good faith desired to carry out the contract made with defendants, it had ample opportunity to do so.

The judgment of the district court is fully sustained and is

AFFIRMED.

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

ESSIE E. DAVIS, APPELLEE, V. MORRIS MERSON ET AL., APPELLANTS.

FILED APRIL 4, 1919. No. 20259.

Vendor and Purchaser: LAND CONTRACT: INCLUSION OF HOMESTEAD. "An executory contract for the sale of a body of lands which includes the family homestead of the vendor and which is not signed and acknowledged by his wife is not wholly void, but is obligatory upon him, except with respect to the homestead tract, and such a contract is therefore not open to the objection of want of mutuality." *Johnson v. Higgins*, 77 Neb. 35.

APPEAL from the district court for Grant county: BAYARD H. PAINE, JUDGE. *Affirmed as modified.*

A. D. Fetterman and *Mitchell & Gantz*, for appellants.

Sullivan, Squires & Johnson and *D. F. Osgood, contra.*

LETTON, J.

Defendant Merson was, on July 15, 1915, the owner of 640 acres of land in Cherry county. On that day he sold the same to the plaintiff by written contract for $2,600. Plaintiff paid $200 by check at the time the contract was signed, and afterwards in due time tendered the sum remaining due. Defendant refused to execute the contract. On the 16th day of August he sold the 640 acres to defendant Beem, and with his wife executed and delivered to him conveyance of the same. This deed has been recorded.

Beem had full notice and knowledge of the contract with plaintiff and of the fact that plaintiff was in possession of the three quarter sections involved in this action before he made any payment to Merson, or received the conveyance. The answer pleads that the 640 acres described was the homestead of Merson and his wife; was patented to Merson as a homestead by the federal government, and that the family occupied it as a homestead up to and including August 16,

1915; that plaintiff knew the tract was a homestead; that the contract was not acknowledged by Merson; that there was no consideration for the contract; that plaintiff failed to perform its terms; that the wife of Merson never relinquished her homestead right; that, when the deed to Beem was executed, Merson and Beem believed and had legal advice to the effect that the pretended contract with plaintiff was void and without force and effect.

It also alleged that the pretended contract was a cloud upon the title of Beem and asked to have the same set aside and his title quieted.

The court made specific findings of fact, to the effect that, at the time Merson entered into the contract with plaintiff, he was a married man, the head of a family, and resided upon and occupied the southwest quarter of section 24, township 27, range 38, in Cherry county as a homestead, and that the remainder of the premises was not subject to the right of homestead; that the contract is void as to the homestead, but valid as to the remainder of the tract; that during the months of July and August, 1915, plaintiff was in possession of these three quarters for pasturage purposes, and had a large number of cattle ranging thereon; that Beem knew of her possession and knew of the existence of the contract. Plaintiff has paid into court $2,600, the full amount which she agreed to pay for the premises. The court quieted the title in the quarter section occupied as a homestead in Beem, and quieted the title in the other three quarter sections in the plaintiff.

The evidence shows that, on the day the contract was executed, Merson went to the home of the plaintiff and offered to sell his land to her. After some negotiations the terms of the contract were reached, and it was signed. The Mersons lived on the land for about a week after this contract was entered into, when they removed to Hyannis, and never occupied the land again. The evidence also shows that before Beem

bought the land he had been informed by Merson of the existence of this contract.

The real question in the case is one of law. It is contended by plaintiff that, although the contract is of no force and effect as regards the 160 acres upon which Merson and his family resided, it is valid and effectual as to the other three quarter sections. Defendant Beem, relying on the decision in *Meisner v. Hill,* 92 Neb. 435, maintains that the homestead includes the dwelling house, appurtenances, and the entire tract of land used in connection therewith, without regard to the area or value of the land comprising the homestead.

In the case of *Clare v. Fricke,* 102 Neb. 486, the *Meisner* case was examined, and it was decided that the homestead provided for by the statute is limited to 160 acres of land. In *Anderson v. Schertz,* 94 Neb. 390, also cited by defendant, the question as to whether the homestead consisted of more than 160 acres was not involved.

An agreement to convey a tract of land which includes the homestead, while it is invalid as to the homestead because not signed and acknowledged by both husband and wife, may be specifically enforced as to the remainder of the tract. *Lichty v. Beale,* 75 Neb. 770; *Johnson v. Higgins,* 77 Neb. 35.

The entire tract is in the form of a square, and the homestead was one-fourth of this square. The land is sandy in character, and used mostly for grazing purposes, except a small tract upon the homestead. The homestead is readily separable from the remainder of the tract, and there is no physical reason why specific performance should not be allowed.

Defendant also contends that to compel specific performance would be to enforce a contract which Merson never made, nor intended to make. This is a peculiar defense for a wrongdoer to attempt to set up. Plaintiff is compelled to lose the most valuable 160 acres.

If she is willing to accept the remainder of the tract at the same price she was to pay for the entire tract in full performance of the contract, defendant has no reason to complain. *Gartrell v. Stafford,* 12 Neb. 545, 551; *Meek v. Lange,* 65 Neb. 783; *Johnson v. Higgins, supra; Lutjeharms v. Smith,* 76 Neb. 260; *Moore v. Lutjeharms,* 91 Neb. 548.

Defendant's argument based upon *Anderson v. Schertz, supra,* does not appeal to us. The facts in the case are not similar. In that case the plaintiff asked for the enforcement of a contract for exchange of lands as to a tract of land exclusive of the homestead, and also requested compensation for the loss of the homestead. If there is any language in the opinion contrary to the views expressed herein it is disapproved.

The district court did not err in decreeing specific performance of the contract exclusive of the homestead. In two respects, however, the decree should be modified. The contract describes the land as being in "range 39," but by an error in the copy of the contract set out in the petition it was erroneously described as "range 38." The decree is also incorrect in this respect.

Furthermore, since Mrs. Merson did not sign the contract, her marital rights, if any, in the 480 acres were not affected thereby. The decree is therefore modified so far as to convey only the rights of Merson in the land, and is also corrected to describe the land as lying in "range 39." As thus modified, the judgment of the district court is

AFFIRMED.

CORNISH, J., not sitting.

DANIEL M. THOMAS, APPELLEE, v. OTIS ELEVATOR COMPANY ET AL., APPELLANTS.

FILED APRIL 4, 1919. No. 20387.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: ACTION AGAINST THIRD PARTY. Section 3659, Rev. St. 1913, is for the benefit of an employer who has paid or is liable to pay compensation under the act to an injured workman. If the workman who is injured by the negligence of a third party obtains an assignment from his employer of his right to bring the action, it may be maintained directly by the injured workman against the negligent third party.
2. **Negligence:** INSTRUCTIONS. Where a petition charged several grounds of negligence, it is not error on the part of the district court to submit any of the allegations of negligence which there is evidence to support.
3. **Trial:** INSTRUCTIONS. Where the evidence is sufficient as to the existence or nonexistence of a fact, and is undisputed, it is not error for the district court to so state to the jury.
4. **Damages.** A man 26 years of age, in consequence of a negligent act of defendant's workmen, was struck by a descending elevator and fell to a depth of five stories, falling upon a concrete floor. The fall caused a compound fracture of both legs, broke one arm, fractured his jaw, and dislocated a number of his teeth. The necessary surgical operations resulted in shortening both legs, with one about one and a half inches shorter than the other. One knee was stiffened and he was crippled for life. He suffered great pain and agony for several months. He was earning at the time from $85 to upwards of $90 a month, and his expectancy of life was 37.14 years. *Held*, that a verdict for $25,000 is not so excessive as to indicate that it was the result of passion or prejudice.

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

Gurley, Fitzh, West & Hickman, for appellants.

John O. Yeiser and *John C. Travis, contra.*

LETTON, J.

This is an action to recover damages for personal injuries brought against the Otis Elevator Company, and

one Blackwell, one of its employees. Plaintiff recovered a judgment for $25,000, and defendants appeal.

Selden-Breck Company, builders, were erecting a hotel building in Omaha under a contract. Part of the work was sublet to a number of other concerns. The Otis Elevator Company, defendant, had a subcontract to install two elevators in the building, and the Omaha Iron Works had a subcontract to erect and furnish certain doors and metal work for the elevator shaft.

The plaintiff was a workman employed by the latter. On the morning of the accident, plaintiff, who had been directed by his foreman the night before to clean up certain dirt and debris from the runway of the elevator door upon the fifth floor of the building, was engaged in this duty, part of his body projecting into the elevator shaft. The foreman of defendant elevator company and Blackwell were working upon an elevator in another shaft across the hall, when some one called up that shaft to one of them, telling him the foreman, or superintendent, wanted to speak to him. The two men left the elevator upon which they were working, went to the south shaft, got into the elevator, which was standing there, and, without giving any notice or warning, started the elevator downward. It struck the plaintiff at the next floor, and he fell five stories to the basement. The fall caused compound fracture of both legs broke one arm, fractured his jaw, dislocated a number of his teeth, and otherwise severely sprained, bruised and injured him. His injuries required a number of surgical operations, which resulted in shortening one leg about one and a half inches more than the other one which was also shortened. He suffered severe pain and agony, his knee was stiffened, and he is a cripple for life. He was a young man about 26 years of age, at that time, of strong physique, and was earning at the time of the accident from $85 to $90 and upwards a month, excluding overtime, and his expectancy of life was 37.14 years.

The particular grounds of negligence alleged in the petition are substantially that the work to be performed by the Elevator Company and the Iron Works was of such a character that it conflicted and rendered the south shaft dangerous for the employees of both companies, if they were permitted to work in and about the shaft at the same time; that "said south elevator shaft was turned over to the Omaha General Iron Works, and that instructions were issued to these defendants that said south shaft was not to be used by them, nor was the elevator to be operated during working hours, until the completion of the work to be performed in the shaft by the Omaha General Iron Works;" that said work "was not in fact completed, as said Otis Elevator Company well knew, or ought to have known;" that the defendants, without notice of warning, or taking any precautions, and with full knowledge of the plaintiff's employment, and in breach of the instructions issued that they were not to operate said car in said south shaft during working hours, carelessly and negligently lowered the elevator in said south shaft from the sixth floor downward, striking plaintiff, etc.

In its answer defendant Otis Elevator Company denies generally most of the allegations of the petition, and denies that the plaintiff while working for the Iron Works sustained accidental injuries. It also pleads that under the employers' liability act, where a third person is liable to the employee for injury, the employer shall be subrogated to his right against such third person, and that by reason thereof the plaintiff assigned his cause of action, if any, against said defendant to his employer, and is not a proper party to institute this action.

The reply alleges that the action was brought with the approval and under the direction of the Iron Works. It is further alleged that plaintiff had filed a petition in the district court, alleging the fact of the accident;

that the Iron Works had directed him to prosecute it in his own name; that the Iron Works admitted its liability to plaintiff for compensation, and its willingness to assign its right of action against the Elevator Company, if approved by the court; and that the court authorized plaintiff to continue the prosecution of this action and apply the proceeds, first, to the satisfaction of any claim plaintiff might have against the Iron Works for compensation, as provided by the agreement.

There is little dispute as to the facts, except perhaps with respect to whether there were instructions given by the general contractor to the defendant Elevator Company not to operate the car in the south shaft.

The first complaint made is that the plaintiff had no right to bring the action in his own name under section 3659, Rev. St. 1913. In *Muncaster v. Graham Ice Cream Co. ante, p.* 379, it was decided that the statute did not take away the right of the employee to recover damages against a third person when the relation of master and servant does not exist; that the section was designed for the protection of an employer who had paid the compensation; that, if the employer's rights were protected, it was no concern of the negligent third party.

Furthermore, there was an agreement between the plaintiff and his employer with respect to the bringing of this action, which was approved by the district court. Defendants under these circumstances suffered no prejudice and cannot complain.

The next complaint is that the instructions failed to reflect the issues presented by the pleadings. It is insisted that the trial court by instruction No. 3, submitted the case on the theory that if defendants knew, or in the exercise of ordinary care could have known, the plaintiff's position, it was the duty of the conductor in charge to give plaintiff some reasonable warning of his intention to cause the elevator to de-

scend. As we read the petition, this ground of negligence was alleged, as well as others, and it was not error for the court to so instruct the jury.

It is also complained that the court erred in saying in that instruction: "It is admitted or established in this case that the work being performed by the plaintiff made it necessary or proper for him to be about or in the elevator shaft known as the south shaft." It is said this part of the instruction was highly prejudicial to the defendants. It may be highly prejudicial, but there is no doubt that the statement of fact is correct. It was not disputed that the plaintiff had been ordered to clean up the runway or the doors, and that the position he assumed was proper for that purpose. This being the case, the court was justified in stating this to the jury.

It is also complained that the evidence fails to show that the instructions as to not using the shaft were heard or understood by defendants. There is evidence that the superintendent of the Selden-Breck Company, while Blackwell was running the elevator a few days before, ordered it stopped during working hours, for the reason that the use of the shaft was necessary for the iron workers to complete their work, and that the foreman of the defendant Elevator Company was present. The fact that the use of the elevator was accordingly stopped is strong evidence that the foreman heard these instructions, and knew that the shaft was in use by the iron workers. It is immaterial whether or not defendant's foreman made an express agreement with the Iron Works. If he knew that the iron workers were using the shaft, and had been directed not to use the elevator, this was sufficient.

It is common knowledge that cocontractors in working upon a building in process of erection must take notice of facts and circumstances which demand that control of a particular part of the building for a

limited time must be exercised by one or the other in order to avoid injuries to other workmen.

Considering all the testimony in the case, we are convinced that it supports the allegations of negligence, and that such negligence was the proximate cause of plaintiff's injury.

The verdict was for $25,000. It is strongly urged that "this verdict is exorbitant;" that the amount invested at 6 per cent. would bring an amount largely in excess of plaintiff's normal income. In the beginning of this opinion we stated plaintiff's physical condition. It clearly appears that, from being an active, strong and healthy young man, he has been made a deformed and helpless cripple for life. In addition to this, the evidence is clear and positive as to the prolonged and excessive pain and agony which he endured while in the hospital and since. We believe the amount of the verdict is not excessive.

After the trial affidavits from two of the jurors were filed to the effect that the verdict was what is known as a quotient verdict. This evidence is not satisfactory. These affidavits were not made or filed until about three months after the trial. Furthermore, they do not show the jury had previously agreed to be bound by the result. Since the affidavits were not filed until the day the motion for a new trial was passed upon, there was no opportunity to obtain counter affidavits. The practice of attacking verdicts by the affidavits of part of the jurors long after the trial is not to be encouraged or commended. The verdict will not be set aside merely upon such indefinite and uncertain affidavits.

The judgment of the district court is

AFFIRMED.

ROSE and CORNISH, JJ., not sitting.

ELSIE MYERS, ADMINISTRATRIX, APPELLANT, V. ARMOUR & COMPANY, APPELLEE.

FILED APRIL 4, 1919. No. 20941.

Master and Servant: WORKMEN'S COMPENSATION: PAYMENTS. Under the workmen's compensation act, commutation and payment in a lump sum by order of the district court are authorized only in the exercise of a sound discretion upon an agreement or a settlement by the parties.

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

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

Kennedy, Holland, De Lacy & Horan, contra.

ROSE, J.

This is a proceeding under the workmen's compensation act. While Joseph J. Myers was performing his duties as an employee of Armour & Company in a packing-house in Omaha, September 4, 1918, a boiler exploded and fatally injured him, death ensuing a day later. He left surviving him his widow, Elsie Myers, age 26, and a daughter 2 years old. The widow was appointed administratrix of his estate. As such she instituted this proceeding before the compensation commissioner and applied for an order commuting the statutory compensation and requiring payment in a lump sum. The application was overruled, and the executrix appealed to the district court, where a judgment was rendered in her favor for the payment of $12 a week for 350 weeks and for funeral expenses in the sum of $100, but the application for a commutation and for payment in a lump sum, being resisted by the employer, was overruled on the ground that such relief could not be granted without the consent of both parties. It is from this judgment that the executrix has appealed.

The employer concedes that the widow, for the benefit of herself and child, is entitled to $12 a week for 350 weeks and to $100 for funeral expenses. The only question presented is the authority of the district court, under the workmen's compensation act, to order commutation and payment in a lump sum. The answer to the question depends on the meaning of the language used by the legislature. The workmen's compensation act provides:

"The amounts of compensation payable periodically under the law, by agreement of the parties with the approval of the compensation commissioner, may be commuted to one or more lump sum payments, except compensation due for death and permanent disability, which may be commuted only upon the order or decision of the district court; provided, that where commutation is agreed upon, or ordered by the court, the lump sum to be paid shall be fixed at an amount which will equal the total sum of the probable future payments, capitalized at their present value upon the basis of interest calculated at five per centum per annum with annual rests. Upon paying such amount the employer shall be discharged from all further liability on account of the injury or death, and be entitled to a duly executed release, upon filing which, or other due proof of payment, the liability of such employer under any agreement, award, findings, or decree shall be discharged of record.

"Whenever an injured employee or his dependents and the employer agree that the amounts of compensation due in periodic payments for death, permanent disability, or claimed permanent disability, under this article, shall be commuted to one or more lump payments, such settlement or agreement therefor, shall be submitted to the district court in the following manner:

"An application for the approval of such settlement, signed by both parties, shall be filed with the clerk of the district court, and shall be entitled the same as an

action by such employee or dependents against such employer; and shall contain a concise statement of the terms of the settlement sought to be approved, together with a brief statement of the facts concerning the injury, the nature thereof, the wages received by the injured employee prior thereto, and the nature of the employment. The judge of the district court, immediately, or within one week after the filing of said application, unless there be good cause for continuance, at chambers or in open court and in or out of term time, shall hold a hearing on said application, and proof may be adduced, witnesses subpœnaed and examined, the same as in an action in equity. If, after such inquiry, the court finds said settlement fair, just, and for the best interests of said employee or his dependents under all the circumstances, he shall make an order approving the same. If such agreement or settlement be not approved the court may dismiss said application at the cost of the employer or continue the hearing, in the discretion of the court." Laws 1917, ch. 85, sec. 131.

This legislation was enacted to protect the dependents of employees. The regular method of exacting compensation is the requiring of periodical payments for a definite period. The system does not contemplate payments in large sums to dependents who may be improvident. The law was not framed to defeat the legislative aims. To prevent dependents from dissipating or losing their means of support, payments at stated times are required for definite periods. An unnecessary construction which would defeat the intention of the lawmakers should be avoided. Payment in a lump sum is a departure from the general rule. When this method is followed, the authority for such a course should be found in the language relating to the exception. In the light of all of the legislation on this subject, the discretion of the district court in passing on application for commutation seems to be

invokable only where both parties have agreed to such a course. This construction is not refuted by the exception in the following provision:

"The amounts of compensation payable periodically under the law, by agreement of the parties with the approval of the compensation commissioner, may be commuted to one or more lump sum payments, except compensation due for death and permanent disability, which may be commuted only upon the order or decision of the district court."

The latter clause, in connection with the entire act, does not necessarily mean that the district court, in absence of an agreement for commutation, may order payment in a lump sum to compensate a dependent for the death or for the permanent disability of the employee. Other provisions have a different import.

In the district court the procedure for commutation and payment in a lump sum in case of death or of permanent disability applies alone to agreements or settlements. A method of procedure in absence of a mutual understanding of the parties is not found in the statute. In overruling the application the trial court correctly interpreted the law.

AFFIRMED.

CORNISH, J., not sitting.

WILLIAM C. REDFIELD, APPELLEE, V. ELMER J. LAMB ET AL., APPELLANTS.

FILED APRIL 4, 1919. No. 20309.

1. **Fraud: SALE OF CORPORATE STOCK: MISREPRESENTATIONS: LIABILITY OF OFFICER.** A director or other officer of a corporation who approves a report respecting the value of corporate stock that contains untrue and misleading statements of material facts, and which report is used, with his knowledge, to induce another to purchase stock in such corporation, may become personally liable to a purchaser who in reliance thereon is defrauded thereby.

2. ———: ———: ———: EVIDENCE: SUFFICIENCY. Evidence examined, and *held* sufficient to support the verdict.

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

Peterson & Devoe, for appellants.

George A. Adams, T. F. A. Williams and *Clark Jeary, contra.*

DEAN, J.

Plaintiff recovered a verdict and judgment for $1,600 against the defendants, Graf, Putman and Lamb, as damages on account of alleged fraudulent representations made by defendants by which plaintiff was induced to buy 20 shares of corporate stock in the Farmers Hog & Cattle Powder Company at $100 a share. The defendants appealed.

For two or three years defendants were engaged as partners in the manufacture and sale of stock powder, stock dip, and the like. About a month before plaintiff purchased the stock the partnership assets were taken over by the corporation and it became the successor of the partnership. Just before the succession was effected defendants procured C. M. Wilson, an accountant, to make a report respecting the partnership assets and liabilities. So much of the report as appeared on the corporate books that is material to this inquiry follows: "C. M. Wilson, an accountant, employed for the purpose, reported to the board of directors that the gross present worth of the association, including interest of its members, was $20,564.48, less liabilities of $5,234.23, net present worth $15,330.25." The Wilson report was unanimously adopted and approved on January 26, 1915, by the board of directors, consisting solely of defendants, who were all present and voting. The board meeting was held a little more than a month before plaintiff bought the stock in question.

In their brief defendants say: "The corporation

had no assets and conducted no business until on and after January 26, 1915," and that the partnership assets were "turned over to the corporation on January 26, 1915." So that the corporate assets on that date consisted solely of the assets obtained from the late partnership. It was not shown that the corporation had any additional assets when plaintiff made his purchase.

Plaintiff contends that the Wilson report was misleading and fraudulent, in that it did not include all of the liabilities of the partnership at the time they were taken over by the corporation. He points out that some of the undisclosed liabilities arose from the fact that the partnership took notes of customers, ranging from a few dollars to $500 and over, and that a small amount of goods were sold at the time to the makers of the notes, thus leaving the difference between the value of the goods purchased and the face of the customer's note as a liability against the company. The proof fairly shows that the liabilities that were not included in the Wilson report were a little more than $4,000.

Defendants contend that they cannot be held for anything in the Wilson report that may have misled plaintiff. But Mr. Graf testified on this point: "Q You had this report made by Mr. Wilson for just such a purpose to have it to hand out to men like Mr. Redfield who were thinking of putting new cash into the company? A. To a certain extent." There was other testimony of a like nature. Graf testified that he and Putman told plaintiff to go to the office of the corporation at Lincoln, and that C. M. Wilson "would show him the books or anything that he might want to know in regard to the business." In pursuance of that conversation, Redfield testified that he went to the Lincoln office and saw Wilson, who showed to him the report.

Putman testified that he and Graf met plaintiff in Graf's bank and told him that they would like to have

him take "about $5,000, that we would like to have him have as much as the rest of us have got." That statement in effect informed plaintiff that each of the defendants had invested $5,000 in the enterprise. A reasonably prudent man would give to it that meaning. But it was not the fact, as appears from a stipulation in evidence wherein it is conceded that from the organization of the company until January 26, 1915, each of the defendants paid in $400, and no more, "making an aggregate of $1,200, one-half of which was paid at the beginning of 1913 and one-half at the beginning of 1914." It was not shown that any of the three defendants paid in any additional money before March 10, 1915, which was the date of plaintiff's purchase. Plaintiff testified that Putman told him that the company had made approximately $15,000 in two years out of a small investment, and that Lamb told him that the business had been making them a great deal of money. Plaintiff testified that he relied on the Wilson report, believing it to be true, and also on the statements of the defendants, and that in reliance thereon he purchased the 20 shares of stock for $2,000.

Defendants argue: (1) That "a stockholder cannot sue individually for injuries affecting the corporate or collective rights." The answer to this argument is that plaintiff did not sue for injuries affecting the rights of the corporation, but for injuries affecting his individual rights. A director or other officer of a corporation who approves a report respecting the value of corporate stock that contains untrue and misleading statements of material facts, which report is used, with his knowledge, to induce another to purchase stock in such corporation, may become personally liable to a purchaser who in reliance thereon is defrauded thereby. Clark, Law of Corporations, sec. 210; 7 R. C. L. 485-487, secs. 466-468; *Carruth v. Harris,* 41 Neb. 789.

It is also argued by defendants: (2) "Representations of the value, present or prospective, of corporate

assets and stock of a corporation, which by their nature are necessarily speculative, are not actionable." The rule invoked by defendants is not applicable to a case where it has been clearly shown that the officers of the corporation had superior knowledge as to the facts affecting the value of the corporate stock, and where an investigation would be required to discover the truth. *Carruth v. Harris,* 41 Neb. 789; *Abts Co. v. Cunningham,* 95 Neb. 836; 12 R. C. L. 293, sec. 58. Clearly the statements and representations on which plaintiff testified that he relied were those of fact as distinguished from mere matter of opinion.

Defendants' final argument that the verdict is not supported by the evidence cannot be upheld. In a record consisting of approximately 1,200 pages, exhibits included, there is some conflict in the evidence, but the verdict is amply sustained. The jury were fairly instructed on every contested phase of the case.

We find no reversible error. The judgment is

AFFIRMED.

ROSE and CORNISH, JJ., not sitting.

WILLIAM B. SHURTLEFF, APPELLEE, V. ALBERT PICK & COMPANY, APPELLANT.

FILED APRIL 4, 1919. No. 20371.

1. **Contracts:** REFORMATION. Equity has jurisdiction to reform a written contract, when there has been a mistake of one party and there has been fraud or other inequitable conduct by the other party in reducing the contract to writing.

2. ———: FRAUD: NEGLIGENCE. A party is not chargeable with negligence in signing a contract that does not express the true intent of the parties, when there is nothing on the face of such contract from which an ordinarily prudent man would reasonably be expected to discover a fraudulent misstatement of a material fact by the other party, who reduced such contract to writing.

3. **Damages:** MITIGATION. Where goods of the quality ordered are not delivered, the vendee is not required to purchase goods on the open market of the quality ordered of the vendor, in mitigation of damages, while negotiations for a settlement are pending.

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

Fawcett & Mockett, for appellant.

C. C. Flansburg, contra.

DEAN, J.

Plaintiff sued defendant, a Chicago firm, for reformation of a contract and for damages for alleged failure to deliver a shipment of rugs of the quality and at a price agreed on by the parties. He recovered judgment against defendant on the contract as reformed for $946.01. Defendant appealed.

Plaintiff contends that he was shown a sample rug of a superior grade that is known to the trade as "Bigelow Electria" and that defendant represented to him and agreed that the shipment that he ordered would be the same as the sample in all material respects. Defendant denied that the order was made from the sample, and contends that it was made from defendant's catalogue, and that a grade of rugs inferior to the Bigelow and at a lower price was ordered.

Defendant's traveling salesman took plaintiff's signed order for the rugs. The order or contract was written by the salesman. Plaintiff and two witnesses, Mr. Guenzel and Mr. Morris, testified that the salesman told them at plaintiff's office that his company would furnish Bigelow rugs to plaintiff in the 9 x 15 and 11¼ x 12 sizes at $24 each.

Defendant's illustrated catalogue consisting of almost 500 pages is in evidence. Plaintiff testified that he did not see the catalogue, and that the salesman did not even refer to it. The salesman denied this, and testified that plaintiff found a cheaper rug that he ordered at the catalogue price.

It seems from the salesman's testimony that he is mistaken on this point. He testified that he wrote the contract in the presence of plaintiff, and that he took the rug numbers and the sizes of the rugs and the prices from the catalogue and wrote them in the order. But the price of 9 x 15 and 11¼ x 12 rugs that are numbered in the catalogue as 17E624 and 17E625 is $17.75, while the price for the rugs that are designated in the contract by the same catalogue number and size are charged in the contract to plaintiff at $24. Plaintiff was therefore charged in the contract for an inferior rug the same price that was quoted to him by defendant's salesman in the presence of Mr. Guenzel and Mr. Morris for the Bigelow rug. On this point the evidence is clear and convincing that the written contract did not express the contract as made between the parties. Hence the contract was a proper subject for reformation.

There is sufficient evidence to support the court's finding: "That after plaintiff and defendant's agent had specifically agreed upon the said rugs * * * above described (Bigelow Electria) according to the specific description and samples then and there shown to the plaintiff, the defendant's said agent fraudulently and surreptitiously wrote said contract describing said rugs * * * by numbers and falsely and fraudulently representing to the plaintiff that said numbers were known to the company to cover these specific articles above mentioned, rugs * * * which the plaintiff and defendant's agent had agreed upon." The court did not err in ordering a reformation of the contract to conform to "the real agreement of the parties for Bigelow Electria rugs." It is elementary that equity has jurisdiction to reform a written contract where there has been a mistake of one party and there has been fraud or other inequitable conduct by the other party. 34 Cyc. 920; 2 Pomeroy, Equity Jurisprudence (3d ed.) sec. 870; 10 R. C. L. 301; 23 R. C. L.

329. The present case seems clearly to come within the rule.

Defendant says that plaintiff was negligent. There is nothing on the face of the contract from which an ordinarily prudent man in plaintiff's position could reasonably be expected to discover that the agent had written an order for a rug that was inferior to the Bigelow. There is nothing in the contract, as written by him, that is of a descriptive nature, except the catalogue number, the size of the rugs, and the price. It seems to us that under the circumstances, and in view of the record generally, plaintiff is not chargeable with negligence in signing the contract.

Defendant's argument that damage has not been shown and that the court erred in rendering judgment therefor is not tenable. Ninety-six rugs of varied design and pattern were ordered, and plaintiff obtained samples from which selections might be made. When the samples came he said he discoverd they were inferior to the sample from which he ordered, and he at once informed the agent, who admitted a mistake had been made that defendant would rectify. The shipment was not made by defendant, and negotiations for settlement were pending between the parties from the time that plaintiff received the samples and complained to the agent until suit was commenced. It was shown that rugs of the quality ordered by plaintiff advanced materially in price between the date of the contract and the commencement of this action. It seems that the amount of the advance in price on such rugs is approximately the amount of the judgment. Defendant's argument is that plaintiff "made no attempt, on or about December 10, 1916, the last date when by the terms of the written contract defendant should have delivered the property in controversy, to purchase the articles specified in the contract on the open market, or at all." In view of the negotiations

for a settlement, plaintiff was under no obligation to purchase rugs "on the open market, or at all," while such negotiations were pending. The court did not err in the respect noted by defendant.

We do not find reversible error. The judgment is

AFFIRMED.

SEDGWICK and CORNISH, JJ., not sitting.

ELLA B. YOUNG, APPELLANT, V. ESTATE OF RANDALL B. YOUNG, APPELLEE.

ESTATE OF SMITH MCPHERSON, APPELLANT, V. ESTATE OF RANDALL B. YOUNG, APPELLEE.

MRS. SMITH MCPHERSON, APPELLANT, V. ESTATE OF RANDALL B. YOUNG, APPELLEE.

FILED APRIL 4, 1919. NOS. 20393, 20394, 20395.

1. **Appeal: TRIAL TO COURT: MOTION FOR NEW TRIAL: TIME.** When a jury is waived and trial had to the court, an application for a new trial that does not come within any of the exceptions of section 7884, Rev. St. 1913, must be filed within three days after the rendition of the decision, in order to obtain a review of alleged errors occurring at the trial.
2. **Judgment: MODIFICATION: DISCRETION DURING TERM.** In such case the court may in its discretion vacate or modify a judgment during the term at which the decision was rendered, but this can not be demanded as a legal right.

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

Vail & Flory and *T. J. Hysham,* for appellants.

Albert & Wagner, F. D. Williams, W. H. Maloney and *O. M. Needham, contra.*

DEAN, J.

Randall B. Young, a resident of Missouri, died in Kansas City on October 20, 1914. At the time of his death he was the owner of a quarter section of land in

Boone county, Nebraska. Appellants here filed claims against the estate in the county court of Boone county. On appeal the findings of the county court on the respective claims were affirmed with these exceptions, namely: The claim of one appellant allowed in county court for $4,611.51 on appeal was increased $330.50; another claim allowed for $300 in county court was wholly disallowed on appeal; and another claim wholly disallowed in county court was allowed in district court for $37.50. The claimants have all appealed.

These suits were by stipulation and order of court consolidated in one action. A jury was waived and the cases tried and decision rendered on July 2, 1917. A motion for a new trial was filed 12 days thereafter and overruled in chambers on August 29, 1917.

Appellees argue that "this court is precluded from a review of the evidence because the respective motions for a new trial were filed out of time." They cite section 7884, Rev. St. 1913, which provides that, "except for the cause of newly discovered evidence," the application for a new trial "shall be within three days after the verdict or decision was rendered, unless unavoidably prevented." In support of their argument numerous decisions of this court are cited. Among others is the case of *Nebraska Nat. Bank v. Pennock*, 59 Neb. 61, where it is said: "The provisions of the statute are not directory merely, but are wholly mandatory, and a motion for a new trial filed out of time is of no avail and cannot be considered, unless an earlier filing was unavoidably prevented, or the motion is based upon the ground of newly-discovered evidence." To substantially the same effect is *Havens-White Coal Co. v. Bank of Rulo*, 98 Neb. 632, and cases there cited.

The reason assigned by appellants in the record for their failure to make an earlier application is contained in this unverified statement that is a part of the motion, namely: "This cause was decided on the

2d day of July, 1917, and the claimant was unavoidably prevented from filing a motion for a new trial within three days after the decision was rendered for the reason that claimant resides at Red Oak, Iowa, and claimant's attorneys in active management of this litigation at Albion, Nebraska, and the communication from claimant to claimant's attorneys at Albion did not reach Albion in time to file the motion for a new trial within three days."

Appellants have not shown that they were "unavoidably prevented" from filing the motion within the statutory time as pointed out by appellees. That the motion, under the numerous decisions of this court, does not comply with the statute is apparent. Of course, it is not within the judicial province to amend or change a statute under the guise of construction.

In a supplemental brief the appellants direct attention to the rule stated in *Bradley v. Slater*, 58 Neb. 554, namely: "A court of general jurisdiction possesses inherent power to vacate or modify its own judgments at any time during the term at which they are pronounced." It is conceded that the court has this power, but it does not follow that an appeal will lie from a refusal to exercise such power. The point is discussed in the *Bradley* case, where, among other things, it is aptly said by Sullivan, J: "One may ask as a matter of judicial grace what he cannot demand as a legal right."

Finding no reversible error, the judgment is

AFFIRMED.

CORNISH, J., not sitting.

UNION PACIFIC RAILROAD COMPANY, APPELLEE, V. GREGORY COAL COMPANY, APPELLANT.*

FILED APRIL 19, 1919. No. 20224.

1. **Principal and Agent:** ACTS OF AGENT. An act of an agent, although without actual authority from his principal, may be with such apparent authority as to bind the principal.
2. **Landlord and Tenant:** RELEASE: QUESTION FOR JURY. The evidence indicated in the opinion as to the surrender of the premises and an agreement by plaintiff's agent to release defendant from further payments of rent *held* sufficient to raise a question for the jury.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Former judgment of reversal adhered to, and motion for rehearing overruled.*

Strode & Beghtol, for appellant.

Edson Rich, Fred C. Foster, and *J. E. Jacobson, contra.*

MORRISSEY, C. J.

May 29, 1913, the parties to this action entered into a written contract whereunder plaintiff leased to defendant desk space in plaintiff's office in the city of Lincoln. Plaintiff is a railroad corporation, and the lease was signed and executed by its president. The lease was to cover a term of five years from and after June 1, 1913, at a monthly rental of $60. Defendant occupied the space and paid the monthly rental until June 30, 1915, when it vacated the space, and ever since refused to pay the rental stipulated in the contract, claiming that it had been released by E. B. Slosson, local agent of plaintiff. This suit was brought to recover the rental for the last six months of the year 1915. The court instructed a verdict for plaintiff.

*First heard before Commission, and reversed without opinion.

We think it clear that Slosson did not have actual authority to release defendant. With this question out of the record two questions remain: (1) Did Slosson have apparent authority to accept a surrender of the premises? (2) Did he accept a surrender and thereby release defendant from liability?

Having found that Slosson did not have actual authority to cancel the contract, we must consider the facts disclosed in an effort to determine whether defendant would be justified in dealing with him on the assumption that he had authority to waive the provisions of the contract. He had been in the employ of plaintiff for more than 30 years. He was its general freight and passenger agent for the city of Lincoln. As such he solicited business for the company and advertised its business, his name appearing in the advertisements as "General Agent." In the room where defendant hired the desk space, Slosson was provided with a private room, or office, and matters pertaining to the conduct of the company's business in that office were referred to him. The other employees were subordinate to him, although it appears that he neither hired nor discharged subordinates without authority from his superiors in Omaha. When defendant took possession of the space, the key to the door was furnished by Slosson. During the occupancy of the space defendant paid the rent to Slosson, and he executed receipts, sometimes signing as "Agent," at other times signing as "General Agent." He was the ranking officer of the company in the city and had direct charge of the room in which this desk space was leased. It is conceded that he was the general freight and passenger agent. We think these facts sufficient to submit to the jury the question whether he had apparent authority to release defendant.

On the remaining question an agent of defendant testified that some time before vacating the space he discussed the matter of a release with Slosson, ex-

pressed a desire to secure a release from the terms of the contract, and that Slosson assented thereto. This is not without contradiction, and the conflict is sufficient to call for a submission of the question to a jury.

The judgment heretofore entered is adhered to, and the motion for rehearing is

OVERRULED.

LEONA S. JUSTICE, APPELLEE, V. C. E. SHAW ET AL., APPELLANTS.

FILED APRIL 19, 1919. No. 19925.

1. **Fraud**: EVIDENCE. The finding of the district court that the plaintiff was induced to convey the real estate which she seeks to recover in this action by means of fraud and false representations, *held* to be sustained by the evidence.
2. **Vendor and Purchaser**: BONA FIDE PURCHASER: BURDEN OF PROOF. The burden of proof is upon one who claims to be an innocent purchaser of property procured by fraud, to establish that he bought without knowledge or notice of the fraud.
3. **Lis Pendens.** Under section 7651, Rev. St. 1913, where such a purchaser fails to record his deed until after the filing of a notice of *lis pendens* in an action to set aside the deeds of his grantors, he is a subsequent purchaser and bound by the proceedings to the same extent as if he were made a party to the action.

APPEAL from the district court for Madison county: ALEXANDER R. OLESON, JUDGE. *Affirmed in part, and reversed in part.*

J. B. Barnes, H. E. Siman, M. D. Tyler, Jack Koenigstein, M. F. Harrington, F. M. Tyrell, J. H. Walker and *Mapes & McFarland*, for appellants.

O. A. Abbott and *James Nichols, contra.*

LETTON, J.

This is an action to set aside certain conveyances of real estate on the ground that the same were procured

by fraud. A judgment of the district court in favor of the plaintiff was appealed to this court and affirmed (without opinion). Argument has been had upon a motion for rehearing, and the case is now before us again.

Briefly stated, the facts as found by the district court are: That the plaintiff, a widow residing in Norfolk, was fraudulently induced to exchange several parcels of property in that city and an 80-acre farm for a hotel property in Denver, which was heavily incumbered. Certain representations were made to her by defendant Waddell and others, which have been abundantly proved to be false. It is unnecessary to repeat the whole story of the transaction, as we are convinced that the finding of the district court as to the fraud is amply sustained by the evidence. The title to her property was conveyed by Mrs. Justice to C. E. Shaw at Waddell's request, and was held by Shaw for Waddell.

The difficulty in the case is not as to the fraud, but arises out of the question whether the defendants Sattler, Crane and Christopher were severally innocent purchasers of part of the real estate conveyed by Mrs Justice.

One who claims to be an innocent purchaser of real property from a person who recently acquired the title to the same by fraud must, in an action to set aside the conveyance, allege, and the burden of proof is upon him to establish, that he was a *bona fide* purchaser for value without knowledge of the fraud. *Baldwin v. Burt*, 43 Neb. 245; *Bowman v. Griffith*, 35 Neb. 361.

About a week before this action was begun, Waddell exchanged lots 7 and 8 in block 2, Koenigstein's Second addition to Norfolk, to William A. Crane for a ranch in Cherry county. The testimony of Crane is to the effect that at the time the exchange was made he owned a ranch of 960 acres of land in Cherry county, having lived there from 1891 to 1914; that in June, 1914, he was in Norfolk visiting a Mr. Fitch, a former neighbor of his, and there met Waddell; that he had told Fitch

he wanted to make a change on account of his wife's health, and after he went home Fitch wrote him about the Norfolk property, which he thought might be exchanged for the ranch; that on the 28th of July, 1914, Fitch, Waddell and C. E. Shaw (Waddell's brother-in-law) came to the ranch one morning, drove over it, went to the house for dinner, afterwards they made an offer to exchange, and he accepted it. They had photographs of the place in Norfolk with them, and he relied upon their description, also upon Mr. Fitch's word. He had never seen the property. He understood it was subject to $3,500 incumbrance. Crane and his wife went to Merriam, a nearby town, had a deed written at the bank, and acknowledged and delivered it at that time. He obtained a deed from Shaw to the Norfolk property at that time. The deed was dated July 6, and the name of the grantee was in blank and was filled in at that time. Mr. Blanchard, cashier of the bank, sent it for record at his request. Crance testifies: "They told me the title to the Norfolk property was absolutely good or the Building and Loan Association would not accept it. I trusted it was all right and relied upon Mr. Fitch's description, and the reason of the Building and Loan Association accepting the title. I knew it was good or they would not accept it." He paid Fitch a commission of $100. He had no notice or knowledge that Mrs. Justice had any interest in the Norfolk property. Crane's testimony was corroborated by that of his wife, Fitch, and the cashier of the bank.

This property consisted of two lots with three houses upon them. Mrs. Justice lived in a house on one corner of the lots. Waddell testified that he took possesion of this property on July 1, that he rented the corner house to her for $20 a month, that she wanted screens put on, and electric light fixtures. The other two houses also required work to be done upon them, and he paid out over $200 for screens, electric lights, paint and papering. He rented the other two houses and re-

tained possession of the premises until he sold them to Crane on July 28.

On July 25, Mrs. Justice wrote to an agent at Denver, asking him to collect the rent upon the hotel property, and on the 28th of July he wrote her saying he would look after the property. On July 31, this agent in a letter gave Mrs. Justice information which clearly indicated she had been deceived.

Another witness testifies that he heard Mrs. Justice and Waddell arrange that she should pay $20 a month rent. Shaw testifies that after the first of August he collected the rent and turned it over to Crane.

Did the fact that Mrs. Justice remained in possession of the corner house give constructive notice to Crane that she claimed to own the property? At the time Crane received the title, Mrs. Justice was in possession as a tenant of Waddell's, and at that time she had no notice or knowledge that she had been defrauded. Her occupancy was notice of the right which she then claimed, which was merely that of a tenant. If Crane had inquired of Mrs. Justice at that time by what right she held possession, she would have so informed him, because she was still claiming to be the owner of the Denver property, and attempting to collect rent for the same. Under these circumstances Crane was an innocent purchaser, unless the statute as to *lis pendens* affects his status.

Was Christopher an innocent purchaser? He testifies that he lived in Cherry county for ten years; that he knew one Baumann, and met him and Waddell in Valentine in June, 1914; that he is a ranchman, and had a large number of horses, which he was disposing of as rapidly as possible. He told Baumann this, and Baumann suggested the trade with Waddell. Waddell represented it to be a good farm, and said the title was in Shaw. He further testified that Mrs. Justice was not mentioned, and he never heard of her; that they

went to the ranch and Waddell looked over about 30 head of horses, which were in a corral. He said he would take $90 an acre for the land, and would take 100 horses; that he, Christopher, had borrowed money from the bank to pay for the horses when he bought them, and when he sold them to Waddell he had the deed made to Mr. Nicholson, the cashier of the bank, as security. This testimony is corroborated by Baumann and other witnesses.

The land was taken subject to a mortgage of $2,175. $925 was paid in cash, and he received 97 head of horses. After Christopher paid his indebtedness to the bank, the land was reconveyed by the cashier to Christopher. Christopher received an abstract of title to the land on August 4, 1914.

The deed to Nicholson was executed on July 6, 1914, before Mrs. Justice knew she had been defrauded. There was no one in possession of the land. Under these facts, we believe that Christopher was an innocent purchaser, unless his status is affected by the *lis pendens* law.

With respect to the property conveyed to Sattler, Sattler is dead, and the testimony in his behalf is given by Waddell, who was the principal actor in the fraud. Waddell testified that he did not tell Sattler about the details of the trade. He told him he was expecting to get the barns Sattler was using, and wanted to sell him the property if he got it. He says that he and Sattler sometimes dealt in property together, Sattler furnishing the money, and they dividing the profits; that Sattler agreed to buy the barns before he went to Denver; that he knew Waddell was getting them from Mrs. Justice. Sattler was paying $1,200 a year rent for the barns in monthly payments. He paid $1,863 for the equity, the mortgage was $4,800. A page of the bank ledger introduced in evidence shows that in March, 1914, when Waddell's account was over-

drawn nearly $600, a deposit of $2,000 was made by Sattler. It is possible that Sattler was an innocent purchaser, but we are of the opinion that his estate has not sustained the burden of proof as to this.

The majority of the court take the view that the *lis pendens* statute, section 7651, Rev. St. 1913, does not operate to render Crane and Christopher purchasers *pendente lite* with notice of plaintiff's claim. The finding and judgment of the district court is affirmed in so far as it adjudicates that the property of Mrs. Justice involved in this action was procured by fraud, but is otherwise reversed, and the cause remanded with instructions to try the same *de novo,* if plaintiff desires, as to the *bona fides* of defendants Crane, Christopher and Sattler, and to determine the liability of Waddell and Shaw, or either of them, to plaintiff for damages; with leave to the parties to amend their pleadings, if so advised, and to introduce further evidence.

JUDGMENT ACCORDINGLY.

SEDGWICK, J., concurring.

It is suggested in appellee's brief that the defendants Christopher and Crane must be regarded as "subsequent purchasers with constructive notice of the pendency of this suit." It is conceded that they purchased the property and received their deeds before this action was begun, but the suggestion seems to be that, under the provisions of section 7651, Rev. St. 1913, the filing of the *lis pendens* in this action before their deeds were recorded makes them subsequent purchasers. The language of this section is: "Every person whose conveyance or incumbrance is subsequently executed or subsequently recorded, shall be deemed to be a subsequent purchaser or incumbrancer." This language makes them subsequent incumbrancers, and, although it is not a part of the law of conveyancing, and is dealing with notice, and not with the validity and effect of deeds, it would perhaps be difficult of construction

if it was not immediately followed by the qualifying clause that states plainly in what sense and to what extent they shall be treated as subsequent purchasers or incumbrancers, and "shall be bound by all proceedings taken in said action after the filing of such notice to the same extent as if he were made a party to the action." This seems to be decisive of the purpose of the lawmakers. If a person, holding an unrecorded deed as an innocent purchaser, is "made a party to the action," he must answer and show his interest, or default will be entered against him, and all of his claims in the property will be barred by the "proceedings taken in said action," resulting in final judgment.

This state seems to have adopted the statute from New York, as many other Code states did. In an early case in New York, the statute is construed, and it is said in the syllabus, "The provision of the Code (sec. 132), providing for the filing of *lis pendens,* making it constructive notice to a purchaser, and declaring that a purchaser whose conveyance is subsequently executed or recorded shall be a subsequent purchaser and shall be bound by the proceedings, simply affects such purchaser 'to the same extent as if he were made a party' to the action." The opinion discusses at length very interestingly the theory of *lis pendens,* and says: "The words 'to the same extent as if he were a party to the action' cannot be omitted in construction. * * * While it (the statute) also applies to cases of rights superior to those of the plaintiff, it only affects them in such a way as they would be influenced if the owners were parties to the action." *Lamont v. Cheshire,* 65 N. Y. 30. This case plainly construes the statute to mean that the plaintiff may file a notice of *lis pendens,* and persons holding unrecorded conveyances not known to plaintiff will have the same rights if the notice is filed before their papers are recorded

as though no notice was filed, and they were made parties to the action. The expression in the statute that they shall be deemed to be subsequent purchasers is not defined in the statute in any way, except by the expression which tells what the effect shall finally be, that is, they shall be bound the same as though they had been made parties to the action. This construction is followed in many New York cases and cases in various Code states which have adopted the New York statute. *Lamont v. Cheshire, supra; Bateman v. Backus,* 4 Dak. 433; *Hathaway v. Arnold,* 157 Wis. 22.

This court has heretofore so construed the statute. In an early case construing the act of 1887, which is now our section 7651, Rev. St. 1913, that part of the statute which we are now considering was held unconstitutional. *Sheasley v. Keens,* 48 Neb. 57. But in a later case the question was discussed at large, and *Sheasley v. Keens, supra,* was overruled. In *Munger v. Beard & Bro.,* 79 Neb. 764, it was said: "The thought of the legislature in providing for a notice to be filed with the register of deeds undoubtedly was to protect the interest of secret owners or lien-holders so far as might be done without prejudice to the plaintiff, and to allow them to come into court and have their rights adjudicated." The majority of the court consider this the proper construction of the statute, and, as these defendants have availed themselves of the right to come into court and have their rights adjudicated, they must be adjudicated in this action.

ROSE, J., not sitting.

WILLIAM H. METCALF, ADMINISTRATOR, APPELLEE, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.

FILED APRIL 19, 1919. No. 20283.

1. **Secondary Evidence.** Where the contents of an order to plaintiff's intestate, a section foreman, to measure overhead wires, is an important issue in a case, and there is evidence that the order has been lost, or was last seen in the hands of agents or employees of defendant, secondary evidence of its contents may properly be received on behalf of the plaintiff.
2. **Trial:** REBUTTAL TESTIMONY. Where plaintiff's witnesses testify that they saw and read such order, that it was written in pencil with the name of the roadmaster attached, and defendant's witnesses testify that the order given was typewritten and mimeographed, and that no orders of this nature were ever given in any other manner, it is not erroneous to permit other orders to the section foreman in the form described by plaintiff's witnesses to be introduced in rebuttal.
3. **New Trial:** NEWLY DISCOVERED EVIDENCE. A motion for a new trial upon the ground of newly discovered evidence, the evidence in support of which is set forth in the opinion, *held*, properly overruled.
4. **Appeal:** CONFLICTING EVIDENCE. Where the evidence is substantially conflicting upon material points, the court, in determining questions of law presented, accepts the verdict of the jury in favor of the plaintiff as determining the facts upon such disputed points.
5. **Trial:** MOTION TO STRIKE. A motion to strike the whole of an answer to a question is properly overruled, if part of the answer is properly admissible.

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

E. P. Holmes, Guy C. Chambers and *George R. Mann*, for appellant.

C. J. Campbell and *H. R. Ankeny, contra.*

LETTON, J.

On January 14, 1914, plaintiff's intestate, John T. Smith, was a section foreman upon the main line of defendant, running through the city of Mankato, Kansas. At that time deceased was directed to measure the height of overhead wires crossing the track upon the section of the road under his jurisdiction. Among other tools or appliances furnished him by defendant was a tapeline. Close to the station at Mankato two high voltage electric wires crossed the track. The tapeline furnished appears very much like an ordinary tapeline, but in reality it contains hidden metal wires, or strips running from end to end. Deceased threw the tapeline case attached to one end of the tapeline over the electric wires, holding the other end in his hand, when immediately a strong current of electricity passed along the line and through his body, killing him instantly. This action is brought by his widow to recover damages under the federal employers' liability act. A verdict for $10,000 was rendered. From a judgment upon the verdict, defendant appeals.

One of the material disputes as to the facts is as to whether the deceased had been ordered to measure the clearance of all wires crossing the track, or that of telephone wires only.

The testimony on behalf of plaintiff tends to prove that Smith had received a written order. Between the time of his death and the time his effects were delivered to plaintiff the next day, this order had disappeared. The coroner testified that the order was given to her by the undertaker, but she was unable to tell what disposition of it had been made by her, and it was not in her possession or control at the time of the trial. Several witnesses for the plaintiff testified that they had seen the order before the accident; that it was on an unruled piece of paper; that it was not typewritten, but written by hand; that the roadmaster's name

was at the bottom of it, and that the words, "telephone," or "telephone wires," did not appear in it, but that it was an order to measure all overhead wires.

A number of written orders received over the telegraph lines by the agent at Mankato giving specific orders by the roadmaster to the deceased were introduced in evidence by the plaintiff. The agent testifies that specific orders usually came by wire, but general orders were usually sent direct to the section foreman by railroad mail; such mail being inclosed in an envelope and delivered direct to the foreman.

Defendant objected very strenuously to the offering of these exhibits, since they did not refer to the measurement of wires, and were only orders to Smith as to certain work to be done upon the section. It is said that it is not shown that these orders came by wire, or that they were not dropped out of the window of the private car of the superintendent, or they did not come by railroad mail. But several of them are dated at Fairbury, and are addressed to the section foreman at Mankato, and some are written in pencil, and some typewritten. They bear upon their face evidence, which, considered in connection with the testimony of the station agent as to the receipt of specific orders by wire, convinces us that it was proper to admit them in evidence for the purpose of showing that Smith did receive other orders relating to his duties than printed or mimeographed orders sent to him by railroad mail.

Two witnesses testified to having seen the claim agent of the railway company and the station agent soon after the accident in the ticket office, and to have heard the claim agent read the order taken from Smith's body aloud to the other, to the effect that all overhead wires were to be measured, and remarked that "this looked bad," or words to this effect, and that this fact was impressed upon their minds for the reason that the railroad company afterwards was insistent that the

order was only to measure telephone wires. This testimony is positively denied by the two men mentioned, and there are other circumstances in the record which rendered it of doubtful credibility.

On the other hand, witnesses for defendant testified that it was a general order typewritten and mimeographed, and was identical with exhibit 2, a copy of which appears in the record, and is as follows:

"Fairbury, Nebr., Jan. 12, 1914.

"All Foremen:

"Kindly advise me as soon as possible the number of telephone lines you have crossing our track on your section, giving this information by M. P. location, and clearance from top of rail to wires. Also advise name of telephone company. J. L. Hayes."

Several other section foremen testified they received such an order. The coroner's testimony is somewhat indefinite. She said: "It was two or three lines, saying, measure all overhead telephone wires in a certain distance and before a given time." She thought it was a printed order about the size or a little longer than a telegraph blank, and it had printed characters across it; that it was written with pen or pencil. She afterwards said that it was typewritten or printed. The roadmaster testifies that the order above set out was the only order sent out by him as to the measurement of wires about this time. Considering that the order was either lost by the coroner, or was last seen in the hands of the agents of defendant, secondary evidence was admissible.

One of the alleged errors relied upon for reversal is the overruling of a motion for a new trial on account of newly discovered evidence. The evidence which is alleged to have been newly discovered is with reference to the relations existing between Smith, the deceased, and his wife at the time of his death. This is material

since, under the federal employers' liability act, a wife is only allowed to recover for pecuniary loss resulting from the death of her deceased husband.

The facts alleged are, that, subsequent to the trial of the case, the attorney for the defendant received a letter from a justice of the peace at Tobias, Nebraska, to the effect that in April, 1913, the deceased was arrested and convicted upon the charge of failing to support his wife and children, and entered into a support bond; that afterwards he went to Kansas, and that the justice afterwards acted as intermediary between him and his wife, who still resided with her parents at Tobias; that for several months before Smith's death he refused to support his wife because she refused again to live with him at Mankato.

It was also shown by correspondence of Smith with the justice of the peace that Smith had agreed to live apart from her for six months while it was ascertained whether he was in good faith in his avowed intentions to support his wife and children; that deceased repeatedly stated that he loved his wife and children; that he was very anxious to have his wife return and live with him, and was arranging to buy furniture and provide a home at Mankato, though his later letters to the justice indicate that he was disappointed at her failure to come to him, and spoke of getting a divorce. He sent her money during this time.

The complaint filed at Tobias was against John Schmidt, while the name by which he was known to defendant was John T. Smith, and defendant urges this as a reason why by the use of ordinary diligence it was unable to ascertain these facts.

On the other hand, the testimony at the time of the inquest shows that the station agent and other employees of the defendant in Mankato knew, and the roadmaster, whose office and headquarters were at Fairbury, Nebraska, not far from Tobias, was then told by the plain-

tiff that Smith was not living with his family, and that his wife and children were living at Tobias.

In a counter affidavit by Mrs. Smith's mother, she deposes that Smith always provided for his wife and children, except for a period of about four or six weeks in March or April, 1913, when Smith and his wife were at the home of her parents, and that during that time Smith had trouble with the parents which resulted in his leaving their home; that she saw all the letters which Mrs. Smith received from her husband, and knew that the money, clothing, provisions and assistance which he sent were of about the value of $35 a month, except in November and December, 1913, when he sent her a part of this.

Mrs. Smith deposes that she never talked to the justice about the matter of rejoining her husband, except on one occasion about December 5, 1913, when she told him she was planning to join Smith in the near future. She did not know he was carrying on a correspondence with her husband; that the letters written by him were not authorized by her; that the money she received was sent directly to her; that the justice did not know the amount she was receiving; that the proceedings before the justice were had at his instance, and caused an estrangement of the family, and that from the latter part of April Smith had sent her about $30 a month, and also furnished her and the children with some articles of clothing. Considering all the facts in this connection, there was no error in this ruling.

At the trial Mrs. Smith, after having testified that she had made arrangements, at the time Smith was killed, to move to Mankato, was asked the following questions: "Q. Did you receive a letter from him? A. I did. Q. Even after he was dead, and written the day of his death, arranging for the furniture and all there at Mankato? A. I did."

Defendant then objected "as calling for the contents of the letter, and moves to strike out the answer as incompetent and immaterial." No objection was made to the question. The objection was to the answer as a whole. That portion of it in response to the question whether she received the letter after he was dead was competent testimony. The objection was too broad. Part of the answer was objectionable, but the motion should have been so framed as to ask the court to strike out the incompetent portion of the answer only. Under these circumstances it was properly overruled.

Two witnesses, Green, the station agent, and Argo, his assistant, testified that each of them had, in a conversation with Smith on the date of his death, warned him not to measure the electric light wires, that they were dangerous, and he might get killed. On cross-examination the testimony of Argo was so shaken as to make it, in our opinion, unworthy of credence, and this presumably was the conclusion reached by the jury. The testimony of Mr. Green, however, is direct and specific upon this point. There was a direct conflict between Green and other witnesses with respect to other facts as to which he testified. We cannot say that the contradiction of Green on other points did not influence the minds of the jury to such an extent that they rejected his testimony altogether with regard to this alleged warning.

Instruction No. 13 is complained of because it omitted to tell the jury that the two minor children were entitled to recover from their loss only until they should arrive at 21 years of age. Under the more recent decisions of the federal courts, it was unnecessary for the jury to make such an apportionment. The children were four and one years of age, respectively. The verdict under the instructions of the court, awarded $2,500 to the infant son, $2,500 to the infant daughter, and $5,000 to the widow. The amount of the verdict as a whole and

the amounts awarded to the infants are not excessive, and this assignment must be overruled.

The complaint as to the refusal to give instructions 12 and 13, requested by defendant, we think is not well founded, since in another instruction the jury were told that, if Smith was directed to measure all overhead telephone wires, and that he measured an electric wire carrying a high voltage, which was not included in the order, plaintiff could not recover. This is more specific than the instruction refused with regard to the nonliability of the defendant in case Smith had voluntarily measured the high voltage wires, and hence defendant suffered no prejudice. The instructions as a whole fairly submitted the issues to the jury.

It is argued that the fact that another section foreman measured wires by throwing a line over them, and then measuring the line, establishes the fact that Smith was careless in using the tapeline in the manner in which he did, and that the line itself discloses that it contained wires. The words, "Chesterman Metallic, Sheffield, England," are printed upon the back of this line, but an ordinary individual using the line would not be apt to notice this, and the line itself to an ordinary observer does not indicate the presence of fine interwoven wires.

The principal questions in the case are questions of fact. These have been resolved by the jury in favor of the plaintiff, and whatever doubt may exist in our minds must be considered settled by the verdict.

The deceased was a young man, strong and vigorous, and considering the amount which the testimony shows he had for years been in the habit of devoting to the support of his family, and the proof as to reconciliation, the amount of the verdict seems to be reasonable. The judgment of the district court is therefore

AFFIRMED.

CORNISH, J., not sitting.