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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

JANUARY AND SEPTEMBER TERMS, 1920, AND JANUARY TERM, 1921.

VOLUME CV

HENRY P. STODDART,

OFFICIAL 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
JAMES R. DEAN, Associate Justice
CHESTER H. ALDRICH, Associate Justice
GEORGE A. DAY, Associate Justice
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IN MEMORIAM.

John B. Barnes.

At the session of the Supreme Court of the State of Nebraska, June 6, 1921, there being present Honorable Andrew M. Morrissey, Chief Justice, Honorable Charles B. Letton, Honorable William B. Rose, Honorable James R. Dean, Honorable Chester H. Aldrich, Honorable George A. Day, and Honorable Leonard A. Flansburg, Associate Justices, the following proceedings were had:

MAY IT PLEASE THE COURT:

Your committee appointed to present appropriate resolutions commemorative of the life and services of the late John B. Barnes beg to report as follows:

John B. Barnes was born on a farm in Ashtabula county, Ohio, in 1846. At the age of 18 years he enlisted as a private in Battery E, First Ohio Light Artillery, and thereafter until the close of the Civil War, and until mustered out in July, 1865, engaged in active service with his company. Judge Barnes came west in 1870, settling first at Fredericksburg, Iowa, and in June, 1871, located near Ponca, Nebraska, on a homestead. He married Miss Ida Hannant of Butler county, Iowa. After coming to Nebraska he taught school for a time and studied law, was admitted to the bar, and immediately entered on the practice of his profession. He was elected district attorney of the Third district in 1876, and served until he was appointed judge of that district in 1877, in which capacity he served for six years. In 1888 he located in Norfolk, Nebraska, where he remained in the practice of his profession until January 1, 1902, when he was appointed supreme court commissioner, in which capacity he served until elected one of the judges in 1905. He served two full terms as a judge of this court. Later he was assistant in the office of attorney general. Judge Barnes died in Lincoln, January 14, 1921, survived by a wife and two sons.

Intensely patriotic as a citizen, industrious and painstaking in every vocation he entered, frank, open, kindly, and courageous at all times, generous to a fault, devoid of malice and ready to forgive, he passed through the pioneer days of Nebraska, and came to this high court at the zenith of his splendid physical and mental powers. On this bench, as on the district bench, his varied experience in life, his studious and industrious habits, his logical turn of mind, his sympathy, coupled with inflexible integrity, and a genius for the disposition of work that came to his hands, made him a just and learned judge, helpful to his associates, and a valuable servant of the commonwealth. In private life his counsel was ever sought, first by his neighbors and later by his clients, and his desire was ever that he should assist those neighbors and clients, rather than that out of their misfortunes he should amass a fortune. His life was a blessing, and his memory shall ever be an unfailing joy to his family, comrades, associates, and to the people of this great state. The sudden removal of such a man from the commonwealth in which he for many years held high and responsible positions leaves a vacancy and casts a shadow, which is deeply felt by all, and his death will prove a grievous loss to the state.

THEREFORE, BE IT RESOLVED, that in the death of John B. Barnes, the bar of this state has lost an active, able, and upright member, and the commonwealth a loyal, devoted and useful judge and 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, under the seal of the court, to the widow and family of our departed brother.

Respectfully submitted,

M. D. TYLER.
JACOB FAWCETT.
CLARENCE A. DAVIS.
JESSE L. ROOT.
WILLIAM V. ALLEN.

JUDGE WILLIAM V. ALLEN:

MAY IT PLEASE THE COURT: John Beaumont Barnes was born in East Trumbull, Ohio, August 26, 1846. He was educated in the common schools and at Grand River Institute in that state, and was a private in Battery E, First Ohio Light Artillery in the Civil War. He was admitted to the bar in 1872, and was married to Ida Frances Hannant at Ponca, Nebraska, in 1874. He was district attorney of the sixth judicial district from 1875 to 1879, and judge of the sixth judicial district from 1879 to 1883. He was a commissioner of this court from 1902 to 1904, and a justice from January 1, 1904, to his reelection in 1909. For a time he was *ex officio* chief justice, and he died January 14, 1921.

I first met him at Fredericksburg, an interior Iowa village, in the winter of 1867. We were young men fresh from the Civil War. It was after he came to the bar of the county of my residence in 1888 that I became better acquainted with him. I found him to be an intelligent gentleman of pleasing address, easily approached, and companionable. It was then that I first met him in a professional way, and, until I was elevated to the bench in 1892, we were opposing counsel in many cases, and, while there was sharp rivalry, our relations were pleasant. He practiced before me in 1892 and until I was sent to the United States senate, and again in 1899 until I was returned to the senate, and our friendship was never marred nor broken.

He lived and was active in the most important period of the world's history. The life of our dead friend was typical of the lives of thousands of other American boys of humble birth, who, by energy and persistence, arose from obscurity to popularity and power. It has been given to few men to participate more actively than he in the development of the state. As husband and father, soldier and citizen, jurist and judge, he performed his full duty, and he did much in shaping and molding the policies of the state. His domestic life was tranquil, and he peace-

fully passed away, leaving his wife and two sons to mourn his loss; one son having preceded him to eternity. He was a careful and painstaking judge and a jurist of undoubted merit. He was familiar with the legislative and judicial history of the state and was well grounded in the elementary principles of jurisprudence. I am not sufficiently informed of his habits of study to know whether he explored the field of abstract science or was devoted to *belles lettres,* or familiar with the great epochs of history.

It is difficult to speak in befitting terms and in adequate language of one who was lately of our number. I am assured that he held to the Christian faith,—that life is but a transition state and the grave, instead of being a wall, is a door opening into a future and more delightful world. Since the introduction of the Christian era and the extinction of paganism and pagan philosophy, men have believed in a future existence and the hope of salvation has been universal. "I am the resurrection and the life: He that believeth in me, though he were dead, yet shall he live: And whosoever liveth and believeth in me shall never die," says Christ. If life is to end here and is a mere span of the hand on the dial-plate of time, and labor and sorrow are to count for nothing, if death is to end all and the grave is the final resting place, man's struggle is of no avail. But we have the Divine promise of the resurrection and the life to come, and that the natural body is to be superseded by a spiritual body, and these promises are definite and specific:

"Behold," it is said, "I show you a mystery: We shall not all sleep, but we shall all be changed: In a moment, in the twinkling of an eye, at the last trump: For the trumpet shall sound, and the dead shall be raised incorruptible, and we shall be changed. For this corruptible must put on incorruption, and this mortal must put on immortality. So when this corruptible shall have put on incorruption, and this mortal shall have put on immortality, then shall be brought to pass the saying that is written, Death is swallowed up in victory. O death, where is thy sting? O grave, where is thy victory?"

And when we, too, shall pass away, our homes will be among the heavens; "the problems that our burdened souls have studied so despairingly shall be happily solved; and we may even become participators in the knowledge and power of Him

Whose power o'er moving worlds presides,
Whose voice created and whose wisdom guides.

To this felicity the friend we now with tenderness remember has already advanced. We would not, if we could, bring him back to earth, slowly and painfully to die again. We wait, reverently and hopefully, for the summons to us to join him in some star that is shining, from eternity to eternity, with unfading luster in God's illimitable wilderness of worlds." *Requiescat in pace.*

HONORABLE M. D. TYLER:

MAY IT PLEASE THE COURT: I cannot permit this occasion to pass without paying a personal tribute to the memory, character, and services of Judge Barnes, by bringing, as it were, my robin's leaf to deck the hearse of him who in this life wrought so honorably and so well.

I knew Judge Barnes well, even intimately, for more than thirty years. I came to this state a stranger in 1888 and Judge Barnes was the first person with whom I became acquainted after arriving here. He generously permitted me to occupy a desk in his office until the beginning of the year 1890, when we formed a partnership in the practice of law, which continued until the year 1902, when he became a supreme court commissioner. Our relations, both personal and in a business way, were always most pleasant and agreeable, and, to me at least, most helpful. His death, therefore, comes to me as a great personal loss.

Judge Barnes was in many ways a remarkable man. He had a mind of great power and clearness. He possessed, to a degree vouchsafed to but few, the faculty of taking a complicated state of facts involved in a lawsuit and arriving quickly and accurately at the real, deciding issues involved therein. This faculty was of great assistance to him, not only as a lawyer at the bar, but also

as a judge on the bench. He was strongly partisan, but never contentious. I never knew him to take part in a political argument. He was jealous of his own opinions, yet always tolerant of the opinions of others. One beautiful trait of his character was exhibited in this, that he never spoke ill of any one. He seemed able always to find something good to say of every one. Although he loved and was exceedingly proud of his profession, he cared little for its emoluments. He was absolutely without acquisitiveness. Being happiest when doing good for others, he would go on foot and out of his way to help those in need.

Of Judge Barnes it can truthfully be said that he was a splendid lawyer and an upright judge, and that he was a man, taken all in all, whose like we shall not soon see again.

CHIEF JUSTICE ANDREW M. MORRISSEY:

Realizing that our committee, so far as human minds are given to do, have correctly portrayed the life and character of our late associate, I am content to let the record stand as they have written it. However, I cannot let the occasion go by without a personal word to the memory of one I loved so well. It is often said of some striking character that he is typical of this, or typical of that; but as I live and work again, in memory, with Judge Barnes, I see in him the typical American—big and active of body, keen and alert of intellect, courageous in battle, wise in council, loyal to his ideals, and devoted to his family and friends. As a judge all persons were alike to him, and in his judgments "Equality Before The Law" was a living, breathing idealism. He did what his conscience told him it was right to do and never stopped to count the cost.

As a mark of respect to his memory the resolutions presented and the addresses delivered will be spread upon the journal and printed in the reports.

During the period covered by these reports, in addition to the cases reported in this volume, there were 5 cases affirmed by the court without opinion, and 61 cases disposed of by the supreme court commission.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1920.

IN RE ESTATE OF ISAAC B. ROBINSON.

EDWARD E. GUSTIN, APPELLANT, V. ESTATE OF ISAAC B. ROBINSON, APPELLEE.

FILED JULY 14, 1920. No. 21006.

Vendor and Purchaser: ABATEMENT IN PRICE. When a vendor sells real estate that is described in gross for a gross sum and the property is subsequently discovered to be slightly less in quantity than that described in the deed, the purchaser is not entitled to an abatement in the purchase price unless it appears that fraudulent representations were made by the vendor as to quantity that induced the vendee to purchase.

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

Lincoln Frost, for appellant.

R. H. Hagelin, contra.

DEAN, J.

Plaintiff sued to recover $1,000 from the estate of Isaac B. Robinson, deceased, "on account of the breach of covenants" in a deed executed August 27, 1915, as alleged, wherein Robinson was grantor and plaintiff was grantee. The estate recovered a verdict and judgment and plaintiff appealed.

The controversy grew out of an exchange of real estate between plaintiff and Mr. Robinson, each party delivering to the other warranty deeds in the usual form. Plaintiff owned a house and lot valued at $4,200 that was mortgaged for $1,700. Mr. Robinson owned a two-story brick building, about 70 or 80 feet in length, at 816 O street, valued at $10,000 that was mortgaged for $5,500. Under the exchange agreement, as part payment, plaintiff assumed payment of the $5,500 mortgage on the O street property and also gave Mr. Robinson a mortgage thereon for $2,000. A deed to the house and lot owned by plaintiff, in which his equity was valued at $2,500, was also conveyed by deed to Mr. Robinson. The value of the respective properties, for the purpose of the trade, seems to have been agreed on between the parties. The Robinson deed merely described the property as lot 20, block 44, original city of Lincoln, the deed also containing this recital: "And we do hereby covenant with the said grantee and with his heirs and assigns that we (are) lawfully seised of said premises." Mr. Robinson in his deed of course expressly excepted liability to plaintiff in respect of the $5,500 mortgage. The recorded plat of the "original City of Lincoln" describes the Robinson lot as being 25 feet wide and 142 feet deep. The actual width is 24 feet and 3 inches, and plaintiff contends that because of this deficiency he was damaged in the trade in the sum of $1,000. Hence this suit.

Plaintiff has lived in Lincoln since 1880, and for about 10 years before Mr. Robinson died he knew him in a business way. He testified that for 25 years he has known the Hoppe three-story brick building that stands on O street immediately east of the Robinson property; that 9 inches of the west wall of the Hoppe building stands on the east margin of the Robinson lot; that he did not find it out until about 2½ years after he traded properties with Robinson; that the Robinson building is "properly on the west line, * * * the 25-foot line

running 9 inches into the wall, into the building belonging to Mr. Hoppe." Plaintiff also testified that he owned four lots in block 44 fronting on P street; that Mr. Robinson occupied his own building on O street for approximately 10 years, both being in business in the same block during that time; that their respective properties joined, or nearly so, in the rear at or about the "east and west" center line of the block; that he examined the building before the trade was made. There is evidence in the record tending to prove that plaintiff paid interest on the mortgage to the Robinson estate after he discovered the shortage that he now complains of.

Among other assignments of alleged error counsel argues that the court erred in not instructing the jury to find for plaintiff on the ground "that there had been a breach of the covenant of seisin" and that the only question for the jury was "to determine the amount of damages." From the record before us, and in view of the law applicable thereto, it seems that the court did not err in the premises and that the judgment must therefore be affirmed. There is no charge of fraud or misrepresentation on the part of the vendor, nor is there anything from which fraud can be implied. There is nothing to show that the transaction was other than an exchange or sale in gross for a gross sum. It appears that Mr. Gustin was well acquainted with the Robinson property and was aware of the erection of the Hoppe building, that encroached on its east line, for more than 25 years before the trade was made. He examined the Robinson property and doubtless his knowledge or lack of knowledge of its dimensions just as it stood equaled that of the vendor. There is nothing to show that the vendor or the vendee were advised or had any knowledge in respect of the actual width of the lot and building. Nor does it at all appear that any misrepresentations were made to plaintiff that induced him to make the trade.

Morris Canal Co. v. Emmett, 9 Paige (N. Y.)* 168, 37 Am. Dec. 388, involved an application of the same principle of law that we are considering here. There the court said: "The sale to Emmett was clearly a sale *per aversionem,* as it was called in the Roman law; that is, for a gross sum to be paid for the whole premises, and not at a specified price by the foot or acre. In such sales the purchaser is entitled to the quantity contained within the designated boundaries of the grant, be it more or less, without reference to quantity or measure of the premises which is mentioned in the contract or conveyance. And where there has been no fraud or misrepresentation he is neither liable for a surplus, nor entitled to a deduction on account of any deficiency, in the quantity or measure of the premises mentioned in the contract or deed. *Mann v. Pearson,* 2 Johns. (N. Y.) 37; *Powell v. Clark,* 5 Mass. 355, 4 Am. Dec. 67; *Beach v. Stearns,* 1 Aik. (Vt.) 325." The *Morris Canal Co.* case also cites *Stebbins v. Eddy,* 4 Mason (U. S. C. C.) 414, and quotes Mr. Justice Story as holding in effect that the vendee cannot recover unless there has been fraud or wilful misrepresentation by the vendor to induce the vendee to suppose the quantity of land was greater than it actually was.

Board of Commissioners v. Younger, 29 Cal. 172, is a case where the vendor sought to recover on the alleged ground that the vendee misrepresented quantity. The court said: "If land is sold by metes and bounds, with a statement of the number of acres, a mistake as to the number of acres affords no ground of action, unless it appears beyond controversy that quantity was one of the principal conditions of the contract." It was there held that the vendor was not entitled to relief if he had the means of ascertaining the quantity and did not do so.

In *Graham v. Larmer,* 12 S. E. 389 (87 Va. 222), it is said: "Where land purchased for the gross sum of $6,000 is described in the contract of sale by metes and bounds,

and also as containing 274 acres more or less, a deficiency of 28 acres in the quantity of the land is no ground for an abatement in the purchase price, where the vendor made no representations as to the number of acres in the tract sold, and the vendee bought the land in gross, and not by the acre, and made partial payment after he knew of the alleged deficiency."

In *Lane v. Parsons,* 108 Ia. 241, the court declared: "An owner of a tract of land, which, according to the government plat, contained a certain number of acres, but, according to fixed boundaries, contained much less, conveyed it in gross, describing it as certain fractional quarters of the government survey, the grantee knowing it had been so originally surveyed. The grantor made no covenant or representation as to the number of acres in the tract, except that he merely stated his belief that, if resurveyed according to the original field notes, it would contain the number of acres as therein shown. *Held,* that the grantee was not entitled to recover for a deficiency."

It was held in *Wadhams v. Swan,* 109 Ill. 46: "On a sale of land by its proper numbers, or other specific description by which its boundaries are made certain, for a sum in gross, the boundaries, when ascertained, will control in case of a discrepancy as to the quanity or number of acres; and in such case neither the purchaser nor the vendor will have a remedy against the other for any excess or deficiency in the quantity stated, unless such excess or deficiency is so great as to raise a presumption of fraud."

In *Powell v. Clark,* 4 Am. Dec. 67 (5 Mass. 355), the court, speaking by Chief Justice Parsons, said in substance that, where in a deed of conveyance the land was described as containing a certain quantity, "the words expressing the quantity are not to be considered as a covenant that the land contained such quantity, but are to be taken as merely descriptive." In the body of the

opinion the learned Chief Justice observed: "The question before us in this action depends upon the construction of the deed declared on; and we are of opinion that the words expressing the quantity of land in the two tracts do not amount to a covenant, but are merely descriptive of the lands conveyed. Each tract is definitely limited, and any surveyor could easily ascertain its contents; and the plaintiff might have known the quantity of land contained within the limits described, before he concludes his purchase, by taking proper measures. If, to avoid that trouble, he chose to rely on the estimation of the defendant, he should have taken care that an express covenant was introduced into the deed." *Beach v. Stearns,* 1 Aik. (Vt.) 325; *Shields v. Thompson,* 63 Tenn. 227; *Burke v. Smith,* 57 Okla. 196; *Kendall v. Wells,* 126 Ga. 343; *White v. Price,* 202 Pa. St. 128; *Baker v. Manley,* 203 Pa. St. 191; 2 Devlin, Real Estate (3 ed.) sec. 1044.

Our decision is in harmony with the great weight of authority. The rule seems to have prevailed from an early day. It is a reasonable rule and, under the facts in the present case, we think it should prevail. Other assignments of alleged error are argued by plaintiff in respect of instructions given and refused and as to the admission of certain of the testimony which, in view of our conclusion, we do not find it necessary to discuss. The case was fairly submitted to the jury.

The judgment is

AFFIRMED.

LETTON, J., not sitting.

J. L. WITHERWAX, APPELLANT, V. HOLT COUNTY, APPELLEE.

FILED JULY 14, 1920. No. 21417.

Highways: OBJECTION TO LOCATION: WAIVER. "Where a landowner files a claim for damages caused by the location of a public road over his land, he thereby waives all objections on the ground of irregularities in locating the road." *Davis v. Boone County*, 28 Neb. 837.

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

H. M. Uttley, for appellant.

Lewis C. Chapman, contra.

DEAN, J.

Plaintiff appealed from a judgment dismissing his petition in error in an action wherein he alleged that the county board that located a highway on his land was without jurisdiction "over the subject-matter of the action and the person of the appellant."

The petition alleged that the notice required by section 2870, Rev. St. 1913, was not served; that no claim for damages was filed by any person; and that the county clerk could not therefore lawfully appoint appraisers to examine and report upon claims.

In his objections filed in the county clerk's office plaintiff states that the road "will practically destroy five acres of land," and that his damages "will not be less than $1,500 * * * if said road is finally established * * * according to the notice served upon this objector by the deputy sheriff. This claim or demand for damages is not made with the intent to waive any of the objections made." In plaintiff's notice of appeal from the board's action on his claim, which is in part disallowed, he refers to himself as "being a claimant for damages" and therein says that he

"appeals from said decision." It appears that his appeal bond was approved and filed in the county clerk's office.

In explanation of the foregoing statements plaintiff argues that they constitute "simply a continuation of our recital of reasons why the road should not be established and why the board had no jurisdiction." There is no bill of exceptions and we therefore do not know what evidence was before the board at the hearing. In respect to its action in the premises, and in the absence of proof to the contrary, the presumption is that "in their judgment, founded on the testimony, the public good" required the establishment of the road. Rev. St. 1913, sec. 2878.

That plaintiff was served with notice, and that he filed a claim for damages and appealed from an adverse decision sufficiently appears. When the county board has jurisdiction, and the contrary does not appear in the present case, and a landowner files his claim for damages for the establishment of a road on his land, he thereby waives all objections on the ground of irregularities in locating the road. *Davis v. Boone County*, 28 Neb. 837. Plaintiff is fairly within the rule announced in the *Davis* case. "Jurisdiction of the county commissioners to locate a public road having been shown, all subsequent proceedings will be liberally construed, and a substantial compliance with the statute will be held sufficient." *Howard v. Dakota County*, 25 Neb. 229.

The judgment is

AFFIRMED.

ALDRICH, J., not sitting.

REUBEN W. MAHAFFY, APPELLEE, v. HANSEN LIVE STOCK & FEEDING COMPANY, APPELLANT.

FILED JULY 14, 1920. No. 21046.

1. **Appeal:** CONTINUANCE. A continuance of a cause is largely within the discretion of the trial court, and an order denying a continuance will not be reversed except for an abuse of discretion.
2. **Principal and Agent:** AUTHORITY OF AGENT. "Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority. Whether or not an act is within the scope of an agent's apparent authority is to be determined under the foregoing rule as a question of fact from all the circumstances of the transaction and the business." *Johnston v. Milwaukee & Wyoming Investment Co.*, 46 Neb. 480, followed.

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

W. E. Shuman and *Chez & Barker,* for appellant.

W. T. Wilcox and *Halligan, Beatty & Halligan, contra.*

DAY, J.

The plaintiff recovered a judgment against the defendant in the district court for Lincoln County, based upon allegations which in effect amount to an account stated. To review this judgment the defendant has appealed.

The record shows that the plaintiff and the defendant, through a series of telegrams, entered into a contract whereby the defendant agreed to pasture 1,200 head of cattle in the plaintiff's pasture at the price of $2 a head for the season. The plaintiff by his telegram represented that his pasture would care for that number of cattle. Pursuant to this contract the defendant ship-

ped from time to time and placed in the plaintiff's pasture, as shown by the testimony, 32 car-loads, variously estimated at from 800 to 1000 head. These cattle were under the control and management of one Gottlieb, an agent of the defendant. He exercised complete control over them, shipped them out from time to time, paid numerous bills incident to their care, and on two occasions, prior to the settlement and the giving of the draft for $900 hereinafter referred to, had paid the plaintiff $1,500 on account of the pasturage, the same being paid by two drafts on the defendant, and which were honored by it. At the close of the feeding season there still remained in the pasture about 60 head. A settlement was accordingly had beteen Gottlieb and the plaintiff, which resulted in an agreement being reached that there was a balance due the plaintiff upon the pasturage of $900, and thereupon Gottlieb drew a draft upon the defendant as he had done twice before, for the sum of $900 and delivered it to the plaintiff, and thereupon the plaintiff permitted the balance of the cattle to be removed from the pasture and shipped to market. The defendant failed to honor this draft, and this suit was instituted.

The answer admitted the contract as disclosed by the telegrams, but alleged that defendant did not pasture more than 750 head of cattle, for the reason that there was not adequate pasture and water supply for any more. It denied that Gottlieb had any authority to make a settlement or to draw the draft, and denied that it was indebted to the plaintiff in any sum whatsoever.

While there are a number of assignments of error, in their last analysis they can be reduced to two questions, viz.: Did the court err in overruling the defendant's application for a continuance over the term? And is the evidence sufficient to establish authority in Gottlieb to bind his principal in the settlement? The record shows that the action was commenced in December, 1917, and

the answer filed February 18, 1918. On January 20, 1919, the case was set down for trial and regularly reached for trial on January 27, 1919. On that day the local counsel for the defendant, Mr. William E. Shuman, filed a motion for continuance of the case over the term, supported by his affidavit, in substance, that the defendant had no witnesses present to establish its defense: that the entire preparation of the case, including the drafting of the answer, was in the hands of chief counsel residing at Ogden, Utah, the location of the defendant company; that the names of the prospective witnesses had not been furnished affiant by the chief counsel, and therefore the names of such witnesses could not be set out or the facts to which such witnesses would testify if personally present; that such witnesses resided at Ogden, Utah, and that their testimony would establish the allegations of the answer; that a telegram had just been received from the chief counsel that an important witness was sick, and that arrangements had been made to procure a doctor's certificate of such illness.

This showing is entirely insufficient. The names of no witnesses are given, nor the facts to which they would testify if present. The matter of the continuance of a cause is largely within the discretion of the trial court, and an order denying a continuance of a case will not be reversed except for an abuse of such discretion. *Kramer v. Weigand,* 88 Neb. 392; *Harrington v. Hedlund,* 89 Neb. 272. The record shows that ample opportunity was given the defendant to be ready for trial, or, if not ready, to make such a showing of facts as would justify the court in granting a continuance. The failure in this case was laches on the part of the defendant.

We deem it but justice to say of Mr. Shuman, the local counsel, that he is entirely blameless for the situation in which he was placed. For reasons not apparent

he was not apprised of the facts of the case or the names of defendant's witnesses. He was sent into battle without a shield or a sword. We are unable to say that the ruling of the court on this motion was an abuse of discretion.

Is the evidence sufficient to establish that Gottlieb, as agent for the defendant, had authority to bind his principal in the matter of the settlement? The question of agency is always one of fact to be determined from the evidence in each particular case. It seems to us quiet clear that the acts of Gottlieb, as hereinbefore described, which were brought home to his principal, are such as to bring this case within the rule announced in *Johnston v. Milwaukee & Wyoming Investment Co.*, 46 Neb. 480, in which it was held: "Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority. Whether or not an act is within the scope of an agent's apparent authority is to be determined under the foregoing rule as a question of fact from all the circumstances of the transaction and the business."

From a careful review of the case, we find no reversible error. The judgment is

AFFIRMED.

ALDRICH, J., not sitting.

JOSEF BLAZKA V. STATE OF NEBRASKA.

FILED JULY 14, 1920. No. 21400.

1. **Homicide**: INFORMATION: CONSTRUCTION. In determining whether an information for murder contains all of the essential averments necessary to charge that crime, the information should be construed as a whole, and the language employed should be given its usual and well-understood meaning.
2. ———: ———: SUFFICIENCY. When so construed, if the information fairly and with reasonable certainty charges the elements of the crime of murder, it will be held to be sufficient.
3. ———: ———: CONSTRUCTION. The word "so" in the information construed in connection with the context, and *held* to be the equivalent of the words, "by reason of the mortal wounds inflicted as aforesaid."
4. **Criminal Law**: DEMONSTRATIVE EVIDENCE. In a prosecution for murder, bloody garments and photographs of wounds upon the body of the victim are proper to be received in evidence, when sufficient foundation has been laid, where they tend to illustrate or make clear any controverted issue in the case.
5. **Information** examined, and *held* to sufficiently charge the crime of murder.
6. **Instructions** examined, and *held* not erroneous.
7. **Evidence** examined, and *held* to sustain the verdict and judgment.

ERROR to the district court for Cherry county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Orville L. Jones and *John T. Heffron,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *John B. Barnes, contra.*

DAY, J.

Josef Blazka, hereinafter designated the defendant, was convicted of murder in the second degree, in the district court for Cherry county, and sentenced to life im-

prisonment. He prosecutes error to this court, relying upon a number of assignments.

After the verdict and before sentence the defendant filed a motion in arrest of judgment, challenging the sufficiency of the information. This motion was overruled, and the ruling thereon is now assigned as error. The precise point raised by the motion and argued in the brief is that the information fails to charge that Franciska Blazka, the victim, hereinafter designated the decedent, died of the mortal wounds inflicted upon her. It is manifest that, if the information is subject to the criticism directed against it, it is fatally defective. One of the essential averments in an information for murder is a charge that the victim died of the wounds inflicted. The question involves an examination of the information. In the descriptive part of the information, it charges in apt and appropriate language, and in the usual form of informations for homicide, the venue, the date, March 5, 1919, the assault upon the decedent with deliberate and premeditated malice with the intent to kill and murder, the character of the weapon used, and the infliction upon the body of the decedent of "certain mortal wounds," which are specifically described, following which is the averment: "And did then and there so injure the said Franciska Blazka that she then and there became sick, sore and wounded and confined to her bed where she languished, and so languishing until the 11th day of March, 1919, did die, in said county and state."

As we view it, the whole question turns upon the meaning to be given to the word "so" as used in the latter part of the portion of the information above quoted. The word "so" is of very common use in good English, and has a wide and varied meaning, and the context has much to do with the thought conveyed by its use. The Century dictionary gives various meanings to the word "so," among them: "By this or that means;" "by virtue or because of this or that;" "for that rea-

son;" "in such a way as aforesaid." Webster's New International dictionary defines the word "so:" "As has been stated;" "for that reason;" "in such manner;" "often used with pronominal force to avoid repetition." Stripped of unnecessary verbiage, and reduced in part at least to its last analysis, and giving to the word "so" its pronominal meaning to avoid repetition, and transposing the words, the clause quoted would read: "And did then and there so (in the manner and by the means) injure the said Franciska Blazka that she became wounded, and 'so' (by reason of the mortal wounds inflicted as aforesaid) did die, on March 11, 1919, in said county and state." Such a construction does not, as we view it, do violence to the use of English or put a strained construction upon the words used. A charge that a person feloniously and of deliberate and premeditated malice assaulted a woman on a day named, and inflicted upon her mortal wounds, and did then and there so injure her that she languished and so languishing did die, would be understood in common parlance to charge that she died from those mortal wounds. Defendant so understood the charge against him, and was defended with that understanding.

Section 9050, Rev. St. 1913, provides: "No indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stayed, arrested or in any manner affected, * * * nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." While we do not consider this provision of the statute as obviating the necessity of essential averments in an information, still it may be regarded as legislative authority to place a liberal rather than a technical interpretation upon the meaning of the words used, and especially is that true when by so doing no prejudice results to the defendant in making his defense upon the merits. While it is necessary that an information for murder should aver all of the essential elements of the crime, the law does

not require that it should be laid in the best-chosen English, nor in the technical form approved by long-honored custom. It is sufficient if, from a fair and reasonable construction of the charge as a whole, giving to the language employed its usual and well-understood meaning in the light of the context, it appears that the essential averments of the crime are charged. There was a time in the history of criminal jurisprudence when the courts were justified in resorting to absolute exactness in pleading, and to extreme technicality in an effort to protect the individual in his life and liberty. Many of these technical rules grew up in times when what would be now regarded as trivial offenses were punishable with death. In the time of Blackstone 160 offenses were punishable with death. The accused was not permitted to testify in his own behalf; he was not permitted counsel in his defense in court; and many of the charges were prompted by religious or political passion. Happily that time has passed. The reason for the technical rule no longer exists, and the formalities and technical exactions should no longer be required.

It follows, from what has been said, that the information in this case, when construed as a whole, and giving to the language used its usual and well-understood meaning in the light of the context, sufficiently charges that the decedent came to her death by reason of the mortal wounds inflicted upon her. In this case there can be no possible doubt that defendant understood that he was charged with the murder of his wife, the decedent. Neither is there basis to believe that the so-called defects tended "to the prejudice of the substantial rights of the defendant upon the merits." In this discussion we have not overlooked *Hase v. State,* 74 Neb. 493, and cases cited therein. We do not consider the principle herein announced to run counter to that case.

After laying a sufficient foundation, the state, over objection of the defendant, was permitted to offer in evidence certain photographs of the body of the decedent,

showing numerous wounds of more or less severity. The photographs of the mangled corpse presented a gruesome spectacle, and it is urged that their introduction in evidence tended to arouse a feeling of prejudice, in the minds of the jury. The general rule is that photographs, proved to be correct representations of the person, place or things which they purport to represent, are competent evidence of anything of which it is competent and relevant for a witness to describe verbally. 16 C. J. 744, sec. 1528. In the present case it was incumbent on the state to show, not only that the wounds were inflicted by the defendant, but also that the decedent died of such wounds. Whether the wounds were sufficient to produce death was a strongly controverted issue. The size, character and number of the wounds, the severity of the beating, was a material inquiry, as bearing upon the issue as to whether death resulted from the wounds inflicted. The state was not required to stand alone upon the verbal description given by its witnesses upon this vital question of its case. It had the right, upon a sufficient foundation being laid, to support the oral testimony by demonstrative evidence, and the mere fact alone that the photographs presented a gruesome spectacle would not in itself be sufficient reason to exclude them. It is only when photographs do not illustrate or make clear some controverted issue of the case, and when they are of such a character as to be calculated to prejudice or influence the mind of the jury, that such evidence is not admissible. *Willis v. State,* 49 Tex. Cr. Rep. 139; *Franklin v. State,* 69 Ga. 36; *State v. Miller,* 43 Or. 325; *People v. Lee Nam Chin,* 166 Cal. 570; *People v. Elmore,* 167 Cal. 205; 2 Wigmore, Evidence, sec. 1157. As we view it, the photographs offered were material and competent evidence, as tending to support a material issue in the case, and were properly received in evidence.

As a part of the state's case, it offered in evidence certain bloody garments found upon the premises shortly

after the death of the decedent. These exhibits were objected to by the defendant as incompetent, irrelevant, and immaterial, and not within any of the issues of the case, and as tending to create a prejudice in the minds of the jury. The objection was overruled and the garments admitted in evidence. Error is predicated upon this ruling. There are many instances in which it is proper that such articles of evidence should be received. We conceive the rule to be that, when such evidence tends to throw light upon or illustrate any controverted issue of the case, then it is admissible. When, however, it does not appear that the offered evidence would be material to some inquiry in the case, such exhibits should be excluded. In the cases of *McKay v. State,* 90 Neb. 63, and *Flege v. State,* 93 Neb. 610, it was held that the bloody garments offered in evidence by the state should have been excluded, as they did not tend to elucidate any issue in the case, and that the introduction of such evidence would serve only to arouse the passions of the jury. In each of these cases, however, there was no issue as to the manner in which the deceased persons came to their deaths, the only question being whether the accused committed the deed, and, the blood-stained garments shedding no light upon this question, we think it was properly held that they were inadmissible. In the instant case, however, one of the issues was whether the decedent died of the wounds inflicted upon her. Any evidence of a probative character which tended to throw light upon or illustrate this issue was proper to be admitted. The amount of blood found upon articles of clothing might have some probative force in determining whether the wounds were slight and inconsequential, or whether they were severe. It frequently involves the exercise of wise discretion to determine whether such evidence has probative force, or whether its only purpose would be to arouse resentment in the minds of the jury. We hold that it was not error to receive the exhibits in evidence. For cases illustrating this principle, see *State v. Jackett,* 85

Kan. 427; *State v. Moore,* 80 Kan. 233; *State v. Peterson,* 110 Ia. 647; 2 Wigmore, Evidence, sec. 1157; *Cole v. State,* 45 Tex. Cr. Rep. 225; *Christian v. State,* 46 Tex. Cr. Rep. 47; *Melton v. State,* 47 Tex. Cr. Rep. 451; *Lucas v. State,* 50 Tex. Cr. Rep. 219.

Criticism is made in the brief to errors occuring at the trial, among them, the introduction in evidence of a letter written by the defendant's son to his mother, and also to certain instructions given by the court, and applause by the spectators during the trial. We deem it unnecessary to go into a discussion of these criticisms. We have considered them, and in our opinion they are not sufficient to show prejudicial error. In the instructions the court clearly and carefully guarded the rights of the defendant, and submitted the theory of his defense to the jury.

Lastly, it is urged that the evidence does not support the verdict and judgment. We cannot, in this opinion, without unduly extending it, enter into a discussion of the evidence in detail, and must necessarily content ourselves with brief outlines and conclusions. There is no question but that defendant inflicted upon his wife a most cruel and brutal beating, using as a weapon a bit of harness tug about two inches wide and three-fourths of an inch in thickness, upon the end of which was an iron cockeye. In giving an account of the "whipping," as he termed it, the defendant claims that he used moderation, and that he did not strike his wife with the cockeye end of the tug; but from the frightful manner in which the body was cut and lacerated, and the skin and flesh beaten into a pulp in many places, it is very certain that it was not done with moderation, and more than probable that he struck her with the cockeye end of the tug. From the effect of this beating she was taken to her bed and five days thereafter died. The physician who testified in behalf of the state, and who made an autopsy and examination of the body, gave it as his opinion that the deceased died of the effect of the wounds, and while the

force of his testimony was somewhat weakened by the cross-examination, we are of the opinion there was ample testimony for the jury to conclude that she died of these wounds. The autopsy indicated that the vital organs were in a healthy condition, and that death did not ensue from disease. There was some testimony on behalf of the defense which suggests that the decedent might have died from strychnine poison, self-administered; the manner of her death indicates many of the characteristics of strychnine poison, but these questions were for the jury to pass upon, and were submitted under proper instructions.

From an examination of the entire record, from the facts clearly and undisputably established, and from the fair inferences to be drawn from such facts, we are clearly of the opinion that the testimony amply supports the verdict and judgment.

We find no prejudicial error which would warrant a reversal of the case.

JUDGMENT AFFIRMED.

OMAHA ALFALFA MILLING COMPANY, APPELLANT, V. L. W. PINKHAM ET AL., APPELLEES.

FILED JULY 14, 1920. No. 21076.

1. **Principal and Agent: CONTRACT IN EXCESS OF AGENT'S AUTHORITY.** Where an agent, authorized by his principal to execute a contract only upon a certain condition to be embodied therein, informs the other party of the limitation upon his authority, but nevertheless executes, on behalf of his principal, a written contract embodying a different and opposite condition, the principal will not be bound thereby.

2. ———: ———: **PAROL EVIDENCE.** In an action upon a written contract executed by an agent on behalf of his principal, where the defense is that one of the conditions of the contract was in excess of the agent's authority, it is not a violation of the rule forbidding written contracts to be varied by parol to permit the

principal to show, by the testimony of witnesses present during the negotiation, that before the contract was executed the agent informed the other party that he was not authorized to execute the same if it embodied the condition in question.

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

J. M. Fitzgerald and *C. P. Anderbery,* for appellant.

J. L. McPheely, contra.

DORSEY, C.

This action is to recover damages for the failure of the defendant, L. W. Pinkham, to deliver 55 tons of hay under the terms of a written instrument purporting to be an agreement on his part to sell and deliver that quantity of hay to Leypoldt & Pennington, whose rights under the contract they afterwards assigned to the plaintiff. Hjalmar Olson was also made a defendant, but was not really a party in interest. The verdict and judgment were for the defendants, and plaintiff appeals.

The defendant Pinkham was represented in the transaction by Olson. Pennington, a hay buyer, was at the Olson farm when the subject of buying the Pinkham hay was brought up, and Olson said he would go to the house and telephone Pinkham about it. After the conversation over the telephone, Olson and Pennington went to Kearney, where the instrument sued upon was drawn up, in duplicate, and signed by Olson on behalf of Pinkham. It recites that Pinkham thereby sold and transferred to Leypoldt & Pennington the 55 tons of hay in question for $8.50 a ton, and that it was to be delivered by Pinkham within 30 days "on board of cars at siding at Minden;" that $50 had been paid upon the purchase price, the remainder to be paid "when said hay has been delivered as aforesaid to the satisfaction of said Leypoldt & Pennington."

The negotiations took place and the instrument was signed on October 17, 1916, and on November 7 the con-

tract was assigned to the plaintiff. Some time later a representative of the plaintiff called up Pinkham and informed him by telephone of the assignment, requesting him to bill the hay to Omaha, and to send the bill of lading to the plaintiff's agent at Cozad, stating that a check would be sent for each car from there. November 15, 1916, Pinkham refunded the advance payment of $50 by check to Leypoldt & Pennington, but the check was returned to Pinkham on December 28, 1916. The hay was never delivered.

The plaintiff in its petition sets up the contract and the payment of $50 upon it, alleges the defendant's failure and refusal to deliver, and that, at the time it should have been delivered, it was worth $13.50 a ton, and prays for damages equivalent to the increase in the price of the hay, together with the sum of $50, advance payment upon the contract.

Among the defenses interposed by the defendant Pinkham was the following: That, while Olson was authorized to contract, as agent for Pinkham, for the sale of the hay, his authority had been expressly limited to selling it only in case the buyer should agree to procure from the railroad company the cars necessary for its shipment, and only upon condition that Pinkham should be relieved of any obligation to furnish cars; that such limitation was expressly insisted upon in the telephone conversation in which Pinkham authorized Olson to act as his agent in selling the hay; that this condition was communicated by Olson to Pennington before the contract was signed; and that therefore the defendant was under no obligation to deliver the hay until cars were furnished by the plaintiff, and plaintiff was not entitled to take advantage of any technical interpretation of the words "on board of cars" in the contract, which might ordinarily impose upon the defendant the duty of furnishing cars.

To sustain this defense the defendant offered, and the court received, over the plaintiff's objections, the testi-

mony of Hjalmar Olson and his brother to the effect that, after talking with the defendant by telephone, Olson returned to Pennington and informed him that Pinkham would not consent to the sale, except upon condition that Pennington, and not Pinkham, should attend to procuring the cars, and that Pennington assented to that condition before the contract was drawn up. The plaintiff objected to this testimony on the ground that the language of the contract, "to be by him delivered on board of cars," has a well-understood legal significance, which the courts have construed to imply a duty on the part of a vendor in a sale contract to procure from the railroad company the cars necessary to carry out the agreement to deliver. *Vogt v. Schienebeck,* 122 Wis. 491; *Elliott v. Howison,* 146 Ala. 568; *Culp v. Sandoval,* 22 N. M. 71.

The plaintiff insists that to permit the defendant to show a prior or contemporaneous oral agreement, shifting from defendant to the plaintiff the duty of furnishing the cars, which, under the language of the contract, devolved, as a matter of law, upon the defendant, is a violation of the rule that a written agreement cannot be varied or contradicted by parol.

In this case, however, the defense was that Olson's authority to make any contract at all, on behalf of the defendant, with reference to the hay, was limited by a condition of which Pennington had knowledge before the contract was signed, that Pennington's knowledge is binding upon the plaintiff, and that, since it is chargeable with knowledge that Olson had no general authority, but only such special and restricted authority as was directly communicated to Pennington at the time, the limitation upon Olson's authority is binding upon the plaintiff. In such case the plaintiff could not rely upon a provision of the contract that it knew in advance was contrary to, or in excess of, the powers confided by the principal to the agent. *Bradley & Co. v. Basta,* 71 Neb. 169; 31 Cyc. 1329.

It is, therefore, clear to us that, while, under ordinary circumstances, if the defendant had made the sale and signed the contract himself, without the interposition of an agent, he would be bound by the terms of the agreement as embodied in the written contract, and could not be permitted to vary them by parol, there was no error in permitting him to show, by parol evidence, that the provision of the contract relative to furnishing cars was known by Pennington, at the time the contract was signed, to be in excess of the agent's authority. 17 Cyc. 701.

Except for the matter of the right of the plaintiff to recover the advance payment of $50 on the purchase price of the hay, which we shall presently consider, the assignments of error insisted upon by the plaintiff all relate to and are dependent upon the propriety of the ruling of the trial court in admitting the parol evidence complained of, and the conclusion reached upon that question disposes of the principal contentions raised upon this appeal.

The plaintiff pleaded the advance payment in its petition and prayed for judgment therefor. The defendant, in his answer, tendered that sum into court, "to be paid to the said Leypoldt & Pennington, or whichever one the court may find entitled to the same." The defendant's liability for the return of this money being thus conceded in the pleadings, the trial court, we think, should have required the jury to return a verdict for the plaintiff in the sum of $50, even though the jury found for the defendant with reference to the damages claimed for breach of contract.

We accordingly recommend that, if, within 30 days, the defendant pay into the hands of the clerk of this court the sum of $50 for the use and benefit of the plaintiff, the judgment of the court below be affirmed, but that otherwise it be reversed and remanded.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, if, within 30 days, the defendant pay into the hands of

the clerk of this court the sum of $50 for the use and benefit of the plaintiff, but that otherwise it be reversed and remanded, and this opinion is adopted by and made the opinion of the court.

AFFIRMED ON CONDITION.

GLADYS MAY GARRISON, APPELLEE, V. MODERN WOODMEN OF AMERICA, APPELLANT.

FILED JULY 14, 1920. No. 21075.

1. **Insurance**: BENEFICIAL ASSOCIATIONS: BY-LAWS. A by-law of a fraternal benefit society enacted after the issue of the benefit certificate must be reasonable to bind a member, though the certificate provides that the member shall be bound by the by-laws as they then existed, or may be thereafter modified or enacted.
2. ———: ———: ———. A subsequently adopted by-law of a fraternal beneficiary society is not binding upon a member who has agreed in his application and the certificate issued to him that all by-laws then in force or thereafter adopted should be binding upon him, where such by-law provides that the disappearance or long-continued absence of a member unheard of shall not be regarded as evidence of death or right of recovery on any benefit certificate issued by the society until the full term of the member's expectancy of life.
3. ———: ———: PROOF OF LOSS. When a member disappears, and the beneficiary depends upon such disappearance as a presumption of death, the society is estopped from claiming the proofs of loss were not sufficient, where it took the position that it was not liable until actual death was shown, or payments made for term of expectancy.

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

Truman Plantz, P. J. Barrett and *Nelson C. Pratt,* for appellant.

James R. Swain, contra.

TIBBETS, C.

This is an action by the plaintiff against defendant to recover on a beneficiary certificate. Trial had to a jury. Judgment for plaintiff, and defendant appeals.

The plaintiff in this action is the daughter and sole beneficiary named in a certificate issued by defendant to one G. G. Garrison for $2,000, payable to plaintiff on the death of insured, who at the time of the issuance of the certificate was of the age of 43 years. The defendant is a fraternal beneficiary society incorporated, organized and doing business under the laws of the state of Illinois. Among other conditions contained in said certificate is the following: "This certificate and contract is and shall be subject to forfeiture for any of the causes of forfeiture which are now prescribed in the by-laws of this society, or for any other cause or causes of forfeiture which may be hereafter prescribed by this society by amendment of said by-laws." Another provision contained in said certificate is: "No action can or shall be maintained on this certificate until after the proofs of death and claimant's right to benefits as provided for in the by-laws of this society have been filed with the head clerk, and passed upon by the board of directors, nor unless brought within one year from the date of such action by said board."

The said certificate was executed by defendant on the 16th day of July, 1898, and delivered August 6, 1898. Subsequently the by-laws of defendant were amended to take effect from and after the 1st day of September, 1908, and contained the following:

"Sec. 66. Disappearance No Presumption of Death—No lapse of time or absence or disappearance on the part of any member, heretofore or hereafter admitted into the society without proof of the actual death of such member, while in good standing in the society, shall entitle his beneficiary to recover the amount of his benefit certificate, except as hereinafter provided. The disappearance or long-continued absence of any member

unheard of shall not be regarded as evidence of death or give any right to recover on any benefit certificate heretofore or hereafter issued by the society until the full term of the member's expectancy of life, according to the national fraternal congress table of mortality, has expired within the life of the benefit certificate in question, and this law shall be in full force and effect, any statute of any state or country or rule of common law of any state or country to the contrary notwithstanding. The term 'within the life of the benefit certificate,' as here used, means that the benefit certificate has not lapsed or been forfeited, and that all payments required by the by-laws of the society have been made."

There was also an amendment to the by-laws which went into effect September 10, 1914, as to proof and requirements to be furnished the society on the death of a member.

The insured continued to pay, or caused to be paid, the assessments from the time the certificate went into effect until about April, 1910, when he disappeared, since which time until the commencement of this action plaintiff and her relatives have paid the assessments due under the certificate. The insured disappeared after the by-law relating to disappearance had been enacted and gone into effect. As to the disappearance of Garrison and the presumption of his death after the lapse of seven years, it is not necessary to enter into a discussion of the same, as defendant has not successfully controverted the fact that he did disappear on the date mentioned and that all the necessary requirements have been met as to a search for his whereabouts. The sole question as we deem it for our consideration is: Was the amended by-law adopted in 1908 conclusive on the plaintiff and her right to recover in this action? This court has decided frequently and it is the well-established rule in this jurisdiction that—"A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence

for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." *Holdrege v. Livingston,* 79 Neb. 238. See, also, *McLaughlin v. Sovereign Camp,* W. O. W., 97 Neb. 71; *Masters v. Modern Woodmen of America,* 102 Neb. 672.

This rule is almost universal, and its adoption was to meet those conditions and circumstances that occasionally arise in human affairs. In the instant case it will not be contended but what the plaintiff would be entitled to recover were it not for the adoption of the by-law by defendant abrogating the presumption of death from seven years' disappearance. As contended by counsel for defendant this is a rule of evidence; but it is such a general rule that parties entering into a contract, and especially one similar to the one involved, would take cognizance of its existence, force and effect, and it would naturally be in contemplation of the parties when entered into. We have been cited by both plaintiff and defendant to the case of *McLaughlin v. Sovereign Camp, W. O. W.,* 97 Neb. 71, to maintain their separate contentions. In the *McLaughlin* case the court, after affirming the rule of presumption of death, as heretofore quoted, held: "In such case an insurer cannot avoid its contract of insurance on the life of such absentee because of an alleged violation by the insured of a by-law adopted by the insurer during such unexplained absence, without evidence that the insured was living when the by-law was adopted." In the instant case the by-law was adopted during the life of the insured, and if this court intended to hold in the *McLaughlin* case that in all cases where the by-law was amended, whatever its nature, scope, or character, before the disappearance of the insured, the beneficiary was bound by the amendment, then we are determined as to the right of the plaintiff to recover, and this case should be reversed. But we are not faced with such a contingency. The *McLaughlin* case is not determinate of the rights of the parties in

this case. The question logically occurs as to whether the by-law adopted in 1908 was of such a character as to be binding upon the insured and the beneficiary. As to this proposition the *McLaughlin* case is silent. It determined the issues in that case as far as it became necessary, and did not discuss or decide the question as to the binding force of the by-law or as to the effect of an amendment after the contract was entered into and prior to the disappearance of the insured, or as to whether the same was reasonable or not.

In the case of *Sweet v. Modern Woodmen of America,* 169 Wis. 462, the supreme court in a case analagous to the one at bar, and having under consideration the same by-law, the defendant in that case being the same as the defendant in the present case, held:

"A controversy as to contract rights between a fraternal benefit association and a beneficiary is not an internal affair of the corporation with reference to which the legal decisions of its tribunal can be made conclusive.

"Thus, a by-law of a fraternal benefit association, providing that the disappearance of a member for any period short of his life expectancy should not entitle the beneficiary to recover on the certificate, substantially changed the contract, and could not apply to a certificate theretofore issued, though the insured had agreed that the laws thereafter enacted by the association should become a part of the contract."

The court in the opinion in discussing the provisions of the by-law say: "It is an attempt to establish by contract a rule of evidence and enforce acceptance of the rule upon the courts."

The civil court of appeals of Texas in the case of *Supreme Lodge, K. P., v. Wilson,* 204 S. W. (Tex.) 891, declared the rule to be in that jurisdiction: "Fraternal insurance company's by-law that absence for seven years shall not be evidence of death until full

term of life expectancy of insured has expired was unreasonable as to a policy already existing."

"A bylaw of a fraternal insurance company that no recovery could be had upon any certificate of insured absent seven years until after the expiration of life expectancy was unreasonable as to an existing certificate."

It is true that the statutes of Texas provide "that any person absent for seven years shall be presumed to be dead." The court held, however, that the by-law was not only in conflict with the statutes of that state, but it was unreasonable, and by numerous decisions the courts of Texas are committed to the rule that a by-law similar to the one in question is unreasonable, both as to the terms and conditions contained therein and also as an usurpation of the powers of the court.

The supreme court of Kansas in the case of *Hannon v. United Workmen,* 99 Kan. 734, having under consideration a by-law similar to defendant's, arrived at the same conclusion as the Texas court, as to the effect of this particular by-law, and state that the rule to be applied to unexplained absences is so well settled in that state as to have acquired substantially the force of a statute. The court in the *Hannon* case distinguishes many of the cases cited by defendant in support of its contention. The supreme court of Idaho in *Gaffney v. Royal Neighbors of America,* 31 Idaho, 549, declared that a by-law similar to defendant's was void.

The supreme court of Michigan has also arrayed itself on the side of those courts which have held that a by-law containing the provision of the one under consideration in the instant case is an unreasonable one. *Samberg v. Knights of Maccabees,* 158 Mich. 568.

The exhaustive and well-considered opinion in the case of *Richey v. Sovereign Camp, W. O. W.,* 184 Ia. 10, is determinate of nearly, if not all, of the contentions urged by the defendant in the instant case. In that case the supreme court of Iowa not only held that the change in the by-law had by them under consideration was in-

effective to bar the plaintiff from his right of recovery, but also held: "Where beneficiary of member relied upon his absence or disappearance, creating presumption of death, proof of loss furnished society was not required to go beyond showing such disappearance as would raise the presumption.

"Where a member disappeared, and his beneficiary claimed under presumption of death from absence, the society, which flatly took position it was under no liability until actual death were shown or payments were made for term of expectancy, thereby waived different and further proof." (168 N. W. 276.)

We are constrained to adopt the holdings of the Iowa court, not only as to its construction of the force and operation of the by-law passed upon by them, but also as to the ruling of the court as to the sufficiency of the proof of loss furnished. The case at bar and the Iowa case as to those two matters are practically identical, and the reasoning in the Iowa case would apply to the instant case in all the matters in which the facts and law involved in the two cases are similar.

We have had our attention called to *Cobble v. Royal Neighbors of America,* 219 S. W. (Mo. App.) 118, in which that court, having under consideration a by-law similar in all respects to the one in the instant case, held the by-law valid and enforceable and affirmed the judgment of the circuit court from which the appeal was taken. Justice Bradley of that court, however, filed a strong and convincing dissenting opinion and collated the cases bearing on both sides of the question and clearly demonstrated by the argument and authorities cited that the by-law was void and had been so declared by a majority of the courts considering the same, and at his request the case was certified to the supreme court of that state, where it is now pending.

Also the case of *Stein v. Modern Woodmen of America,* decided April 30, 1920, is in point, wherein the appellate court in and for the first district of the state of

Illinois held that the said by-law under consideration in the instant case is not against public policy nor in contravention of any public law, and bases its conclusion largely on the case of *Apitz v. Knights & Ladies of Honor,* 274 Ill. 196, and *Supreme Council, Royal Arcanum v. McKnight,* 238 Ill. 349.

Counsel for defendant cites in his brief in support of his contentions the case of *Olson v. Modern Woodmen of America,* 182 Ia. 1018, where the conclusions of the court were the same as in the case of *Masters v. Modern Woodmen of America, supra,* and *McLaughlin v. Sovereign Camp, W. O. W., supra.* Yet the Iowa court by its decision in the *Richey* case, *supra,* did not consider that it was in any manner modifying or overruling the *Olson* case. Neither do we consider that the conclusion we have arrived at is in conflict with the rule declared in the *McLaughlin* and *Masters* cases. The reasons given in those for the conclusions arrived at would apply with equal force to conclusions we have arrived at in the instant case.

The rule is almost universal that an unreasonable and oppressive amendment to the by-laws of a society of the character of defendent's is inoperative. "All by-laws must be reasonable and consistent with the general principles of the law of the land, which are to be determined by the courts when a case is properly before them." 1 Bacon Life and Accident Insurance, Benefit Societies (4th ed.) sec. 106.

It must be conceded that the courts of some states have upheld amendments to by-laws similar to the one under consideration, notably the courts of Ohio, Maryland, New York, and Illinois, and others inferentially; but we decline to be governed by those, but choose rather to adopt the conclusions arrived at by a majority of and the best-considered cases; the reasoning and conclusions which we consider are in harmony with the previous decisions of this court, and not in violation of public policy, the statutes of this state, or the fundamen-

tal principles governing a change in the laws of a society which is unreasonable and oppressive.

For the reasons heretofore set forth, we recommend that the judgment of the district court be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

LETTON, J., dissents.

EDITH R. STONE, APPELLANT, V. JAMES H. STINE ET AL., APPELLEES.

FILED JULY 14, 1920. No. 21064.

1. **Wills: CONSTRUCTION.** Both in construing a will and in determining the rights of parties under it, the supreme controlling consideration is the intention of the testator.
2. ———: LEGATEES. By claiming under the will, a legatee, by implication, submits to the testator's intention.
3. ———: ———. Where a testator, having life insurance payable to his heirs at his death, treats it as part of his estate in making his will, in the belief that it is, his belief in that regard, though erroneous, is adopted by all legatees claiming under the will and is binding upon them.

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

Will H. Thompson & Son, for appellant.

Charles W. Sears and *John W. Graham, contra.*

CAIN, C.

Plaintiff, a minor, by her guardian and next friend, brought this suit to require her father's testamentary

trustee to give a fidelity bond to secure trust funds to the extent of $1,000. The defendant trustee, James H. Stine, in his answer and at the trial, declared himself willing to execute the required bond to secure funds to the extent of $600 only, claiming that plaintiff had already received $400 of her legacy. The judgment of the district court was that the defendant trustee held only $600 belonging to the plaintiff, and ordered him to give a fidelity bond to plaintiff in that sum, premiums thereon to be paid out of plaintiff's trust estate in his hands, the costs of suit to be taxed to plaintiff. The plaintiff appealed. Decision of this case incidentally involves the construction of a will.

The facts are all stipulated and, as far as material, are as follows: Edith R. Stone, the plaintiff, is a minor of the age of 15 years on July 21, 1919, and is the daughter of John W. Stone, the deceased testator, by his second wife, Luvilla J. Stone, divorced, who is plaintiff's guardian. The interveners, Mamie Stine, Floyd E. Stone, Ella M. Stone, and Ethel Stone are children of John W. Stone by his first marriage, and are appellees herein.

John W. Stone died in the state of Washington on January 23, 1911, leaving a last will and testament executed on the 4th day of November, 1910, which was duly admitted to probate at Seattle in February, 1911. Final decree of distribution was entered December 3, 1913.

The portions of the will material to this suit are as follows: "First. To my children by my first wife, to wit, Mamie Stine, wife of James H. Stine, of Omaha, Nebraska, Floyd E. Stone, Ella M. Stone and Ethel Stone, I give the life insurance which I have in the 'Ancient Order of United Workmen,' to wit, two thousand dollars ($2,000), share and share alike. * * * Second. To Edith R. Stone, my daughter by my second marriage, if she survive me, I give the sum of one thousand dollars ($1,000) in cash, and direct that if

said Edith R. Stone be under the age of twenty (20) years at the time of my death, this bequest shall be paid to said James H. Stine, as trustee, to hold the same, both principal and interest, until my said daughter arrives at the age of twenty (20) years, at which time the entire sum, both principal and interest, shall be paid over to her. But if my said daughter shall die before she reaches the age of twenty (20) years, then this bequest shall lapse and the amount thereof shall be paid into the residue of my estate under the provisions hereinafter set out." The third paragraph of the will bequeaths the residuary estate to James H. Stine, to be held by him in trust until the youngest surviving child of the testator's first marriage shall reach the age of 23 years, at which time the entire residuary estate shall be divided equally between the surviving children of the first marriage, or the children of any deceased child of the first marriage by right of representation. The trustee has given no bond, and plaintiff offers that the premium be paid out of her trust estate.

For nearly 20 years before his death, the testator had a benefit certificate for $2,000 in the Ancient Order of United Workmen. His first wife, Eva D. Stone, was named as beneficiary, but after her death no new beneficiary was named. Hence, it was payable, at his death, only to his five children in equal shares, as all parties concede and as this court has held. *Schneider v. Modern Woodmen of America,* 96 Neb. 545. The Grand Lodge insurer refused to pay the insurance money to the executor, and it was paid to the five children in equal shares, plaintiff receiving $400 thereof. She claims that she is entitled to retain this $400 and, in addition, to receive the legacy of $1,000 under the will. Appellees contend that the $400 already received by her should be deducted from the $1,000.

On October 19, 1910, Luvilla J. Stone, mother and guardian of plaintiff, was granted a divorce from John

W. Stone and was awarded the custody of plaintiff, who was then six years old, and $25 a month for the plaintiff's support during her minority. After the death of John W. Stone, Luvilla J. Stone, as plaintiff's guardian, filed a claim against his estate for $825, the amount then due on the monthly payments, and the further sum of $2,500 to cover the payments thereafter to become due until plaintiff should become of age in 1922. On the court's order, and out of the estate, $825 was paid to plaintiff's guardian and $2,500 was paid to the Title Trust Company of Seattle, plaintiff's trustee. The entire estate, after payment of all debts, other than the two payments above noted, consisted of a half interest in some lots in Seattle valued at $2,250, $8,311.43 cash, and other items of less value than $100. After deducting those two payments, there remained in the hands of the executor only $4,986.43, which he paid to the defendant trustee.

It will be noted from the will itself that the testator believed he had power to make testamentary disposition of the $2,000 life insurance money, and that he made his will with the idea that it was a part of his estate. Of course, he was mistaken about this, since the insurance was payable to his children, no new beneficiary having been named. Nevertheless, it was included within his testamentary scheme, and he treated the insurance as part of his estate and it must be so treated by all who claim under the will. He provided that plaintiff should have but $1,000 out of the whole of what he regarded as his estate. That was the testator's intent, and it is controlling and must prevail over every other consideration, not only in the construction of the will, but in determining the rights of all persons claiming under it. *Beermann v. DeGive*, 112 Ga. 614; *Weeks v. Weeks*, 77 N. Car. 421; *Worley v. Wimberly*, 99 Neb. 20; *Hill v. Hill*, 90 Neb. 43; *In re Estate of Willits*, 88 Neb. 805; *In re Estate of Manning*, 85 Neb. 60; *St. James Orphan Asy-*

lum v. Shelby, 60 Neb. 796; *Mohr v. Harder,* 103 Neb. 545. By claiming under a will, a legatee adopts and submits to the testator's intent. *Weeks v. Weeks, supra.*

The testator intended that this life insurance money should go to the four children of his first marriage in equal shares, and that this plaintiff should have a total of only $1,000 out of what he regarded as his estate. If plaintiff's contention should prevail, she would receive $400 more than the testator intended and each of the appellee children would receive $100 less than he intended, and thereby his whole scheme would be disarranged and his purpose defeated. This cannot be permitted. The only way now to carry out the testator's intent is to treat the insurance money as part of the estate as he treated it, and charge the $400 already received by plaintiff against her legacy of $1,000, leaving $600 in the hands of the trustee belonging to her.

But appellant contends that the parties to the will and those concerned in carrying out its provisions have placed a different construction on the will by treating the insurance money as not being a part of the estate at all, citing *Cady v. Travelers Ins. Co.,* 93 Neb. 634, *Jobst v. Hayden Bros.,* 84 Neb. 735, and *Pate v. French,* 122 Ind. 10, in support of the contention. There are two answers to this contention. One is that the insurance money was paid by the Grand Lodge and received by the children under actual legal necessity and they had no alternative, and, hence, their act cannot be interpreted as a construction of the will. The other answer is that the legatees cannot displace the testator's intent by their interpretation without setting aside the whole will. The two Nebraska cases cited relate to the construction of contracts and no will was involved. The Indiana court simply upheld deeds made by devisees. Neither of the cases cited is in point.

Appellant also contends that the probate court of the state of Washington has construed the will in her favor.

We have examined the decree of that court with care, and the construction of the will was not in issue or before the court, and was not decided. The report of the executor to that court shows that he has paid the total sum in his hands, after the payment of debts and charges, over to the trustee, and states the total amount and the names of all legatees, but does not state any specific amount to be paid to any legatee. There could not be and was not any judicial construction of the will by that court.

Appellant further complains that the trial court erred in holding that the trustee should account for the money from December 8, 1913, instead of February 14, 1912, when he received a sum sufficient to cover the bequest to plaintiff. In this appellant is right, and it is conceded by appellees in their brief, and the decree of the district court should be modified accordingly. Complaint is also made of the taxing of the costs to plaintiff, but we think the costs were properly so taxed.

We recommed that the judgment of the district court be modified so as to require the defendant trustee to account to plaintiff for the $600 from February 14, 1912, and that, as so modified, the judgment of the district court be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, as modified, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

NATIONAL SURETY COMPANY, APPELLANT, V. THOMAS LOVE, APPELLEE.*

FILED JULY 14, 1920. No. 21086.

1. **Judgment: VALIDITY.** Section 1, art. IV of the Constitution of the United States, requiring that full faith and credit shall be given to the judgment of a sister state, has no application to such

* Reversed on rehearing. See opinion, p. —, *post*.

a judgment rendered against one of several joint obligors who was a nonresident of the state, and had no notice or knowledge of the pendency of the action, and did not appear therein. *D'Arcy v. Ketchum*, 11 How. (U. S.) *165; *Thompson v. Whitman*, 18 Wall. (U. S.) 457; *Knowles v. Gaslight & Coke Co.*, 19 Wall. (U. S.) 58; *Hall v. Lanning*, 91 U. S. 160.

2. ———: CONCLUSIVENESS. A judgment rendered against an indemnitee on a bond upon which he was surety is not conclusive upon the indemnitor of his liability thereon, when such indemnitor was a nonresident of the state in which the judgment was rendered, and had no notice or knowledge of the pendency of the action on the bond, and did not appear therein.

3. **Evidence:** JUDICIAL RECORD: AUTHENTICATION. It is indispensable to the authentication of a judicial record of a sister state that it have attached thereto a certificate of the presiding judge that the attestation is "in due form" or "in due form of law." *Chapman v. Chapman*, 74 Neb. 388; Rev. St. 1913, sec. 7979.

4. **Evidence** examined, and *held* to sustain the judgment of the trial court.

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

F. S. Baker and *Crane, Boucher & Sternberg*, for appellant.

J. E. Porter, O. W. Percy and *Tyrrell & Westover, contra.*

CAIN, C.

In this action the National Surety Company sued the defendant, Love, to recover the sum of $650.80 upon a written contract executed by Love to indemify the company for any loss, damage or expense it should sustain by reason of becoming his surety upon an attachment bond executed on the 8th day of May, 1914, in a case where he sued one Al Crystal in the circuit court of Klamath county, Oregon, to recover the sum of $1,000. The case was tried to the court without a jury, and, on May 12, 1919, resulted in a judgment dismissing plaintiff's action. Plaintiff appeals, assigning as error that the judgment is contrary to law and to the evidence.

The facts are somewhat involved, but will be stated with as much brevity as possible, as follows: On May 8, 1914, Thomas Love began an action and attachment proceeding against Al Crystal in the Oregon court to recover $1,000 for money had and received, and the plaintiff herein became surety on the attachment undertaking. The attachment was levied upon a stock of liquors and bar fixtures belonging to Crystal in Klamath Falls, Oregon, but he gave a redelivery bond with Powell and Montgomery as his sureties, and again got possession of his goods. On August 14, 1914, upon the affidavit of Love a successive writ of attachment issued, which was served on August 20, 1914, by garnishing $1,000 in the hands of the First State & Savings Bank of Klamath Falls. In the case of Love v. Crystal, plaintiff was represented by C. M. O'Neill, and the defendant by W. H. A. Renner, assisted by J. C. Rutenic and Joseph S. Kent, all of Klamath Falls. On August 20, 1914, Love's attachment case was dismissed upon his own motion, the order of court reciting that an adjustment had been made of all differences between the parties by the sureties on the redelivery bond, "who settled all matters pertaining to said cause of action." It is undisputed that, a day or two before the order of dismissal was entered, O'Neill, the attorney of record for Love, and Renner, the attorney of record for Crystal, met together and discussed the settlement of the case, and agreed upon the terms of settlement; that they together went and saw Powell, one of the sureties on the redelivery bond, and that Powell paid O'Neill $1,000 in settlement of the case in the presence of Renner, and that O'Neill and Renner were both present in court when the order of dismissal was entered. From that point there is a conflict between the testimony of O'Neill and that of Renner. O'Neill testifies that a stipulation of settlement was drawn up in triplicate and signed by himself and Renner. Renner denies this, and takes the

ground in his testimony that, at the time the settlement was made, although he was still Crystal's attorney, he was not acting for him, and that Crystal knew nothing about it until from one to six months later, and that the $1,000 paid to O'Neill was not Crystal's money, but that Powell paid it out of his own funds to escape a prospective additional liability of $250 on the redelivery bond. Renner testified that he did not represent the sureties on the redelivery bond at the settlement, and accounts for his participation by saying that he did represent the Jesse Moore Hunt Liquor Company, which had idemnified these sureties. On the other hand, O'Neill testified in open court very fully to all the circumstances attending the settlement, and explained that the $1,000 paid was really Crystal's money that had been garnisheed in the bank, and that Renner was acting for Crystal; and his testimony shows that he had no suspicion that Renner was really representing an undisclosed client. A careful examination of the record convinces us that the trial court was right in adopting O'Neill's version of the settlement. We hold that the evidence clearly establishes the fact that a complete settlement of the attachment case of Love v. Crystal was made between the parties thereto acting through their respective attorneys. The payment by Crystal of the full amount claimed by Love was a confession of the justice of the claim, and, as under the Oregon law an attachment seems obtainable on plaintiff's affidavit that his claim is just, it follows that the writ did not issue wrongfully, and that there was no liability on the attachment bond.

But appellant insists that there was an adjudication that there was no settlement by Crystal and that the attachment wrongfully issued, in an action in the same Oregon court, wherein Crystal sued the National Surety Company and Love for damages on the attachment bond on the alleged ground that the writ wrongfully issued. The last case was begun on March 8, 1915, and

again Crystal was represented by Renner, and the Surety Company by Rutenic and Kent, who had been attorneys for Crystal in the attachment suit. Love was then a nonresident of Oregon, was not notified of the suit, did not appear, and knew nothing of its pendency. Under these circumstances, the provision of the federal Constitution requiring full faith and credit to be given the judgment of a sister state has no application, and the defendant is not concluded thereby, even though he might be so concluded under its laws. *D'Arcy v. Ketchum,* 11 How. (U. S.)*165; *Thompson v. Whitman,* 18 Wall. (U. S.) 457; *Knowles v. Gaslight & Coke Co.,* 19 Wall. (U. S.) 58; *Hall v. Lanning,* 91 U. S. 160.

Moreover, there is in the instant case no proof of the judgment of the Oregon court, except what purports to be a copy thereof certified by the clerk of the court only. There is no certificate of the presiding judge, as required by section 7979, Rev. St. 1913, which this court has held to be indispensable to its authentication. *Chapman v. Chapman,* 74 Neb. 388. However, what purports to be a copy of the judgment of the Oregon court shows that, on January 7, 1916, Crystal recovered a judgment for $500 against "the defendant, National Surety Company," only. We are of the opinion, therefore, that the judgment of the Oregon court in the case of Crystal v. The Surety Company is not, in any view, conclusive upon Love, who was a nonresident, and had no notice of the suit, and that there was no adjudication against the settlement or of the wrongful issuance of the attachment. Those questions were still open at trial of this case, and depended for their decision upon the evidence. *Henderson v. Eckern,* 115 Minn. 410; Ann. Cas. 1912D, 989. In 22 Cyc. 106, it is said: "The omission to give notice to the indemnitor does not go to the right of action against him, but simply changes the burden of proof, and imposes upon the indemnitee the necessity of again litigating and establishing all of the actionable facts."

And again at page 93, it is said: "But unless notice is given the first judgment is *prima facie* evidence only of liability and the indemnitor may show that the indemnitee had a good defense which he neglected to set up."

We have seen that there is ample evidence to establish the fact that the case in which the attachment bond was given was fully settled and dismissed, and that there is no evidence whatever that the attachment was issued wrongfully, but, on the contrary, a fair inference is that it was properly issued. The surety company, therefore, had a good defense against the action brought against it by Crystal in Oregon. In short, there was, in our opinion, no liability against the company on the attachment bond, and this defense is still available to this plaintiff indemnitor. It is against only actual legal liabilities that the contract of indemnity engages, and not against such as are fictitious or imaginary. Still, it may be urged that the surety company was sued in Oregon, and paid a judgment, and at least was put to the expense of interposing a defense. To this suggestion we have to say that the foregoing observations are sufficient answer. But there is still another fact which deserves attention in this connection. It is true that in the trial of the Oregon case of Crystal v. The Surety Company, plaintiff herein, the company "set up" in its answer the defense that the attachment suit had been settled. But, it must be added, the company neglected to establish it by evidence. The evidence of O'Neill, who had left Klamath Falls, might have been taken by deposition, but it was not. Even Manning, his partner, who lived at Klamath Falls, could have been produced as a witness, but no attempt was made to do so. Love was absent in Nebraska, and only feeble and futile efforts were made to reach him for the service of summons, and none at all to get his testimony. In fact one or both attorneys for the surety company seem to have been favorably impressed with Renner's unique theory that, while he was

the attorney for Crystal at the time of the settlement, and was participating therein, he was not really acting for him in the matter.

This case was loosely tried in the court below. Depositions of the attorneys, Renner, Kent, Rutenic, and the clerk, Chastain, were taken twice. Some were offered in evidence and some were not. At the close of the trial, on June 3, 1918, a stipulation was made that plaintiff's attorneys might take additional depositions, which was done in November, 1918. All depositions are attached to the bill of exceptions. Other questions are raised by both parties, but our conclusions obviate the necessity of considering them.

The evidence is sufficient to sustain the judgment of the trial court, and it is right.

We recommend that the judgment of the district court be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

L. M. THOMAS ET AL., PLAINTIFFS, V. LAVINA GEORGE ET AL., APPELLEES: HORSCH LUMBER & COAL COMPANY, APPELLANT.

FILED JULY 14, 1920. No. 20927.

1. **Mechanics' Liens: LIEN ON WIFE'S LAND: CONTRACT BY HUSBAND.** "A mechanic's lien cannot be created upon the land of a married woman for work done or material furnished in improving such land under a contract with her husband, where the husband acts merely for himself," *Rust-Owen Lumber Co. v. Holt*, 60 Neb. 80, followed.

2. ———: CONTRACT: NOVATION: ESTOPPEL. If one orally agrees with a dealer to purchase a certain quantity of building material to

be used in the construction of a building, and, before any of the material is delivered or any part of the purchase price paid, the vendee enters into a contract with a contractor to take over the same material and use it in the construction of the building, and so expressly notifies the dealer, good faith on the part of the dealer requires that he take an unequivocal position as to whom he will regard as his debtor; and, if his attitude is ambiguous in that respect and the original vendee, believing his oral agreement abrogated, becomes obligated to the contractor, who uses the material, the dealer will be held to have released the vendee in the original oral agreement and estopped to enforce it.

3. **Contract:** NOVATION: EVIDENCE. Evidence examined, and *held* that there was a novation of the original agreement by which the contractor became substituted for the original vendee and the latter released.

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

Sterling F. Mutz, W. G. Kline and *T. F. A. Williams,* for appellant.

George E. Hager, contra.

CAIN, C.

L. M. Thomas & Son, plaintiff, brought this suit against Lavina George and E. T. George, her husband, to foreclose a mechanic's lien for hardware furnished in the erection of a dwelling-house on lot 1, in block 99, of University Place, Nebraska, owned by the defendant Lavina George. The defendant Horsch Lumber & Coal Company filed a cross-petition against the defendants George, seeking to foreclose a mechanic's lien for $701.12 for lumber and material furnished in the erection of the same building. The defendant William Seng sought judgment against the defendants George for a balance due for the construction of the dwelling-house. The district court by its decree dismissed the plaintiff's suit, and rendered a money judgment against the defendants George for $391.75 in favor of the defendant William Seng, and dismissed the cross-petition of the

defendant Horsch Lumber & Coal Company. The Horsch Lumber & Coal Company appeals from the decree dismissing its cross-petition, and is the sole appellant. Lavina and E. T. George are the appellees.

Appellant's assignments of error are that the court erred in denying the foreclosure of its lien, and in refusing to render a personal judgment against the defendant E. T. George, and in holding that the Georges were not the original contractors for the material furnished, and that Lavina George had not authorized E. T. George to purchase the material and bind her property for the payment thereof.

We are agreed with counsel for both parties that there are but two questions in this case, as follows: (1) Is the Horsch Lumber & Coal Company, appellant, entitled to establish a lien against the property of the defendant Lavina George? (2) Is the Horsch Lumber & Coal Company entitled to a personal judgment against the defendant E. T. George?

As before stated, this is a suit by which appellant seeks to establish and foreclose a mechanic's lien for lumber and material furnished by it in the erection of a dwelling-house on the lot described owned by the defendant, Lavina George. It is undisputed that she owned the lot and is the wife of the defendant E. T. George. It is settled law in this state that a mechanic's lien is purely statutory and must be based upon contract, express or implied. Rev. St. 1913, sec. 3823; *Bradford v. Higgins,* 31 Neb. 192; *Rust-Owen Lumber Co. v. Holt,* 60 Neb. 80; *Occidental Building & Loan Ass'n v. McGrew,* 86 Neb. 694. It is equally well settled that a mechanic's lien cannot be created upon the land of a married woman for work done or material furnished in improving such land under a contract with her husband, where the husband acts merely for himself, and that whether the husband was the agent of the wife in the matter is a question of fact and will not be presumed from the marital relation alone, and that the failure of

the wife to dissent or her joint occupancy of the premises with her husband does not establish such agency. *Rust-Owen Lumber Co. v. Holt, supra.*

With these propositions of law in mind, we will consider the evidence on this point. The record discloses that Mrs. George herself never had any business relations with the appellant. If, then, she was bound by any contract with appellant, it must have been through the agency of another or from such facts and circumstances known to her as would imply an agreement. On the question of agency, the only evidence is that of Mrs. George herself, who was called as a witness by appellant, thereby placing her credibility beyond impeachment. She testified in the most explicit terms that she never ordered any of the material in question, did not talk to her husband about it, had nothing to do with any negotiations for it, that she had nothing at all to do with it and knew nothing about it, that no one did anything for her in the matter, and that she authorized no one to do anything for her in the premises. Her testimony excludes any idea of agency. Appellant seeks to escape the consequences of this testimony by urging the following: (a) That, in the original answer of the Georges, it was admitted that they agreed to purchase from appellant the bill of lumber in controversy. (b) That Mrs. George admitted in her testimony that her husband was "acting for both of us." (c) That, in testifying to his agreement with appellant to take the material in question, her husband constantly used the plural personal pronoun "we," meaning thereby himself and wife. (d) That the trial court found that both husband and wife had jointly contracted with Seng for the same material. (e) That Mrs. George paid for part of the material and thereby ratified the contract her husband had made with appellant.

As to the first of these points, it appears that the original answer in this case was verified by the husband alone, and the wife knew nothing about it; that the

admission contained in it is on behalf of the husband alone; and that later the wife filed an amended answer containing a general denial. In view of these facts, it cannot be said that Mrs. George made the admission claimed. The second point is equally unsound, since it is clear from her testimony that, when she used the plural personal pronoun, it had reference to the general idea of building a house, and had no reference whatever to any contract with appellant. Her husband explained how he chanced to use the word "we" in his testimony by saying that it was a habit of his and he referred to the family, and that in dealing with appellant he acted for himself. In any event nothing he could say about it would bind his wife without her knowledge. The finding of the trial court upon Seng's cross-petition can have no possible relevancy here, because it may have been a default or acquiescence. The only evidence that Mrs. George paid anything is that she paid $40 upon an order of Seng, the contractor. Far from being a recognition of any contract with appellant, this is a recognition of a contract with Seng. There is no merit in any of these propositions, and they do not in the least detract from the probative force and effect of the testimony of Mrs. George. There was no evidence that Mrs. George knew where any of the material came from. We therefore must hold that neither by agency nor by implication of law was there any contract between Mrs. George and appellant. It follows, of course, that appellant has no claim whatever against her or any lien on her property.

There is a further phase of this case, consideration of which not only will confirm the foregoing conclusion, but incidentally will dispose of appellant's claim to a personal judgment against E. T. George. Appellees, while admitting that Mr. George verbally agreed to purchase from the appellant the lumber and material used in the construction of the building, contend that, before delivery of any material or payment of any money, the

agreement was canceled by substituting William Seng, the contractor, in the place of Mr. George as purchaser, and that thereby a new contract was made and Mr. George released from the old one. Decision of this question depends upon the facts, which will be briefly stated. In the spring of 1917, E. T. George and his brother, J. D. George, were both contemplating building residences in University Place, and J. D. George had obtained a proposition from appellant to furnish him a bill of lumber at the price of $1,300. E. T. George, defendant, told his brother to ask appellant if it would duplicate the bill for him at the same price, and the brother did so, and appellant replied in the affirmative. Thereupon, E. T. George authorized his brother to tell the appellant that he would take the bill of lumber for the price named and appellant was so informed. Mr. N. W. Kallemyn was the manager and agent of appellant throughout. No part of the lumber or material was delivered, no payment was made, and no written memorandum made. The statute of frauds was not pleaded, but the sufficiency of the evidence is before us. A few days later Mr. George entered into a written contract with the defendant William Seng which provided that Seng, who was a contractor, should build the house and furnish all lumber and material for $2,925 plus some extras not necessary to be noticed. A little later, and about June 15, 1917, E. T. George and J. D. George visited the office of appellant, and E. T. told Mr. Kallemyn, the manager, that the bill of lumber he had agreed to take had been taken by Mr. Seng at the terms previously agreed upon, and that Mr. Seng had contracted to build the house. This testimony is corroborated by J. D. George, and even by Mr. Kallemyn himself, who testified on cross-examination as follows: "Q. And they told you in substance—I am not trying to use the exact words—that Mr. Seng would use this bill of lumber and order it out just as he would use it in the

house, and that in that way the bill you and Mr. George had agreed upon would be used in Mr. Seng's contract, or that in substance? A. Yes, sir." This, he admits, was before any of the lumber was delivered. It will be seen that there is no dispute about appellant being notified of the contract with Seng and of Mr. George's arrangement to substitute Seng for himself in the agreement with appellant. There is a conflict, however, in the evidence about what Kallemyn said in reply. E. T. George testifies that Kallemyn said; "It don't matter much to me, just so I get my money; that is what I am interested in." Kallemyn testifies that he said to George that when the lumber went out it would be charged to him. This J. D. George denies. Nothing further was done or said in that regard. Seng built the house from lumber and material delivered to him or his workmen by the appellant; and it appears that George has paid Seng the full contract price, which included the judgment for $391.75. It will be seen that whether or not there was a novation depends upon what was said and done when George notified appellant of the substitution of Seng for himself and the conduct of the parties thereafter. J. D. George testified that the substitution seemed agreeable to Kallemyn. E. T.'s testimony shows that Kallemyn answered the proposal of substitution ambiguously. However, we cannot think there is much doubt that he must be held to have acquiesced in the proposal. He knew that, if George acted upon his contract with Seng, it would be irrevocable and George would be absolutely obligated by it. The proposal of substitution was squarely put up to him. Good faith and fair dealing required Kallemyn to take an unequivocal position. If, by his evasion or ambiguous response, Mr. George was induced to believe that the old contract was superseded by a new one which released him from the old, appellant should not now be permitted to stand upon the old, when George has performed the new. A creditor cannot have two different debtors on a single debt and

reserve a choice between them and exercise it to the injury of either. Circumstances may arise which require a man to speak directly and frankly, and this instance was one of them. George testified that he had no doubt, from his talk with Kallemyn, that he was released from the old contract. Moreover, both parties acted upon the new contract substituting Seng, George by performing it, and appellant by delivery of the lumber and material to Seng. Our conclusion is that there was a complete novation and both parties thereto were released from the old contract. Counsel for appellant especially requested us to examine the case of *Western White Bronze Co. v. Portrey*, 50 Neb. 801, and we have done so. The case holds that there can be no novation of a debt in the absence of an unqualified discharge of the original debtor by the creditor. As we have already held that there was an unqualified discharge of George by the consent and conduct of the appellant, the case cited is not in conflict with this opinion. It follows, of course, that, the agreement between Mr. George and appellant having been abrogated, no personal judgment can be rendered against him.

We think that the judgment of the district court was right, and we recommend that it be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

The following opinion on motion for rehearing was filed February 10, 1921. *Former opinion modified and judgment of district court reversed.*

1. **Husband and Wife: AGENCY.** A husband may act as the agent of his wife in contracting for materials to be used in the construction of a house upon property, the separate estate of his wife, and the question of agency is a question of fact, to be determined from the circumstances of each particular case.

2. **Mechanics' Liens:** LIEN ON WIFE'S LAND: CONTRACT BY HUSBAND. When it is shown that a husband and wife plan a home together, to be built upon the property of the wife, and that the wife draws the plans and shares in directing and controlling the undertaking, helps select the materials, frequently visits the building during the course of construction, to see that the plans are being carried out, the acts of the husband, in ordering materials in furtherance of the undertaking, *held* to be binding upon the wife, and *held* to show sufficient authority from the wife to support a mechanic's lien upon her property.

3. **Contracts:** NOVATION. An agreement, in order to result in a novation, must contain two stipulations, expressly stated or necessarily and clearly inferred from the terms used—one, to completely extinguish an existing liability, and the other, to substitute a new one in its place.

4. ———: ———: BURDEN OF PROOF. Whether the original debtor is completely released must be determined as a question of fact, depending upon the intention of the parties, and the burden of proof is upon the original debtor to show such release and novation, when he asserts it as a defense.

FLANSBURG, J.

On motion for rehearing. The questions arise on the cross-petition of the Horsch Lumber & Coal Company, seeking to recover a money judgment against defendants E. T. George and Lavina George, husband and wife, and to foreclose a mechanic's lien upon the property of Lavina George, the company having furnished lumber for the construction of a house upon property, the separate estate of Mrs. George.

One defense is that the company furnished lumber upon the contract of E. T. George, and that he did not act, in contracting for such lumber, as the agent of his wife, but for himself alone. The record does not sustain that defense.

Mrs George testified that she and her husband had for some time talked of building a home upon the property in question; that she, herself, drew a great number of plans for the house and finally they decided upon one of them; that she and her husband then met with a

contractor, at their home, and went over the plans and estimated the cost; that at that time she knew that her husband had made a contract with the Horsch Lumber & Coal Company for lumber to go into the house, and that it was then agreed that the contractor should take the lumber, so contracted for, and use it in the construction of the building. She said, however, that she paid no attention to the question of materials, and if she saw the lumber bill figures it was just as the men had them there, figuring upon them. She said that the matter of providing materials was left to her husband, and that he acted "just as any husband would by working together in building a house;" that she paid little attention to the business arrangements or contracts, since she knew Mr. George was attending to that. She paid attention to the details of the plan of the house. Further testimony of hers follows: "Q. Did you ratify what he had done or did you object to it? A. I didn't do either. I knew that he was doing the right thing. I suppose you would say I ratified what he was doing. Q. Well, was it satisfactory to you? A. All that he has done about building the home has been satisfactory to me." They talked over changes in the plans with the contractor and her testimony was: "I gave my choice of my idea of the home. Q. And your choice was the one used in most of the instances, wasn't it? A. Yes, sir." When construction of the building was commenced, one of the plans drawn by her was tacked to a board and kept upon the premises by the carpenters as a guide for their work. During construction she was frequently at the building to see that the work was progressing according to the plans, sometimes, she says, 10 or 12 times a day. She personally selected the windows which were put into the building. Many changes were made in course of construction, which were talked over and to which she agreed.

In fact, all the testimony tends to but one conclusion: That Mrs. George and her husband planned and constructed the house together as a common enterprise,

and that Mr. George, in all he did, acted with the full authority and approbation of his wife.

The facts in the case, therefore, do not bring it within the rule announced in *Rust-Owen Lumber Co. v. Holt,* 60 Neb. 80, that mere knowledge by the wife that her husband is constructing buildings on her premises does not establish agency, when he acts for himself alone, and where she takes no part in the planning or direction of the construction of the house.

The question of whether the husband acts with authority from the wife and is her agent is a question of fact to be determined from the circumstances of each particular case. Mere knowledge that a building is being constructed by her husband upon her premises, when that fact stands alone, is insufficient to show that her husband acted as her agent. Agency in such a case will not be presumed from the marital relation; but the fact that the wife has such knowledge, in the light of other evidence, may be of strong corroborative value. Owing to the close relationship existing between husband and wife, an agency by the husband may be created by slight circumstances. It is unnecessary that they enter into any formal contract of agency, nor is it necessary that the wife expressly state to her husband that she gives him authority to act. Such an agency may be inferred from things said and acts done.

Where it is shown that a husband and wife plan a home together, to be built upon premises constituting the wife's separate estate, and where she draws the plans and shares in directing and controlling the undertaking, helps select certain materials, is present during and takes part in the conversation with the contractor at the time the contract for the construction of the building is entered into, frequently visits the building during the course of construction, to see that the plans are being carried out, the acts of the husband, in ordering materials and labor in furtherance of such common undertaking, are sufficiently shown to have been done under

such authority from the wife as will bind her through her husband as agent. *McCormick v. Lawton,* 3 Neb. 449; *Bradford v. Peterson,* 13 Neb. 96; *Milligan v. Alexander,* 72 W. Va. 615; *Bodey v. Thackara,* 143 Pa. St. 171; *Jobe & Meanor v. Hunter,* 165 Pa. St. 5; note, 4 A. L. R. 1042; 13 R. C. L. p. 1173, sec. 200.

It may be further pointed out in this connection that the trial court made a specific finding that Mrs. George had bound herself as a party to the contract made with the contractor, and her testimony shows that, at the time of the execution of that contract, she was informed of the arrangement between her husband and the lumber company for the furnishing of lumber. Had she not been informed of that arrangement prior to that time, her action, after such information had been imparted to her, in then proceeding to a contract with the contractor, whereby he was to take over the lumber bill and use the lumber in the construction of the house, constitutes a ratification of an arrangement made between her husband and the lumber company, and shows an authority from her that the particular lumber ordered should be used upon her premises. It is our opinion, therefore, that a mechanic's lien would attach.

The defendants George and his wife assert, as a further defense, that, after Mr. George had made the contract with the company, the company agreed to turn the lumber bill agreement over to the contractor of the defendants, and that the defendants were thereby released by a novation.

The original lumber bill was $1,300. In the beginning Mr. George expected to conduct and supervise the erection of the building himself. Later it was decided that the work would be let to a contractor. When Mr. and Mrs. George went over the matter of construction with the contractor, changes were made in the plans, and it became apparent that extras would be necessary on the lumber bill. At the time of this conversation, the Georges agreed with the contractor that he should take over the

lumber bill that Mr. George had contracted and use the lumber in the construction of the building. Mr. George then, in company with his brother, went to the lumber company, and the conversation took place between Mr. George and the manager of the company upon which the defendants rely as showing a novation.

Mr. George relates the conversation thus: "I told Mr. Kallemyn (the lumber company's manager) that the bill of lumber that we had agreed to take had been taken by Mr. Seng (defendants' contractor), that he had contracted to build our house and he would take it on the terms that we had talked over with him. * * * I don't recall just what may have been said more than this, that we had let the contract to Mr. Seng and he was to erect the building and furnish the material, taking this bill of lumber that we had agreed to take from them. * * * He (Mr. Kallemyn) said, 'It don't matter much to me, just so I get my money; that is what I am interested in.' * * * Q. At that time all you had said to Mr. Kallemyn was—that is, as to these extras—that you were to pay for them. Wasn't that the question of your conference at that time with him? A. I think so, at the time we told him the contract was with Mr. Seng. * * * A. What I told Mr. Kallemyn was that there were certain things that were to be extras; we knew they would be in there, and they would be extra, above this bill. Q. And 'we' were to pay for them, or words to that effect? A. Well, I don't know just what I said there, but the thought was that this was a part of the contract, and this would be above the contract price of the lumber; here was a certain bill of lumber figured, but Mr. Seng couldn't take that bill of lumber without these additional doors, windows, and change to the more expensive floor; we had talked that over, so we expected to pay for the extras on those. Q. Who do you refer to as 'we'? A. Myself. Q. And not Mr. Seng; you don't mean that he was a part of that 'we'? You mean yourself? A. Well, I went to Mr. Kallemyn, who was furnishing this lumber,

and I wanted him to understand that there were certain things that we would pay—that I was to pay for, if that suits you better—if it went above that in my settlement with Mr. Seng."

Mr. George's brother testified: "My brother told Mr. Kallemyn that he had let the contract for his building to Mr. Seng, and that he was to take the lumber bill, and that my brother said I am to pay extra for what doors and windows and floors there is used, over this bill," and that Mr. Kallemyn answered either "that the house is good for the pay," or that he was "interested in getting" his pay, or "something to that effect." Mr. George did not remember whether anything was said in that conversation as to whom he would make payment for the extras; whether he would pay the contractor or the company direct. Upon that point his testimony is quite indefinite, but his testimony is that he had in mind that he would pay the contractor, who in turn should pay the company.

The company received $1,389.62 on its account. This more than covers the original bill of $1,300. The extras amounted to $790.74, and there remains unpaid a balance of $701.12. The conversation had with regard to extras is quite important. The question presented is whether such conversation is sufficient to support a finding of novation. The testimony on behalf of the company, which conflicts with that of defendant George, and is to the effect that Mr. George was, in this conversation, affirmatively told that he would be looked to personally for pay, and would not be released, it is unnecessary to consider. Mr. George naturally would desire that his contractor take the lumber that he had contracted for. Had the contractor purchased lumber elsewhere, or entered into an independent contract for lumber, Mr. George would have had two bills of lumber to account for, when he could use only one. In the light of these circumstances, does the conversation, as related by Mr. George and his brother, indicate that Mr. George was to

be entirely released and discharged from further obligation to the company, and that the contractor was to be accepted as a substitute in his place and relied upon alone for the payment of the purchase price?

A novation will never be presumed. The complete discharge of the original debtor must be shown to have been expressly agreed upon, or must be necessarily and clearly inferred from the express terms of the agreement. An agreement, in order to result in a novation, must contain two stipulations: One, to completely extinguish an existing liability, and the other, to substitute a new one in its place. Before the original debtor will be discharged and another party substituted in his place, the burden is upon the original debtor to show, just as in proving any other contract, that such was intended, not only by him, but also by the creditor and by the party to be substituted. *Goetz Brewing Co. v. Waln,* 92 Neb. 614; *Western White Bronze Co. v. Portrey,* 50 Neb. 801; *Indiana Bridge Co. v. Hollenbeck,* 99 Neb. 115; *Mercer v. Miles,* 28 Neb. 211; *Barnes v. Hekla Fire Ins. Co.,* 56 Minn. 38; *Studebaker Bros. Mfg. Co. v. Endom,* 51 La. Ann. 1263, 72 Am. St. Rep. 489; *State Bank v. Domestic Sewing Machine Co.,* 99 Va. 411, 86 Am. St. Rep. 891; 20 R. C. L. p. 372, sec. 16; and note, L. R. A. 1918B, 113.

In the case of *Barnes v. Hekla Fire Ins. Co., supra,* the court said (page 41): "It is frequently the case that the creditor consents to the arrangement as a favor, or for the convenience of his debtor; and we apprehend it would be a surprise to the parties, as well as an injustice, in many cases, if it were held to operate as a release of the original liability; and therefore it should distinctly appear, from the express terms of the agreement, or as a necessary inference from the situation of the parties, and the special circumstances of the case, that such was the intention and understanding of the parties, of which the creditor was chargeable with notice."

The statement by Mr. George, that he himself intended to pay for extras if they went above the settlement with Mr. Seng, does not indicate even an intention on his own part that he was to be completely released from all obligation; nor does the statement by Mr. Kallemyn, that he was interested in his pay and that the property would be good for the lumber bill, indicate an intention on his part to release Mr. George. Furthermore, there was no valid reason at that time why Mr. George should be released, since it was contemplated by all concerned that he was to be the ultimate source from which the money to satisfy the lumber account would be forthcoming. We cannot say that a clear intention that no obligation was to continue against him is necessarily nor reasonably to be inferred from this testimony, and it is our conclusion that a novation did not result.

The law protects those furnishing materials and lumber for building purposes, on the theory that the owner may protect himself by seeing that all bills are paid before he settles with the contractor. If a full settlement has been actually made with the contractor in this case before the bills were paid, we cannot, in this suit, relieve against the situation. The defendants' remedy is against the contractor, who, Mr. George's testimony shows, is financially responsible.

The former opinion is modified in the respects above indicated, and the case is reversed and remanded for further proceedings in accordance with this opinion.

REVERSED.

AUSTIN GRANT SHUBERT, APPELLANT, V. WESTERN CEREAL COMPANY, APPELLEE.

FILED JULY 21, 1920. No. 21073.

Appeal: FINDINGS OF FACT. Findings of fact, based on conflicting evidence, in a cause submitted to the court without a jury, have the same effect as the findings of a jury.

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

Frank N. Prout, for appellant.

Anderson & Murphy, contra.

MORRISSEY, C. J.

Plaintiff brought suit against defendant in the district court for Richardson county to recover $315 alleged to be due for services rendered. After the taking of evidence had proceeded for some time, each party moved for a directed verdict. The court thereupon discharged the jury from further consideration of the case. Afterwards plaintiff, by leave of court, was permitted to withdraw his rest and offer additional evidence. The court, upon consideration of the whole evidence, rendered judgment for defendant.

Plaintiff furnished one Aldrige an automobile and chauffeur while Aldrige was engaged in selling capital stock of defendant company. Aldrige, in consideration thereof, agreed to pay plaintiff 5 per cent. of the par value of all stock sold by him. Nothing was ever paid plaintiff, and the sum sued for represents the amount claimed to be due under the contract. The suit is brought against defendant company, on the theory that Aldrige was its general manager, or ostensibly so, and that the contract made by him was binding on the company.

According to the contention of defendant, the corporation never was fully organized, or, if so, Aldrige never was its general manager, either actually or ostensibly. It appears that the corporation never actually transacted any business, and whatever money was paid over to Aldrige on the subscriptions he took while being conveyed about the country by plaintiff was returned to the subscribers. Whether plaintiff had a right to believe that Aldrige had authority to bind the corporation, and whether he did so believe, were questions of fact. On

each of these issues the evidence is conflicting, and the findings of the trial court, having the same effect as the findings of a jury, will not be disturbed.

AFFIRMED.

ALDRICH and DEAN, JJ., not sitting.

ALFRED D. SMITH, APPELLANT, V. THEODORE JOHNSON ET AL., APPELLEES.

FILED JULY 21, 1920. No. 21063.

Schools and School Districts: EXPULSION OF PUPIL. The district board of a school district may invite the patrons and legal voters residing in the district to a special meeting of the board to confer with it upon the question whether a pupil charged with "gross misdemeanors" shall be expelled pursuant to section 6785, Rev. St. 1913. That the persons so invited joined with the board members in voting on the question of expulsion will not impair the vote of the board on that question, nor its action of expulsion, notwithstanding the director kept no formal record of the meeting.

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

Lincoln Frost, F. D. Williams, W. M. Iodence and *E. C. Barker,* for appellant.

Mitchell & Gantz, contra.

DEAN, J.

Alfred D. Smith, plaintiff, was 12 years of age when, by his next friend and legal guardian, Miss Charlotte Worley, he began this action against Theodore Johnson, Charles Tuchek, Mrs. Flora Bergfield, Joseph Reiman and William Kiester, defendants, as alleged in plaintiff's brief, "to recover damages in the sum of $2,500 for humiliation and injury by reason of a wrongful, malicious and illegal expulsion from school." Defendants recovered a verdict and judgment of dismissal and plaintiff appealed.

Theodore Johnson was director, Charles Tuchek, moderator, and Mrs. Flora Bergfield, treasurer, of school district number 30 in Box Butte county. This action was brought against them as individuals and not as officials. Reiman and Kiester were patrons of the school and were made parties defendant because of alleged active participation in plaintiff's expulsion. Miss Worley was a legal resident of the school district, and plaintiff, who resided with her in 1917, was one of the pupils.

The testimony, though contradicted, tends to show that plaintiff was rude and disobedient at home, and that he and his younger brother Earl cursed their benefactress and called her vile names. With respect to his behavior at school the evidence, though denied by plaintiff, tends to prove that he was quarrelsome, disobedient and unruly; that he used profane language when in the hearing of the pupils; and that he was uncouth and given to obscenity; that he wrote obscene and suggestive language on paper slips and handed them to girls of 10 and 12 years, and that he used vulgar language in their presence, and that his remarks to them were grossly obscene. Some of this evidence was developed on the cross-examination of pupils who were called by defendants as witnesses. There is more evidence of like tenor that need not be discussed here.

Section 6785, Rev. St. 1913, provides for the expulsion of a pupil by the district board for contumacious conduct. The statute follows: "They may authorize or order the suspension or expulsion from the school, whenever in their judgment the interests of the school demand it, of any pupil guilty of gross misdemeanors or persistent disobedience, but such suspension shall not extend beyond the close of the term."

Plaintiff argues that the real point at issue is this: "Did the school board ever hold a legal meeting in which Alfred Smith was expelled?" He contends that if it had been a legal meeting the director would have kept a rec-

ord. He cites section 6771, Rev. St. 1913, which provides: "The director shall be clerk of the district board and of all district meetings when present, but if he shall not be present, the qualified voters may appoint a clerk for the time being who shall certify the proceedings to the director to be recorded by him."

The weight of the evidence tends to establish these facts: Miss Uhrig, who was the teacher in charge of the school, complained to the board members that, owing to unsatisfactory conditions in the school, she was unable to do good work and that they should get another teacher and relieve her. Upon inquiry and investigation by the board it developed that the trouble centered about plaintiff's conduct in school. A few days after the complaint was made, namely, December 21, 1917, a community entertainment was held at the schoolhouse that was largely attended by the patrons of the school and citizens generally. At the close of the entertainment Mr. Johnson, the director, announced that the school board would hold an important meeting the next evening at the schoolhouse and invited the patrons and the public to attend. At the appointed time Mrs. Bergfield, treasurer, Director Johnson, Moderator Tuchek, Joseph Reiman and William Kiester, being all of the defendants herein, and many patrons and citizens of the district were at the school house. The meeting was called to order by Director Johnson, who presided at the request of Moderator Tuchek. Mr. Johnson then stated to the persons present what the teacher had told the board members about Alfred's conduct in school and that she was about to resign "because she could not teach on account of Alfred and Earl Smith," Earl being a younger brother. It seems that a general discussion followed Johnson's statement. When the discussion came to an end, defendant Reiman moved for expulsion, the motion being seconded by defendant Kiester. At this point Johnson called for a rising vote on the motion for expulsion, and, with the exception of a

relative of plaintiff's guardian, all present voted for expulsion by rising. Mrs. Bergfield, the treasurer, testified that she and Director Johnson, in the absence of Moderator Tuchek, met at her home two days before the meeting of December 22 and upon consideration of plaintiff's conduct they reached the conclusion that he should be expelled. No record was kept of that meeting nor of the meeting of December 22. Mainly because of the absence of such record plaintiff argues that the court erred in not informing the jury that plaintiff was entitled to a verdict and that the only question for them to determine was the amount of the recovery. In the present state of the record and in view of the law applicable thereto, it seems to us that the ruling of the court was without error.

Illinois has a statute which provides that the clerk of the board of school directors "shall keep a record of all the official acts of the board." Rev. St. Ill. 1891, ch. 122, sec. 137. Another section (section 139) reads: "No official business shall be transacted by the board except at a regular or special meeting." In *Pollard v. School District,* 65 Ill. App. 104, the statutes herein cited were under consideration in a suit relating to a contract of employment of a teacher by the board. The court said: "The directors met specially for the purpose of considering this matter, and while their session was somewhat informal, and while it does not appear that a record of it was made, yet we think it was a special meeting at which they might legally transact official business." In passing it may be noted that the Illinois statute differs from ours in that it specifically provides that the clerk of the board "shall keep a record of all the official acts of the board," while our statute merely provides that "the director shall be clerk of the district board" without expressly prescribing his duties as clerk of such board. The act does, however, expressly provide that "the proceedings" of "all district meetings" shall be recorded by the director.

A situation somewhat similar, but less aggravating as to the offense, arose in Massachusetts under an act which provides: "The school committee shall appoint a secretary and keep a permanent record book, in which all its votes, orders and proceedings shall by him be recorded." Gen. St. Mass. 1860, ch. 38, sec. 22. In 1874 the Massachusetts act was construed in *Russell v. Inhabitants of Lynnfield,* 116 Mass. 365, in an action where a pupil's exclusion from school attendance for a minor offense was under consideration. The court said: "For the disobedience of a regulation established to prevent tardiness, the plaintiff was suspended from a public school until she should conform to the rule. This action is brought under the statute which declares that 'a child unlawfully excluded from any public school shall recover damages therefor in an action of tort, to be brought in the name of such child by his guardian or next friend against the city or town by which such school is supported.' Gen. St. c. 41, sec. 11. * * * The school committee are required to have the general charge and superintendence of all the public schools in town, and to keep a record of their votes, orders and proceedings. Gen. St. c. 38, secs. 16, 22. But this does not imply that all rules and orders required for the discipline and good conduct of the schools shall be matter of record with the committee, or that every act in regard to the management of each school in these respects should be authorized or confirmed by formal vote. It would be practically impossible sufficiently to provide for such matters by a system of rules, however carefully prepared and promulgated. Much must necessarily be left to the individual members of the committee and to the teachers of the several schools. *Huse v. City of Lowell,* 10 Allen (Mass.) 149; *Hodgkins v. Inhabitants of Rockport,* 105 Mass. 475."

The district school board is charged with the general care of the school, but we do not think the law contemplates that the board should be censured or penalized for

inviting the patrons and citizens of the district to attend its meetings and counsel with its members. The rural school district is a democratic unit of government. It follows that its officers are and of necessity must be in close touch with all the citizens of the community and perhaps more especially with those who, as patrons, are most vitally and immediately interested in the welfare of the school.

Counsel for plaintiff finally argues that his constitutional right to attend school was violated when he was expelled. He cites section 6, art. VIII of the Constitution, which reads: "The legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years."

It will not be seriously contended that the fundamental law contemplates the attendance at a public school of any pupil who, by reason of contumacious conduct, will not avail himself of the opportunity for free instruction there offered to the youth of the state. If plaintiff's schoolmates told the truth, and evidently the jury believed them, his conduct was such that his attendance and his presence among them was not only a hindrance to their advancement but was as well a postive menace to the morals and to the safety of pupils who attended the school to avail themselves of the instruction that is guaranteed by the Constitution.

The action of the board, in voting for expulsion, was a reasonable exercise of the power conferred upon it by the legislature for the preservation of morality and discipline in the school. 24 R. C. L. 646, sec. 105 *et seq;* 35 Cyc. 819. The district board of a school district may invite the patrons and legal voters residing in the district to a special meeting of the board to confer with it upon the question as to whether a pupil charged with "gross misdemeanors" shall be expelled pursuant to section 6785, Rev. St. 1913. That the persons so invited

joined with the board members in voting on the question of expulsion will not impair either the vote or the action of the board on that question notwithstanding the director kept no formal record of the meeting. That plaintiff committed gross misdeameonors and that he was a fit subject for expulsion sufficiently appear. The evidence, though somewhat conflicting, amply supports the verdict.

Other alleged assignments of error are discussed in the brief of counsel, some relating to instructions and some to the admission of certain evidence. Upon examination we do not find reversible error.

The judgment is

AFFIRMED.

CREIGHTON GAS, ELECTRIC LIGHT & POWER COMPANY, APPELLEE, V. I. J. JAMISON ET AL., APPELLANTS: ALICE C. HOUGH, INTERVENER, APPELLEE.

FILED JULY 21, 1920. No. 20860.

Vendor and Purchaser: EVIDENCE. Evidence examined, and *held* to support the finding and decree of the district court.

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

Richard Steele and *M. H. Leamy,* for appellants.

W. A. Meserve, contra.

DAY, J.

Creighton Gas, Electric Light & Power Company, a corporation, hereinafter designated the company, instituted this action in the district court for Knox county against I. J. Jamison and F. B. Jamison, his wife, to cancel and set aside two certain deeds executed and delivered by the company on July 20, 1915, in which I. J. Jamison is named as grantee, and to quiet the title

in said respective properties in the company. By a cross-petition I. J. Jamison prayed that the title to the respective properties be quieted in him, and that all machinery, poles and wires situated upon the premises hereinafter described as tract one, and the poles, wires and branch line running from said tract to the village of Bazile Mills, be decreed to be the property of I. J. Jamison, and for an accounting of rents due upon the premises described hereinafter as tract two. For the sake of brevity and convenience, the premises in controversy and described as the east 22 acres of the southwest quarter of the southwest quarter of section 27, in township 30 north, range 5 west of the sixth principal meridian, and a tract commencing at the southwest corner of the southeast quarter of the southwest quarter of section 27, township 30 north, range 5 west of the sixth principal meridian, thence east on section line 30 rods, thence north at right angles to said section line 29 rods to the intersection of Bazile creek, thence westerly along the south edge of said creek to the intersection of the west line of said southeast quarter of the southwest quarter with said creek, thence south on said west line 40 rods to place of beginning, will be referred to as tract one; and the premises described as the east half of lot 4, in block 1, of O. A. H. Bruce's addition to the city of Creighton, Nebraska, will be referred to as tract two.

By its decree the trial court quieted the title to tract one in the company, and quieted the title to tract two in I. J. Jamison, and also rendered decree against the company and in favor of I. J. Jamison for $272, being rent for the premises described as tract two up to August 1, 1918. I. J. Jamison has filed an appeal from that portion of the decree quieting the title to tract one in the company. The company has filed a cross-appeal from that part of the decree affecting tract two, and the money judgment for rent.

The record shows that on and prior to July 12, 1915, the entire capital stock of the company was owned and held by I. J. Jamison, his wife, and two sons. On that date I. J. Jamison, acting for himself and the other stockholders of the company, entered into a contract with one Alice C. Hough, whereby the parties made a mutual exchange of their respective properties, I. J. Jamison and his associates exchanging all of the capital stock held by them in the company, including the physical property of the company, for an orange ranch owned by Alice C. Hough in California. By the terms of the transfer both properties were to be free and clear of all incumbrances, and the actual transfer of the properties was to be made as near August 1, 1915, as practicable. The company had its principal place of business in the city of Creighton, and furnished electric lighting for that city, as well as the village of Bazile Mills, the power being carried between the two points by a transmission line. It also had a pole line extending from the land described as tract one to the village of Bazile Mills, a distance of about two miles. Upon this tract a dam had been constructed for the purpose of generating electricity from the water power, as an auxilliary to the main power station in the city of Creighton. A system of line poles and wires connected tract one with the village of Bazile Mills and thus became a part of the plant. Some two years prior to the trade, this dam had washed out and was not in condition to be used without considerable repairs being made upon it. The record also showed that, at the time of the contract between the Jamisons and Alice C. Hough, the company was the owner of, and held the record title to, three pieces of land, to wit, tract one, tract two, and the tract upon which the power plant was located. After signing the contract for the exchange, and on July 20, 1915, the company, by its then officers, I. J. Jamison, president, and D. R. Jamison, secretary, executed and delivered

to I. J. Jamison deeds conveying the title to tracts one and two before mentioned, which deeds were duly recorded on July 21, 1915, in Knox county, Nebraska. It was claimed upon the trial that these two deeds were given in payment of $2,750 for advancements made by I. J. Jamison to the company.

There is a sharp conflict in the testimony as to whether the lands described as tract one and tract two were to be included in the trade, but on a careful review of the testimony we are of the opinion that tract one was to be included in the terms of the exchange and tract two excluded. Both Mr. and Mrs. Hough in their testimony say that Jamison told them that the office property (tract two) belonged to him personally and was not to be considered as going in the deal, that nothing was said by him excluding in any way from the operation of the trade tract one. Jamison's testimony is to the effect that at all times he reserved from the trade tracts one and two. After the actual exchange had been made on August 6, the company leased from I. J. Jamison tract two. This transaction would be entirely inconsistent with the idea of ownership, and clearly indicates that Alice C. Hough understood that tract two was not included in the deal. There was an effort made on the part of I. J. Jamison to show that the deeds to him made by the company were based upon a contract between himself and the company made long prior to the trade in question, by which these deeds were to be given in payment for advances made by him to the company. The testimony on behalf of I. J. Jamison, in so far as it affected tract one, had so many earmarks of bad faith that the trial court was amply justified in finding that there was no consideration to support the deed from the company to him as to tract one. The testimony of Mr. Hough, who examined the property as agent of the wife, establishes that Jamison represented that this tract belonged to the company and was a part of the system, and while

Mr. Hough did not examine tract one on account of a bridge being washed out, the property was described to him, and he was told what was on it; that it was not then being used; that it was a rough piece of land and of but little value; and that it was in the contemplation of the company to take down the poles and wires and use them for extending the line to a German church.

The contract between the parties of July 12, 1915, is inartistically drawn, but fairly interpreted shows that the Jamisons were to transfer all the shares of the capital stock of the company to Alice C. Hough, who would thereby become the sole stockholder in the company. The contract further described the physical property then owned by the corporation. This was described in very general terms, among the items of property listed being, "all pole lines, wires, meters, switches, conduits, fixtures, and land and buildings." That it was the intention of the parties that all the lands and buildings then belonging to the company, except such as were specifically reserved, should be included in the transaction, is, we think, free from doubt. Just prior to the signing of the contract, the evidence shows that I. J. Jamison acting for himself and the other stockholders represented that there were no debts against the company, and all of its physical property, including the land, was free from incumbrance. In the light of the testimony, and the clear intention of the parties as to what property was to be included in the transfer, it would be a fraud, which no court would permit, to allow the parties to the contract, who were the officers of the company, to, in the name of the company, transfer its property to one of their number between the time of the signing of the contract and the actual transfer of the property. Good faith and fair dealing require that the status of the property should remain in the same condition, except such as was specifically reserved from the operation of the contract.

Some questions of law are presented in the appellants' brief; but, in the view we have taken of the testimony, the authorities presented have no application. As we view it, only questions of fact are presented in this case.

Upon an examination of the entire record, we are satisfied that the finding and decree of the district court is sustained by the evidence, and is clearly right. In the court below each party was decreed to pay one-half of the costs. In this court the costs on the appeal will be borne by the appellants, including the costs of briefs. The costs in this court on the cross-appeal will be borne by the cross-appellant.

The finding and decree of the district court is

AFFIRMED.

NANNIE I. MAURER, APPELLEE, V. ANDREW N. FEATHERSTONE, APPELLANT.

FILED JULY 21, 1920. No. 21041.

1. **Sales:** AGENT PRINCIPAL DEBTOR AFTER RESALE. "A consignee, by the terms of his agency, may be the agent of the consignor until the consigned goods are sold, and, when they are sold, become, as between him and the consignor, the purchaser of and principal debtor for the goods sold." *Nutter v. Wheeler*, 2 Low. (U. S. D. C.) 346.

2. **Appeal:** CONFLICTING EVIDENCE: REVIEW. "Where, in an action at law, the evidence is conflicting, it is not the province of this court to examine it further than to see that there is sufficient to justify the conclusion reached." *Young v. Kinney*, 85 Neb. 131, followed.

3. **Evidence** examined, and *held* to support the judgment.

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

Daniel H. Sheehan and *Organ & Sheehan*, for appellant.

A. P. Lillis and *Richard S. Horton, contra.*

DAY, J.

The plaintiff, Nannie I. Maurer, recovered a judgment in the district court for Douglas county against the defendant, Andrew N. Featherstone, for $1,385.87. Featherstone has appealed. The trial was had to the court, a jury being waived. The plaintiff has succeeded to all the rights of J. W. Blackstone under the contract which is the basis of the action.

The question argued turns largely upon the interpretation to be placed upon the contract, whether it be held a contract of agency, as contended by the defendant, or whether it be construed as a contract of sale, as contended by the plaintiff. The contract, omitting the inventory, is as follows: "Omaha, Neb., May 3, 1909. Received of J. W. Blackstone the following described property on consignment, to be sold by us and the proceeds accounted for every two weeks from the date hereof. It is hereby agreed and understood that the property belongs to J. W. Blackstone, that it is to be sold by A. N. Featherstone and C. K. Jones, who are to stand all the expense of storage and selling and pay the said J. W. Blackstone every two weeks in cash 75 per cent. of the invoice price for all goods sold. C. K. Jones, A. N. Featherstone, by C. K. Jones." Under this contract Featherstone in December, 1909, sold the stock remaining in his hands to one Coatsworth, describing it in the contract as "a certain stock of merchandise valued at $1,200, consisting of office supplies and office fixtures (office furniture)," in monthly instalment payments, taking Coatsworth's notes therefor. In these notes Featherstone was named as payee. The contract between Featherstone and Coatsworth is also drawn in uncertain terms, containing the elements of a conditional sale and a chattel mortgage. After making three monthly payments upon his purchase, Coatsworth made default, and the stock was turned back to Featherstone. Upon this state of facts the plaintiff claims that she is entitled to recover under the contract, while the de-

fendant claims that he is holding the goods as agent for the plaintiff, and offers to return them to her. It does not clearly appear in the record how Featherstone succeeded to the interest of Jones and Featherstone in the contract, but there seems to be no point made in the brief but that he was the successor in interest of the consignees. The contract of sale which Featherstone made with his purchaser was not made for and on behalf of the consignor, but for his own individual benefit. The terms of his sale to his purchaser were entirely different from those under his contract with the consignor.

The contract now before us must be construed as a whole, giving meaning to its several parts in an effort to arrive at the intention of the parties. When so construed, we believe that the goods were to be treated as a bailment in the hands of the consignees, with the right of sale, and, when that right was exercised by the consignees, the relationship of debtor and creditor as between the consignor and consignees at once arose.

The case of *Nutter v. Wheeler*, 2 Low. (U. S. D. C.) 346, in its facts, is very similar to the case at bar. In that case it is held: "A consignee, by the terms of his agency, may be the agent of the consignor until the consigned goods are sold, and, when they are sold, become, as between him and the consignor, the purchaser of and principal debtor for the goods sold." The same principle is announced in *Ex parte White*, L. R. 6 Ch. App. (Eng.) 397; *Depew v. Keyser*, 3 Duer (N. Y.) 335. See note under *Ferry & Co. v. Hall*, L. R. A. 1917B, 620.

It is also argued that the plaintiff's claim is barred by the statute of limitations; that the evidence of the plaintiff's witness that there had been a payment of $1 upon the claim which tolled the statute is not worthy of serious consideration. Upon this point there was a conflict in the testimony. In such case, it being a law action, it is not the province of this court to examine the evidence further than to see that there is sufficient evidence to

sustain the conclusion reached. The evidence before the court in this case was sufficient to justify the judgment.

Other questions were discussed relating more particularly to the rulings of the court on the questions of evidence. We deem it unnecessary to discuss them. Suffice it to say they have been considered in consultation, and we find no error in the rulings.

The judgment of the district court is

AFFIRMED.

LETTON and ALDRICH, JJ., not sitting.

STATE, EX REL. CLARENCE A. DAVIS, RELATOR, v. ESKER M. COX ET AL., RESPONDENTS.

FILED JULY 21, 1920. No. 21611.

1. **Schools and School Districts:** CONSOLIDATED SCHOOL ACT: CONSTITUTIONALITY. The act covering consolidated schools (Laws 1919, ch. 243) *held* constitutional, as not defective in title, and not shown invalidated through failure of proper procedure in enacting.

2. **Statutes:** CONSTITUTIONALITY. The Constitution does not require that every step in the course of enacting bills be recorded in the journal, and the enrolled bill, duly authenticated and approved, is *prima facie* evidence of a compliance with those constitutional requirements in its passage, which are not expressly required by the Constitution to be shown on the journal.

3. ———: ———: PRESUMPTION. The silence of the journal on matters, not expressly required to be entered on the journal record, does not conflict with the presumption of the regularity of the passage of the bill afforded by the enrolled bill; but, in order to destroy the presumption of regularity afforded by it, the journal must clearly, explicity and unequivocally disclose the irregularity in passage.

4. ———: ———: SUBSTITUTION OF NEW BILL BY AMENDMENT. The method of substituting an entire new bill by amendment, when the changes by way of amendment are strictly germane to the original, is not unconstitutional, is in accord with universal legis-

lative procedure, and it is unnecessary that a bill, which has been read the first and second time before such amendment, shall be again placed on first and second reading before passage.

5. ———: ———: PRINTING. The record does not disclose that the bill, with amendments, was not printed before final passage, and the act is not unconstitutional on that objection.

6. ———: ———: AMENDMENT. The enactment is not in violation of section 11, art. III of the Constitution, providing that no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended be repealed.

7. ———: CONSOLIDATED SCHOOL ACT: VALIDITY. The provision of the bill, providing an appropriation, is invalid, since the bill did not originate in the house, but this provision is not so essential to the entire act that it can be presumed that the legislature would not have passed the act without it, and, therefore, does not invalidate the act as a whole.

Original proceeding in *quo warranto* to determine the right of respondents to hold office as members of a board of education. *Action dismissed.*

Stewart, Perry & Stewart, Lambe & Butler and *Clarence A. Davis, Attorney General,* for relator.

O. E. Shelburn, Peterson & Devoe and *George W. Ayres, contra.*

FLANSBURG, J.

Action in *quo warranto,* commenced in this court, to try the right of the members of the board of education of Consolidated School District No. 2 of Harlan county to hold office. The school district referred to and offices now held by respondents were created under and by virtue of chapter 243, Laws 1919. Relator contends that this act is unconstitutional.

The first objection made is that the bill was amended in one house of the legislature, that these amendments were not concurred in by the other house, and that, therefore, the two branches of the legislature did not pass the bill in the same and final form.

The legislative journals show that the bill was introduced in the senate as Senate File No. 261. After being passed by that body and transmitted to the house, it was referred to the committee on education, and on April 10, 1919, reported out of that committee, with recommendation that the bill be amended in two specific particulars. The report was adopted. On April 12 the sifting committee recommended that the bill be placed on the sifting file with "no amendments." The committee of the whole reported the bill, with recommendation that the "house amendments" be engrossed, and that the bill be placed on the calendar for third reading. No report of the committee on engrossed and enrolled bills is shown, nor is there any further record of any action taken on this bill until on April 14, when it appears that the bill was read the third time and put upon its passage. At that time the speaker, in the usual form, declared: "This bill having been read at large on three different days, and the same with all of its amendments having been printed, the question is, shall the bill pass?" The record further shows the vote taken and, "a constitutional majority having voted in the affirmative, the speaker declared the bill was passed and the title agreed to." The house then reported to the senate that it had passed Senate File No. 261. In this report there was no mention that any amendments had been made. The bill was enrolled without any house amendments, and the presiding officers of each house and the governor signed the bill in that form.

The bill was not duly enacted unless it was voted upon and passed by both houses in its final form. *Moore v. Neece,* 80 Neb. 600; *Cleland v. Anderson,* 66 Neb. 252, 262.

Does it affirmatively and unequivocally appear from the record that the bill was not so passed?

In the majority of jurisdictions a bill is conclusively presumed to have been regularly enacted when the en-

rolled bill, properly authenticated and approved, is filed with the secretary of state, and the courts in those states have no power to look to the legislative records to see whether the constitutional requirements have been complied with. 36 Cyc. 973. We have a more liberal rule in this state. An enrolled bill is only *prima facie* evidence of a compliance with the constitutional requirements in its passage, and this presumption is rebuttable. If the legislative journals clearly and explicitly contradict the evidence furnished by the enrolled bill, the journals will control. *Webster v. City of Hastings,* 59 Neb. 563; *State v. Burlington & M. R. R. Co.,* 60 Neb. 741; *State v. Abbott,* 59 Neb. 106; *State v. Frank,* 61 Neb. 679; *Stratton v. State,* 79 Neb. 118.

The Constitution does not expressly require that all steps in the passage of a bill shall be spread upon the journals, and, though the legislature is required to keep journals of its proceedings, an omission to show a step in the procedure in the course of enactment raises no presumption that such step was not taken, except as to those acts which the Constitution explicitly requires shall be shown upon the journal, such, for instance, as yeas and nays on final passage. *People v. Illinois State Board of Dental Examiners,* 278 Ill. 144; *Perry v. State,* 214 S. W. (Ark.) 2. Where the journal is silent, therefore, as to such steps not expressly required to be shown, the enrollment, authentication and approval of the bill will suffice to supply the proof that the step was taken. As said in *State v. Frank,* 60 Neb. 327, 333: "The enrolled bill has its own credentials; it bears about it legal evidence that it is valid law; and this evidence is so cogent and convincing that it cannot be overthrown by the production of a legislative journal that does not speak, but is silent. Such seems to be the conclusion reached by a majority of the courts; and such, certainly, is the trend of modern authority. To hold otherwise would be to permit a mute witness to prevail over evidence

which is not only positive, but of so satisfactory a character that all English and most American courts regard it as ultimate and indisputable."

Upon examining the history of the statute in controversy, we find that the journal does not explicitly show that the house, on final passage, voted amendments to the bill. It is true that the report of the committee on education proposing amendments was adopted, and that the committee of the whole ordered the "house amendments" engrossed. The proceedings in committee of the whole are not set forth; neither is it shown what the "house amendments" were when the bill emerged from that committee. The journal does not show any report of the committee on engrossed and enrolled bills after this bill had been referred to it, nor does the record set out the bill or what it contained when it was finally voted upon. When reported to the senate, the record does not show that the bill was transmitted *with amendments*. So far as the record goes, the house may have receded from the proposed amendments before final passage, and passed the bill in its original form—the form in which it was signed and authenticated by the presiding officers of the two houses. There is some indication, at least, that this was done, from the fact that, in transmitting the bill to the senate, no amendments were noted. No significance can be attached to the words of the speaker, at the time of third reading, to the effect that, "this bill having been read at large on three different days, and the same with all of its amendments having been printed, the question is, shall the bill pass?" for that stereotyped phrase, as the journal shows, is used for all bills put on final passage, whether they carry amendments or not.

The journal record is not clear and complete. It does not affirmatively show that the bill was ever engrossed with amendments, nor that the house did not recede from proposed amendments prior to the final passage. On the other hand, there is evidence tending to the inference

that the amendments were, in fact, withdrawn. There being no clear and unequivocal proof that the house adopted amendments which are not shown in the enrolled bill, the journal record is insufficient to impeach the evidence arising from the enrollment of the bill and the authentication by the presiding officers of the two houses that the bill was duly passed.

Such is the holding in the case of *Perry v. State, supra,* in a case almost identical with this, and similar rulings are found in *State v. Dean*, 84 Neb. 344, and *In re Appraisement of Omaha Gas Plant,* 102 Neb. 782. In the case of *Perry v. State, supra,* the senate amended the bill and ordered it engrossed for third reading. These amendments were not found in the bill as signed by the governor. That case differs, and goes a step farther than this, in the fact that the committee on engrossed and enrolled bills reported the bill back as "correctly engrossed" before it went to third reading. The court said (214 S. W. 2, 4):

"After being engrossed, it was within the province and power of the senate to have ordered the bill placed back on its second reading for amendment, and to have receded fom the amendment engrossed into the bill, or to have stricken the amendment from the bill, and, should such course have been taken, it would not have been necessary to its validity to have entered these steps, concerning the amendment, on the journal.

"The silence of the record in this regard would not conflict with the presumption that such course was pursued by the senate. The silence of a legislative journal, on matters not required to be entered on the journal, cannot conflict with the presumption of the regularity of the passage of a bill. It is only in matters where the journal does speak, or where it is required to speak, that it could conflict with such presumption."

The next contention made is that the bill as passed was not read in the senate on three separate days. The jour-

nal shows that the bill was introduced by the governor on April 4 and read the first time under the title: "A bill to provide for the districting of consolidated schools and to repeal section 2, chapter 121, Session Laws of 1915, relating to consolidated school districts, and to repeal chapter 229, Session Laws of 1917, relating to the districting of school districts, and to declare an emergency." The bill was read the second time on April 7, and on that day the committee on education recommended amendments in the nature of a substitute bill, and these amendments were again recommended by the committee of the whole on April 8. By these amendments the title was changed to read as follows: "A bill for an act to provide for the districting of all territory into districts for consolidated and high school purposes, and to provide for the organizing and operating of the same, and to repeal chapter 229, Session Laws of 1917, and section 2 of chapter 121 of the Session Laws of 1915." All after the enacting clause was amended by a substitute bill. The body of the bill, as originally introduced, is not disclosed. The subject expressed in the original title was to provide for districting consolidated schools. By the amendment to the title, provision was added for "organizing and operating of the same." Redistricting could not take place without a provision for organizing and operating the same, under the districts as newly created.

We see no material nor substantial change in the title which is not strictly germane and proper. No doubt the body of the act was amended in a manner entirely germane to the act originally introduced. There is no record to the contrary, and nothing to rebut the presumption that the amendment, in the nature of a substitute bill, was properly made. Our court has held that a substitute bill which is germane to the original is not a new bill. *Chittenden v. Kibler*, 100 Neb. 756. See also *Thrift v. Towers*, 127 Md. 54. And it is the rule that it is unnecessary, as each amendment is made, to begin again and read the

bill three times as amended. *State v. Ryan*, 92 Neb. 636; *Cleland v. Anderson, supra; Richards v. State*, 65 Neb. 808.

It is objected that the bill and amendments were not printed before final passage. The record does not affirmatively disclose such to be the fact. On the contrary, it is recorded that on final passage the bill with amendments had been printed. There appears to be no basis for that contention.

It is argued that the bill did not contain the section or sections sought to be amended, nor repeal the sections of the statute so amended. The bill does not purport to be an amendment of the former sections, but enacts entirely new legislation upon the same subject matter, and repeals the former sections covering that matter. Such enactments are not in violation of the constitutional requirement that no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed.

It is objected that the title to the bill contains more than one subject, and does not clearly express the purpose of the act. It is clear that the law had one general subject—the redistricting for schools. This necessarily contemplated all necessary provisions incidental to the creation, organization and operation of such consolidated districts. *State v. Amsberry*, 104 Neb. 279; *Cathers v. Hennings*, 76 Neb. 295; *State v. Power*, 63 Neb. 496; *Stewart v. Barton*, 91 Neb. 96; *State v. Ure*, 91 Neb. 31; *Robinson v. Kerrigan*, 151 Cal. 40; *Gay v. District Court*, 41 Nev. 330, 3 A. L. R. 224; *People v. Crissman*, 41 Colo. 450; *Adams v. Iten Biscuit Co.*, 162 Pac. (Okla.) 938; 36 Cyc. 1017.

Again, it is argued that the bill is one appropriating money, and, under the provisions of the Constitution, should have originated in the house. The act provides that all consolidated districts, organized under the law, shall be awarded and paid out of the state treasury, from

moneys not otherwise appropriated, a certain sum of money toward the furnishing of equipment, together with a certain sum annually. This provision of the statute is not directly involved in this case, except in so far as it may give character to the act as a whole as an appropriation bill, in the light of the requirement of the Constitution that all appropriation bills must originate in the house. The creation of the obligation to pay by the state would not, in itself, be an appropriation, but this act goes further, and provides that payments shall be made from certain moneys in the state treasury not otherwise appropriated. This directly creates a charge upon those funds, and to that extent is an appropriation. As an appropriation bill it could not be sustained, since it did not originate in the house. But it is not essentially an appropriation bill. The appropriation made was only an incident to it. That provision of the act cannot be said to be an essential part of the act, for the act would be complete without it, and, though such provision, by providing the method of payment of state aid, created an appropriation, it is not so connected with the subject-matter of the entire act that we can presume that the legislature would not have passed the remainder of the act except for this provision. The one invalid provision, therefore, would not invalidate the entire act. *Merrill v. State*, 65 Neb. 509.

The respondents hold their office under a valid enactment. The action is therefore dismissed, and costs taxed to relator.

DISMISSED.

ROSE, J., dissenting.

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

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1920.

FRED GILLARD v. MICHAEL L. CLARK, SHERIFF.

FILED SEPTEMBER 27, 1920. No. 21455.

1. **Habeas Corpus:** DISCHARGE OF PRISONER: RIGHT OF APPEAL. A public officer entrusted with the custody of a prisoner, who is made respondent in a habeas corpus proceeding, has the right to have reviewed an order discharging the prisoner from custody.
2. **Appeal:** MOTION FOR NEW TRIAL: REVIEW. This court will not consider a showing that a party was "unavoidably prevented" from filing his motion for a new trial within the statutory time, so as to permit a review of the questions raised by the motion for a new trial, where the showing was not filed in the district court until after the motion was overruled, and there is nothing to indicate that the district court had the facts before it, so that it was at liberty to consider, or did consider, the merits of the motion.
3. **Habeas Corpus:** VENUE. An application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined.
4. ———: JURISDICTION. Where application is made for a writ of habeas corpus to the district court of a county other than the one in which the prisoner is confined, and the officer in whose custody the prisoner is held brings the latter into court and submits to the jurisdiction without objection, the prisoner is then under confinement in the county where the action is brought and the court has authority to inquire into the legality of his restraint.
5. ———: APPLICATION: SUFFICIENCY. An application for a writ of habeas corpus, which shows that the petitioner has been convicted of a felony on a plea of not guilty, without a jury trial, of non-support of his wife and child, and has been committed to jail, states facts sufficient to warrant the issuance of the writ.

ERROR to the district court for Franklin county: WILLIAM A. DILWORTH, JUDGE. *Affirmed.*

Baker & Ready and *Samuel O. Cotner*, for plaintiff in error.

Bernard McNeny, contra.

MORRISSEY, C. J.

The district court for Douglas county sentenced Fred Gillard to 60 days in the county jail for nonsupport of his wife and child. Gillard applied to the district court for Franklin county for a writ of habeas corpus, alleging that his commitment was illegal. A hearing was had and the petitioner was ordered discharged. Respondent, the sheriff of Douglas county, has brought the case to this court for review.

A motion to dismiss the petition in error has been filed by the petitioner on the grounds, among others, that an order discharging a prisoner on habeas corpus is not reviewable; that, if such order is reviewable, the proceedings must be taken by the state through the attorney general, or his representative, and cannot be brought by a custodial officer; and that the motion for a new trial was not filed within the statutory time.

1. At common law a judgment remanding or discharging a prisoner in a habeas corpus proceeding was not reviewable. 12 R. C. L. 1256, sec. 74. In this state, however, the right of review in such cases has always been recognized. And ever since *Atwood v. Atwater*, 34 Neb. 402, where the question appears first to have been raised, this review has been permitted to the state as well as the petitioner. There is no force in the petitioner's argument that the only right of review in a habeas corpus proceeding, where the prisoner has been discharged, is under section 515 of the Criminal Code (Rev. St. 1913, sec. 9185), on exceptions taken by the attorney general or county attorney for the purpose of

obtaining a ruling from this court on a question of law, but in no way affecting the liberty of the petitioner.

2. Was the respondent a proper party to prosecute this case? It is well established that a public officer entrusted with the custody of a prisoner who is made respondent in a habeas corpus proceeding has the right to a review of an order discharging the prisoner. *State v. Huegin,* 110 Wis. 189, 62 L. R. A. 700; *Miller v. Gordon,* 93 Kan. 382; *Davis v. Smith,* 7 Ga. App. 192. These cases are in accord with the spirit of our Code provisions.

3. We come now to a consideration of the motion for a new trial. The judgment of the trial court was rendered October 15, 1919. The motion for a new trial was filed October 17, 1919. Court had adjourned its term October 16, 1919. The motion was filed within the three-day period prescribed by statute, but not before the close of the term. At a subsequent term the court overruled the motion. On the succeeding day respondent filed a showing that he was "unavoidably prevented" from filing the motion for a new trial during the term at which the judgment was rendered. Whatever may be the sufficiency of the showing to excuse the delay in filing the motion for a new trial, we cannot consider the affidavit for the reason that there is nothing in the record to indicate that the district court was ever apprised of the facts contained in it. We are therefore not at liberty to review any of the questions which were required to be presented to the district court by motion for a new trial. *Tait v. Reid,* 91 Neb. 235.

4. This does not, however, prevent us from passing upon the question whether the district court had jurisdiction to issue the writ in this case. In *In re White,* 33 Neb. 812, this court held that ordinarily habeas corpus proceedings should be instituted in the county where the unlawful restraint is alleged to exist. In *State v. Porter,* 78 Neb. 811, it was held that, when the right of personal liberty makes it necessary, the district court or a judge thereof at chambers may, in the exercise of a sound

legal discretion, issue a writ of habeas corpus to another county of the state outside of his judicial district. That case involved the right to the custody of a child as between father and grandparents. The argument in support of permitting the writ to issue to another county of the state can have no force in a case like the present where the petitioner is confined under sentence of court, presumed to be lawful. Nor is any reason apparent why a public officer, having a prisoner in custody under mandate of court, should be required to appear in another county and defend against a proceeding in habeas corpus. The prisoner is not subjected to hardship in the matter of procuring witnesses or in other incidents of trial by being required to bring his action in the county where he is confined, since the question to be determined is not one of complex fact, but simply one of law as to the validity of the proceedings under which the commitment was made. We are therefore of the opinion that an application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined. 12 R. C. L. 1218, sec. 38. And where proceedings are instituted in another county, it is the duty of the court, on objection to its jurisdiction, to dismiss the proceedings.

5. But where application is made for a writ of habeas corpus to the dstrict court of a county other than that in which the prisoner is confined, and the officer in whose custody the prisoner is held brings the latter into court and submits to the jurisdiction without objection, the prisoner is then under confinement in the county where the action is brought, and the court has authority to inquire into the legality of his restraint. In this case respondent filed an answer and return stating: "That as respondent in this action, he now has the said George Fred Gillard in court, subject to the order of this court." The judgment of the district court for

Franklin county cannot therefore be set aside for want of jurisdiction.

6. One other question is presented by respondent which we are at liberty to consider, namely, whether the application states facts sufficient to authorize the issuance of the writ. The application shows that the petitioner was denied a jury trial, and this, although the charge on which he was tried was a felony, being punishable, in the discretion of the court, with a penitentiary sentence. This fact is one which would make the commitment void. *Michaelson v. Beemer*, 72 Neb. 761. No copy of the complaint or information filed against the petitioner is contained in the record, and there is no way for us to determine whether he ever was lawfully charged with crime. Under the circumstances, the judgment of the district court must be affirmed.

AFFIRMED.

DEAN and ALDRICH, JJ., not sitting.

IN RE ESTATE OF JOHN O'CONNOR.

CHARLES O'CONNOR ET AL., APPELLEES, v. JOHN SLAKER, ADMINISTRATOR DE BONIS NON, ET AL., APPELLANTS.

FILED SEPTEMBER 27, 1920. No. 21036.

1. **Evidence**: EXPERT ON HANDWRITING. The value of the testimony of a handwriting expert on the issue of forgery depends largely on the cogency of the reasons for his opinion.

2. ———: EXPERT AND OPINION EVIDENCE. The mere opinion of witnesses who testify alone from familiarity with a signature and from comparing genuine and disputed writings has less weight generally on the issue of forgery than expert opinions based on scientific skill and sound reasons.

3. ———: EXPERT ON HANDWRITING. The result of comparisons made by handwriting experts is a character of evidence sanctioned by statute and merits proper consideration on the issue of forgery in a civil action.

In re Estate of O'Connor.

4. Wills: FORGERY: EVIDENCE. Testimony of handwriting experts that a will offered for probate is a forgery, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony of subscribing witnesses that they saw the will executed.

5. ———: ———: ———. On the issue that a will offered for probate is a forgery, the testimony of subscribing witnesses that it was duly executed may be overthrown by any probative proof, either direct or circumstantial, if admissible under the ordinary rules of evidence.

6. ———: ———: ———: PRESUMPTION. After substantial evidence has been adduced in support of the plea that a will offered for probate is a forgery, there is no presumption that the persons purporting to be subscribing witnesses told the truth in testifying that they saw the will executed, though not directly impeached or directly contradicted.

7. ———: ———: ———. After contestants adduce credible proof that the will offered for probate is a forgery, it is error for the triers of fact to entertain the presumption that subscribing witnesses, in testifying that it was duly executed, told the truth merely because they were not directly impeached, but the issue must be determined from all evidential facts considered in their proper light in connection with the plea that the will is genuine and with the charge of forgery.

8. ———: ———: ———. Where circumstances show that subscribing witnesses testified falsely that the will offered for probate had been duly executed, the will may be rejected without direct proof that their reputations for truth and veracity were bad or that such witnesses were corrupt or dishonest.

9. ———: ———: ———. Evidence summarized in the opinion *held* to show clearly that the will offered for probate is a forgery.

10. Appeal: REVERSAL. Where the evidence shows that the judgment from which the appeal is taken is clearly wrong on the sole issue of fact, it will be reversed, if properly challenged on that ground

APPEAL from the district court for Adams county: HARRY S. DUNGAN and WILLIAM C. DORSEY, JUDGES.

Tibbets, Morey & Fuller, Sutton, McKenzie, Cox & Harris, W. T. Thompson, J. A. Gardiner, McDonough &

McDonough and *Burkett, Wilson, Brown & Wilson*, for appellants.

F. P. Olmstead, J. W. James and *J. B. O'Connor, contra.*

ROSE, J.

This is a proceeding commenced in the county court of Adams county to probate an instrument alleged by proponents to be the will of John O'Connor, who died in Hastings, Nebraska, August 17, 1913. The county or probate judge received the document by mail September 12, 1917, without any letter of transmittal. Proponents offered it for probate. Parties claiming to be heirs of decedent, but ignored in the will, contested it as a forgery. The county or probate court, the court of exclusive, original jurisdiction, found that the instrument offered was not the will of decedent and refused to probate it as such. Proponents appealed to the district court, where, upon a trial without a jury, the will was sustained as genuine. To reverse the judgment of the district court the contestants have appealed to this court.

The controlling question for determination is the sufficiency of the evidence to sustain the finding that the instrument offered for probate is the will of decedent.

John O'Connor went to Hastings alone more than a third of a century ago and resided there like a recluse until his death. He settled among strangers. He was a cobbler, and pursued his trade and business diligently, lived modestly and left the community at long intervals for brief periods only. In the meantime his estate increased until it exceeded in value $100,000. At the time of his death the neighbors who had known him best and the persons whose business relations with him had extended over a long period of years knew nothing about his early history or his family connections. Since, however, many persons claiming to be his heirs and a number of his purported wills have engaged the atten-

tion of the courts. One of the alleged wills was found to be a forgery. *In re Estate of O'Connor,* 101 Neb. 617. The will in controversy now is in form as follows:

"I, John O'Connor, of Hastings, Adams county, Nebraska, make, publish and declare this my last will and testament, hereby annulling and revoking all other wills and testaments made by me.

"First. It is my will that all my just debts including expenses of my last illness and funeral expenses be paid.

"Second. It is my will that a suitable monument mark my last resting place and that my brother or his heirs, if located, take charge of and bury my remains.

"Third. Having all my life remained single and unmarried and having at this date no wife or children to inherit my property and having no relatives now living unless my brother Charles or his heirs survive me, I hereby dispose of my property and effects as follows, to wit:

"Fourth. I will, bequeath and devise all my property, be it real, personal or mixed and where ever situate, if he be living, to my said brother Charles and if he be dead, I will, bequeath and devise all my said property to his heirs.

"Fifth. Should my said relatives fail to claim under this will within five years after my death, then and in that event, it is my will that all my property, be it real, personal or mixed and where ever situate go and be used for the purpose of founding an orphanage for homeless children of the state of Nebraska, not including the cities of Lincoln and Omaha.

"One of the provisions herein being that no child shall be and remain an inmate of said orphanage longer than ten years, or after said child has reached its tenth birthday.

"A second provision is that all sums of money spent or used in founding or maintaining such orphanage be under the management and control of three directors or trustees, one of whom shall be my executor hereinafter

named or his successor, which said successor shall be named or appointed from Adams county, Nebraska, by the then acting governor of the state of Nebraska. The other two trustees shall be named from Adams county, Nebraska, aforesaid by the then acting mayor of Hastings, Nebraska, and the then acting judge of the circuit court of Adams county, Nebraska.

"A third provision is that said orphanage and all property incident thereto be located in Adams county, state of Nebraska.

"Should it be ascertained that my estate would be insufficient to maintain said orphanage as hereinbefore provided then I would suggest and it is my will, that the age limit of children in said orphanage be reduced, unless the state of Nebraska would make up the deficiency.

"Sixth. I hereby appoint my trusted friend, Mr. W. H. Lanning of Hastings, Nebraska, executor of this, my last will and testament.

"Seventh. It is my will that my said executor and any trustees that may be appointed hereunder be required to give bond for the faithful performance of this trust.

"Executed by me this 10th day of October, 1908.

"John O'Connor

"Signed, sealed, published and declared by the above named John O'Connor, as and for his last will and testament, who in the presence of us and at his request, and in the presence of each other, have subscribed our names hereto as witnesses hereof.

"Lawson Tarwater.
"Stephen H. Turner.

"STATE OF MISSOURI }
COUNTY OF BUCHANAN } ss.

"On this 10th day of October, 1908, before me, the undersigned, a notary public within and for Buchanan county, state of Missouri, personally appeared John O'

Connor of Hastings, Nebraska, who is personally known to me to be the person described in and who executed the foregoing will and testament and subscribed and published same in the presence of the above named witnesses to be his last will and testament.

"In witness whereof, I have hereunto set my hand and affixed my official seal at my office in St. Joseph the date and year first above written. My term expires on the 22d day of March, 1909.

"(Seal) Grant S. Watkins, Notary Public."

If this is a genuine will, it was drawn by and acknowledged before Grant S. Watkins, an attorney at law and notary public, and was executed in his office on the fourth floor of the German-American Bank Building, St. Joseph, Missouri, October 10, 1908. It is alleged that the Charles O'Connor mentioned in the will as the brother of decedent died June 13, 1903, and that proponents, eleven in number, are his sons and daughters. Watkins died August 5, 1909. His widow, a witness for proponents, told the story of the finding of the will, which may be summarized thus:

September 11, 1917, James D. Witten, of Kansas City, Missouri, who, long ago, had shared a law office with Watkins, and who had not been seen by Mrs. Watkins for a good many years, called on her at her home in St. Joseph, asked her about some mining stock formerly owned by her husband, inquired if she wanted to sell it, and wondered what had become of her husband's law books. She told him the books had all been sold except a set of Lawyers' Reports Annotated and a few volumes of an Encyclopædia. For the purpose of examining the books Mrs. Watkins and Witten went together the same day to the law office of W. K. Amick, where the books, in the bank building mentioned, had been stored after the death of Watkins. They were piled in a corner and were covered with dust. Amick was in his office at the time with his back to the books. After Witten had ex-

amined a number of volumes, a book in his hands opened, while he was seated, and from the position of Mrs. Watkins as she stood behind him she observed between the leaves a sealed envelope, marked on the outside a will. She took it, but did not open it, and without calling Amick's attention to what had been found in his office went directly with Witten to an office in another building. There she procured a suitable mailing envelope. She and Witten then went directly to the post office. By his direction Mrs. Watkins sent the sealed document by registered mail to the "Probate Judge, Hastings, Neb." A few minutes later Witten left St. Joseph for Kansas City. After some negotiating and a trip by Mrs. Watkins to Kansas City in response to a call by telephone, Witten bought the books for $35, and they were shipped to him in November following.

In substance this is the story of Mrs. Watkins. In many respects it is like the testimony of Witten, who was called as a witness by some of the contestants. He said, however, that he was not seated while examining the books, that Mrs. Watkins found the will, that he never touched it, and that he was never nearer to it than three feet; but he admitted he advised her to send it to the probate judge at Hastings by registered mail without mentioning the matter to any one, and that he did not leave her until he was certain that the registered envelope had been deposited in the post office. Where the testimony of these two witnesses to the finding of the will conflict, that of Mrs. Watkins is more satisfactory. She seems to have a better memory and appears to be more candid. Both testified by deposition.

The registered letter was received by the county or probate judge at Hastings September 12, 1917. When opened it contained a sealed envelope bearing in typewriting the following indorsement:

"My last will and testament. In case of death send to W. H. Lanning, Hastings, Nebr."

This was followed by "John O'Connor, Hastings, Nebr.," written with pen and ink in the genuine or the simulated handwriting of decedent. After publication of notice of a purpose to open the sealed envelope, the county judge publicly opened it November 19, 1917, and it contained the will in controversy.

Mrs. Watkins, in giving her deposition, looked at a photographic copy of the will and said she thought the name of the notary, "Grant S. Watkins," by whom the acknowledgment purports to have been taken, was the genuine signature of her husband.

W. K. Amick testified that, in a drawer in his office desk under papers which had not been disturbed for several years, he found a notarial seal; that, when found, it could not be opened; that he had it repaired and, when tested, it proved to be the seal of Watkins. Impressions of the seal were taken in open court and they are identical with the impression of the seal on the will.

The names of the subscribing witnesses are Lawson Tarwater and Stephen H. Turner. At the time of the trial the former resided in Kansas City, Missouri, and the latter in San Bernardino, California. According to their story as told on the witness-stand, they became friends in 1899, while working in the Burlington shops at St. Joseph, Missouri, their friendship having remained steadfast and a correspondence having been carried on between them when separated. Their testimony on the witnessing of the will, for present purposes, may be summarized as follows:

In October, 1908, Turner, while employed in a dairy at Jacksonville, Illinois, had a two weeks' vacation, with liberty to go where he pleased, and went on a visit to the home of Tarwater, who then resided in St. Joseph, Missouri, arriving at the latter's residence in the forenoon, Saturday, October 10, 1908. In the afternoon of the same day host and guest walked down town, a mile or more, and went together to the law office of Watkins, an

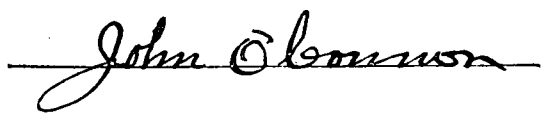
acquaintance of Tarwater, whose purpose in calling was to inquire about the renting of some property. Tarwater and Turner walked into the office of Watkins between 3 and 4 o'clock in the afternoon. Tarwater spoke to Watkins and introduced Turner. Watkins shook hands with both. At the time another man seated in the office was introduced by Watkins to the two arrivals as John O'Connor, of Hastings, Nebraska, and came forward and shook hands with them. "I have a will here for Mr. O'Connor," said Watkins. "We should like for you boys to sign this will, if you haven't any objections." Both expressed a willingness to be witnesses. Watkins read the will, asked O'Connor if it was his will, and was answered in the affirmative. The signatures were written on the will by each person in the following order: O'Connor, Tarwater, Turner, Watkins. The latter took the acknowledgment and affixed his notarial seal. Tarwater talked to Watkins about renting a house, while Turner engaged O'Connor in conversation. The subscribing witnesses were in the office of Watkins 20 or 30 minutes only. They had never before seen John O'Connor and never saw him afterward.

If the subscribing witnesses told the truth, the will offered for probate was executed in the manner outlined. In the respects narrated there was no material difference in the testimony of the two subscribing witnesses. Both were specific, direct and positive in their statements. In addition, the office of Watkins, the pens used by all present, the sealing of the will by Watkins in an envelope, the personal appearance of John O'Connor and of Watkins, the former's benefactions and his statements in regard to himself and to his lost brother, Charles, and the place of their nativity, were described in more or less detail by one or the other or by both of the subscribing witnesses while testifying on behalf of proponents.

There is also proof that John O'Connor once went to St. Joseph to purchase shoes for his store, but the date is not given, and the evidence tends to show it was not October 19, 1908. In addition, there is testimony by both experts and nonexperts that the names of John O'Connor and Grant S. Watkins, as they appear on the will, are genuine.

Was the trial court clearly wrong in finding that the will offered by proponents for probate was genuine?

Wallace O. Shane, paying teller of the Omaha National Bank, with which he had been connected in some capacity for nearly 35 years, testified on behalf of contestants as a handwriting expert. He had examined the handwriting of decedent and his genuine signature, including checks, letters and other instruments, his purported signature on the will, and had compared accepted standards with the disputed writing and expressed the opinion that the latter was a forgery. Asked to give reasons for his opinion, the expert explained characteristic habits of decedent in writing his name as shown by genuine signatures covering a number of years. The following is a facsimile of a genuine signature:



A reproduction of the disputed signature on the will follows:

Some of the habits, characteristics, and earmarks of John O'Connor, as revealed by his genuine signatures, but not found in his purported signature on the will,

were pointed out by the expert, Shane, in substance, as follows: The strokes of the pen show a tremor. The letters "J" and "h" and "C" are about in a line. The upper loop of the "J" is wide at the top and is above the base line, the left curve being nearly uniform to the apex. The "o" in "John" has a pinched appearance, and the line running therefrom to the top of the letter "h" is almost vertical, the stem of the "h" being finished and left with sharp strokes. The latter part of the "h" and the "n" show a cramped position of the hand. The bottom of the capital letter "O" extends below the base line. The right side of the loop in the capital letter "C" is almost vertical, and it is crossed by the left curve close to the base line. The small "o" following "C" in the word "O'Connor" is almost vertical, and the two "n"s are made with sharp strokes. The last "o" in the name shows stops of the pen or a tremor, and between it and the final "r" the line is almost straight.

The expert explains that these peculiarities in the genuine signature result from the habits of John O'Connor in writing his name, and are not evidenced by the disputed signature. In handwriting "a habit," says the witness, "operates automatically without a man's conscious effort." The imitator or the forger is not affected by these habits or by the natural tremor of an older person. As interpreted by the expert, they tell their own story of the handwriting of John O'Connor in connection with the standards used. In the respects outlined, when explained by the expert, there are distinctive chirographic differences between the genuine and the disputed signatures, as comparisons show. If John O'Connor signed the will, in doing so he departed from the habits of penmanship which had voluntarily prompted him for years in writing his name. This witness had made a study of standard texts on the subject of handwriting and had testified as an expert in important

cases involving the charge of forgery. His testimony answers for itself and gives its own reasons for the light it throws on the issue of forgery. An eminent author writes:

"The real expert, * * * when guided and assisted by the competent lawyer, will make the facts themselves testify and stand as silent, but convincing, witnesses pointing the way to truth and justice." Osborn, Questioned Documents, p. XXIII.

Of this author's work, Wigmore says:

"The feature of Mr. Osborn's book which will perhaps mark its most progressive aspect is its insistence upon the reasons for an opinion, not the bare opinion alone." L. R. A. 1918D, 647 (*Baird v. Shaffer,* 101 Kan. 585).

The importance of this feature of expert testimony on handwriting was emphasized in a former opinion. *In re Estate of O'Connor,* 101 Neb. 617.

There is other testimony of a similar import. Charles G. Lane, president of the Exchange National Bank of Hastings, had known John O'Connor for 30 years. The latter had been a regular depositor and customer of that bank and had kept therein a box for papers. Lane had seen him writing his name, was familiar with his handwriting, had recently compared genuine signatures with the signature on the will, and expressed the opinion that the latter was a forgery. His answers on the witness stand show that he was competent to testify from actual knowledge as well as from the standpoint of a handwriting expert. In several important particulars he points out distinctive features of the genuine handwriting which are not found in the disputed signature. In all of the genuine signatures, according to his testimony, the letters are imperfectly formed as compared with those in the disputed signature, and in the latter the terminating curve in the capital "O" is too heavily shaded. From observation of John O'Connor while writing his name, Lane said that the former made the apostrophe in a care-

less manner with a quick upward stroke, always making it the same way, commencing at the bottom and finishing at the top. Lane also testified, in substance, that the apostrophe in the name on the will was made from the top downward, the pen opening with pressure where the line is shaded and closing with a fine point at the end. This testimony shows on its face that it speaks the truth when considered with the genuine and the disputed signatures and with the other evidence. It demonstrates that the apostrophe, which is a distinctive part of the name of John O'Connor as he always wrote it himself, is upside down on the will. Being in the habit of making the apostrophe in a careless manner from the lower end upward, and being thus prompted without a conscious, mental effort, the inference is that he did not write his name on the will with this character wrong end down in a different form. The apostrophe in the name on the will shows, as the expert explains, that it was not carelessly made with an upward stroke, as John O'Connor made it, but that it was carefully made with a downward stroke, the pen spreading with pressure where the shading is heavy and closing where the character terminates with a fine point. Other differences between the genuine and the disputed signature, as the chirography is analyzed by the experts, tell the same story of forgery.

Testimony of this character is sanctioned by legislation. The statute provides:

"Evidence respecting handwriting may be given by comparisons made by experts or by the jury with writing of the same person which is proved to be genuine." Rev. St. 1913, sec. 7912.

Testimony of handwriting experts that a will is a forgery has been held sufficient to overturn oral testimony of subscribing witnesses that the will was duly executed. *Weber v. Strobel,* 194 S. W. (Mo.) 272; *Baird v. Shaffer,* 101 Kan. 585, L. R. A. 1918D, 638. In the latter case the rule announced reads thus:

"The testimony of subscribing witnesses to a will may be overcome by any probative facts and circumstances admissible under the ordinary rules of evidence."

There is also in the present case expert testimony of a probative nature tending to prove that the name of Grant S. Watkins, the lawyer by whom the will is said to have been drawn and before whom it purports to have been acknowledged, is a forgery.

While witnesses who had seen Watkins writing his name and who were familiar with his handwriting testified to the opinion, after examining accepted standards, that his signature on the will is genuine, the reasons which give weight to such testimony are generally wanting. There is like proof as to the genuineness of the signature of John O'Connor on the will, and one handwriting expert gave reasons for his conclusion, but they failed to show characteristic habits of decedent by which the writer of the signature on the will was prompted. All of such testimony on behalf of proponents, though entitled to consideration, lacks weight for want of cogent reasons, when the expert proof of forgery is considered from the same standpoint. Note III, L. R. A. 1918D, 647.

The two subscribing witnesses who testified on behalf of proponents that the will was duly executed were not directly impeached or directly contradicted by other witnesses, and for that reason the trial court, in reaching the conclusion that the will is genuine, indulged the presumption that they told the truth. This presumption, after there had been credible proof of the forgery charged by contestants, was entertained throughout the remainder of the trial below and inheres in the judgment, as shown by the opinion of the trial court. After the evidence of forgery had been adduced the entertaining of such a presumption was a serious error. In a civil case, when there is substantial proof in support of the plea that the will offered for probate is a forgery, all presumptions in favor of genuineness fall. Thereafter the truth must be

found in the evidence itself, and every item of proof must stand on its own footing in connection with each evidential fact considered in its proper light. In this test presumption creates no advantage one way or the other. In such a situation persons who declare themselves to be subscribing witnesses and boldly speak from the witness-stand as such, though not directly impeached, are subject to the same impartial and penetrating scrutiny as the mute instrument ascribed by them to the dead. In the unbiased search for the truth the law has no favorites by presumption. Silent circumstances, without power to change their attitude, or to make explanations, or to commit perjury, may speak as truthfully in court as animated witnesses. When an issue of forgery in a civil case is raised by pleadings and contested by evidence on both sides, there is no presumption either in favor of witnesses or in favor of circumstances. All of the evidential facts which throw light on the issue must be considered in connection with the allegation of proponents that the will is genuine and with the charge of contestants that the document offered for probate is a forgery. If the truth is found in oral testimony, it must determine the issue, but it is equally potent if found in circumstances. In the recent case of *Baird v. Shaffer,* 101 Kan. 585, the appellants stated their position as follows:

"It is also our contention that the positive testimony of the three subscribing witnesses cannot be overthrown by mere opinion evidence in the absence of evidence tending to show corruption or dishonesty on the part of such attesting witnesses."

This was answered by the supreme court of Kansas as follows:

"The testimony of attesting witnesses to a will may be overcome by any competent evidence. * * * Where the signature to a will is a forgery, and where the attesting witnesses have the hardihood to commit perjury, it is difficult to see how the bogus will can be overthrown ex-

cept by expert and competent opinion evidence tending to show that the pretended signature is not that of the testator, but spurious."

There being competent evidence on both sides of the controverted issue, the circumstances must be considered from the standpoint of forgery as well as from the standpoint of genuineness.

Whether the will is genuine or spurious, the person to be most benefited by it, if probated, is James B. O'Connor, of Kansas City, Missouri. He claims to be a son of Charles O'Connor, testator's lost brother and beneficiary, who died June 13, 1903, leaving eleven children now living, all being proponents. In addition to his share of the estate, if the will is probated, James B. O'Connor is interested as attorney for the other legatees and devisees. October 10, 1908, the date of the will, and both before and after that, he occupied an office on the fourth floor of the German-American Bank Building, St. Joseph, Missouri, diagonally across a corridor from the office of Grant S. Watkins, where the will was found in presence of the latter's widow September 11, 1917; Watkins having died August 5, 1909. Some of the law books and the notarial seal of Watkins were in a law office on this floor until the will was found. James B. O'Connor was familiar with the scenes of the making and of the finding of the will as the facts are pleaded by him. He knew Watkins, who is said to have drawn it, and Tarwater, a subscribing witness who testified it was executed. James B. O'Connor spent at least two hours a day for six days with the other subscribing witness, Turner, in California before the latter gave a deposition in this case, and he also knew Witten, who found the will in time to prevent the estate of decedent from going to a charitable institution. James B. O'Connor, Tarwater, and Witten, all former residents of St. Joseph, and all familiar with the office in which the will was found and the surroundings, now live in Kansas City, Missouri. James B. O'Connor

was a listener at a trial in Hastings, Nebraska, where an instrument purporting to be the will of John O'Connor, deceased, was found to be a forgery, and therefore had an opportunity to observe the handwriting, appearance, property, neighbors, and business associates of decedent. The incentive for the forgery and the knowledge essential to such an undertaking are clearly shown.

From the standpoint of a genuine will the stories of the witnesses who testified that it was executed and found are unusual, if not fanciful. A careful, exacting man, with sufficient sagacity and determination to keep all knowledge of his family connections from his neighbors and business associates for a third of a century and to make and preserve a fortune, is not likely to confide his secrets and the disposition of his property to utter strangers or to chance. From the standpoint of forgery the will and the discovery are clever devices to deceive the court and to screen the forger from justice. The will itself, if examined without suspicion, contains an unnecessary acknowledgment, which a careful lawyer would generally avoid; but, considered as a forgery, the acknowledgment and the seal create an appearance of authenticity to allay suspicion of forgery and to make an occasion for the recital of facts difficult of proof, namely, that testator was John O'Connor, of Hastings, Nebraska, that he was personally known to the notary, and that the will was executed.

The finding of the seal under papers that had not been disturbed for several years, as already stated, is a circumstance tending to indicate that the will is not a recent device adapted to known, present conditions, but it does not necessarily refute the inference of a series of circumstances tending to support the theory of forgery. A single incident like that may be due to an honest mistake of the witness who so testified or to an imposition, just as Mrs. Watkins, who saw the will in the book, may have mistakenly, but honestly, believed it had been left there by her husband years before.

No one would forge a will, intending to have it probated, without plans for its discovery, for the screening of himself from justice, and for procuring the false testimony essential to proof of its execution. Was the will discovered by accident or design? Witten opened the book where it was seen by Mrs. Watkins. Do the circumstances or his testimony indicate that he would not undertake such a mission? He used reckless, coarse and profane language while testifying, and was unable to disguise his anxiety to create the impression that he had not acted by prearrangement or design in his connection with the finding of the will and with his directions to Mrs. Watkins to send it secretly to the probate court. Among other things, he said, in substance, that he was a grandson of a brother of King Albert of England; that he was admitted to the bar in Keokuk, Iowa, in 1866, but never practiced law regularly, because he had been shot in the neck at Long Jack, the wound interfering with his speech, though he had been interested in a law office with Watkins for four years beginning in 1887; that he had run down and arrested moonshiners in Arkansas, Indian Territory, and Missouri; that he had been special agent for the federal revenue department in western Nebraska; that he was with Frank Hickock, known as "Wild Bill," when the latter was murdered in Deadwood; that he had been interested in mines in Arkansas, and had been with "Wild Bill" in the Black Hills during the mining excitement there; that he was investigator at St. Joseph for the street car company and the Grand Island Railroad, James B. O'Connor having cases against those corporations at the time; that he was not often in that attorney's office in Kansas City, Missouri. His evidence as to the finding of the will is on its face open to the suspicion of design. While he was called by some of the contestants as a witness, the court is more interested in ascertaining the truth than in charging his infirmities to any particular

litigant. Though he said his errand to the home of Mrs. Watkins was to inquire about mining stock, the conversation promptly drifted by his inquiry to the law books of her deceased husband. These books absorbed his attention until the will was found, and thereafter the will was the sole subject of interest until it was in the mail, when Witten immediately left Mrs. Watkins for Kansas City. The negotiations for the books did not close for perhaps two months, and not until the will was about to be, or had been, opened in the county court at Hastings, Nebraska. He confessed he had made no use of the books. The sealed envelope, when found, bore this indorsement in typewriting:

"In case of death send to W. H. Lanning, Hastings, Nebr."

Though there were no other directions, Witten instructed Mrs. Watkins to send the will to the "Probate Judge, Hastings, Neb.," instead of following the direction to send it to Lanning, and she did as she was told. The will thus escaped the scrutiny of a public-spirited man of known integrity before reaching the probate court. The evidential facts, the character of the testimoney of Witten, and the circumstances disclosed by all of the evidence are consistent with the charge of forgery and with the theory that the will was found by design, and not by accident.

Do the proofs of forgery and the corroborating circumstances overthrow the testimony of the two subscribing witnesses, Turner and Tarwater? These witnesses seem to have been chums. Their employment changed often and they frequently moved from place to place. Within a few years Turner had been a helper in a machine shop, an operator in a gas plant, a stationary fireman, a janitor in a building, an employee in a dairy, a laborer in an orange grove, in car shops, and in an ice plant, and had been in the employ of Young Men's Christian Associations in a number of cities in the capacity of janitor or

caretaker of rooms. In the meantime he had lived in seven different states. He took an active interest in the O'Connor estate as early as January 21, 1916, when, in the Young Men's Christian Association, LaFayette, Indiana, he wrote a letter to Tarwater, saying in part:

"I received a little surprise to-day. I picked up a Nebraska State Journal in one of the rooms and glanced over it, and what do you think caught my eye? It was an item about the John O'Connor estate being turned over to the state of Nebraska. I wonder Jack if that could be the John O'Connor that we were witnesses to his will several years ago when I was in St. Joe visiting you? You remember, don't you? It was in that lawyer's office where we went for you to have a lease fixed up. Let me see, what was his name? 'Watkins'—that was it—in that big bank building; but what I was going to say, Jack, it seems to me as though there has been some will come up that has been forged. Now that will we signed Jack is somewhere in existence, or must be, and if it could be found it might be of great value to some of the heirs; but now let me see—didn't that will read, or I mean, turn everything to an only brother? Do you remember his name? It was Charlie, wasn't it? Ha! Ha! I am sure you will remember all about it, and I am pretty sure this is the O'Connor, for the one that made the will was from Hastings. I will send you the paper so you can see for yourself. Well I must close hoping that O'Connor's brother runs across that will some time.

"Good bye. Write soon.

"Stephen H. Turner."

This letter contains its own evidence of craftiness. Generalities, such as "that big bank building," self- questioning and inquiries in regard to the name of the lawyer, of the testator, and of the devisee, all disappeared when Turner testified to minute details of the building, of the lawyer's office, of the meeting, and of the execution of the will, even describing O'Connor and Watkins and the

pens used by all present, after the lapse of 10 years, though nothing of a striking nature had occurred to make deep and lasting impressions on the mind. If Turner told the truth, he obtained, within 30 minutes, from John O'Connor, an utter stranger, a knowledge of the latter's family history, which had been kept from neighbors and business associates for more than 30 years. Tarwater's story of the execution of the will is like Turner's. The similarity suggests a recent understanding, rather than an honest recollection of what occurred 10 years earlier. They testified too much for disinterested, truthful witnesses. One of the inferences from the testimony of Turner and Tarwater is that the will was sealed in an envelope and left in the hands of Watkins. On the outside of the envelope part of the indorsement already mentioned reads thus:

"In case of death send to W. H. Lanning, Hastings, Nebr."

"John O'Connor, Hastings, Nebr."

The name of John O'Connor as there written purports to be his genuine signature, but it is denounced by experts as a forgery. How could this recluse, in the ordinary course of events, without the public notoriety which he shunned, expect the news of his death at Hastings to reach Watkins at St. Joseph? If the indorsement quoted was the work of a forger who planned to have the envelope discovered and sent to Hastings, bearing its own evidence of having been unopened, the indorsement served an intelligent purpose.

If the story of the subscribing witnesses and the theory of proponents are correct, John O'Connor, in going to the lawyer's office to will his fortune to his lost brother, Charles, if found, otherwise to the heirs, got out of the elevator with his face toward the office of his brother's son, his nephew, James B. O'Connor, whose name was on the door, and to the latter this munificient benefaction remained a profound secret until the will was opened in

Hastings, while Tarwater, the friend of James B. O'Connor, the beneficiary, knew of the will and of its contents during all of the intervening time. The testimony of a former stenographer in the office of James B. O'Connor, while he was practicing law in St. Joseph, tends to prove an intimacy between him and Tarwater that neither of the two was willing to admit. Part of the testimony of the subscribing witnesses is consistent with the charge and the proof of forgery and is not above the inference of perjury. The story of John O'Connor's signature told by the experts who testified on behalf of contestants, when considered in the light of corroborating circumstances, is better evidence of the truth than the testimony of the subscribing witnesses on the controlling issue of fact.

If properly dated, a letter from James B. O'Connor to Mrs. Watkins, who testified that Witten found the will, shows conclusively that the writer of the letter knew the contents of the will before it was opened. This letter is distinctly dated November 4, 1917, fifteen days before the county judge opened the sealed envelope containing the will. When confronted with this letter, the author of it testified that the date was an error and should have been November 24, 1917, five days after the opening of the will. Notwithstanding earnest efforts of the writer of the letter to utter the will alleged to have been forged, the proof of forgery, the grave import of the circumstances tending to connect him with it, and the contradiction of his oral correction by the letter itself over his own signature, he made no attempt to show how the mistake occurred, who made it, or to verify the exact date by memoranda or by records of his correspondence. The letter itself, however, shows that it was corrected both with a typewriter and with a pen, indicating great care in preparing it and a reexamination of it before it was mailed. The letter itself contains a proper inquiry about evidence, if the will is genuine, but shows that there was in the mind of the author of

the letter a suspicion that his motives might be questioned, a suspicion more likely to arise from a knowledge of evil than from a consciousness of virtue. While Mrs. Watkins said she did not receive the letter until after the will had been opened, she was unable to give the date of its receipt by her or to produce the postmark, and may have been mistaken as to the fact. Under the circumstances the letter itself seems to be the better evidence of its date, and it shows that James B. O'Connor, though claiming to be an heir unknown to testator, knew the contents of the will before it had been opened.

The stenographer employed by Watkins in his law office, having served in that capacity continuously for three years up to the time of his death, testified from memory, from recent examinations of some of her work while in his office, and of documents in evidence, and from knowledge of customs, of typewriter, of office stationery, and other supplies, in substance, as follows: Except for a week's vacation in July, she had not been absent from her duties. She did not have a weekly half-holiday, but remained in the office until about 5:30 Saturday afternoons. She had not been absent on account of sickness. While temporarily away from the office her employer generally waited for her services upon her return. She did not know of any work having been done in his office by another stenographer. She had written a few wills for him, but had never heard of the one in question until recently, and had no knowledge or recollection of John O'Connor or of Tarwater or of Turner having been in the office. The will had not been written on the office typewriter, the only one there during her term of service, and the paper, cover and envelope were in size, kind and quality unlike any stationery kept or used by her employer or observed by her in his office. Typewriting showing her work and the paper used in the office were identified or described, disclosing

differences. It was not the custom of Watkins to append an acknowledgment to a will or to require a typewritten indorsement on the outside of the envelope inclosing it. Separate sheets of his legal documents, however, were fastened together at the top with small metallic staples clamped with an appliance adapted to the purpose, and these were exactly like the ones used on the will. Within two months after the death of Watkins his office was occupied by James B. O'Connor. A stenographer who had performed services for him said she knew his signature and that the patronymic part of the signature of John O'Connor on the will looked like the handwriting of James B. O'Connor. A stenographer who was familar with the signature of Watkins, having seen him write it a great many times, expressed the opinion that the one on the will was not his. This testimony throughout bears the stamp of truth.

A banker with whom John O'Connor had transacted business for 25 years and also a neighbor who had known John O'Connor for a third of a century testified to conversations with him in regard to the making of his will. These conversations all occurred within a year and a half of the death of John O'Connor, and what he said, according to these witnesses, indicates that he had not then made his will. This neighbor testified that Judge Tibbets of Hastings had been mentioned by John O'Connor as the attorney selected by him to draw the will.

One witness produced what he verified as a correct, original book entry showing that Saturday, October 3, 1908, a week earlier than the date of the will, he had completed the erection of a windmill on a farm owned by John O'Connor, and a tenant testified that he paid to John O'Connor, in the latter's room in Hastings, rental for pasture, Saturday afternoon, October 10, 1908, the date of the will, fixing the time by incident as the Saturday following the completion of the windmill, a subject of

conversation between them. If this is the truth, John O'Connor was not in St. Joseph the day the will purports to have been executed.

The expert testimony and the circumstances in which the truth on the sole issue of fact is found confirm the charge of forgery and condemn the will as spurious.

The evidence as a whole shows that the will is a forgery, that the judgment of the county court denying the probate is free from error, and that the judgment of the district court sustaining the will is clearly wrong.

Reversed and judgment of county court affirmed.

JUDGMENT ACCORDINGLY.

MORRISSEY, C. J., dissents.

ALDRICH, J., not sitting.

M. A. GEDNEY COMPANY ET AL., APPELLANTS, V. CHARLES W. SANFORD ET AL., APPLLEES.

FILED SEPTEMBER 27, 1920. No. 20974.

Corporations: SUIT BY CREDITORS. Creditors of an insolvent corporation cannot maintain an action against a part of the stockholders for the payment of corporate debts until it is shown that the stockholders who are not made parties defendant and who are not served with process are nonresidents of the state or for other good and sufficient reason cannot be reached by the process of the court.

APPEAL from the district court for Lancaster county: LEONARD A. FLANSBURG, JUDGE. *Affirmed.*

Fawcett, Mockett & Walford and *Burkett, Wilson, Brown & Wilson,* for appellants.

John J. Ledwith, T. S. Allen, Anderson & Baylor and *Reese & Stout, contra.*

DEAN, J.

The M. A. Gedney Company is a Minnesota corporation; the Bank of Dixon county is a Nebraska corporation located at Ponca. The Gedney company and the bank joined as plaintiffs in a suit against Charles W. Sanford and 15 other defendants, alleging that the Hargreaves Mercantile Company was organized as a Nebraska corporation, and that defendants were holders and owners of certain specified shares of stock therein; that in April, 1915, being insolvent and indebted to many persons, it assigned its assets, for distribution among its creditors, to the First Trust Company of Lincoln. The Gedney company sought to recover from defendants $319.98 and the bank sought to recover $1,707.58. Ralph P. Wilson intervened, as assignee for collection of the accounts of a number of creditors, seeking to recover a sum aggregating $3,730.59 on his cross-petition. Six additional creditors intervened and filed a joint answer and cross-petition seeking to recover an aggregate sum approximating $1,500. Plaintiffs and all intervening cross-petitioners seek substantially the same relief, and will, for brevity and convenience, be hereinafter referred to as plaintiffs. They allege in substance that "the assets of the said company have been exhausted and there is a large amount of indebtness still owing to the creditors," and that when it ceased doing business in April, 1915, it was then and long prior thereto had been insolvent. They allege they are entitled to an accounting. When the taking of testimony was concluded the court dismissed the suit at plaintiffs' costs, and they appealed.

Plaintiffs allege generally that "the defendants herein named were all the stockholders in the said Hargreaves Mercantile Company, owning stock therein; * * * that a part of the defendants herein and who are stockholders as above set forth, are nonresidents of the state of Nebraska and service upon a part of the said defend-

ants and stockholders cannot be obtained in the state of Nebraska, and that a part of the said defendants and stockholders * * * are insolvent and collection cannot be made from them by process of law, and that each of the defendants is liable for a part of the liability owed by the said Hargreaves Mercantile Company, the same to be in proportion to the amount his stock bears to that of the solvent stockholders * * * upon whom service may be had, and that the only way that the amount of the liability of each may be determined is by having an accounting in a court of equity."

All answering defendants plead the same defense. To the petition and cross-petitions they interpose a general denial, and specifically deny the existence of the alleged indebtedness.

With the exception of the sheriff's return, "not found in my county," there is no allegation in the petition nor in the cross-petitions, nor is there any proof to show that four or five of the defendants, or some of them, who were named in the petition as stockholders, but were not served with summons, namely, Gladys Hargreaves Southwick, J. B. Waldo, Alex Berger, R. L. Hargreaves, George E. Haskell, and Grace B. Hargreaves, were not residents of Nebraska. It also appears from the stock books that A. E. Hargreaves, A. H. Drain, Frainor Rowan, and J. C. Ridnour, or some of them, were owners of a number of shares of stock when the indebtedness herein was incurred, but none of these men were made defendants. It does not appear what disposition, if any, was made of this stock, but it does appear that none of it came into the hands of the defendants or was owned by them.

With respect to the defendants who were not served with process, as shown by the sheriff's return, it seems to us that it was incumbent on plaintiffs to show that they were not residents of Nebraska, and that they were therefore not within the jurisdiction of the court. That

the court had jurisdiction of defendants residing in the state plainly appears. It follows that the burden was on plaintiffs to show that the defendant stockholders who were not served with summons were nonresidents, if such was a fact. It was not sufficient to show merely they were not found in the county where the suit was pending. Inability to reach them with the process of the court must be shown. With respect to some of the persons who were named as defendants and some others who were shown to be stockholders, but were not named as defendants, it does not clearly appear that they, or in any event some of them, were nonresidents of Nebraska, nor does it appear that such persons, or some of them, did not have property in Nebraska that was subject to levy and sale under execution. *Emanuel v. Barnard,* 71 Neb. 756.

The decisive question in the case before us is not new. The authorities clearly tend to show that the creditors of an insolvent corporation cannot maintain an action against a part of the stockholders for the payment of corporate debts until it is shown that the stockholders who are not made parties defendant and who are not served with process are nonresidents of the state or for other good and sufficient reason cannot be reached by the process of the court.

In *Adler v. Milwaukee Patent Brick Mfg. Co.,* 13 Wis. 63, it is said: "In such actions, unless it be impossible or impracticable, all the stockholders must be made parties. * * * For it would be manifestly wrong and unjust to allow the creditors to select one or more of the stockholders and compel them to submit to burdens from which the other shareholders, though equally bound, are exonerated. Hence the shareholding defendants have the right, unless some good reason for the omission be shown, to insist on all other shareholders being parties also."

In *Dunston v. Hoptonic Co.,* 83 Mich. 372, with respect to the rule in question it is said: "Any other rule would

permit the creditors of the corporation to select one or only a few of the stockholders within the jurisdiction, and compel payment by them of all the debts of the corporation, at least up to the unpaid balance of their subscription, and such subscribing stockholders, in order to compel the others to contribute, would be remitted again to the courts, thus leading to a multiplicity of suits." On this point Thompson (Liability of Stockholders, sec. 353) says: "Moreover, the bill must be filed against all the shareholders, unless some valid excuse is shown for not bringing them in. This must necessarily be so; otherwise, the main object of asserting the jurisdiction of equity, the equalizing of the burden of the shareholders and the preventing of the multiplicity of suits, would be defeated."

It plainly appears that some stockholders have not been made parties defendant and some who were named as defendants were not served with process. Sufficient reason is not shown why they were omitted. Other questions are presented in the respective briefs that in view of our decision we do not find it necessary to discuss.

The judgment is AFFIRMED.

ALDRICH and FLANSBURG, JJ., not sitting.

LUTHER L. LARSON, APPELLEE, V. FRED H. SWINGLEY, SPECIAL ADMINISTRATOR, DEFENDANT: DELIA ANDERZHON ET AL., APPELLANTS.

FILED SEPTEMBER 27, 1920. No. 20981.

Witnesses: PRIVILEGED COMMUNICATIONS. Under section 7894, Rev. St. 1913, a person is not incompetent to testify in respect of independent acts performed by him, for or in behalf of a person since deceased, when it appears that he had no conversation with the person since deceased with respect to such acts, and in which the deceased did not participate.

Larson v. Swingley.

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

Carl E. Herring and *W. K. Hodgkin,* for appellants.

J. A. Donohoe, contra.

DEAN, J.

Carl L. Larson died intestate January 3, 1917, leaving four children surviving him, namely, Luther L. Larson, Martin T. Larson, and two married daughters, namely, Delia Anderzhon and Lydia Chambers. The four children were his sole heirs. Luther L. Larson appears here as plaintiff, alleging that he was in partnership with his father for about eight years, and that the partnership owed him $3,116.21 when his father died. Delia, Lydia and Martin appear as defendants, and deny that there was a partnership or that the estate is at all indebted to plaintiff. The court found that there was a partnership, and that $2,372.30 was due plaintiff "from the assets of the copartnership;" that the fund was ample to discharge the debt, and decreed that plaintiff recover $2,372.30 from the estate. All defendants appealed.

From a transcript of the county court proceedings in the Carl Larson estate it appears that Luther L. Larson, plaintiff herein, was appointed administrator, and that subsequently, and while the probate proceedings were pending, Fred H. Swingley was appointed "special administrator" pursuant to the prayer of a joint petition filed in that court by Mrs. Anderzhon, Mrs. Chambers and Luther L. Larson. The petition states generally that Luther L. Larson is administrator of the estate and that Luther and "Carl L. Larson were copartners engaged in the business of farming and stock raising in Holt county, and that * * * it is to the best interest of the said estate and to all parties interested therein that a full, complete and final accounting and settlement be made of the affairs of said copartnership;" that

the petitioners "are the heirs at law, except one, of the said Carl L. Larson, deceased; * * * that it is necessary that a special administrator be appointed for the purpose of making said final accounting and settlement of said copartnership affairs," etc. The petition concludes with a prayer that Fred H. Swingley be appointed such special administrator, and was signed: "Delia Anderzhon, Lydia Chambers, petitioners, by W. K. Hodgkin, their attorney. Luther L. Larson, petitioner, by J. A. Donohoe, his attorney."

Mr. Hodgkin, counsel for Mrs. Anderzhon and Mrs. Chambers, called by plaintiff, testified in substance that he was present at a meeting at which there were present his clients, the special administrator, Luther L. Larson, and Mr. Donohoe, his counsel. With respect to that meeting Mr. Hodgkin testified: "Q. Now, as a preliminary, or as a foundation for that accounting, did you make any agreement in behalf of your clients? * * * A. Yes; I think there was some understanding in regard to certain matters. Q. Did you make an agreement with reference to the matter of the kind of copartnership that had existed between Luther and his father? A. No; I don't think so. Q. What did you say or admit with reference to that? * * * A. Why, I believe that you (Mr. Donohoe) made some statement yourself as to the relationship between these parties, between Luther and his father, as to the father owning the land and financing the partnership, that Luther put in his time and conducted the partnership affairs largely, and just as to all that you stated—(interrupted) Q. That they were to share equally in the profits and loss? A. I think there was some statement as to that. Q. And to that statement did you on behalf of your clients agree? * * * A. For the purpose of that hearing, yes. Q. Did you, before agreeing, consult your clients with reference to that fact? A. I did."

Several disinterested witnesses testified to statements made by Carl L. Larson that seem to establish the fact that there was a partnership relation between plaintiff

and his father. When the evidence of disinterested witnesses is considered in connection with the statements in the petition for the appointment of a special administrator and in view of the evidence generally, we conclude that the record shows a partnership.

Defendants cite section 7894, Rev. St. 1913, which provides generally: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." The partnership being shown by disinterested and competent evidence, we do not think plaintiff's testimony comes within the inhibition of section 7894. His testimony had to do solely with matters pertaining to the carrying on of the partnership business, and was not with respect to "any transaction or conversation had between the deceased person and the witness." The distinction is pointed out in *Fitch v. Martin*, 83 Neb. 124, wherein it is held generally that a person is not incompetent to testify in respect of independent acts performed by him, for or in behalf of a person since deceased, when it appears that he had no conversation with the deceased, with respect thereto, and in which the deceased did not participate. *Scott v. Micek*, 86 Neb. 421. In *Sharmer v. McIntosh*, 43 Neb. 509, it is said: "Since the amendment of 1883, section 329 of the Code (Rev. St. 1913, sec. 7894) does not render a party adversely interested to the representative of a deceased person incompetent as a witness in the action, but only renders his testimony as to transactions and conversations with the deceased incompetent."

Other alleged assignments of error are discussed, but upon examination we are unable to find that defendants have been prejudiced in the respects noted by counsel.

The judgment is

AFFIRMED.

ALDRICH, J., not sitting.

WILLIAM PHILBRICK V. STATE OF NEBRASKA.

FILED SEPTEMBER 27, 1920. No. 21330.

1. **Indictment and Information:** SUFFICIENCY. "Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute. *Cordson v. State*, 77 Neb. 416." *Goff v. State*, 89 Neb. 287.
2. **Criminal Law:** TEST OF RESPONSIBILITY. "The generally accepted test of responsibility for crime is the capacity to understand the nature of the act alleged to be criminal, and the ability to distinguish between right and wrong with respect to such act." *Schwartz v. State*, 65 Neb. 196.
3. ———: INSANITY: QUESTION FOR JURY. The defense of insanity, when interposed by the accused in a criminal action, is a question of fact for the jury.
4. ———: VERDICT: EVIDENCE. When the defendant in a criminal action pleads insanity as a defense and the jury is properly instructed on that question, the verdict will not be disturbed, unless it is clear that it is not supported by the evidence.

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

A. H. Murdock, for plaintiff in error.

Clarence A. Davis, Attorney General, and *J. B. Barnes, contra.*

DEAN, J.

William Philbrick was convicted in Douglas county of feloniously assaulting his wife with intent to commit murder. He was sentenced to the penitentiary for an indeterminate period of not less than 2 nor more than 15 years, and has brought the case here on error for review.

The evidence tends to prove that Philbrick and his wife frequently engaged in domestic broils; that some of their trouble grew out of the care of their three children, aged

from five to nine years; that owing to a strike defendant, a boilermaker by trade, was unemployed for a month or more before his arrest, except for odd jobs, driving an ice wagon and the like; that to assist in obtaining necessaries for the family Mrs. Philbrick obtained employment as an elevator conductress in an Omaha building, and was so employed when the assault was made; that because her daily employment caused her to be absent a part of the day from her home defendant therefore insisted that the children should be placed in a créche; that she opposed this plan and favored keeping them in their own home on the ground that defendant, being practically unemployed, could assist in looking after them until the strike ended. Mrs. Philbrick testified that defendant was abusive in his language and conduct, and that her father and brothers on several occasions, recently before the assault, were obliged to interfere to protect her from physical violence at his hands; that she finally yielded and placed the children in the créche; that two days before the assault she was "chased out of the house" by defendant; that she then went to live with a relative; that the next morning, that being the day before the assault, Philbrick came to the First National Bank building where she was employed and attempted to get her to return home; that she was afraid of him and refused and so informed him; that on the following morning he again came to the building to see her; that in the afternoon about 4:30 o'clock he came again and entered the elevator and rode to the top floor; that when the passengers had all departed and they were alone in the elevator defendant made as though to give her some trifling article that he held in his hand; that when she reached out her hand to take it he suddenly and without warning drew an ice pick that was concealed about his person and stabbed her through both of her arms and in the right lung, "the full length of the ice pick," three times and in her abdomen several times;

that she then sank to the floor of the elevator, and shortly afterwards was removed to a hospital where, on account of her wounds, she was detained "from Tuesday until Saturday;" that thereafter she was at her room for a week and was in bed several days. A physician who attended Mrs. Philbrick immediately after the assault testified that "she was suffering from some punctured wounds of the body. * * * She had some in the arm, some in the abdomen, some on the chest." On the cross-examination of Mrs. Philbrick it developed that the trouble between them became such that, a few weeks before defendant's arrest, she caused to be prepared and was about to file a petition for a divorce.

Defendant argues that "the information does not state a crime against the defendant," and that the court therefore erred in overruling his objection to the introduction of any evidence; that the court erred in admitting evidence tending to prove that "defendant was in possession of an ice pick at the time the assault was committed."

Section 8589, Rev. St. 1913, provides: "Whoever assaults another with intent to commit a murder, rape or robbery upon the person so assaulted, shall be imprisoned in the penitentiary not more than fifteen nor less than two years." The charging part of the information recites that, on or about June 24, 1919, William A. Philbrick, in Douglas county, Nebraska, "then and there being, then and there in and upon one Mary A. Philbrick, * * * unlawfully, maliciously and feloniously did make an assault, with the intent of him, the said William A. Philbrick, then and there and thereby her, the said Mary A. Philbrick, then and there to kill and murder;" contrary to the form, etc. Abel V. Shotwell, County Attorney.

"No indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings be stayed, arrested or in any manner affected: First. By the ommission of the words 'with force and arms,' or any word of simi-

lar import; * * * nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Rev. St. 1913, sec. 9050.

The court did not err in its ruling. The modern tendency is to disregard technical objections that do not tend to prejudice the substantial rights of the accused. When the intent is charged and the information is in the language of the statute, the means by which the offense is committed are matters of evidence for submission to the jury. In all criminal prosecutions the accused must be apprised of the nature and cause of accusation preferred against him, that he may prepare his defense and plead the judgment as a bar to future jeopardy for the same offense. The information before us plainly charges a felonious assault in the language of the statute, and this has been held sufficient by this and other courts. *Goff v. State,* 89 Neb. 287.

Rice v. People, 15 Mich. 1, involves the same question in part. The prosecution in that case was brought under 2 Comp. Laws Mich. sec. 5724, which reads: "If any person shall assault another with intent to commit the crime of murder, every such offender shall be punished by imprisonment in the state prison for life, or any number of years." The charging part of the information in the *Rice* case avers that the defendant, "with force and arms in and upon one Charles Parsons, then and there being, did make an assault, and him, the said Charles Parsons, then and there did beat, wound and bruise, with intent, him, the said Charles Parsons, then and there, to kill and murder, and other injuries to him, the said Charles Parsons, then and there did, contrary to the statute," etc. Judge Cooley wrote the opinion of the court and among other things said: "The information charges the defendant with an assault with intent to murder. * * * No further words are necessary to inform the accused of the nature of the charge

against him; and if more are essential for any purpose, it can only be for technical reasons. * * * The offense as described in the statute is, an assault 'with intent to commit the crime of murder;' and this is the offense as set out in the information."

The rule was announced in *United States v. Herbert,* 26 Fed. Cas. 284: "In an indictment under the statute for assault and battery with intent to kill, it is not necessary to state the manner and extent of the assault and battery, nor the particular weapon used. It is only necessary to describe the assault and battery as at common law, with the addition of the words charging the intent to kill in the terms required by the statute. It is not necessary to charge the assault to be felonious nor malicious, nor to be with malice prepense, nor to state any other circumstance to show that, if death had ensued, it would have been murder." In *State v. Jackson,* 37 La. 467, the court said: "In an indictment for an assault with intent to murder, it is not necessary to set forth the mode of assault, or the means or weapon with which the assault was made." To the same effect is *State v. Gainus,* 86 N. Car. 632: "In an indictment for an assault with intent to murder, it is not necessary to state the instrument used by the assailant." In the long ago a jurist with foresight observed: "More offenders escape by the over easy ear given to exceptions in indictments than by their own innocence, and many times gross murders, burglaries, robberies, and other heinous and crying offenses, escape by these unseemly niceties to the reproach of the law, to the shame of the government, and to the encourgement of villany, and to the dishonor of God." 2 Hale's Pleas of The Crown (Eng.) 193.

Not only is there a strong tendency in the courts to relax the requirement of extreme technical accuracies that do not go to the merits, as pointed out in *Blazka v. State, ante,* p. 13, but distinguished statesmen as well

have given to this subject earnest attention. As bearing on this question President Taft said in his message to congress in December, 1910: "The necessity for the reform exists both in United States courts and in all state courts. * * * The simplicity and expedition of procedure in the English courts today make a model for the reform of other systems. * * * I cannot conceive any higher duty that the supreme court could perform than in leading the way to a simplification of procedure." 6 Am. Bar. Ass'n Jour. 519 (July, 1920). Woodrow Wilson when governor, in an address before the Kentucky Bar Association in 1911, among other things said: "America lags far behind other countries in the essential matter of putting the whole emphasis in our courts upon the substance of right and justice. * * * The actual miscarriages of justice, because of nothing more than a mere slip in a phrase or a mere error in an immaterial form, are nothing less than shocking. Their number is incalculable, but much more incalculable than their number is the damage they do to the reputation of the profession and to the majesty and integrity of the law." 6 Am. Bar Ass'n Jour. 520.

The defense of insanity was interposed, and counsel argues that the court erred in its instructions on that question. We do not think so. The court in brief informed the jury "that the beneficence of the law will not permit the punishment of one who is not responsible for his acts by reason of mental disease," because a person so afflicted "is not capable of forming an intent" to commit crime, and hence is not subject to punishment. And that: "In order to hold the defendant criminally responsible" for the offense with which he is charged, "it is only necessary that the jury be satisfied from all the evidence, beyond a reasonable doubt, that he had sufficient mental capacity to distinguish between right and wrong as to the particular act with which he so stands charged." In *Schwartz v. State,* 65

Neb. 196, we said: "The generally accepted test of responsibility for crime is the capacity to understand the nature of the act alleged to be criminal, and the ability to distinguish between right and wrong with respect to such act." The question of defendant's sanity, like other questions of fact, comes within the province of the jury, and, having been determined by that body, under instructions that correctly state the law, we will not substitute our judgment for that of the jury, unless from the evidence it appears to be clearly wrong.

Defendant argues: "The party assaulted did not die; hence the blows were not sufficient to produce death so that the court could not properly charge as it did in this fourth paragraph (of instruction No. 6) that the jury must find, if the ice pick was used at all, it was used with an intent to murder." On the question of intent the court charged the jury: "If you find from the evidence beyond a reasonable doubt that the defendant, while sane, intentionally assaulted his wife with a deadly weapon, in such manner and at such places upon her body as would have a natural and probable tendency to cause her death, then the presumption would be that defendant intended the natural and probable consequences of his acts." We approve the instruction as used. In a criminal case intent is a question of fact for the jury to be determined from all the evidence and the circumstances of the case. In *Jerome v. State,* 61 Neb. 459, we said: "On the trial of a criminal case every hypothesis that implies the defendant's guilt is pertinent, and any evidence fairly tending to sustain such hypothesis is relevant to the issue."

Dr. Young is county physician and official examiner for the board of insanity. In respect of defendant's mental condition he testified, *inter alia,* on the part of defendant: "Taking into consideration all the data you have given me in the hypothetical question and the fact that the man apparently recovered his full senses three

or four days afterwards, on just this data alone, I don't think I would be able to give you a definite opinion as to whether he was sane or insane; I could only say that there is a strong possibility of his being insane. * * * As to the man's insanity or sanity, I would not be able to give a definite answer." In view of the foregoing testimony and in the present state of the record and of the law applicable thereto, error cannot be predicated on the rejection of defendant's offer of proof, namely: "This defendant now offers to prove by the witness on the stand that taking into consideration the hypothetical question heretofore given to the witness, the defendant was in such a frame of mind on the evening of June 24, 1919, while he was in the elevator, that he was unable to know or distinguish the difference between right and wrong."

Other alleged assignments of error are pointed out which, upon examination, we do not find it necessary to discuss. We conclude that the evidence supports the verdict upon every contested question of fact. The case was fairly submitted, and we do not find reversible error.

The judgment is

AFFIRMED.

ALDRICH and FLANSBURG, JJ., not sitting.

JAMES A. SNOKE, APPELLANT, V. ELLSWORTH J. BEACH, APPELLEE.

FILED SEPTEMBER 27, 1920. No. 20622.

1. **Mortgages:** DEED AS MORTGAGE: INTENT. "Whether a deed absolute on its face is a sale or a mortgage depends upon the intention of the parties, and such intention is to be gathered from their declarations and conduct, as well as from the papers which they subscribed." *Sanders v. Ayres*, 63 Neb. 271.

2. ———: PAROL EVIDENCE. "Where it is sought to vary the effect of a deed of conveyance by parol testimony so as to declare it to

be a mortgage, the evidence must be clear, convincing, and satisfactory in its nature in order to warrant a court to grant the relief prayed." *O'Hanlon v. Barry*, 87 Neb. 522.

3. ———: POSSESSION: RENTS. When it is established that a deed was in fact given as security only, the grantor therein stands in the relationship to the premises as mortgagor, and is entitled to redeem. In such case the mortgagor is entitled to the possession of the premises and to receive the rents and profits therefrom.

4. ———: EVIDENCE. Evidence examined, and transaction *held* to be one of security, and not an absolute sale.

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

Boyd & Metz, and *E. L. Meyer*, for appellant.

Mitchell & Gantz, contra.

DAY, J.

James A. Snoke brought this suit in equity against Ellsworth J. Beach to have a certain deed from the former to the latter declared to be a mortgage; that an accounting be taken of the rents and profits of the land; that he be let in to redeem; and that the defendant be required to reconvey the premises to the plaintiff. The trial court denied the plaintiff the relief prayed, and he has appealed.

The pleadings, as well as the evidence, present a clear-cut question as to whether the transaction is to be regarded as an absolute sale, with an option back to the grantor to repurchase the land, or a mortgage. A determination of this question involves an examination of the testimony in the light of well-settled legal principles applicable in such transactions.

The record shows that the plaintiff purchased the land in question in 1909. At that time there was a mortgage on it in favor of one Goedekin for $1,200. Later the plaintiff gave a mortgage on it to J. C. McCorkle for $1,500, and still later the plaintiff executed a third mortgage to the defendant for $600. The mortgage to McCorkle had been assigned as collateral security to the

First National Bank of Alliance, Nebraska. At the date of the transaction now in question these three mortgages were past due, and upon two of them payment was being demanded and foreclosure proceedings threatened. At this stage of the proceedings a conference was held between McCorkle, Beach and Snoke, which resulted in Snoke executing and delivering to Beach a deed absolute in form, conveying the N. E. 1/4 of section 20, township 25 north, range 47, Box Butte county, Nebraska, and receiving back from Beach the contract hereafter mentioned. The consideration named was "one dollar and other valuable consideration." The actual consideration, however, was the payment by Beach of the mortgages upon the land, and the execution of the contract. While the deed bears date of November 7, 1914, and the contract two days later, there is no doubt but that the two instruments form part of one and the same transaction. Some of the testimony tends to show the instruments were in fact executed the same day, but in our view this is immaterial so long as they constitute but one transaction.

On the date of the delivery of the deed a contract was signed by Beach and Snoke, as follows: "11-9-14. I have this day received from James A. Snoke warranty deed to the N. E. 1/4 of section 20, township 25, range 47, Box Butte county, Nebr., for which I agree to sell back to the said James A. Snoke within one year from this date for $2,719.40 and 9 per cent. interest on this amount from this date, except I reserve the right to make private sale of this land within the year at the stipulated price of $22.50 per acre, and agree to pay James A. Snoke, in case I make such sale, all over and above the sum of $2,719.40 and interest and any and all expense I may have during this time, including any taxes I may pay. E. J. Beach. J. A. Snoke."

Pursuant to the arrangement, Beach paid off the Goedekin and McCorkle mortgages and canceled his own, and later filed of record releases for the three mortgages.

There is a sharp and irreconcilable conflict in the testimony of the two principals to the transaction. Snoke's testimony is to the effect that the transaction was one of security, and that he was to pay back to Beach $2,719.40 with interest at 9 per cent. in a year. In his testimony he says: "I gave him the deed with a contract that I was to have the privilege of redeeming the land." He told Hampton, who drew the contract, that "I gave him the deed for security," and in response to the question, "And you didn't tell Hampton that Beach had bought the land?" he answered, "No, sir; the land wasn't sold at all." McCorkle, who was present, corroborates Snoke. In his testimony, he says: "My understanding was that this was an extension of time given with the idea, that if I or Mr. Kibble or Mr. Snoke could sell the land so as to redeem it he would do it. * * * It was put up as security in the form of a deed; that was my understanding of it." The testimony of Beach corroborates his theory that the transaction was an out and out sale, that he did not want the land, but in order to protect himself and save costs he bought the land outright and gave Snoke the option to repurchase on the conditions named in the contract. The testimony of Hampton, the president of the First National Bank which held the McCorkle mortgage, tends strongly to sustain Beach's theory. He says, in substance, that Snoke was anxious to get a little money out of the land, and Mr. Beach didn't want to put that much money into it, so they entered into agreement, "which I tried to put in words, exactly as they stated it to me." He was then asked, "Now was there anything said about this deed being a mortgage?" to which he answered, "No, sir. * * * My understanding was that it was an absolute sale." The testimony shows that the amount of $2,719.40 mentioned in the contract was arrived at by computing the amount due upon the three mortgages, principal and interest, and deducting from that sum $120 which was paid by Snoke by an assignment to Beach of the rent for the year 1914. Upon this phase of the case Beach's testimony is to the

effect that the $120 was paid to him for an option on the land. The effect of his testimony, however, on this point is very much weakened by cross-examination, which in the end rather tended to support the other witnesses as to the method of arriving at the figures $2,719.40.

There can be no doubt that the holder of a mortgage debt has the legal right, with the consent of the mortgagor, to accept an absolute deed to the mortgaged premises in full satisfaction and discharge of the debt, where such transaction is freely and voluntarily made, and is free from the vice of fraud or coercion. It is the policy of the law to encourage rather than to discourage the settlement of controversies by the parties out of court. It is also within the right of the parties to enter into a contemporaneous contract whereby the grantee in such deed agrees to resell the premises to the grantor upon the payment of a stipulated price and within a given time, and no legal impediment arises even though the amount named in the contract to reconvey is the same amount as the debt for which the deed was given in payment. Where, however, a dispute arises as to whether the deed and the contract speak the real transaction, and proof is offered tending to show that the deed was intended to be a mortgage, the fact that there was an antecedent debt existing and that the repurchase price named in the contract is the same amount as the mortgage debt with interest will be regarded as strong circumstances tending to show the transaction to be a mortgage. It is well settled that a deed and contract to resell, however positive and clear the terms may be, are subject to parol explanation, and that a court of equity in its effort to find the truth will look behind the form of the language used to determine the real transaction. Whether a deed absolute on its face is a sale or a mortgage depends upon the intention of the parties, and such intention is to be gathered from the declarations and conduct of the parties, as well as from the papers which they subscribe. *Sanders v. Ayres,* 63 Neb. 271; *Kemp v. Small,* 32 Neb. 318. The rule is also established in this state that, where it is sought to vary the effect of a deed

absolute on its face by parol testimony so as to declare it to be a mortgage, the evidence must be clear, convincing, and satisfactory before a court is warranted in adjudging it to be a mortgage. *O'Hanlon v. Barry*, 87 Neb. 522.

The value of the land as compared with the consideration paid for it is also an important factor to be considered in determining the true nature of the transaction. This of course is based upon the well-recognized trait of mankind to secure as nearly as possible a fair value for his property. While there is a sharp dispute upon the question of value, the weight of the defendant's testimony fixing it at $3,600 and that of the plaintiff from $4,000 to $4,500, we are inclined to the view that the value of the land as shown by the testimony was $4,000. The possession of the premises is also an important factor to be considered. In that respect the testimony shows that the possession of the premises was to be in Snoke, and in fact it is shown that an agent for Snoke rented the premises on a crop rent basis for the year 1915, taking the lease in Snoke's name. Later, however, in Snoke's absence, the landlord's share of the crop was delivered to Beach and appropriated by him. The agent of Snoke who had made the lease testified with respect to the 1915 crop as follows: "Before they got ready to thresh Mr. Beach came and asked me what I was going to do with the grain, and I told him Mr. Snoke wasn't here at the time, he was over in Colorado, and he wrote me to look after it; there was no granary to put it in, and Mr. Beach said, 'I will do this with you, I will take the grain from the machine, and if Mr. Snoke redeems the land I will owe him for the grain, and if he don't redeem the land the grain belongs to me.' I said, 'That is satisfactory to me,' and so Mr. Beach took the grain."

We cannot in the space proper to be given to an opinion quote from the testimony further, and must in the end give our conclusion as to what the testimony shows.

From a careful examination of the testimony and the circumstances surrounding the transaction, we have be-

come satisfied that the deed was given as security for a debt. What the parties attempted to do was to draft a contract in such form that, in the event Snoke failed to pay the amount with interest, the deed would stand as an absolute conveyance without the necessity of a foreclosure proceeding. Such an agreement, however thoroughly understood between the parties, does not change the legal aspect of the transaction. If in fact the deed was given as security, it became *ipso facto* in legal effect a mortgage, and the equitable right of redemption which attaches to a mortgage cannot be cut off by contract or understanding of the parties at the time the contract is made. "Once a mortgage, always a mortgage," has become one of the axioms of the law. Having determined the transaction to be in fact a mortgage, it follows that the plaintiff was entitled to the possession of the premises and to receive the rents and profits therefrom. The rents and profits for the entire period having been appropriated by the defendant, he should in an accounting be charged with the fair and reasonable cash rental value of the land. It appears, however, that for the year 1915 the plaintiff rented the land on crop rent basis, the proceeds of which, amounting to $85, was appropriated by the defendant. For the years 1916 and 1917 we find the reasonable cash rental value of the land to be $125 per annum. In the accounting the plaintiff should pay the sum of $2,719.40 with 9 per cent. interest from November 9, 1914, together with any taxes paid by the defendant, with interest at 7 per cent. from the date of the several payments, and the reasonable value of any improvements which the defendant may have placed on the premises since the trial. As against this, there should be credited $85, with interest from January 1, 1916; $125, with interest from January 1, 1917, and $125, with interest from January 1, 1918. The court is directed to take further testimony as to the cash rental value of the land for the crop years of 1918, 1919, and 1920, and from the several amounts strike a balance of the amount due from the plaintiff, and enter a decree finding the deed to be a mortgage, and provide that within

20 days from the entry of the decree the plaintiff shall pay the amount so found due into court for the defendant, and that, on so doing, the title to the land shall stand quieted in the plaintiff; the costs of the proceedings to be taxed to the defendant.

REVERSED, WITH DIRECTIONS.

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

DANIEL FITZPATRICK, APPELLEE, V. WALKER D. HINES, APPELLANT.

FILED SEPTEMBER 27, 1920. No. 21077.

1. **Master and Servant:** INJURY TO LOCOMOTIVE ENGINEER: NEGLIGENCE. It is negligence as a matter of law for the employees of a railroad company in charge of a work train, under orders to have the train in the clear on a side-track at a designated time and place where a regular, scheduled passenger train was due to pass without stopping, to fail to observe such orders; and where through such negligence an engineer on the passenger train is injured the company is liable.

2. ———: ———: ———. It is also negligence *per se* for a work train to remain standing on the main-line track at a time and place a regular, scheduled passenger train is due to pass without stopping, without a flagman or other warning being given to the approaching train, as required by the rules of the company; and where through such negligence an engineer on the approaching train is injured the company is liable.

3. ———: ASSUMPTION OF RISKS. An employee, by entering and continuing in the employment of a master without complaint, assumes the ordinary risks and dangers incident to the employment, and the extraordinary risks and dangers which he knows or which by the exercise of ordinary care he would have known; but he does not assume the extraordinary risks caused by direct acts of negligence of his employer.

4. ———: CONTRIBUTORY NEGLIGENCE: FEDERAL ACT. Under the federal employers' liability act of April 22, 1908, 35 U. S. St. at Large. ch. 149, sec. 3, p. 65, providing that contributory negligence shall not bar a recovery, but shall be considered in abatement of recovery in accordance with the degree thereof, no degree of con-

tributory negligence, however great, will bar a recovery of any damages. It is only when the plaintiff's act is the sole cause—where the defendant's act is no part of the causation—that defendant is free from liability under the act.

5. ———: ASSUMPTION OF RISKS. A locomotive engineer upon a passenger train, although warned by a "permissive card" to "proceed expecting to find a train in the block," does not assume the risk of the negligence of the forward train, in failing to have the train in the clear on the siding, as required by the rules of the company, at a time and place where the passenger train was due to pass without stopping. Neither does he assume the risk of the negligence of the employees of the forward train in permitting their train to be standing on the main-line track at a time and place where the passenger train was due, without flagging or other warnings, as required by the rules of the company.

6. ———: ———: WITHDRAWAL FROM JURY. Under the evidence, the court properly withdrew the defense of assumption of risk from the jury.

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

8. Damages. A verdict for $28,800 for personal injuries sustained by a locomotive engineer 49 years of age, under the facts, *held* excessive, and a remittitur of $6,800 ordered.

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

Byron Clark, Jesse L. Root, R. T. York, F. A. Wright and *J. W. Weingarten,* for appellant.

M. F. Harrington and *Gerald F. Harrington, contra.*

DAY, J.

Daniel Fitzpatrick brought this action in the district court for Sheridan county against the Chicago, Burlington & Quincy Railroad Company, under the provisions of the federal employers' liability act of April 22, 1908, to recover damages for personal injuries claimed to have been sustained by him on account of the negligence of the defendant. Later Walker D. Hines, director general of railroads under United States railroad administration, was substituted as party defendant. The trial resulted in

a verdict and judgment in favor of the plaintiff for $28,800, to review which the defendant has appealed.

The defenses interposed were assumption of risk and contributory negligence.

A brief statement of the facts will serve to make clear the application of the defenses urged. On September 10, 1918, the date of the accident, and for some years prior thereto, the plaintiff was in the employ of the defendant company in the capacity of a locomotive engineer, and on the day in question was operating the locomotive on train No. 43, a west-bound interstate passenger train. The plaintiff's run was between the division points of Seneca and Alliance in Nebraska, a distance of 108 miles. Alliance is a division station on the Burlington where the time is changed. Trains running east of Alliance are operated under central time, while those running west of Alliance are governed by mountain time, which is one hour slower than central time. Birdsell is a nonagency station about six miles east of Alliance, where passing and storage tracks are maintained. Still further east, approximately six miles, is the town of Hoffland, where a telegraph station is maintained. Passenger train No. 43 was a regularly scheduled train of the first class, having superior rights over trains of a lower class, and was due to pass Birdsell without stopping at 2:50 p. m., central time, and on the day and place of the accident was six to eight minutes late. An extra work train had been sent out from Alliance, and had taken a position on the main track about 1,000 feet east of the east switch at Birdsell, and was engaged in spotting cars to be loaded with gravel, and was so working at the time of the collision. The locomotive on the work train was on the east end of the string of cars with its nose fronting to the west, and was stationed just outside of a sharp curve in the main track still further to the east. This curve was in a side-hill cut, about 700 feet long, and for trains going westward was a left-hand curve. It was so sharp that, from the proper position of the engineer upon the right-hand side of the

locomotive going westward, the line of vision along the track was about 125 feet. From the fireman's side of the cab the line of vision was considerably further, so far in fact that a train standing on the track could have been seen for such a distance ahead that the train could have been stopped and the disaster averted. At the time of the accident, and immediately prior thereto, the fireman was engaged in shoveling down coal preparatory to firing the engine. The fireman was under the orders of the engineer and he could have directed him to have kept a lookout in going around this particular curve. On the day of the accident the plaintiff left Seneca with train No. 43 forty minutes late for his run to Alliance. At Hoffland the plaintiff was given a "permissive card" by the agent in charge of the station, which read as follows: "Block Station, Hoffland, 4:30 p. m. 9/10, 1918. Conductor and Engineman, train No. 43 on main track: Proceed, expecting to find a train in the block between this station and Alliance. Vining, Signalman." At the same time he was given a clearance card, addressed also to the conductor and engineman on No. 43, which read, "I have no—orders for your train. You have received no orders No. —. Stop signal is displayed for following trains. Block not clear. Vining, Operator." The last block for train No. 43 in its run to Alliance was the 12 miles between Hoffland and Alliance. As plaintiff's train came around the curve, before mentioned, and while running at 35 to 40 miles an hour, and at a point in the curve where his vision ahead was limited to 125 feet, he came suddenly upon the work train standing in the position before described. In that situation a collision was inevitable. Plaintiff reversed his engine, called to his fireman to jump, and threw himself backwards out of the cab window, receiving the injuries for which damages are claimed. Under the rules of the company, it was the duty of the crew operating the work train to have their train on the side track and in the clear at Birdsell at the schedule time of No. 43 leaving Hoffland, and also in case of standing on the main track that a flag-

man be sent out to warn approaching trains. This they omitted to do. This neglect was due to a misreading of the time. The engineer in charge of the work train was provided with a watch equipped with two hour hands, one gold one which marked central time, and one black which indicated mountain time. In taking note of the time he misread the hour. At the time he looked at his watch he sensed that he still had 40 minutes to get his train off the main track and in the clear at Birdsell siding, when in fact, concealed from view by the curve and cut, No. 43 was bearing down upon him. Under the rules of the company each of the men in charge of the work train had a duty to perform in the protection of the work train, which, if observed, would have avoided the accident. Singularly at this critical moment each of the crew failed in duty, resulting in this tragic disaster in which 11 persons were killed and 27 injured.

Under this state of facts the trial court took the position that a case of negligence on the part of the defendant had been made; that the facts did not present a question of assumption of risk, and submitted to the jury only the question of damages and contributory negligence.

That it was negligence on the part of the employees in charge of the work train to fail to have their train on the siding at Birdsell at the time No. 43 was due to pass that station without stopping, in violation of the operating rules, seems too clear for argument. That it was also negligence to permit the work train to be at rest upon the main track, at a time and place when No. 43 was due to pass, without a flagging or other warning being given as required by the rules, is equally true; especially so at a point in the road where the view was obscured by the curve and cut. The mistake of the crew of the work train to observe the duty imposed upon them by the rules is but another illustration of the fallibility of human agency. The engineer of the work train, in testifying as to how the accident occurred, said, "It was a slop over on my part, on the time, and we should have headed in at Bird-

sell;" and, again, "I became confused on the time, I was working on mountain time." The conductor and one of the brakemen were attempting to fix some telephone connections, assuming no doubt that the engineer would look after the siding of the train at the proper time. Upon this question of negligence it does not seem that reasonable minds could differ, and under such circumstances it was within the clear province of the court to withdraw that issue from the jury.

It is strongly urged that the doctrine of assumption of risk under the facts shown preclude the plaintiff's right of recovery, and that the trial court should have so instructed the jury. The rule is now well settled, not only in this state, but elsewhere, that the employee assumes the usual and ordinary risks incident to the employment in which he is engaged, and which are known to him, or which by the exercise of reasonable care he would have known. The doctrine, however, does not go to the extent that the employee assumes the risk of the negligent performance of duty imposed upon the master or his agents. Cases supporting this doctrine can readily be found. A few are noted: *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, which case was subsequently affirmed in *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470; *Chicago, B. & Q. R. Co. v. Shalstrom*, 195 Fed. 725, and cases cited, and note in 45 L. R. A. n. s. 387; *Chicago, R. I. & P. R. Co. v. Ward*, 252 U. S. 18; *Chesapeake & O. R. Co. v. DeAtley*, 241 U. S. 310.

In the discharge of his employment, so far as the doctrine of assumption of risk applies to the situation, the plaintiff had the right to assume that the other employees of the master would perform their full duty and comply with the rules promulgated for the operation of trains, and in a manner free from negligence. The "permissive card" which he received was a warning that he might proceed expecting to find a train in the block, but even this was not sufficient to warn him that the crew ahead might be negligent in their method of handling their train. The

plaintiff had a right to assume that, if for any reason the train ahead should be standing, the usual and customary warnings of torpedoes and flagging would be given. The plaintiff did not know that there was an unprotected work train standing on the main track in violation of the company's rules, or that the crew of the work train had failed in their duty to have their train on the siding at Birdsell. The notice he received was not such that by the exercise of reasonable care he would have known this situation. The testimony shows that passenger trains were operated under the "permissive-card" system, such as was given in this case, and that it frequently occurred that a train would be sent out while there was another train in the block. On this very trip another "permissive card" had been issued to the plaintiff for another block. From a careful consideration of all the facts we are of the view that the doctrine of assumption of risk does not apply in this case, and that the court was right in so ruling.

But, it is urged vigorously that the plaintiff's conduct in driving his locomotive around the curve at such a rate of speed that it was impossible for him to stop within the range of his vision ahead, and in failing to step over to the fireman's side of the cab where he could have seen the work train or to have directed his fireman to keep a lookout at that particular point, under the circumstances, was such gross negligence that he ought not to be permitted to recover. This argument is based upon the doctrine of assumption of risk, as well as upon contributory negligence. We have sufficiently observed that the facts do not bring the case within the rule of assumption of risk, for the reason that the cause of the accident was the negligence of the master's servants, and negligence of the master is not ordinarily one of the risks assumed. The distinction between assumed risk and contributory negligence is sometimes difficult to draw, but it is a distinction which must be borne in mind. Assumption of risk bars a recovery, while contributory negligence under the federal employers' liability act merely diminishes the amount of recovery.

Upon the question of contributory negligence the court, properly we think, instructed the jury that contributory negligence was not a complete defense, but should be considered in abatement of the damages in proportion to the amount of the plaintiff's negligence which contributed to the injury as compared with the negligence of the defendant. Cases involving this question have frequently been before the federal courts. In *Pennsylvania Co. v. Cole,* 214 Fed. 948, it is said: "But it is strongly pressed upon us that plaintiff's negligence in going to sleep in the caboose while on duty, and thus in failing to flag the following train, was negligence so gross and so proximate in its effect as to preclude all right of recovery. The danger to the interests of the traveling public from failure to enforce such rule is strongly urged. There can be no doubt, at the common law, such would have been the effect of plaintiff's alleged negligence; but the employers' liability act expressly abrogates the common-law rule under which action was barred by the negligence of the plaintiff proximately contributing to the accident, and substitutes therefor the rule of comparative negligence. Under this act, no degree of negligence on the part of the plaintiff, however gross or proximate, can, as matter of law, bar recovery; for, as said in *Norfolk & W. R. Co. v. Earnest,* 229 U. S. 114, 122, * * * the direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means that: 'Where the casual negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both.' "

In *Grand Trunk W. Co. v. Lindsay,* 201 Fed. 836, 844, it is said: "If, under the employers' liability act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the stat-

ute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act." Bearing on the general question, see *Louisville & N. R. Co. v. Wene,* 202 Fed. 887; *Hadley v. Union P. R. Co.,* 99 Neb. 349.

It is urged that the court erred in permitting to be offered in evidence Exhibit D, which was a circular order issued under date of November 5, 1918, and after the accident. This circular order recited that "Trains operating under permissive card, form C, will run expecting to be flagged, and at a reduced speed around curves and other points where the view is obscured, so that they can be prepared to stop within a reasonable distance." In making this offer, plaintiff's counsel stated that it was not offered in support of the issue of negligence on the part of the defendant, but for the purpose of meeting the charge of contributory negligence on the part of plaintiff.

It has frequently been announced that the subsequent conduct of a defendant in repairing a defect which was the alleged cause of the accident could not be shown as being in the nature of an admission of the negligence charged. *Pribbeno v. Chicago, B. & Q. R. Co.,* 81 Neb. 657; *Tankersley v. Lincoln Traction Co.,* 101 Neb. 578. We fail to see any distinction in principle whether the proffered testimony be offered for the purpose of showing negligence of the defendant or contributory negligence of the plaintiff. In both instances such testimony is inadmissible, and in the instant case the testimony should have been excluded. But, in view of the fact that the testimony offered related to a question upon which the testimony was well-nigh overwhelming in favor of the plaintiff, we think it falls within the rule of error without prejudice. The plaintiff testified, and was corroborated by other engineers on the road, that when the "permissive cards" first came out the instructions were that "we should slow up around curves;"

that as a result the trains were late, and that the schedule could not be maintained; that later they were told to go ahead and make the speed; that the "permissive card" was intended as an extra precaution to look out for flagmen.

Under the provisions of section 7713, Rev. St. 1913: "An error which does not affect the substantial rights of a party will not justify a reversal of a judgment." *Huxoll v. Union P. R. Co.*, 99 Neb. 170.

A number of other questions are discussed, based upon the 23 propositions presented in defendant's brief, but the principal questions, as we view it, are the ones we have considered. The remaining assignments have been considered, but do not, in our opinion, present such a situation as calls for a reversal of the case.

Lastly, it is urged that the damages assessed are excessive, and that for that reason the judgment ought not to be permitted to stand. At the time of the accident the plaintiff was 49 years of age, and was earning $247 a month, under a recent advance in wages. The year prior he was earning $217 a month. His injuries, according to the testimony of his physicians, are permanent, resulting in what is usually termed "leakage of the heart," and in addition he suffered injuries to the nerves along the spine, which affected to a more or less degree the motor nerves. At the time of the trial, some six months after the accident, he was able to walk with the aid of a cane. All of the expert witnesses agree that the condition of the heart is incurable. The question as to whether the plaintiff's condition was due to the injuries received in the accident was a question for the jury.

We are of the opinion that the damages, in view of all of the circumstances proved, are excessive, and should be reduced $6,800. If plaintiff within 20 days files a remittitur of $6,800, leaving the judgment $22,000, the judgment will be affirmed; otherwise, it is reversed and remanded.

AFFIRMED ON CONDITION.

ALDRICH, J., not sitting.

ARLOWE D. SUTTER V. STATE OF NEBRASKA.

FILED SEPTEMBER 27, 1920. No. 21313.

1. **Criminal Law:** JEOPARDY. Under section 9126, Rev. St. 1913, a jury charged with the trial of a criminal case, after deliberating for so long a time "that there is no probability of agreeing," may be discharged by the court, and the accused held to a further trial, without any infringement of the constitutional provision that a person shall not "be twice put in jeopardy for the same offense." Const., art. I, sec. 12.
2. ———: JURY: DISCHARGE. When a jury in a capital case have been deliberating for 36 hours, excluding necessary time for sleep, meals, and exercise, and report to the court that there is no probability of an agreement on a verdict, it is the proper exercise of the power of the court to discharge them and remand the prisoner for further trial.
3. ———: ———: ———: JOURNAL ENTRY. Section 9126, Rev. St. 1913, requiring that when a jury are discharged "the reasons for such discharge shall be entered upon the journal," is met by the entry: "And the said jury in open court report to the court that they are unable to agree upon a verdict herein, and, the court being satisfied that this is true, it is by the court ordered that the said jury be, and they hereby are, excused from further consideration of this case"—supplemented by a further order during the term: "Upon discharging the jury the court was convinced that there was no possibility of their agreement, and that it would be useless to hold them longer on the case, and discharged them for that reason, and the court then so stated, and this entry is made now for then."
4. **Evidence** upon the November, 1918, trial examined, and *held* sufficient to submit the issue of guilt to the jury.
5. **Homicide:** SUFFICIENCY OF EVIDENCE. Evidence upon the present trial examined, and *held* sufficient to support the verdict.

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

R. J. Greene, for plaintiff in error.

Clarence A. Davis, Attorney General, and *C. L. Dort, contra.*

DAY, J.

Arlowe D. Sutter was convicted in the district court for Lancaster county of murder in the second degree, and, following a recommendation of clemency by the jury, was sentenced to a term of ten years in the penitentiary. He brings the case here for review.

This case was before this court upon a former occasion wherein the judgment of conviction was reversed and the case remanded for further proceedings. *Sutter v. State,* 102 Neb. 321. Following the remanding of the case the defendant was placed on trial in November, 1918, and the jury, being unable to agree upon a verdict, was discharged by the court. To this action of the court the defendant duly excepted. Proceeding upon the theory that the discharge of the jury under the circumstances was in legal effect an acquittal, and that he could not again be placed upon trial for the same offense, the defendant filed a motion that he be discharged, which was overruled. Thereupon he obtained leave to withdraw his plea of not guilty, and filed a plea of *autrefois acquit,* based upon the theory that the discharge of the jury without his consent was in legal effect an acquittal. The issue raised by this plea was submitted to a jury in April, 1919, and a verdict returned adversely to the defendant's contention. Later, defendant was again placed on trial, resulting in his conviction, as stated in the outset of this opinion. By proper procedure and timely objections the defendant has preserved the question of his former jeopardy arising out of the proceedings in the November, 1918, trial, and this is the principal point discussed in the brief, as well as upon the oral argument. The record shows that at the November, 1918, trial, the case was submitted to the jury at 4:45 p. m. on November 25, and the jury were discharged on November 27, at about 4:45 p. m. It also appears that by consent of the parties the jury were permitted to discontinue their deliberations from 9:30 p. m. November 25 to 9:30 a. m. November 26; the reason for this interruption not being shown. The rest of the time, save the unavoidable inter-

ruption of sleep and meals, was occupied by the jury in their consultation. It will thus be seen that, barring the unavoidable interruptions, the jury had the case under consideration approximately 36 hours. At the expiration of this period the jury reported to the court their inability to arrive at a verdict and were discharged by the court. We do not understand the argument of defendant's counsel to go so far that there may not arise circumstances which would warrant the court in discharging the jury without arriving at a verdict, and that such a discharge would form no basis for a claim of former jeopardy. The argument is rather to the point that the circumstances of the present case did not warrant such action. The prevailing rule upon this subject is to the general effect that there must be some manifest necessity for the discharge of the jury, and to leave the courts to determine in their discretion whether under all of the circumstances of each case such necessity exists, and when such necessity exists a plea of former jeopardy will not prevail on a subsequent trial. 16 C. J. 250, sec. 394, and cases cited. In *Thompson v. United States,* 155 U. S. 271, the rule is stated as follows: "Courts of justice are invested with authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury; and a defendant is not thereby twice put in jeopardy, within the meaning of the Fifth amendment to the Constitution of the United States." *United States v. Perez,* 9 Wheat. (U. S.) 579; *Simmons v. United States,* 142 U. S. 148; *Logan v. United States,* 144 U. S. 263. In many of the states, our own included, the power to discharge the jury is specifically conferred by statute. Section 9126, Rev. St. 1913, provides:

"In case a jury shall be discharged on account of sickness of a juror, or other accident or calamity requiring their discharge, or after they have been kept so long together that there is no probability of agreeing, the court

shall, upon directing the discharge, order that the reasons for such discharge shall be entered upon the journal; and such discharge shall be without prejudice to the prosecution."

It will be noted that the court is authorized to discharge the jury "after they have been kept so long together that there is no probability of agreeing." The trial court is primarily entrusted with the duty of determining whether there is a probability of the jury reaching a verdict. This question cannot be determined arbitrarily or capriciously, but must be in the exercise of a sound judicial discretion. In *State v. Shuchardt*, 18 Neb. 454, the court had under consideration the same question now before us, and it was held:

"The authority of a judge of the district court in the trial of a criminal case to discharge the jury in the event of disagreement, without the consent of the prisoner, can only be exercised after the jury have been in consultation for so long a time that there is no reasonable probability that they will agree."

In that case the jury had been in consultation 11 hours, and it was held that the discharge of the jury under the circumstances was unwarranted, and that the prisoner was entitled to be released. In commenting on this phase of the case, it was said: "It never was intended to permit a court arbitrarily to discharge a jury for disagreement until a sufficient time had elapsed to preclude all reasonable expectation that they will ever agree. The county should not be subjected to the expenses incident to a second trial where there is a reasonable probability that a verdict may be reached on the first, while the accused is entitled as a matter of right to a verdict in his favor, if after a full and careful consideration of all the testimony, and on comparison of views, the jury should find that the charge was not established by the proof."

No hard and fast rule can be laid down as to the length of time a jury in a criminal case should be kept in consultation before they are discharged for inability to agree. Much

must be left to the circumstances of each particular case, and to the sound discretion of the trial court. The jury should be kept in consultation as long as it seems reasonably probable that they might by a full and careful consideration of the testimony and an exchange of views reach a verdict, but not so long that the verdict may be said to be the result of coercion or fatigue. The law contemplates that the verdict should be the voluntary judgment of all the jurors based upon the evidence and the instructions of the court, and unfettered by anything in the nature of coercion. *Jahnke v. State,* 68 Neb. 154. In *Russell v. State,* 66 Neb. 497, the jury were kept in consultation 89 hours, and the complaint of the accused was that the verdict was a coerced one. It was held that the length of time the jury should be kept together was largely within the discretionary power of the court.

The record shows that the court called the jury in and interrogated them as to the probability of their agreeing on a verdict; that the foreman, the usual spokesman of the panel, in the presence of the jurors stated that there was no probability of their arriving at a verdict. None of the other jurors expressed a contrary view, and it will be presumed that he expressed their conclusions, as well as his own views. This is the usual practice followed by the trial courts in the state, and is the proper procedure in an endeavor to ascertain whether anything is to be gained by keeping the jury longer in deliberation. At the time of their discharge the jury had been deliberating, including the time of necessary interruptions, as before observed, approximately 36 hours, exclusive of the 12 hours they were excused by mutual consent of the parties. They had reported to the court their inability to agree, and that there was no probability of reaching an agreement by longer consultation. Under all of the circumstances we are convinced that the action of the court in discharging the jury was the proper action to take.

But it is urged that the reasons for the discharge of the jury were not spread upon the journal as required by the

provisions of the statute above quoted; and, there being no legal justification of record for the discharge, it must therefore be an unauthorized act. The journal entry in this behalf, under date of November 27, 1918, recites, omitting the formal parts: "And the said jury in open court report to the court that they are unable to agree upon a verdict herein, and, the court being satisfied that this is true, it is by the court ordered that the said jury be and they hereby are excused from further consideration of this case. Defendant excepts." While this journal entry is not as formal and complete as is usual in this class of cases, we do not regard it necessary to pass upon the sufficiency of the entry as above outlined, for it appears that on December 20, 1918, and at the same term of court, a supplemental journal entry was entered, as follows: "On this day the defendant herein being in court with his attorney, the court states that it will make the following entry and the same is according to the facts, to-wit: Upon discharging the jury the court was convinced that there was no possibility of their agreement, and that it would be useless to hold them longer on the case, and discharged them for that reason, and the court then so stated, and this entry is made now for then. Defendant excepts and excepts to this entry."

The journal entries above quoted sufficiently state the reasons for the discharge of the jury to satisfy the requirements of the statute. As to the right of the court to amplify its journals so as to speak that which was actually done, there can be no question. While it is true the judge's notes or minutes made upon his calendar are silent as to the reasons for the discharge of the jury, it must be borne in mind that such notes or minutes are not strictly speaking parts of the record of the court. They are rather memoranda for the use of the judge and clerk in making up the record. The record when made up speaks for the court, and is the legal and authentic evidence of the proceedings of the court, and cannot in any appellate proceeding be contradicted or impeached by the entries in the trial

docket. *Morrill v. McNeill,* 1 Neb. (Unof.) 651; *Gage v. Bloomington Town Co.,* 37 Neb. 699; *Barker v. State,* 54 Neb. 53.

Defendant also complains that he has been deprived of a right to have a review of the November, 1918, trial, and that the evidence upon that trial was such that the court should have directed a verdict in his favor.

Leave was granted by this court to the defendant to file the bill of exceptions in the November, 1918, trial, and we have taken great pains to read the entire record. The evidence upon that occasion, as well as upon the last trial, is circumstantial, and is of such a character that it was clearly a proper case for the jury to pass upon. We cannot prolong this opinion by attempting a review of the testimony upon the November, 1918, trial, or upon the last trial. Suffice it to say, that after a careful examination of the records in both of the trials we are convinced that the evidence and the proper inferences therefrom presented a case for the determination of the jury.

The evidence was circumstantial. No one was present in the house at the time of the shooting except the defendant and his wife. A brother of the defendant, who was present shortly before the tragedy, testified that the defendant had the gun in his hand, and that the defendant had inquired about a "picture of a woman," and that the wife had stated that she had burned it. Certain letters indicated that the defendant had become interested in the "other woman," to the extent of some neglect, at least, of his wife. The brother left the house, and on his return, an hour later, found the dead body of the wife on the floor, the gun lying a short distance from the body. The defendant was in bed, apparently asleep, and claimed to know nothing of the shooting until awakened and told by his brother of his wife's death. It was the defendant's theory that it was a case of suicide, and some of the circumstances lend color to this theory. But, taking all of the circumstances connected with the case, we conclude that the evi-

dence upon the November, 1918, trial was sufficient to justify the court in submiting it to the jury.

We find no error which would warrant us in disturbing the judgment of the lower court.

AFFIRMED.

ALDRICH and FLANSBURG, J. J., not sitting.

NYE-SCHNEIDER-FOWLER COMPANY, APPELLEE, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED SEPTEMBER 27, 1920. No. 21056.

1. **Carriers:** TRANSPORTATION OF LIVE STOCK: LIABILITY. A railroad company is liable for damage to live stock carried by it, except for such damage as results from the act of God, the public enemy, the fault of the owner, or the natural propensities of the animals.

2. ———: INJURIES TO LIVE STOCK: PRESUMPTION. When live stock, unaccompanied by a caretaker, is received by a railroad company in good condition and is delivered later to the consignee in a damaged condition, a *prima facie* case is made against the railroad company by reason of a presumption that the damage resulted from some cause other than one which would exempt the company from liability.

3. ———: ———: ———. Such presumption is not evidence, and expires when sufficient evidence is introduced of the facts out of which the damage grew to support a finding that the damage was from a cause for which the company would not be liable.

4. **Evidence:** RECORDS: COMPETENCY. A book record, kept by the stock yards company, of dead and crippled animals received in shipment, kept in regular course of business and as a record upon which the transactions with the packing companies purchasing hogs is based, is not rendered incompetent, as not being a book of original entry, from the fact that the entries are made by a clerk from data collected by various other employees.

5. **Carriers:** LIABILITY OF INITIAL CARRIER. When a railroad company makes a contract to deliver live stock at a point beyond its own line, it becomes liable for the default of the connecting and terminal carriers under section 6058, Rev. St. 1913, and cannot, in the event of such a contract, limit its liability as a carrier to its own line.

6. **Constitutional Law**: STATUTE FIXING LIABILITY OF CARRIERS. Though such statute fixes a liability on the initial carrier for the default of another carrier, and gives no express right of reimbursement to the initial carrier, the initial carrier has the right of reimbursement from the connecting carrier under the general principle of subrogation, and the statute cannot be said, on that objection, to be unconstitutional, as depriving the initial carrier of its property without due process of law; nor is the statute unconstitutional as denying such carrier the equal protection of the law.

7. **Trial**: INSTRUCTIONS: BURDEN OF PROOF. An instruction that "the burden of proof is upon any one * * * to establish * * * such several allegations as he asserts are material to such one's success" is improper and misleading, but *held* not reversible error in this case, since other instructions definitely cover the subject.

8. ———: ———: CREDIBILITY OF WITNESSES. In passing on the credibility of witnesses, the jury are not required to lay aside their general knowledge which comes from the common experience of mankind, and an instruction to that effect is not improper.

9. **Carriers**: ATTORNEY'S FEES. Section 6063, Rev. St. 1913, making provision for attorney's fees to plaintiff's attorneys, upon claims against a railroad, *held* to allow recovery in the nature of reimbursement of costs, and not unconstitutional as providing a penalty in favor of an individual.

10. **Costs**: ATTORNEY'S FEES. An attorney's fee to be reasonable, under such a statute, should be based upon a consideration of the value of the attorney's service to his client and the amount of time and labor expended by him, but should not bear an unfair proportion to the amount of the judgment recovered.

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

Wymer Dressler and *C. H. Gorman*, for appellant.

Courtright, Sidner, Lee & Jones, contra.

FLANSBURG, J.

Plaintiff is a stock shipper, and brings this action to recover for damages to hogs during shipment to South Omaha over defendant's railroad. Various shipments of hogs are involved. The shipments occurred during a period of two years, 1916 and 1917, and the claims are represented by 71

separate causes of action. The jury returned a general verdict on all causes of action for $802.27, and defendant railroad company appeals.

Plaintiff introduced evidence to show that the hogs were delivered to defendant in good condition, and that when received by the consignee at South Omaha 59 hogs were dead and a number crippled. The shipments were made without a caretaker.

Plaintiff relies, for a *prima facie* case, upon the presumption that all damage to the hogs during shipment was caused by the negligence of the defendant railroad.

Testimony was introduced by defendant to show the damage was from disease and natural causes, for which it would not be liable, and contends that in those instances, where such testimony was introduced, the legal presumption that the defendant had been negligent and caused the damage would expire; that such presumption is not and does not take the place of evidence, and that the court should have withdrawn those items from the jury, since in those instances there was no issue of fact to be submitted.

Where it appears that live stock, unaccompanied by a caretaker, is received by a railroad company in good condition and delivered later to the consignee in a damaged condition, a *prima facie* case is made against the railroad company, and the burden is upon it to show that such damage resulted from some cause which would exempt it from liability. Information as to the cause of damage during shipment is peculiarly within the knowledge of the railroad company, and the company is therefore required, as a matter of expediency, to produce the proof of the cause of damage, and to show whether or not the cause is one for which it can or cannot be held responsible. *Church v. Chicago, B. & Q. R. Co.*, 81 Neb. 615; *Chicago, B. & Q. R. Co. v. Slattery*, 76 Neb. 721; 10 C. J. 379, sec. 581. A railroad company, under our decisions, is an insurer of live stock carried by it, except for such damage as results from the act of God, the public enemy, the fault of the owner, or the natural propensities of the animals. In the absence of any evidence, it is presumed that the damage was

not the result of any one of those causes. Such presumption, however, is not evidence, and is destroyed when actual evidence is introduced of the facts out of which the damage occurred. When evidence of such facts appears and is sufficient to sustain a finding, the presumption expires.

Doctor Everett, a veterinarian, testified, in behalf of the defendant, that he inspected the hogs at destination, and that some of the hogs had been killed by smothering, caused by their piling on one another. Other testimony was to the effect that hogs might pile on one another to keep warm in cold weather, or in an endeavor to get fresh air in hot weather, but there was also testimony showing that hogs could be made to pile by severe and unusual bumping of the cars. Other veterinarians testified that death from smothering could not be determined from casual inspection. Whether these dead hogs were smothered and, if so, the actual cause of smothering were questions, under the evidence introduced, open to reasonable dispute, and were for the jury. Doctor Everett further testified that certain of the hogs had died from cholera, but his opinion on that matter was disputed by the testimony of other veterinarians who said that cholera could not be detected by such a casual examination as Doctor Everett made. He further testified that certain of the hogs had died from congestion of the lungs, as determined from a *post mortem* examination. His testimony on that point stands alone, and, since there is evidence to show without controversy that those particular hogs died from natural causes, the claims covering them should have been withdrawn from the jury. These are items 6, 48, 58, and 95, upon which claim was made of $163.86.

Doctor Everett again testified that certain of the hogs, which seemed to be crippled, had a disease known as arthritis, and humped up and walked on their toes in a manner peculiar to that disease. There is some dispute in the testimony as to whether arthritis is a rheumatic or tubercular disease, but Doctor Everett's testimony that

the crippling of the hogs was due to this disease is not controverted. The presumption, then, that the hogs were crippled as a result of some act of the defendant would no longer obtain, and the claims upon those hogs should also have been withdrawn. They were items 16, 20, 29, 39, 47, 49, 51, 79, and 85, upon which a total claim of $41.40 was made. It also appears that one hog, claimed to be crippled (item 19), was suffering from a disease and partial paralysis, brought on by such disease. The amount of claim on this item was $3.75. Before the judgment in this case can be allowed to stand, a remittitur should be filed covering the amounts of these claims which should have been withdrawn.

The defendant contends that plaintiff's proof is based upon incompetent evidence. The Union Stock Yards Company, into whose yards the hogs were delivered, keeps a record of the number and condition of the hogs when taken from the cars. This book record was introduced in evidence by the plaintiff, over defendant's objection, to show that the hogs in question were received, some dead and some crippled. The plaintiff's case must stand or fall upon the competency of this proof.

A number of employees of the stock yards company get data for this record. One employee is known as a "car checker." He is supplied with what is called a "chute book." He enters in this book the number of the car opposite each chute, and then turns the book over to the yard-master, who goes into the chute and counts the animals unloaded from the car, and enters the result of his count in this book. He also enters the name of the shipper and consignee and point of origin of shipment, which information he hears read by another from the waybills of the railroad company.

Another employee, known as the "cripple checker," carries a book called the "cripple record," and counts and enters in this book the number of crippled animals in each car.

Another employee, known as the "dead hog checker," keeps what is called a "dead stock record." He goes into

each car and counts and enters in this book the number of dead animals found and records the number of the car. The "stock yards record book" is the book which was introduced in evidence, and it contains a complete record of each individual shipment received. It contains the name of the railroad, number of car, name of shipper and consignee, number of animals, and number of "cripples and deads." The information as to the number of animals in each car and the number of "cripples and deads" is taken by the office clerk from the so-called "chute book," "cripple record," and "dead stock record," just described. It is a complete compilation made up immediately from the data contained in these memoranda books, with other data, and is the first complete and permanent record of the shipment, based upon the data so collected. The preliminary books mentioned seem to be in the nature of memoranda, gathered for the purpose of making the stock yards record book. These memoranda books are very numerous, since the stock yards company receives several hundred cars of live stock each day. There are a number of sets of employees who keep the memoranda, and the books are not identified by the party making them otherwise than by handwriting. Although these books are kept by the company, it is an enormous task to go through the various books to find the record of each individual car in question, and then to learn from the handwriting what employee made the record. As the superintendent of the stock yards testified, it would have been necessary in this case to have examined an express wagon load or two of these memoranda books in order to sort out the items here involved. This "stock yards record book" is kept in the regular course of business, and is the record upon which the transactions with the packing companies purchasing hogs are based. A number of employees, who made the original memoranda books and turned them in to be copied into the "stock yards record book," testified as to the manner of getting the data, identified a number of these books and testified to their correctness. The clerk testified that the stock yards record was made by him, and that the entries were true and correct

entries of the information furnished him in the manner we have just described. Since this is a first complete record made directly from the data so collected and is kept in the regular course of business, it may be considered a book of original entry. It cannot be said to be incompetent, nor to be hearsay evidence, from the fact that it is made directly from other memoranda, even though that memoranda may have been collected by other employees. *Missouri Electric Light & Power Co. v. Carmody,* 72 Mo. App. 534; *Louisville & N. R. Co. v. Daniel,* 122 Ky. 256; *Mercantile Trust Co. v. Doe,* 26 Cal. App. 246; *Cudahy Packing Co. v. Chicago & N. W. R. Co.,* 201 S. W. (Mo. App.) 596; *Union Pacific Lodge v. Bankers Surety Co.,* 79 Neb. 801; 22 C. J. p. 874, sec. 1055, p. 887, sec. 1077.

The defendant further contends that the record of cripples, as contained in this book, is not evidence of actual crippling, since, so far as the record is concerned, every hog which does not walk with the herd, is marked a cripple, whether a cripple or whether too slow or too fat to go with the rest. Just what the term "cripple" means on the record is, however, put in controversy by the testimony of a stock yards employee, who says that it is his duty and the duty of other employees to gather all hogs which are in good condition, and too slow and too fat to walk, and to haul them by wagon and deliver them with the herd, and that only actual cripples are left in the pens, and therefore recorded in the book. There was, then, an issue of fact upon that question.

It is admitted by the pleadings that plaintiff's shipments were all made to the Standard Live Stock Commission Company at South Omaha. It appears from the evidence that the defendant, upon reaching South Omaha, turns its cars over to the Union Stock Yards Company, which handles the cars, pulls them into its unloading stations, and there itself conducts the unloading and delivery of the animals. The stock yards company acts as terminal carrier for these shipments so long as its duties as a carrier continue. The damage to hogs, complained of, is shown to have existed immediately after unloading and before there

was delivery or opportunity to deliver to the consignee, and there is therefore no proof that the obligation of the stock yards company as a carrier had at that time terminated, and that its obligation as a bailee, for which the initial carrier could not be held liable, had commenced. See note, L. R. A. 1918B, 631 (*Adams Seed Co. v. Chicago, G. W. R. Co.*, 181 Ia. 1052).

In this connection, the court based certain instructions upon that portion of section 6058, Rev. St. 1913, which reads as follows: "Whenever two or more railroads are connected together, the company owning either of such roads receiving freight to be transported to any place on the line of either of the roads so connected shall be liable as common carriers for the delivery of such freight, to the consignee of the freight, in the same order in which such freight was shipped"—and the jury were told that, though the damage to the hogs might have been sustained during the time that the stock yards company handled them, still the defendant could be held liable for that damage as initial carrier.

The defendant contends that the statute is not operative in this case, since the bill of lading covering the shipments, in every instance, contained a provision that the "responsibility of this railway company shall cease upon delivery of said property to its connecting line," and that, by virtue of this limitation, the defendant railroad could not be held liable for the default of the stock yards company.

Defendant relies upon the holding in *Fremont, E. & M. V. R. Co. v. Waters*, 50 Neb. 592; *Fremont, E. & M. V. R. Co. v. New York, C. & St. L. R. Co.*, 66 Neb. 159; and *Whitnack v. Chicago, B. & Q. R. Co.*, 82 Neb. 464. Those cases are distinguishable from this, for in each of those cases the contract *of carriage* was over the line of the initial carrier only, and was a contract only to deliver to the connecting carrier. It may be further noted that the portion of the statute in question here was in none of those cases invoked or referred to.

In the case at bar the contract of carriage was to the Standard Live Stock Commission Company at South

Omaha, necessitating the employment of the Union Stock Yards terminal facilities to make delivery at the point of destination, designated in the contract of transportation. It is unnecessary to enter upon the question of whether or not a carrier can, in the face of this statute, limit its contract of carriage to its own line, when the completed transportation contemplated necessitates the employment of a connecting carrier, for that is not the contract in this case. It seems clear to us, however, that, where the railroad company does make a contract for through transportation, as was done here, it cannot, at the same time, limit its liability to loss or damage occurring on its own line, and relieve itself from the default of its connecting carrier, the obligation for whose default is expressly imposed by the statute. *Miller Grain & Elevator Co. v. Union P. R. Co.*, 138 Mo. 658; *Burtis v. Buffalo & S. L. R. Co.*, 24 N. Y. 269; *Chicago, R. I. & P. R. Co. v. Western Hay & Grain Co.*, 2 Neb. (Unof.) 784; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463; see note, 31 L. R. A. n. s. 52 and 53; *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U. S. 186.

Defendant raises the question that this statute is unconstitutional, for the reason that it fixes a liability upon an initial carrier for the default of a connecting carrier, does not furnish to the initial carrier any express right of procuring reimbursement when the loss occurs on the line of the connecting carrier, and hence deprives the initial carrier of its property without due process of law, and denies to it the equal protection of the law, in violation of the Fourteenth amendment to the Constitution of the United States. For such loss, due to the fault of the connecting carrier, the initial carrier, it seems clear, would have the right of reimbursement under the general doctrine of subrogation, though the statute does not expressly so provide. *Texas & P. R. Co. v. Eastin & Knox*, 100 Tex. 556; 37 Cyc. 394.

The defendant complains of the court's instruction: "The burden of proof is upon any one in litigation to establish by a preponderance of the evidence, in maintaining his cause of action or defense, such several allegations as he

asserts are material to such one's success in the action, unless such allegations are admitted by the opposing side." Such an instruction is no aid to a jury, and, in fact, if standing alone and uninterpreted, might be positively misleading. In this case the court proceeded to give other instructions definitely placing the burden of proof, and we do not see that prejudice resulted from the giving of the instruction complained of, nor that in this case it constitutes reversible error.

It is further urged that the court erred in instructing the jury upon the credibility of witnesses by adding a statement that the jury should "consider all the facts shown to exist that will aid you in properly weighing the testimony of each witness. And, in this manner, appealing *to your own experience and knowledge of men and of the affairs of mankind,* and in your own best judgment, examine, measure and weigh the evidence of each witness, and then give to it such effect as you think it fairly and justly entitled to." The defendant contends that the court thus gave the jury to believe that they might take into consideration their own peculiar experience or observation regarding either the particular witness or the matters testified about, in addition to or irrespective of the evidence, and thus arrive at a verdict. A fair interpretation of the instruction, however, it seems to us, does no more than advise the jury that they are to consider the witnesses in the light of that knowledge which comes from the common experience of mankind, and not their personal knowledge of the character of any of the witnesses, nor of the matters upon which the witness is called to testify. Such general knowledge on the part of the jury and their own observations and experience they are not required to lay aside, when it comes to a matter of determining the credibility of the witnesses who appear before them. 38 Cyc. 1761.

The trial court allowed an attorney's fee of $600 to plaintiff's attorneys under section 6953, Rev. St. 1913. Defendant contends that this statute is unconstitutional, since it imposes a penalty upon the railroad in favor of an individual. This question is foreclosed by the holdings in

Smith v. Chicago, St. P., M. & O. R. Co., 99 Neb. 719, and *Marsh & Marsh v. Chicago & N. W. R. Co.*, 103 Neb. 654. It is there decided that an allowance of attorney's fees is in the nature of a provision for costs, and does not amount to a penalty. A provision for costs is intended to furnish reasonable reimbursement to the litigant who is compelled to bring suit and incur expense, caused by the wrong of the losing party. The amount of these fees is left to the discretion of the court, the limitation of the statute being that the amount must be reasonable. So long as the fees are reasonable in amount and not exorbitant, the statute does not operate as a penalty, since it provides only reimbursement of necessary expenses. It was not intended by this statute that the railroad company should pay double damages. An attorney's fee to be reasonable must, under such a statute, not only be based upon a consideration of the value of the attorney's service to the plaintiff, and the amount of time and labor expended by him, but must bear some fair proportion to the amount of the judgment recovered. In this case plaintiff sued for some $3,000. A judgment for $802.27 was obtained, and, in order that the judgment may be allowed to stand, it is necessary that it be cut down by way of remittitur in the amount of $209.01. Though the plaintiff's attorneys have done a considerable amount of work in preparation for the trial of this case, still, under the circumstances disclosed by the record, we must hold that a $600 attorney's fee is more than can reasonably be allowed, and it is ordered that the attorney's fee for plaintiff's attorneys in the trial court be fixed at $200. An attorney's fee of $100 is allowed plaintiff's attorneys for services in this court.

It is further ordered that, should the plaintiff file a remittitur in the amount of $209.01, within 20 days from the entry hereof, the judgment of the trial court be affirmed; on the other hand, should such remittitur not be filed, that the case be reversed and remanded for further proceedings in accordance with this opinion.

AFFIRMED ON CONDITION.

ALDRICH, J., not sitting.

ANNA DRAKE ET AL., APPELLEES, V. JOHN A. FRAZER, APPELLANT.

FILED SEPTEMBER 27, 1920. No. 21347.

1. **Constitutional Law:** "TORRENS ACT:" CONSTRUCTIVE SERVICE. Proceedings under the Torrens act (Laws 1915, ch. 225) are *quasi in rem*, and the constructive notice provided is binding upon nonresidents and upon unknown persons and persons whose residence is unknown and cannot, with due diligence, be learned, and such service constitutes due process of law, as that term is used in the federal and state Constitutions.

2. **Records:** REGISTRATION OF TITLE: UNBORN REMAINDERMEN. Where by the provisions of a will contingent remainders are created, and a proceeding is brought, under the Torrens law, to adjudicate the question of the rights of the contingent remaindermen, some of whom are living and some of whom may yet be born; *held* that, where the living persons are made parties to the suit and are brought in by notice provided by the statute, and where the protection of their interests depends upon the identical questions as the interests of the unborn remaindermen, so that they have the same incentive to defend as the unborn remaindermen would have had if in being, the representation of the living parties is a virtual representation of the interests of those yet unborn, and the court has jurisdiction to determine the interests of all contingent remaindermen.

3. **Constitutional Law:** "TORRENS ACT." Provisions of the statute imposing duties upon the registrar, under the Torrens law, *held* not to bestow upon him judicial powers, in violation of the Constitution.

4. ———: ———: AFFIRMATIVE RELIEF. Defendants, in a registration proceeding under this law, are not denied the right to affirmative relief, and, were such right denied, the act of the legislature would not be rendered unconstitutional on that ground, as the state may control the manner in which remedies shall be allowed in its courts.

5. ———: ———: REGISTER OF DEEDS. The act is not unconstitutional by reason of conferring additional duties upon the register of deeds.

Drake v. Frazer.

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

McKillip & Barth, for appellant.

Thomas, Vail & Stoner, contra.

FLANSBURG, J.

Action for specific performance of a contract for the sale of land by the plaintiff to the defendant. Defendant refused to perform, alleging insufficiency of plaintiff's title. Decree for the plaintiff and defendant appeals.

The title in this case depends upon a registration under the Torrens Land act (Laws 1915, ch. 225). The certificate of registration was issued in May, 1917, more than two years prior to the commencement of this action.

Plaintiff is the daughter of John A. Boon, who died in 1899, seised of the land in controversy, and leaving a last will and testament which was duly probated. By this will he first devised to his widow, Hannah Boon, a life estate; then a life estate to the plaintiff, his daughter; and at plaintiff's death the property to descend to such of plaintiff's children as might then be living, and, if no children then living, the rents from the property to be divided among the survivors of the testator's children and the heirs of any of such children then deceased, in equal shares.

The heirs at law, including the plaintiff, conveyed all their right, title and interest in this property to Hannah Boon, the widow, and it is the contention of the plaintiff that, by such conveyance, the estate of the reversioners and the estate of the life tenants, all being parties to the deed, became merged, and that thereafter the contingent remainders to the children of the plaintiff and the further contingent remainders for the benefit of the surviving children and heirs of the deceased children of the testator were left without a particular estate to support them, and, therefore, lapsed and were cut off.

After these conveyances, Hannah Boon, the widow, conveyed the fee title to the plaintiff, reserving to herself a life estate. With the title to the land in this situation,

plaintiff applied to the district court to register the fee simple title in herself, subject to the life estate of Hannah Boon and free of the claims of all contingent remaindermen.

In this proceeding all of testator's children and all the living children of the testator's children, including living children of plaintiff, were made parties defendant, as was also Hannah Boon, testator's widow and the tenant on the land. All parties "whom it may concern" were also designated as defendants. Service was had, as provided by the statute, upon all defendants named in the application and notice was published as provided by law. The court ordered a registration of the title in the plaintiff, subject only to the life estate of Hannah Boon.

Subsequently, Hannah Boon conveyed her interest to the plaintiff and the certificate of registration was extended to show that plaintiff had a full fee simple title. This was the condition of the title when plaintiff tendered performance.

Whether or not the trial court, in the registration proceeding, rightfully held that the contingent remainders were destroyed by a failure of the particular estate to support them (see note, Ann. Cas. 1917A 902), it is unnecessary to determine, for this is not an appeal from but a collateral attack upon that judgment. The essential question here is whether or not the decree in the registration proceeding, rendered against remaindermen before they came into being, is conclusive upon them, so as to bar them from at any time asserting their claims in future litigation.

The defendant contends that the contingent remainders were not destroyed by a merger of the reversion and life estates, and that the registration proceeding is insufficient to bar the claims of the contingent remaindermen who were at that time unborn; that the rights of these remaindermen could not be foreclosed in an action where they were neither parties nor where they had no opportunity to assert their rights, and that the decree of the court, in

pursuance of the power, given by the statute, deprives them of their interest in the property without due process of law.

The statute requires the issuance and service of summons upon all known defendants, residents of the state, whose names and addresses can, with care and diligence, be ascertained, as is required in civil cases generally. It further provides for publication of notice addressed to all known defendants by name and "to all whom it may concern," thus providing, so far as can be done with reasonable certainty, constructive notice to all persons in interest whose names or addresses cannot be ascertained, or who may be nonresidents. It is also further provided that a copy of this published notice shall be mailed to each defendant, whose name and address is known, and who is not served with process.

These provisions for notice are as full and broad as the legislature could reasonably be expected to devise as to all living persons and all unknown claimants, and, upon settled authority, constitute, as to all such persons, due process of law, as that term is used both in the state and federal constitutions.

The state has full control over the subject and manner of establishing title to real property within its boundaries, and the Torrens law provides a special proceeding in that regard, based upon well-recognized principles. The proceeding is substantially *in rem* to fix the status of the land, to declare the nature of the titles and interests therein, and to determine to what persons such titles and interests belong. The power of the state is not limited to the settlement of actual present controversies over title, but it may look to the future, and, in a present proceeding, determine anticipated controversies, and thus forestall and prevent future litigation and make titles marketable for present generations.

Proceedings involving this principle are not new, for decrees probating wills and quieting titles to real estate against unknown heirs and unknown parties have been repeatedly held to be conclusive for all time and against all persons.

Statutes, involving the Torrens system of the land title registration, have been sustained, where like objections were raised as to the sufficiency of the notice and conclusiveness of the decree, by courts, in carefully considered opinions, in Illinois, from which state our statute was virtually taken, and in other states. *People v. Simon,* 176 Ill. 165; *White v. Ainsworth,* 62 Colo. 513; *Robinson v. Kerrigan,* 151 Cal. 40; *Tyler v. Court of Registration,* 175 Mass. 71; *State v. Westfall,* 85 Minn. 437.

The general principle of constructive notice in proceedings of this nature have been recognized and fully discussed in *Arndt v. Griggs,* 134 U. S. 316; *Title & Document Restoration Co. v. Kerrigan,* 150 Cal. 289; *Shepherd v. Ware,* 46 Minn. 174; note, 29 L. R. A. n. s. 625 (*Tennant's Heirs v. Fretts,* 67 W. Va. 569).

Though it is fundamental that the rights of a person may not be adjudicated in a proceeding to which he is not a party, nevertheless the legislature may provide, in the interest of justice, that a person's rights in real estate may be determined in proceedings where he is represented, though he is not in person an actual party to the suit.

If that could not be done, then property interests, under a will, in the nature of contingent remainders in favor of unborn persons, as in this case, could not be passed upon by the courts, nor the status of title determined until all such persons, having future interests, should come into being. This would tie up real estate indefinitely.

In Massachusetts, the legislature has provided, in certain cases, that the interest of persons not in being should be represented by guardian *ad litem,* and such representation has been, in *Loring v. Hildreth,* 170 Mass. 328, held sufficient.

In the statute under consideration, it is provided that the life tenant in the property shall present and file claims in behalf of the contingent interests of unborn persons. As it happens in this case, the life tenant, in conjunction with the reversioners, has, by her own act, caused the interests of the contingent remaindermen to lapse and be cut off,

and is an adversary against them. She, therefore, would not have been a fit nor proper representative in behalf of their interests.

In this case it is unnecessary to rely upon the representation by the life tenant, as provided by the statute, as we find that the unborn remaindermen were represented in the registration proceeding under the doctrine known as virtual representation.

At the time of the proceeding for registration there were children living both of plaintiff, and of the testator, all of whom were made parties and properly notified, as required by the statute. The interests of these living persons, who, upon future contingencies, might become remaindermen, rest upon the identical legal questions as do the interests of those unborn persons, who, also, might become entitled to contingent remainders in the property. As the court had before it, at the time of registration, persons whose interests were the same as the interests of those not in being, the persons before the court, in representing and protecting their own interests, necessarily represented the interests of an identical nature of those remaindermen who were yet unborn. It follows that, the matters concerning all contingent remaindermen being fairly and honestly represented, the court had full opportunity and jurisdiction to properly adjudicate all the interests involved. By the doctrine of virtual representation, the interests of those persons not in being actually had representation in the proceeding. Such rule is generally recognized, in furtherance of justice and upon the general ground of public policy, as such controversies cannot await the coming into existence of all persons whose interests might be involved. To hold otherwise would prevent many cases from ever being brought to a final conclusion. *Gavin v. Curtin,* 171 Ill. 640; *Ridley v. Halliday,* 106 Tenn. 607; *Mathews v. Lightner,* 85 Minn. 333, 89 Am. St. Rep. 558; 15 R. C. L. 1024, sec. 498.

It is urged that the Torrens law is unconstitutional, since it confers judicial powers upon the registrar. The act

provides that, where a person files a mortgage or instrument to create a charge upon land, and it appears to the registrar that the person intending to create the charge has the title and right to do so, and is entitled to have the same registered, the registrar shall then register the instrument; and it is further provided that, when it is made to appear to the registrar that a party, desiring to transfer property which has been registered, has the right or interest proposed to be transferred, and is entitled to make the conveyance, and that the transferee has the right to have such estate transferred to him, the registrar shall make out a new certificate.

The mere fact, that the registrar is required, in these instances, to exercise his judgment as to the rights of parties to file such instruments and have them registered, does not mean that he is to act as a tribunal for the adjudication of disputes, but the judgment he is intended to exercise is purely incidental to his ministerial duties, and, though his act may be called quasi-judicial in character, such duties given him are not imposed in violation of the Constitution. *People v. Simon, supra.*

It is argued that the act provides for an *ex parte* hearing before an examiner, without notice to the parties interested, and which is binding upon them. On the contrary, the statute provides only for an investigation and report by the examiner. This report is not binding upon the court, and the court, it is provided (section 24), "may require other or further proof."

Again, it is contended that the act does not provide affirmative relief for defendants. Provision is made, however (section 22), for filing a cross-petition by defendants and affirmative relief is thus afforded. But it is not necessary, in order to meet the requirements of the Constitution, that affirmative relief be granted to a defendant in a suit, as the state has full control over that subject and may determine in what manner remedies shall be provided through its courts. *People v. Crissman,* 41 Colo. 450.

Another contention is that the act creates a new office by bestowing new duties upon an officer already existing, and does not provide for the election of such officer. There is nothing in our Constitution limiting the power of the legislature in that regard, as to the office of register of deeds, and the argument is untenable. *People v. Crissman,* and *State v. Westfall, supra.*

The act further provides that no person shall commence any action to recover any interest in the land, or make adverse entry upon the land, unless within two years after the entry of the order or decree. The unborn remaindermen in this case, as we have pointed out, were virtually represented in the proceeding and concluded by the decree of registration. That decree quieted the title as against the world and no person has appeared, to this time, with any showing that he was not served with notice, as provided by the law, and that the decree for that reason is not binding on him. The decree itself being binding, there is nothing to invoke the operation of the two-year limitation mentioned, and that provision is therefore not involved in this case and not before the court for determination.

Other objections are made as to the constitutionality of certain provisions of the law, but those questions bear upon parts of the act not at all involved in this controversy, nor so connected with the act as a whole that to declare them invalid would vitiate the entire act, and are not, therefore, before the court.

The judgment of the lower court is.

AFFIRMED.

DEAN and ALDRICH, JJ., not sitting.

GEORGE HALL, APPELLANT, V. JOHN W. DAVIS: A. R. ROBERTS ET AL., APPELLEES.

FILED OCTOBER 4, 1920. No. 21091.

Gaming: SPECULATION IN WHEAT. "Evidence examined, and *held* that the only conclusion to be reached from the plaintiff's evidence is that the contract was based on a wagering transaction, and that there was, in fact, no intention on the part of the parties to engage in a *bona fide* purchase to be followed by an actual delivery of the commodity in which they nominally dealt, and that such transaction was a gambling venture and speculation in the fluctuation in the price of wheat in the markets, and is void as being contrary to public policy." *Rogers & Bro. v. Marriott*, 59 Neb. 759.

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

Berge & McCarty and *Sterling F. Mutz*, for appellant.

Smith, Schall & Howell, contra.

LETTON, J.

Action for money had and received. Plaintiff is a farmer living near Alvo. In 1916 defendant Davis was managing an elevator at Alvo for Elliott Lowe, the owner of the elevator. Plaintiff alleges that he formed a partnership with Davis for the purpose of dealing in grain, and that he furnished him from time to time with money, amounting in all to about $25,000, for the purposes of the business; that Davis, without his knowledge or consent, and instead of buying actual grain, paid the money to the defendants, A. R. Roberts Commission Company, and the other defendants, in the course of illegal and gambling transactions and speculating on margins. He alleges that he was entirely innocent and ignorant of these transactions, and that defendant Roberts, having received the money illegally, must pay it back.

The defense, in substance, is that the partnership was formed for the purpose of dealing on the board of trade in

futures upon margins; that the plaintiff had full knowledge of all transactions; that the money was paid with full knowledge and approval of plaintiff; and he is estopped to maintain this action.

At the close of the testimony on behalf of plaintiff, each of the defendants made a separate motion that the court direct a verdict in his favor upon the ground, among others, that the transaction was a gambling transaction, and that the plaintiff was *particeps criminis*. These motions were sustained, and from a judgment dismissing the case, plaintiff appeals.

In the brief of defendants it is said: "We will assume that Hall lost money in his grain transactions, and that such were gambling transactions." Counsel for plaintiff in the reply brief says: "In our brief we argued that plaintiff's money was lost in gambling, and now having the admission of counsel that the money was so lost we are one step nearer the actual facts in the case." And further: "The only question in the case now is whether the plaintiff participated in this gambling or acquiesced in it if he knew about it." We also quote from plaintiff's brief: "Whether the parties honestly intended to deal in grain or use the contract as a cover for bidding on the rise and fall of its price on the market is a question of fact to be determined by what the parties did in pursuance with the contract and other competent evidence."

It must be conceded that, for the purpose of the motion, the testimony of plaintiff must be taken as true. His testimony in chief supports in the main the allegations of his petition, but his cross-examination discloses that he appears to be possessed of a "double personality," and we must consider his whole evidence and view it in the light of common experience. In chief he testifies that Davis had been operating the elevator at Alvo for one Elliott Lowe; that he first met defendant A. R. Roberts when Davis and he went to his office in the Terminal building in Lincoln early in 1916; that they had practically formed the partnership before they went to Roberts' office.

He also testified in answer to questions, in substance: I did not know that any one could deal in margins in Robert's office; I did not understand what dealing in margins was, or that Roberts was a member of the board of trade in Chicago, or that Roberts was engaged in anything else than handling actual grain. Between June, 1916, and else than handling actual grain. Between June, 1916, and the latter part of April, 1917, I furnished the partnership about $27,000. I never bought or sold any grain myself during that time. Davis did all the business and issued all the checks. During all this time I did not know how Davis was using the money. I did not know that any of the money was used to buy grain in Chicago. I had no grain delivered and never had any money back. After the business was concluded Davis handed me the checks, drafts and other papers which are in evidence. I did not know that there was an account of Hall & Davis in the office of Roberts. During the whole time I believed that Davis was actually buying and selling actual grain. I did not know that Davis was dealing in margins.

Upon cross-examination, however, he testified, in substance, as follows: When I bought grain at Alvo for my cattle it was a cash transaction and I usually paid the whole price within a short time. I never bought grain from the elevators and paid down three cents a bushel. I had no place to store grain except what was ordinary on a farm, and had no interest in an elevator at that time.

In June, 1916, when I was in Roberts' office in Lincoln, the chairs in the room were arranged about like jury chairs, arranged in a body and close together. There was a blackboard on the wall. I saw the words "corn," "wheat," and "oats," on the blackboard. Andy was putting figures down. I read them because I was interested in the market. There were men in the room. I do not remember of seeing the names of any months on the blackboard, but would not say they were not there. I understood this represented the price of grain, but did not know really, did not remember, if it said Chicago, St. Louis, or Kansas City. I did not understand about the board, was looking at it to

try and understand it. I saw the figures, but did not read them. I might have seen that the figure was a six, and some other figures that were under the column headed "wheat," and others under the columns headed "corn," "oats," "rye," etc. I do not recall having seen "wheat," "oats," and "corn" on the board. I do not remember of sitting with any one. Davis was in the room. Andy was the man that looked after the board. I met him that day for the first time. (A check for $150 given by Hall & Davis is among the exhibits.) I did not buy 5,000 bushels of wheat that day. The check of $150 was given by Davis that day. I knew before we got out of town that I had done some business before we left. "Q. You knew that you had bought or sold 5,000 bushels of wheat, didn't you? A. I knew, I don't just remember about the number of bushels. * * * Q. You did know, however, that you had done something about some wheat, didn't you? A. Yes, sir. I knew * * * that $150 would not buy 5,000 bushels of wheat." Wheat was worth about $1 a bushel. I did not suppose I had 150 bushels. I thought Davis had purchased 5,000 bushels of wheat and he had paid for it with this check.

"Q. Where did you think that 5,000 bushels of wheat was when you bought it; after you bought it, where did you think it was located? A. I did no thinking about it. Q. You did not know whether it was in the moon or in the sun? A. No, sir. Q. Or in Chicago, or in the Alvo elevator? A. No, sir; I did not. * * * Q. You knew then and you know now you did not have any place to put it, didn't you, if they delivered it to you? A. Yes, sir. * * * Q. And you did not ask them where this wheat was, did you? A. No, sir. * * * Q. And so far as you know there never was any such wheat, was there, as far as you know? A. As far as I know. * * * Q. And you intended that money to be checked out by Davis in the name of Hall & Davis to buy wheat as you have described in the manner we have gone over, this morning, is that right? A. Yes, sir. * * * Q. In the

manner in which he drew the first check? A. Yes, sir. * * * Q. And you borrowed money when they would tell you they needed some more up here to protect these trades, didn't you? A. Yes, sir. * * * Q. And Davis kept telling you that they wanted more money to protect these wheat deals, didn't he; and then you would go, if you didn't have it, and get it from the bank? A. Yes, sir. Q. And then put it in the bank account in the Farmers & Merchants Bank, and Davis would check it out? A. Yes, sir. * * * Q. And you checked it out or ordered him to check it out in order to apply on those wheat deals, didn't you? A. Yes, sir. * * * Q. Then you put up money whether you sold wheat or whether you bought wheat, didn't you? A. Yes, sir. Q. It was common knowledge for years and years on your part, wasn't it, that there was a board of trade in Chicago, to trade in wheat and corn and oats? A. Yes, sir; that was common knowledge. Q. You knew that? A. Yes, sir. Q. You had heard the word 'futures' spoken of, too, hadn't you? A. I have heard of 'futures.' Q. Yes, with reference to grain? A. Yes, sir. Q. And you had heard 'margins' spoken of, hadn't you? A. Yes, sir."

He also testified that before he dealt with Roberts he had dealt with Elliott Lowe; that Lowe had a board upon the wall and he sat and watched this board. It had "wheat," "oats," "corn," etc., on it, and a man put figures underneath. He had one trade with Elliott Lowe; bought 5,000 bushels of corn from him and received a confirmation notice similar to those they got from Roberts; did not pay the market price it might have been three cents a bushel—never paid any more than that for corn—could not say whether he won or lost. He paid Davis money so he (Davis) could make other deals. "Q. Well, how much did you lose in your deals with Elliott Lowe? A. I should judge somewhere around $300." He also testified that he would sit with Davis about twice a week and hear him talk over the telephone to the Roberts Commission Company. Speaking of his final transaction with Roberts,

in which he gave a promissory note in settlement:" Q. And you wanted to settle for the difference according to the prices which then were and quit? A. I wanted to settle that difference up. Q. The difference between you according to the prices and then quit? A. Whatever difference there was. Q. You wanted to settle up the difference? A. Yes, sir. Q. You didn't want and didn't ask that the wheat change hands, did you? A. No, sir."

The conclusion we draw from all the testimony is that plaintiff was not so childlike and unsophisticated as he alleges. It is clear that the sole business in which the firm of Hall & Davis embarked was not the *bona fide* buying and selling of actual grain. They did not expect to receive or deliver a single bushel, and had no facilities for its storage. The transaction was purely speculative. Plaintiff was *particeps criminis* with defendant in a gambling transaction. The case is within the rule of *Rogers & Bro. v. Marriott,* 59 Neb. 759, *Farmers Cooperative Shipping Ass'n v. Adams Grain Co.,* 84 Neb. 752, *Ives v. Boyce,* 85 Neb. 324, *Boon v. Gooch,* 95 Neb. 678, and *Sunderland & Saunders v. Hibbard,* 97 Neb. 21, and the motion was properly sustained.

AFFIRMED.

CHESTER FORCE V. STATE OF NEBRASKA.

FILED OCTOBER 4, 1920. No. 21529.

1. **Rape**: CORROBORATIVE EVIDENCE. "In a prosecution for the crime commonly called statutory rape, where the prosecuting witness testifies positively to the facts constituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction." *Mott v. State,* 83 Neb. 226.

2. **Evidence** examined, and *held* not sufficient to sustain the verdict.

ERROR to the district court for Douglas county: CHARLES A. GOSS, JUDGE. *Reversed.*

John M. Berger and *Albert S. Ritchie,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *C. L. Dort, contra.*

ALDRICH, J.

This is a prosecution for statutory rape upon one Grace Knepper, in Douglas county, Nebraska, in January, 1920. The prosecutrix at the time of the alleged commission of the crime was 13 years of age. The record discloses that the prosecutrix remained over night on two successive nights at the home of defendant and his wife, where the alleged crime took place. There was but one bed in the room, and it was a very small room.

The defendant gave the prosecutrix a dress, for which he paid the sum of $1. Prosecutrix testified that defendant gave her the dress in consideration of the alleged sexual intercourse, but defendant and his wife both stoutly deny this. The defendant was a married man 50 years of age, and his wife 21 years old. The defendant and his wife occupied the same room in the house where the crime is alleged to have taken place. They occupied the same bed when the prosecutrix visited them at their one room apartment. The prosecutrix claims that after she got into bed with defendant the wife of defendant slept on the floor. There is testimony to the effect that it was a bitter cold night. Defendant assaulted her and had sexual intercourse with her at 12 o'clock p. m. and again the following morning at 5 o'clock a. m., according to the Knepper girl's story. The prosecutrix also testified that defendant had sexual intercourse with her in June, 1919, and that she expected to have intercourse with him in January, when she went there to stay all night.

Then, the issue at the outset is: Was she sufficiently corroborated in her evidence as to the alleged act of sexual intercourse? It is the settled law of this state that in a prosecution commonly called statutory rape, where the prosecuting witness testifies positively to the facts con-

stituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction. *Mott v. State,* 83 Neb. 226; *Klawitter v. State,* 76 Neb. 49; *Mathews v. State,* 19 Neb. 330; *Oleson v. State,* 11 Neb. 276.

Alleged circumstances claimed to corroborate her testimony are: She had been there before; undressed and slept in the same room; expected to have intercourse with defendant on that occasion; defendant introduced evidence tending to show that Grace Knepper was previously unchaste; defendant bought her a dress; had a bottle of jamaica ginger and had a drink; had previously had intercourse with defendant. Now, these are essentially all of the facts alleged as corroborating the evidence of Grace Knepper. Is the evidence sufficient to justify a conviction? We think not.

As to the first proposition in corroboration, we are met with the testimony of Dr. Marcia L. Young. She testified that intercourse had been recent, within a few days, and takes as evidence of sexual intercourse with defendant the congestion of the perineum, the ruptured hymen and the presence of a whitish discharge on the parts that looked to her like semen. This statement on the part of witness is unreliable and unsatisfactory. In the first place, there is evidence in the record given by Dr. E. R. Porter, who has practiced medicine in Omaha for 20 years, that mere congestion of the perineum does not always mean sexual intercourse, and that the breaking of the hymen is practically the only thing that one could tell by. It is in evidence that the prosecuting witness had sexual intercourse on other occasions than the one complained of. If it is true, as the record tends to show, that she had had intercourse before, then it follows that the hymen was not ruptured on the occasion of the act complained of. What Dr. Young testifies as having the appearance of semen is unreliable and purely a guess; it having been shown that

semen after two or three hours would dry up and could only be identified by a microscopical examination. Dr Young made no such examination of the discharge, and none was ever made.

What Grace Knepper said to Mr. Carver, the truant officer, has little or no weight as corroboration. Mr. Carver testified that she made complaint to him, but, after all, it is really only what she herself said. On other occasions she claimed that defendant had sexual intercourse with her. Defendant, as we have said before, denies this, and it is simply her statement after all.

The claims that she had previously had intercourse with defendant are as positively denied by defendant as she alleged them. Then, on principle, this case comes clearly under the rule laid down in *Mott v. State, supra,*: "In a prosecution for the crime commonly called statutory rape, where the prosecuting witness testifies positively to the facts constituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction." This matter of corroboration is the law in this state, and it is our duty to follow it.

Thus we are led to say in conclusion on this phase of the decision that the prosecution fails to sufficiently corroborate the testimony of Grace Knepper, the prosecutrix.

It will be noted that Gladys Force, the wife of defendant, was also prosecuted for aiding and assisting her husband in the alleged commission of the act complained of. Now, the same evidence as to her guilt on this charge was submitted to the same jury, and the jury after hearing it found her not guilty. Then it follows that if she did not aid and abet the defendant in his alleged act of sexual intercourse, as the Knepper girl said she did, the defendant should at least be granted a new trial, because if it is insufficient as to her it is insufficient as to defendant.

We might have discussed and analyzed the instructions, but have refrained from so doing because the lack of corroboration is so obvious that the defendant must be grant-

ed a new trial on this question alone. It would be unjust and wholly unsafe to society to take the unsupported evidence of a mere child devoid of modesty and moral principle, and apparently ever ready to tell an untruth. It is hazardous and dangerous to encourage it by belief in a case like this.

The alleged facts testified to by the prosecuting witness are so improbable and unnatural that they are well-nigh unworthy of belief, and especially when you take into consideration her boldness and immodesty and lack of shame and humiliation in the position in which she was placed by this complaint. The fact that a married woman is living with her husband occupying the position of husband and wife has some weight. Both the defendant and his wife stoutly and explicitly deny that this prosecutrix ever slept with defendant. It seems strange for a jury to believe for one purpose that Mrs. Force told the truth and on the same evidence in the next breath find the defendant guilty.

Thus it appears from all the evidence submitted in the record that the defendant is entitled to a new trial. The case is reversed and remanded and new trial ordered.

REVERSED.

ROSE, J., dissenting.

I adhere to the opinion expressed in my dissent in *Gammel v. State*, 101 Neb. 540, that corroboration of prosecutrix is unnecessary in proving rape. Evidence showing defendant's guilt beyond a reasonable doubt is all the proof required by law. There is nothing in the Constitution, the statutes or the common law adopted by the legislature to make corroboration essential to a conviction. The announcement of the rule in the first instance by this court in the absence of statute was an error amounting to an exercise of judicial power which did not come from any legitimate source. The unauthorized rule requiring corroboration should be abandoned.

MILES MUCHA, APPELLANT, V. MORRIS & COMPANY, APPELLEE.

FILED OCTOBER 4, 1920. No. 21391.

Master and Servant: AWARD OF COMPENSATION: APPEAL: NOTICE: WAIVER. The notice required to be filed with the compensation commissioner within seven days after an award (Laws 1917, ch. 85, sec. 29, subd. *g*) is intended to give information of the appeal to the opposing party, and may be waived by him, where the petition for review is filed in the district court within the time required by law.

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

Anson H. Bigelow, for appellant.

James C. Kinsler, contra.

FLANSBURG, J.

Action under the workmen's compensation law. Plaintiff, who had sustained personal injuries, was given an award of compensation by the compensation commissioner on December 6, 1918. On December 16, 1918, he filed a petition in the district court to review the award. The district court dismissed the petition on the ground that plaintiff had not filed notice of intention to appeal, as required by subdivision *g*, sec. 29, ch. 85, Laws 1917, which reads: "Every order and award of the compensation commissioner shall be binding upon each party at interest unless notice of intention to appeal to the district court has been filed with the compensation commissioner within seven days following the date of rendition of the order or award: Provided, that the order and award shall be binding and final, notwithstanding notice of intention to appeal has been filed within the time limit, until the appeal has been perfected and service had upon the opposite party or parties."

Plaintiff contends that the filing of notice was waived by defendant's attorney, both orally within the seven-day

period and by a written voluntary appearance of the defendant filed in the district court on December 19, 1918, reciting that "defendant hereby waives summons and voluntarily agrees to appear in the above-entitled action." Whether or not there was any conversation whatsoever during the seven-day period purporting to be a waiver of notice is directly disputed in the testimony. That was a question of fact for the trial court and will therefore not be further considered here. The only question now presented is whether or not the written voluntary appearance filed in the district court was a waiver of the filing of notice with the compensation commissioner.

The statute of 1917 did not limit the period for the filing of the petition for review in the district court to seven days, as it does now. Laws 1919, ch. 91, sec. 5. It is not urged that the petition on appeal was filed out of time. The appeal was in every particular, except the filing of the notice with the compensation commissioner, completed within the time required by law. The case of *Jefferson Hotel Co. v. Young,* 121 N. E. (Ind. App.) 94, differs in that regard from the one before us.

The provision for the filing of notice with the compensation commissioner was for the purpose of giving the adverse party knowledge of the appeal. Upon the filing of such notice, no further duty devolved upon the compensation commissioner. The filing of such notice did not affect the award; on the other hand, the award continues to be binding until the appeal is perfected and service had. It is apparent that such notice is for the benefit of the opposing party, and in such cases it is generally held that the party for whose benefit the provision is made may waive the giving of the formal notice, and that this may be done by a voluntary appearance in the court where the appeal is lodged. 3 C. J. p. 1240, sec. 1343, p. 1241, sec. 1345. That rule is in line with the holdings of our court. *Shold v. Van Treeck,* 82 Neb. 99; *McDonald v. Penniston,* 1 Neb. 324; *Haylen v. Missouri P. R. Co.,* 28 Neb. 660; *State v. Shrader,* 73 Neb. 618.

It is our opinion that the district court had jurisdiction of the subject of the action, given by statute by the timely filing of the petition for review, and that the voluntary appearance filed in the case conferred upon the court jurisdiction of the person of the defendant.

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

REVERSED.

DAY, J., not sitting.

ALFRED J. GRISWOLD, APPELLANT, V. EFFIE ROBINSON ET AL., APPELLEES.

FILED NOVEMBER 10, 1920. No. 20957.

Appeal: FAILURE TO FILE ANSWER. Where an action is tried upon the theory that an answer and reply have been filed, the failure to file the answer is not alone ground for reversal.

APPEAL from the district court for Lancaster county: LEONARD A. FLANSBURG, JUDGE. *Affirmed as modified.*

O. B. Clark, for appellant.

W. T. Stevens, contra.

LETTON, J.

The purpose of this action is to obtain an injunction restraining defendants from trespassing upon certain property leased to the plaintiff by defendant, Effie Robinson, and from annoying plaintiff and his wife.

The facts are that Mrs. Robinson leased to plaintiff for one year a house and tract of land adjoining the residence in which Mrs. Robinson lived with her family. On the leased premises were situated a garage, well, and toilet. After plaintiff had taken possession of the premises the defendants insisted that, although the written lease made no reservation of these appurtenances, they were in fact reserved under an oral agreement which it was agreed was to be inserted in the lease after Mrs. Robinson recovered from

an attack of illness. Defendants continued to go upon the premises and use the appurtenances contrary to the express wishes of the plaintiff.

The district court found for defendants, and gave them affirmative relief by reforming the lease and enjoining the plaintiff from interfering with their access to and use of the toilet and well. It is contended by plaintiff that there was no justification for this decree since no answer was ever filed. The bill of exceptions shows that the case was tried as if an answer had been filed. It was stipulated by both parties "that the cause shall be tried and the pleadings made up as if the plaintiff had filed a reply to the defendant's answer, denying each and every allegation of new matter contained in said answer." It is not shown that the decree does not respond to the issues.

The evidence supports the decree as to the use of the well and toilet, and it is so far affirmed. It is shown that one of defendants pleaded guilty to disturbing the peace and threatening to injure plaintiff. This, with other evidence, convinces us that the plaintiff was entitled to an injunction restraining defendants from interfering with his quiet enjoyment of the garage, and from being annoyed and disturbed by the rude and boisterous language and conduct of the male defendants. So far the decree is reversed and such an injunction allowed to plaintiff.

The decree of the district court is modified accordingly, and it is adjudged that each party pay one half the costs in both courts.

AFFIRMED AS MODIFIED.

ALDRICH and FLANSBURG, JJ., not sitting.

DAISY M. STEVENS, APPELLEE, V. PETER P. LUTHER ET AL., APPELLANTS.

FILED NOVEMBER 10, 1920. No. 21051.

1. **Negligence:** AUTOMOBILES: HUSBAND'S NEGLIGENCE NOT IMPUTABLE TO WIFE. Negligence on the part of a husband in driving an automobile cannot be imputed to his wife, who is riding with him, unless the parties are engaged in an enterprise giving the wife the power and duty to direct or to assist in the operation and management of the car.

2. **Master and Servant:** INJURY TO THIRD PARTY: LIABILITY OF MASTER. The owner of an automobile kept for family purposes is liable for injuries inflicted upon a stranger as a result of the negligent driving of one of his children, where the car is occupied by members of the family and is being used for one of the purposes for which it is kept.

3. **Negligence:** AUTOMOBILES: UNLAWFUL DRIVING. If a driver of a motor vehicle runs it at a rate of speed "forbidden by ordinances enacted for the safety of the general public, and injuries result, these facts afford reasonable grounds for inferring negligence prejudicial to the rights of those in whose interests and for whose protection such municipal regulations were adopted." *Omaha Street R. Co. v. Duvall*, 40 Neb. 29, 35.

4. **Cases Distinguished.** Case distinguished from those mentioned in the opinion, where the violation of a positive and affirmative duty enjoined upon one for the protection of others to whom he owes a duty is the negligence alleged, such as statutes requiring safety devices upon machinery, fire escapes, fencing of railroads, etc.

5. **Trial:** INSTRUCTIONS. Evidence and instructions examined, and *held* that no error prejudicial to defendant occurred at the trial.

6. **Case Disapproved.** In so far as the opinion and syllabus in *walker v. Klopp*, 99 Neb. 794, are not in harmony with the views expressed in this opinion they are disapproved.

APPEAL from the district court for Lancaster county: LEONARD A. FLANSBURG, JUDGE. *Affirmed.*

T. J. Doyle, for appellants.

G. A. Adams and *Max V. Beghtol, contra.*

LETTON, J.

Defendants appeal from a judgment for $1,950 recovered for personal injuries received by plaintiff in an automobile collision.

Plaintiff's husband was driving west on L street in the city of Lincoln with his wife and infant child, when his Ford automobile was struck by a seven-passenger Overland car at the intersection of Eighteenth and L streets. The Ford car was turned completely around and all of the spokes were torn from its right hind wheel. Plaintiff was thrown from the automobile and suffered painful and permanent injuries. The Overland car was owned by defendant Peter P. Luther, and was being driven by his daughter, defendant Margaret Luther.

1. Numerous assignments of error are presented, dealing mostly with the instructions given or with instructions requested by defendants and refused. One of the questions raised is that of imputed negligence. On this issue the court instructed the jury: "Negligence on the part of the plaintiff's husband, from the mere fact alone that plaintiff's husband was driving the car, would not be considered in law the negligence of the plaintiff herself, nor affect in any degree her right, if any, to recover, as the wife is ordinarily considered a passenger in the car driven by her husband, and not chargeable with the direction, control, nor manner of driving."

This court has held: "Except with respect to the relationship of partnership, or of principal and agent, or of master and servant, or the like, the doctrine of imputed negligence is not in vogue in this state." *Hajsek v. Chicago, B. & Q. R. Co.*, 68 Neb. 539; *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 586. Negligence on the part of a husband in driving an automobile, therefore, cannot be imputed to his wife who is riding with him, unless the parties are engaged in an enterprise giving the wife the power and duty to direct or to assist in the operation and management of the car. 8 L. R. A. n. s. 656, note (*Cotton v. Willmar & S. F. R. Co.*, 99 Minn. 366); L. R. A. 1915A, 764, note (*Christopherson v. Minneapolis, St. P. & S. S. M. R.*

Co., 28 N. Dak. 128). Plaintiff had no such power in the present case. The car belonged to the husband, and the evidence shows that he alone was controlling it; the wife was a mere passenger. It is true plaintiff might be guilty of negligence on her own part which would bar her right to recover, but this phase was properly covered in a subsequent portion of the instruction. On the question of imputed negligence, we find no error with respect either to the instructions given or the instructions refused.

2. Complaint is made of the court's instruction No. 5, which told the jury that defendant, Margaret Luther, in this case was the agent of her father, and the father was liable for any actionable negligence on her part in driving. The father was not present at the time of the accident, but the car was being driven by the daughter, with his knowledge and consent, to convey members of the family to church. He testified that the automobile was kept for the pleasure and convenience of the family; that the daughter usually drove it; and that taking the family to church was one of the purposes for which it was kept. The question presented by defendant is new in this jurisdiction. But by the weight of authority, in the jurisdictions where the question has been determined, the owner of an automobile kept for family purposes is liable for injuries inflicted upon a stranger as a result of the negligent driving of one of his children, where the car is occupied by members of the family and is being used for one of the purposes for which it is kept. 5 A. L. R. 226, notes. See, also, 41 L. R. A. n. s. 775, notes (*McNeal v. McKain*, 33 Okla. 449); 50 L. R. A. n. s. 59, notes (*Birch v. Abercrombie*, 74 Wash. 486); L. R. A. 1916F, 223, note (*Griffin v. Russell*, 144 Ga. 275); *Denison v. McNorton*, 228 Fed. 401. Some of the courts have drawn a distinction between cases where the car is being used by one of the children alone and where it is occupied by other members of the family as well, but this distinction need not here be considered.

It is objected that the court erred in giving instruction No. 7, which told the jury that a person violating a statute

fixing a rate of speed for automobiles is guilty of negligence as a matter of law. Counsel say: "If the court imparts to the jury the statute regulating the speed of automobiles, it should then say to the jury: 'It is for you to determine whether or not the excess rate of speed, if you find it was in excess of that fixed by statute, contributed to the injury, under all the facts and circumstances of the case.' " In the instruction given the jury were told that it was for them "to determine the degree or amount of such negligence under these instructions, in view of all the facts and circumstances, and other acts of negligence, if any, proven at the trial, and to determine whether such negligence was the proximate cause of, or contributed to, the accident." This seems to meet the criticism made. The evidence justifies the conclusion that both automobiles were traveling at a rate of speed exceeding that fixed by the statute. Each driver was equally guilty of a violation of its terms; and, under all the facts and circumstances proved at the trial, we are satisfied that defendant suffered no prejudicial error by the giving of the instruction.

On account of some lack of harmony, it may be advisable in this connection to review the former decisions of this court with respect to the question whether the violation of a statute or ordinance enacted for the safety or protection of persons or property constitutes negligence *per se,* or is only evidence of negligence, for the jury to consider with all the other evidence in the case on that issue. The rule that the violation of a statute requiring signals to be given by railroad trains approaching crossings is evidence to be considered by the jury in ascertaining whether defendant was guilty of negligence is first laid down in Nebraska in *Omaha, N. & B. H. R. Co. v. O'Donnell,* 22 Neb. 475, and with respect to the violation of a city ordinance of this nature in *Union P. R. Co. v. Rassmussen,* 25 Neb. 810. The question is discussed at length by Irvine, C., in *Chicago, B. & Q. R. Co. v. Metcalf,* 44 Neb. 848, beginning at p. 859. The doctrine is reiterated that the violation of a statute requiring a bell to be rung or whistle to be sounded by a

locomotive when approaching a road crossing is not negligence *per se,* but only evidence of negligence. Since this decision it has been the rule with few exceptions for the district courts of the state to instruct that the violation of such a statute or ordinance is evidence of negligence, which the jury is entitled to consider in connection with all other evidence in the case. Perhaps in a few opinions since that time, where the precise question was not under discussion or involved, it has been loosely said that the violation of such a statute or ordinance was negligence.

It has been argued in another case now under consideration (*Dorrance v. Omaha & C. B. Street R. Co.,* p. 196, *post*) that a different rule applies to statutes from that relating to ordinances; but the same rule is applied to the violation of a statute in *Omaha Street R. Co. v. Duvall,* 40 Neb. 29; *Omaha & R. V. R. Co. v. Talbot,* 48 Neb. 627; *Missouri P. R. Co. v. Geist,* 49 Neb. 489; *Wallenburg v. Missouri P. R. Co.,* 86 Neb. 642, 646; and to the violation of an ordinance in *Riley v. Missouri P. R. Co.,* 69 Neb. 82, 87; *Omaha Street R. Co. v. Larson,* 70 Neb. 591; *Lincoln Traction Co. v. Heller,* 72 Neb. 127; *Olson v. Nebraska Telephone Co.,* 87 Neb. 593; *Rule v. Claar Transfer & Storage Co.,* 102 Neb. 4.

In a note in 5 L. R. A. n. s. 226 (*Sluder v. St. Louis Transit Co.,* 189 Mo. 107), a large number of cases are cited upholding the doctrine of this court. The supreme courts of the United States, of New York, Massachusetts, California, Illinois, Indiana, Iowa, Georgia, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Montana, New Hampshire, Ohio, Oregon, Pennsylvania, South Carolina, Utah, Wisconsin, Virginia, Washington, also the courts of Ontario and England, take the view that the violation of a duty prescribed by such a statute or ordinance is evidence proper for the consideration of the jury, to be considered with all the other circumstances in the case upon the question of the defendant's negligence.

Mr. Justice Lamar says in *Grand Trunk R. Co. v. Ives,* 144 U. S. 408, 418: "Indeed, it has been held in many cases that the running of railroad trains

within the limits of a city at a rate of speed greater than is allowed by an ordinance of such city is negligence *per se*. *Schlereth v. Missouri P. R. Co.*, 96 Mo. 509; *Virginia M. R. Co. v. White*, 84 Va. 498. But, perhaps, the better and more generally accepted rule is that such an act on the part of the railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence" —citing a number of cases.

There are decisions which at first reading may seem to be inconsistent with this rule, but most of them may be distinguished on account of the different character and purpose of the statutes involved. Statutes requiring protective devices to be placed upon machinery, upon barbed-wire fences, scaffolding statutes, railroad fencing statutes, fire escape statutes, and other statutes of like nature, impose a mandatory and affirmative duty upon the owners of such property, and even in states where the violation of speed statutes is held to be only evidence from which negligence may be inferred, the courts generally hold that a failure to perform a mandatory duty so enjoined is negligence *per se*, and if any person to whom the duty is owed, or for whose protection the statute is enacted, is injured in consequence of such violation, a case is made.

In New York the violation of a statute requiring fire escapes is held to be negligence for which one injured in consequence of the failure to supply the required appliances is liable in damages. The cases of *Strahl v. Miller*, 97 Neb. 820, and *Hoopes v. Creighton*, 100 Neb, 510, considering a statute relating to fire protection by hotel keepers, *Vanderveer v. Moran*, 79 Neb. 431, a statute relating to guarding barbed-wire fences, *McCarthy v. Ravenna*, 99 Neb. 675, a statute requiring machine shafting to be guarded, *Butera v. Mardis Co.*, 99 Neb. 815, a statute relating to hoists and scaffolds, are cases illustrating the latter principle. Other cases stating the same principle are cited in the opinion in the case last mentioned.

Statutes limiting the speed of vehicles are upon a different footing. There is a general duty upon drivers of street cars, automobiles, and vehicles generally, to use due care for the rights of others when driving upon streets and in crossing intersections. The exercise of due care demands that such vehicle, especially at crowded intersections, move at a moderate rate of speed. A statute or an ordinance which seeks to prescribe a limit of speed upon streets or intersections, and forbids a greater speed, may make an act unlawful and subject the doer to punishment where before its enactment no breach of law existed; but while in some instances the speed of a vehicle may of itself constitute negligence, in other instances, although the act may be unlawful in the sense that the doer is liable to punishment, no reasonable mind would say that the act was negligent of itself. Take, for example, the statute under consideration, which provides that it is unlawful to operate an automobile at intersections of streets within a city at a speed exceeding 6 miles an hour. We all know that in the great majority of cities, many of which in this state have less than 3,000 inhabitants, to drive across the intersections of streets at 7, 8, 10, or 12 miles an hour is entirely consistent with the exercise of due care, and therefore, except under special circumstances, it is not negligence. In fact, circumstances may arise where, in order to avoid an accident, it would be negligence not to exceed the statutory limit. This law has now been repealed and a more reasonable statute enacted. Laws 1919, ch. 222, sec. 28.

At the time of the decision in the *O'Donnell* case automobiles had not been invented, and the numerous serious and fatal accidents to occur from reckless driving could not be foreseen. If the court were now establishing a rule for the first time, it might be inclined to follow the other line of decisions, but that which has been the law of the state, and accepted as such by the people and the courts for over 30 years, ought not to be set aside without the most convincing reasons.

The case of *Walker v. Klopp,* 99 Neb. 794, may seem to be, and has been considered by district judges and some

members of the bar to be, in conflict with the well-established rule. The case was properly decided, as under the facts the issue was one for a jury to decide; but we think the opinion does not distinguish between the cases cited, one of which was a street railway case falling within the rule, and one a railroad fencing case falling under the other principle. The opinion and syllabus are confusing and not in harmony with our former decisions, and in so far as in conflict with the rule of *Omaha Street R. Co. v. Duvall,* 40 Neb. 29, cited in the same opinion, the case is disapproved.

The remaining assignments of error need not be considered in detail. Most of them are disposed of by the views expressed above. The question of comparative negligence presented is covered by section 7892, Rev. St. 1913. None of the complaints made as to the admission or exclusion of evidence warrant a reversal. The instruction requested by defendants, that "the regulation by law of speed of motor vehicles is primarily made for the protection of pedestrians and vehicles, other than motor vehicles, occupying or using the street," was properly refused.

An examination of all the questions presented fails to reveal any reversible error in the record, and the judgment is

AFFIRMED.

FLANSBURG, J., not sitting.

RAY BLODGETT, APPELLEE, V. SWANSON BROTHERS ET AL., APPELLANTS.

FILED NOVEMBER 10, 1920. No. 21119.

Pleading: MOTION TO STRIKE: WAIVER. A motion to strike a petition for want of verification is waived by the filing of an answer before a ruling on the motion.

APPEAL from the district court for Adams county: WILLIAM C. DORSEY, JUDGE. *Affirmed on condition.*

J. E. Addie, for appellants.

Walter M. Crow, contra.

LETTON, J.

This action was begun in justice court to recover $83.97 for work and labor, and $13.90 for goods paid for but not delivered. The justice found defendants were entitled to a set-off of $47.20, and found for plaintiff in the sum of $68.75. Defendants appealed to the district court. The petition in that court was unverified. A motion to strike was filed by defendants, but not ruled upon. Afterwards defendants filed a general denial and counterclaim. The jury returned a verdict for plaintiff for $97.87 with interest, amounting to $104.52. Defendants appeal.

The petition in the district court pleaded an item of $18.72 due plaintiff upon a settlement, in addition to the items sued upon in justice court. No motion was made to strike this item as not within the issues below.

The principal controversy at the trial was as to certain charges made against plaintiff by defendants for storage and work on his cars. There was a conflict of evidence as to these items. The jury settled them in favor of plaintiff, and we see no reason to disturb its findings in this respect.

It is argued that the judgment should be reversed because the petition was unverified, but defendants waived verification by the filing of the answer.

The amount of the verdict is complained of. According to plaintiff there was $18.72 due him on a settlement made on January 2, 1918. Afterwards there was due him $83.97 for labor, and $13.90 for parts paid for but not furnished by defendants, making a total of $116.59. In addition to the credits he allows in the petition, his own testimony is to the effect that on January 8 he received a check of $15 for which no credit was given. The verdict, therefore, is excessive to the amount of $15 with interest from January 8, 1918. The amount being fixed and determined, the judgment will be

reversed and the cause remanded for further proceedings, unless the plaintiff enters a remittitur of $15 with interest from January 8, 1918, within 20 days, in which case it will stand affirmed.

AFFIRMED ON CONDITION.

OMAHA ALFALFA MILLING COMPANY, APPELLANT, V. HJALMAR T. HALLEN ET AL., APPELLEES.

FILED NOVEMBER 10, 1920. No. 21123.

Payment: PLEADING AND PROOF. The plea of settlement or ratification is an affirmative defense, the burden of which is upon defendant; and, in order to be availed of by him, such defense must be pleaded.

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

J. M. Fitzgerald, for appellant.

Lysle I. Abbott, John N. Dryden, and *I. J. Dunn, contra.*

LETTON, J.

The petition in substance charges that plaintiff was the owner of 52 tons of alfalfa hay; that defendants unlawfully converted the hay to their own use; that its reasonable value was $1,040; that $626.25 has been paid, and there is still due $413.75, with interest from the date of conversion.

The answer of defendant Hallen admits that plaintiff was the owner of the hay, and the payment of $626.25, but denies every other allegation.

The answer of defendant Palmer is a general denial, and a statement that any hay purchased by him from Hallen was purchased for the Grain Belt Mills Company of St. Joseph, Missouri, and not for himself. A jury was waived, and the case tried to the court, which found for defendants, and dismissed the action. Plaintiff appeals.

The principal question is one of pleading, but it is necessary to state the facts. Plaintiff, whose place of business is in Omaha, purchased from one Hallen, who lived near Riverdale, Buffalo county, about 200 tons of alfalfa hay. This hay was to be shipped to Omaha, but, being unable to procure cars in which to ship it, a large portion of it was stored in a barn in Riverdale and left in custody of Hallen to be shipped by him when cars were obtainable. Plaintiff agreed to pay him 50 cents a ton for loading and shipping the hay.

About this time one Palmer, representing a milling concern at St. Joseph, Missouri, was purchasing hay at Riverdale. Hallen sold him a quantity of hay which he had purchased from a man named Frederick. This will be hereafter referred to as the Frederick hay. Hallen was compelled to go to Omaha, and remained some weeks. Before he left he instructed one Lindholm, an employee, to load the Frederick hay and to notify Palmer, who would bill it out when it was ready for shipment. Lindholm evidently misunderstood the directions. He loaded the Frederick hay, also about 50 or 60 tons of plaintiff's hay, and notified Palmer, who billed it all to his principal in St. Joseph, making drafts for the purchase price. When Hallen returned he learned what had happened, and notified the plaintiff at Omaha. The president of the plaintiff corporation went to Riverdale, paid Hallen for loading the hay, and afterwards, though the evidence is not clear upon this, attempted to collect the value of the hay from the St. Joseph concern. In the meantime $626.25 had been paid into a bank at Kearney to Hallen's credit by the consignee, on account of this shipment of plaintiff's hay. Plaintiff put the matter in the hands of an attorney, who wrote a letter to Hallen, stating in substance that he knew of the deposit of $626.25 in the Kearney bank to Hallen's credit on account of this shipment of hay, "and I would suggest that you mail me a check for the amount above, so that we can apply the same on account of the sale, thus avoiding bringing you into the lawsuit which I believe that I

shall be compelled to bring before the matter can be adjusted."

Hallen communicated with plaintiff and found the attorney was authorized to receive the money. He gave him a check for the amount. A receipt was given Hallen, which recites that it was for the money "placed to *my* credit by the Grain Belt Mills Co. of So. St. Joseph, Missouri, without my knowledge, by one Palmer, purchasing agent of said company, on account of alleged purchase of alfalfa hay." This was a slip of the pen for the money was placed to Hallen's credit, as both knew.

Under these facts, Hallen, through his employee, converted plaintiff's hay. There is some testimony that Palmer knew at the time that plaintiff's hay was included in the shipment. Assuming this to be the fact, then Hallen and Palmer were joint tort-feasors. If the plaintiff settled and released Hallen from liability, the effect would be to release Palmer.

Hallen insists that the statements in the letter and the acceptance of the money paid for the hay constituted a ratification of the unauthorized act of shipping the hay, and released him from any further liability, and Palmer asserts that the release of Hallen ended his liability. As to these contentions plaintiff replies that at the trial the introduction of the letter and receipt tending to prove a settlement, was objected to as incompetent, irrelevant, and immaterial under the pleadings, and that it was error to admit them in evidence. In neither answer is there any plea of payment, settlement, accord and satisfaction, ratification, or estoppel. We have repeatedly decided that such defenses, are not admissible under a general denial. The pleas of settlement and ratification are affirmative defenses, the burden of which are upon defendant, and they must be pleaded. The question whether Hallen had been released from liability by the terms of the letter and the acceptance of the money was not an issue in the case. The trial court erred in the admission of this evidence. Were it not for this defense, Hallen would be liable for the reasonable value of the hay at the time it was shipped, since

it was left in his custody, and it was inadvertently converted by him by a mistake of his agent. Plaintiff had no information as to this defense from the pleadings and could not anticipate it. The error, therefore, prejudicially affected a substantial right of plaintiff. The judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WILLIAM H. DORRANCE, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED NOVEMBER 10, 1920. No. 21135.

1. **Street Railways**: EXCESSIVE SPEED: INFERENCE OF NEGLIGENCE AS EVIDENCE. If the rate of speed of an automobile or of a street car is in excess of the rate limited by statute or ordinance, this fact affords grounds for inferring negligence in the operation of the vehicle, and is proper to be submitted to the jury as evidence of negligence, together with the other evidence in the case. *Omaha Street R. Co. v. Duvall*, 40 Neb. 29, 35.

2. ———: ———: STATUTES AND ORDINANCES. The rule is the same in this respect both as to statutes and valid ordinances. *Stevens v. Luther*, *ante*, p. 184.

3. **Affirmance.** Evidence and instructions examined. Verdict sustained.

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

John L. Webster and *William M. Burton*, for appellant.

Jefferis & Tunison and *A. P. Lillis*, *contra.*

LETTON, J.

Plaintiff was driving a heavy automobile hearse across Thirteenth street at Capitol avenue in Omaha about 9:15 in the evening. A collision occurred at the intersection between a street car and the hearse, and plaintiff was injured. This action was brought to recover damages for such injuries. Plaintiff recovered, and defendant appeals.

Plaintiff's version of the accident is that he was driving the automobile at the rate of about 10 miles an hour; that he and his companion, as they neared the intersection, looked to the south and saw the light of an approaching street car at a distance of about 200 feet. The car was then moving at the rate of about 6 to 8 miles an hour. He looked to the north and slowed down the hearse to cross the street car tracks, moving at about 6 or 8 miles an hour. He looked to the south again when he was about 8 or 10 feet into the intersection, and saw the street car close to the intersection and running down grade at the rate of about 25 miles an hour. He then attempted to avoid the collision by turning the hearse northward and increasing the speed; but the left corner of the street car struck the right side of the hearse, breaking the left front wheel of the hearse, the front wheels of the street car left the track, the car pushed the hearse 6 or 7 feet northward, and then diagonally to the northeast corner of the intersection against the curb.

The contention of the defendant is that the plaintiff was driving the hearse on the wrong side of the street without lights and at an unreasonable rate of speed, and that he drove it into the front end of the street car with such impetus that it knocked the front wheels of the car off the track. There is a direct conflict in the evidence as to whether the lights of the automobile hearse were burning before the collision. Such conflict also extends as to the rate of speed of both hearse and street car. The jury had the witnesses before them, and were better qualified to judge of the truth of their accounts of the accident than this court is. Unless some prejudicial error has occurred in the conduct of the trial, the verdict cannot be disturbed.

An ordinance of the city of Omaha, at that time, limited the rate of speed of street cars, in the portion of the city where the accident occurred, to 10 miles an hour. Other ordinances provided that every automobile should have at least one lighted lamp, showing white, visible at least 200 feet in the direction in which the automobile is proceeding, and should also exhibit at least one red light vis-

ible in the reverse direction. It was also provided that driving a motor vehicle "in excess of the following rates of speed for a distance of more than two hundred feet shall be presumptive evidence of driving at a rate of speed which is not careful and prudent: * * * at eight miles per hour at intersections of streets * * * within the city limits." Ordinance No. 7960, City of Omaha, sec. 47. The law of the state at that time provided: "No person shall operate a motor vehicle * * * within any city * * * at a speed greater than twelve miles per hour, * * * nor * * * when crossing an intersection of streets within any city * * * at a speed exceeding six miles per hour." Rev. St. 1913, sec. 3049. And further provided: "Every motor vehicle while in use on public highways * * * shall have exhibited, during the period from one hour after sunset to one hour before sunrise, one or more lamps showing white lights visible within a reasonable distance * * * and a red light visible from the reverse direction." Rev. St. 1913, sec. 3051.

The court instructed the jury, in substance, that the provisions of this ordinance and of the statute mentioned are valid and reasonable provisions, and, if either or both of the parties to this action violated the statute or ordinance, "you are at liberty to take any such violation into consideration, along with all the other evidence in the case, in determining whether or not the party so violating the same was chargeable with negligence in and about the accident."

The first error assigned is with respect to the giving of this instruction. It is argued that the court lost sight of the distinction between the violation of a state statute and the violation of a city ordinance; that a violation of the statute with reference to speed of motor vehicles constitutes negligence *per se,* and that the violation of such an ordinance is not negligence *per se,* but is only evidence of negligence. The courts are hopelessly divided upon the question whether the violation of a statute or ordinance designed for the protection of the public constitutes negli-

gence *per se*, or is only evidence of negligence, or, as some courts hold, *prima facie* or presumptive evidence of negligence. Our own decisions are not entirely harmonious, but in *Stevens v. Luther, ante* p. 184, the cases are examined, and we adhere to the rule, long established in this state, that such a violation is evidence of negligence, which the jury are entitled to consider upon the question whether actionable negligence existed, but is not negligence *per se*. We are unable to see any good ground for a distinction between a state statute and a city ordinance in this respect. The statute imposes a duty upon all the citizens of the state, and is a rule of conduct prescribed for them. An ordinance of a city is likewise a rule of conduct for every person within its corporate limits, and every person is as much bound to obey and observe a reasonable law laid down by the city council as one laid down by the legislature. *Memphis Street R. Co. v. Haynes*, 112 Tenn. 712. Our attention has not been called to any cases showing a reasonable basis for such a discrimination. The former decisions of this court recognize no such distinction. *Stevens v. Luther, supra*. The supreme court of Michigan in some cases seem to find a distinction (*Westover v. Grand Rapids R. Co.*, 180 Mich. 373), but in other cases announce the same rule for statutes as for ordinances (*Zoltovski v. Gzella*, 159 Mich. 620). The district court therefore properly refused instructions tendered by the defendant drawing such a distinction.

It is assigned that the court erred in instructing the jury that, if they found from the evidence that the motorman "could have seen, in the exercise of ordinary care and diligence, the hearse in time to have avoided the collision, and failed to do so, then the defendant would be guilty of negligence." Such an instruction was approved by the court in *Omaha Street R. Co. v. Duvall*, 40 Neb. 29 and *Lucas v. Omaha & C. B. Street R. Co.*, 104 Neb. 432. It is also upheld in *Memphis Street R. Co. v. Haynes, supra*, and other cases. The rule requires no more than ordinary care and diligence on the part of the motorman in keeping a lookout.

It is said that the court erred in refusing to give an instruction that, if plaintiff violated the city ordinances regulating the rate of speed and the providing of lights, such violation would be evidence of negligence. On its own motion the court instructed the jury that, if either or both parties violated the statute or the ordinances, they were at liberty to take any such violation into consideration along with the other evidence in the case in determining whether or not the party so violating the same was chargeable with negligence in and about the accident. This is a fair instruction, and it allows the jury to consider the violation as evidence of negligence.

Defendant requested an instruction that, if plaintiff failed to have his hearse under control as it approached the tracks, and if by care he could have avoided the accident, he cannot recover, which was refused. The defect in this is that it failed to take into consideration the statutory doctrine of comparative negligence. The plaintiff might have failed in some or all the respects mentioned in the instruction, and yet if the negligence of the defendant was gross, and the plaintiff's negligence was slight as compared therewith, he would still be entitled to recover. This instruction was properly refused, but the idea was given in another instruction with respect to contributory negligence and the rule of comparative negligence. The instruction was not so full and specific as that tendered; but, in view of common knowledge as to the need of care and caution on the part of the drivers of motor vehicles at intersections, we think it was sufficient.

It is also urged that the physical facts and the photographs of the street car in evidence demonstrate that it was the plaintiff's negligence which caused the accident; that the facts that the front of the street car was broken at one side and its front wheels forced from the track show conclusively that plaintiff drove the hearse into the car. The testimony on behalf of the plaintiff is to the effect that, when plaintiff looked south for the second time, he saw the street car so close to him that it was impossible to avoid a collision; that in order to avoid it he swerved his

car to the left; and it is argued by him that the resultant of forces of the two moving bodies was the cause of the street car being pushed to the northeast. The photographs in evidence seem to bear out defendant's contention in some degree, but the jury were as well qualified to pass upon the question of fact as this court, and we cannot say as a matter of law that their conclusion was incorrect.

Complaint was made of other portions of the charge to the jury; but, when it is taken as a whole, we find it not subject to the criticism made. It seems apparent to us that both parties were negligent in greater or less degree, and whether plaintiff's negligence was slight in comparison with the gross negligence on the part of defendant was for the jury. While we think a verdict in favor of defendant would be supported by the evidence, we are also of the opinion that it is sufficient to sustain the verdict rendered.

AFFIRMED.

DAY, J., not sitting.

EDWIN F. BRAILEY ET AL., APPELLEES, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED NOVEMBER 10, 1920. No. 21150.

Trial: INSTRUCTIONS. Instructions are to be considered together, to the end that they may be properly understood, and when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated upon the giving of the same.

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

John L. Webster and *William M. Burton,* for appellant.

Jefferis & Tunison and *A. P. Lillis, contra.*

LETTON, J.

The judgment appealed from in this case grew out of the same accident that is involved in the case of *Dorrance v. Omaha & C. B. Street R. Co., ante* p. 196. That action was

for damages for personal injuries to Dorrance, who was then driving the hearse, while this is by the partnership which owned the hearse, for damages to the vehicle.

Complaint is made of the refusal of the court to direct a verdict for the defendant. The testimony in the case was sufficient to require the submission of the evidence to the jury. This instruction was properly refused.

The next complaint is that the court erred in a general instruction that, if the jury found that the automobile was injured as a result of the collision, and that negligence on the part of the defendant was the proximate cause of the collision, then the verdict should be for the plaintiff. It is objected to this instruction that it is a positive direction to the jury to find for the plaintiffs if the elements named therein existed, irrespective of whether the plaintiff was guilty of contributory negligence. Standing alone, the instruction is subject to this criticism, but the jury were further instructed that it was the plaintiff's duty "to exercise that degree of care which a person of ordinary prudence would have exercised under like circumstances to prevent a collision between the automobile he was driving and one of defendant company's cars;" and, further, that if he or the motorman "omitted to exercise such care as an ordinarily prudent person would have exercised, taking into consideration the surroundings, then such one would be guilty of negligence." They were fully instructed with respect to the rule of comparative negligence. We are satisfied that the jury did not misinterpret the instructions.

Like complaints are made in this case as in the *Dorrance* case with respect to the instruction relating to a violation of the statute or ordinance. These contentions were overruled in that case. We find no reversible error.

AFFIRMED.

EDNA M. BARKLEY ET AL., APPELLEES, V. CHARLES W. POOL, SECRETARY OF STATE, APPELLEE: L. D. RICHARDS ET AL., APPELLANTS.

FILED NOVEMBER 10, 1920. No. 21370.

1. **Costs, Taxation of.** In the taxation of costs the clerk of the district court acts ministerially.
2. ———. Where a judgment for costs was rendered against defendants, but the items of costs were not taxed by the clerk before the final adjournment of the term of court at which the judgment was rendered, he may tax the costs afterwards within a reasonable time, and before the payment of the judgment.
3. ———: TAXATION AT SUBSEQUENT TERM. In such case, a motion for an order to the clerk to tax costs does not require the opening or modification of the judgment, and the court has jurisdiction to act upon the motion at a subsequent term of court from that at which the judgment was rendered.

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

Fawcett & Mockett, John L. Webster, L. F. Crofoot and *Byron G. Burbank,* for appellants.

T. J. Doyle, F. A. Brogan and *C. A. Sorensen, contra.*

LETTON, J.

The controversy in this case is over the taxation of costs. In January, 1919, the district court rendered a decree "that the costs of this action shall be paid, one-half by the secretary of state, and one-half by the interveners herein, and plaintiffs are hereby given judgment against said defendant and interveners for costs of this action."

An appeal was taken on the merits of the case, and on January 28, 1919, the decree was affirmed by this court. On October 11, 1919, a motion, accompanied by affidavits, was filed in the district court "for an order directing the clerk of the district court to have the costs in said action taxed as per said affidavits, and the amounts thereof in-

serted in the entry of judgment in said action." The intervening defendants appeared specially, and objected to the jurisdiction of the court with respect to the motion, for the reasons that the final decree had been entered during the January term of court, that the April term had been held and had adjourned, and the September term had begun when the motion was filed, and therefore the court had lost jurisdiction. The objections were overruled. No further appearance being made, the court ordered the clerk to tax the costs as set forth in the affidavits. Afterwards a motion was filed for an order directing the clerk of the district court to correct an error and tax as costs the amount set out in the affidavit as having been paid to the special examiner for services in the action and not yet taxed. This motion was also sustained. Defendants have appealed from both orders.

In the brief of appellants some argument is directed to the insufficiency of the affidavits as evidence, but no objection, except as to jurisdiction, was made at the hearing, or in the motion for a new trial. Not having been raised below, the point cannot be considered here. The real contention of appellants is that the court was without jurisdiction to act after the adjournment of the term at which the original judgment was rendered. We think this position is unsound. By the judgment the court directed the defendants to pay the costs. The only thing left to be done was the ministerial duty of the clerk to ascertain and enter the amount. In a number of states the manner of taxing costs is regulated by statute, and the fee bill must be presented to the clerk, or taxing official, at the same term at which the judgment is rendered, and within a specified number of days. There is no statute in this state governing the matter. We have held that, where the costs are made a part of the judgment or decree, it can only be opened up and mistakes corrected in the manner provided for opening judgments. *Olson v. Lamb,* 61 Neb. 484. We have also held that, where the costs have been erroneously taxed by the clerk, a motion to retax the same may be made at a subsequent term of court. *Smith v. Bartlett,* 78 Neb.

359. In this case it is said that the court by making such an order does not change the judgment awarding costs, but uses its power to see that the award of costs is not improperly or illegally taxed, and that a mistake made by the clerk in taxing the fees in favor of or against a party may be corrected by the court on motion at any time.

The purpose of the motion was not to change or modify the judgment or to retax the costs, it was to tax them in the first instance. The clerk had failed to tax the costs at the time of the original decree. This is not an uncommon occurrence. It is not infrequent that sheriffs', referees', or receivers' costs, or the cost of taking care of attached property, are not known at the time of the final judgment. If costs must be taxed at the same term as the final judgment, in many counties in the state it would frequently be very inconvenient, and sometimes impossible, to tax all items of costs in a case which had occupied the attention of the court up to the time of final adjournment. If after the cost bills are presented to the clerk, he refuses or fails to tax any particular item, or taxes the costs improperly, a motion may be made to retax. Since no statute prohibits this, it can be done within a reasonable time, and before the payment of the judgment. The following cases are in conformity with the views herein expressed: *Fairbairn v. Dana,* 68 Ia. 231; *Frankel v. Chicago, B. & Q. R. Co.,* 70 Ia. 424; *Fisher v. Burlington, C. R. & N. R. Co.,* 104 Ia. 588; *Big Goose & Beaver Ditch Co. v. Morrow,* 8 Wyo. 537, 80 Am. St. Rep. 955; *Citizens Nat. Bank v. Gregg,* 53 Neb. 760; *Barber's Estate,* 11 Pa. Co. Ct. Rep. 242.

It may be well to say, however, that such proceedings as were had in this case are not to be commended. Parties desiring to recover costs expended by them should furnish the clerk with the proper and legal evidence of the expenditures, such, for example, as the returns made by the several officers who have executed process, showing the fees and mileage to which they are entitled; also the *per diem* and mileage of witnesses should be noted by the clerk, or, if their testimony is taken by deposition, or before a referee,

it should be set forth in the return of the officer. In other words, the clerk should have the legal evidence before him when he acts.

AFFIRMED.

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

NICHOLAS OPP, APPELLEE, V. FREDLIN W. SMITH ET AL., APPELLANTS.

FILED NOVEMBER 10, 1920. No. 21390.

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

Williams, Hurd & Neighbors and *J. E. Philpott,* for appellants.

Hunt & Perry and *Fawcett & Mockett, contra.*

LETTON, J.

This action has appeared in this court twice before. On the first appeal (96 Neb. 224) the only issue was on the question of adverse possession. This issue was decided adversely to the defendant, and the cause remanded, "with directions to determine the question of the validity of the tax deed, set out in the pleadings, and of the tax sale upon which such deed is based, and, if the same are found to be void, to ascertain the amount which plaintiff should be required to pay in order to redeem the lands in controversy, and to permit such redemption."

At the next trial the district court found the tax deed valid, but upon appeal this court decided that the deed was void upon its face, and remanded the cause for further proceedings. 102 Neb. 152. Since the deed was void upon its face, the short statute of limitations, in the revenue law, was not applicable, and the only matter left for adjudication, or further proceedings necessary or proper to be had, was to determine the amount which plaintiff should

pay in order to redeem, and the value of the improvements, if any.

After remand several amendments were sought to be made to the answer, but these were either stricken, or did not change the issues. The record is not quite clear as to which amendments were stricken. At the trial defendant offered a number of exhibits. The court excluded such as had been offered at the former trial upon the issues as to the validity of the tax deed, upon the ground that the matter had already been adjudicated. In this there was no error.

Defendants refused to proceed further with proof of the amount of taxes and interest to which they were entitled. The court, from the allegations and admissions in the pleadings, found the amount paid by the defendants for taxes with interest as allowed by the statute and rendered a decree in their favor for this sum.

The main contention of defendants now is that this court erred in its opinion and judgment as to the validity of the tax deed upon the former appeal. This question has already been determined upon the same pleadings. The former judgment settled the law of the case, and is *res adjudicata*. The district court, as was its duty, followed the mandate of this court; its judgment is therefore.

AFFIRMED.

ROSE, J., not sitting.

C. H. RUSSELL ET AL., APPELLANTS, V. CITY OF INDIANOLA ET AL., APPELLEES.

FILED NOVEMBER 10, 1920. No. 21423.

1 **Venue:** SUIT TO CONTEST BOND ELECTION. An action against a city and the mayor and council thereof, the main object and prayer of which is to contest an election held in the city upon a proposition to erect a municipal water supply system, and issue bonds for the purpose of paying for the same, and to enjoin the issuance of such bonds, must be brought in the county where the election is held.

2. **Quære.** Whether such an action may be maintained is not decided.

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

J. B. Strode and *W. R. Starr,* for appellants.

H. W. Keyes and *J. F. Cordeal, contra.*

LETTON, J.

The object and prayer of the petition is that the city of Indianola, the mayor and members of the city council, and the auditor of the state of Nebraska, be enjoined from issuing, registering or negotiating bonds of that city voted for the purpose of erecting and maintaining a system of municipal waterworks, and that the election, upon the authority of which the bonds are threatened to be issued, be set aside and declared null and void. A temporary injunction was allowed by the district court. A general demurrer to the petition and a motion to dissolve the injunction were sustained, and the action dismissed.

In substance, the petition charges that at the election 309 votes were cast, of which 190 were in favor of the proposition, which was more than the requisite majority; that the mayor and council declared the proposition carried and have taken the necessary steps for registration of the bonds with the state auditor, who will register them unless enjoined. A number of specific allegations as to illegal voters are made; other violations of the election laws are charged; it is also alleged that mistakes were made in the count, and that sufficient legal votes were not cast to carry the proposition.

The district court held that the action was one to contest the election, and that it had no jurisdiction.

In *Thomas v. Franklin,* 42 Neb. 310, *Sebering v. Bastedo,* 48 Neb. 358, and *Barnes v. City of Lincoln,* 85 Neb. 494, it was held that, since the statute relating to contested elections does not authorize a taxpayer or elector to initiate such a contest, it cannot be maintained by him. Appellants contend that, having no remedy by way of contest under the decisions quoted, they are entitled to contest the election in a court of equity. Assuming for the purpose of

the argument, but without deciding, that they are correct in this, does the district court for Lancaster county have jurisdiction over such an action?

The evident purpose is to contest the election. The city of Indianola is made a party defendant, and so also are the city officials. Such an action under sections 7612-7623, Rev. St. 1913, must be brought in the county where the cause of action arose. The auditor of state is in no sense a proper or necessary party to such a proceeding. The relief sought against him is purely ancillary to the main action. Making him a party cannot confer jurisdiction over the defendants who cannot properly be sued in Lancaster county.

There is a conflict in the authorities as to whether, in the absence of a statute, an election of this nature may be contested by a taxpayer in a court of equity. In view of this fact, and of the decisions hereinbefore cited, it would seem that legislation should be had providing an adequate remedy for taxpayers who may be compelled to bear an increased burden of taxation and whose property may be reduced in value by the imposition of taxes authorized by an election carried by means of fraud, or by the use of illegal votes. In our opinion the law relating to election contests should be amended so as to solve all doubt and furnish a speedy and adequate remedy for such wrongs.

AFFIRMED.

DEAN and FLANSBURG, JJ., not sitting.

REICHENBACH LAND & LOAN COMPANY ET AL., APPELLANTS, V. BUTLER COUNTY, APPELLEE.

FILED NOVEMBER 10, 1920. No. 21085.

Taxation: ASSESSMENT: REVIEW. The review by the district court of assessments made by the county assessor is limited to questions presented to the county board of equalization.

APPEAL from the district court for Butler county: EDWARD E. GOOD, JUDGE. *Affirmed.*

Hastings & Coufal, for appellants.

A. V. Thomas, contra.

ROSE, J.

This is a proceeding to review and to correct an assessment made by the county assessor of Butler county for the year 1918. The county board of equalization refused to change the assessment, and plaintiffs appealed to the district court, with a like result. From the judgment of the district court, plaintiffs have appealed to this court.

On the form of schedule used by banks, loan, trust, and investment companies, "showing the number of shares comprising the actual capital stock, name and residence of each stockholder, number of shares owned by each and the value of such shares," and other items, the Reichenbach Land & Loan Company, a corporation, one of the plaintiffs, made its return to the county assessor. Rev. St. 1913, sec. 6343. According to this schedule there were two stockholders and 500 shares, valued at $874.48 a share, making a total of $437,240. A statement of the condition of the corporation April 1, 1918, disclosed resources as follows: Real estate, cash value, $438,000; real estate mortgages, $19,200; Chicago, Burlington & Quincy Railroad bonds, $10,000; village bonds $8,100; due from national and state banks, $1,443.14; total, $476,743.14. The liabilities were listed as follows: Capital stock paid in $50,000; surplus, $385,000; bills payable, $39,500; undivided profits, $2,243.14; total, $476,743.14. The county assessor fixed the actual value of the shares of stock at $876,000, and the difference between that amount and the value of the real estate listed at $438,000, or the sum of $438,000, was fixed as the assessable value of the shares; 20 per cent. of the latter item being the statutory basis of a levy. Of the assessor's action plaintiffs complained to the county board of equalization as follows:

"The assessment of the assessor for said year is too high on the following described property situated in Nebraska and Iowa township, Butler county, Nebraska, to wit: Value of the shares of stock as fixed and determined by the assessor and particularly on the deduction allowed on real estate at assessed value and not at actual value. Said property is assessed at $438,000 for said year as appears by the schedule and assessment book of the assessor for said township and the same should be assessed at $754.86, according to its true value."

There was presented to the county board of equalization no complaint except that the assessment of the shares of stock was too high, but it was averred that such shares were assessable. In the district court on appeal it was not shown that the assessment was too high, but it was there pleaded and urged that the Reichenbach Land & Loan Company was a holding corporation merely, and not an investment company which could be assessed on its shares of stock. For the reason that this latter question had not been presented to the county board of equalization, it was disregarded in the district court, with the result that plaintiffs were denied relief on appeal. In this ruling the district court was clearly right. The local board had ample power in the first instance to correct any error in the official action of the assessor, and the question for review should have been pointed out in some form. In considering the interests of the taxpayers of an entire county and of the public at large, in examining numerous items and in determining the value of property in different forms for the purpose of taxation, the county board of equalization is entitled to a specific complaint, and should have an opportunity to pass on the question for ultimate decision before the public revenues become involved in protracted or vexatious litigation. On appeal to the district court the questions for review are limited to the questions presented to the county board of equalization. This is the public policy of the state. Rev. St. 1913, sec. 6440; *Nebraska Telephone Co. v. Hall County,* 75 Neb. 405; *First Nat. Bank v. Webster County,* 77 Neb. 813; *Reimers v. Mer-*

rick County, 82 Neb. 639; *Brown v. Douglas County*, 98 Neb. 299; *State Bank v. Seward County*, 95 Neb. 665.

The trial court enforced this rule, and the judgment is

AFFIRMED.

HELEN M. MCHUGH, APPELLEE, V. WILLIAM S. RIDGELL, APPELLANT.

FILED NOVEMBER 10, 1920. No. 21174.

1. **Malicious Prosecution: PROBABLE CAUSE: QUESTION OF LAW.** Whether the facts and circumstances established by uncontradicted evidence amount to probable cause in an action for malicious prosecution is a question of law for the court, and not an issue of fact for the jury.
2. ———: ———. Such facts and circumstances as would lead an unprejudiced person of ordinary prudence and intelligence to believe that accused is guilty of a crime which some one has in fact committed constitute probable cause for a criminal prosecution.
3. ———: ———. The undisputed facts and circumstances outlined in the opinion *held* to show probable cause for the prosecution of accused for arson as a matter of law.

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

J. B. Barnes, George W. Ayres and *Harvey M. Johnson*, for appellant.

George A. Adams, contra.

ROSE, J.

This is an action to recover damages in the sum of $10,125 for malicious prosecution. Plaintiff recovered a verdict and a judgment thereon for $1,500, and defendant has appealed.

The first assignment of error is that the verdict is not supported by the evidence and is contrary to law. Both the facts and the law which control the decision are thus presented.

While plaintiff and her brother were conducting a laundry in a leased building in Lincoln, an incendiary fire was started in the laundry at night June 29, 1918. Both were charged by defendant with the felony, and were bound over to the district court after a preliminary hearing before a justice of the peace, who found probable cause for the prosecution. In the district court the county attorney charged them with the same felony, but afterward dismissed the prosecution as to plaintiff. Her brother was tried and acquitted. Plaintiff had not been taken to prison, but had given bond to appear in court to answer the charge of arson.

When defendant made the initial complaint he was deputy fire commissioner of the state. As such, it was his statutory duty to investigate the cause, origin and circumstances of every fire occurring in the city of Lincoln. Rev. St. 1913, secs. 2501, 2502. After due investigation and the collection of the necessary data, he was directed by law, among other things, as follows:

"If he shall be of the opinion that there is evidence sufficient to charge any person with the crime of arson, he shall cause such person to be arrested and charged with such offense." Rev. St. 1913, sec. 2503.

In the action for malicious prosecution defendant pleaded his privileges as a public officer, prosecution in good faith, full disclosure to, and advice of, the county attorney, and probable cause. After a thorough examination of the record and the law applicable to undisputed facts, it has been found necessary to discuss only the defense of probable cause.

Whether facts and circumstances established by uncontradicted evidence amount to probable cause for a criminal prosecution is a question of law for the court, and not an issue of fact for the jury. This is not only the law of Nebraska, but is a generally accepted rule. *Turner v. O'Brien,* 5 Neb. 542; *Dreyfus v. Aul,* 29 Neb. 191; *Nehr v. Dobbs,* 47 Neb. 863; *Bechel v. Pacific Express Co.,* 65 Neb. 826; *Bank of Miller v. Richmon,* 68 Neb. 731; *Clark v. Folkers,* 1 Neb. (Unof.) 96; and other cases cited in note in L. R. A. 1915D

5, 8 (*Michael v. Matson,* 81 Kan. 360). The principle of law applicable has been stated in this form:

"In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant." *Bechel v. Pacific Express Co.,* 65 Neb. 826.

This doctrine is founded on public policy and is essential to the welfare of society. Those who feloniously destroy property, and thus endanger lives, should be brought before the bar of justice. Individuals and officers having knowledge of felonies should not be unnecessarily deterred from becoming informers by the fear of incurring liability for damages for malicious prosecution. The law recognizes the interests of the state and the proper protection of its informers, as well as the rights of individuals charged with crime. The guilt of accused is not the legal test of probable cause. Such facts and circumstances as would lead an unprejudiced person of ordinary prudence and intelligence to believe that accused is guilty of a crime which some one has in fact committed constitute probable cause as a matter of law. The language of the law is that "what facts and whether particular facts amount to probable cause is a question of law." Where uncontradicted evidence thus shows probable cause, the jury should not be allowed to speculate on the issue.

Testing the conduct of defendant by the principles of law stated, what are the undisputed facts and circumstances which prompted him to accuse plaintiff of arson?

The fire department was called about 3 o'clock in the morning and extinguished the fire before the laundry or the building was destroyed. The chief of the fire department promptly notified defendant of the fire, and requested an official investigation, which was made the same morning. Defendant did not know plaintiff or her brother, and was therefore unprejudiced at the time. When the fire department arrived the doors of the laundry were locked and there was a fire in the interior. A barrel of waste paper saturated with gasoline had been left near the center of the main floor and another on the second

floor. Both barrels had been partially consumed. Two or three kerosene cans had been left in the laundry and there was an unusual amount of oil there. There was conclusive evidence of arson. Plaintiff and her brother admitted they had been in the laundry as late as 11:30 the night of the fire, and that they left the building together. The laundry was an insolvent enterprise. Its property had been recently attached for debt. It was valued at $4,093.70, according to an inventory jointly made by an underwriter, defendant, and others. The fire insurance aggregated over $12,000. A policy of $8,000 had been issued the day before the fire. Plaintiff and her brother, the latter being owner, operated the laundry together. Both were unmarried and occupied the same home. Plaintiff received no stated salary, but her brother provided her with a living and with whatever money she needed. With the exceptions of plaintiff and her brother there was nothing to indicate that any one had a motive for committing the arson, and there was no incriminating circumstance connecting any one else with it. It is shown by uncontradicted evidence that defendant had knowledge of these undisputed facts and circumstances before he accused plaintiff of the arson, and they establish probable cause as a matter of law. By other proofs probable cause did not become an issue of fact. In the office of defendant, as deputy fire commissioner, plaintiff had an opportunity to tell her own story, and she there denied participation in, and knowledge of, the starting of the fire. She also gave references to persons whom she said would vouch for her good character. On the witness-stand she testified that defendant threatened to arrest her if she did not confess her guilt, but this latter statement was positively denied by defendant. Accepting, however, all of the testimony in her behalf as verity, it does not raise a question of fact on the issue of probable cause. Denial of guilt is often found in the pleas and in the testimony of accused persons who are convicted by circumstances which speak louder than words. The facts and condition outlined herein, notwithstanding the denial, justified an honest belief that plaintiff, though in-

nocent, participated with her brother in the arson. A threat to arrest defendant if she did not confess would imply a belief in her guilt, and that belief, as already explained, is justified by facts and circumstances proved by evidence not disputed. Defendant was not responsible for the incriminating incidents pointing to plaintiff's guilt. Plaintiff did not make a case for the consideration of the jury, and the verdict is not supported by the evidence. It is contrary to law.

For the reasons stated, the judgment of the district court is reversed, with directions to dismiss the action at the costs of plaintiff in both courts.

REVERSED.

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

JOHN F. OSBORN, APPELLEE, V. OMAHA STRUCTURAL STEEL COMPANY, APPELLANT.

FILED NOVEMBER 10, 1920. No. 21476.

Master and Servant: WORKMEN'S COMPENSATION ACT: PAYMENTS: PENALTY. Under the workmen's compensation act, periodical instalments of compensation for an injury to an employee do not become due, in the sense that they carry the statutory penalties for non-payment, until the obligation of the employer is definitely ascertained or settled in the exercise of proper diligence on his part, where there is a reasonable controversy over the extent of the injury as a basis for the number of periodical payments and the amount of each.

APPEAL from the district court for Douglas county: ARTHUR C. WAKLEY, JUDGE. *Reversed, with directions.*

Rosewater & Cotner and *E. J. Corkin,* for appellant.

J. E. Von Dorn, contra.

ROSE, J.

This is a proceeding under the workmen's compensation act. While plaintiff was earning 75 cents an hour in the employ of defendant, his right hand was drawn into a hoist-

ing machine November 14, 1918. As a result of the accident the hand was mangled and plaintiff lost a little finger. He applied to the compensation commissioner for an award for his injuries, and July 31, 1919, was allowed $12 a week for 34 3-4 weeks from the date of the injury. Defendant having made weekly payments of $12 each for 31 weeks, that period was deducted from the whole period for which compensation was allowed. It was ordered further:

"The periodical payments of compensation now due shall be paid immediately upon receipt of this award. Failure of the defendant company to comply with the provisions of this award shall automatically subject the said defendant company to the penalty as provided in 3666, section 116 workmen's compensation law of Nebraska, as amended in 1917."

From the award of the compensation commissioner plaintiff appealed to the district court, where there were findings that plaintiff was entitled to $12 a week for 119 weeks, beginning June 25, 1919, and that for failure of defendant to make such payments plaintiff was also entitled, under the statute, to $6 a week from June 25, 1919, until February 28, 1920, the date of the decision. From a judgment on these findings in favor of plaintiff, defendant has appealed to this court.

It is argued that the judgment is excessive, and that it is not sustained by the evidence. An examination of the record leads to the conclusion that plaintiff's earnings and his injuries were such as to justify the finding that he was entitled to recover $12 a week for 119 weeks, beginning June 25, 1919. The penalties, however, seem to have been imposed under a misinterpretation of the statute. There was a reasonable controversy as to the extent of the injury, and there is nothing to indicate that defendant did not pursue its remedies with proper diligence. At the time the compensation commissioner made his award of $12 a week for 34 3-4 weeks, defendant had been in default on that basis for 3 3-4 weeks only, and was willing to comply with the award. Plaintiff, by his appeal, not defendant, sus-

pended the award until it was set aside, and until the allowance for compensation was increased with penalties upon a trial in the district court. There being a reasonable controversy over the extent of plaintiff's injuries, defendant, feeling itself aggrieved by the extended period for weekly payments, including penalties, exercised the right of appeal to this court. Under these circumstances, the statutory penalties are not imposable, except for the period of actual default outside of the legitimate course of litigation, which, in the present instance, is 3 3-4 weeks. Under the workmen's compensation act, periodical installments of compensation for an injury to an employee do not become due, in the sense that they carry the statutory penalties for nonpayment, until the obligation of the employer is definitely ascertained or settled in the exercise of proper diligence on his part, where there is a reasonable controversy over the extent of the injury as a basis for the number of periodical payments and the amount of each. Rev. St. 1913, sec. 3666, as amended by Laws 1917, ch. 85, sec. 9½, and Laws 1919, ch. 91, sec. 4; *Updike Grain Co. v. Swanson,* 104 Neb. 661. It follows that the judgment below is excessive to the extent of all the penalties imposed, except for the period of 3 3-4 weeks. The proceeding is therefore remanded, with a direction to the district court, on the record already made, to reform the judgment to comply with these views.

REVERSED.

DAY, J., not sitting.

DEAN, J., dissenting.

The penalty that is discussed in the opinion of the majority was imposed by the legislature to make it reasonably certain that the payments contemplated by the law would not be delayed and the act thereby nullified. In other words, the penalty was imposed to protect the injured employee from an employer's "bad guess" with respect to the meaning of the law. *Parson v. Murphy,* 101 Neb. 542, 16 N. C. C. A. 174. If the statute as construed by the opinion of the majority is to become the settled law of the

state it is perfectly plain that the "waiting time penalty" feature of the act will be of no benefit to the persons for whom the benefit was intended by the legislature.

FRANK W. MATTESON ET AL., APPELLEES, V. CREIGHTON UNIVERSITY, APPELLANT.

FILED NOVEMBER 10, 1920. No. 21590.

1. **Constitutional Law:** DISTRICT COURTS: JURISDICTION. Under the state Constitution, district courts have equity jurisdiction, and it may be exercised without legislative enactment.
2. **Charities:** ADMINISTRATION. In the exercise of equity jurisdiction, the district courts may supervise the administration of charitable trusts.
3. ———: TRUST PROPERTY: ALIENATION. Alienation of trust property to carry out the original design of the donor may be permitted by a court of equity, though not authorized by the instrument creating the trust or by legislative enactment.
4. ———: ———: ———. Owing to changed conditions, equity may permit a trustee to sell real estate charged with a charitable trust, to invest the proceeds in interest-bearing securities, and to apply the interest to beneficial uses in lieu of the former rents, when manifestly for the benefit of the trust, though the terms of the grant do not authorize such a sale.
5. ———: ———: EQUITY JURISDICTION. Where the form of trust property is legally changed, the trust follows it in its new form with equity's supervisory power of administration unchanged.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

Edwin F. Leary, for appellant.

Brogan, Ellick & Raymond, contra.

ROSE, J.

This is a suit in equity to quiet in plaintiffs the title to lot 2, block 192, in the original city of Omaha. A demurrer to the petition was sustained, and, defendant electing to stand on its demurrer and refusing to plead further,

a decree was rendered in favor of plaintiffs. Defendant has appealed.

The lot described is situated in a business district, and on it there is a five-story brick building which is rented for warehouse purposes. When John A. Creighton owned the property he conveyed it by warranty deed October 15, 1906, to defendant, the Creighton University, a corporation having authority to conduct an educational institution and to accept and execute trusts for that purpose. Grantor in his deed created, and defendant as trustee accepted, a charitable trust in the following terms:

"The said the Creighton University is to keep, maintain and preserve the premises and property herein above described and use the rents, issues, revenues and money derived therefrom primarily for the support, maintenance and development of Creighton College at Omaha, Nebraska, maintaining such classes and faculty as may be necessary in conducting high schools and college departments; the surplus if any of said rents, revenues and money derived from said property remaining after supplying the needs of said Creighton College is to be devoted to the maintenance and development of the Creighton University."

The trust as created was administered by defendant with the property in specie for more than 13 years. In the meantime conditions changed. The building deteriorated and the value of the lot increased until interest at the rate of 6 *per centum per annum* on the sale value of the property would exceed the net rental value to the extent of $1,340 in a year. On a proper petition containing all of the essential facts the district court, in the exercise of chancery or equity jurisdiction, authorized defendant to sell the trust property for $100,000 and to invest the proceeds in interest-bearing securities for the benefit of the trust. Pursuant to the authority thus granted, plaintiffs bought the real estate described for the fully paid consideration of $100,000 and defendant conveyed the title to them by warranty deed.

According to the petition to quiet title, the cloud of which plaintiffs complain arises from the apparent re-

strictions in the deed creating the trust. Defendant as trustee was not therein specifically authorized to sell the trust property, nor is such authority to be found in any statute. There is no statute conferring upon the district court in specific terms power to authorize a corporation like defendant to sell property acquired on the terms imposed by the trust deed. These considerations, however, do not control the decision. The chancery or equity powers of the district courts come from a higher source than legislative enactment. The Constitution declares: "The district courts shall have both chancery and common-law jurisdiction." Article VI, sec. 9. The equity jurisdiction thus conferred may be exercised without the aid of legislation.

One of the well-recognized grounds of equity jurisdiction is supervision of the administration of trusts.

Alienation of trust property to carry out the original design of the donor may be permitted by a court of equity, though not authorized by the instrument creating the trust or by legislative enactment.

Owing to changed conditions, equity may permit a trustee to sell real estate charged with a charitable trust, to invest the proceeds in interest-bearing securities, and to apply the interest to beneficial uses in lieu of the former rents, when manifestly for the benefit of the trust, though the terms of the grant do not authorize such a sale.

Where the form of trust property is legally changed, the trust follows it in its new form with equity's supervisory power of administration unchanged.

These rules of equity are firmly established. They are founded on wisdom and justice, and it is unnecessary to go into their history or into the philosophy on which they rest. The present case is a typical one for the application of the principles stated. The use of "the rents, issues, revenues and money" derived from the real estate "for the support, maintenance and development of Creighton College" was the primary and fundamental object of the grant. Neither the building nor the ground was intended to be used directly for educational purposes. Interest-bearing

securities purchased with the proceeds of the sale will create a much larger current fund than the realty itself. To the extent of the increase the purpose of grantor would be thwarted, if the sale were not made. The interest of the trust requires the change. The trust attaches to the property in its new form without impairing the security, and it will thus be protected by the same supervisory power under which equity authorized the change. The trust deed contains no condition forbidding a sale by the trustee or by the beneficiaries of the trust. The right to make such a sale has not been taken away by statute. The reasons for the sale make a strong appeal to a court of equity. There is no legal objection to the permission granted.

The title, therefore, was properly quieted in plaintiffs, and the judgment is

AFFIRMED.

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

JONATHAN A. BRIDGER, APPELLANT, V. LINCOLN FEED & FUEL COMPANY, APPELLEE.

FILED NOVEMBER 10, 1920. No. 21626.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: CASUAL EMPLOYEE. Under the workmen's compensation act, an employee whose employment is "casual" is not entitled to compensation from his employer for personal injuries. Rev. St. 1913, sec. 3656, as amended by Laws 1917, ch. 85, sec. 4.
2. ———: ———: ———. The term "casual," as used in that part of the workmen's compensation act precluding an employee whose employment is casual from recovering from his employer compensation for personal injuries, is defined by the act itself to mean "occasional; coming at certain times without regularity, in distinction from stated or regular," and should be so construed in applying the statute.
3. ———: ———: ———. An employee unloading cars of coal for 25 cents a ton at irregular intervals under a separate employment for the unloading of each particular car *held*, on the facts stated in the opinion, to be a person whose employment was "casual," and not entitled to compensation for personal injuries.

APPEAL from the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Affirmed.*

R. J. Greene and *Hugh C. Wilson,* for appellant.

F. C. Foster, O. K. Perrin and *S. M. Kier, contra.*

ROSE, J.

This is a proceeding under the workmen's compensation act. Plaintiff's right hand was crushed February 24, 1920, and his third finger severed therefrom, while he was unloading for defendant a car of coal for 25 cents a ton. He applied to the compensation commissioner for an award for his injuries, and was allowed therefor $15 a week for 20 weeks and in addition $7.50 a week for 9 weeks for medical expenses. From this award defendant appealed to the district court, where it was held that plaintiff was not entitled to compensation for his injuries. From a dismissal of the proceeding he has appealed.

The question presented by the appeal is the applicability of the workmen's compensation act to plaintiff's claim.

Defendant pleaded that the employment of plaintiff was "casual," and that therefore he is precluded from recovering compensation by the following statutory provisions relating to the term "employee:"

"It shall not be construed to include any person whose employment is casual, or not for the purpose of gain or profit by the employer, or which is not in the usual course of the trade, business, profession or occupation of his employer. The term 'casual' shall be construed to mean 'occasional; coming at certain times without regularity, in distinction from stated or regular.' " Rev. St. 1913, sec. 3656, as amended by Laws 1917, ch. 85, sec. 4.

For the purposes of this inquiry "casual" must be thus construed, and the facts may be stated as follows: Plaintiff began to unload a car of coal for defendant February 21, 1920, and finished the task the next day. He began to unload another car February 23, 1920, and was injured the following day before he had removed all of the coal. For these services he was paid $20 by check of defendant, being

25 cents a ton. About a week earlier plaintiff had unloaded a car of coal for defendant in the same yards. During a year's time previously he had unloaded three or four cars and received 25 cents a ton. He was entitled to his pay when he unloaded a car, and could then get it if he could find defendant's manager at the time. Plaintiff in each instance was employed to unload a particular car of coal. Between jobs he sometimes stayed around defendant's yards, and when a car of coal came in he asked for the unloading, was told the price, and performed the service, but during some of the intervals he had worked for others. There is competent evidence of these facts, and they are established for the purpose of the appeal by the finding of the district court in favor of defendant.

Was the employment of plaintiff "casual?" The legislature defined that word as used in the workmen's compensation act. In the provision quoted it means "occasional; coming at certain times without regularity, in dinstinction from stated or regular." This statutory definition is plain, and plaintiff's employment by defendant was within its terms. The evidence shows clearly that plaintiff's employment was "occasional; coming at certain times without regularity, in distinction from stated or regular." The trial court so held, and the judgment is

AFFIRMED.

DEAN, J., not sitting.

JULIA KAMMER V. STATE OF NEBRASKA.

FILED NOVEMBER 10, 1920. No. 21648.

1. **Contempt: INFORMATION.** Where an information for contempt for the violation of a remedial judicial order in a civil case shows clearly that the disobedience was "wilful," the failure to use that word in making the charge is not a fatal defect.
2. **———: FAILURE TO ANSWER.** A defendant may be found guilty of contempt for violating a peremptory, remedial order, where, after the filing of a proper information and the giving of due notice to show cause why he should not be punished, he does not

answer, fails to make any such showing, and offers no excuse for his disobedience; and in such a case he is not deprived of his right to a hearing, his conduct being treated as a confession of guilt.

3. ———: COMMITMENT. Where a person charged with contempt for violating a peremptory order entered as a remedial measure for the benefit of a party in a civil suit has been duly convicted after proper notice, his commitment may be ordered in his absence.

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

F. A. Mulfinger, John F. Moriarty and *W. J. Connell,* for plaintiff in error.

Arthur C. Pancoast, contra.

ROSE, J.

Julia Kammer, defendant, was convicted of contempt for violating a peremptory order to produce before the district court the infant child, Ruth Naomi Kammer, the punishment being commitment to the county jail during further disobedience. As plaintiff in error, defendant presents for review the record of her conviction.

When the child was three years old its mother procured a divorce from its father on the ground of extreme cruelty, and the court committed its permanent custody, care and nurture to its mother, but permitted defendant, its paternal grandmother, to keep it two days each month for companionship with its father. Under the court's order defendant took the child for a visit, but, failing to return it to its mother, was peremptorily ordered to produce it before the court. This order was disobeyed after due notice. Upon information of the mother defendant was cited to show cause, if any, why she should not be punished for contempt, but at the appointed time defendant entered no formal plea, filed no answer, and made no sufficient showing. Thereupon she was adjudged to be in contempt, the punishment, as stated, being imprisonment in the county jail until such a time as she should produce the child in court.

It is first argued that the information is insufficient because it fails to charge wilful disobedience. The position seems to be untenable. Defendant was permitted by the decree to keep the child as a monthly visitor for two days at a time. Her right to its custody was granted on the terms prescribed by the court. She was answerable to the court for the performance of the trust confided to her. Her son had abused his child's mother and had thus lost his rights as custodian of his offspring. Defendant represented the judicial arm of the government in permitting temporary companionship between the father and the child and in returning the latter to the lawful custody of its mother. It was the duty of defendant to exercise her temporary authority in a manner commensurate with her responsibility to the mother and to the state, to keep control of the child during its visit, to report immediately any invasion of her right to temporary custody, and to return the ward to its permanent custodian without any further order from the court. Over these matters the court had supervisory power and had jurisdiction to order defendant to bring the child into court. No fine was imposed. The purpose of the imprisonment was to compel obedience. The punishment was remedial. The information states the jurisdictional facts. The making of the court's order and its violation by defendant are charged. It is also charged that, though often requested, defendant refuses to return the child to its mother. While the information does not use the word "wilful," the charge as a whole shows clearly that the disobedience was wilful. This is sufficient in that respect, where the proceeding is remedial to compel obedience to a judicial order. *Nebraska Children's Home Society v. State,* 57 Neb. 765.

The next complaint is that defendant was deprived of her right to a hearing. On this point she seems to be foreclosed by former opinions. *Gandy v. State,* 13 Neb. 445; *Nebraska Children's Home Society v. State,* 57 Neb. 765; *Gandy v. Estate of Bissel,* 5 Neb. (Unof.) 184. In a recent opinion it was held:

"Under the Criminal Code the defendant must be arraigned and be required to plead, and if he stand mute the court is required to enter a plea of not guilty in his behalf. Such is not the rule in a contempt proceeding. In such cases we have held that defendant in contempt, who refuses to plead, may be treated by the court as admitting the charges contained in the information." *Hanika v. State,* 87 Neb. 845.

In the present case the trial court, therefore, in adjudging defendant to be in contempt upon her failure after due notice to answer the citation at the appointed time, or to show sufficient cause why she should not be punished or to give any reasonable excuse for her failure to comply with the peremptory order, followed precedent.

The concluding argument is directed to the proposition that the commitment is void because defendant was not present in court when the sentence of imprisonment was pronounced. In a case like the present, where the purpose of punishment is to compel obedience to a judicial order for the benefit of a party to the suit, after due notice and a failure to answer the citation, there is authority for the rule that defendant's presence is unnecessary at the time the commitment is ordered. *Barclay v. Barclay,* 184 Ill. 471. An annotator on this subject in a recent note in 10 L. R. A. n. s. 1102, where the cases are collected, says:

"An extensive search has failed to reveal any case where a conviction for a civil contempt has been set aside merely because the contemnor was not in the presence of the court when sentence was rendered. In proceedings for civil contempt, if the alleged contemnor has had notice thereof, the judgment against him will be upheld, in spite of his absence from court at the time it was rendered." *Mylius v. McDonald,* 10 L. R. A. n. s. 1098 (*Ex Parte Mylius,* 61 W. Va. 405).

Though absence of defendant at the time the order of commitment is made, after there has been a valid conviction as a remedial measure, is not a ground of reversal, it is the better course, if practicable, to require the presence of defendant, since it leaves open to the last the opportunity

to appeal for mercy, to comply with the order violated, or to purge the contempt. The respect due to the courts of justice is more likely to follow the milder course.

There being no prejudicial error found, the judgment is

AFFIRMED.

DEAN, J., not sitting.

STATE, EX REL. ANDREW R. OLESON, RELATOR, V. WALTER L. MINOR, COUNTY CLERK, RESPONDENT.

FILED NOVEMBER 10, 1920. No. 21764.

1. **Elections:** VACANCY IN SUPREME COURT: MANDAMUS. Mandamus will not lie to compel a ministerial officer to place upon the official nonpartisan judiciary ballot blank spaces, appropriately placed in the proper office division, so that the electors of the state may at the general November election write in names, and vote for persons whose names are so written in, to fill a vacancy in the supreme court, when such vacancy occurred at a period so recently before the primary election that there was not sufficient time to nominate candidates for such office. Rev. St. 1913, secs. 2209, 2211, as amended, Laws 1917, ch. 37, as amended, Laws 1919, chs. 88, 89. *State v. Penrod*, 102 Neb. 734.

2. ———: ———. When a vacancy occurs in the supreme court and two persons are thereafter regularly nominated at the regular election under the nonpartisan judiciary law as candidates for "judge of supreme court," and subsequently another vacancy occurs in such court, but too late to have the names of persons filed for nomination at the primary as candidates for such second vacancy, the two persons so nominated are candidates for the first vacancy only.

3. **Constitutional Law:** VACANCY IN SUPREME COURT. Section 21, art. VI of the Constitution, reads: "In case the office of any judge of the supreme court, or of any district court, shall become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor shall be elected and qualified, and such a successor shall be elected for the unexpired term at the first general election that occurs more than thirty days after the vacancy shall have happened." *Held*, that the foregoing section is not self-executing,

but must be construed together with section 20, art. III of the Constitution, which reads: "All offices created by this Constitution shall become vacant by the death of the incumbent, by removal from the state, resignation, conviction of a felony, impeachment, or becoming of unsound mind. And the legislature shall provide by general law for the filling of such vacancy, when no provision is made for that purpose in this Constitution."

4. Judges: VACANCY IN SUPREME COURT. When a vacancy is created in the supreme court by death, resignation, or otherwise, so recently before the primary election that sufficient time does not remain to nominate candidates to be voted for at the general election to fill the vacancy, the appointee named by the governor to fill the vacancy is entitled to hold the office until a successor is regularly nominated and elected pursuant to the provisions of the nonpartisan judiciary law.

5. Elections: NOMINATION OF JUDGES. The legislature having provided that candidates for the office of judge of the supreme court shall have their petitions for nomination filed at least 30 days prior to the primary election, and having made no provision for the nomination of candidates for that office after the expiration of such 30-day period, the court is without authority to supply that which the legislature did not see fit to supply. Rev. St. 1913, sec. 2209, as amended, Laws 1919, ch. 88.

Original proceeding in mandamus by relator to compel respondent, as county clerk, to provide in the nonpartisan ballot for the election of a judge of the supreme court to fill a vacancy. *Writ denied.*

E. B. Perry and *W. T. Thompson,* for relator.

T. J. Doyle, C. C. Flansburg, C. E. Matson and *H. R. Ankeny, contra.*

DEAN, J.

Relator made application to this court for a writ of mandamus to require respondent to place on the official nonpartisan judicial ballot blank spaces, appropriately placed in the proper office division, so that the electors of the state may, at the general election to be holden November 2, 1920, write in names and vote for persons to fill the vacancy in the supreme court caused by the death, on April 18, 1920, of the late Judge Albert J. Cornish.

In 1919 a vacancy was created by the death of Judge Samuel H. Sedgwick who departed this life December 25, 1919, and for reasons hereinafter appearing the vacancy so created must be noticed in deciding the present case. Both Judge Sedgwick and Judge Cornish were elected to the supreme court in November, 1916, for the six-year term beginning January, 1917, and ending January, 1923. On January 8, 1920, to fill the vacancy caused by Judge Sedgwick's death, until it could be filled by election, Honorable George A. Day was appointed by the governor. Subsequently, but not less than 30 days before the April primary, and pursuant to the provisions of the nonpartisan judiciary law, nominating petitions were filed in behalf of Honorable George A. Day and Honorable William C. Dorsey as candidates for "judge of supreme court." When their petitions were circulated and filed the vacancy caused by the death of Judge Sedgwick was the only vacancy to be filled. Both candidates were nominated pursuant to the respective petitions filed in their behalf under the nonpartisan judiciary law governing nominations, and they are now candidates for such vacancy. Rev. St. 1913, secs. 2209, 2211, as amended, Laws 1917, ch. 37, as amended, Laws 1919, chs. 88, 89. *State v. Penrod,* 102 Neb. 734.

On April 21, 1920, Honorable Leonard A. Flansburg was appointed by the governor to fill the vacancy caused by the death of Judge Cornish. Relator contends that both vacancies, notwithstanding that Judge Cornish died only two days before the April, 1920, primary, should be filled by the electors of the state at the general election in November by writing in the names of persons and voting for them. In support of his argument he cites section 21, art. VI of the Constitution, which he says is self-executing. It provides: "In case the office of any judge of the supreme court, or of any district court, shall become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor shall be

elected and qualified, and such a successor shall be elected for the unexpired term at the first general election that occurs more than thirty days after the vacancy shall have happened."

We do not agree with relator's argument that the foregoing section of the Constitution is self-executing. No provision is made in that section for the nomination or the naming of candidates to be voted for at the general election to the end that the general election feature to which the section refers may be carried into effect. It follows that it must be considered in connection with section 20, art. III of the Constitution, which expressly provides: "All offices created by this Constitution shall become vacant by the death of the incumbent, by removal from the state, resignation, conviction of a felony, impeachment, or becoming of unsound mind. And the legislature shall provide by general law for the filling of such vacancy, when no provision is made for that purpose in this Constitution."

The fact that the lawmaking body has made no provision for the nomination of candidates to be voted for at the general election to supply a vacancy that has occurred too late to make a nomination under the provisions of the nonpartisan judiciary law does not impose the duty upon the court of supplying that which the legislature did not supply to make the constitutional provision effective.

"The right to vote is a political right or privilege to be given or withheld at the exercise of the lawmaking power of the sovereignty. It is not a natural right of the citizen, but a franchise dependent upon law, by which it must be conferred to permit its exercise. It can emanate only from the people, either in their sovereign statement of the organic law or through legislative enactment which they have authorized." 20 C. J. 60, sec. 13.

In considering the facts before us it is to be noted that the legislature did not provide in the amendment to the nonpartisan judiciary law that judicial ballots should be prepared for the general election with blank spaces so

that voters might write in names and vote for persons who were not first nominated at the primary.

It is true that, under the general election law, it is provided that blank spaces may be placed on the ballot following the names of persons who have become candidates in the manner provided by the statute. Rev. St. 1913, sec. 1995. But the act last cited is general in its application and cannot be held to supersede a special act, such as the nonpartisan judiciary act, that relates to an independent subject and is complete in itself. In *State v. Penrod,* 102 Neb. 734, we held: "Mandamus will not lie to compel a county clerk to place on the nonpartisan judiciary ballot the name of a person as a candidate for the office of judge of the county court who is not one of the two candidates who received the highest number of votes at the primary." Substantially the same principle is involved here, and we adhere to the rule there announced as being applicable to the facts before us in the present case. In the *Penrod* case it is also said: "We deem it proper to suggest that relator's argument should be addressed to the legislature rather than to the courts." The following legislature, in 1919, so amended the law as to provide for the nomination of a candidate for county judge when less than two persons filed a petition to have their names placed on the primary election ballot, but it made no provision for the nomination of a candidate for supreme judge under like circumstances. Laws 1919, ch. 89. It has been said often enough that in the division of the powers of government the judiciary shall not usurp the function of the legislature. To do so would be judicial legislation, an insidious judicial offense, and one which may in time, if indulged, imperil the perpetuity of our institutions.

In *State v. Drexel,* 74 Neb. 776, 791, we said: "The right to freely choose candidates for public offices is as valuable as the right to vote for them after they are chosen. Both these rights are safeguarded by the constitutional guaranty of freedom in the exercise of the elective franchise."

In *State v. Junkin,* 85 Neb. 1, 6, we said: "Electors who desire to vote for a particular candidate for judge of the supreme court at the November election should be allowed to take part in nominating him or in whatever preliminary step the law requires as a condition of allowing his name to be printed on the official ballot."

In *State v. Dubuclet,* 28 La. 698, 704, it is held: "In civil governments, rights are enforced by rules and methods having the authority of law, and they can be legally enforced in no other way. The high behests of the organic law are not always self-enforcing; the manner in which its commands are to be obeyed is often left to be provided by the legislative branch of the government. To this branch of the state government the organic law delegates the power to provide rules and principles by which its provisions are to be made practically useful, and especially so when the organic law is silent on the subject. Without such prescribed rules established by law, courts have no guide by which to proceed in their investigation of litigated questions." In the body of the opinion the court said: "If the lawmaker has omitted to enact the law under which proceedings in such cases are to be conducted, it is a *casus omissus* which the courts cannot supply." To the same effect is the text in 12 C. J. 730, sec. 106.

In *State v. Gardner,* 3 S. Dak. 553, it is said: "There is no inherent reserved power in the people to hold an election to fill a vacancy in an elective office. Such election can only be held when and as authorized by law. In section 37, art. V of the Constitution, which provides that 'vacancies in the elective offices provided for in this article (judiciary) shall be filled by appointment until the next general election,' etc., the expression 'next general election' means the next election at which it is provided by law that the officer may be elected whose office has become vacant."

The recent constitutional convention of our state composed of 100 representative citizens selected from the body of the people were in almost continuous session from December 2, 1919, until March 25, 1920. Among other pro-

posed amendments submitted to the people was this: "In case the office of any judge of the supreme court or of any district court shall become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, for the unexpired term, and until a successor shall be elected and qualified." Constitution, as amended, art. V, sec. 21.

Upon submission to the people September 20, the amendment so proposed was adopted by a vote approximating almost five to one of those voting on the question. The amendment so adopted is not, of course, controlling in the present case. It does not become effective until January, 1921, but it is not without significance that the people are committed to the policy that is embodied in the amendment, namely, that the person appointed to fill a vacancy in the office of the supreme court or of any district court shall hold the office for the unexpired term for which the regularly elected incumbent was elected.

The legislature having provided that candidates for the office of judge of the supreme court shall have their petitions filed at least 30 days prior to the primary election, and having made no provision for the nomination of candidates for that office after the expiration of such 30-day period, the court is without authority to supply that which the legislature did not see fit to supply. Rev. St. 1913, sec. 2209, as amended, Laws 1919, ch. 88.

Our construction of section 21, art. VI of the Constitution, seems to be supported by the courts of the states having similar constitutional provisions where a like question has been raised. *State v. Portland Railway, Light & Power Co.*, 56 Or. 32; *Blake v. Board of Commissioners*, 5 Idaho, 163; *Arizona E. R. Co. v. Matthews*, 20 Ariz. 282; *Kelsey v. District Court*, 22 Wyo. 297; *Cauthron v. Murphy*, 61 Tex. Civ. App. 462. From what has been said herein, and in view of the authorities, it seems clear to us that the relief prayed for by relator must be denied.

WRIT DENIED.

DAY and FLANSBURG, JJ., not sitting.

CALVIN RAYMOND BROOKS ET AL., APPELLEES, v. WILLIAM A. BROOKS ET AL., APPELLANTS.

FILED NOVEMBER 10, 1920. No. 21084.

1. **Witnesses:** COMPETENCY. Where a party to an action who, on the face of the record, is adversely interested to the representative of a deceased person, and in the absence of fraud or mistake files a disclaimer of any and all interest in the subject-matter of the action, such person is estopped from asserting any right, interest or claim in or to the subject-matter of such action, and such party is a competent witness as against such representative.
2. **Deeds:** DELIVERY: BURDEN OF PROOF. "A deed takes effect only from the time of delivery. The possession of a deed by the grantee, in the absence of opposing circumstances, is *prima facie* evidence of delivery, and the burden of proof is on him who disputes this presumption." *Roberts v. Swearingen*, 8 Neb. 363.
3. ———: ———: PRESUMPTION. No particular act or form of words is necessary to constitute delivery of a deed. Delivery may be presumed from facts and circumstances which show an intention to deliver.
4. ———: ———: ———. Where a grantor agreed to give certain land to a son, and subsequently executed a deed of conveyance, which was placed in the son's possession, this raises a presumption of delivery by the grantor.
5. **Quieting Title:** LACHES. Laches do not apply to a plaintiff, where infancy during a portion of the time in question and ignorance of his rights account for delay in asserting them, he having exercised due diligence, and where the denial of an equitable claim would work inequity and injustice, and would defeat the original intention of the ancestral grantor.
6. **Limitation of Actions.** The statute of limitations runs only from the time plaintiff became informed, after the exercise of due diligence, that he was being defrauded in his rights. *Held*, evidence sufficient to excuse delay.
7. **Adverse Possession.** In a proper case, it is competent to show that possession of land by a grantor, after the execution and delivery of a deed therefor, is in the nature of a trust for the grantee. The statute of limitations as against the plaintiff, daughter of the grantee, does not begin to run in such case until the vendor asserts an adverse holding by some act brought to the knowledge of such plaintiff.

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

Cook & Cook, for appellants.

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

ALDRICH, J.

This is a suit in equity brought by appellees, Calvin Raymond Brooks, Jennie Marie Floyd, Stella Etna Mainard, and Orlo Bryan Brocks, against the appellants and the appellee Ella Brooks, to quiet title in them to the northeast quarter of section 18, in township 10 north, range 24 west of the sixth P. M., in Dawson county.

Calvin J. Brooks was the grandfather of appellees herein and Ella Brooks was his daughter-in-law. Calvin M. Brooks was the father of appellees and son of Calvin J. Brooks. The record presents the issue: Did the land pass to Calvin M. Brooks by a deed from his father, Calvin J. Brooks? Is the decree sustained by the evidence and the law? The grandfather, Calvin J. Brooks, lived on a farm near North Platte, surrounded by his several sons, each one in possession of a farm their father had given them. Calvin M. Brooks, another son, lived with his family in Pennsylvania. The father wished to have his son who resided in Pennsylvania come to Nebraska, and as inducement offered to give him the land now in litigation. Calvin M. Brooks then moved his family to the home of the father in 1898, and lived there until his death, which occurred shortly after the execution of the deed, when he met with an accident that caused his death. After the death of Calvin M. Brooks, the son, the deed in question was destroyed without the knowledge or consent of plaintiffs and was never recorded. Ella Brooks, widow of Calvin M. Brooks, files an answer admitting that she was the wife and is the widow of Calvin M. Brooks and mother of plaintiffs herein, and further answering disclaims any interest, right or title in said premises.

The trial court entered a decree quieting title in plaintiffs. The issue is largely one of fact. Ella Brooks, mother of plaintiffs, testifies that she lived at Sterling, Colorado, that she is the widow of and was the wife of Calvin M. Brooks, that she is mother of plaintiffs, who lived in Pennsylvania until they came west in 1898. She further testifies that her husband received letters from his father, importuning him to come to Nebraska with his family, and make his home with him; that he, the father, would give him the land in question. On or about the first of January, 1898, Mr. and Mrs. Calvin J. Brooks and Calvin M. Brooks went to Cozad and executed the deed for the northeast quarter in question. On their return, Calvin M. Brooks had the deed in his possession and showed it to his wife, Ella Brooks, who said it was signed by Calvin J. Brooks and his wife. Ella Brooks further testified that her husband placed the deed in a writing-desk in the bedroom of the father and mother; that, after the death of Calvin M. Brooks, the father brought the unrecorded deed out and discussed it with the widow of the deceased son and burned it, saying he wanted to make different arrangements. Ella Brooks also said that, when she returned to Nebraska in 1907, Calvin J. Brooks told her he was going to give the children, plaintiffs herein, the land in question.

It is claimed that Ella Brooks' evidence is incompetent, as she had a direct legal interest in the result of the action, and that she was the representative of a deceased person. This objection is based upon a section of our statute (section 7894, Rev. St. 1913), and presents a law question which we may as well determine now as any other time. When persons are parties to an action, but not to the issue, and disclaim any interest in the subject-matter, they are competent. In the case of *Mester v. Zimmerman,* 7 Ill. App. 156, the supreme court of Illinois said: "A son of the mortgagor who had been made a party defendant to the foreclosure proceedings, but who by his answer disclaimed all interest in the event of the suit, and who had formally renounced the legacy left him by the mortgagor in his will,

is a competent witness upon the question of usury, when called by the other defendants." Also, in the case of *New American Oil & Mining Co. v. Troyer,* 166 Ind. 402, the supreme court of that state said: "Such a pleading of itself operates as an estoppel, and, between the parties and their privies, is an absolute bar to any further assertion of the right renounced." See *Greely v. Thomas,* 56 Pa. St. 35; *Jordan v. Stevens,* 55 Mo. 361; 12 Enc. of Evi. 769, note. See, also, *Denny v. Schwabacher,* 54 Wash. 689; *Fenton v. Miller,* 94 Mich. 204.

It is also true that in a case tried to the court without a jury the admission of improper evidence is simply error without prejudice. *Sharmer v. McIntosh,* 43 Neb. 509.

It has also been held by this court that since the amendment of 1883 (Laws 1883, ch. 83), with reference to the competency of an interested party to testify to a conversation or transaction had with a deceased person, a party adversly interested to the representative of the deceased is not incompetent. *Riddell v. Riddell,* 70 Neb. 472.

But it will be conceded that where persons, who are even parties to the action, but not to the issue, disclaim any interest in the subject-matter, they are competent witnesses. *Martin v. Martin,* 118 Ind. 227. It appears of record in the instant case that Ella Brooks filed a disclaimer denying every interest and claim of every character in and to the subject-matter of this case. Therefore, she has forever barred herself from hereafter setting up any claim of any character antagonistic to the results of this suit. Equity has very well said that in a case of this kind death closes the lips of the one and the law those of the other. It is axiomatic, then, that, if Ella Brooks is forever barred from hereafter setting up any claim of any character in the subject-matter of this suit, the record that she made here in the instant case will be a complete bar and final determination of her each and every claim. Therefore, the testimony of Ella Brooks was material and competent and properly received.

Another legal proposition raised is: Was there a delivery of the deed by the father to the deceased son? It will be admitted as a matter of law that no particular act or form of words or ceremony is necessary to constitute a delivery of a deed. In this case a delivery may be presumed from the grantee's possession of the instrument. That the father and mother went to Cozad for the express purpose of executing and delivering to the son, Calvin M. Brooks, a deed to this land in question is apparent, as Calvin M. Brooks had possession of the deed upon his return. This deed was a conveyance of the title to the identical land he had agreed to give to the son Calvin M. Brooks. Some very respectable text-writers have held that, when "a grantee has possession of the deed, this raises a presumption of its legal delivery to him on its date." Lawson, Presumptive Evidence (2d ed.) 491. This court has also held that "a deed takes effect only from the time of delivery. The possession of a deed by the grantee, in the absence of opposing circumstances, is *prima facie* evidence of delivery, and the burden of proof is on him who disputes this presumption." *Roberts v. Swearingen,* 8 Neb. 363. The destroying of this deed by Calvin J. Brooks and his statement that he wanted to make other arrangements are virtually an admission on his part of the execution and delivery of the deed. The possession of a deed by the grantee, it is held in *Strough v. Wilder,* 119 N. Y. 530, is *prima facie* evidence of delivery, where there is nothing to impeach the *bona fides* of the possession. We think the trial court was right in its finding that the deed to the land here was to Calvin M. Brooks, and that, after the death of Calvin M. Brooks, the father destroyed the deed in furtherance of his purpose to make other arrangements. In view of what we have hereinbefore said, we conclude that the trial court was justified in finding that there was a delivery by the grantor to the grantee of the title to the land in question, and this finding does equity to the plaintiffs, and is in accordance with Nebraska decisions and other cases herein cited

and discussed, and is in furtherance of the declared intent or wish of the father, Calvin J. Brooks, to settle his sons about him. It is fairly well established in this record that the father transferred this land to his son Calvin M. Brooks, that it was in furtherance of an original purpose of his to locate his sons around him, and if this deed is permitted to stand it simply fulfills his original intention, and it is sustained by the decedent laws of the state.

There are other questions here, but we now purpose to take up the question of the statute of limitations as applied to the widow, Ella Brooks, and her daughter, Stella E. Mainard. As to Ella Brooks the statute of limitations cannot run because she is here under oath with a disclaimer of every kind and character in the event of this suit. As to the daughter, Mrs. Mainard, throughout a greater portion of the time after the death of her father she was under age, and the statute of limitations could not apply prior to the time she was 18 years of age. In 16 Cyc. 168, it is said: "Infancy, when a right accrued, may excuse ignorance of such right and consequently a failure to assert it promptly after attaining majority."

In *Kern v. Howell,* 180 Pa. St. 315, 57 Am. St. Rep. 641, it is held that the possession of land by the vendor after the execution and delivery of a deed therefor is a trust for the vendee, and the statute of limitations does not begin to run until the vendor asserts an adverse holding by some unequivocal act brought to the knowledge of the vendee. It is also the law that, if a parent purchases land in the name of his son, the purchase is deemed *prima facie* an advancement. This is the precise situation under the facts in this case. The statute of limitations cannot bar the interest of this plaintiff, Mrs. Mainard, because to invoke such a rule would be doing inequity and would defeat the consequences of the original intent of the deceased, Calvin J. Brooks.

It should be noted that during the greater part of the period in which this plaintiff, Mrs. Mainard, lived in

Nebraska she was a child, and it was only a few years after she became of age that she learned that she had been defrauded out of this land in controversy. The neighbors, after the death of her father, began to talk concerning the gift of the land in controversy to the father, and also of the plaintiffs herein coming into possession and ownership of this land. Their claim and their rights here are simply the natural claims and natural rights resulting from and normally included in the disposition made by Calvin J. Brooks, the grandfather, in his lifetime. From a review of the authorities cited, we conclude that the the statute of limitations does not apply here, and the doctrine of laches has no force and effect, for its application here would work inequity and injustice.

We concur in the finding of the trial court, and hold that this case must be, and it is,

AFFIRMED.

LETTON, J., dissents.

JAMES M. WILEY v. STATE OF NEBRASKA.

FILED NOVEMBER 10, 1920. No. 21350.

Criminal Law: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* sufficient to support the verdict of the jury. *Held*, that no prejudicial error occurred at the trial.

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

Matthew Gering and *C. H. Hendrickson*, for plaintiff in error.

Clarence A. Davis, Attorney General, J. B. Barnes and *Fred S. Berry, contra.*

ALDRICH, J.

The defendant was convicted by a jury of the crime of adultery and was sentenced by the court to serve one year

in the county jail of Wayne county. He brings error proceedings to this court.

The record discloses that defendant was an instructor in the Wayne State Normal. He had been a school teacher nearly all his life. Kate Adams, prosecutrix, was a young unmarried woman about 24 years of age. It appears that she had been attending the Wayne State Normal irregularly for several years and was a school teacher by profession. In December, 1918, she filed a complaint against the defendant charging him with the crime of adultery and alleging that she had sexual intercourse with defendant on or about June 25, 1918, and again on or about September 22, 1918.

It is claimed the court erred in giving instruction No. 1, requested by the state; that the court abused its discretion in the order of proof in this case; that the evidence is insufficient to support the verdict, there being no corroborating evidence; and that the court unduly limited the cross-examination.

The first error complained of is in giving instruction No. 1. There was no error in this for the instruction has the support of section 8767, Rev. St. 1913.

The order of proof in a prosecution for adultery rests wholly within the sound discretion of the trial court, and this court has many times approved that rule. The prosecutrix is amply corroborated by admissions made by defendant and by other surrounding facts and circumstances.

This court has many times upheld and laid down the rule that a verdict of the jury will not be disturbed unless it is clearly wrong.

It is claimed that the trial court unduly restricted the cross-examination. We have examined the record and hold this alleged situation not to be true.

In conclusion, we hold that the defendant had a fair trial, that the jury found him guilty on sufficient evidence, that the court instructed it in accordance with the law of this state as laid down on the crime of adultery.

Judgment

AFFIRMED.

MARTHA OLIVER, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED NOVEMBER 10, 1920. No. 21385.

1. **Evidence:** REVERSAL. Where evidence essential to a recovery by plaintiff is clearly disproved by physical facts and conditions, a verdict in his favor should be reversed.
2. ———: NEGATIVE TESTIMONY. "When there is positive and substantial affirmative testimony by a number of witnesses that a gong was sounded, the fact that there is testimony by one or more witnesses that they did not hear the gong and that it did not ring does not authorize that question to be submitted to the jury, where it is shown that the attention of such witnesses was diverted at the time the gong is said to have rung, and when their position, mental condition, and surroundings were not such as would raise a presumption that they would have heard it if it had sounded. Before their negative testimony is entitled to weight, it must appear that they had such knowledge as would justify them in speaking affirmatively in denial of the fact." *Dodds, v. Omaha & C. B. Street R. Co.*, 104 Neb. 692.
3. **Evidence** examined, and *held* insufficient to support the verdict of the jury.

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

C. A. Magaw, Thomas W. Bockes and *Thomas F. Hamer,* for appellant.

W. D. Oldham and *Ed P. McDermott, contra.*

ALDRICH, J.

This is an action at law in which plaintiff alleges that on May 3, 1916, she was a passenger in an automobile driven by Frederick Shieck on one of the public streets of Shelton, which street crosses the tracks of defendant company at the second crossing east of defendant's depot; that plaintiff was a guest together with her two little children occupying the back seat of the automobile; that the automobile approached the crossing of defendant railroad com-

pany from the south side while going north on the public street over the crossing; that at this crossing there are two main tracks, one known as the east-bound track, the other as the west-bound track; that immediately south of the east-bound track is a switch extending westward from the crossing at which the injury occurred close to a building known as the Alfalfa Mill; that on said switch there was a string of box cars extending from the Alfalfa Mill to about 20 feet from the crossing; that the cars obstructed the vision to the west of the railroad; that the automobile in which plaintiff was riding as a passenger carefully approached the crossing; that plaintiff listened carefully for any signal either by the whistle or ringing of the bell; that, as soon as the automobile in which plaintiff was riding passed the line of freight cars which obstructed the west vision as they approached closely to the east line of defendant's track, they suddenly observed an engine and a tender in the charge of defendant John Sleuter, the engineer; that said engine was within about 40 feet of the crossing on the house track when discovered; that the driver, Frederick Shieck, tried to stop his automobile, but the momentum carried it farther north onto the south rail of defendant's east-bound track; that with the front wheels in that position it was struck by defendant's engine operated and controlled by defendant John Sleuter.

This collision caused an injury to plaintiff's left knee and was a general shock to her nervous system, and there were also other internal injuries alleged to have been caused. The jury returned a verdict of $4,500 in plaintiff's favor, and defendant appeals.

This in the main is a fair statement of the claims made by plaintiff and contains a fair statement of the facts and issues upon which the case was tried.

The first issue tendered in the trial of this case is: Was the defendant company negligent? An answer to this proposition is decisive of this case.

The modern invention and universal use of the automobile created a different situation in the matter of accidents

at railroad crossings than has heretofore prevailed. In former times the collision of a ponderous locomotive with a horse and buggy incurred comparatively little danger of injury to the locomotive or passenger coaches. Today locomotives colliding with a rapidly moving touring car composed of steel and heavy iron are in danger of destruction, and it is extremely hazardous to the lives of passengers in passenger coaches. Hence there must be a different responsibility imposed upon the railroad management and individuals driving automobiles. The traveling public is entitled to the highest degree of care and skill to avoid accidents which happen all too often in these modern days.

Then, the question for decision here is: Was the defendant guilty, and did this accident originate by reason of its negligence? We answer, the switch engine and the cars had the right, as a matter of law, to be on this track where the accident occurred, for the purpose of placing some cars. The distance from the house track to the track in question was about 40 or 45 feet. It is true that the automobile driver coming from the house track had his view somewhat obstructed by freight cars, but before arriving at the track in question he and the occupants had a clear and unobstructed view to the west of where the automobile was being driven. The record shows that the automobile was moving at the rate of five or six miles an hour. Then the car was under absolute control. Pressure upon the foot brake would have stopped it almost instantly. The switch engine on the main track was coming to the east at six or eight or ten miles an hour. The signal was given to stop the engine or to slow down. The engineer saw and acted upon this signal, but was unable to stop before reaching the crossing where the collision took place. That this signal and attempt to stop was acted upon by the engineer is testified to by two brakemen who were riding on the tender of the engine. The automobile continued to come on at the same rate of speed with which it ran over the house track, and in this way the engine and the automobile collided as the car came upon the main track, which was

being used for switching purposes. Now, under this state of facts, was there any negligence on the part of the railroad company?

It is conceded that the plaintiff submitted an array of witnesses to prove that the bell was not rung and the whistle not sounded as the train proceeded to the eastward from the west, but this class of evidence is negative and has but little probative force as compared to the positive testimony of several other witnesses that signals were given. For instance, Mrs. M. O. Tillotson, who resided near the track and the scene of the accident, saw this train as she was hanging out her clothes at the north side of the house, and the smoke from the train and dust stirred up by it was soiling the newly washed clothes, and her attention was particularly drawn to this train that caused the accident. She knew whether the whistle was blowing and the bell ringing, and her evidence is positive as to that fact. She testified that she heard a bell ringing, following which she heard a scraping noise and the scream of a woman. She turned and saw the automobile just after the accident had occurred. Then there is another witness, who also resided near the scene of the accident, who had two nephews boarding with her. She was especially interested in this train because these boys were freight haulers who took the goods as they were unloaded from the train, and as soon as they were unloaded the boys were to come to dinner. She had an especial reason to note whether the bell was rung or the whistle blown, because from these signals she could tell when the freight was unloaded and they would come to dinner, and in this way she could determine whether she would be able to go to the decoration day exercises held at the opera house.

Then there is the testimony of a traveling man, to wit, R. B. Cromwell, who was upon the step of a caboose of a train in sight of the accident and was in a position to know affirmatively whether signals were given or not. From his positive testimony it appears the bell was ringing and the whistle was blown as the engine and tender pro-

ceeded from the west to the east. This witness saw the accident at the crossing. On the proposition as to whether or not there was proper lookout as testified to negatively by the plaintiff's witnesses, several of defendant's witnesses positively say there were two brakemen riding on the tender of the engine as it proceeded backward to the crossing where the accident occurred. These brakemen saw the approaching automobile and before it reached the scene of the accident signaled the engineer to slow down or stop. And immediately before going upon the crossing these two brakemen jumped from the tender and escaped the accident. This in substance is the testimony of fact given by two witnesses who were there and present at the collision. The witnesses of plaintiff do not deny but what they may have been on the engine, but say they did not see any one riding on the tender as lookouts. This kind of evidence is but little assistance in determining whether there was any lookout. There is more of defendant's evidence in the record to support defendant's position, but it is sufficient to say for the purposes here that the evidence establishes the fact that warning was given and proper lookout kept.

A very late case from this court is materially helpful in arriving at a conclusion in the instant case. The first and fourth syllabus points in the case of *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692, are as follows:

"1. The rule that a verdict will not be disturbed when there is evidence tending to support it does not apply where the verdict is opposed to the undisputed physical facts of the case or is in flat contradiction of recognized physical laws, and where the testimony presented, taken as a whole, is capable of no reasonable inference of such a state of facts as would allow the plaintiff to recover."

"4. When there is positive and substantial affirmative testimony by a number of witnesses that a gong was sounded, the fact that there is testimony by one or more witnesses that they did not hear the gong and that it did not ring does not authorize that question to be submitted to the jury, where it is shown that the attention of such witnesses

was diverted at the time the gong is said to have rung, and when their position, mental condition, and surroundings were not such as would raise a presumption that they would have heard it if it had sounded. Before their negative testimony is entitled to weight, it must appear that they had such knowledge as would justify them in speaking affirmatively in denial of the fact."

This case is in point in showing what the law is upon the reception of negative testimony by this court.

In view of all the evidence and especially the positive testimony of several witnesses of defendant that a warning was given and proper lookout kept, we are of the opinion that the evidence was insufficient to support a verdict in favor of plaintiff. The case is therefore reversed and remanded.

REVERSED.

MORRISSEY, C. J., not sitting.

IN RE COMMERCIAL STATE BANK.

COMMERCIAL STATE BANK ET AL., APPELLANTS, V. S. K. WARRICK ET AL., APPELLEES.

FILED NOVEMBER 10, 1920. No. 21411.

1. **Banks and Banking:** REFUSAL OF CHARTER. Where it appears that the state banking board has acted within its jurisdiction, and that all the jurisdictional facts essential to uphold its final order are sustained by some evidence competent for that board to consider, its order will be upheld in error proceeding to the district court and on appeal to this court.

2. ———: CONSTRUCTION OF STATUTE. The banking board was created by statute and is purely in the nature of an administrative body, and in a proceeding before it the statute must be strictly construed.

3. ———: REFUSAL OF CHARTER: REVIEW. Where it is clear that there has been no abuse of discretion, this court will not substitute its judgment for the findings made by the state banking board.

In re Commercial State Bank.

APPEAL from the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Affirmed.*

W. T. Thompson, Burkett, Wilson, Brown & Wilson and *Dexter T. Barrett,* for appellants.

Max V. Beghtol and *Hainer, Craft & Lane, contra.*

ALDRICH, J.

This case originated before the state banking board. On May 6, 1919, the stockholders of appellant bank filed with the banking board an application in the usual form for a charter to do a commercial banking business at Scottsbluff. Several parties filed protests against the issuance of a charter, which protests were in the main directed against the integrity and responsibility of the applicants for a charter. A hearing was had before the banking board and a final order was issued by that body denying the application. The case went to the district court on a petition in error, where the decision of the banking board was affirmed, and to review such judgment this appeal is prosecuted.

There is evidence in the record tending to show that the integrity and responsibility of some of the stockholders of the proposed bank was questionable, and also that the applicants on or about March 22, 1919, made application to the state banking board to obtain a charter for the State Bank of Commerce of Scottsbluff. There are affidavits in the record to the effect that protests were filed against the issuance of a charter; that the promoter and one of the stockholders of the bank in question in the instant case were to receive a commission or bonus in violation of statute; and that some of the parties were guilty of gross misrepresentation by making statements as to advantageous connections with the Merchants National Bank of Omaha. The record shows that none of these stockholders had any such connection with the Omaha bank. Also several witnesses testify unfavorably to the financial ability of several of the applicants.

We are satisfied from a review of the record that there was no abuse by the banking board of its discretionary powers in refusing to grant a charter to these applicants. There is sufficient competent evidence in the record on which to base such a finding.

Where it appears that the state banking board has acted within its jurisdiction, and that all the jurisdictional facts essential to uphold its final order are sustained by some evidence competent for that board to consider, its order will be upheld in error proceedings to the district court and on appeal to this court. This principle is enunciated in the case of *Mathews v. Hedlund,* 82 Neb. 825.

Upon this proposition *Munk v. Frink,* 81 Neb. 631, is in point: "In such a case, when the state board of health has so proceeded and taken testimony, and given the respondent full opportunity to appear in person or by counsel to cross-examine the witnesses against him, and to introduce testimony in his own behalf, and has passed upon the sufficiency of the evidence so taken, the findings of the board as to the sufficiency of the evidence to sustain the charges will be upheld, unless it appears that there is no evidence to sustain such findings."

It seems that the banking board employed one Van Riper, a bank examiner, to make investigations in the matter of this application for a charter. Van Riper made a report to the board, which report is in the bill of exceptions. Counsel for applicants requested permission of the banking board to examine this report, but were refused. In fairness to the applicants we have not considered this report in arriving at a decision in this case, because they had no opportunity to rebut it or to cross-examine Van Riper. The board, as shown by the record, based its findings and final order partly on this bank examiner's report, but it also appears that there is other independent competent evidence upon which to base the findings made.

The banking board was created by statute and is purely in the nature of an administrative body, and in such a

procedure the statute must be strictly followed. Where it is clear that there has been no abuse of discretion, this court will not substitute its judgment for the findings made by that body.

The judgment is

AFFIRMED.

MORRISSEY, C. J., not sitting.

WILLIAM LEMKE, APPELLEE, V. ANNA GUTHMANN, APPELLANT.

FILED NOVEMBER 10, 1920, No. 21593.

Habeas Corpus: CUSTODY OF CHILD. In habeas corpus proceedings to determine the right to possession of a nine-year-old boy as between father and an aunt, where it appears that the aunt took the child when he was a week or two old, and for nine years has cared for and brought him up in her home, which is pleasant and suitable for bringing up children, the father paying for his support, this court will decide the case in accordance with the right of the father and with regard to the best interest of the child. *Held*, that it is for the best interest of the child to leave him where he is in the home of the aunt, and to place the responsibility of the boy's educational and religious training under the direction and control of the father.

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

Matthew Gering, for appellant.

Charles E. Matson, contra.

ALDRICH, J.

This is a proceeding in habeas corpus where plaintiff seeks possession of his nine-year-old son, who has been living with defendant at Plattsmouth. The father, plaintiff herein, visited his son several times a year at the home of Anna Guthmann, defendant.

The father is a well-to-do farmer of Lancaster county, living at Walton. Since the death of his wife he has not

remarried nor employed a housekeeper. Paul, his nine-year-old son, is the subject of this contest. Plaintiff has lived on his farm since the death of his wife with his oldest son, a boy of sixteen years of age. The father sent his two children living near his home to school and to the Lutheran church, while Paul, who was living with defendant, attended Catholic church and parochial school. The plaintiff herein is a Protestant and defendant is of the Catholic faith.

The child in question, Paul Lemke, has been reared in a fine home and pleasant surroundings and tenderly cared for by the defendant, who is so positioned that she can give to this boy the comforts and even luxuries that go with a well-furnished and well-kept home. The issue concerning the final disposition of this boy is whether we should permit him to be deprived of this home and its comforts and removed to unknown surroundings and influences. This kind of a home to a boy who stands at the threshold of manhood's estate is the most important factor in making him the kind of a man that he may be throughout the years of his life. The home influence in moulding character and developing the child mentally and in his disposition and otherwise cannot be overestimated. The foster mother in nurturing and bringing this boy up has certainly performed a mission that many an own mother might envy. She could not have treated her own flesh and blood more tenderly and affectionately than she has this boy, and the father owes her a lasting debt of gratitude for the splendid bringing up she has accorded his child. It should not be overlooked that this foster mother took this tiny babe when he was in the most delicate and feeble condition possible. With loving care and tender hands she nursed him through all these years, and we think saved his life and brought him into the vigorous, healthy condition that he enjoys today.

However, we should not be unmindful of the parental love of the father, which is entitled to recognition and respect, and by the rules of society in this situation the

father, as a matter of law, has the first claim upon this child. The question is, what is for the best interests of this child, and what is the right and just thing to do in the promotion of his education and his general welfare? Unfortunately this splendid woman and the father of this child are diametrically opposite in their religious faith. We are not here to say which one is right. Possibly both may be not so far apart in matter of principle as one would think. But all this is beside the mark. Ordinarily the father has the right to determine what shall be the education and religious instruction given to his child. *Purinton v. Jamrock,* 195 Mass. 187, 18 L. R. A. n. s. 926. And, because of the home which defendant affords this boy, we have decided to leave him where he is, on condition that she permits the father to control his educational and religious training. We do not think it is for the best interest of the child at this particular time to completely break in upon his surroundings. The father never entirely surrendered his rights to this child, and can, if he chooses, exercise parental control over the educational and religious training to be given him. Upon arriving at the age of sixteen years the child may select his own home.

So much, then, of the judgment of the district court as is in conflict with the principles expressed in this opinion is reversed.

Reversed, with the exception that the educational and religious training is to be and remain under plaintiff's direction and control.

JUDGMENT ACCORDINGLY.

MORRISSEY, C. J., not sitting.

WILSON SIX, APPELLEE, v. BRIDGEPORT IRRIGATION DISTRICT, APPELLANT.

FILED NOVEMBER 10, 1920. No. 20698.

1. **Waters: IRRIGATION DISTRICT: REPAIRS: NOTICE.** In an action against an irrigation district for failure to deliver water, by reason of negligently failing to repair a washout in a flume used for diverting water to the ditch, the written notice, required by section 3526, Rev. St. 1913, is filed in time, if filed within 30 days from the time the district has had reasonable opportunity of making repair and negligently fails to do so, or, without reasonable excuse, signifies that the repair will not be made.
2. **Pleading: AMENDMENT OF PETITION: WAIVER.** Where, during the trial, the court permits amendment of the petition to show the giving of such written notice, and the defendant then files an amended answer to the petition as amended, and the trial proceeds upon the theory presented by the amended pleadings, the defendant cannot later complain of the amendment of the petition.
3. **Evidence** examined, and *held* sufficient to support the verdict.

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

Leslie G. Hurd and *F. E. Williams,* for appellant.

C. G. Perry, contra.

FLANSBURG, J.

Action by plaintiff against the Bridgeport Irrigation District to recover damages for alleged negligent failure, on the part of defendant irrigation district, to furnish plaintiff water for the irrigation of his crops under the district ditch. Plaintiff recovered damages, and defendant appeals.

Plaintiff had planted a crop of corn and potatoes, and during the month of July, 1916, received little or no water through his lateral. He claims that during this time defendant negligently failed to deliver the water. Defendant, on the other hand, contends that plaintiff's lateral

allowed so much seepage that it was incapable of carrying water to his land, though the defendant claims his full quota was delivered to him at the intake. Negligent acts, if any, in the matter just mentioned are not, however, now in the case, and consideration thereof was taken from the jury by the court's instructions, for the reason that written notice had not been given to the district by the plaintiff, within 30 days of the happening of the alleged negligent acts, calling attention to the negligent acts complained of and giving notice that plaintiff intended to hold the defendant liable for them.

The statute (Rev. St. 1913, sec. 3526) provides: "Such districts shall not be liable as herein provided, unless the party suffering such damage by reason of such negligence or failure shall, within thirty days after such negligent acts are committed, or such districts shall fail to deliver water, serve a notice in writing on the chairman of the board of directors of such district, setting forth particularly the acts committed or the omissions of duties to be performed on the part of the district, which it is claimed constitute such negligence or omission, and that he expects to hold such district liable for whatever damages may result."

On August 4, 1916, the flume, by which water was diverted from Cedar creek to one of the ditches of defendant company, was partly washed out, so that a 12-foot gap was left between the flume and the bank. This ditch formerly carried water to several landowners, and was the ditch from which the plaintiff's lateral was constructed. There was evidence to show that the ditch officers were contemplating the construction of a concrete flume in the place of this one, but that not until August 9 did they decide that they would not fill in the gap with earth work, nor repair the damaged flume. The result was that the flume was not repaired and no water furnished during the remainder of the season. On September 6, following, plaintiff filed his written notice, in pursuance of the statutory requirement.

The written complaint and the present cause of action are based upon the negligent failure of the defendant to repair the flume and furnish water to the plaintiff. Testimony in behalf of plaintiff showed the condition of his crops at the time immediately after the washout, and what crops he would reasonably be expected to receive if water had thereafter been delivered to him. It was also shown what crops he actually did receive and their value.

The plaintiff's petition, as originally filed, did not allege the giving of the statutory notice. During the trial, however, the court allowed amendment of the petition to show that fact. After the amendment was made, defendant filed an amended answer, and the trial proceeded upon the amended pleadings. The case was tried upon the theory presented by those pleadings, and the defendant is now in no position to complain.

The defendant contends that it appears that the statutory notice was filed more than 30 days from the time of the negligent acts complained of. It is true the flume washed out on August 4. But the defendant had a reasonable time thereafter in which to act and make the necessary repairs, and it was not until August 9 that it decided that the repairs would not be made, and that it would wait until it could conveniently construct a new concrete flume. It cannot be said, under such circumstances, that the alleged negligent act of defendant in failing to repair was, as a matter of law, entirely complete more than 30 days prior to the filing of the notice on September 6. That question the jury has resolved in favor of the plaintiff.

The defendant complains that the evidence is insufficient to support the instruction on the measure of damages. The court instructed that the measure of plaintiff's damage was the value of the crops at the time the water was shut off from his land, with the right to irrigate from that time on to the end of the season, less the value of the crops, without the right to irrigate from that time on. Defendant complains that, though the plaintiff

introduced evidence to show the value of the crops, with the right to irrigate, no questions were put to his witnesses asking what the value of the crops was without the right to irrigate, and considering that the crops should be allowed to mature without irrigation. It is true that such specific questions were not put, but, on the other hand, the then present value of the crops was shown, and also the value of the crops which were later, without any irrigating, actually received from the land. It appears that about 11 bushels an acre of potatoes were actually received, and, from various estimates, that from 100 to 200 bushels would reasonably have been expected, had the crop been irrigated. The corn, without irrigating, produced only a crop of fodder, and its value was proved.

The defendant complains that the evidence shows plaintiff's ditch was insufficient to carry the water from the ditch to his land, by reason of allowing too much seepage. However, that was a question of fact properly presented to the jury under the court's instructions, and upon which the evidence is sufficient to support a finding that the plaintiff could have taken and received the water, had the opportunity been afforded him.

We are of opinion that the verdict is supported by the evidence, and we find no error on the part of the trial court in any of the matters complained of by defendant.

AFFIRMED.

EDA MAY LARSON, APPELLEE, V. DAVID HAFER, APPELLANT.

FILED NOVEMBER 10, 1920. No. 21116.

1. **Witnesses: CROSS-EXAMINATION.** When testimony is given by a witness on direct examination, from which an inference of fact arises favorable to the party producing him, anything within the knowledge of the witness tending to rebut that inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right.

2. **Appeal:** DENIAL OF CROSS-EXAMINATION. A denial of that right of cross-examination, when the ruling is prejudicial, is sufficient ground for reversal.

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

Charles L. Whitney and *J. L. Cleary,* for appellant.

Hainer, Craft & Edgerton and *C. C. Fraizer, contra.*

FLANSBURG, J.

Action for damages for personal injuries sustained by plaintiff from an assault and battery, committed upon her by the defendant. Plaintiff recovered judgment, and defendant appeals.

Plaintiff's testimony shows that she was a married woman, and was assaulted with a hammer and severely beaten by the defendant; that as a result she was bruised and injured in the chest, back, and arms, and, being pregnant at the time, was caused to have a miscarriage.

Aside from the objection as to the sufficiency of the evidence, and that the amount of the jury's verdict is excessive, upon which questions we would, in this case, follow the judgment of the lower court, the only error complained of is the denial of the right of the defendant to cross-examine one of plaintiff's witnesses in certain particulars.

Plaintiff testified that about two weeks before the assault she had a menstrual period; that immediately after the assault she began flowing; that after three or four days she passed a well-formed fœtus, and that for several days afterward she continued to lose blood. She testified that she had suffered a miscarriage once before, and, through that experience, was able to diagnose her condition and trouble at the time in question.

After the assault, and during the time she was confined to her bed Doctor Steenberg acted as her attending physician, and called upon her on six or eight different occasions. He was called as a witness for plaintiff, and described her bruises, and testified that he had examined her, and that she was flowing blood, but gave no further testi-

mony, except, upon cross-examination, he stated that he had prescribed medicine to stop the flow.

The defendant on cross-examination sought to bring out what this doctor knew as to whether or not a miscarriage had actually taken place, but was not allowed to proceed along that line. An objection to defendant's question, which called upon the doctor to state whether he had made an examination to determine whether or not there had been a miscarriage, was sustained.

A very substantial element of damages in this case was based upon the claim that defendant had so injured plaintiff as to cause a miscarriage. In the light of the testimony plaintiff herself had given, the testimony elicited from Doctor Steenberg, that plaintiff was suffering from an unnatural flow of blood at a time other than her menstrual period, could not have been offered, nor could the effect be other than to produce upon the minds of the jury an impression, and give rise to a reasonable inference, that a miscarriage might probably have been suffered by her.

A party cannot be allowed to deduce only such facts from a witness as will create an inference favorable to him, and then prevent a cross-examination and full disclosure as to the knowledge of such witness, when such disclosure would tend to rebut the inference created. *State v. Harvey,* 130 Ia. 394; *Gjurich v. Fieg,* 164 Cal. 429; *Meyer v. United States,* 220 Fed. 822; *Kramer v. State,* 16 Ala. App. 456; 40 Cyc. 2493. Though cross-examination is to be restricted to the subject-matter of the examination in chief, that does not mean that it must be confined to the questions asked upon direct examination. *Zelenka v. Union Stock Yards Co.,* 82 Neb. 511. The testimony of Doctor Steenberg bore upon the question of miscarriage. It was offered for the purpose of adding to the testimony, theretofore given, that a miscarriage had taken place. Surely the plaintiff cannot be allowed to benefit by so much of the testimony of this witness, when the value of that testimony might be weakened or destroyed

by a full disclosure of the doctor's knowledge on the subject. The rule is stated in Jones on Evidence (2d ed.) sec. 821: "Although the court may exercise a reasonable discretion in regulating or limiting the cross-examination yet it is clearly *error to exclude cross-examination upon subjects included in the examination in chief,* where such ruling is prejudicial. So far as such cross-examination of a witness relates either to facts in issue or facts relevant to the issue, it may be pursued by counsel as a matter of right."

For some reason, the testimony of the doctor was limited in his direct examination. It was not incumbent upon the defendant, when denied the right of cross-examination, to make an offer to prove by this witness what he believed the witness would testify. *Powell v. Morrill,* 83 Neb. 119. The full knowledge of the witness, as to the matter inquired about, we think was clearly competent and proper to bring out upon cross-examination by the defendant. The matter inquired about was of vital importance upon the question of damages, and the denial to the defendant of the right to cross-examine, we believe, entitled him to a new trial. See cases cited in note, 25 L. R. A. n. s. 683 (*Prout v. Bernards Land & Sand Co.,* 77 N. J. Law, 719).

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

REVERSED.

DAY, J., not sitting.

EDWARD N. STANLEY, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

FILED NOVEMBER 10, 1920. No. 21122.

Infants: DEFENDANT. A child may be said to be "dependent" or "neglected," under section 1244, Rev. St. 1913, and the rights of the parent to the custody of the child must yield, when it is

shown that the parent is of immoral character and is rearing the child in a place and among surroundings which are not free from immoral influence.

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

Murphy & Winters, for appellant.

Clarence A. Davis, Attorney General, and *J. B. Barnes, contra.*

FLANSBURG, J.

Action in the juvenile court. The trial court found Lorene Stanley was a "dependent" and "neglected" child under section 1244, Rev. St. 1913, and ordered her paroled to a suitable home. Such a home was found, and the child placed there. Edward N. Stanley, parent of the child, appeals.

Under the statute, a child, who "has not proper parental care or guardianship, or is growing up under such circumstances as would tend to cause such child to lead a vicious or immoral life; * * * or who is found living * * * with any vicious or disreputable persons, or whose home, by reason of neglect, cruelty or depravity on the part of its parents, guardian or other person in whose care it may be, is an unfit place for such a child," is declared to be a "dependent" or "neglected" child.

The sole question presented is whether or not the evidence is sufficient to show Lorene Stanley, eight years of age, was a dependent or neglected child, within the meaning of the law. It appears that her father for many years lived with a woman in Kansas; that they were never married, though children were born to them. Lorene Stanley was in their custody until she was taken to Omaha by her father. When brought to Omaha she was in a dirty and ragged condition and suffering from extreme neglect. Appellant, in Omaha, took up his abode in a tent with a woman of negro blood.

Within one month after this woman obtained a divorce from her negro husband, she and appellant were married

at Council Bluffs. At the commencement of this suit they were living in Omaha. Appellant, who is white, and his colored wife, her colored boy, and Lorene Stanley all had sleeping quarters in the same room. We do not hesitate to say that these surroundings, in view of the immoral character of the parties, was an unfit place and manner to rear a child, and that appellant was an unfit person.

It is needless to enter into a detailed discussion of the testimony. There is ample in the record to justify the court in the finding made. The welfare of the child is the matter of chief importance. A proper home and surroundings are now provided, and the order of the court is, beyond question, for the best interests of the child.

AFFIRMED.

DAY, J., not sitting.

JAMIN B. ROOT, APPELLEE, v. DOUGLAS COUNTY ET AL., APPELLANTS.

FILED NOVEMBER 10, 1920. No. 21553.

1. **Highways: PAVING: CONTRACT: VALIDITY.** Where, in letting a county paving contract to the lowest and best bidder, under section 2956, Rev. St. 1913, the specifications and proposal for bids call upon each bidder to specify the time when he will agree to commence and when he will complete the work, if awarded the contract, and provide that liquidated damages shall be charged against the contractor for each day's delay in performance beyond the contract time, the time of performance is an essential part of the bid, and, where omitted, the bid is incomplete and not responsive to the proposal. In such event the bid cannot be filled out, nor the time for performance inserted, after it is received and opened by the county board, and an award of the contract to such bidder is invalid.
2. **Appeal: AMENDMENT OF PLEADING.** Under section 7712, Rev. St. 1913, power is given the court to conform the pleadings to the proof, when the amendment does not substantially change the claim or defense, and a judgment based upon such proof will not be reversed for the reason that such amendment has not actually been made.

Root v. Douglas County.

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

Crofoot, Fraser, Connolly & Stryker, Carl E. Herring and *A. V. Shotwell,* for appellants.

John P. Breen, contra.

FLANSBURG, J.

Action by plaintiff, a taxpayer, to enjoin the performance of a contract, entered into between Douglas county, defendant, and the Allied Contractors, Incorporated, defendant, for the paving of certain county roads. The trial court allowed the injunction, declared the contract void, and found as a ground, among others, for such decision that the specifications and notice to bidders thereon did not fix a time within which the paving was required to be laid, but, on the other hand, called upon the bidder to fix his own time, and that the defendant Allied Contractors, Incorporated, did not in its bid respond to that request, nor fix a time within which it would perform, if awarded the contract.

The statute governing the matter (Rev. St. 1913, sec. 2956) provides: "All contracts for the erection or reparation on bridges, * * * for the building of * * * improvements on roads; * * * the cost and expense of which shall exceed five hundred dollars, shall be let by the county board to the lowest and best bidder."

The specifications and blanks furnished to the bidders in this case called upon the bidder to specify in his bid, not only the price at which he would agree to perform the contract, but also the time when he would commence work and the time when he would agree to complete it. The specifications further provided that any contract entered into would make time for performance material, and would have embodied in it an agreement for the payment by the contractor of liquidated damages for each day's delay beyond the contract time.

Time within which a contract of this kind is required to be performed has a direct bearing and influence upon

the cost of performance to the contractor, and hence upon the amount of his bid, and prices will vary according to the length of time allowed for performance, as well as according to what lapse of time may be allowed before the work must be commenced. Where the specifications do not fix the time for performance, but require the bidders to designate a time, they will naturally endeavor to specify such a time, both as to date to commence and as to period of duration of performance, which best suits each of them, and which will allow each to do the work for the least money, and, therefore, give an opportunity to offer what would be the lowest possible bid.

It is readily seen that time, as well as price, becomes a very material element of the bid, and that both must be considered by the board in arriving at a determination as to who is the lowest and best bidder. The state engineer testified to that conclusion, and the defendants in their brief admit such to be the fact. They say: "Can it be possibly contended that in considering who is the lowest and best bidder the element of time is not as essential a matter to be considered as the element of costs?"

It has been held in some jurisdictions that time is not only an essential question for consideration by the public officials in passing upon bids, but the courts have gone so far as to say that the element of time, even in the absence of statutory requirement, must be definitely fixed and stated in the specifications, so that each and every bidder may, not only be given equal opportunity of bidding, but be required to bid, on the basis of the same identical period of time. These courts hold that when time is not so specified the proposal for bids is incomplete, and a uniform and common plan of bidding is not provided, since, if each bidder determines the matter of time for himself, no two bids will be on the same basis, and this, it is said, goes to the very essence of competition. *Johnson v. Atlantic City,* 85 N. J. Law, 145; *MacKinnon* v. *Newark,* 100 Atl. (N. J.) 694; *Armitage v. Newark,* 86 N. J. Law, 5; *Kneeland v. Furlong,* 20 Wis. 460; 3 McQuillin, Municipal Corporations, sec. 1207.

In the case here under consideration the contention of the state engineer, who acts in conjunction with the county in these paving undertakings, as his attitude is determined from his testimony, is that, where time for performance of the work is definitely limited or specified in the proposal for bids, then many bidders, who may be so situated that they cannot do the work at the particular time described, though they might be able at some other time, are excluded and prevented from offering bids, and the field of competition is thereby narrowed. On the other hand, it is asserted that, when all bidders are allowed to specify their own time, each is given a chance to make the lowest bid possible to him, and the time specified in their bids can be considered by the board, in conjunction with and as a part of the item of costs, in determining who is the lowest and best bidder. It becomes apparent, whether this court should adopt the rule that time must be specified in the proposal for bids, or whether that matter may be left to the bidder, that, in any event, where time for performance is material, and where it directly bears upon the question of cost and the question, therefore, of whose bid is the lowest and best, as it does in this case, the matter of time must at least be covered and finally determined by the bid when the bid is filed.

The bid of the defendant in this case, as the finding of the trial court, based upon the record, shows, did not, when it was filed and opened, specify any time when or within which defendant agreed to perform the work. That element, as we have just pointed out, was an essential part of the bid. The bid was not responsive to the proposal made by the board, nor was it complete without the time element being covered. Though the state engineer himself filled in a date in this bid, to the effect that the work should be completed by December 1, 1920, such material addition and alteration of the bid, after the sealed bid had been filed and opened with the other bids, in pursuance of the plan prescribed for the competition, cannot be authorized, and the contract based thereon is in-

valid. *Hornung v. Town of West New York,* 82 N. J. Law, 266; *City of Chicago v. Mohr,* 216 Ill. 320; *McQuiddy v. Brannock,* 70 Mo. App. 535.

Defendants contend that the finding of the trial court, as to the bid of the Allied Contractors not specifying the time within which the work would be performed, is not within the issues presented by the pleadings. The petition alleged, only, that the bid was not responsive to the printed specifications and proposal furnished by the board, for the reason that the Allied Contractors, Incorporated, had fixed no definite time in which it would complete the work, but had filled in the blanks so as to read that it would "use due diligence" to complete the work by a certain time.

On the trial it developed that, when the bid was received, it was entirely blank as to matter of time, that the state engineer filled in the date, December 1, after the bid was opened, and that after he had done so the Allied Contractors, Incorporated, qualified what he had done by interlining in the bid the words to the effect that defendant would "use due diligence" to complete the work by the date mentioned. The tenor of the claim in the petition was that the bid was not responsive, by reason of the use of the qualifying words that the defendant would "use due diligence" only to complete the work by the date mentioned; the proof, however, received without objection, discloses that the bid was not responsive, since no time whatsoever was specified in the bid presented.

No objection has been raised by the defendants that the court's finding was not supported by the pleadings, nor that the evidence was not within the issues, until the reply brief was filed in this case. It does not appear that an amendment of the pleadings to conform to the proof, under section 7712, Rev. St. 1913, would substantially have changed the plaintiff's claim in this case. Such an amendment would undoubtedly have been allowed by the trial court, had request been made, and the defendants could not have been prejudiced thereby. The issues pre-

sented here are, apparently, the same as those presented in the trial below, and, since this matter was treated as within the issues there, it should be so considered now. See note, Ann. Cas. 1913E, 1315 (*Peterson v. Lincoln County*, 92 Neb. 167); L. R. A. 1916D, 843 (*Ellinghouse v. Ajax Live Stock Co.*, 51 Mont. 275).

It is unnecessary to pass upon other objections raised by plaintiff, since the judgment must, for the reasons given, be

AFFIRMED.

DAY, J., not sitting.

FRANCES J. ROBISON, APPELLEE, V. TROY LAUNDRY, APPELLANT.

FILED NOVEMBER 10, 1920, No. 21103.

1. **Negligence**: PROXIMATE CAUSE: COMPARATIVE NEGLIGENCE. Evidence examined, and *held*, not to show such contributory negligence on the plaintiff's part, in driving at excessive speed and without warning signals, as to establish as a matter of law that her negligence was the proximate cause of the accident or that it was more than slight in comparison with the negligence of the defendant, within the meaning of the comparative negligence statute (Rev. St. 1913, sec. 7892).
2. ———: ———: ———: QUESTION FOR JURY. Where, in an action for damages arising from a collision between vehicles at a street intersection, there is evidence that the defendant's servant was driving toward the intersection at reckless speed, keeping no lookout, but preoccupied in looking back toward another vehicle with which he was racing, the question of the comparative negligence of the parties and the proximate cause of the accident is for the jury, although there is evidence from which the jury would be justified in believing that the plaintiff was also negligent in driving at excessive speed and failing to give warning signals.
3. **Trial**: VIEW OF PREMISES: DISCRETION OF COURT. The granting or refusal of an order directing a view by the jury of the locality of the accident rests within the sound discretion of the trial court, and the fact that one party consents to the request of the other

that such view be directed will not control the discretion of the court in that regard.

4. ———: ———: ———. The fact that the trial court in the first instance directs a view of the premises will not deprive it of power to rescind the order, if, within its sound discretion, the granting of a view finally seems inadvisable.

5. ———: ———: ———. It is not abuse of discretion to deny a view of the premises if it does not appear that such view is necessary to a clear understanding by the jury of the physical conditions, or where it is not made affirmatively to appear by the party requesting the view that no material change has occurred in the conditions of the locality in question.

6. ———: REFUSAL OF SPECIFIC INSTRUCTION. It is not error for the trial court to omit to give a specific instruction bearing upon a certain ground of contributory negligence set up as a defense in the answer, unless the defendant tenders a request for an instruction upon the omitted issue, which fairly reflects and calls attention to it and is a substantially correct statement of the law pertaining thereto.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

Ernest A. Conaway, for appellant.

F. P. Marconnit, contra.

DORSEY, C.

Frances J. Robison recovered a verdict and judgment against the defendant, the Troy Laundry Company, for damages for personal injuries sustained in a collision between an automobile driven by her and a motor delivery truck belonging to the defendant and operated by one of its employees.

The accident occurred at the intersection in the city of Omaha where Thirty-third street, running north and south, crosses Poppleton avenue, running east and west. Poppleton avenue does not continue directly west from its intersection with Thirty-third street, but jogs to the north. The intersection in question is therefore closed to the west by the west curb line of Thirty-third street. A space about 30 feet square, from curb to curb, is comprised in the inter-

section, and this space is open to the east on Poppleton avenue and to the north and south on Thirty-third street. Just before the accident the defendant's delivery truck was approaching the intersection from the north, and the plaintiff was driving her father's automobile, with a party of friends, on Poppleton avenue toward the intersection from the east.

The plaintiff alleged and testified that as she entered the east side of the intersection she noticed the defendant's truck approaching from the north at so excessive a speed and so obviously out of control that she concluded there was no way to avoid a collision, except to go directly west across the intersection, ahead of the truck, and get out of its way by forcing her car upon the park space beyond the curb line on the west side of Thirty-third street. She accordingly applied the power and shot across the intersection to the southwest, but was unable to get her car off the street and beyond the curb before it was struck by the defendant's truck.

The defendant, on the contrary, in its pleading and evidence denied any unlawful speed or lack of control on the part of its truck driver, and contended that the accident was caused by the undue speed at which the plaintiff was driving when she entered the intersection, and by the fact that she gave no signal or warning, although her view to the north on Thirty-third street was obscured by a high bank at the northeast corner of the intersection. The defendant not only asked to be dismissed from any liability to the plaintiff, but counterclaimed for damages to the truck.

The controversy at the trial was waged, for the most part, upon conflicting evidence as to the speed at which the respective motor vehicles were being driven, and the record showed a decided variance in the testimony upon that point. The defendant argues, upon this appeal, that the evidence is insufficient to sustain the verdict. We are convinced, however, that there was abundant testimony which, if the jury saw fit to credit it, would justify a finding

that the defendant's truck was being driven toward the intersection with the utmost recklessness. It was shown by several witnesses that the driver of the truck was apparently racing, and, as he neared the intersection, was looking backward toward the rival car, instead of moderating his speed and looking in the direction of Poppleton avenue, as was his duty.

The plaintiff, it is true, admits that she was driving toward the intersection at a speed of 12 miles an hour, and there was testimony from which the jury might have gathered that the speed of her car, going toward Thirty-third street, was as much as 25 miles an hour. The jury might have found that she was not cautious enough in reducing her speed upon entering the intersection, and that her sudden resolution to run upon the curb ahead of the defendant's car was unwise and imprudent. If, on the other hand, we consider the evidence in the light most favorable to the plaintiff, as is the rule when it is a question of setting aside a verdict, we feel that this court would not be warranted in saying, as a matter of law, that reasonable men could have reached no other conclusion from the evidence than that the plaintiff's negligence alone was the proximate cause of the accident, or that her negligence, under the circumstances, was more than slight in comparison with the negligence of the truck driver, within the meaning of section 7892, Rev. St. 1913.

It was peculiarly a question for the jury, under the comparative negligence statute, to determine whether, notwithstanding any negligence on plaintiff's part in driving at excessive speed or failing to signal, responsibility for the collision must nevertheless be ascribed to the failure of the driver of defendant's truck to observe any reasonable precaution; to determine whether he was, or was not, racing toward the intersection without keeping a proper lookout in the direction of Poppleton avenue, and, if he was, then to determine whether his recklessness created such an emergency as would reasonably justify the plaintiff in adopting the course that she took in the effort to avoid a collision.

In the progress of the trial the defendant requested an order directing the jury to view the locality of the accident. No action was taken upon this request at the time, but after the evidence was all in the court referred to the request, and counsel for defendant suggested that he and opposing counsel should go with the bailiff and the jury; to which plaintiff's counsel responded: "I should think that would be a bad thing, for counsel. Let the bailiff take the jury out. Conaway would not agree with me when we got out there." The court then said: "There is really no necessity for attorneys to go along; the bailiff can take them out." Plaintiff's counsel then made formal objection to the jury viewing the premises on the ground that the conditions at the intersection had changed, and a colloquy ensued between the court and counsel, in which it was asserted on the one side and denied on the other that material changes had been made in cutting off the street corners since the accident. The court finally said: "I don't know; if there have been some changes made, then I guess we won't do it. Go ahead with the argument."

The defendant contends that the record shows, in effect, a stipulation by the plaintiff to have the view and an order of the court directing it, and that it was error and an abuse of discretion for the court later to change its attitude and refuse the view. The fact that counsel for plaintiff at first consented that the jury view the locality would not, in our opinion, be binding upon the court. The granting or refusal of the request for a view was a matter resting within the sound discretion of the trial court, which could not be controlled by the stipulation of the parties. Nor do we think that the trial judge, by granting the request in the first instance, as counsel contends he did, deprived himself of the power to rescind the order, if, upon more mature reflection, a view by the jury seemed inadvisable. It was an order which, like other rulings in the course of the trial, the court had inherent power to change, being responsible for error or abuse of discretion.

The defendant complains that the refusal to direct a view was an abuse of discretion. It appears, however, that there was no material dispute in the evidence as to the physical surroundings and conditions at the intersection, and it does not appear that the jury would have been materially assisted by a view. The facts essential to a clear understanding or mental picture of the locality, the width and direction of the streets, and the existence of a high bank obscuring the plaintiff's view were uncontroverted. The issues before the jury arose, not from a conflict in the evidence relating to the physical facts, but from the contradictory testimony as to the conduct of the plaintiff and of the driver of defendant's truck. It was, furthermore, incumbent upon the defendant, as the party demanding a view, to make clear to the court that no material change had taken place at the intersection since the accident. No such evidence was offered, and the court was left in doubt upon that proposition. There was no abuse of discretion in refusing to direct a view. *Whelan v. City of Plattsmouth,* 87 Neb. 824; *Beck v. Staats,* 80 Neb. 482.

Counsel for the defendant had prepared certain instructions upon the supposition that the court would direct a view, and in these the jury were told that they should find for the defendant in case they found certain facts "from the evidence and your view of the premises."

These instructions were tendered in that form because, as counsel claims, he was so surprised and disconcerted by the court's refusal to direct a view, after having apparently been inclined to grant it, that he omitted to strike out the words referring to the view. The instructions, in question, which the court refused to give, were to the effect that, if the jury believed the view of the "plaintiff's agent and servant" was so obstructed by the high bank at the corner of the intersection that she could not see north on Thirty-third street, her omission to give any signal was a violation of the ordinances of the city of Omaha; and, if the jury believed her failure to signal was the proximate cause of the accident, they should find for the defendant.

The instructions in question were inaccurate in the form tendered, for two reasons, aside from the proposition that they were predicated upon a view by the jury which had not taken place: They assumed to instruct the jury as to the ordinances of the city, which were not in evidence, and they referred to the view of the "plaintiff's agent and servant" north on Thirty-third street, when it was the view of the plaintiff herself which was in question, as she was driving the car.

It is contended, however, that it was the court's duty, without any specific request, to give an instruction to the effect that the jury should find for the defendant in case they found that the proximate cause of the accident was the plaintiff's failure to give warning signals on approaching the intersection. The existence of the high bank obstructing her view and her consequent duty to give signals were alleged in the answer; the contributory negligence charged against the plaintiff consisted, not only of excessive speed, but of failure to signal, yet the jury were not told to return a verdict for the defendant if they found that the plaintiff's neglect to signal was the proximate cause of the collision. Excessive speed was the only ground of contributory negligence which the jury were informed might be a good defense.

It is the rule that, if the court omits to charge the jury upon some issue material to a cause of action or defense, its error cannot be availed of unless a request be tendered for a proper instruction upon the omitted issue. *Sanford v. Craig*, 52 Neb. 483. This rule has been, to some extent, qualified by the proposition that, where a request is made for an instruction which, in the form tendered, is not a clear and satisfactory statement of the particular phase of the case which it is intended to cover, but which fairly reflects and calls attention to it, and is not an erroneous statement of the law, it becomes the duty of the court to give either the instruction requested or another embodying the same principle. *Colgrove v. Pickett*, 75 Neb. 440; *Western Mattress Co. v. Ostergaard*, 71 Neb. 575.

In their references to the ordinances of the city and in making the question of the plaintiff's alleged negligence in failing to signal dependent upon her observance or nonobservance of those ordinances, the instructions tendered were, in our opinion, too inaccurate, not only in form, but in substance, to challenge the court's attention to the correct rule with regard to the effect of the plaintiff's neglect to signal as a defense, or to require the court to give an instruction of its own on that subject.

For the reasons stated, we recommend that the judgment of the court below be

AFFIRMED.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

HENRY DINSLAGE, ADMINISTRATOR, APPELLEE, V. FRANK STRATMAN, APPELLANT.

FILED NOVEMBER 10, 1920. No. 20704.

1. Gifts: DELIVERY. Where the proof is clear of an intention to make an absolute gift *inter vivos* of a chose in action, arising from a debt not evidenced by a promissory note or other document, an unqualified direction by the donor to the debtor to pay the debt to the donee, instead of to the creditor, is a sufficient delivery of the gift, it being the only delivery of which the chose is susceptible.
2. ———: VALIDITY. The mere fact that actual enjoyment of the gift by the donee is, by the declaration of the gift, postponed until the death of the donor, does not render the gift either conditional or testamentary, or in any way invalid.
3. ———: ———. In such a case, the stipulation that actual enjoyment of the gift is to be deferred until the donor's death only marks the time when enjoyment begins, and is not a condition, since the donor's death is inevitable.

4. **Evidence** examined, and *held* to require a reversal of the judgment of the district court.

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

F. D. Hunker and *Brome & Ramsey,* for appellant.

H. M. Nicholson and *W. J. Donahue, contra.*

CAIN, C.

This action was brought by Henry Dinslage, as administrator of the estate of Thresa Stratman, to recover the sum of $1,400 from the defendant, Frank Stratman, for money loaned him by Thresa Stratman in her lifetime. The defense interposed was that, while the defendant had been indebted to Thresa Stratman in the amount named, he had paid it, by her direction, to her granddaughter Tracey Dinslage. At the conclusion of the evidence, the trial court directed the jury to render a verdict for the plaintiff in the sum of $1,035.75. Defendant's motion for a new trial being overruled, he appeals.

This is the second hearing of this case in this court. Upon the former hearing, the judgment of the district court was reversed and the action dismissed, a memorandum opinion being written by Mr. Commissioner Dorsey. A rehearing was granted, Commissioner Dorsey himself suggesting it, out of abundant caution and on account of the comparative novelty of the questions involved in this jurisdiction. Appellee filed a brief on the rehearing, and the cause has been reargued and resubmitted.

The facts are not in dispute, and are as follows: Thresa Stratman lived on a farm in Cuming county with her son, Frank Stratman, the defendant, from 1909 until her death on October 6, 1915. She had, living in the same neighborhood, another son by a former marriage, John Dinslage, the father of Tracey Dinslage, who was eight years of age at the time of her grandmother's death. She owned a mortgage of $5,000 and was entitled to the $1,400 due her from the defendant, making a total of $6,400. The indebted-

ness of the defendant to his mother was not evidenced by a promissory note or other writing. The defendant had borrowed the money from his mother at various times until the loans aggregated $1,400, and he paid the interest to his mother.

When Tracey Dinslage was three years old she went to live with her grandmother at the home of the defendant, Frank Stratman. The evidence clearly shows without dispute that, shortly after Tracey went to live with her grandmother, her father wanted her to come home, and often said so, but the grandmother desired the little girl to remain with her, and said to John Dinslage, the father, that she wanted Tracey to stay with her until Tracey reached 18 years of age or the grandmother died and she would give her $1,000. The fact of this desire of the grandmother to have Tracey stay with her, and the certainty that, if she did stay until she reached 18 years of age or the grandmother died, she was to have $1,000, is substantiated by the testimony of several witnesses as to conversations to that effect between them and Thresa Stratman. In June, 1915, Thresa Stratman told the defendant, in the presence of John Dinslage, that he should pay $1,000 of the sum he owed her to Tracey. John Dinslage testified to this conversation as follows: "She says that Frank Stratman should pay the little girl $1,000; that she (Thresa) would pay her $1,000 if she be of age, and, if she died before that, Frank Stratman should pay her $1,000 at her death." And on cross-examination he testified: "Well, she told me if that girl reached that age and stay with her she would give her a $1,000, and if she died that Frank Stratman should pay the girl the money." The $400 was to be paid to the priest of Aloys for saying masses for the repose of the souls of Thresa Stratman and her husband, who had died some years before. Thus it will be seen that in June, 1915, Thresa Stratman did everything in her power to make final disposition of the chose in action arising from her loans of money to her son, the defendant. She told John Dinslage that his daughter, Tracey, was to get the $1,000, and she

directed the defendant to pay that sum to Tracey, at the time of her death, and said that, if she was alive when Tracey reached the age of 18 years, she herself would then pay it to Tracey. This intent of the grandmother was communicated to several persons extending over a period of several years, and as late as two months before her death. The record compels the conviction that she regarded this arrangement as settled, and that she intended to set apart, and did set apart, the money which Frank Stratman owed her as a fund to carry out the arrangement. This conclusion is corroborated by the fact that on July 9, 1915, when C. W. Ackerman, of West Point, assisted her in disposing of the $5,000 mortgage, she said to him that she "didn't have any more. She had given it all away." The grandmother died on October 6, 1915, and on February 17, 1916, the defendant, Frank Stratman, paid the $1,000 to John Dinslage "for Tracy," and had paid the priest of Aloys about $150 of the $400 at the time of the trial of this case. By some arrangement, not clear in the record, the gift of $400 was allowed to stand, and so is eliminated from the case, except as to such significance as it might have as proof.

The defendant contends that the $1,000 was an executed gift *inter vivos,* and therefore irrevocable; that transfer of the title to the money to the defendant in trust for Tracey Dinslage was complete in the lifetime of the donor, although actual enjoyment of the fund by the donee was postponed; and that his payment of the $1,000 to John Dinslage "for Tracey" was a payment of the debt to that extent. On the other hand, the administrator insists that, at most, the evidence shows only an intent to make a gift, which was never executed by delivery, and that it was not absolute, but conditional, and the donor retained dominion over it, and that whatever was said and done was testamentary in character, and, lacking the formalities prescribed for the execution of a will, was void.

The administrator bases his contention that Thresa Stratman retained dominion over the fund upon the testi-

mony of Fred Brandstetter on cross-examination, where he testified to conversations he had with her in which, referring to this fund, she said that, "if she needed it, it would be spent in her lifetime." Neither John Dinslage nor Frank Stratman was present at either of these conversations. But upon this evidence the administrator contends that the gift was not absolute, as the donor retained the right to use it if she needed it. We think it a sufficient answer to this contention to point out that there is no evidence that the donor made such a statement at the time of the donation, or in the presence of John Dinslage or the defendant, and that, if the declaration and direction of the donor to the defendant in June, 1915, under all the circumstances, constituted a valid gift *inter vivos*, other statements made by her to strangers at other times could not affect its validity. Parenthetically, it may be observed that, in Brandstetter's testimony in chief, when he detailed the conversations he had with Thresa Stratman, professing to give them in full, he said nothing indicating that she intended to use, or claimed the right to use, any of the money, and his testimony in that regard on cross-examination was merely an affirmative answer to a question of counsel incorporating the statement quoted above. We think that, if the gift were validly executed in June, 1915, when in the presence of John Dinslage and of the defendant, Thresa Stratman directed the defendant to pay the $1,000 to Tracey, then any subsequent declaration by her to a stranger would not affect its validity.

The administrator, appellee, next insists that the evidence, at most, shows only an intention of the grandmother to make a gift to her granddaughter, and that the attempted gift is a nullity for lack of delivery. We have no doubt that delivery, either actual or constructive, is an indispensable essential to the validity of the gift, and the question for solution is whether the evidence shows such a delivery, and that point will now be considered.

The rule is thus laid down in 20 Cyc. 1196 *et seq*: "Delivery, to be effectual, must be according to the nature and character of the thing given, and hence may be actual or constructive according to the circumstances. There must, however, be a parting by the donor with all present and future legal power and dominion over the property."

At page 1198 appears the following: "The rule is well settled, however, that delivery need not be made to the donee personally, but may be made to a third person as agent or trustee, for the use of the donee, and under such circumstances as indicate that the donor relinquishes all right to the possession or control of the property, and intends to vest a present title in the donee."

At page 1199: "The trend of modern decisions is toward a modification of the early English rule requiring an actual, manual delivery of the property, in all cases, to constitute a valid gift *inter vivos*, and the substitution therefor of a symbolic or constructive delivery, where the circumstances of the case require it. Now according to the better doctrine, an unequivocal declaration of gift, accompained by a delivery of the only means by which possession of the thing given can be obtained, is sufficient."

In *Foster v. Murphy*, 76 Neb. 576, this court held: "The indorsement and delivery of a certificate of deposit, with the intention of making a gift of the deposit thereby represented to the party to whom the certificate is thus delivered, operates as a gift of the fund itself."

The statement of the rule in 20 Cyc. 1199, that "an unequivocal declaration of gift, accompained by a delivery of the only means by which possession of the thing given can be obtained, is sufficient," is supported by the following cases: *Ebel v. Piehl*, 134 Mich. 64; *Green v. Langdon*, 28 Mich. 221; *Gammon Theological Seminary v. Robbins*, 128 Ind. 85; *Martin v. McCullough*, 136 Ind. 331; *Smith v. Youngblood*, 68 Ark. 255; *McGillicuddy v. Cook*, 5 Blackf. (Ind.) 179; *Hawn v. Stoler*, 22 Pa. Super. Ct. 307; *Pirie v. LeSaulnier*, 161 Wis. 503; *Hagerman v. Wigent*, 108 Mich. 192. In *Ebel v. Piehl, supra*, it was

held that an oral promise by a son to his father, on receiving property from the father, that on the latter's death $400 should be paid to a daughter, created a chose in action in favor of the father, which, on being assigned to the daughter, could be enforced by her; and it was also held that the transfer of the chose in action to the daughter did not constitute a gift *in futuro,* but a gift *in præsenti* of a promise to pay *in futuro.*

In the instant case, there was no promissory note or other documentary evidence of the $1,400 debt, and consequently there was nothing tangible that could be delivered by Thresa Stratman to any one. The whole thing rested in parol. The only thing that could be done by her was to direct her debtor to pay $1,000 of the money to Tracey, instead of to herself. It is conclusively established by the evidence that she gave this direction. Hence, she did everything in June, 1915, that was in her power to divest herself of the title to the chose in action, and invest Tracey with it. We think that there was a sufficient delivery. To hold otherwise would be to say that there can be no delivery of a chose in action unless it is accompained by delivery of written evidence of it, and this would be absurd.

The administrator also contends that the gift was not absolute, but conditional only upon the death of the donor, and for that reason is invalid. As the death of the donor was inevitable at some time, we do not consider it a condition to the vesting of the title in Tracey, but only as marking the time when she would come into the enjoyment of it. That postponement of the enjoyment of a gift until a future time does not affect its validity is well supported by the authorities. In the well-considered case of *Tucker v. Tucker,* 138 Ia. 344, it is said: "If the gift is absolute, the mere postponement of the enjoyment until the death of the donor is not material, and will not defeat it"—citing many cases, among which are: *Schollmier v. Schoendelen,* 78 Ia. 426; *Hogan v. Sullivan,* 114 Ia. 456; *Scrivens v. North Easton Savings Bank,* 166 Mass. 255; *McNally v. McAndrew,* 98 Wis. 62; *Martin v. Martin,* 170 Ill. 18;

Davis v. Ney, 125 Mass. 590, 28 Am. Rep. 272. To the same effect is the case of *Innes v. Potter,* 130 Minn. 320, and *Bostwick v. Mahaffy,* 48 Mich. 342. In *Brown v. Westerfield,* 47 Neb. 399, *Dunlap v. Marnell,* 95 Neb. 535, and *Roepke v. Nutzmann,* 95 Neb. 589, it was held that, where deeds conveying real estate are signed and acknowledged by the grantor, and by him left with a third person to be delivered to the grantee upon the death of the grantor, the title vests in the grantee upon such death. The postponement of the actual delivery of the deed does not affect its validity. In our opinion the fact that the $1,000 was not to be paid to the donee until after the death of the donor, neither made the gift conditional, nor did the postponement affect its validity or render it testamentary in character.

In this case, the father of Tracey desired that she come home and live with him, but the grandmother wanted the little girl to live with her until her death, and it was understood by all that Tracey was entitled to the fund of $1,000, to be enjoyed by her after her grandmother's death. Tracey did stay with her grandmother continuously until her death, and it is inconceivable to us that she had any other notion than that the gift was absolute, and that her direction to the defendant to pay that sum to Tracey after her death settled the matter beyond recall. It seems to us that the evidence without dispute conclusively establishes that such was the grandmother's intent, and that she did everything in her power to effectuate it. We therefore hold that there was an absolute completed gift of the fund to Tracey at the time when Thresa Stratman directed defendant to pay the money to Tracey upon her death, and that there was a sufficient constructive delivery.

We recommend that the former decision be adhered to, and that the judgment of the district court be reversed and the action dismissed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and

the action dismissed, and this opinion is adopted by and made the opinion of the court.

REVERSED AND DISSMISSED.

LOUIS C. STAATS, APPELLANT, V. HENRY MANGELSEN, APPELLEE.

FILED NOVEMBER 10, 1920. No. 21128.

1. **Principal and Agent: REVOCATION OF AUTHORITY: LIABILITY OF PRINCIPAL.** "Where an agent is vested with a mere naked authority not coupled with an interest, his principal may revoke that authority before performance; but, if the agent has rendered services and incurred expense in the course of his employment before his authority was canceled, the principal will be liable therefor, unless it is otherwise provided by the terms of their agreement." *Hallstead v. Perrigo*, 87 Neb. 128.
2. **Brokers: SALE OF LAND: RIGHT TO COMMISSION.** Even though a real estate broker's contract, not coupled with an interest, gives him the exclusive agency to sell the land, the owner of the land is not thereby precluded from selling it himself without the aid or knowledge of the broker; and, while a sale by the owner necessarily operates to revoke the agent's power to sell, it does not, under such a contract as in this case, annul the agreement for compensation. *Hallstead v. Perrigo, supra*, and *Maddox v. Harding*, 91 Neb. 292, explained and followed.
3. ———: ———: ———. In such case, if the broker, before he has notice or knowledge of the sale by the owner, has performed his part of the contract in good faith by securing a purchaser to buy the land on the terms fixed by the owner, the owner is liable to the broker for the compensation stipulated in the contract.

APPEAL from the district court for Merrick county: FREDERICK W. BUTTON, JUDGE. *Reversed.*

John C. Martin, for appellant.

Elmer E. Ross, contra.

CAIN, C.

Louis C. Staats brought this action to recover $800 for the breach by the defendant landowner of a real estate

broker's contract, which plaintiff alleged he had fully performed. Omitting descriptive matter not now material, the contract is as follows: "9/28 (1917). I hereby employ L. C. Staats sole and exclusive agent to sell or exchange my farm or ranch of 160 acres. Legal numbers S. W. ¼, section 14, township 15, range 5. * * * Price, $125 per acre. Cash, $12,000, balance 5 years, Int. 5%. Commission to be $800. Agreement to run 3 months from date and thereafter until withdrawn from the market. I also agree to give warranty deed and abstract showing clear title to above-described land. I hereby authorize and empower my agents above named to make, execute and deliver in my name such written contract as they may deem necessary to close a sale of the premises on the foregoing terms with any purchaser thereof. Owner: H. Mangelsen. Agent: L. C. Staats. Witness: Geo. E. Bockes. $2,000 to be paid on contract till March 1st."

Trial was had to court and jury. At the close of plaintiff's evidence, the defendant moved the court to direct a verdict in his favor of no cause of action. The court overruled this motion, and, in doing so, stated to defendant's counsel that, if the case were submitted on the evidence then received, and the defendant would rest his case, the court would render judgment in favor of the plaintiff for $56 only. Thereupon the defendant rested his case, and the court directed a verdict in favor of plaintiff for $56, and both parties excepted to the ruling. Each party filed a motion for a new trial, and both motions were overruled. Each party excepted to the ruling, and was allowed the usual time in which to prepare and serve a bill of exceptions. Plaintiff appeals, and asks that judgment be rendered in his favor in this court for $800 and interest and costs. Defendant filed no formal cross-appeal, but sets out formal assignments of error in his brief, and asks that the judgment against defendant for $56 be reversed, "but that the action of the lower court in otherwise directing the verdict against the plaintiff should be sustained."

Plaintiff contends that the trial court erred in directing the verdict for only $56, claiming that it should have been for $800. Defendant urges that the evidence was not sufficient to warrant the court in directing a verdict against him for any amount. These contentions require an examination of the evidence, which may be briefly stated as follows: The plaintiff, Louis C. Staats, had been in the real estate business for nine years with his office at Central City, and George E. Bockes, who signed the contract as witness, was his employee assisting to carry on the business. The defendant, Mangelsen, was the owner of the land described. On September 28, 1917, the broker's contract hereinbefore set out was entered into. Thereafter, and before December 28 of that year, plaintiff showed defendant's farm to different people whom he regarded as possible purchasers, using hired automobiles part of the time and his own car part of the time for that purpose. On January 1, 1918, the plaintiff, accompained by Mr. Bockes, took Dr. E. H. Nauman, of Columbus, Nebraska, out to defendant's farm, showed it to him, and discussed a sale of it to Nauman. The defendant was present and participated in that discussion. No agreement was made at that time, and Dr. Nauman went home. On January 16, 1918, Dr. Nauman returned to Central City, having decided to buy the farm on the terms stipulated in the contract. The plaintiff himself was temporarily absent in Texas at this time, but Mr. Bockes was in charge of the business in his absence, and drafted a contract for the sale of the land to Dr. Nauman on the terms stated, and took him out to the farm to have the defendant, Mangelsen, sign the contract. The defendant was not at home, but his daughter informed Mr. Bockes that they had sold the place to another party. Then Bockes and Nauman returned to town. The fact was that the defendant himself had sold his farm to Clarence E. Lawson on January 9, 1918, but had not notified either the plaintiff or Mr. Bockes of the sale, and neither of them had any knowledge of it. No notice was ever given by the

defendant of a withdrawal of the farm from the market. It is established that on January 16, 1918, Dr. Nauman was ready, able, and willing to buy the farm on the terms fixed by the defendant. The plaintiff testified that the reasonable value of his services in procuring the purchaser was $800.

Upon this state of facts the plaintiff contends that, as he had within the time fixed procured a purchaser ready, able, and willing to buy the land on the terms stated, and was prevented from completing the sale solely by reason of the owner of the land having previously sold it without notice to him, he is entitled to recover the sum fixed in the agency contract, citing, among other cases, *Hallstead v. Perrigo,* 87 Neb. 128, to sustain his contention. The defendant, on the other hand, insists that his sale of the land revoked the agent's power to sell the land, and that therefore the defendant is not liable for anything either by way of compensation or damages, citing *Hallstead v. Perrigo, supra, Woods v. Hart,* 50 Neb. 497, *Miller v. Wehrman,* 81 Neb. 388, *Maddox v. Harding,* 91 Neb. 292, and *Buck v. Hogeboom,* 2 Neb. (Unof.) 853, among other cases, to sustain his contention.

There is no doubt that when an agent has a mere naked authority to sell land, and such authority is not coupled with an interest, the landowner may revoke the authority at any time. *Miller v. Wehrman, Maddox v. Harding, Woods v. Hart, supra.* And even where a landowner by written contract gives an agent the exclusive agency to sell his land, the owner is not thereby precluded from selling it himself without the broker's aid or knowledge. *Hallstead v. Perrigo, supra; Buck v. Hogeboom, supra.*

These propositions that the landowner may at will revoke a naked agency for the sale of his land, and may himself sell it, notwithstanding an exclusive agency contract, are well settled in this state by the cases cited. But it does not follow, as contended by the defendant in this case, that no liability attaches to the landowner for services performed or expense incurred by the agent before

he had notice or knowledge of the revocation or sale. The agent's power to sell the land may be revoked by operation of law when the owner sells it, or it may be revoked by the owner exercising the right to do so, but in neither case does it necessarily deprive the agent of his right to compensation. The power to sell may be revoked, and yet the agreement to compensate remain in force. *Cloe v. Rogers,* 31 Okla. 255, 38 L. R. A. n. s. 366, and cases cited. This is the same theory upon which this court must necessarily have decided the case of *Maddox v. Harding, supra.* And in the *Hallstead* case the second section of the syllabus is as follows: "Where an agent is vested with a mere naked authority not coupled with an interest, his principal may revoke that authority before performance; but if the agent has rendered service and incurred expense in the course of his employment before his authority was canceled, the principal will be liable therefor, unless it is otherwise provided by the terms of their agreement."

This language could not have been used with any idea in mind other than that the agreement to compensate for services rendered an expense incurred up to the time of revocation still remained in force after the power to close a sale had ceased. And in case of a revocation of the agent's power to sell, either by the owner effecting a sale himself or by exercising his right to terminate the agency contract, the revocation does not become effective upon the agent's right to such compensation as is provided in the contract, unless and until the owner gives notice thereof to the agent. 9 C. J. 520, sec. 22, and cases cited. The Nebraska cases cited by defendant do not sustain his contention.

In the case at bar, the plaintiff agent, within the time specified in the contract of agency, procured a purchaser for the defendant's land upon terms specified in the contract, and before he had received notice or had knowledge of the sale by the owner; and, although the agent's power to sell necessarily was revoked by the owner's sale of the land on January 9, the agent had performed his part of

the contract before he knew or had notice of the sale, and on the facts set forth is entitled to the commission stipulated in the contract.

We hold that the agency contract remained in force as far as it related to his compensation up to the time on January 16 when plaintiff's employee, Bockes, was informed that the land had been sold to another. It follows that the trial court erred in directing a verdict in plaintiff's favor for only $56, which, according to the testimony, was the reasonable charge for some of the automobile trips the plaintiff made in an effort to sell the land.

Defendant finally argues that, as the agency contract did not provide that he give notice to plaintiff of a withdrawal of the land from the market, and as the sale by the owner necessarily operated to withdraw the land from the market, the contract terminates on such sale without notice to the agent. We cannot agree to this argument. The law requires that the parties act toward each other in good faith. 9 C. J. 520, sec. 22; *Maddox v. Harding, supra.* And good faith would require notice. The landowner could not secretly sell his land, and thereby terminate the agent's right to effect a sale, and, by remaining silent, permit the agent to expend further time and effort in attempting to make a sale, and escape liability under his contract. To approve such a doctrine would be in effect to say that one man could escape liability by his own neglect or craft, and another be deprived of his rights without fault on his part. As far as the agent's right to compensation under the contract is concerned, the land could not be "withdrawn from the market" under the terms of the contract, until the agent had notice or knowledge of such withdrawal.

Some distinction is attempted to be drawn between compensation under and by virtue of the contract and damages for the breach of it. The distinction is academic and unsubstantial. It makes no difference to either party whether plaintiff is considered to have earned the compensation provided in the contract by performing it, or has been damaged by the loss of the stipulated commission by

the owner's preventing performance. The result would be the same in either view.

In this case, the defendant's answer set up that he did not understand the contract when he signed it, and that certain representations were made to him at the time, and, as this court said in the *Hallstead* case, this opinion should not be construed to the prejudice of any lawful defense the defendant may interpose to plaintiff's claim. It is true the record shows that defendant rested his case, and it might seem that he acquiesced in the court's announcement of its intent to make the order; but, as defendant excepted to the ruling, it leaves the record in such confusion that we think it best to remand the case for a new trial.

For the error of the district court in directing a verdict in plaintiff's favor for $56 only, when it should have been for $800 on plaintiff's case, we recommend that the judgment of the district court be reversed and this cause remanded for a new trial.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and this cause remanded for a new trial.

REVERSED.

JAMES A. RIDGEWAY, APPELLEE, V. EASTERN COLORADO DEVELOPMENT COMPANY, APPELLANT.

FILED DECEMBER 4, 1920. No. 21129.

1. **Vendor and Purchaser: NONPERFORMANCE: MEASURE OF DAMAGES.** In a cross-action by a vendor in a contract to sell real estate to recover damages for the failure of the vendee to perform, the proper measure of damages is the difference between the actual market value of the land at the time of the breach and the price which the vendee was to pay. In other words, the loss of profits on the part of the vendor.
2. ———: ———: ———. In such an action the expenses of a resale are not proper elements of damage.
3. **Evidence** examined, and *held* to sustain the verdict.

APPEAL from the district court for Lancaster county: LEONARD A. FLANSBURG, JUDGE. *Affirmed.*

C. A. Robbins, for appellant.

C. H. Epperson and *G. E. Hager, contra.*

LETTON, J.

Action for money had and received. Judgment for plaintiff. Defendant appeals.

On December 2, 1916, plaintiff and defendant entered into a contract whereby defendant agreed to sell, and plaintiff to buy, a half section of land in Colorado. Plaintiff agreed to pay $11,200 for the land; $1,000 cash, and $5,000 by the transfer of a house and lot in Fairfield, Nebraska, to be made on or before January 1, 1917, the balance of $5,200 to be due in four years, secured by a first mortgage on the land. Defendant agreed to convey the land by warranty deed, and to provide abstract showing a merchantable title. Possession of both tracts of real estate was to be given January 1, 1917, and time was made the essence of the contract. Plaintiff paid defendant $500 in cash; $500 which was in defendant's hands under a former contract, which was surrendered, was also applied to make up the $1,000 paid. An abstract of title to the Fairfield property was furnished defendant in December, and a deed to it deposited in a Fairfield bank to await performance by defendant. Nothing was done by either party on January 1, the date of performance. Apparently no further transactions were had until January 11, when a conversation was had between plaintiff and the secretary of the defendant company, Bevard, at the office of the defendant's attorney, Minor, in Fairfield. There is a decided conflict in the testimony as to what then occurred, but the jury evidently accepted plaintiff's version, which is that Bevard then told him, in substance, that the company had had some difficulty in obtaining title to the Colorado land, but the deed would be there in a few days. Plaintiff made no objection to this. He after-

wards inquired at the bank whether the deed had come, but was told it had not arrived. He told one Crosby, who had before this been acting as agent for defendant, on January 23, that he refused to proceed, and on January 24, informed two of the officers of defendant that he refused to go farther and complete the contract. On the same day he began an action in Clay county to recover the $1,000 paid, with interest, alleging failure of defendant to perform, and that he had rescinded the contract.

On March 19, 1917, defendant made a contract to sell the Colorado land to some other parties and conveyed the same in April. After the latter contract was made, but before the deed was delivered, defendant tendered deed and abstract to the Colorado land to plaintiff, which he refused to accept. A mistrial of the Clay county case took place and plaintiff began this action. Defendant counterclaimed, asking $3,500 damages for loss of profits on resale of the Colorado land, and $1,800 for expense of resale.

It is conceded that the title to the Fairfield property shown by the abstract was not merchantable, and that both plaintiff and defendant broke the contract in the first instance. On January 11, the time for performance of the contract was extended, according to plaintiff, for a few days to allow the deed to the Colorado land to be delivered, according to defendant, until February 1. So far as the evidence shows, neither plaintiff nor defendant was ready to perform at either time. Plaintiff had never tendered a merchantable title, and defendant did not tender performance until late in March. Both parties were in default, and the court so instructed the jury, and further instructed, in substance, that defendant's action in selling the land to other parties and seeking damages in this action is an election to treat the contract as terminated by plaintiff's breach, and, there being no provision in the contract for forfeiture of the $1,000 paid, plaintiff was entitled to a verdict for this amount, less such damages as defendant suffered by the breach; and that the measure

of damages was the difference between the market value of the Colorado land in January, 1917, and $11,200, the consideration to be paid. We find no error prejudicial to defendant in these instructions. In fact, we believe they are more favorable than it is entitled to.

Accepting the instructions as stating the law of the case which the jury were bound to follow, it is argued that the jury disregarded the testimony and did not follow the instructions with respect to the damages suffered by the defendant. While some of the witnesses for defendant testified that the land was worth $25 an acre, the jury were entitled to consider this evidence in connection with all the other facts before them as to its value, and as to the credibility of the witnesses, one of whom had evidently testified differently at a former trial in regard to some material facts. In March defendant sold the Colorado land for $11,200, the same price as sold to plaintiff, $10,140 of which was to be paid in cash and deferred payments, and the balance of $1,060 by taking a tractor and team of horses at that valuation, but which, according to defendant's witnesses, were only worth about $250, making the gross receipts about $10,400. There was quite a little evidence as to the value of these articles. The jury drew their own conclusion as to the value of the land, and, taking all of the evidence into consideration, we believe they were justified in reaching the conclusion that defendant suffered no damages. Upon the whole case we find no prejudicial error.

AFFIRMED.

FLANSBURG, J., not sitting.

RACHEL HARDIN SCUDDER ET AL., APPELLANTS, V. JOHN W. EVANS ET AL., APPELLEES.

FILED DECEMBER 4, 1920. No. 21161.

1. Wills: PROBATE. Parties interested in the denial of the probate of a will must proceed on the assumption that the proponent will produce evidence at the hearing that the will was legally executed.
2. ———: PROBATE: SETTING ASIDE IN EQUITY. In an equitable proceeding to set aside the probate of a will on the ground that it was obtained by fraud and false testimony, the plaintiffs must allege and prove that they exercised due diligence before the hearing, and that the failure to obtain a proper decision was not attributable to their own fault or negligence.
3. ———: ———: ———. Where in such an action it is not shown that the parties who would be benefited in any manner procured or caused false testimonys, to be given by the witness, who, it is alleged, gave such testimony, and no fraud is shown extrinsic to the record, the decree will not be set aside on that ground.

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

Ringer, Bednar & King, for appellants.

Lambe & Butler, contra.

LETTON, J.

Plaintiffs are sons and daughters of a deceased sister of Elijah Manning, who died March 11, 1917. He executed an instrument on February 15, 1915, which was afterwards probated and allowed as his last will and testament. By the terms of the will his personal property and a life estate in the realty were to go to the widow, Ellen Manning, with remainder in fee to his sister, Elizabeth Sherman, subject to the payment by her of $500 to each of the plaintiffs. He left a valuable estate in this state and in Illinois. The will was probated on April 27, 1917, on the petition of the widow, who afterwards refused to take under it and elected to take her distributive share

under the law. An administrator with the will annexed was appointed. In May, 1918, he filed his final report and asked to be discharged. Plaintiffs filed objections to the final report, and a petition to set aside the decree probating the will. This was denied and no appeal was taken.

In September, 1918, this suit was brought on the equity side of the county court, seeking to set aside the probate of the will, the grounds alleged being that the purported will was admitted to probate on the testimony of one of the subscribing witnesses; that in fact there was only one witness to the will who signed in the presence of the testator, and this fact was fraudulently concealed by the two persons whose names appeared thereon as witnesses, C. M. Evans and his brother, J. W. Evans, who was afterwards appointed administrator; that the brothers had great influence over the deceased, and were especially friendly with the defendant Elizabeth Sherman, and they fraudulently conspired to induce testator to give most of his property to Mrs. Sherman; that at the time the instrument was offered for probate the petitioners did not know the facts and had no knowledge of such facts as to cause them to make inquiry concerning the ground of invalidity; that at the hearing C. M. Evans was examined as to the execution of the will, and testified, but John W. Evans, who did not subscribe as a witness in the presence of the testator, did not testify, and they thereby fraudulently procured the decree of probate.

The answer pleads the validity of the will and probate, *res adjudicata,* failure to appeal, the short statute of limitations where judgments are sought to be opened, and estoppel of one plaintiff by acceptance of benefits conferred by the will. The court found generally for defendants, and plaintiffs have appealed.

There is no proof of undue influence or of mental incompetency. The question presented is whether plaintiffs have shown any grounds in equity for setting aside the former decree probating the will.

The evidence shows that plaintiffs each had a copy of the will before the time set for the hearing. Mrs. Hoxworthy, one of plaintiffs, on her own behalf and on behalf of the other plaintiffs, through a firm of lawyers in Illinois, where she resided, employed a local attorney to represent her interests at the hearing. He appeared and asked for a continuance on the ground that his client desired to contest, but no objections were filed and no reason was given why the will should not be probated. The motion to continue was overruled, and, there being no objections on file, the will was probated on the testimony of one subscribing witness under section 1304, Rev. St. 1913, which provides that, if no contest is made, the will may be probated on the testimony of one of the subscribing witnesses. No appeal was taken.

Mrs. Scudder, another of the plaintiffs, went to Furnas county about the middle of May, 1918, and ascertained from Mrs. Fisher and Mrs. Manning that they believed John Evans was not present when the will was signed.

The question is whether a decree of probate should be set aside on application made more than a year after its rendition upon the sole ground that a witness, not a party to the proceedings, or in any wise interested therein, so far as the evidence shows, testified falsely at the hearing. An extended experience of the general inaccuracy of observation and of the frailty of human nature as exhibited on the witness stand convinces the writer that, if judgments may be opened up and set aside on the sole ground that testimony given at the hearing was false or even perjured, then comparatively few judgments would be conclusive. It is in the highest degree essential to the welfare of the community, and to the respect which should be given to and the confidence which ought to exist in the judgments of a court, that they should not be set aside unless upon the strongest and most convincing grounds. Since the title to much of the real estate in the state depends upon the conclusiveness of a decree of probate, it is evident that it ought not to be set aside except for the

strongest of reasons and in accordance with established rules. It is seldom, indeed, that a judgment may be opened on account of perjured testimony. It is only when an interested party may have participated in, or conspired to commit, a fraud upon the court. The principles applicable are well stated by Mr. Justice Miller in *United States v. Throckmorton,* 98 U. S. 61. After an examination of a number of cases, the opinion says:

"We think these decisions establish the doctrine on which we decide the present case, namely, that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered. That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."

An exhaustive note on the subject is found in 10 L. R. A. n. s. 216, to cases of *Graves v. Graves,* 132 Ia. 199, and *Bleakley v. Barclay,* 75 Kan. 462, 10 L. R. A. n. s. 230. The same principles have been stated by this court in *Munroe v. Callahan,* 55 Neb. 75, *Barr v. Post,* 59 Neb. 361, *Secord v. Powers,* 61 Neb. 615, and *Miller v. Estate of Miller,* 69 Neb. 441; and in the same cases the necessity to show that due diligence has been exercised by plaintiff is also stated. Was due diligence exercised? There is no showing that the facts testified to by Mrs. Manning and Mrs. Fisher could not have been ascertained at any time after the death of Mr. Manning upon due inquiry of Mrs. Manning. It is true that Mrs. Fisher was absent from the state during a considerable portion of the time which elapsed, but there is nothing to show that Mrs. Manning could not

have furnished the information just as freely and fully before the will was probated as thereafter. Mrs. Scudder, one of the plaintiffs is a resident of the state, and, apparently, as soon as she went to Furnas county and made inquiry, she ascertained the facts to which these witnesses testify. The law expects that those interested in a matter coming up for hearing before a court will fully inform themselves of the facts upon which their side of the controversy depends before the hearing, or, if there is not sufficient time to do so, that they make their grounds of defense or matters of objection known, so that the court, upon their application for a continuance, may be advised that a real and substantial controversy and dispute exists. There is no evidence that any of the beneficiaries under the will conspired or confederated together with the attesting witness in any degree to secure its fraudulent probate, and the record does not show such diligence on the part of plaintiffs as to entitle them to have the decree probating the will set aside.

AFFIRMED.

OTTO BIRDHEAD V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1920. NO. 21694.

Criminal Law: MOTOR VEHICLE ACT: CONSTITUTIONALITY. Chapter 160, Laws 1919, entitled "An act to amend section 1, of chapter 200, Session Laws of 1917, entitled 'An act relating to the stealing buying or concealing of automobiles and motorcycles,' to declare what facts shall be considered *prima facie* evidence of guilt, and to provide for including different counts in the same indictment," is not violative of the constitutional provision that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title." Const., art. III, sec. 11.

ERROR to the district court for Knox county: WILLIAM V. ALLEN, JUDGE. *Affirmed.*

E. A. Houston, for plaintiff in error.

Clarence A. Davis, Attorney General, J. B. Barnes and *P. H. Peterson, contra.*

LETTON, J.

Plaintiff in error was convicted of the theft of an automobile. The question now raised relates to the validity of the act of 1919, under which petitioner alleges he was prosecuted.

The complaints are that the act contains more than one subject, and that the title is not broad enough to cover its scope. The title is: "An act to amend section 1 of chapter 200, Session Laws of 1917, entitled 'An act relating to the stealing, buying or concealing of automobiles and motorcycles,' to declare what facts shall be considered *prima facie* evidence of guilt, and to provide for including different counts in the same indictment."

The first portion of section 1 treats of the stealing of an automobile or motorcycle, and of the receiving, buying or concealing of the same, knowing the same to have been stolen. Plaintiff in error concedes that these constitute one subject. The section further provides: "Or who conceals any automobile or motorcycle thief, knowing him to be such, shall be deemed guilty of a felony," etc. It is argued that the elements which go to make up one crime do not relate to nor are they interwoven in any way with the other. We are not of this opinion. A statute which *relates* to the stealing, buying or concealing of an article is sufficiently broad in its title to cover any act connected with or incidental to the crime, such as attempts to commit it, aiding or abetting the criminal, the protection and concealment of the thief, or the stolen property. The general subject is the prevention of automobile stealing, and any act having a reasonable relation and germane to the general purpose does not constitute a separate subject under the meaning of the constitutional provision.

That the title is not broad enough to include the concealment of an automobile thief, or the punishment of one who

receives an automobile, is the next contention. It is not essential that a title contain an index of everything contained in the act. The purpose of this provision of the constitution "is to prevent surreptitious legislation. If a bill has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate this provision of the Constitution." *Van Horn v. State,* 46 Neb. 62.

It is argued that the act is void because the title fails to mention any penalty, while one is specified therein. This point has been decided otherwise in *State v. Powers,* 63 Neb. 496, in which it was held an act, "the title of which is 'An act to provide for the better protection of the earnings of laborers, servants and other employees of corporations, firms or individuals engaged in interstate business,' comprehends legislation providing for the punishment of those who violate the provisions of the act by doing the things therein declared unlawful." In the opinion it is said: "There is but one object to be accomplished, and that is protection. This is secured by resorting to means that will effectively prevent the prohibited acts, and the legislature doubtless believed this could best be accomplished by imposing a liability both civil and penal."

An extended examination of cases upon the subject may be found in that opinion. *Sandlovich v. State,* 104 Neb. 169. No other points argued are necessary to consider. We find no error in the record.

AFFIRMED.

FARMERS LUMBER & HAY COMPANY, APPELLANT, V. HENRY SHALD ET AL., APPELLEES.

FILED DECEMBER 4, 1920. No. 20991.

Mechanics' Liens: EQUITY. Equity may require a lumber dealer, who bound himself as surety on a contractor's agreement to construct a building and turn it over to the owner free from mechanics' liens

for a specific price, to respect his suretyship, where he furnished lumber to the contractor and filed a mechanic's lien, which, when added to payments made by the owner for materials and labor as the work progressed, exceeded the contract price, though some of such payments were made without estimates of the architect in violation of the building contract.

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

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

John P. Breen, A. R. Oleson and *R. H. Olmsted, contra.*

ROSE, J.

This is an action to foreclose a mechanic's lien for materials furnished by plaintiff and used in the construction of a dwelling-house on land owned by defendant Henry Shald in Holt county. Shald entered into a contract which obligated Samuel W. Rector, building contractor, to construct a dwelling-house according to adopted plans and specifications, and, when completed, to turn it over to Shald free from mechanics' liens for the agreed price of $3,450. For materials and labor furnished in the construction of the building Shald paid to persons entitled thereto $2,909.20, and owes plaintiff the difference between that sum and the contract price, or $540.80, with interest from December 24, 1913. For materials furnished by plaintiff to the contractor, the latter owes $900, with interest from December 24, 1913. It is for Shald's failure to pay in full this claim against Rector that foreclosure is sought. Shald concedes his liability for the difference between the contract price and the payments made, but he denies further liability to plaintiff. This partial defense is based on a plea in Shald's answer that plaintiff was surety on the contractor's bond, and was thus bound by Rector's obligation to construct the dwelling-house for $3,450 and to turn the completed building over to Shald free from mechanics' liens. The reply to the answer contains the plea that Shald paid claims without estimates of the architect, and failed to limit his payments to 75 per cent. of the value

of the labor and materials furnished, thus violating the building contract and releasing plaintiff as surety on the contractor's bond. The trial court found that plaintiff, as surety, had not been released, and ordered a foreclosure limited to the difference between the contract price and the sum of the payments made by Shald for materials and labor, or $729.90, including interest. Plaintiff has appealed.

If plaintiff as surety on the bond of the contractor is bound by the contractor's obligation to turn over to Shald free from mechanics' liens the completed dwelling-house for $3,450, plaintiff is not entitled in equity to a mechanic's lien for any part of its claim in excess of the contract price. The question presented by the appeal is the release of plaintiff from its obligations as surety. In this connection plaintiff invokes the doctrine that the owner of a building in course of construction releases the sureties on the contractor's bond by violating the terms of the building contract. *Bell v. Paul,* 35 Neb. 240.

There are reasons why the doctrine announced in the case cited should not be applied here. That was an action at law on the bond. The obligor there sued sureties who were entitled to stand on the strict letter of their obligations as favorites of the law. Here plaintiff itself is the surety, and is seeking in a court of equity to foreclose a mechanic's lien against an obligor whom it had undertaken to protect from mechanics' liens. Plaintiff in the present case is not a favorite of the law, because as a merchant it made use of its suretyship for the dual purpose of inducing Shald to engage Rector as building contractor and of selling to the latter for profit materials to be used in the construction of Shald's building. Having come into a court of equity seeking affirmative equitable relief, plaintiff must abide by the rules of equity. Shald paid $1,200 for labor and materials on estimates of the architect, but made other payments without such estimates. Out of payments made by Shald plaintiff itself received at least $940.80. The purpose to which the con-

tractor devoted one payment of $100 is not shown, but all other payments made without estimates were for labor and materials. The claims for the sums paid would, except for such payments, have ripened into claims for mechanics' liens against which plaintiff as surety had obligated itself to protect Shald. When the building was completed Shald had retained approximately the percentage required by the building contract, and plaintiff was not injured by the mere failure of Shald to make payments only on estimates of the architect. Under these circumstances, equity will not permit the release of the surety, but will require it to perform the obligations of its suretyship as a condition of foreclosure.

AFFIRMED.

ALBERT JACKSON V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1920. No. 21532.

Homicide: SUFFICIENCY OF EVIDENCE. Evidence *held* sufficient to sustain a conviction for murder in the first degree under instructions free from error.

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

Frank O'Connor and *Richard S. Horton,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *J. B. Barnes, contra.*

ROSE, J.

In the district court for Douglas county Albert Jackson, defendant, was convicted of murder in the first degree, and for that felony was sentenced to the penitentiary for life. As plaintiff in error he has presented for review the record of his conviction.

Defendant admitted that he shot and killed Roy Teeter, the victim of the homicide, on an approach to the Locust street viaduct in Omaha on the afternoon of May 10, 1919, but he urges self-defense as a justification, and insists that there is no evidence of murder either in the first or in the second degree, and that the court erred in giving instructions which permitted the jury to find him guilty of homicide in a higher degree than manslaughter. In other words, defendant contends that evidence of deliberation, premeditation and malice is wanting, and that he acted "without malice" and "upon a sudden quarrel," if not in self-defense. The position thus taken is untenable, when the evidence and the instructions are impartially considered.

The tragedy occurred on a public street in daylight. Eyewitnesses testified to the following facts: Defendant was city dog-catcher. While he and William Hockley, both armed, were in an automobile driven by the latter around a short, right curve, up grade, on an approach to the viaduct mentioned, they ran into a two-horse team attached to a wagon occupied by Joseph McCool and Bert Mitchell, who were going down grade in the opposite direction along the other side of the curve. As a result of the collision the wagon tongue was broken and the harness was injured. Beginning with McCool, whose property had been damaged without fault on his part, there was an exchange of harsh words between him and defendant. Both dismounted, and while McCool, a man about 60 years' old, was at the heads of his horses, he was violently struck on the head by defendant. During the assault on McCool defendant had a gun in one hand. At this point Roy Teeter, a young man who was unarmed, but who happened to be near, walked up to defendant, reproached him for striking an old man, and knocked him down with a blow from a naked fist. Here Hockley, who had driven the automobile occupied by him and defendant into McCool's team, interfered, and, using a revolver as a weapon, forced Teeter back a distance estimated by one witness at 15 feet and by another witness at about 40 feet. In the meantime

defendant got onto his feet, and, disregarding an admonition by Hockley, shot Teeter though the heart, while, with lifted empty hands, Teeter was imploring defendant not to shoot. There is abundant evidence of these facts. The jury were justified in finding beyond a reasonable doubt that defendant had time for deliberation, premeditation and the promptings of malice, within the meaning of the criminal law; that these were all elements of the felonious act, and that defendant was not in real or apparent danger from Teeter when the fatal shot was fired. In this view of the evidence every right of defendant was protected by the trial court. Under a correct charge the jury were free to acquit defendant on the ground of self-defense, or to find him guilty of manslaughter, or of murder in the second degree, or of murder in the first degree. On sufficient evidence he was found guilty of murder in the first degree, but the death penalty was not imposed. There is no error in the record.

AFFIRMED.

ALPHEUS GADDIS V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1920. No. 21578.

1. **Disturbing Religious Meeting.** Without violating the statute forbidding the disturbance of a religious meeting, a member of a church, if permitted by its precepts and usages, may, in a becoming manner with good motives, interrupt a minister in the midst of a sermon to correct an utterance at variance with the established tenets or rites of such church.

2. ———: INSUFFICIENCY OF EVIDENCE. Conviction for disturbing a religious meeting *held* not sustained by the evidence.

ERROR to the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Reversed and dismissed.*

Frank J. Munday and *J. F. Fults,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *J. B. Barnes, contra.*

ROSE, J.

In the district court for Furnas county Alpheus Gaddis, defendant, was convicted under the accusation that on November 9, 1919, he did "unlawfully interrupt and molest a certain religious society, to wit, the Christian Church of Beaver City, Nebraska, and the members thereof, while said members were met together for the purpose of worship." Rev. St. 1913, sec. 8754. For that misdemeanor defendant was sentenced to pay a fine of $15 and costs of prosecution, taxed at $23.30. As plaintiff in error he presents for review the record of his trial.

The principal assignment of error is the insufficiency of the evidence to sustain the conviction. Under this head it is argued that there was an utter failure to prove that defendant violated any statute of the state or any rite, discipline, rule or usage of the church society, or that he unlawfully interrupted or molested the religious meeting or any member of the congregation, or that he acted in an improper or disorderly manner. In this connection it is further argued that interruption of a religious service is justified, if it results from the exercise of a lawful right becomingly asserted.

Apparently relying on the right to charge the offense in the language of the statute, the prosecutor did not mention in the information any specific act or acts constituting a misdemeanor. What defendant did, if anything, to justify his conviction must therefore be found alone in the testimony of witnesses. In describing what was said and done the witnesses were not entirely harmonious, but the material facts are not in dispute. Defendant was a charter member of the Christian Church of Beaver City, a religious society which had been in existence for 30 years. For Bible school, preaching and communion the congregation convened Sunday morning, November 9, 1919. The minister's text was the Lord's Supper or the Communion. In the midst of the sermon the minister said, in substance, that the deacons in conducting communion services had a right to pass a member whom they believed to be un-

worthy. At this point defendant arose from his pew and interrupted the discourse. Some of the expressions directed to the minister by defendant, as recollected by witnesses, may be paraphrased as follows: "You are preaching wrong." "You have gone too far." "You are touching on a matter between the communicant and God Himself." Defendant's own version of what he said to the minister is: "You have no authority for what you are saying. You have already said too much." After interrupting and correcting the minister, defendant, without leaving his place, turned his back to the pulpit, asked permission to speak, and addressed the congregation, saying, among other things, in respect to communion, that no one had a right to judge another, and referring to the following passages from the Scriptures:

"But let a man examine himself, and so let him eat of that bread, and drink of that cup.

"For he that eateth and drinketh unworthily, eateth and drinketh damnation to himself." 1 Cor. 11: 28, 29.

In speaking, defendant made no gestures. His appearance indicated sincerity. He talked a good deal like the minister, who remained standing during the interruption, afterward offered a prayer, finished his sermon, and dismissed the congregation. There is some evidence of a commotion in the meantime, during which at least two persons left the building. When defendant asked permission to address the congregation, no audible objection was made. During his remarks, however, the choir, it seems, voiced a protest by an impromptu musical service. It is manifest from undisputed evidence that defendant interrupted a religious meeting, but it is not every interruption that constitutes a violation of law. Without violating the statute forbidding the interruption of a religious meeting, members of the society may repel a lawless invasion either from without or from within. Under the same principle a member of a religious society, if permitted by its precepts and usages, may, in a becoming manner with good motives, interrupt a minister to correct utterances at

variance with established tenets or rites. Otherwise freedom of worship and free speech might be impaired by bigotry and false doctrines. The proper and orderly exercise of these rights, though resulting in a commotion during a religious meeting, is not punishable in a criminal court. Defendant no doubt reasoned in his own mind that silence on his part would imply his consent to a discipline depriving his brethren, without accusation or hearing, of the sacred right of communion on the mere belief of deacons that the brethren were unworthy. Under such circumstances he had a right to speak, even in the midst of a sermon, unless he had by some means committed himself to silence. He was a part of the religious society and as such was entitled, like other members, to its privileges and rites. The undisputed evidence shows that the utterance of the minister, when interrupted, was contrary to the doctrines of his church, and that defendant as a member thereof was within his rights in interrupting the meeting to correct the mistake. There is no evidence that defendant in exercising the privilege of interruption violated any established rule, usage, doctrine or rite of the Christian Church of Beaver City. For want of such proof the prosecution fails. The judgment of the district court is therefore reversed and the prosecution dismissed.

REVERSED AND DISMISSED.

MORRISSEY, C. J., not sitting.

JOSEPH MCCLENEGHAN, PLAINTIFF, V. CHARLES A. POWELL ET AL., APPELLANTS: CLIFFORD MCCLENEGHAN, APPELLEE.

FILED DECEMBER 4, 1920. No. 21117.

1. **Witnesses.** A party litigant is bound by statements made in his cross-examination that are at variance with and less favorable to himself than statements made by him in the direct examination on the same subject-matter.

2. **Vendor and Purchaser:** DEFERRED PAYMENTS: INTEREST: RENT. Equity will not permit a vendee to enjoy the rentals that are derived from land for which he has not paid and at the same time permit him to escape payment of interest to the vendor on the unpaid purchase price, unless a tender has been made of such purchase price and kept good.

3. ———: ———: ———: ———. When, in an action for specific performance, a vendee of land recovers judgment against the vendor for rent, he cannot escape payment of interest to the vendor on a deferred payment of the purchase price, unless it clearly appears that he either borrowed or exclusively appropriated the money used for such payment, and that he received no benefit therefrom, and that the money was held continuously, unused and in readiness to be paid to the vendor, with notice to him that it was subject to his order upon fulfilment of his part of the contract of sale.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Modified, and reversed in part, with directions.*

Murphy & Winters, for appellants.

William R. Patrick, contra.

DEAN, J.

Joseph McCleneghan, plaintiff, was the owner of a real estate mortgage that he foreclosed on 149 acres of land in Douglas county. The land was owned by Charles A. Powell subject to the life estate of his mother, Elizabeth Powell. As party defendants plaintiff joined Charles A. and Catherine Powell, his wife; Elizabeth Powell, his mother; Emil Walstat, tenant then in possession under a five-year lease; First State Bank of Alliance; and Clifford McCleneghan, plaintiff's son. The issues in the present case are raised solely by the cross-petition of Clifford McCleneghan, the answer of the Powells thereto, and the cross-petitioner's reply.

In his cross-petition Clifford McCleneghan prayed for specific performance of a contract for the purchase of the land in suit from the Powells, alleging that he, as vendee, and the defendants, Charles A. Powell and Elizabeth

Powell, his mother, as vendors, entered into a contract May 22, 1917, by the terms whereof he agreed to buy and the Powells agreed to sell and convey the land to him, free of incumbrances, for $21,000, of which $1,000 was paid at the time, the deferred payment of $20,000 to be made March 1, 1918, and possession of the land to be given on that date. Sometime before March 1, 1918, the Powells informed McCleneghan that they could not deliver possession of the land at the time agreed upon, namely March 1, 1918, because defendant Emil Walstat was in possession under a lease from Mrs. Elizabeth Powell that would not expire until March 1, 1921. Subsequently, however, the cross-petitioner obtained title and possession March 1, 1919, so that the controversy herein as to the respective rights of the parties growing out of possession, rentals, and interest on the deferred purchase price, has to do with the year beginning March 1, 1918, and ending March 1, 1919.

Cross-petitioner McCleneghan alleged that he sustained damages because of the Powells' failure to convey the land and deliver possession March 1, 1918, as the contract provided. For the damages so alleged the court found the rental value to be $1,492.50 from March 1, 1918, to March 1, 1919, and for this sum judgment was rendered against the Powells. On February 13, 1919, the court decreed specific performance, and in a supplemental decree, on April 23, 1919, found and decreed that the Powells were not entitled to any interest on the unpaid purchase money from March 1, 1918, until February 25, 1919, that being the date when the remainder of the purchase money was paid into court by cross-petitioner Clifford McCleneghan. The defendants Powell appealed.

Cross-petitioner McCleneghan alleged, and the Powells denied, that the annual rental value of the land in suit was $1,500, and that he sustained damages in that sum because of the failure of the Powells to convey the land and deliver possession March 1, 1918, as the contract provided. With respect to rental value, Joseph McCleneghan

testified on the part of the cross-petitioner that he lived in the vicinity of the land in suit about 29 years; that for the past 15 years he resided in Omaha, where he was engaged in the live stock commission business; that prior thereto he farmed in the Powell vicinity about 20 years; and that the rental value of the farm for the year in question was $10 an acre. It seems that he based his opinion in part on his own general knowledge of rental values and in part upon the rent that he said he could have obtained for the Powell farm from Gus Wedburg, who he said would have rented the land from him if it had been in his possession. Elsewhere in the record it was stipulated that Gus Wedburg, if present, would testify that he would have given $10 an acre rent for the Powell land for the years 1918 and 1919. It seems though that such testimony, even if produced, would have lost much, if not all, of its probative value from the fact that defendant Walstat was in possession of the land for both of those years under the Powell lease. Joseph Gibbons testified that the rental value was about $10 an acre; that he rented an 80-acre farm five miles away to a Mr. McCormick for $10 an acre. McCleneghan and Gibbons were the only witnesses called by the cross-petitioner on this question.

John Mangold testified on the part of defendants respecting the rental value for the year ending March 1, 1919. Both the cross-petitioner and the defendants Powell lay stress on his evidence. The cross-petitioner points out that, while Mangold fixed the rental value at $4 to $5, he testified that "Joe Gibbons got $10 per acre in 1918 for much poorer land and farther from town than the Powell farm." On this point defendants in their brief point out that, when Mangold was asked about the Gibbons land having rented for $10, he said it "was begging for a tenant, but that a Mr. McCormick, who had another farm, had his farm sold out from under him, and he said he had to have something to do that year, so he took a chance at it." Neither party took exception to the statements so made by the other on this point in their respective briefs.

Besides Mr. Mangold, four or five witnesses, resident in the Powell vicinity from seven to twenty years, testified on the part of the defendants respecting the rental value of the Powell farm for the year in question and fixed it at from $4 to $5 an acre. Some were tenants and some were landowners. One tenant paid $800 a year, beginning March 1, 1917, for a ten-year lease on 180 acres. Another paid $4 an acre. One of the rented tracts was separated from the Powell land by a railroad. A real estate dealer testified that $659 would be a fair rental value. It may be added that Mr. Walstat paid $650 rent for the land in question for the year ending March 1, 1919. It has been held that the selling price of land is some evidence of its value. *Engel v. Tate,* 203 Mich. 679. No reason appears in the record to show why the same principle should not apply to the rental value of the land in question. We conclude that the weight of the evidence fairly shows that the cross-petitioner's recovery should have been $5 an acre, that being a reasonable rental value for the Powell farm for 1919.

Joseph McCleneghan, who acted for his son in the purchase of the land, was the only witness in the controversy over the payment of interest. It seems that on March 1, 1918, he tendered to the defendants Powell two certified checks, exhibits 2 and 3, aggregating $20,000, that were subsequently withdrawn, as McCleneghan testified, "because you (the Powells) couldn't give possession." On this important feature of the case the cross-petitioner, quoting Joseph McCleneghan's direct examination, says in his brief: "As to whether the Powells were entitled to set-off interest on purchase money against damages for breaching their contract. Joseph McCleneghan testified, pp. 22, 23: Q. Now, Mr. McCleneghan, what is the fact as to whether or not—what was subsequently done with the money, the $20,000 represented by these two checks, exhibits 2 and 3? A. Well, I held it ready to make the payment when they conveyed the property. Q. And had this $20,000 at all times been ready to be turned over to the Powells at any

time they saw fit to carry out the terms of their contract of sale with Clifford McCleneghan? A. Yes, sir. Q. Has Clifford McCleneghan or yourself received any interest upon said $20,000 or any benefits from the use of it since the 1st day of March, 1918, up until the entry of the decree of this case on February 13, 1919? A. No, sir." The record shows that on the cross-examination he testified: "Q. Now, where did you get this $21,000—the Live Stock Bank? A. Yes, sir. Q. In the shape of a cashier's check? A. Certified check. Q. Did you borrow the money? A. I did part of it; yes, sir. Q. And you assigned this contract to get it? A. I did. Q. How long did you keep it? A. Well, I think two or three days. Q. As a matter of fact, you just went in the bank and made arrangements with the Live Stock Bank to get these cashier's checks for the purpose of making the tender? A. Yes; if you will let me go into detail and tell you—Q. I am asking you that question. A. In the first place I went to the Federal Loan and borrowed $10,000. Q. Made an application to borrow it? A. Yes, sir; and the money was ready and they held that for four months. Q. That was held on account of some defects in the title? A. Yes, sir. Q. By March 1 that was all wiped aside and they were going to make the loan? A. They were, and they held the money. Q. You simply went in the bank and borrowed the money for a few days in order to make this deal? A. I gave them a note for it. I didn't know but what you fellows would try to take snap judgment on me, and that note was down there awhile."

On the question of interest the evidence is not satisfactory. Joseph McCleneghan was the only witness on this point and knew all about this feature of the case, but his evidence, when considered in its entirety, is evasive and obscure. At one point in his cross-examination he testified that the borrowed money was kept "two or three days." Later he testified that he either borrowed or made an application to borrow $10,000 from the Federal Loan Bank, and that "the money was ready and they held that

for four months." If McCleneghan paid interest on or after March 1, 1918, for money that he borrowed to make the deferred payment in question he should have said so in plain language when given opportunity on the cross-examination. He did not do so. It is obvious that if he paid four months' interest before March 1, 1918, for money borrowed to make the deferred payment, the Powells were not liable for such interest because the money was not payable before that date. The statements made in the cross-examination do not support his statements in the direct examination.

The cross-petitioner elected to sue for the rental value and then sought to evade the payment of interest. Equity will not permit a vendee to enjoy the rentals that are derived from land for which he has not paid and at the same time permit him to escape the payment of interest to the vendor on the unpaid purchase price unless a tender has been made of such purchase price and kept good. *Craig v. Greenwood,* 24 Neb. 557; *Jordan v. Jackson,* on rehearing, 76 Neb. 26. Evidently the court found against the defendants with respect to interest on the theory that the cross-petitioner, or those acting for him, had either borrowed or exclusively appropriated $20,000 and that the money was held continuously from March 1, 1918, unused and in readiness to be paid to the defendants Powell upon fulfilment of their part of the contract, and that the Powells had knowledge of this fact. But this state of facts does not appear in the record. Hence we conclude the defendants Powell are entitled to the lawful rate of interest upon $20,000, the deferred purchase price, from March 1, 1918, until February 25, 1919, that being the date when it was paid into court.

The rule in this class of cases, and one that conforms to equitable principles, is well stated in *Bostwick v. Beach,* 105 N. Y. 661, wherein this was said by the court: "Where specific performance of a contract for the sale of land is decreed, the court will, so far as possible, place the parties in the same position they would have been in if the con-

tract had been performed at the time agreed upon. The vendor is regarded as trustee of the land for the benefit of the purchaser and liable to account to him for the rents and profits or for the value of the use and occupation, and the purchaser, as trustee of the purchase money unpaid and chargeable with interest thereon, unless it has been appropriated and no benefit has accrued to him from it."

In *Beckwith v. Clark,* 188 Fed. 171, the court held: "The general rule is that from the time when a contract of sale of land should be performed the land is in equity the property of the vendee held by the vendor in trust for him, and the purchase price is the property of the vendor held in trust for him by the vendee, and that upon specific performance the vendor is liable to account for the rents and profits and the vendee for the interest on the purchase price. There is this exception to the rule: That where the vendor fails or refuses to convey at the time for performance, and the vendee, to the knowledge of the vendor, deposits and keeps the purchase price subject to the order of the vendor upon his delivery of his deed, and derives no benefit from it, the vendor must account to the vendee for the rents and profits of the land, but the vendee is not liable for the interest on the purchase price." To substantially the same effect is *Powell v. Martyr,* 8 Ves. Jr. Ch. Rep. (Eng.) 146; 36 Cyc. 754, 755.

We have examined the case *de novo.* The judgment with respect to rent is modified to conform to the views expressed herein. The judgment against the defendants Powell on the question of interest is reversed, with directions that a judgment be entered in their favor in conformity with the views expressed in this opinion on that subject.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA, APPELLEE, V. FRANK CERSCIRNELLO: E. N. CERNEY, APPELLANT.

FILED DECEMBER 4, 1920. No. 21237.

1. **Recognizances:** FORFEITURE. A recognizance given in a criminal action conditioned for the appearance of the accused before the district court "from day to day, to answer unto the charge preferred against him, * * * and not to depart from the court without its leave and to abide the orders and judgments of the court," can only be forfeited during the term at which it was given. To hold the surety liable for the nonappearance of the accused, he must be called and his default entered during the term at which the recognizance was taken.
2. ———: ———. If the term of the district court in which an accused is recognized to appear adjourns without entering his default and without forfeiting the recognizance, the surety cannot afterwards be held liable thereunder.
3. ———: CONSTRUCTION. A recognizance is a contract with the state ordinarily entered into by the surety without consideration. It follows that its terms should be strictly construed.

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

William Simeral, for appellant.

W. W. Slabaugh and *Abel V. Shotwell, contra.*

DEAN, J.

This is a suit to recover the penalty on a recognizance entered into by Frank Cerscirnello, as principal, and E. N. Cerney, as surety, for the appearance of the principal in the district court for Douglas county under an information charging a felony. The court under section 9017, Rev. St. 1913, reduced the amount of the recovery, under the forfeited recognizance, from $1,000 to $500, and rendered judgment thereon against the surety for that sum, from which he appealed.

Frank Cerscirnello was brought into the district court June 12, 1918, charged with robbery. He pleaded "not

guilty," and upon his application, on the same day, the court fixed a recognizance for his appearance in the penal sum of $1,000, with E. N. Cerney as surety, and he was released from custody. The case was called for trial March 17, 1919, and upon the failure of Cerscirnello to appear for trial the recognizance on that day "was ordered forfeited and a finding entered that the conditions of said bond had been broken." It was stipulated "that the fuli September term of the said court intervened between the taking of the recognizance and the forfeiture thereof, and that during the September term of said court the said defendant Cerscirnello was not called for trial, and that said recognizance was not renewed at any time."

The recognizance was conditioned for the appearance of Cerscirnello before the court "from day to day, to answer unto the charge preferred against him," and not to depart therefrom without leave and "to abide the orders and judgments of the court."

The parties agree there is only one disputed question in the case. We think it comes within the rule announced in *Hesselgrave v. State,* 63 Neb. 807, wherein it is said that a recognizance in a criminal action conditioned that the defendant shall be and appear in court on the first day of the next term thereof to answer to the charge pending against him, and which provides that he will not depart the court without leave, and abide the order of the court, "is limited to the term at which it exacts the appearance," and that, "in order to default the defendant, he must be called at some time during the term set for his appearance." To the same effect is *State v. Murdock,* 59 Neb. 521, wherein the recognizance was conditioned that the accused "shall be and appear before the district court on the first day of the next term thereof, and appear thereat from day to day to abide the order of the court." It was there held that the appearance was limited to a term at which the appearance was exacted, and that "a continuance of the cause to a subsequent term of court is not within the contract of the recognizance, and, if made, a

nonappearance of accused at the term to which the continuance carries the cause is not a breach of such recognizance." In 3 R. C. L. 41, sec. 47, it is said: "Where a recognizance in a criminal case is conditioned 'that the principal appear at the next term and thereafter from day to day and not depart without leave,'" and contains the further condition that he "'shall abide the judgment of the court,' the surety is bound for the appearance of the prisoner during the first term of the court only, and if the court adjourns without making any order, the sureties are exonerated from their recognizance."

Counsel for the state contend that neither the *Hesselgrave* case nor the *Murdock* case is in point, but we fail to see clearly the distinction between the condition of the recognizance in the case at bar and the two cited cases. True, the recognizance in both those cases used the expression "on the first day of the next term thereof;" the *Murdock* case adding these words, "and appear thereat from day to day." If in the present case the surety can be held liable for the nonappearance of his principal after one term of court has intervened between the taking of the recognizance and its forfeiture, he could likewise be held if two terms or if any number of terms intervened, and this merely because the recognizance requires an appearance of the accused "from day to day." In that case the obligation of the bondsman would have a beginning but might be without end.

The giving of "bail bonds" grew out of the humanity of the law, and in a bailable offense the practice is encouraged by the state, in part no doubt on economic grounds. But if a recognizance, in a bailable offense, conditioned as in the present case and without other qualifying words, is held to require the appearance of the accused from day to day, without limitation as to the term of court at which he is to appear, under pain of forfeiture for nonappearance, few persons would assume the burdon of suretyship in a criminal proceeding. A recognizance is a contract with the state ordinarily entered into by the surety without con-

sideration. It follows that its terms should be strictly construed. The weight of authority seems to support the rule herein announced.

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

REVERSED.

IN RE APPLICATION OF HENRY B. BABSON, APPELLANT.
IN RE APPLICATION OF GEORGE W. STEINMEYER, APPELLEE.

FILED DECEMBER 4, 1920. No. 21340.

1. Waters: DEPARTMENT OF PUBLIC WORKS: DISCRETION. The department of public works is an administrative body, having quasi judicial functions, and is invested with reasonable discretion in the exercise of its supervisory powers.
2. ———: DIVERSION FOR POWER PURPOSES: EXTENSION OF TIME. The department of public works in event of abnormal conditions, such as those created by the world war, has discretion to extend the time within which the work of diverting water for power purposes, under a permit previously given, may be completed.
3. ———: DEPARTMENT OF PUBLIC WORKS: FINDINGS: REVIEW. In the exercise of its supervisory powers, the findings and orders of the department of public works will not be disturbed, in the absence of an abuse of discretion.
4. Evidence examined, and *held* that it sustains the findings and orders of the department of public works.

APPEAL from the Department of Public Works. *Order affirmed.*

Thomas, Vail & Stoner, for appellant.

Hazlett, Jack & Laughlin and *Rinaker, Kidd & Delehant, contra.*

DEAN, J.

Henry B. Babson, plaintiff, on May 7, 1918, filed his first application with the department of public works, hereinafter called department, for a permit to appropriate

water from the Big Blue river. By the terms of his application, No. 1511, he sought to appropriate water at the same point of diversion that is covered by George W. Steinmeyer's application, No. 1262, that was granted and approved by the department July 26, 1915. Both applications contemplate the use of the water for power development by means of a hydro-electric plant. In Babson's application there appears a statement that the proposed cost of the project will total $55,000, and that "the plant will be operated intermittently." His application was disallowed December 27, 1918; the department making and entering the following findings and orders:

"The above-entitled proceedings came on for hearing on the 20th of August, 1918, and was continued to later dates, at which hearings the parties were represented by counsel, and the testimony of witnesses was taken and briefs of counsel filed. Upon due consideration of the records in these proceedings, the testimony of witnesses therein, and the briefs of counsel submitted, this board is of the opinion that the application of Henry B. Babson, No. 1511 (application of May 7, 1918), should not at this time be granted, and the application of George W. Steinmeyer and the permit issued to him be accordingly rescinded and forfeited unless the said George W. Steinmeyer shall neglect and fail to comply with the order herein as follows: That he proceed immediately, and within 30 days from this date, to the prosecution and construction of the work provided for under the permit granted to him by this board and shall prosecute the same to completion as provided by law. The application of the said Henry B. Babson, No. 1511, is therefore at this time denied. Dated Dec. 27, 1918. (Signed) State Board of Irrigation, Highways and Drainage. Keith Neville, Governor. Willis E. Reed, Attorney Gen., by Charles S. Roe, Deputy Atty. Gen. G. L. Shumway, Comm. P. L. & Bldgs."

An appeal was taken from that order to this court, and on March 20, 1919, we dismissed the appeal and remanded

the cause on the ground that the order appealed from was not a final order. It appears that on June 1, 1918, under the same application, No. 1511, Babson filed an additional application with the department, praying therein that defendant's application be canceled. After several adjournments a final hearing was had on October 21, 1919, plaintiff's application was dismissed, and his motion to dismiss and cancel defendant's application was overruled. The department held that the application of defendant "and the granting thereof are in full force and effect." From "the order, ruling and judgment" so made and entered by the department, plaintiff prosecuted the present appeal.

Some time in April, 1917, shortly after the United States entered the world war, defendant Steinmeyer made application to the department for an extension of time in which to commence work and apply the water to beneficial use, on the ground that the nation was in need of all resources, both labor and material, to prosecute the war to a successful conclusion. The record shows, too, that Steinmeyer was about to enlist, and subsequently did enlist, in an officer's training camp, where he was stationed five months. The department thereupon granted his request, and, on April 28, 1917, "found, determined and ordered that the time in which to commence work under said application 1262 be extended to a date three months after our nation is at peace with our enemies, said extension of time not to extend over two-year period." It appears that the extension was granted because of the nation's urgent and imperative need of all available man power and construction material, and also because of defendant Steinmeyer's enlistment in the army.

Plaintiff Babson argues that the department erred: "(1) In entering the order of April 28, 1917, assuming to extend the time within which Steinmeyer should commence work. * * * (2) In entering the order of December 27, 1918, granting Steinmeyer 30 days additional within which to commence work, and in refusing to cancel his application and allow Babson's (application). * * * (3) In enter-

ing the final order of October 21, 1919, overruling Babson's application to cancel the application of Steinmeyer, and in denying Babson's application to appropriate the water in controversy."

In view of the facts and the law applicable thereto, the order of the board must be sustained. On July 26, 1915, that being the date when defendant Steinmeyer's application was granted and his application was approved, the order of the department provided, *inter alia*: "2d. The work of excavation or construction shall begin on or before January 25th, 1916. 3d. The time of completing the work of construction shall extend to Oct. 1st, 1917." Under section 3413, Rev. St. 1913, and within six months after the approval of his application, and pursuant to the order of the department, defendant Steinmeyer filed a map and a report with the department showing that he surveyed and made soundings and excavations to find depth of bed rock and the like as a necessary part of the prosecution of the work in the erection of the plant. In passing, it may be noted that the department of public works is successor to the board of irrigation, highways and drainage, as provided in Laws 1919, ch. 190.

The court will, of course, take judicial notice of the world war and the conditions that grew out of that calamitous event. No person was immune from those conditions. From the record before us it plainly appears that defendant's prosecution of the work was interrupted, not only by his enlistment in the officer's training camp, but as well by the untoward war conditions that prevailed throughout the nation, and that for two years or more caused an almost entire cessation of constructive work of any sort, except such work as pertained to preparation for and prosecution of the war. The war period demanded the conservation of practically all material and man power for war purposes, and this demand was enforced by the federal government everywhere. The interruption of the work seems clearly to come within the meaning of the expression "unavoidable cause," as it is used in the act.

Plaintiff not only complains that defendant has not performed the amount of work required by the statute, but he contends that he is without sufficient capital to finance the enterprise. We do not think the record sustains his contention. It is shown that after the order of December 27, 1918, that gave to defendant a 30-day extension, beginning January, 1919, and up to and including October of the same year, approximateiy $40,000 had been expended on the project. In addition to the money so expended, it appears that provision has been made for funds that are ample to finance the work to completion. Aside from interruptions that are unavoidably caused and that arise from natural causes, the department is given certain discretion with respect to the exercise of its supervisory powers. *Kersenbrock v. Boyes,* 95 Neb. 407. It may be observed that even now and the war ended two years, the times are not yet normal. This is seen in the cessation of public and private construction enterprises everywhere and in the housing conditions that prevail throughout the country. Of all this the court takes judicial notice.

The department did not err. Its order is therefore

AFFIRMED.

FLANSBURG, J., dissents.

MERCHANTS-MECHANICS FIRST NATIONAL BANK, APPELLEE, v. CAVERS ELEVATOR COMPANY, APPELLANT.

FILED DECEMBER 4, 1920. No. 21141.

1. **Estoppel.** "Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." *Grant v. Cropsey,* 8 Neb. 205.

2. **Payment: RECOVERY.** But where money is paid to another under the influence of mistake, that is, upon the supposition that a

specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payor that the fact was untrue, an action will lie to recover it back.

3. Evidence examined, and *held* sufficient to sustain the judgment.

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

Smith, Schall & Howell, for appellant.

McGilton & Smith and *Gaines & Van Orsdel, contra.*

ALDRICH, J.

This is an action at law wherein the Merchants-Mechanics First National Bank of Baltimore, Maryland, sues the Cavers Elevator Company to recover $3,283.51, with interest, alleged to have been paid out in error on a draft by the plaintiff and received by the Cavers Elevator Company, the defendant below and drawer of the draft. Both parties moved for a directed verdict, and the court rendered judgment for $3,283.51, with interest, in favor of plaintiff. Defendant appeals.

The defendant is a corporation doing a general business in buying and selling grain, organized under the laws of Nebraska, with its principal place of business at Omaha. The plaintiff is a Maryland corporation, with its principal place of business at Baltimore, doing a general banking business under and by virtue of national banking laws of the United States. In January, 1917, defendant elevator company sold to Fahey & Company of Baltimore, 185,000 bushels of wheat. The sale consisted of several separate contracts, each contract calling for a certain amount of wheat. A portion of the wheat was shipped, and on April 16, 1917, all but 20,000 bushels of the wheat had been shipped and paid for. On that date the Cavers Elevator Company drew a draft on Fahey & Company, payable to the Merchants National Bank of Omaha, for $3,283. 51, which was indorsed and sent to the plaintiff bank for collection. On or about April 21, 1917, the Merchants

National Bank of Omaha, after receiving notice of dishonor and protest, telegraphed the plaintiff bank for further information as to the draft, and received a telegram that it had been paid. Plaintiff contends that the latter telegram was sent by mistake, the draft never having been paid. The draft was drawn by Cavers Elevator Company for the amount claimed to be due from Fahey & Company as interest and carrying charges on all the shipments of wheat.

The defendant contends that plaintiff is estopped to dispute the statement made that the draft was paid, or, in other words, that the plaintiff is estopped from asserting the truth.

The rule has long been firmly established that "Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." *Grant v. Cropsey,* 8 Neb. 205; *Newman v. Mueller,* 16 Neb. 523; *Cain v. Boller,* 41 Neb. 721; *Brown v. Eno,* 48 Neb. 538; *Larson v. Anderson,* 74 Neb. 361.

We understand it to be the rule of law that before a person can sustain the plea of estoppel against another he must have relied upon and been injured by the facts as pleaded. *Dent v. Smith,* 76 Kan. 381.

The record conclusively shows that defendant was in no way prejudiced by representations made, and there is not sufficient evidence to prohibit or estop plaintiff from showing the whole truth and a correct statement of the facts upon which issues herein are based.

Plaintiff's contention is that the money in question was paid out by mistake and for that reason it should be allowed to recover it back. In the case of *United States v. Barlo,* 132 U. S. 271 (*Kelly v. Solari,* 9 M. & W. (Eng.) 54, 58), we find the following rule on this proposition: "Where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true,

which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payor that the fact was untrue, an action will lie to recover it back." This is a correct rule and has the approval of this court.

Before the defendant can successfully invoke plaintiff's acts as an estoppel, it must show that it relied upon and was prejudiced by the acts of which it complains. Whether or not defendant was prejudiced or its previous position changed was a question of fact to be decided by the jury. Both plaintiff and defendant moved for a directed verdict and thereby submitted the finding of fact to the trial court, which found in plaintiff's favor. Such a finding has practically the same effect and is treated the same as a verdict of a jury. Under the rule in this state a verdict of the jury will not be disturbed unless clearly wrong.

The record shows that there is competent and sufficient evidence upon which to base the finding of fact made. Fahey & Company paid defendant for all wheat shipped, including the last shipment, and denies any liability for interest and carrying charges. The amount due as interest and carrying charges from Fahey & Company, if anything is due at all, is unliquidated. In view of all the facts, we think the finding of the trial court was right.

The judgment is

AFFIRMED.

J. H. SCHEMMER V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1920. NO. 21466.

1. **Intoxicating Liquors: PROSECUTION: EVIDENCE.** In a prosecution for having in possession an alcoholic preparation, or remedy containing drugs or medicines, such as are described in section 27, ch. 187, Laws 1917, and unfit for use as a beverage, it is essential to a conviction that the compound, preparation or remedy be "manufactured, bought, sold or dealt in for use as a beverage or intoxicant."

2. ———: BEVERAGE: QUESTION OF FACT. Whether an alcoholic compound, preparation, etc., such as those described in section 27, ch. 187, Laws 1917, is unfit for use as a beverage, is a question of fact to be determined from the evidence in each case.

3. ———: ———. If any of the preparations, compounds, etc., described in said section 27, ch. 187, Laws 1917 (in which class Jamaica ginger is included), are found by the jury to be fit for use as a beverage, they are within the general provisions of the prohibition act.

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

F. L. Bollen and *A. J. Wilcox,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *P. H. Peterson, contra.*

ALDRICH, J.

This is a prosecution for a violation of the liquor laws. It was charged that the plaintiff in error did "unlawfully, wilfully, and maliciously have in his possession, and keep for illegal purposes, one pint of intoxicating liquor, to wit, about one pint of Jamaica ginger, in his place of business and on his person," etc. The evidence showed that he is a druggist, and on the date charged he was found lying on the floor in the rear part of his drug store apparently in a stupor; that when he was revived partially he said that in moving some tubs of ice cream he had slipped and fallen, had broken a rib, and had taken at intervals two small doses of Jamaica ginger and a dose of morphine in order to relieve the severe pain. There was found on his person a 16-ounce bottle of Jamaica ginger partially filled. His rib was not broken, but the physician testified he found a tender spot on his side.

The evidence shows that Jamaica ginger is manufactured by percolating alcohol through ginger root in a powdered from, and that it usually contains in its commercial form at least 80 per cent. of alcohol. It is a standard medical preparation and is used in materia medica in diseases or disturbance of the bowels. The un-

disputed testimony sustains the recital of facts in the first paragraph of instruction No. 1, requested by defendant, and refused by the court, which is as follows:

"The evidence in this case shows that the liquor claimed to have been found and in the possession of the defendant on his person is a preparation or remedy containing drugs which do not contain more alcohol than is necessary for the legitimate purpose of extraction, solution, or preservation, and which contains drugs which in compatible combination is in sufficient quantities to so medicate such preparation or remedy as to make such liquor a medical preparation and render same unfit for use as a beverage, and the same is unfit for a beverage.

"And the burden of proof is on the state to prove beyond a reasonable doubt that the defendant did manufacture, sell, buy or deal in same for use of the same as a beverage at the time and place stated in the complaint; and unless you so find you will find the defendant not guilty."

The court, however, adopted and gave to the jury in his charge the first paragraph of this instruction, and, instead of the second paragraph, substituted the following: "And the burden of proof is on the state to prove beyond a reasonable doubt that the defendant had such liquor in his possession on his person at the time and place stated in the complaint; that the same was an intoxicating liquor; and that the defendant, at said times and place, had such liquor in his possession for use as a beverage; and unless you so find you will find the defendant not guilty."

Section 27, ch. 187, Laws 1917, after describing the alcoholic compounds, preparations and remedies which are not within the act, contains the following provision: "Provided that such compounds, preparations, remedies, perfumes, essences, extracts, and syrups, are not manufactured, bought, sold or dealt in for use as a beverage or intoxicant, and provided further that such compounds, preparations, remedies, perfumes, essences, extracts, and syrups, are unfit for use as beverages."

Under the first proviso, in order to bring such preparations within the act, it must be proved that "such compounds, preparations, remedies, perfumes, essences, extracts, and syrups, are not manufactured, bought, sold or dealt in for use as a beverage or intoxicant." There is no proof in this case that this article is manufactured, bought, sold or dealt in for use as a beverage or intoxicant, or that the defendant had kept or sold the article for that purpose. The testimony of expert witnesses is that Jamaica ginger is harsh and irritating to the stomach, unpleasant to take, and unfit for use as a beverage, although occasionally individuals with abnormal appetites use it for that purpose.

The intention of the legislature was evidently not to prohibit the use of all alcoholic compounds, remedies, essences, culinary, mechanical or toilet preparations, but to include within the prohibition of the act all such articles manufactured, bought, sold or dealt in for use as a beverage or intoxicant. It is a difficult matter to draw the line, because the question is one of degree, and the circumstances of each case must determine the intent. The legislature did not mean to punish those who in good faith manufacture, sell, deal in, or keep the articles enumerated in section 27 for their proper purpose, if they "are unfit for use as beverages."

The charge was not intoxication, but possession of a liquor described in section 27 of the act. It was incumbent upon the state to prove that the article was manufactured, bought, sold or dealt in for use as a beverage or intoxicant, and the jury should have been so instructed. The instruction tendered by defendant was not entirely correct, in that it did not follow the language of the statute, but one should have been given covering the point. Instruction No. 4 given by the court was prejudicially erroneous.

REVERSED.

OSCAR S. MCINTOSH V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1920. No. 21287.

1. **Information: SUFFICIENCY: CATTLE STEALING.** An information based upon a violation of section 8632, Rev. St. 1913 (making cattle stealing a distinct offense), which avers that the accused, at a time and place named, did "unlawfully and feloniously steal, take and carry away one red steer with white face, branded T X on left side, the personal property of Vernon L, Hanson, of the value of sixty dollars," sufficiently charges the crime.
2. **Criminal Law: INSTRUCTION.** An instruction which does not purport to set out all the essential elements constituting the offense will not be held to be prejudicially erroneous, when by another instruction the whole case is covered and the essential elements necessary to be established are set out, when there is no inconsistency in the two instructions.
3. ———: ———: **LARCENY.** An instruction which defines larceny as the unlawful and felonious stealing, taking and carrying away of the personal property of another, of some value, with the felonious intent on the part of the taker to permanently deprive the owner of his property, embraces all the essential elements of the crime. In such case it is not necessary to add, "and with the intent to convert the stolen property to the taker's own use," or words of similar import. In so far as *Ladeaux v. State*, 74 Neb. 19, and *Cheney v. State*, 101 Neb. 461, announce a different rule, they are disapproved.
4. ———: ———: **REASONABLE DOUBT.** The instruction defining "reasonable doubt," set out in the opinion, and, under the circumstances, *held* correct.
5. **Larceny: ASPORTATION.** Any removal of the property, after the same is under the complete control of the taker, from the spot where found, with the requisite intent of the taker to steal, is a sufficient asportation to satisfy the law.
6. ———: ———. When one, with a felonious intent to steal a steer and sell the meat, to aid himself in such purpose, shoots and kills such animal and afterwards, in furtherance of such intent, drags the carcass from the spot where killed, and for fear of detection flees, he may be convicted of larceny of the steer.
7. **Criminal Law: EVIDENCE: CONFESSION.** Evidence examined, and *held* that the admissions of the accused that he committed the

crime were voluntary, and the evidence in that behalf properly received.

ERROR to the district court for Sioux county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Earl McDowell, for plaintiff in error.

Clarence A. Davis, Attorney General, and *C. L. Dort, contra.*

DAY, J.

Oscar S. McIntosh was convicted in the district court for Sioux county on a charge of stealing a steer, and sentenced to the penitentiary for an indeterminate period of from one to ten years. As plaintiff in error he has brought the case here for review.

It is first argued that the information does not charge an offense against the laws of this state, for the reason that there is no charge that the steer was taken without the owner's consent; that it was taken with the intent to deprive the owner of its future use; that it was taken with the intent to convert it to the taker's use. The information is in the usual form, and, omitting the more formal parts, avers that the accused, at a time and place named, did "unlawfully and feloniously steal, take and carry away one red steer with white face, branded T X on left side, the personal property of Vernon L. Hanson, of the value of sixty dollars, contrary to the form of the statute," etc. The offense thus charged is based upon a violation of section 8632, Rev. St. 1913, which, so far as pertinent, provides: "Whoever steals any cow, steer, bull, heifer or calf, of any value * * * shall be imprisoned in the penitentiary not more than ten years nor less than one year." It will be noted that the information follows substantially the language of the statute. It has frequently been held that, when the statute states the elements of a crime, it is generally sufficient in an information or indictment to describe such crime in the language of the statute. *Goff v. State,* 89 Neb. 287, and cases cited.

The objections made to the information in the case before us have been met by the former decisions of this court, and other courts, a few of which are cited. In *Chezem v. State,* 56 Neb. 496, the information was a charge of larceny from the person, in violation of a statute (Rev. St. 1913, sec. 8627) which provided: "Whoever steals property of any value by taking the same from the person of another without putting said person in fear, by threats or the use of force and violence," etc. The information averred that the accused from the person of the prosecuting witness did "unlawfully and feloniously steal, take and carry away" certain described property. It was held that the information sufficiently charged that the taking was against the will of the owner.

In *Martin v. State,* 67 Neb. 36, the information charged that the defendant "unlawfully and feloniously, * * * from the person and against the will of the said B. F. Strawn, did steal, take and carry away, * * * the said personal property," etc. In commenting on the sufficiency of the information, the court said: "While not charging in direct terms that the property was taken with intent on the part of the defendant to convert it permanently to his own use, this element of the crime charged is manifestly included in the statement that he feloniously took and carried away the property with intent to steal. The charge that the property was stolen embodies the idea that it was taken without the consent of the owner, and with the intent of the taker to wrongfully convert it to his own use." In the case last above cited it was apparently taken for granted that an element of the crime was an intention to convert the property to the taker's own use. Whether this is a necessary element of the crime of larceny will be hereinafter discussed.

In *Rema v. State,* 52 Neb. 375, the information was based upon the same statute as in the case now before us, and charged that the accused "unlawfully and feloniously did steal, take and drive away one cow." It was held that the information sufficiently charged that the taking

was with the felonious intent to permanently deprive the owner of his property.

As bearing on the sufficiency of the information, see *Brown v. State,* 88 Neb. 411; *State v. Perry,* 94 Ark. 215; *State v. Jones,* 41 La. Ann. 784; *State v. Jones,* 7 Nev. 408; *Wedge v. State,* 7 Lea (Tenn.) 687; *State v. Griffin,* 79 Ia. 568; *State v. Fitzpatrick,* 9 Houst. (Del.) 385.

We are convinced that the objections to the sufficiency of the information are not well founded.

It is also urged that the court erred in giving instruction No. 8. The criticism directed against this instruction is that, in defining "larceny," the court omitted the word "felonious;" that to constitute larceny there must be a "felonious taking." It is also urged that the instructions as a whole are faulty, in that they omit the element that the taking of the property was with the intention to convert it to the taker's use. By instruction No. 8 the court told the jury: "That larceny has been defined as an unlawful taking and carrying or leading away the personal property, the property of another, without the consent and against the will of the owner and with the intent to permanently deprive the owner of such property." Standing alone this instruction may be open to criticism for the failure to incorporate the idea of "felonious taking" of the property. It has been held, however, that the use of the word "felonious" is not necessary in an instruction defining larceny, if words of equivalent import or meaning are employed. *Philamalee v. State,* 58 Neb. 320. We do not deem it necessary, however, to pass upon the correctness of instruction No. 8 as an abstract definition of larceny. This court has repeatedly held that the charge to the jury must be considered as a whole, and when thus considered, if the law is correctly stated and the jury could not have been misled, that error will not lie for some defect in some instruction.

By instruction No. 2 the court charged the jury that the material allegations of the information, which the state must prove, are: "(1) The time and place therein charged;

(2) that the defendant then and there being did then and there unlawfully and feloniously steal, take and carry away one red steer; (3) that said red steer was then and there the personal property of Vernon L. Hanson; (4) that said red steer was then and there of some value; and (5) that the unlawful and felonious taking was with the intent of the defendant to permanently deprive said Vernon L. Hanson of his said property. If you are convinced by the evidence in this case, beyond a reasonable doubt, of the truth of each one and all of the foregoing material allegations of the information, then you should find the defendant guilty. If you are not so convinced, or if you entertain a reasonable doubt as to the truth of either one or all of said material allegations, then you should give the defendant the benefit of such doubt and acquit him." This instruction clearly required of the jury that they must find beyond a reasonable doubt that the property was taken with a felonious intent before they could convict the defendant. As a whole the charge of the court clearly met the criticism of the omission of a felonious taking.

If there was error in the giving of instruction No. 8, it was without prejudice. But it is further argued that the instructions do not embody the idea that the taking of the property must have been with the intention of converting it to the taker's use. The question is fairly presented whether the taking with the intention of converting the property to the taker's use is an essential element of the crime of larceny. Upon this question there is a conflict of authority, and our own decisions at first blush would appear not harmonious. In *Thompson v. People,* 4 Neb. 524, simple larceny was defined as the "felonious taking and carrying away of the personal goods of another, with intent to deprive the owner permanently of his property therein." This definition was approved in *Mead v. State,* 25 Neb. 444.

Bishop in his valuable work on Criminal Law defines larceny to be: "The taking and removing, by trespass, of personal property which the trespasser knows to belong

either generally or specially to another, with the felonious intent to deprive him of his ownership therein; and, perhaps should be added, for the sake of some advantage to the trespasser—a question on which the decisions are not harmonious." 2 Bishop, Criminal Law (8th ed.) sec. 758. Many definitions with varying expressions are cited by the author.

In *Ladeaux v. State,* 74 Neb. 19, and in *Cheney v. State,* 101 Neb. 461, there is injected into the definition of larceny, as a necessary element, that the property must be taken with the "felonious intent to thereby convert the stolen property to the defendant's own use." By the weight of authority it is not a necessary element that the property be taken for some advantage of the taker or for his use. In 17 R. C. L. 9, sec. 8, it is said: "There is some authority, especially among the earlier decisions, to the effect that the taking must have been *'lucri causa,'* that is, for the sake of gain or pecuniary advantage to the taker. * * * This view, however, has not been uniformly approved by the courts, and according to the weight of modern decisions the element of personal gain to the taker or to some third person is not essential, it being regarded as sufficient if there is an intention permanently to deprive the owner of his property." See cases cited.

From what has been said, it follows that all the essential elements of the crime were set forth in the instructions, and that the objections are not well founded. The expressions in *Ladeaux v. State* and *Cheney v. State, supra,* in so far as they embody as an essential element of larceny that the taking must be with a felonious intent to convert the stolen property to the taker's own use, are disapproved.

The plaintiff in error also complains, of the giving of instruction No. 5, defining "reasonable doubt," as follows: "You are instructed that a reasonable doubt within the meaning of the law is such a doubt that if the same were interposed in the ordinary concerns and affairs of life would cause an ordinarily prudent man to pause and hesitate before acting on the truth of the matter charged. A

doubt to justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case, and unless it is such that, were the same kind of doubt interposed in the graver transactions of life it would cause a reasonable and prudent man to hesitate and pause, it is not sufficient to authorize a verdict of not guilty. It must be a doubt which arises from the evidence or want of evidence in the case, and if it does not so arise it is not a reasonable doubt within the meaning of the law. If, upon consideration of all the evidence, you can say you have an abiding conviction of the truth of the charge, amounting to a moral certainty, then you are satisfied beyond a reasonable doubt."

This instruction is assailed as coming within the criticism of instructions in *Brown v. State,* 88 Neb. 411, *Flege v. State,* 90 Neb. 390, and *Hodge v. State,* 101 Neb. 419. A comparison of the instructions in the cases last above cited with instruction No. 5 will disclose that this instruction does not contain the sentences criticised in those cases. The sentence in the instruction in question, "A doubt to justify an acquittal must be reasonable," etc., was criticised in *Bartels v. State,* 91 Neb. 575, in connection with another sentence in the instruction in that case, in which the jury were told that the rule that requires proof of guilt beyond a reasonable doubt "is not intended to aid any one who is in fact guilty to escape," and the giving of the instruction was held prejudicially erroneous. On the other hand, in *Maxfield v. State,* 54 Neb. 44, an instruction containing the identical sentence, as in instruction No. 5, "A doubt to justify an acquittal must be reasonable," etc., was approved. The sentence in instruction No. 5, "It must be a doubt which arises from the evidence or want of evidence," etc., is substantially the same as found in *Gocmann v. State,* 100 Neb. 772, which was held free from error.

We think the instruction in the case at bar fairly states the meaning of the term "reasonable doubt," and that there was no error in giving it.

Plaintiff in error also urges that the evidence does not support the verdict. The record shows that on the day the offense was committed, but prior thereto, the accused arranged to sell a chunk of meat; that he borrowed a rifle of one man, an axe of another, and in company with a companion left town in an automobile. On the afternoon of the same day, the complaining witness had occasion to go to his ranch, and, observing some commotion among his cattle, drove over in that direction. On his approach he saw an automobile rapidly driving in his pasture. Two men were in the car, but he was not near enough to identify the occupants of the car. On further investigation he discovered that one of his cattle, the steer in question, had been killed, its head severed from the body, the carcass having been dragged some distance from where the animal was shot. The carcass was still bleeding at the time complaining witness saw it, indicating that the killing was recently done. Accused, on being arrested, admitted that he committed the act. In the confession he stated that he shot the steer while sitting in the automobile, that it was dragged a distance from the spot and the head severed with the axe by his companion. The accused, in company with the sheriff, the county attorney, and a brother of the accused, drove over the route taken, the accused driving the car. He pointed out where the animal was shot, and where it was dragged, he indicated where the axe had been thrown in the pasture and got out of the automobile and produced it. On being arraigned in county court on the complaint, he pleaded not guilty, but later asked to be taken before the county judge, and, on being brought into court, told the court he was guilty.

On this state of facts it is suggested that the circumstances do not show the stealing and carrying away of the steer; that there was no possession by the accused of the steer as a live animal. The testimony shows a clear and unmistakable intent on the part of the accused to steal the steer and sell the meat. To aid himself in carrying out this purpose, he shot and killed the steer, took posses-

sion of the carcass, dragged it some distance from the spot, where, after severing the head from the body, he became apprehensive of detection, and fled. We think the facts bring the case within the inhibition of the statute. Of course, if the steer had been accidently or recklessly killed, and the carcass had been found by the defendant and feloniously stolen, such facts would not be a stealing of the steer within the meaning of the statute. This distinction is made in *Hunt v. State,* 55 Ala. 138. The case of *Frazier v. State,* 85 Ala. 17, is very similar to the case at bar. In that case defendant was indicted for stealing a hog. With the intention of feloniously stealing the hog, he shot and killed it, and concealed the carcass with pine tops, in order to conceal it until he could return and remove it. He then told the owner that he had found one of his hogs dead in the woods and obtained permission from him to remove the carcass, which he did. The court said: "If the defendant shot and killed the hog, with the larceny of which he is charged, in a pine thicket in the field, with felonious intent, and covered it with pine tops, in order to conceal it until he could return and secretly remove it; and if he subsequently removed it, in pursuance of the previous felonious intent, there was, in the legal acceptance of the terms, a taking and carrying away, sufficient to complete the offense, though the removal may have been with the consent of the owner, if such consent was procured by intentional misrepresentation and deception." The same principle is recognized in *People v. Smith,* 112 Cal. 333, and *Kemp v. State,* 89 Ala. 52.

One of the elements of larceny is asportation. It is not necessary, however that the property stolen be retained in the possession of the thief. To remove it with the requisite felonious intent from one part of the premises to another, or from the spot where it is found, is a sufficient asportation. 17 R. C. L. 22, sec. 24, and cases cited. Applying this rule to the facts in the case at bar, it is clear there was a sufficient asportation to satisfy the law.

It is further argued that the admissions of guilt made by the accused to the sheriff and others after his arrest were improperly admitted in evidence. In this regard the record shows that while accused was being returned to the state, and before any statement was made by the accused, the sheriff told him that any statement he made might be used against him; that no threats were made or any inducement held out to the accused; that his statement was voluntarily made. On cross-examination, however, the sheriff stated that he told the accused that Hardman had made an affidavit, and that Hardman was not playing square with him, and that these statements were made for the purpose of getting him to talk. This was a species of deception which, while hardly commendable, does not, as we view it, make the subsequent act and admissions of the accused inadmissible. After this conversation on the train, the accused made several admissions, and made the trip over the route, and gave the details of the crime, as has before been stated. Under all of the circumstances, we think the testimony was properly received.

From an examination of the record, and the questions presented, we find no reversible error.

AFFIRMED.

LUCY CARNAHAN, APPELLEE, V. MARY CUMMINGS, APPELLANT.

FILED DECEMBER 4, 1920. No. 21144.

1. **Adverse Possession.** Where a fence is constructed as upon the boundary between two properties and openly intended as a boundary-line fence, and where a party claims ownership of the land up to the fence for the full statutory period, and is not interrupted in his possession or control during that time, he will, by adverse possession, gain title to such land as may have been improperly inclosed with his own.

2. ———: REQUISITES. There must be claim of title, either actual or presumed from the circumstances, in order to acquire land by adverse possession, and, where title to land is claimed on the ground, as in this case, that it is part of a farm owned by plaintiff, it being a strip along the boundary inclosed by a boundary-line fence, it must appear that the plaintiff and his predecessors in interest either had title to the farm or that their possession was such as to show a claim of title to it throughout the period of adverse possession, since the nature of their claim to the disputed strip throughout the period would, under such circumstances, depend upon the general character of the claim that they were making to the farm.

3. ———: EVIDENCE: POSSESSION. In an action to determine title to land, based upon alleged adverse possession, it is improper to allow a witness to testify to his conclusion as to who was in possession of the land during the statutory period, since possession is one of the ultimate facts for the jury to determine.

4. **Husband and Wife:** TORTS: AGENCY. The mere fact that the wife was present when a tortious act is committed by her husband raises no presumption that the act was committed by him as her agent, even though the act has some connection with or reference to her separate estate, when it is not shown that she participated, nor that she encouraged or instigated him to do the act, and where there is no other evidence of agency.

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

Bernard McNeny, for appellant.

George J. Marshall, contra.

FLANSBURG, J.

Action in ejectment and for damages to the land. The strip of land in dispute lies along the boundary between the farm of plaintiff and that of defendant. Plaintiff sets up two causes of action: (1) To recover the land; and (2) for damages for alleged wrongful destruction by the defendant of trees upon the land. Defendant introduced no testimony and moved for a directed verdict, which motion was overruled. Plaintiff recovered a judgment on both causes of action, and defendant appeals.

Defendant contends that the evidence is insufficient to show title in the plaintiff.

Plaintiff owns the land to the east, and the defendant and her husband the land to the west, of the strip in controversy. The locust trees were planted upon the disputed strip in 1882 by Doctor Weston, then the owner of what is now the plaintiff's farm. The planting of these trees was some evidence of a proprietary claim to so much of the land in dispute upon which the trees were planted. In 1885, or 1886, F. L. Cross, then occupying what is now defendant's farm, built a fence a little to the west of the row of trees, and on what was accepted as the boundary line between the two farms. Shortly afterwards the plaintiff and her husband moved upon what is now the plaintiff's farm. Whether or not the plaintiff took title to this land at the time they first moved upon it is not shown. In fact, it nowhere appears in the record at what date she did acquire title to the land or first make claim of title to it; the only evidence being that she is now the owner. Testimony was introduced to the effect that, some 20 or 25 years prior to the commencement of this suit, though that matter is disputed in the record by the testimony of defendant's husband, defendant had asked permission of the plaintiff to build a stile over this fence. What answer plaintiff made, or whether the stile was constructed, however, does not appear, but the alleged incident, if found by the jury to be true, would disclose a mental attitude of the parties recognizing some right of the plaintiff to the control of the fence, or of the property lying to her side of it. It appears that the fence remained as originally placed until in 1914, when it is shown that defendant moved it by nailing the wires to the row of locust trees.

Though the fence may not have been built upon the true boundary, the rule in this state is well settled that, where a fence is constructed as upon the boundary and openly intended as a boundary-line fence, and where a party claims ownership of the land up to the fence for the full statutory period, and is not interrupted in his possession

or control during that time, he will, by adverse possession, gain title to such land as may have been improperly inclosed with his own. *Krumm v. Pillard,* 104 Neb. 335; *Zweiner v. Vest,* 96 Neb. 399; *Andrews v. Hastings,* 85 Neb. 548.

Though there is some evidence that the fence was originally constructed as a boundary-line fence and was treated as such by the parties until it was moved in 1914, that proof, standing alone, is insufficient to bring the plaintiff within the rule above stated. It appears that, after the plaintiff and her husband moved upon the land, they remained for some years and then were followed by two other occupants. Whether the plaintiff and these occupants were tenants, or whether they had continuous or exclusive possession, does not appear, nor does it appear what the nature of their possession was. If the plaintiff and the other occupants owned the land adjacent to the strip in dispute during their respective occupancies, the fact that the fence was built and maintained as a boundary-line fence would, it is true, be sufficient evidence to show the possession and claim of ownership by these parties of all land enclosed by the fence with the property which they owned, although no actual use was made of the disputed strip.

Defendant claims that the plaintiff and the two occupants mentioned were allowed, over objections, to state their conclusions that they had held "possession" of all the land east of the fence, including the strip in dispute. Such testimony was erroneously admitted, for the entire claim of plaintiff must rest upon adverse possession under claim of title for a period of ten years prior to the time when the fence was removed, in 1914, and the question of possession was the ultimate fact to be determined by the jury. The conclusions of these witnesses cannot be treated as evidence, nor be considered as tending in any way to support the verdict.

Moreover, a claim of title, either actual or presumed, is necessary in order to acquire land by adverse possession.

Ryan v. City of Lincoln, 85 Neb. 539; *Andrews v. Hastings*, *supra*. In some cases the claim of title will be presumed when an adverse holding is shown for the statutory period, but in this case the possession of the strip was incidental to and of the same character of possession as was the possession of the farm, and it is neither shown that plaintiff had received the deed to the farm and held title during the period, nor are the facts sufficient to show that the plaintiff and the other occupants had such possession of the farm as to acquire title by adverse possession. The nature of their claim to the disputed strip of land, as being a part of the farm, depends entirely upon, and would be presumed, under such circumstances as are shown in this case, to be the same as the claim of title they are making to the farm itself; but, it is not shown that they had or claimed title to the farm during the period necessary for adverse possession, neither is it shown that they had or claimed title to the disputed strip, as being a part of the farm by reason of its being inclosed by a boundary-line fence.

It is the contention of the defendant that there is no evidence in the record from which a liability for damages, on plaintiff's second cause of action, could attach to the defendant, in any event, for the reason that it appears that defendant's husband cut down the trees, and that defendant herself, though present a part of the time, did not participate.

The record is not clear as to just what title defendant had to the farm of which they were in possession. Defendant's husband testified that both he and the defendant owned it together. He further testified that he cut the trees, and that, though his wife was present at several times, she did not participate, encourage or direct, and that he did it solely upon his own responsibility. His testimony is not contradicted. Plaintiff claims that a presumption arises that the husband acted as the agent of the wife, from the fact that she owned an interest in the farm; that

the cutting of the trees was intended as a benefit to her property; and that she was present and made no objection.

At common law, the rule was just the reverse of what is contended for here. The actions of the wife in the presence of her husband were presumed to have been committed under coercion, exercised by the husband upon the wife, and the wife was relieved from responsibility. That common-law status has been modified by statute in this state. *Goken v. Dallugge,* 72 Neb. 16.

By our statute (Rev. St. 1913, secs. 1560-1562) a married woman is allowed to acquire and control a separate estate and to engage in a trade or business on her separate account. Though at common law she could not be held liable in tort for the acts of her agent, since she could not contract—and agency was based upon contract—nevertheless, under the statutory authority to contract, just referred to, it is clear that she could now be held liable for the torts of her agent, when done within the scope of authority and with respect to her separate estate, even though that agent were her husband. *Atherton v. Barber,* 112 Minn. 523; *McMurtry v. Brown,* 6 Neb. 368. See note to *Kellar v. James* (63 W. Va. 139), 14 L. R. A. n. s. 1003.

The evidence here fails to bring the plaintiff's case within the rule, for neither is it shown that the defendant had such an interest in the farm as would constitute a separate estate under the definition of the statute (Rev. St. 1913, sec. 1560), nor is it shown that the defendant's husband acted as her agent in cutting down the trees. The mere fact that the wife was present when a tortious act was committed by her husband raises no presumption that the act was committed by him as her agent, even though the act has some connection with or reference to her separate estate, when it is not shown that she participated, encouraged or instigated him to do the act, and when there is no other evidence of agency. *Multer v. Knibbs,* 193 Mass. 556, 9 L. R. A. n. s. 322; *Rust-Owen Lumber Co. v. Holt,* 60 Neb. 80; *Goken v. Dallugge, supra; Kellar v. James,* 63 W. Va. 139, 14 L. R. A. n. s. 1003.

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

REVERSED.

AUGUST H. BRUNKE V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1920. No. 21637.

1. **Perjury: TAXATION: ASSESSMENT LIST: FALSE OATH.** One who swears falsely to a list of property, which is furnished the county assessor, and with the fraudulent purpose of evading taxation, and in violation of the provisions of the statute (Rev. St. 1913, sec. 6340), is guilty of false swearing under the statute, though the oath to such property list is administered by a *de facto* precinct assessor.
2. **Criminal Law: EVIDENCE AT FORMER TRIAL: ABSENT WITNESS.** Former testimony, taken at a previous trial of the same criminal case, of a witness whose presence at the trial cannot be enforced, by reason of his having located permanently in another state and beyond the jurisdiction of the court, may be given by the official reporter, who testifies to his recollection that his stenographic notes were accurate and correct, when made, even though such reporter can give no present recollection of the testimony without referring to such notes.
3. ———: **INDORSEMENT OF NAMES ON INFORMATION.** The court may, in its discretion, permit names of additional witnesses to be indorsed upon an information after trial has begun, and where the defendant is not prejudiced thereby.
4. **Rulings** on the admission of evidence examined and *held* no error.

ERROR to the district court for Johnson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

L. W. Colby, for plaintiff in error.

Clarence A. Davis, Attorney General, C. L. Dort and *Lewis C. Westwood, contra.*

FLANSBURG, J.

Defendant was convicted and adjudged to pay a fine on a charge of making a false and fraudulent list of personal

property to the assessor, with the purpose of evading taxation, and in violation of the provisions of section 6340, Rev. St. 1913, and brings the case here for review.

He is a farmer, and, there is evidence to show, listed a part only of the corn and oats belonging to him and which were then stored upon his farm. This list was made out in the presence and with the aid of the precinct assessor, and was sworn to by the defendant before such assessor. It appears that the precinct assessor, though he had been duly elected and was acting under color of that authority, had never taken nor subscribed the oath of office, nor given bond, as required by section 6307, Rev. St. 1913.

The defendant attacks the indictment, the sufficiency of the evidence, and the court's instructions to the jury, raising in each instance the objection that, though the precinct assessor may have been duly elected, yet, never having been qualified by taking oath and giving bond, he had no authority to administer the oath to the defendant, and that a prosecution for false swearing is not maintainable where the oath, made the basis of the charge, has been so administered.

The general rule is that, in order to establish the guilt of the accused in such cases, it must appear that the oath complained of was one prescribed by law, was administered by a person having legal authority, and that the person so administering the oath was acting within his jurisdiction.

It cannot be said that the precinct assessor was acting without legal authority. He was an officer *de facto,* and his acts must be upheld as valid, in so far as they affect the interest of the public and of third persons, to the same extent as though he had been an officer *de jure.* As to such official acts, his legal authority cannot be questioned nor attacked collaterally. *Magneau v. City of Fremont,* 30 Neb. 843; *Ex parte Ward,* 173 U. S. 452; 22 R. C. L. 601, sec. 324.

When the defendant listed his property, the transaction was in no way affected by the fact that the assessor

had not taken an official oath, nor given bond. The defendant, by such property listing, was following the regular process of the law towards a determination of a property valuation. So far as the assessor's office or the public was concerned, the property schedule, given in the regular course of legal procedure, was just as effective for the purpose of evading taxation as though furnished and sworn to before an officer *de jure*.

Following an early English decision, a number of the courts in this country have held that an oath administered by an officer *de facto* is insufficient as a basis for a charge of false swearing. 30 Cyc. 1416. But such decisions, it seems to us, lose sight of the fact that the oath administered by such an officer is not a mere nullity, but is, in fact, a legal and binding oath and one founded upon the legal authority which appertains to *de facto* officers to perform official functions.

The better rule seems to be that a person will be held guilty and liable to the same punishment when swearing before a *de facto* officer as when the oath has been administered by an officer *de jure*. Such is the holding in the following cases: *State v. Williams,* 61 Kan. 739; *State v. Thornhill,* 99 Kan. 808; *Campbell v. People,* 55 Colo. 302; *Izer v. State,* 77 Md. 110; *Woodson v. State,* 24 Tex. App. 153; *People v. Cook,* 8 N. Y. 67; *Greene v. People,* 182 Ill. 278.

Defendant predicates error upon rulings of the court in the admission of certain testimony. Evidence was introduced to show that there was, at the time in question, considerably more grain in storage upon the farm than what defendant had described in his property list. It was further shown that defendant made out property schedules for his two sons, who were living with him upon the farm, and these schedules showed no corn nor oats owned by them. Defendant objects to the introduction of these schedules in evidence, on the ground that they were immaterial. This was evidence in the nature of a declaration against interest, bearing directly upon the

question of defendant's ownership of the grain, then in the apparent possession of himself and his two sons, and was evidence upon his alleged intent to list only a part of what he actually owned. In his own behalf, he testified that his two sons owned a portion of this grain, and these exhibits were quite material as tending to refute the defendant's testimony in that respect.

The testimony of R. H. Holmes, taken and reduced to writing at a previous trial of this case, was also introduced. In order to lay a foundation for the introduction of this former testimony, the county attorney testified that Holmes was, at the time of this trial, residing in Colorado and beyond the jurisdiction of the court, and, as corroborative evidence of that fact, introduced a letter, written by this witness, dated a few days prior to time of this trial, postmarked Yuma, Colorado, and in which it was stated that the witness could attend the trial if sent a check to cover expenses and could arrange his affairs. Such testimony, it seems to us, was entirely proper, as tending to show the whereabouts of the witness and that he was beyond the court's jurisdiction.

The name of the court reporter, G. W. Goldsmith, who took the former testimony of Holmes, had not been indorsed upon the information when it was filed. The name of Holmes, however, had been so indorsed, and it was therefore apparent to the defendant from that indorsement that the testimony of Holmes was intended to be used, though he was not advised at that time that the former testimony, taken at the previous hearing, was to be resorted to. After the trial had commenced, the court granted permission to indorse on the information the name of the reporter, Goldsmith. The court acted within reasonable discretion and within the provisions of the statute (Laws 1915, ch. 164), and the defendant was not prejudiced thereby. *Sheppard v. State,* 104 Neb. 709; *Kemplin v. State,* 90 Neb. 655.

The defendant complains further that the court erred in permitting the witness Goldsmith to give the former

testimony of Holmes, just referred to, from his stenographic notes, for the reason that, though Mr. Goldsmith testified that he remembered that the notes were accurate when made, he admitted that he had no distinct present recollection of the substance of the former testimony, so that he could give the testimony from his recollection alone, without referring to the transcript. That objection, under the ruling of this court and under the majority rule in other jurisdictions, is untenable. *Hair v. State,* 16 Neb. 601; 22 C. J. 439, sec. 527.

The defendant makes the further objection to the testimony of Mr. Goldsmith that the presence of the witness Holmes could have been procured at the trial, as indicated by his letter. It appears, however, that the county attorney both wrote and telegraphed the witness to come, but that the witness did not comply. There was no means of compelling the witness to come; no process could issue to him. The witness was living in Colorado, and had taken up his abode there, and, so far as the evidence shows, for an indefinite time. The defendant had been confronted by this witness at the former trial, and then had full opportunity to cross-examine, and had exercised that right. To hold that at each successive trial the accused must be again confronted with each witness would, in cases where the witness had gone beyond the jurisdiction of the court, as in this case, frequently result in a defeat of justice. Under the circumstances shown, the former testimony of this witness was admissible. *Hair v. State, supra; Koenigstein v. State,* 103 Neb. 580; 16 C. J. 757, sec. 1557.

AFFIRMED.

FRANK A. POPEL v. STATE OF NEBRASKA.

FILED DECEMBER 4, 1920. No. 21670.

Criminal Law: ARRAIGNMENT. In a felony case, it is reversible error to dispense with the arraignment of the accused, which is required by the statute (Rev. St. 1913, sec. 9092), and which, by the plain meaning of the statute, the accused is not allowed to waive.

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

D. W. Livingston and *W. F. Moran,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *C. L. Dort, contra.*

FLANSBURG, J.

Defendant was convicted of the crime of arson, and brings the case here for review.

The first error complained of is that the defendant was not arraigned, in accordance with the provisions of the statute. The record shows that he waived the reading of the information and pleaded not guilty. Under prior decisions of this court (*Burroughs v. State,* 94 Neb. 519; *Barker v. State,* 54 Neb. 53; *Browning v. State,* 54 Neb. 203; *Wozniak v. State,* 103 Neb. 749), it is held that the provisions of the statute (Rev. St. 1913, sec. 9092) requiring arraignment must be complied with; that the arraignment could not be waived; and that a failure to follow the statute is fatal to the proceeding.

It is the contention of the state's attorney that we should now overrule those decisions and that this case should not be reversed, since it appears that the accused had been served with a copy of the indictment several months before the trial and had ample opportunity to inform himself as to the charge made, and it is urged that, since the accused was fully informed of the charge

made against him, the failure of the trial court to read to him the indictment was a failure to perform a mere formality, which would have protected no substantial right, and was, therefore, not reversible error.

The statute in question reads as follows: "The accused shall be arraigned by reading to him the indictment, unless, in cases of indictments for misdemeanors, the reading shall be waived by the accused by the nature of the charge being made known to him, and he shall then be asked whether he is guilty or not guilty of the offense charged."

It is manifest, as pointed out in our decisions above referred to, that it was the intention of the legislature, as gathered by implication from the wording of the statute, that the accused in felony cases should not be allowed to waive the reading of the information. The statute is not open to construction. It is clearly the provision of the statute that in felony cases the reading of the indictment cannot be waived. When the legislature says there shall be no waiver, can the court annul that mandate of the statute and say that nevertheless a waiver may be had? We think not. It was within the province of the legislature to require that the information be read to the accused in open court, in pursuance of its power to prescribe what things are essential to a fair trial. Where the information is not read to the accused in open court, it becomes a question of fact, depending upon other proof, as to whether or not he has been fully advised of the charge. An information must be prepared with precision and particularity. This would be a useless formality unless the exact contents of that document is fully made known to the accused. The requirement that the information be openly read to him settles the question of his exact knowledge of the charge beyond the peradventure of a doubt. It is a provision that is reasonable and easily complied with. The state's attorney argues that there is no prejudicial error, for the reason that the accused in this case knew the nature of the

charge being made against him. That, however, is a question of fact which the legislature evidently intended should be foreclosed by a reading of the information in open court.

At the time of the enactment of this provision, it was the general holding that a formal arraignment was an essential step in a criminal proceeding. At the common law an arraignment was essential, could not be waived, and its omission was fatal. The statute is simply an enunciation of that rule. It is true that many courts have departed from their former holdings that an arraignment cannot be waived, and have held that, where the charge is shown to have been fully made known to the accused, and where he proceeds to trial as if an arraignment had been made, he is not prejudiced by the omission of a formal arraignment, and such omission does not, therefore, affect his substantial rights, nor constitute reversible error. But, upon examination of those cases, it is disclosed that the statutes of the states where the decisions were rendered differ from our own, and, furthermore, in most, if not all, of those jurisdictions, statutes have been enacted providing that the trial, judgment, or the proceeding should not be affected by reason of any technical errors which have not affected the substantial rights of the accused. By such statutes, the courts are given authority to determine whether or not failure to take certain steps in the proceeding has prejudiced the defendant, and, therefore, whether such omissions constitute reversible error. In all of the following decisions the courts have had such authority from the lawmaking power: *Garland v. State,* 232 U. S. 642; *Hack v. State,* 141 Wis. 346, 45 L. R. A. n. s. 664; *Hudson v. State,* 117 Ga. 704; *People v. Weeks,* 165 Mich. 362; *State v. O'Kelley,* 258 Mo. 345; *State v. Reddington,* 7 S. Dak. 368; *State v. Cassady,* 12 Kan. 550; *State v. Straub,* 16 Wash. 111; *People v. Osterhout,* 34 Hun (N. Y.) 260.

The state's attorney relies especially upon the case of *Garland v. State, supra.* Under the federal statute there is no provision for an arraignment, no statutory inhibition against a waiver by the accused, and there is, furthermore, the statutory provision of the kind we have just mentioned, to the effect that the trial or judgment shall not be affected by technical errors which do not tend to the prejudice of the defendant.

In this state we have no such provision in our Criminal Code. This court has no authority to dispense with any of those steps in a criminal proceeding which the legislature has declared to be essential. Where a statute is merely directory, a failure to follow it is not reversible error, should it be determined that the accused is not prejudiced thereby. But where the statute is mandatory, the court can have no latitude of judgment in the matter, but must follow the provisions. We cannot depart from that well-grounded rule and sacrifice the stability of the law to the end of bringing about a desired result in any given case. For the court to adopt a rule of disregarding essential provisions of the statute, where it believes no prejudice results, is to substitute a court procedure in the place of that established by the legislature, and renders uncertain to what limit the court may exercise that freedom.

It is argued that this court has held in *Barker v. State,* 54 Neb. 53, and *Foster v. State,* 83 Neb. 264, that the defendant may waive the service before trial of a copy of the information upon him, and that if he can do this he can also waive arraignment. That argument loses sight entirely of the legal question here involved. Quite a different section of the statute provides for the serving of a copy of the information upon the accused, and by the terms of the statute the accused is given the right to waive such service, and by his own consent may proceed to trial without it. Rev. St. 1913, sec. 9080. The two statutes are so vitally different that those cases are not

only not controlling, but they do not have any logical bearing whatsoever upon the question here presented.

In *Hopt v. People,* 110 U. S. 574, the court said: "That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods." By our statute a formal arraignment is made an essential step in a criminal proceeding, and it is a step based upon reason. As has been pointed out repeatedly in the former decisions of this court, hereinbefore referred to, until the legislature changes the law or grants permission to the court to determine when those steps now made essential may be disregarded in case no prejudice results, this court is not at liberty to dispense with those formal requirements.

The former decisions of this court are in line with the decisions of other courts (*State v. Donahue,* 75 Or. 409, 5 A. L. R. 1121; 16 C. J. 391, sec. 720), and are adhered to, and the judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED.

MORRISSEY, C. J., not sitting.

LETTON, J., dissenting.

I feel it my duty to again dissent to the theory that no part of arraignment may be waived. In addition to the reasons adduced in the dissenting opinions in *Burroughs v. State,* 94 Neb. 519, and *Wozniak v. State,* 103 Neb. 749, 754, I submit the following in the hope that in time the court may adopt the views expressed in these dissents.

New trials are allowed in courts of law on statutory grounds. Section 9131, Rev. St. 1913, provides: "A new trial, after a verdict of conviction, may be granted on the application of the defendant for any of the following reasons *affecting materially his substantial rights*: First,

Irregularity in the proceedings of the court, or the prosecuting attorney, or the witnesses for the state, or any order of the court, or abuse of discretion, *by which the defendant was prevented from having a fair trial.*"

Five other grounds are set forth in this section, none of which, however, apply to the situation under consideration. There is nothing in the Criminal Code specifying for what reasons a new trial may be granted by this court in error proceedings, but, so far as the writer is advised, judgments are never reversed and new trials are never granted in such proceedings unless one of the reasons set forth in section 9131 exists.

It will be noticed that the reason for which a new trial may be granted must be one "affecting materially his (defendant's) substantial rights," and that "irregularity in the proceedings of the court," in which category failure to have the information read to the accused falls, is not a ground for a new trial, unless by reason of the same "the defendant was prevented from having a fair trial."

In *Barker v. State,* 54 Neb. 53, the record failed to show that the accused was ever arraigned. The court said: "It is obvious that, in every case where a trial upon an indictment or information is required, a plea of not guilty must be entered by the court, since this is essential to the formation of the issue upon which the accused is tried." The case does not decide that, under such circumstances as in this case, the accused is entitled to a new trial. The *Barker* case and others to the same effect are not in point, because the accused here pleaded "not guilty," and an issue was thus created for the jury to pass upon. The majority opinion is a more extreme example of holding to mere form than the *Barker or Burroughs* cases, since here the accused had a copy of the information in proper season, and there was an arraignment and plea, incomplete in only one respect. The accused by his own express declaration waived the reading

of the charge, and thus caused or induced the omission of which he now complains.

The statute is as positive in its terms that requires the plea of the accused to be indorsed upon the indictment, but in *Preuit v. State,* 5 Neb. 377, it was held that the failure to do so was not prejudicially erroneous.

The language of Chief Justice Winslow in *Hack v. State,* 141 Wis. 346, is peculiarly applicable: "Surely the defendant should have every one of his constitutional rights and privileges, but should he be permitted to juggle with them? Should he be silent when he ought to ask for some minor right which the court would at once give him, and then when he has had his trial, and the issue has gone against him, should he be heard to say there is error because he was not given his right? Should he be allowed to play his game with loaded dice? Should justice travel with leaden heel because the defendant has secretly stored up some technical error not affecting the merits, and thus secured a new trial because forsooth he can waive nothing? We think not.

In 16 C. J. 392, sec. 720, it is said: "Moreover, many of the courts have departed from the old practice, even in cases of felony, and now permit an arraignment to be waived, not only by an express waiver, but also by acts equivalent thereto, as by voluntary pleading to the indictment or information without objection, or even without plea when it appears that defendant was present in person and by counsel, announced himself ready for trial, went to trial before a jury regularly impaneled and sworn, and submitted the question of guilt to their determination." Cases from 22 states are cited in support of the text.

Of course, if the facts in a case should show that the accused was not informed before trial of the nature of the charge against him, and that he had been convicted under such circumstances that a fair trial was not afforded him, the case would fall within section 9131, and a new trial would be granted; but where, as in this case,

nothing but the merest bare formality is omitted, and the accused has had every right which he would have had if he had made the same plea after a reading of the information, there is no sound reason why the labor of the courts, the inconvenience to the jurors of their enforced service, and the expense to which the commonwealth has been put should all be thrown away. Accused caused the omission by his own act and ought not now to be heard to complain. The courts are becoming more practical in their methods of procedure. This tendency should be fostered and encouraged by disregarding outworn and useless precedents of no practical aid in the administration of justice.

ROY JOSEPH BRAUNIE v. STATE OF NEBRASKA.

FILED DECEMBER 4, 1920. No. 21685.

1. **Criminal Law**: INSANITY: EXPERT EVIDENCE. A physician in general practice, who has had experience in cases of insanity, *held* to be entitled to testify as an expert on the question of the insanity of the accused, though he is not a specialist in nervous diseases and testifies that he is not an expert on insanity.

2. ———: NEW TRIAL: MISCONDUCT OF JUROR. A showing that a juror went to sleep during the taking of testimony is not ground for a new trial, when it does not appear how long he remained asleep, nor that the testimony introduced during that time was of any extent or importance, or whether it was favorable or unfavorable to the defendant.

3. ———: HOMICIDE: INSTRUCTION AS TO MANSLAUGHTER. In a trial for murder, where the undisputed facts show that defendant did the killing, and where there is no evidence of provocation by the deceased or other mitigating or extenuating circumstances, which would reduce the crime to manslaughter, it is not the duty of the court to instruct upon manslaughter.

4. ———: ———: INSTRUCTION AS TO MALICE. Though the malice, engendered in the heart of the defendant, must have been without legal justification or excuse in order that he be found guilty of murder in the first or second degree, yet, where there is no

evidence tending to show such justification or excuse, the court is not called upon to cover that matter in the instructions.

5. **Homicide: PASSION.** Passion, no matter how violent, will not reduce the crime to manslaughter, unless there has been adequate provocation, such as would naturally and reasonably arouse the passions of an ordinary man beyond his power of control, and where it appears that the defendant and his employer had heated words over the work being performed, and that the employer told the defendant, in substance, that he was discharged, such circumstances, as a matter of law, do not constitute such adequate provocation.

ERROR to the district court for Morrill county: RALPH W. HOBART, JUDGE. *Affirmed.*

T. F. Neighbors, for plaintiff in error.

Clarence A. Davis, Attorney General, and *J. B. Barnes, contra.*

FLANSBURG, J.

Defendant was convicted of murder in the first degree and sentenced to life imprisonment. He brings the case here for review.

Objection is made to the sufficiency of the evidence. It seems that defendant, a man 24 years old, had been employed as a farm hand on the farm of John Watts. He soon acquired a dislike for Watts, and stated to the boys on the place that he intended to get a revolver and, if he had trouble with Watts, would kill him. A few days thereafter, defendant was working in the field with a team of colts and had difficulty with them. Watts appeared, and defendant and Watts had heated words, ending in the defendant being discharged. Defendant then ran to the milk house, got a rifle, and, as Watts passed some 15 feet away, and was entering the door of the farm house, defendant shot him. Watts died 18 hours afterwards. The defendant's plea was "not guilty on the ground of insanity."

On the question of insanity the testimony of experts was introduced both on behalf of the defendant and also for the state. No hypothetical questions were asked, but

these witnesses based their opinions on their examinations of and conversations had with the defendant before the time of trial. The witnesses for the state testified that defendant was sane. One expert witness, on behalf of the defendant, said that from the discussion he had with the defendant he believed defendant would have had no understanding as to what was right or wrong, with reference to the act committed. The jury had before it the history of the crime, showing defendant's actions, statements and conduct for a considerable time both before and after the shooting, as well as the testimony of experts that the defendant was sane. There is ample to support the verdict.

One physician, called by the state, testified that he was a graduate of a regular medical school, had been licensed to practice and had been engaged in regular practice for 34 years; that he had had experience in insanity cases, and was, in fact, serving as medical examiner on the county insanity board; but he stated that he was not an expert on insanity matters. This witness, over defendant's objection as to his qualifications, was allowed to give expert testimony on the question of defendant's sanity. Such testimony was not improperly received. It is the function of the court to determine the qualifications of a witness, offered as an expert, from the showing of fact as to the study made and knowledge acquired by the witness upon the particular matter in question. The conclusion of a witness, as to whether or not he is an expert, is not binding on the court. It is apparent, in this case, that what the witness intended to convey by his assertion that he was not an expert was that he was not a specialist in matters of insanity. It was, however, not necessary that he be a specialist. If it appears to the court that the witness has had an opportunity to make special study and has done so, and has thus acquired knowledge and has had experience in reference to the matter, beyond that of ordinary persons, he may be allowed to testify as an expert. The extent, then, of such

knowledge and experience bears upon the weight to be given to his testimony by the jury. *Spaulding v. City of Edina,* 122 Mo. App. 65; *Pecos & N. T. R. Co. v. Coffman,* 56 Tex. Civ. App. 472; *Castner v. Sliker,* 33 N. J. Law, 95; 22 C. J. 675, sec. 765.

Counsel for defendant contends that the court erred in ordering that the defendant submit himself to an oral examination by the medical witnesses for the state, for the purpose of giving them an opportunity to pass upon his sanity, since such an order compelled the defendant to give testimony against himself. The record does not show that any such order was made, and the testimony, furthermore, does show that the conversations had with the defendant by these witnesses were of an entirely voluntary nature on his part.

The county attorney, in his argument to the jury, stated that he had been instructed by the court to have certain doctors examine the defendant upon the question of insanity, and the defendant contends that such statements made by the county attorney are prejudicial. The record does not show that any such order had been made by the court and the remarks were outside the record and were properly excepted to. The entire argument of the county attorney is, however, shown in the transcript. It is quite temperate and entirely fair, and it is apparent that no prejudice could have resulted from the statements complained of.

Misconduct of the jury is urged as ground for a new trial. By affidavit, attached to the motion for a new trial, it is set out that one of the jurors went to sleep while testimony was being taken and appeared to pay but very little attention to the testimony or argument of counsel. The length of time the juror was asleep is not shown, nor does it appear what testimony was introduced during that time, nor that it was of any importance or extent, nor whether favorable or unfavorable to the accused. There is no showing that the defendant was in any way prejudiced. 16 C. J. 1170, sec. 2677. Whether

or not this juror paid such attention to the trial as to intelligently comprehend the proceeding and hear the testimony was a matter open to the trial judge and was necessarily passed upon by him when the motion for a new trial was overruled. No objection on this ground was made by the defendant during the course of the trial, and there is nothing in the affidavit, as we view it, to question the sound judgment of the trial judge that the juror was sufficiently attentive.

Error is predicated on the giving of the following instruction: "Malice in law includes, but is not confined to, hatred, ill-will, or desire for revenge. It may for the purposes of this case be defined as that condition of the human mind which shows a heart regardless of social duties and fatally bent on mischief, the existence of which is inferred from the acts done or words spoken."

Defendant makes two objections to this instruction: First, he contends the instruction infers that malice is, in law, presumed from the facts shown in this case; and, second, that the instruction does not inform the jury that, even though the condition of mind described be found to exist, still it should not be considered malice if found to have been produced by adequate provocation on the part of the deceased, in which event such emotions would, in law, have been justifiable or excusable.

As to the first objection, the defendant relies upon the decisions in *Flege v. State,* 90 Neb. 390, *Davis v. State,* 90 Neb. 361, and *Vollmer v. State,* 24 Neb. 838, where it is decided that malice cannot be presumed, as a matter of law, from the fact of killing, when all the circumstances surrounding the killing are shown, and that the question of malice must then be left to the jury. We do not believe the instruction open to the objection made, since it does not instruct that malice is to be inferred from the fact of killing, but, as we interpret it, the jury is informed that the jury itself is to determine the question of malice, and that it may infer malice from the acts done and things said. As to the matter complained of, the instruction is the same

as was approved in *Vollmer v. State, supra,* and *Carr v. State,* 23 Neb. 749.

As to the second objection, the definition of malice, though, perhaps, incomplete if given in a case where the evidence was sufficient to reduce the homicide to the crime of manslaughter, since the emotions described in the instruction, if caused by adequate provocation, would not have constituted malice, yet was sufficient here, where there is no evidence of provocation, nor of extenuating or mitigating circumstances, adequate to reduce the crime to manslaughter. All that could be inferred is that the deceased, by his remarks, had provoked the defendant to anger. That such manner and extent of provocation is insufficient, in law, to mitigate the offense is beyond question. 21 Cyc. 743.

The court in its instructions defined the crime of murder in the first and in the second degree and defined the crime of manslaughter, but neglected to instruct what provocation or cause would be adequate to reduce the offense from murder to manslaughter. The only possible defense in this case was insanity. No prejudice could have resulted to the defendant by a failure to instruct fully on manslaughter, since there was no evidence in the record by which the homicide could have been reduced to that lower degree of crime. *Davis v. State, supra.* There being no evidence tending to establish manslaughter, it was not the duty of the court to instruct upon that degree of the crime. *Williams v. State,* 103 Neb. 710. And by the jury's verdict, that the accused was guilty of a deliberate and premeditated murder and not of murder in the second degree, it becomes quite apparent that the defendant was not prejudiced by the failure of the court to instruct fully as to the crime of manslaughter, or to inform the jury under what circumstances malice, as defined in the instruction, would be legally justifiable or excusable. Ann. Cas. 1913A, 735 (*People v. Brown,* 203 N. Y. 44).

AFFIRMED.

REYNOLDS & MAGINN, APPELLEES, V. OMAHA GENERAL IRON WORKS, APPELLANT.

FILED DECEMBER 4, 1920. No. 21105.

1. **Sales:** OFFER: ACCEPTANCE. A letter to a firm of contractors, proposing, for a stated sum, to furnish all the material of a certain kind required in the erection of a certain building, according to its plans and specifications, in case the firm should be the successful bidders therefor, is such an offer as will, when accepted after the contract for the building has been awarded to the firm, constitute a valid and enforceable agreement.
2. ———: ORAL ACCEPTANCE: EVIDENCE. Evidence examined, and *held* sufficient to establish the unqualified oral acceptance by the appellees of the proposition to furnish the material aforesaid.
3. **Statute of Frauds:** SALES: ORAL ACCEPTANCE. The oral acceptance of a written offer to sell goods is sufficient to satisfy the statute of frauds, if the person making the offer is the party to be charged and the written offer contains all the essential terms of the proposed contract.
4. ———: MEMORANDUM: WRITTEN OFFER OF SALE. The written offer in this case *held* to set forth all the terms essential to constitute a sufficient memorandum to satisfy the requirements of the statute of frauds. Rev. St. 1913, sec. 2631.
5. **Contracts:** INFORMAL AGREEMENT. Though a more formal contract is expected to be afterwards made, an informal agreement complete in its terms will take effect if the parties so intend, provided that the formal contract is not to contain material provisions not contained in or to be inferred from the preliminary informal agreement. Where, therefore, such complete informal agreement has been conclusively established, it is not error to exclude as immaterial offered evidence to the effect that it was the custom of the parties in their previous dealings to embody their agreements in formal contracts.
6. **Appeal:** FAILURE TO REPLY. Where a case is tried in all respects as if the averments of the answer had been denied by reply, the fact that no reply was actually filed cannot be taken advantage of on appeal.

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

Edward R. Burke, for appellant.

Smith, Schall & Howell, contra.

DORSEY, C.

Reynolds & Maginn, a firm of contractors, plaintiffs in the court below and appellees here, recovered a judgment against the appellant, Omaha General Iron Works, for damages for alleged breach of contract in failing to furnish the structural steel and iron required in the erection of a school building at Beemer, Nebraska, which the appellees were under contract to erect. Both parties moved for a directed verdict at the close of the evidence, the jury were discharged, and judgment was rendered by the court.

The action was predicated upon a letter received by the appellees from the appellant and the alleged oral acceptance of the offer therein contained. The letter follows:

"Omaha, Neb., Feb'y 9, 1917.

"Reynolds & Maginn, General Contractors,
3013 Ames Avenue, Omaha, Nebraska.

"Gentlemen: We propose to furnish the structural steel and miscellaneous iron for the erection of the high and grade school at Beemer, Nebr., in accordance with the plans and specifications prepared by Architect W. F. Gernandt, delivered f. o. b. cars Beemer, for the sum of nineteen hundred dollars ($1,900.00).

"In the above price we have included all door and window lintels, steel columns, and I-beams, ring and covers, joist anchors and hangers, clean-out door, cast-iron window sill, reinforcing bars for concrete stairs, door-frame anchors, one flag pole, one ashpit door. We trust these figures may be of some service to you and that if you are the successful bidders we may be favored with the order.

"OMAHA GENERAL IRON WORKS,
"D. B. Van Every."

The appellees made no written response to this letter, but on February 27, 1917, after having secured the contract for the schoolhouse, their representative called the appel-

lant by telephone and informed them that the appellees were the successful bidders. A conversation ensued in which, according to the testimony offered by the appellees, they notified the appellant of their acceptance of its offer to furnish the steel and iron pursuant to the terms of the letter of February 9, and the appellant signified its intention to comply therewith. March 12, 1917, however, the appellant advised the appellees by letter that a mistake of $600 had been made in its estimates of the cost of the material in question, and that it would not furnish the same except at an increase in that amount. The appellees then procured the material from another concern at a cost exceeding the appellant's estimate of $1,900 in the sum for which judgment was rendered in this action.

Deferring, for the moment, the question whether or not there was a sufficient acceptance of the alleged offer, as contained in the letter, our first inquiry must be whether the letter of February 9 constituted such an offer or proposal as could be turned into a contract by acceptance. *Nebraska Seed Co. v. Harsh*, 98 Neb. 89, holds, in substance, that a letter intended only as a preliminary negotiation, an invitation to the person addressed or to the public generally, or to those engaged in a particular line of business, to make an offer or to trade, or a letter in the nature of an advertisement or circular addressed generally to those engaged in a particular line of business stating the price at which property is held, could not be converted into a contract by acceptance. The language of the letter in question in that case consisted of a statement that the writer had about 1,800 bushels of millet seed and wanted a certain price therefor. It was held not to be a final proposition, but a mere request for bids, because it did not contain a distinct offer to sell.

The letter involved in the instant case, however, was in the form of a definite proposal to furnish the material required in the erection of a certain building, in accordance with certain plans and specifications and for a total sum. It was in the nature of a bid for the entire amount

of material of the kind indicated required for a particular job, rather than a general quotation of prices of different kinds of material handled by the appellant, such as the ordinary trade circular. The recipient of a trade circular or price quotation usually must formulate and send an order stating the quantities of different kinds of material desired, and that would be the basis of the contract if it should be accepted by the seller; but in the instant case the terms of the letter obviate that necessity. The quantities and kinds of material fixed by the plans and specifications were equally well known to both parties; nothing was left for future negotiation. The appellant knew that the appellees were bidders for the Beemer schoolhouse, and the letter was a proposal expressly conditioned upon their bid being accepted. By the terms of the letter the appellant, in effect, invited the appellees to accept its offer and to enter into a contract on the basis of the letter if their bid should be successful, and it was tacitly understood that acceptance or rejection of the appellant's proposal should await the result of the competition for the schoolhouse. The terms of the proposed contract being definitely and completely covered by the letter, can it be said that the letter was intended merely as an invitation to future negotiation, to be consummated by the execution of a later and distinct contract? We think not. On the contrary, we are convinced that it was the intention of the parties to treat the letter as the basis of the contemplated contract, and to consider it closed by acceptance duly notified to the appellant.

In *Peirce v. Cornell,* 117 App. Div. 66, 102 N. Y. Supp. 102, a case quite analogous to the instant case, it is said: "The test is whether or not the proposition by one party and its acceptance by the other shows that the minds of the parties met as to the terms of the contract, leaving no essential term to future agreement." We are of the opinion that the letter in question satisfies that test, and that, if there was a valid acceptance of the proposal therein contained, an enforceable contract resulted. *Campfield v. Sauer,* 91 C. C. A. 304, 164 Fed. 833.

Turning now to the issue of acceptance, the testimony on behalf of the appellees was that they notified the appellant by telephone of their acceptance of the proposal embodied in the letter of February 9, and that the appellant assented thereto. While the appellant's version of this conversation did not coincide exactly with the appellees', we think that the fact that there was an unqualified oral acceptance of the proposal was not successfully controverted. If there were any doubt or conflict upon that point, it should be borne in mind that the case was submitted to the trial court upon the facts as well as the law, and that its finding, being supported by sufficient, though conflicting, evidence, is conclusive.

That an oral acceptance of a written offer to sell goods is sufficient to satisfy the statute of frauds, if the person making the offer is the party to be charged and the written offer contains all the essential terms of the proposed contract, is supported by the weight of authority. *Willis v. Ellis,* 98 Miss. 197, Ann. Cas. 1913A, 1039, and note; *Carter v. Western Tie & Timber Co.,* 184 Mo. App. 523; *Kohn & Baer v. Ariowitsch Co.,* 168 N. Y. Supp. 909, 181 App. Div. 415; *Smith v. Gibson,* 25 Neb. 511. The appellant, however, contends that the letter of February 9 was not a sufficient memorandum under the provisions of section 2631, Rev. St. 1913. The appellees claim that, since the contract relates to iron and steel to be manufactured according to plans and specifications, it deals, not with goods in existence at the time, but with work and labor to be bestowed in their manufacture, and that the contract does not come within the purview of the statute of frauds. That question need not be discussed here, for if it be assumed that the contract involved in the instant case is one within the statute of frauds, the letter, in our opinion, constitutes a sufficient memorandum. This court has uniformly held that our statute of frauds does not require all the terms of the contract to be stated in the written memorandum, but that details may be supplied by parol evidence. *Rusicka v. Hotovy,* 72 Neb. 589; *Mc-*

Caffrey Bros. Co. v. Hart-Williams Coal Co., 96 Neb. 774. We cannot perceive that any essential term was omitted from the letter. It set forth with certainty the material to be furnished, the price to be paid, and the place of delivery. When the delivery was to be made and the price to be paid was not specifically covered, but these were matters which, if not implied from the other terms of the contract, could be supplied by parol under the rule laid down in the above-cited cases.

In proof of its contention that the letter of February 9 was intended to be only part of the preliminary negotiation, to be consummated later by the execution of a formal contract, and not to be binding until such formal contract was entered into, the appellant offered to show that like preliminary proposals to furnish materials had often before been submitted by it to the appellees, and that it had been their custom always in such cases to enter into a separate formal contract. The form of contract used on such previous occasions was also offered in evidence. The refusal by the court to admit the offered evidence is assigned as error. In view of our conclusion that the letter expressed all the terms essential to a complete contract and became so when accepted, it was, in our opinion, immaterial that the parties may have contemplated reducing it to a more formal writing. 13 C. J. 290, 291; *United States v. Carlin Construction Co.*, 138 C. C. A. 449, 224 Fed. 859; *Singer v. Disston & Sons*, 178 App. Div. 108, 165 N. Y. Supp. 94. "The law undoubtedly is that an informal agreement complete in its terms will take effect if the parties so intend, though a more formal contract is expected to be afterwards made, provided that the formal contract is not to contain material provisions not contained in or to be inferred from the preliminary informal agreement." *Garrick Theatre Co. v. Gimbel Bros.*, 158 Wis. 649.

No reply was filed to the appellant's answer, and it is argued that the new matter set up therein must therefore be taken as true, and that the appellant was, for that reason, entitled to judgment. Evidence was tendered by

the appellant in the court below in support of all the averments of its answer, as if they had been put in issue by reply. The case having been tried in all respects as if a reply had been filed, the fact that it was not actually filed cannot be taken advantage of on appeal. *Gruenther v. Bank of Monroe,* 90 Neb. 280.

No error appearing in the record, we recommend that the judgment be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

HENRY STALDER, APPELLEE, V. ANDY STALDER, APPELLANT.

FILED DECEMBER 4, 1920. No. 21152.

1. **Wills:** EQUITABLE CONVERSION. Where a will gives the executor power to sell real estate to carry out the provisions thereof, and, because of deficiency of personal estate, they cannot be carried out without converting the real estate into money, the conditions being such that the testator must have intended that such conversion should take place, the power, although not in express terms a positive direction to sell the real estate, will be construed as such, and an equitable conversion of the real estate into money will be deemed to have occurred at the testator's death.
2. ———: ———: RENTS. In such a case a beneficiary, who is given by the will a share of the remainder of the estate after the payment of debts and legacies, takes no interest in the real estate, as such, and cannot maintain an action for rents.

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

Kelligar, Ferneau & Gagnon, for appellant.

John Wiltse, contra.

DORSEY, C.

This is an action by the appellee, Henry Stalder, one of the children and beneficiaries under the will of Annie Stalder, deceased, to recover his share of the rent of a certain tract of land of which she died seised, accruing after her death. This appeal brings up for review the judgment of the court below affirming his right to sue for the rent in question and awarding him the share claimed, on the theory that, as one of the five children of the decedent, the appellee took his proportionate share as tenant in common of the real estate upon the death of the testatrix, and thereby became vested with the right to rents.

Annie Stalder died in Richardson county in October, 1913, leaving no personal estate, her only property consisting of 80 acres of land in that county. By her last will and testament, admitted to probate in August, 1915, she appointed her son, Joseph Stalder, executor, and directed him, after paying her debts and funeral expenses, to expend $200 for a monument. Another item of the will was a bequest of $1,000 to her daughter Rosa. In addition to the specific directions and bequest indicated, the will contained the following clause: "I give, devise and bequeath * * * unto my five beloved children, Henry, Frank, Joseph, Andrew and Rosa, each an equal share of the remainder of my estate, after the above provisions of this instrument have first been carried out. It is expressly understood that my executor hereinafter named is hereby given all power and authority to sell any or all real estate in my name to carry out the provisions of this my last will and testament."

Letters testamentary were issued to Joseph Stalder in August, 1915, and his final account was approved and he was discharged by the county court of Richardson county January 8, 1917. The land was sold in April, 1916, by the executor, under the power conferred by the will, to the appellant and another, the proceeds were reported in the executor's final account, and after the debts, funeral expenses, outlay for monument, and the amount of Rosa's

legacy had been deducted, the remainder was, in the final decree of the county court, ordered distributed in equal shares to the five children named in the will. It is undisputed that the land in question was farmed by the appellant Andy Stalder, one of the children of the deceased, for a period antedating her death and extending down to the date of the sale. No rent was collected or accounted for by the executor.

Among the defenses raised in the court below to the appellee's suit for rent, it was contended by the appellant that, because of the power bestowed by the will upon the executor to sell the land and the necessity of its exercise in order to carry out the intention of the testatrix, there was an equitable conversion of the real estate into money, effective at the time of the death of the testatrix; that no title to the real estate as such, and consequently no right to collect or sue for rents and profits, passed to the beneficiaries under the terms of the will. "Where the provisions of a will are of such a character as to amount to a positive direction to convert the testator's real estate into money or personalty, or where by a fair construction of the will such intention of the testator is clearly shown by implication, a court of equity will decree that an equitable conversion of the real estate of the testator into money took place at the time of his death." *Chick v. Ives,* 2 Neb. (Unof.) 879. This case is cited with approval in the opinions in the following cases: *In re Estate of Willits,* 88 Neb. 805; *Coyne v. Davis,* 98 Neb. 763, it being stated in the opinion in the latter case: "The rule seems to be that, when land is imperatively directed to be sold, it is considered as converted into money from the death of the testator. If the executor has the option whether to sell or not, or if he is merely given authority to sell, without being directed to do so, then it remains as real estate until the conversion takes place."

Examining the will under consideration in the instant case, in the light of the foregoing principles and the circumstances in evidence bearing upon the intention of the testatrix, it appears that the dispositions made by her

in the will left no alternative to the executor other than to sell the land. There was no personal estate, and the funds necessary to comply with the directions to pay debts and funeral expenses, to purchase a monument, and to pay Rosa's legacy of $1,000, could be derived from no other source except the proceeds of a sale of the land. Under those conditions, the words, "it is expressly understood that my executor hereinafter named is hereby given all power and authority to sell any or all real estate in my name to carry out the provisions of this my last will and testament," must be construed as equivalent to an imperative direction to sell the land.

It is argued by the appellee that the language of the will is not imperative or positive with regard to the executor's power of sale, but that it is only conditional. The power is "given" to him, but he is not, in express terms, commanded to exercise it. Nevertheless, the explicit requirements of the other provisions of the will in effect lay that command upon him. He cannot carry out the testatrix' scheme in the disposition and division of her property unless he does sell the land. The determining factor is not, in our opinion, the precise language in which the power is couched, but the intention of the testator as gathered from all the provisions of the will construed together and the necessities of the case. It is well said in *Harrington v. Pier,* 105 Wis. 485, 50 L. R. A. 307: "The rule is that where there is a positive direction in a will to convert the real property into personalty, or there is a power of sale in a will and bequests of such a character as to plainly indicate a testamentary intent that such power shall be executed to provide the means of satisfying them, or where the provisions of a will cannot be carried out without converting the realty into personalty, and the conditions are such that the testator must have contemplated that such conversion would take place to that end, courts of equity deal with the estate as personal property from the time the will takes effect—from the death of the testator."

Since it is apparent that the appellee acquired no interest in the real estate, as such, by the terms of the will, and his action for rents must, for that reason, fail, it will be unnecessary to notice other points of alleged error raised and discussed by the appellant. We therefore recommend that the judgment of the court below be reversed and the action dismissed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the action dismissed, and this opinion is adopted by and made the opinion of the court.

REVERSED AND DISMISSED.

ALSON B. COLE V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1920. No. 21844.

1. **Criminal Law**: HOMICIDE: INSTRUCTION: DEGREE OF CRIME. Under section 9130, Rev. St. 1913, requiring the court, upon a plea of guilty in a homicide case, to take testimony and to determine the degree of the crime, *held*, that an instruction to the jury, declaring that the defendant is convicted of murder in the first degree, is a judicial determination of the degree of the crime, though the court may have erroneously stated in such instruction that the degree of the crime had been determined by reason of the plea of guilty.
2. ———: ———: PLEA OF GUILTY: DEGREE OF CRIME: EVIDENCE. When a plea of guilty is entered by defendant in a homicide case, and the court takes testimony with express reference to the crime committed, as it relates to the defendant, it is presumed that the evidence is taken for the purpose of consideration by the court in fixing the degree of the crime, and by the jury in determining the punishment to be imposed, though the record does not affirmatively so disclose.
3. ———: ———: ———: ———: ———. When a plea of guilty is entered by the defendant in such a case, and the court takes testimony showing the circumstances surrounding the crime, the court has jurisdiction to determine the degree of the crime, and a judicial determination on that question will not be subject to collateral attack, though the court gives erroneous reasons for his conclusion.

Cole v. State.

ERROR to the district court for Howard county: BAYARD H. PAINE, JUDGE. *Petition in error dismissed.*

J. M. Priest, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

FLANSBURG, J.

The case comes here from an entry made by the district judge, as a *nunc pro tunc* order, in the record of the case made in a trial, held before him some two years previously. The complete record in the original case is found in this court in the case of *Grammer v. State,* 103 Neb. 325, which is referred to by the attorneys in argument and is identified in this proceeding and is therefore now before the court.

It appears from that record, as stated by this court in its opinion in *In re Application of Cole,* 103 Neb. 802, 807, that the criminal actions against Cole and Grammer were tried together in the one proceeding, and that no request was ever made by the defendant Cole for a separate trial. After the proceeding had commenced, Cole entered his plea of guilty, and the trial court made a statement that the proceeding would continue as to Grammer alone. Following that statement, however, and in contradiction thereof, and during the course of the proceeding, the judge at various times directed the jury that certain testimony, then being introduced, was introduced and was to be considered with regard to the Cole case only. It is quite apparent from the record that evidence was introduced by the trial judge, to be considered with regard to Cole, and this has been judicially determined both by this court and by the judge of the district court of the United States for the district of Nebraska.

The statute (Rev. St. 1913, sec. 9130) requires the court, upon a plea of guilty being made in a homicide case to take testimony, and, upon that testimony, the court itself must determine the degree of the crime. In such a proceeding, after a plea of guilty, any introduction of testimony with

regard to the person making such plea is presumed to have been taken for the purpose designated in the statute. The court is not required to affirmatively show by the record that the testimony was taken for such purpose. *Ex parte Haase,* 5 Cal. App. 541; *State v. Cumberland,* 90 Ia. 525; *Ex parte Woods,* 41 Pac. (Cal.) 796.

The trial court, by taking testimony with reference to the crime committed by Cole and after Cole had pleaded guilty, had jurisdiction to determine the degree of his crime. Such a judicial determination was, in fact, made by the court in its instruction to the jury as follows: "You are instructed that the defendant Alson B. Cole, upon being arraigned in the manner and form hereinafter set out and entering a plea of guilty to murder in the first degree, is thereby convicted of said crime." The instruction then advises the jury that it was for the jury to determine the question only of the penalty to be imposed.

This instruction fixed the degree of the crime definitely and finally and beyond the power of the jury to change or modify it. The court made this adjudication and the jury had no part in it. The adjudication, on its face, appears to be erroneous. It recites that Cole was guilty of murder in the first degree, by reason of his plea of guilty. Though the court may have disregarded the testimony introduced for the purpose of fixing the degree of the crime and may have determined that Cole was guilty by reason of his plea of guilty, still, from the fact that the court erroneously came to that conclusion, it does not necessarily follow that the court was without jurisdiction. The reason given by the court would be no different in nature than if the court had erroneously stated that certain particular evidence was sufficient to convict the accused of murder in the first degree, in a case where the evidence was not, in fact, sufficient as a basis for such a conclusion. In either event, the reason given by the trial court would be a mere error in the exercise of his judicial powers in a matter where he had full jurisdiction to ultimately determine the degree of the crime. The decision by the federal court, decid-

ing that it was necessary for the district court for Howard county to take further proceedings, is based upon a conclusion that the trial court had made no "finding or determination" of the degree of the crime. We cannot so interpret the instruction that we have referred to, given by the trial judge, and which directed the jury that the defendant "is convicted of murder in the first degree." In our opinion the instruction, though on its face erroneous, was a finding and determination of the degree of the crime. *Ex parte Haase*, 5 Cal. App. 541; *State v. Cumberland*, 90 Ia. 525; *Ex parte Woods*, 41 Pac. (Cal.) 796; *People v. Noll*, 20 Cal. 164; 16 C. J. 1271, sec. 3013. The courts erroneous reason for such conclusion did not change the fact that such a conclusion had been made, and the direction to the jury that Cole was guilty of murder in the first degree conferred power on the jury to decide upon the punishment to be imposed.

The error of the trial court was not jurisdictional, though it was an error that might have been taken advantage of by a direct proceeding for review brought to this court. No such proceeding was ever had. Such errors are not subject to collateral attack. *Fuller v. Fenton*, 104 Neb. 358.

Following the decision of the federal court, the trial court has made an entry attempting to correct his record, to the effect that he did, in his own mind, at the time of the trial, from the evidence adduced, determine upon the degree of the crime, though he had given no expression to that decision except that which is contained in his instructions to the jury.

It is the contention of the defendant's counsel that the original record is insufficient to support the conviction, and that the entry by the trial judge is an unlawful and ineffectual attempt to correct a defective record.

Whether or not such an entry could be considered by this court as legally or properly made, or as having any force or validity, it is unnecessary to determine.

We are of opinion that the original record, as it stood prior to the making of such entry, was sufficient to show

all jurisdictional requirements, to show a determination of the degree of the crime, and to show such a compliance with those mandatory provisions of the criminal law as will support the conviction against collateral attack.

The proceeding in error is therefore

DISMISSED.

WARD HARRIS, APPELLEE, V. DIRK E. HARMS, APPELLANT.

FILED DECEMBER 23, 1920. No. 21083.

1. **Boundaries: LOCATION: EVIDENCE: BURDEN OF PROOF.** "Government corners fixed by a United States surveyor at the time of the original survey will control the field notes of the survey taken at the time the corner was erected and will control the field notes or courses and distances of any subsequent survey. Such corner, if identified by the proofs, is the best evidence of where the line should be. But in the absence of such corner, or of satisfactory proof of its location, the field notes of the survey will govern and determine the true line, and such field notes and government plats in such case are *prima facie* evidence of its true location, and the burden is then shifted to the party who wishes to establish the corner at a place different from that called for by the field notes and government plat of the original survey." *Knoll v. Randolph*, 3 Neb. (Unof.) 599.

2. **Instructions** set out in the opinion *held* free from error.

3. **Evidence** *held* sufficient to support the verdict of the jury.

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

George B. Hastings and *B. F. Hastings*, for appellant.

H. A. Dano, L. A. DeVoe and *W. T. Wilcox, contra.*

W. T. Thompson and *J. J. Halligan, amici curiæ.*

MORRISSEY, C. J.

This is an action in ejectment brought by plaintiff against defendant to recover possession of a strip of land

617 feet wide and 2,640 feet in length along the boundary line between the southeast quarter and the northeast quarter of section 32, in township 14 north, of range 40 west of the sixth principal meridian, in Keith county. There was a verdict and judgment for plaintiff, and defendant appeals.

Plaintiff is the owner of the southeast quarter of section 32 and defendant is the owner of the northeast quarter of that section. Each is holding under a patent duly issued by the department of the interior, and the dispute between them is not a dispute as to titles, but as to the location of the dividing line.

Prior to the institution of this litigation there had been disputes as to the interior boundary lines in township 14, range 40, and, in conformity with statutory provisions, a resurvey of the lines within the township had been made by the deputy state surveyor. Plaintiff claims his land according to the survey thus made. Defendant disputes the accuracy and legality of this survey, and also claims possession for more than ten years next preceding the institution of the suit. The correctness of instruction No. 6, given by the court on its motion, is challenged by appellant. This instruction reads as follows:

"The jury are instructed, as a matter of law, that government corners fixed by a United States surveyor at the time of the original survey will control the field notes of the survey taken at the time the corner was erected and will control the field notes or courses and distances of any subsequent survey.

"Such corner, if identified by proofs, is the best evidence of where the line should be. But in the absence of such corner, or satisfactory proof of its location, the field notes will govern and determine the true line, and such field notes and government plats in such case are *prima facie* evidence of its true location.

"If the monuments erected by the government surveyor have been obliterated, and no witness can fix their original location, and the government field notes returned to

the surveyor general show that section lines were established on straight lines between the township corners and determine their location by courses and distances, the field notes should be accepted as presumptively correct, and should only be overcome by clear and satisfactory evidence that the surveyor established the corners at other points.

"You are further instructed, as a matter of law, that, in determining the boundaries of land, fixed monuments and known corners govern both courses and distances; and where the existence of the original government corner is established at a certain point by sufficient evidence, its authenticity cannot be overcome by showing that the location is not at the distance from other monuments indicated by the field notes of the original survey.

"Where land has been surveyed and corners located by or under the direction of the federal government, all persons are bound to observe such survey and corners where the same can be ascertained, even though mistakes may have been made by the government surveyors in the location of corners.

"Where, however, no corners were located by the government surveyors, or where it is impossible to ascertain with any degree of certainty the point where the government surveyor has located the corner, then the county surveyor has a right to locate the corner, and, in case of a quarter corner, it would be his duty to fix the corner midway between the known section corners of the section."

Appellant complains of the several paragraphs of this instruction. The instruction must be read as a whole. As we understand appellant's assignments, his main criticism relates to the second paragraph of the instruction, where the jury are told, in substance, that, in the absence of proof of the location of the corners established by the original government survey, the field notes of such survey will be taken to determine the true location, and such field notes with their accompanying maps are *prima facie*

evidence of its true location. The rule announced has long been followed in this state. *Knoll v. Randolph,* 3 Neb. (Unof.) 599; *State v. Ball,* 90 Neb. 307.

By instruction No. 7, which is criticised by appellant, the court referred to the state statute (Rev. St. 1913 sec. 5566), providing for resurveys: "In case of any dispute among owners of and arising for or by reason of any survey of boundaries of lands." It is claimed that there is no evidence to show that, prior to the making of the survey, there was dispute among the owners of the land in that township, and that by this instruction special prominence was given to the evidence of the deputy state surveyor who made the survey on which plaintiff relies. But this criticism is not well founded, as appellant's own pleading alleges that there was a dispute over the line as early as 1907.

Appellant urges that there was error in giving instruction No. 8, which reads:

"In this case if, from the evidence, you believe that the line between the said northeast quarter and the southeast quarter of section 32, as shown by the survey of the state surveyor, is as fixed by the original survey, or if, from the evidence, you believe that the government surveyor in surveying said township 14, range 40 west, did not establish the interior corners, but that the line, as established by the state surveyor, is approximately where it would have been had the government surveyor surveyed the interior of said township, and established corners, in accordance with and corresponding to the known lines and corners, established by the government surveyors on the outside boundary of said township 14, range 40 west, then you should return a verdict finding for the plaintiff.

"In other words, if, under the evidence, you believe that the surveyors in making the original government survey did not run the interior lines and establish the interior corners of said township 14 north, range 40 west, then you should find for the plaintiff in accordance with the lines and corners run and established by the state surveyor."

Appellant claims that by this instruction the court left to the jury the question: Did the government surveyors actually run the lines and establish corners on the ground? And it is claimed that this was an attempt to attack collaterally, in an action between private parties, the surveys of the United States. On the record presented it may be said to appear that the deputy state surveyor, after making a most thorough investigation, reached the conclusion that the pits were not dug, the mounds erected, nor the stake driven at each corner in accordance with the practices and usages of government surveyors, while the defendant contended that these things had been done.

We do not understand that the deputy state surveyor reached the conclusion that the government surveyor had not run the lines and actually made the field notes, because he appears to have relied upon the field notes in doing his work. The record appears to present one of two alternatives: The government surveyors did not actually erect the monuments at the section corners, or, if they did erect them, they have become wholly obliterated and lost. Under the instruction given, the jury were left free to adopt either alternative. The effect of appellant's argument would be to hold that, before a corner may be located by the state surveyor, it must first affirmatively appear that the corner once existed. This would defeat the very purpose of the statute allowing resurveys. To make proof of the former existence of a corner other than by the official plats and field notes is often impossible. The survey made by the deputy surveyor, under which plaintiff claims, corresponds substantially with the government field notes, and the instructions of the court in stating the effect to be given to this resurvey is supported by the evidence and in harmony with the provisions of the statute (Rev. St. 1913, sec. 5566). Appellant, however, contends that the rule runs counter to the holding in *Cragin v. Powell,* 128 U. S. 691. A careful reading of the opinion in that case discloses a state of facts materially different from the facts disclosed in the instant case, and it does not appear that

the court therein conclusively held that, where the government surveyor in running the lines failed to properly mark the section corners, another surveyor, duly authorized, in making a subsequent survey, might not locate the corners in keeping with the field notes on the same basis as though the monuments had been actually placed on the ground and later obliterated.

Appellant also cites the case of *Weaver v. Howatt*, 161 Cal. 77, 118 Pac. 519, and 171 Cal. 302, 152 Pac. 925. This case was twice before the supreme court of California. The first paragraph of the syllabus of the second opinion, as it appears in 152 Pac. 925, when read alone, appears to support the position of appellant; but, when the subsequent paragraphs of the syllabus and the whole opinion are read, the conclusion of the court does not seem to be in conflict with the rule herein announced.

Evidently the supreme court of California took the same view that we express, for the paragraph of the syallabus from the Pacific Reporter, quoted in the brief of appellant, is not found in the official state report.

Instruction No. 9, given by the court, is assailed as throwing the burden of proof upon the defendant. By this instruction the court told the jury that the survey made by the state surveyor was *prima facie* correct, and that the burden rested upon defendants to overcome the presumptive correctness of the survey. This instruction must be considered in connection with the other instructions given, together with the provisions of the statute (Rev. St. 1913, sec. 5566), and, when so considered, it appears to be a correct statement of the law applicable to the facts disclosed.

It is further argued that the verdict is not sustained by sufficient evidence. To set out the conflicting evidence found in the bill of exceptions will serve no useful purpose. It may be summarized by saying that the deputy state surveyor and a number of other witnesses testified to making an investigation in the township and to their inability to find the original monuments erected by the government surveyors, but they admitted finding what they denomi-

nated "locators' corners." They express the opinion that these "corners" were erected by land speculators and land agents, and that they differ in many essentials from the monuments erected by government surveyors. On the other hand, defendant, by a number of witnesses, undertook to show that these corners were recognized by the early settlers as the official monuments; that land was entered; that roads were laid out, and fences built, relying upon them, and that they have been recognized for a long term of years by parties residing within that township. Defendant also claimed to have inclosed the land in dispute with a fence and to have acquired title by adverse possession. All these disputed questions of fact were submitted to the jury and resolved in favor of the plaintiff. The finding of the jury is amply supported by the evidence, and the judgment is

AFFIRMED.

BESS M. BAUER, ADMINISTRATRIX, APPELLEE, V. JOHN G. GRIESS, APPELLANT.

FILED DECEMBER 23, 1920. No. 21093.

1. **Appeal:** ACTION FOR DEATH: LIFE EXPECTANCY OF BENEFICIARY. When in a suit by a wife for the death of her husband his life expectancy is affirmatively shown, but no proof is made of the age or life expectancy of the wife, but she is a witness before the jury, and the lack of proof as to her age and expectancy is raised for the first time on appeal, the court will assume that the jury took into account the apparent age and expectancy of the wife.
2. **Negligence:** AUTOMOBILE: INJURY TO GUEST. The owner of an automobile who invites another to ride with him as a guest, the invitation being accepted, does not thereby become the insurer of the safety of the guest, but he is bound to use ordinary care not to increase the danger to the guest by fast and reckless driving.
3. **Instructions** examined, and *held* free from error.

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

Ambrose C. Epperson, Charles H. Sloan, Frank W. Sloan and *Thomas J. Keenan,* for appellant.

Reese & Stout, contra.

MORRISSEY, C. J.

Plaintiff, as administratrix of the estate of her deceased husband, Charles J. Bauer, recovered a judgment for $5,000 in the district court for Clay county against defendant, who appeals.

October 8, 1916, defendant, and his family, being about to take a pleasure ride in defendant's automobile, invited plaintiff and her husband to accompany them. While they were driving along a main highway, a man named Mitchell drove by them, or attempted to do so. It is claimed by plaintiff that, at the suggestion of defendant's wife, defendant increased the speed of the car and drove it in a reckless and dangerous manner; on behalf of defendant it is claimed that the speed of the car was increased to comply with the expressed wish of the guests. In any event the evidence is clear that the speed of the car was accelerated. Defendant drove his car too far to the left side of the beaten tread of the road, thereby striking a small ditch extending from the end of a culvert. It is not made entirely clear whether this directly resulted in the collapse of one of the front wheels of the car or whether it merely caused the driver to momentarily lose control of his car. The car was upset, and plaintiff's intestate and one of defendant's children sustained injuries from which they died. It is stated in the brief of appellant in enumerating the controverted facts that proof was made of the life expectancy of deceased, but no proof was made of plaintiff's life expectancy, or the life expectancy of deceased's father or mother, for whose benefit the suit is also brought.

No evidence was offered to show that deceased had ever contributed anything to the support of either his father or mother, or that he might ever be called upon to do so. But the record shows affirmatively that he had used his entire income for the support of himself and wife. He had for

the past several years preceding his death earned $100 a month in the United States mail service. In addition to his work in the mail service he and his wife operated a picture show, the earnings of which are claimed to have been $250 a month. The record as to the net income from the picture show is indefinite and unsatisfactory, but the earnings definitely shown, owing to decedent's long life expectancy, is sufficient to sustain the judgment. A more serious question is perhaps presented because of the failure to prove the life expectancy of plaintiff. Deceased had a life expectancy of 30 years. The proper practice would require proof of the wife's expectancy. But she testified before the jury and they were able to form some judgment of her expectancy. Furthermore, when the point is not brought to the attention of the trial court, but is raised for the first time on appeal, the court will assume that the wife was not older than her husband, and that her life expectancy was equal to his.

The real point pressed for our consideration has to do with the rule under which liability may attach where one invites another to ride in his automobile, as a guest, and the guest is injured. Appellant contends that under such circumstances the owner of the car is not liable unless it is shown that he is guilty of gross negligence.

The court instructed the jury: "When defendant invited Charles J. Bauer and his wife to ride in the automobile operated by him and undertook to provide a conveyance for plaintiff and her husband, although defendant did so gratuitously, he was bound to exercise due and reasonable care in the operation of said car for the safety of his guests, and not by any act of his to increase the danger or create a new or unnecessary danger.

"If, therefore, you find from the evidence, taking into consideration the condition of the road, the experience, knowledge and skill of defendant in driving the car, the speed at which he was going, and all the conditions and circumstances shown by the evidence that defendant Griess was negligent and careless in the operation of the car, or you

find that by his acts he increased the danger or created a new and unnecessary danger, and you also find that defendant's negligence and want of care was the proximate cause of the injury and death of Charles J. Bauer, then, if you so find, your verdict will be for the plaintiff."

The court also instructed the jury "that by the term 'due and ordinary care,' as used in these instructions, is meant such a degree of care as a prudent and reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would exercise under the existing circumstances and conditions.

"By the term 'negligence,' as used herein, is meant the failure to exercise such care, prudence and forethought as under the circumstances duty requires should be given or exercised."

Defendant complains of these instructions, claiming that the jury ought to have been told that before recovery could be had they must find that defendant was guilty of gross negligence. The contention of defendant appears to be not without support: *Massaletti v. Fitzroy,* 228 Mass. 487; *Flynn v. Lewis,* 231 Mass. 550. In the latter case, however, it is pointed out that under a new statute of Massachusetts a recovery may be had on proof of only ordinary negligence. However, the rule is different in other jurisdictions. In *Beard v. Klusmeier,* 158 Ky. 153, in a case very similar to the one at bar, the court said: "The principal question for decision is this: What duty does the owner, who drives his automobile, owe to his guest who accepts an invitation to ride with him? Appellant likens the case to that of one who is invited upon the premises of another, and insists that an invited guest must take the premises of the host as he finds them, and cannot complain of the conduct of his host in regard to keeping the premises in repair, or in the management of his personal property for the pleasure and enjoyment of the guest, unless guilty of gross negligence." This, in substance, is the claim made by appellant in the instant case. The claim of appellee here may be likened to the claim of appellee in that case,

which is started by the court as follows: "On the other hand appellee, arguing along the same line, insists that the host who invites a guest to come upon his property, or to use his property, either expressly or impliedly, owes him the duty of exercising ordinary or reasonable care to keep the property or premises in a safe condition so that he will not be unreasonably exposed to danger or injury; and that appellant having invited appellee to ride in his automobile, he owed her the duty to operate it in a careful and prudent manner." In that case, as in this, the court instructed the jury that it was the duty of the host to exercise ordinary care in the operation of his automobile to avoid injury to those who were in the automobile with him, and that if he ran his automobile at an unreasonable speed, thereby causing injury to the guest, he was liable for the injury. On review the instructions were approved, and the court held (164 S. W. 319): "It was defendant's duty, upon inviting plaintiff to ride as a guest in defendant's automobile, to use ordinary care not to increase plaintiff's danger or to create any new danger, such as by fast and reckless driving, so that defendant would be liable for injuries to plaintiff from driving the automobile recklessly."

It may be conceded that the host is not the insurer of the safety of his guest, but in sound reason and good morals it cannot be disputed that the driver of an automobile who invites his friend to ride, the invitation being accepted, is bound to exercise reasonable and ordinary care in the operation of his car, and is not free to expose his guest to unnecessary danger.

Every controverted question of fact was submitted to the jury and by the jury resolved against the defendant. finding no error in the instructions, the judgment is

AFFIRMED.

ANTON TRAMP V. STATE OF NEBRASKA.

FILED DECEMBER 23, 1920. No. 21494.

1. **Information:** PLEA IN BAR: DEMURRER: AMENDED INFORMATION. When, on the trial of one charged with a misdemeanor, defendant has entered a plea in bar to the information, and the county attorney has filed a demurrer thereto, and the court overrules the demurrer, it is not error for the court to fail to discharge defendant, nor error to permit the county attorney to withdraw the information and file an amended information.
2. **Criminal Law:** INFORMATION: PLEA IN BAR: JURY TRIAL. In such case it was not error to refuse a jury trial on the issues raised by the plea in bar, since it was not filed nor urged against the information on which defendant went to trial.
3. **Evidence** examined, and *held* sufficient to sustain the verdict.
4. **Criminal Law:** SENTENCE. A sentence of 60 days' imprisonment in the county jail on the third conviction of a violation of chapter 187, Laws 1917, is not excessive.

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

F. L. Bollen and *R. J. Millard,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *C. L. Dort, contra.*

MORRISSEY, C. J.

Plaintiff in error was convicted in the district court for Knox county of giving to one Carl Yonke a quart of whiskey in violation of chapter 187, Laws 1917.

May 27, 1919, the county attorney filed an information in two counts, the first of which charged that defendant gave and furnished to one Carl Yonke about one quart of whiskey, and alleged that this was defendant's third offense, he having been twice convicted of a violation of chapter 187. The second count charged defendant with another separate and distinct violation of the same statute. June 2, 1919, defendant being present in court, the state

was given leave to withdraw the information then on file and permitted to file an amended information instanter, and, on application of defendant, the trial of the cause was continued to the succeeding term. The amended information, filed by leave of court, charged that—"On the 18th day of July, 1918, he, the said Anton Tramp, then and there being in said county of Knox, did then and there unlawfully, wilfully, maliciously and feloniously give and furnish to one Carl Yonke certain intoxicating liquors, to wit, about one quart of intoxicating liquor, commonly called whiskey, which act was the third offense of said Anton Tramp, in violation of chapter 187 of the Laws of the 1917 legislature of the state of Nebraska, to wit, he having violated said chapter 187 in Dixon county, Nebraska, on April 14, 1918, and pleaded guilty to said violation on the 16th day of April, 1918, in the county court of Dixon county, Nebraska, and also violated said chapter 187 in Knox county, Nebraska, prior to this offense, by furnishing and giving to Otto Bartz three drinks of intoxicating liquor, commonly called whiskey, on the 18th day of July, 1918, and was convicted of said offense on the 19th day of September, 1918, in the county court of Knox county, Nebraska." To this amended information defendant filed a general demurrer. The demurrer was overruled. October 17, 1919, defendant filed his plea in bar to the amended information filed June 2, 1919. The county attorney thereupon filed a demurrer to the plea in bar, which was overruled by the court, but upon request of the county attorney he was given leave to withdraw the amended information then on file and to file an amended information instanter. The county attorney thereupon filed his second amended information in form and substance the same as the first amended information. October 20, 1919, defendant, being present in court, was arraigned and placed on trial under the second amended information. The jury found defendant guilty as charged and the court sentenced him to 60 days' imprisonment in the county jail.

As grounds for reversal it is first alleged that the court erred in not discharging defendant on its own motion after the demurrer of the county attorney to defendant's plea in bar had been overruled. We are, however, cited to no authority requiring such summary action to be taken. It is also said the court erred in denying defendant a jury trial on his plea in bar. The ruling of the court was not to the prejudice of the defendant. When the demurrer filed by the county attorney was overruled, he at once asked and was granted leave to withdraw the amended information. The information being withdrawn, there was nothing before the court to submit to the jury. When the second amended information was filed, defendant might again have filed a plea in bar, but he did not do so. He elected to stand trial. This being true, all proceedings had on the original information and the first amended information stood for naught.

It is also argued that the verdict is not supported by sufficient evidence, and, therefore, the court erred in not directing a verdict for defendant. There is a direct conflict in the evidence. Bartz, a witness for the state, testified to facts which, if believed, fully support the verdict. Defendant testified to an entirely different state of facts. Were we sitting as the triers of fact, we might say that defendant's story was the more reasonable; but these parties were before the jury, which had the right to believe the one and disbelieve the other. Defendant's former convictions for violation of this statute were admitted. It is clear that he was present at the time this liquor was given to Yonke, and the facts and circumstances are such that we cannot say the verdict is not sufficiently supported, and the judgment is

AFFIRMED.

DAY, J., not sitting.

MYRTLE E. CHRISTENSEN, APPELLANT, V. PROTECTOR SALES COMPANY, APPELLEE.

FILED DECEMBER 23, 1920. No. 21582.

Master and Servant: WORKMEN'S COMPENSATION: REVIEW. "On appeal from the district court to the supreme court in a workmen's compensation case, findings of fact supported by sufficient evidence and findings of fact on substantially conflicting evidence will not be reversed unless clearly wrong." *American Smelting & Refining Co. v. Cassil*, 104 Neb. 706.

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

B. N. Robertson, for appellant.

Brome & Ramsey and *Joseph P. Uvick, contra.*

MORRISSEY, C. J.

Plaintiff appeals from a judgment of the district court for Douglas county denying a recovery under the workmen's compensation act (Rev. St. 1913, ch. 35) for the death of her husband, Alex C. Christensen.

November 22, 1919, Alex C. Christensen entered into a verbal agreement with defendant whereby he undertook to sell defendant's products to the retail trade on a commission basis. Under this agreement Christensen was assigned a territory, and, November 24, 1919, he called at defendant's office and was given an advancement of $40. He was furnished with samples of the goods he was to sell and with advertising matter. He at once went into his territory and on the same day took two orders for merchandise. On the morning of the second day, while traveling by automobile between two towns within his territory, he was accidently killed.

The issue involved is whether at the time Christensen met his death he was an employee of defendant within the contemplation of the workmen's compensation act. The district court found that he was not such employee. In *Ameri-*

can Smelting & Refining Co. v. Cassil, 104 Neb. 706, it is said: "On appeal from the district court to the supreme court in a workmen's compensation case, findings of fact supported by sufficient evidence and findings of fact on substantially conflicting evidence will not be reversed unless clearly wrong." In the instant case there is no conflict in the evidence. We have therefore to determine whether there is sufficient evidence to support the finding of the trial court. It is admitted that the verbal contract was made, and that Christensen was in his territory selling goods on commission at the time he met with the accident that caused his death. Plaintiff, in order to prove that decedent was an employee of the defendant within the terms of the statute, shows that he entered into this agreement to sell defendant's products, to be compensated therefor by a commission of 10 per cent. on the total sales; that defendant had other salesmen working under a similar agreement, each assigned to a separate territory, and was endeavoring to engage other salesmen to take over other territory; that the company had advanced $40, which was charged against commissions yet to be earned, and that this seemed to have been the practice, it being shown that a similar advance had been made to another salesman; that the deceased was engaged in no other line of work and was carrying samples of defendant's merchandise and advertising matter furnished by defendant. There is also recited a telephone conversation between the undertaker at Genoa, where Christensen died, and the manager of defendant company. According to the testimony, the undertaker called the manager of the defendant company, informed him of Christensen's death, and was directed by defendant's manager to furnish a casket and prepare the body for shipment. The undertaker also testified that defendant's manager said: "We will see that you get your money. * * * Mr. Christensen just began to work for us. This is his second day out for us, as he just started to work." It is also pointed out that the contract was silent as to the length of time it should run; that there

was no agreement as to any definite amount of work; that he was required to make daily reports of sales made by him; all orders were taken subject to the approval of the defendant, and defendant fixed the price at which the goods were to be sold, as well as the terms of payment; and defendant's manager knew that Christensen was going into the territory assigned to him.

The foregoing is in substance the facts and circumstances on which plaintiff relies to show that Christensen was an employee of defendant within the meaning of the statute. It is argued that the contract is in law one of general employment, creating the relationship of master and servant, and that under its terms defendant retained the right to direct and control Christensen as to the time and manner of executing his work.

Generally, to determine whether the relationship of employer and employee exists, it is necessary to determine the right of the employer to control the manner and method in which the service shall be rendered. This ordinarily includes the right to determine the hours of service and to have the exclusive right to the time demanded. In the instant case Christensen was not required to render service any particular day or to travel in any special manner or, in fact, to travel at all. He might devote every day of the week to the sale of defendant's products or he might let days go by without doing any act whatever in relation to his contract. Nor was he required to render the service personally. He was paying his own expenses; and he was not obligated to take orders for any specified quantity of defendant's goods. Defendant had no right to dictate to the salesman in relation to the method of transportation which he would employ. The relationship existing between these parties may be likened to that between insurance solicitors and their companies. When day dawns the agent is free to work or play. If he idles away the day, he does so at his own loss. The company has the right only to revoke the agency agreement. Christensen was free to make his sales by writing letters to the dealers within

his territory; he might have called them by telephone, or he might have employed subagents. He was the master of his own acts, and his compensation depended solely upon the results obtained.

Under the facts disclosed, it cannot be said that the finding of the trial court is not supported by sufficient evidence, and the judgment is

AFFIRMED.

RUSSELL COTTRELL V. STATE OF NEBRASKA.

FILED DECEMBER 23, 1920. No. 21731.

1. **Evidence** examined, and *held* to sustain the verdict.
2. **Criminal Law**: EXHIBITS. When articles are introduced in evidence as exhibits, it is essential to their consideration by a reviewing court that they be properly identified as forming part of the evidence in the case.
3. ———: ———. When such objects are introduced in evidence, they are thereby placed in the custody of the court, and should not, without leave of court, be taken from the custody of the official court reporter. The county authorities should provide that officer with a safe place in which to keep such exhibits under his sole control.

ERROR to the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Myers & Meecham, for plaintiff in error.

Clarence A. Davis, Attorney General, and *J. B. Barnes, contra.*

LETTON, J.

Plaintiff in error was convicted of murder in the first degree. The penalty imposed was life imprisonment. From this conviction he prosecutes error.

The trial was had upon an information charging him jointly with Willard Carroll, and both were convicted. The undisputed facts show that the accused and Carroll,

both young colored men, hurriedly entered the premises in Omaha, where the deceased conducted a grocery store and meat market, about 8:30 or 9 o'clock in the evening. Carroll had a pistol in his hand. At that time Jake Rosenthal, the son, and Bessie Rosenthal, daughter-in-law of the deceased, were in the store. The deceased had just entered from the east, and was standing near the stove facing west, the daughter-in-law was standing near the counter northwest of him, while the son and the clerk were to the south, or a little to the southeast, of where the deceased stood when the fatal shot was fired. Mrs. Rosenthal testifies that when the men came into the store Carroll had a gun in his hand. One of them said, "Don't move," and said to the other man, "Get the cash." Cottrell started toward the cash register, she heard a shot, but cannot say who fired it, and screamed to her husband to "get the gun." Deceased fell to the floor, falling westward. Her husband did not fire until after his father had fallen, and she had shouted to him to get the gun. After that the colored men ran, and, as they ran out of the door, Carroll turned and shot.

The medical testimony shows that a bullet had entered the left ear of the deceased, ranging upwards, penetrated the temporal bone, and lodged back of the left eye. Certain police officers testified to arresting both of the accused, and to the finding of Cottrell's gun, recently discharged, in the bottom of a trunk in his room, and of a number of recently discharged cartridge shells in the back yard of the premises where Cottrell lived, where they had been thrown by a woman with whom he lived.

Neither of the accused testified. All we know of their version of the affair is the testimony of certain police officers as to statements and admissions they made after arrest. The pistol used by Jake Rosenthal was not introduced in evidence. The pistol taken from Cottrell was admitted, but it is not with the record. Three bullets were introduced in evidence. One of these, exhibit 6, is the bullet taken from the skull of the deceased, identified by Dr.

McCleneghan, and said by him to be "in his judgment" 32-caliber. This is the only testimony as to the caliber of the bullets. Another is exhibit 7, which was dug out from the woodwork of the north counter by Mr. Dunn, and appears to be of the same caliber. Both of these bullets are identified. The record shows that another bullet, exhibit 14, was in evidence, but no bullet so identified is here. Several bullets and empty cartridge shells, two of the bullets of a larger size than the others, have been sent here since the case was submitted, but none of these is properly identified or shown to have been received in evidence.

Counsel who presented the case in this court was not present at the trial. The exhibits were not retained by the court reporter, but counsel for the accused has procured them from the county attorney's office since the argument in this court. It was said that the reason for this unsatisfactory condition of the record is that it is the custom in Douglas county for exhibits in criminal cases to be retained by the county attorney. Such exhibits in many cases are of the utmost importance. When they are introduced in evidence they are in the custody of the court, and should be delivered to the official court reporter, not to be taken without leave of court, until attached to a bill of exceptions, or to be safely kept until the time for taking an appeal has expired. It is essential to the proper administration of justice that such exhibits be kept in the control of the court, and that they are not subject to be interfered with by other persons, especially where such a grave penalty as death or life imprisonment may be inflicted upon the accused person.

We have, then, this condition of the record as to the guns and bullets. The testimony of Bessie Rosenthal is that she only glanced at her husband's gun, and it was 32-caliber, so far as she knew. The testimony of police officer Franks as to the gun taken from Cottrell is that it is 38-caliber. The testimony of the doctor is that in his judgment the fatal bullet is 32-caliber, and the testimony of I. J. Dunn is that the caliber of exhibit 7, which was

taken from the counter, is 32. As we have said, neither of the accused testified; the only evidence offered in their behalf being as to character. There is no positive testimony to show that both men had only one gun. There was ample opportunity to dispose of another before they were arrested. It is not improbable that men engaged in robbery would both be armed. There is no definite testimony as to which of the accused shot when in the store, except a statement by Carroll that he fired a shot accidentally. Jake fired five shots. Several must have been fired by the accused. There is no proof as to the number of shots that were fired from the pistol found in Cottrell's room, and only one discharged bullet is here of a larger size than 32-caliber. Even that is not identified. The testimony of Jake Rosenthal and William Laux is that a shot was fired by one of the accused before Jake took his gun from the desk, and the testimony of Bessie is positive that she heard a shot and saw the deceased collapse and fall before she screamed to Jake to get his gun, and before he fired. The jury, at the request of the accused, were permitted to view the scene of the tragedy under proper precautions. Under all of the testimony in the case, and considering the advantage the jury had of seeing the store and the places where the bullets were fired, and of weighing and applying the testimony in connection with this view, we believe we would not be justified in setting aside the verdict.

AFFIRMED.

CATHRYN SAWYER, APPELLEE, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLANT.

FILED DECEMBER 23, 1920. No. 21163.

1. **Insurance: BENEFICIARY ASSOCIATION: CONTRACT: FUTURE BY-LAWS.** An agreement by a member of a fraternal beneficiary association to comply with existing and subsequently enacted by-laws applies to a future by-law exacting, on penalty of forfeiting his insurance,

payment of reasonable, increased assessments to cover increased hazards resulting from a change of occupation.

2. ———: ———: BY-LAWS: REASONABLENESS. Reasonableness, in view of the powers, purposes and duties of a fraternal beneficiary association, is the test of a by-law, when challenged by a member as interfering with vested rights.

3. ———: ———: STATUS OF MEMBERS. The status of a member of a fraternal beneficiary association, who agrees to be bound by subsequently enacted by-laws, is not merely that of an insured, since he is part of a fraternal insurer, and is thus bound by the obligations of his membership to contribute his share to a general fund raised by assessments to pay the insurance of all beneficial members in good standing

4. ———: ———: OBLIGATION OF MEMBERS. By statute the government of a fraternal beneficiary association is required to be representative, and each member, being represented in its sovereign body, is bound by its legal enactments.

5. ———: ———: FORFEITURE. Forfeiture of fraternal insurance is a reasonable and necessary penalty for the enforcement of contributions to a fraternal insurance fund and for the protection thereof.

6. ———: ———: CHANGE OF OCCUPATION: NOTICE. A by-law requiring a member of a fraternal beneficiary association to give notice within 30 days of a change of occupation from laborer to switchman, and to pay in addition to his regular assessments 30 cents for each thousand of his insurance on penalty of forfeiture, is on its face reasonable, and is binding on a member who agreed in advance to comply with subsequently enacted by-laws, though the occupation of switchman was not a prohibited one or one requiring payment of increased dues when he became a member.

7. ———: ———: FUTURE BY-LAWS. A person becoming a member of a fraternal beneficiary association under a promise to conform to existing and subsequently enacted by-laws is charged with the duty of informing himself in regard to rules and regulations, and this duty extends to the exercise of the association's reserved power to make amendments or to enact new by-laws.

8. **Pleading.** Under the statutory rules of pleading, new matter in the reply to the answer is treated as denied.

9. **Insurance:** FORFEITURE: WAIVER. In a suit on a fraternal beneficiary certificate, waiver of a forfeiture arising from insured's failure to pay increased dues required by a change of occupation is not established by defendant's acceptance and retention of

unearned dues, where the undisputed evidence shows that defendant was without knowledge of the facts resulting in the forfeiture, and did not thereafter intend to waive it.

10. ———: BENEFICIARY ASSOCIATION: CHANGE OF OCCUPATION. Foreman of a switching crew in the switchyards of his employer *held* to be a switchman within the meaning of a fraternal beneficiary certificate, where he was required to perform the services of a switchman as a substantive part of the duties of his employment.

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

Gaines & Van Orsdel and *De E. Bradshaw,* for appellant.

Byron G. Burbank, contra.

ROSE, J.

This is an action on a fraternal beneficiary certificate to recover $2,000 for life insurance and $100 for a monument. The certificate was issued by defendant, a fraternal beneficiary association, to H. W. Sawyer, insured, November 13, 1902. He died July 26, 1918. His wife was the beneficiary and is plaintiff. The defense pleaded is forfeiture of the insurance by insured's violation of a by-law alleged to be a part of the insurance contract. A waiver of the forfeiture is pleaded in the reply. Plaintiff recovered a judgment for the full amount of her claim, and defendant has appealed.

It is argued by defendant that the judgment is erroneous, and that there can be no recovery on the certificate for the reason that facts showing insured's forfeiture of the insurance are established by undisputed evidence. Insured became a member of the association while a laborer, and paid his monthly assessments or dues on that basis, namely $1.40, including a war tax of 10 cents, for sovereign camp dues and 25 cents for general fund dues. The right of his beneficiary to participate in the insurance funds of the society was conditioned upon his complying with existing and subsequently enacted by-laws. This condition was a part of his insurance contract, and he agreed to it in

advance as an obligation of his membership. As early as 1917, while insured was in good standing, defendant enacted a by-law requiring him, in the event of his engaging in the hazardous occupation of switchman, to give his subordinate camp notice of the change within 30 days, and to pay in addition to his regular monthly assessments or dues 30 cents on each thousand of his insurance. Forfeiture of the insurance was the penalty for a violation of the new by-law, though the occupation of switchman was not a prohibited one or one requiring additional payments at the time insured's certificate was issued. Insured entered the employ of the Union Pacific Railroad Company as a switchman January 7, 1918, and worked in that capacity until July 15, 1918, when he became engine foreman of the switching crew in the switch-yards of the same employer. While engaged in his duties as such foreman July 26, 1918, insured was dragged from the top of a railroad car by contact with an overhead wire and killed. After changing his occupation as laborer insured paid his assessments at the old rates, but he did not give the notice or make the additional payments required by the subsequently enacted by-law.

The facts outlined are not in dispute, but plaintiff contends that the new by-law is void as being unreasonable and as depriving her of vested rights. In this connection it is argued that the agreement to comply with subsequently enacted by-laws applies alone to rules of conduct and other fraternal features of membership or to reasonable regulations relating to insurance, but not extending to new grounds of forfeiture or to impairment of vested rights. It is earnestly insisted that impairment or forfeiture of the insurance contract was not within the contemplation of the parties, and that such consequences were not within the purview of a future by-law. The doctrine invoked by plaintiff to save her insurance runs through a line of cases cited by her. It may be conceded also that the universal opinion of the courts is that no unreasonable or confiscatory by-law enacted by a fraternal beneficiary association

is binding on a member. The power to adopt a rule of that nature has been taken away from the legislative department of government by the fundamental law of the state, and of course has not been granted to voluntary, fraternal associations. The test of validity, however, is reasonableness, when the powers, purposes and duties of the society are considered in connection with the by-law challenged as interfering with vested rights. The cases cited by plaintiff do not seem to justify the conclusion that the by-law in question is unreasonable and void, in the light of principles to which this court, like many others, is committed.

In considering the question presented the relationship of insured to the association is a material factor. His status was not merely that of an insured whose risk the association assumed. His membership made him a part of the fraternal insurer of all members. The association assumed no greater obligation to pay his individual insurance than he assumed to pay his share of a fund for the payment of all insurance losses of members in good standing. The obligations were mutual. Risks, occupations, assessments, dues and forfeitures were necessary subjects of fraternal legislation. In the legislative body each member was represented by delegates. The government of the association is representative, being made so by statute. *Lange v. Royal Highlanders,* 75 Neb. 188. Each member, either directly or indirectly, participated in the legislative proceedings and is bound by legal enactments. In agreeing to abide by subsequently enacted by-laws, insured contemplated all reasonable changes which might become necessary by experience or by changed or new conditions. In his contract he was apprised of unexercised, reserved power to enact future by-laws. In the very nature of the organization changes relating to occupations, dues, assessments and the means of enforcing payments are as essential as rules of conduct or other fraternal features of membership. Changes in both respects are contemplated by a member's agreement to conform to present and future by-

laws. *Farmers Mutual Ins. Co. v. Kinney,* 64 Neb. 808; *Lange v. Royal Highlanders,* 75 Neb. 188; *Funk v. Stevens,* 102 Neb. 681.

There is nothing in the evidence to show that the period of 30 days for giving notice of a change of occupation from laborer to switchman, as requird by the new by-law, was too short, or that the additional payments were not required by the imperative demands of insurance obligations. On the face of the by-law itself both notice and increase are reasonable. From the standpoint of insurance the occupation of switchman is obviously more hazardous than that of laborer. The cost of insurance increases with hazards. There is no proof that the assessments were unnecessarily increased or that the increase was excessive. In absence of such proof the provision for forfeiture is not shown to be unreasonable.

Notice of a change of occupation is a reasonable requirement. Occupation is an essential feature of an insurance risk and knowledge thereof is a prerequisite to membership. It follows that notice of a change of occupation may be required by a subsequently enacted by-law, and that it is reasonable.

Forfeiture is a reasonable and necessary penalty for the enforcement of contributions to a fraternal insurance fund and for the protection thereof. *Mitchell v. Lycoming Mutual Ins. Co.,* 51 Pa. St. 402. It seems clear, therefore, that insured, having made compliance with subsequently enacted by-laws a condition of his membership and of his contract for fraternal insurance, had no vested right which prevented the association from requiring him to give notice of his change of occupation from laborer to switchman and to contribute his just share to the general insurance fund on penalty of forfeiture. By such exactions and penalties only can a fraternal beneficiary association perpetuate its insurance feature and meet its insurance obligations to all of its members. According to the better reasoning and the weight of authority, the subsequently enacted by-law is reasonable. Under it and other terms of his contract

insured forfeited his insurance by his failure to conform to its requirements. *Gienty v. Knights of Columbus,* 105 N. Y. Supp. 244; *Schmidt v. Supreme Tent of Knights of Maccabees,* 97 Wis. 528; *Loeffler v. Modern Woodmen of America,* 100 Wis. 79; *Norton v. Catholic Order of Foresters,* 138 Ia. 464, 24 L. R. A. n. s. 1030; *Gilmore v. Knights of Columbus,* 77 Conn. 58; *Sovereign Camp, W. O. W., v. Nigh,* 223 S. W. (Tex. Civ. App.) 291; *Carter v. Sovereign Camp, W. O. W.,* 220 S. W. (Tex. Civ. App.) 239.

On the undisputed facts plaintiff cannot escape the consequence of forfeiture on the ground that insured had no notice of the new by-law. The obligations of his membership, his duties as part of a fraternal association engaged in raising money by assessments to pay the insurance of members, and his promise in advance to conform to subsequently enacted by-laws imposed upon him the duty of informing himself in regard to rules and regulations. *Mitchell v. Lycoming Mutual Ins. Co.,* 51 Pa. St. 402. This duty extended to the exercise of the reserved power of amendment or of future enactment. *Supreme Lodge, Knights of Pythias v. Knight,* 117 Ind. 489, 3 L. R. A. 409. Pursuant to statute defendant filed with the auditor of public accounts of the state a duly authenticated copy of the new by-law, where it was open to public inspection. Without such a filing the forfeiture pleaded would be unavailing as a defense. *Hart v. Knights of Maccabees of the World,* 83 Neb. 423. Insured had 30 days in which to give his local camp notice of the change of occupation. Besides, he had, during a former period of his long membership, paid additional assessments for increased hazards, and therefore had knowledge of this feature of his fraternal insurance.

Waiver of the forfeiture is urged to sustain the recovery in favor of plaintiff in the trial court. This plea is based on the failure of defendant to allege rescission of the insurance contract and the return or tender of the unearned assessments received under it; on the acceptance of the assessment for July, 1918, with knowledge of the circum-

stances attending insured's death; on the failure to refund within a reasonable time the unearned assessments received, including those paid after the alleged forfeiture; on a demand by defendant for proofs of death.

The plea of rescission and tender was unnecessary. Plaintiff's petition is based on the beneficiary certificate. In the answer defendant pleaded a forfeiture. The reply to the answer contained the plea that the forfeiture had been waived by the acceptance and retention of dues and by a demand for proofs of death. Under the statutory rule of pleading in Nebraska, new matter in the reply is treated as denied. To disprove a waiver of forfeiture, therefore, it was proper to adduce evidence that the beneficiary certificate had been forfeited, thus showing there was no insurance contract in force to be rescinded; that there was no intention to retain the unearned dues received, and that they had been tendered back.

Is a waiver of the forfeiture established by the acceptance and the retention of unearned dues and by the demand for, and the resulting expense of, the proofs of death? In law a waiver is the voluntary relinquishment of a known right. Knowledge and intention are elements of a waiver, and both must be proved. Though it was a contract obligation of insured, on penalty of forfeiture, to give notice of the change of occupation within 30 days, defendant was not apprised of that fact until after insured had been killed six months later. Plaintiff, with knowledge of insured's death July 26, 1918, asked her brother to pay the July assessment for that year and gave him the necessary money. Pursuant to instructions he went to the office of the clerk of the local camp July 27, 1918, presented the usual post card notice of the items due for that month according to his regular rates for the occupation of laborer, paid the dues to a young woman whom he found on duty, and procured from her a receipt for "Sovereign Camp dues, instalment No. 7, $1.40," and for "general fund dues to August 1, 1918, $ .25," total, $1.65. The additional item of 30 cents for each thousand of insurance, required by the

subsequently enacted by-law, was not included in the notice, payment, or receipt, nor had the increase been paid for any month between January, 1918, and July, 1918. When the brother of plaintiff stated his errand in the office of the clerk of the local camp, the woman in charge inquired: "Is this the man that was killed in South Omaha last night?" The answer was: "No. It happened in Omaha, the Omaha yards of the Union Pacific." In reply to a further inquiry she was told that insured was "riding on the top of a car," was hit by a wire, and was knocked off, falling about 35 feet to the ground. Neither this testimony nor any other proof shows that defendant, when the last dues were accepted, had knowledge that insured had changed his occupation from laborer to switchman, or that he had been killed while working in that capacity, or that as to increased assessments he had been in default for six months, or that his insurance had been forfeited; nor is there evidence that defendant knew these facts before plaintiff was asked to furnish proofs of death. When the demand was made for proofs of death, therefore, after the unearned dues had been accepted, the knowledge essential to a waiver was wanting.

Is there any evidence that defendant intended to waive the forfeiture? On that issue the burden was on plaintiff. Retention of unearned dues under the circumstances does not prove such an intention, when the uncontradicted facts are considered. Five days after insured lost his life proofs of death were verified by plaintiff, and it is thus shown that he was killed while engaged in the occupation of switchman. Within a few days, the exact date not being given, plaintiff had a conference with an attorney for defendant in his office in regard to her loss. It is a fair inference from her version of what took place there that he denied liability for insurance; she having testified that he offered her $200 to settle her claim of $2,100. The clerk of the local camp was directed by defendant to refund to plaintiff the last dues paid by her, and the tender was made probably within a month after the death of insured.

Plaintiff was told that the tender was made under instructions from the lodge. While the sufficiency of the tender is questioned, it refutes an intention to retain unearned dues or to waive the forfeiture. Less than five months after the fatal accident an attorney for defendant wrote, and plaintiff received, a letter inclosing a check for the dues paid after insured changed his occupation. This letter contains the unchallenged statement that plaintiff was already aware her claim had been rejected on the ground that insured had engaged in a hazardous occupation without notice and without paying the increased rate. This undisputed evidence shows conclusively that the intention necessary to a waiver of forfeiture has no basis in fact, and utterly refutes any inference of waiver from the acceptance and retention of unearned dues. *Norton v. Catholic Order of Foresters,* 138 Ia. 464, 24 L. R. A. n. s. 1030; *Gienty v. Knights of Columbus,* 105 N. Y. Supp. 244; *Ridgeway v. Modern Woodmen of America,* 98 Kan. 240.

In addition to the questions discussed it is contended that insured was not a switchman when killed. This proposition is based on his promotion from switchman to foreman of the switching crew July 15, 1918, resulting in a change of occupation and in an increase of daily wages from $4.94 to $5.18. As already explained insured had exposed himself to the hazards of a switchman from January 7, 1918, until July 15, 1918, without giving the notice or paying the increased rates required by his insurance contract. Furthermore, the switching crew was composed of two switchmen and insured, as foreman, all working together in the switch-yards where the switching crew worked before insured was promoted. His duties as foreman required him to perform at times the ordinary work of a switchman as a substantive part of the duties of his employment. He was on top of a car with a switchman in active service as such when knocked off the car. The evidence is insufficient to sustain a finding that he was not then a switchman within the meaning of his fraternal

beneficiary certificate. For these reasons this point does not seem to be well taken.

On the record as it now stands, the judgment in favor of plaintiff for insurance is without support in the evidence, but she is entitled to recover the amount conceded by defendant to be due for unearned assessments paid. The judgment is, therefore, reversed and the cause remanded for further proceedings.

REVERSED.

MARTHA DITTBERNER ET AL., APPELLANTS, V. GUSTAVE TESKE ET AL., APPELLEES.

FILED DECEMBER 23, 1920. No. 20911.

Trusts. Evidence examined and *held* insufficient to establish the parol trust pleaded in the petition.

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

Mapes & McFarland, Willis E. Reed and *James E. Brittain,* for appellants.

M. B. Foster and *M. D. Tyler, contra.*

DEAN, J.

The parties to this suit are all members of the Teske family. Plaintiffs allege that they are sisters, and that the defendant Gustina Teske McAllister is their sister, and defendants Carl Teske, now and for more than 12 years insane, and Gustave Teske are their brothers. Carl Teske appears as defendant by his guardian, William C. Elley. It is alleged by plaintiffs and denied by defendants that approximately five quarter sections of Madison county land have "been impressed with an equitable trust in favor of said (Teske) family;" and that a large amount of personal property is in defendants' hands or has been wrong-

fully disposed of by them, and they "ask that an accounting be had by and between all parties to this action." Judgment was rendered in favor of defendants; plaintiffs' suit was dismissed and they appealed.

The plaintiffs allege that the transactions out of which the present controversy arose had their beginning in 1872 and that no settlement has been had between the parties.

It seems that in 1871 Frederick Teske and his wife and four minor children came to this country from Germany. In 1872 they settled on a quarter section of government land in Madison county and in the same year Mr. Teske bought an adjoining quarter section. This half section became the family home and so remained for many years. Here the younger children, Carl Teske and Martha Dittberner, were born and here in 1893 Mrs. Teske died. The Teskes lived and worked together on the home place until 1881. In that year Gustave was 21 and was about to leave home to earn money for himself. The defendants contend that their parents, who could neither read nor write the English language and were unacquainted with business usages, agreed with Gustave that, if he would remain at home and work the land and take care of and manage the home farm and the business generally, for this service they would give him one-half the proceeds of the farm, the parents retaining the other half. Defendants also contend that it was agreed between Gustave and his parents that another quarter section of land should be bought for him, and that within a year, pursuant to agreement, the "Broeker quarter," as it is known in the record, was bought for $1,050 and deeded by the parents to Gustave. Under this agreement Gustave testified that he remained at home until the early part of 1893, when at the age of 32 he married and had a settlement with his father, and that his share of the money then on hand was $3,500 which he received in the division, that being all the money that he ever received from the home place or from his father. At about the same time or soon thereafter Gustave sold the "Broeker quarter" to his brother Carl, for which he took his note in

the sum of $4,000, which was subsequently paid by Carl. Gustave testified that in 1893 Carl, who succeeded him as tenant and manager of the home place, bought a half-section of land north of Madison, for which he paid either $15 or $17 an acre, and that Carl borrowed a part of the money from him to pay for it, and that subsequently Carl bought another quarter of land, for which he paid $3,000, and that, to pay for it, he mortgaged the "Broeker quarter," and that he, Gustave, paid this mortgage off, as Carl's guardian, after Carl became insane. He further testified that there was never any talk among the members of the family while he was at home, nor that he ever heard of any agreement or talk, to the effect that any property of the family or any part of the property in controversy should be or that it was the joint property of the family.

Mrs. Dittberner testified, on plaintiffs' part, that her father was the director of the work on the home farm, and that the girls did all kinds of farm work just the same as the boys; that the talk in the family was that if Gustave got the "Broeker quarter" of land he would not get any money; that the land was farmed by all the family together and the proceeds were placed in a common fund. Alvina Dittmar, one the plaintiffs, testified that she and her sister Gustina worked in Omaha during the winter as domestics and worked at home on the farm during the summer; that at one time they sent $500 home, and that their father used it in the purchase of a horse, some farm machinery, and a wagon; she corroborated the testimony of Gustina with respect to the work that the girls did on the farm, and further testified that she became the owner of some town property and that the rents therefrom were used in the business on the farm. She said that the land "was simply a company farm," and that the father said the children were to have a farm apiece. Albert Crane, formerly an employee of the Teskes, testified that he heard Carl Teske in speaking of the land say, "we own it altogether;" and that this statement was made after father Teske died. Henry Kerich is a brother-in-law of Gustave Teske. He testified

that he had seen the Teske girls working on the farm, "not once but hundreds of times," and that they were doing all kinds of farm work; that father Teske could not speak English, and that he had a talk with him about a year or two before his death in his native tongue, and that the old gentleman and Carl said they were all working together, and that Carl said he was foreman; that he had another talk with the family when the mother was living, and she said, in speaking of the children, "They will be satisfied and the time will come when they will get their share. So far they have worked well"—"and he (the old gentleman) said, 'Yes, yes.' I heard several such conversations during my visits;" that mother Teske said, "Carl is always satisfied with anything his father does, and never hardly questions anything." Sheriff Smith testified that in 1896 or 1897 or 1898 he took out some blank deeds or papers "made out to be signed up by Carl and the old man." He thought that Carl and the two older girls were at home, and that he told them he came out there to talk with them about dividing up the property, and that "the girls run us off the place; told us to get off the place. They said all that land belonged to them;" that he had seen them work on the farm and haul grain and the like. On cross-examination he testified: "Q. You went out with the old gentleman. What did you say after you had been run off of the place by the girls? Do you remember what, if anything, the old gentleman said then? A. I can't tell just exactly. He said why if they don't want to he would let it go."

Gustina McAllister testified, on the part of defendants, that when the family came to Nebraska in 1872 she was 15. She corroborated Gustave's evidence respecting the contract he made with his parents to farm the land on shares, and also respecting Carl's purchase of the "Broeker quarter" from Gustave when he married and left home. She testified that it was then agreed between Carl and his parents that Carl, on account of the parents continued inability to speak the English language or to transact business, should take Gustave's place as farm and business

manager. She said that Carl afterwards bought a half section of land north of Madison for $5,000, and that he subsequently deeded a quarter section of it to her because she stayed at home and worked longer than the others; that she never made any claim on Carl for the $1,000 that he was to pay her under the oral agreement with his father, that will be presently noted. She further testified that about three years before the present case was tried she was visiting with her sister, Martha Dittberner, and that Frederick Dittberner, her husband, in Martha's presence said this in regard to Carl Teske's land: "Q. Now, you may state what the talk was, what Mr. Dittberner said there in the presence of yourself and Martha Dittberner. A. Well, he said to me, 'Let us take each one piece of land from Carl, and if Carl should get healthy and well again we can give it back to him.' I told him, 'Fred, that don't go. The court will overrule that.' * * * Q. You may state whether you ever at any time heard any talk in the family by your father, mother or sisters or brothers, that all of the land that Carl had and your father had and all the rest of you had was to belong to all of you—belong, not to Carl or to your father or to whoever had title to it, but to all of you? A. There was no such socialist talk, it wasn't in our family."

It appears that in January, 1893, Carl and his father made an oral agreement, and by its terms the home place was, upon the death of the parents, to become Carl's property; that at the time Carl went into and retained possession; that the consideration for the land was that Carl would provide support and a home for the parents, and give the three sisters $1,000 each, pay all taxes, keep up the improvements, and pay his parents each $100 a year provided they chose to leave the home place and live elsewhere. The part of the agreement that devolved upon Carl was in all respects performed by him.

Several circumstances stand out prominently in the record tending to show that the property in suit was not community property. Only a few will be noticed. In 1909

Alvina Dittmar, one of the plaintiffs, sued to compel Carl to convey to her one of the quarter sections of land in controversy here, alleging that he had so agreed. In that case a judgment was rendered against her in favor of Carl Teske. It seems to us that by instituting and pressing her suit she thereby admitted Carl's ownership and the validity of the oral agreement of 1893. It appears, too, that Mrs. Dittmar filed a claim against the estate of her insane brother, Carl, for the $1,000 that was payable under the oral agreement. The money and interest thereon was paid to her in July, 1913, in all amounting to $1,704.88. Her receipt filed in the county court *inter alia* recites that it is for "the one thousand dollars due Alvina Dittmar under and by virtue of a certain oral agreement entered into in January, 1893, by and between Frederick Teske and his wife and the said Carl Teske." So that again is the validity of the oral agreement recognized. Another circumstance: After the death of his wife, Frederick Teske deeded one-half of the home place to Martha Dittberner, one of the plaintiffs. Carl then began an action to cancel the deed and to compel specific performance of the 1893 contract. He obtained judgment against Mrs. Dittberner, that was affirmed, after three hearings in this court, except as to a 46-acre tract because of its homestead character. This feature of the Teske litigation is discussed at great length in *Teske v. Dittberner,* 63 Neb. 607, on rehearing, 65 Neb. 167, on second rehearing, 70 Neb. 544, and need not here be further discussed more than to add that in the final rehearing it is said: "The agreement in question is testamentary. * * * They (such agreements) have been upheld and enforced from an early period. * * * Nor is it necessary that the agreement be in express terms to make a will. A promise that the promisee shall receive the property, or that it shall be left to him, at the death of the promisor, is sufficient. *Kofka v. Rosicky,* 41 Neb. 328."

The record, when considered in its entirety, seems conclusively to show that the Teske family did not own any

of the property in common that is involved here or that is referred to in this action as contended by plaintiffs. We conclude that the evidence is insufficient to establish the parol trust pleaded in the petition. The judgment of the district court is right, and it is

AFFIRMED.

JOSEPH WITTY V. STATE OF NEBRASKA.

FILED DECEMBER 23, 1920. No. 21585.

1. **Criminal Law:** EVIDENCE: VOLUNTARY STATEMENTS. Voluntary statements against interest, made by a defendant in a criminal case at or about the time of the alleged commission of the crime with which he is charged, are admissible in evidence against the accused.
2. ———: ———: ———: INSTRUCTION. Where a witness in a criminal case testified to an alleged voluntary declaration against interest, made by the defendant at or about the time of the alleged commission of the crime with which he is charged, and it does not appear that such declaration was induced by the fear of punishment or the hope of reward, it is not error for the court to refuse to give a tendered instruction which emphasizes in its charge to the jury that evidence of "all verbal admissions, declarations or conversations," made by the accused, "should always be received with great caution."
3. **Rape:** EVIDENCE. "While in a prosecution for rape, or an assault with intent to commit rape, the state may only inquire of the prosecutrix whether she made complaint of the injury, and when and to whom, but not as to the particular facts which she stated, still the defense, in cross-examination, may inquire as to such particular facts." *Wood v. State*, 46 Neb. 58.
4. ———: ———: CONSENT. "In a prosecution for an assault upon a girl under the statutory age of consent, with intent to commit a rape, whether the girl consented or resisted is immaterial, and to constitute the offense it is, therefore, unnecessary to prove that the defendant intended to use force if necessary, to overcome her resistance." *Wood v. State*, 46 Neb. 58.

ERROR to the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

John M. Berger and *Albert S. Ritchie,* for plaintiff in error.

Clarence A. Davis, Attorney General, J. B. Barnes and *C. L. Dort, contra.*

DEAN, J.

Joseph Witty was indicted by the grand jury in Douglas county and charged with having committed rape, July 8, 1919, upon the person of a thirteen-year old female child. At the first trial the jury disagreed. At the next trial he was convicted and sentenced to serve a term of ten years in the penitentiary. He prosecutes error.

Owing to the numerous assignments of alleged error in the record, the necessity has been laid upon us of reproducing and discussing more of the evidence than is usual and more than would otherwise have been necessary. But for this fact much of it might well have been omitted.

The father of Mildred, that being the name of the prosecutrix, died when she was about eight. From that time until she was twelve, she and a brother, three years her junior, lived at an Omaha créche, her mother being employed at a bakery. For about a year prior to July 8, 1919, she lived in a home occupied by her mother, her little sister, her grandmother and an uncle and aunt. Mildred was living with them when, on Wednesday July 2, 1919, she was taken by her aunt to the Witty home in answer to an advertisement by Mrs. Witty that she wanted a little girl between the age of twelve and fourteen to help with the housework and to assist in the care of an infant child about two years old. Mrs. Witty was then about five months advanced in pregnancy. For her services Mildred was to be clothed, boarded and lodged. There was some talk about the Wittys adopting her. The house had three rooms. Mildred slept in the front room on a couch. The Witty family slept in the middle room, adjoining the front room, a kitchen being in the rear. After she retired on Saturday evening, that being her fourth day at the Witty home, she testified that the defendant came into the

room at about 9 o'clock, clad only in his undergarments, and made improper proposals to her; that he there told her about a little neighbor girl of thirteen and said, " 'Alice never does tell her mother and father,' and I says, 'That is no sign I won't tell my mother;' " that she kicked at him and told him to go away; that he finally went away, but after she had fallen asleep he came again and putting his hands on her person awakened her; that again she resented his advances and again he went away and did not disturb her for two or three nights; that on Tuesday night following, namely, July 8, 1919, he again came into her room after she had retired. Concerning his conduct that night she testified: "Then he kicks me into the other room. Q. How did he kick you? A. Hitting me on the back and everything. Q. What did he hit you with? A. His knee. Q. What happened then? A. He pushes me on the bed. * * * Q. What did you say to Mr. Witty, if anything, when he pulled you out of your room into his? A. He said not to say anything or 'I will slap you with the razor strap.' Q. Did you say anything while he was doing this thing to you? A. I screamed and says, 'Quit that.' Q. What did he say if anything? A. He just laughed. Q. Did Mrs. Witty say anything at that time? A No, sir. Q. Did she say anything later? A. Yes, sir." The witness then testified that Mrs. Witty said to her, in substance, that she must submit. She further testified that she protested and tried to get away from him, but that he succeeded finally in accomplishing his evil purpose. She said that Mrs. Witty at the time threatened that she would whip her with a razor strap if she refused to submit to Witty's demands and that she was afraid of her. The next morning she went with her grandfather and another man to the police station and later the same day to her grandmother's home. She testified, over defendant's objection, that in the afternoon or evening she complained to her grandmother and told her about what Witty had done on the previous Tuesday night.

Mrs. Elizabeth Kent is Mildred's grandmother. She testified that she talked with Mrs. Witty on July 1, in

answer to her advertisement, and that subsequently Mr. Witty called her up and said, "What do you think about me adopting the little girl?" to which she replied that she thought it was rather early to talk of adoption. She further testified that Mildred told her in the afternoon of July 9 about Witty's conduct toward her the night before. Delbert Weaver is an employee of the smelting company at Omaha where defendant was employed. He testified that, in July, shortly before his arrest, Witty told him "about a certain girl that he was familiar with," and told him that he had sexual intercourse with her. Edward Bryant is employed by the same company. He testified that some time before the commission of the alleged offense he heard defendant talk about a little girl with whom he said he tried to have sexual intercourse, but that when she screamed he desisted; that the next day he said: "I am going home earlier and I am going to try it over." Clark Kent, Mildred's uncle, testified that defendant told him when he was at the Witty home on July 4, 1919, that he wanted to adopt Mildred; that Mrs. Witty was present part of the time, but said nothing about adoption; that Witty, in speaking about Mildred crying a day or two before, said to him: "He said he came home and found her crying and he kind of consoled her and loved her up, that is the way he quieted her by putting his arms around her and loving her in that way." Doctor Marcia Young, an examiner for the juvenile court, subjected Mildred to a physical examination in her office July 10, 1919, and testified that in her opinion Mildred's physical condition indicated recent sexual intercourse.

The defendant denied in detail all of the material and damaging evidence of the state's witnesses. He not only denied calling up or talking to Mildred's grandmother about adopting Mildred, but in referring to Clark Kent's evidence he said that Mr. Kent told him he had trouble with the girl, and that if she would not consent that defendant adopt her "he would send her to the reform school;" that Mildred overheard her uncle's statement and when he

went away she began to cry and said: "If you adopt me I will run away and tell lies on you and cause you trouble." In his cross-examination defendant testified: "Q. Isn't it a fact that Mildred's nightgown was retained out at your house? A. There was a nightgown left there, if somebody didn't get it; they didn't know who it belonged to. Q. How do you know they didn't know who it belonged to? A. I didn't know; I was locked up; I was in jail. Q. The fact of the matter is it is still there? I wouldn't know; my wife wouldn't; that is immaterial to me any way." On the cross-examination defendant denied too that he had told Mildred that Alice did not object to having her dress raised or that she did not object to his familiarities. He denied that he had said to Mildred that Alice did not tell her parents about his conduct. He emphatically denied that he ever attempted to take liberties with Alice.

Mrs. Witty testified. It developed in her testimony that she had been indicted by the same grand jury that indicted her husband, and that she was charged with aiding and abetting him in the commission of the crime for which he was tried. Elsewhere in the record it appears that a *nolle prosequi* was entered and that the case as to her was dismissed. She corroborated substantially all of the material evidence introduced on the part of her husband. She testified that on the night of July 8 she called Mildred into the house from the front yard and told her to go to bed; that she then went into her bedroom; that her husband was then in bed; and she slept in the front of the bed and he slept next to the wall, as had been his custom for four years; that Mildred was not in their room that night nor did her husband get out of bed after he retired until the usual time the next morning. She denied in detail all of Mildred's evidence respecting the occurrences that Mildred said took place on the night of July 8; that she, and not her husband, called up Mildred's grandmother and told her that she would like to adopt her; she corroborated her husband's testimony in regard to his talk with Clark Kent about Mildred's adoption; that in speaking of the

Witty home Mildred had said to her: "She didn't like the place, and if we adopted her she would run away and tell lies on us." In regard to the removal of Mildred's clothes she testified on the cross-examination: "A. They asked my husband for the clothes, and I wasn't at home that day and my uncle came and got them. Q. Did you pack them for her? A. No; he got them himself. Q. Your uncle did? A. Yes." The testimony of the matron of the crèche reflected upon Mildred's conduct while she was under her control. Her testimony, even if true, does not bear on the issues. Mildred, however, denied all of her accusations. Two physicians testified on the part of defendant to the effect that Mildred's condition as disclosed by Doctor Marcia Young's evidence might have been produced by some other cause than sexual intercourse. Under the circumstances here we do not think their evidence is relevant to the issue. Alice was recalled in rebuttal to explain former testimony. She testified: "Q. This morning you testified that Mr. Witty had done something bad to you, and you told Mr. Ritchie, in answer to his question, that you had told that at the last trial. Now, did you mean you had told it in this room at the last trial, or out here in the hall to some officer? A. I didn't tell it in the last trial. Q. Where did you tell it, Alice? A. To Mrs. Hopkins. Q. That is the juvenile officer? A. Yes, sir." On the cross-examination she testified that Mr. Witty raised her dress and that Mildred was in the front room and did not see him do so. When the rebuttal testimony of Alice was concluded defendant's counsel asked leave to recall him, which was denied. He then offered to show by defendant that he never raised Alice's dress and never made any indecent proposals to her. The offer was denied, and error is alleged. Error cannot be predicated on the court's ruling on this point because defendant had already testified before Alice was called to the stand that he had not committed either offense as against her. He cannot maintain that he was denied a substantial right or that he was prejudiced merely

because he was not permitted to submit the same denial two times to the same jury.

Counsel argues that the court erred in permitting Mrs. Kent, the grandmother, to testify that Mildred made complaint to her in the afternoon or evening of July 9 that defendant had sexual intercourse with her the night before. In his brief he says that the complaint was not one "arising spontaneously out of the transaction. Here it was only at best a relation of a past event, too remote from the time. It was inadmissible altogether." We think the testimony of Mrs. Kent comes within the rule. The complaint was made, recently after the alleged commission of the outrage, to one of the persons to whom she would naturally go for that purpose. Evidently it was the first opportunity that she had to make complaint to one of her own sex of the abhorrent humiliation to which it is charged that she had been subjected. *Wood v. State,* 46 Neb. 58.

The defendant argues that the court erred in giving instruction numbered 1 because in part it is in the language of the indictment. We do not think the court erred. The instruction has the merit of brevity and is to the point. It has no tiresome repetitions and is easily understood. It is elementary that instructions should be applicable to the issue that is being tried. They were so in the present case. *Flege v. State,* 90 Neb. 390.

It is argued "that it cannot be seriously claimed that the intercourse was a rape by force," and an instruction is criticised wherein the jury is informed that, "Whether she was previously chaste and whether she consented or resisted is entirely immaterial." The prosecutrix was under the statutory age of consent. It follows that it was immaterial whether she consented or resisted. *Wood v. State,* 46 Neb. 58. The law relating to the complaint respecting when and to whom made by the prosecutrix, and that pertaining to the age of consent, resistance, and the like, is fully discussed by Judge Irvine in the *Wood* case.

Defendant argues that the court erred in refusing to give a tendered instruction that cautioned the jury with

respect to its consideration of the testimony of the witnesses Weaver and Bryant who testified to alleged statements made to them by the defendant against interest. We do not think the court erred in its refusal. The statements were alleged to have been made to fellow employees and appear to have been entirely voluntary and somewhat boastful. It does not appear that the declarations were induced by the fear of punishment or the hope of reward. It is elementary that voluntary statements so made by the accused at or about the time of the alleged commission of a crime are admissible in evidence against him the same as other competent evidence. Where a witness in a criminal case testifies to an alleged voluntary declaration against interest, made by the defendant at or about the time of the alleged commission of the crime with which he is charged, and it does not appear that such declaration was induced by the fear of punishment or the hope of reward, it is not error for the court to refuse to give a tendered instruction which emphasizes in its charge to the jury that evidence of "all verbal admissions, declarations or conversations," made by the accused, "should always be received with great caution."

With respect to alleged error in the giving and refusing of instructions generally, and with respect to the admission and exclusion of evidence over counsel's objection, we are unable to discover that the substantial rights of the defendant were prejudiced. The evidence conflicts, but it was submitted to the jury and appears to be amply sufficient to support the verdict. We do not find reversible error. The judgment is therefore

AFFIRMED.

MARY M. GRIFFIN, APPELLEE, V. BANKERS REALTY INVESTMENT COMPANY, APPELLANT.

FILED DECEMBER 23, 1920. No. 21190.

1. **Corporations:** SALE OF STOCK: CONTRACT. A contract providing for sale which contains an agreement to repurchase this stock is one and the same transaction, and it is *held* as constituting but a single and original contract.
2. **Statute of Frauds:** CONTRACT: PERFORMANCE. "The sale and delivery of stock and payment of the price, under a contract whereby the seller agreed to repurchase at the buyer's option, constituted an entire transaction which was sufficiently performed to take it out of the statute of frauds, relating to contracts for sale of goods, though the agreement to repurchase was oral." *Hankwitz v. Barrett*, 128 N. W. 430 (143 Wis. 639).
3. ———: ORIGINAL CONTRACT. "If an officer of a corporation orally promises a prospective purchaser of the corporate stock to repay the purchase price at any time and the purchaser acts upon the promise, the agreement is an original contract, and is not within the statute of frauds. The promisor does not thereby agree to answer for the debt, default or misdoings of another person, nor does he agree to purchase goods, wares, merchandise or things in action." *Trenholm v. Kloepper*, 88 Neb. 236.
4. **Corporations:** CONTRACT: VALIDITY. "A contract with a corporation by which it sells certain of its shares of stock and agrees to repurchase the same upon the happening of a certain specified event, is not *ultra vires*; and for a breach thereof the purchaser may recover of the corporation the amount agreed upon as the price of such repurchase." *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370.
5. ———: ———: PERFORMANCE. Where a seller of stock under a contract of purchase agreed to repurchase the same for the corporation and to pay therefor the same price, the purchaser must, as a condition precedent to the right to compel the corporation to repurchase, perform all the concurrent things necessary for the redelivery to the corporation.
6. ———: ———: DEFENSE. Defendant cannot be heard to say that the sale is valid so far as the contract for purchase of stock is concerned and void so far as repurchase is concerned, since the entire contract is one and indivisible.

7. **Contracts:** CONSTRUCTION. Where the parties entered into an oral contract to repurchase the stock so issued and in pursuance of this contract did repurchase three hundred dollars worth of the same, such action by the parties places their own construction upon the meaning of the contract, and the meaning the parties so give to their own contract will be followed by the court.
8. **Corporations:** CONTRACT: DEFENSE. A corporation cannot be heard in retaining the fruits of an unauthorized contract to advance the defense of *ultra vires* when sued on the contract, especially when the contract is an entirety and indivisible. Then every proposition therein contained must stand or fall together.
9. **Evidence:** SUBSCRIPTION FOR STOCK: INDUCEMENT. When an agent resorts to artifice and deceit as an inducement to one to subscribe for stock in a corporation, then evidence is admissible to show what it was that induced the party to subscribe for the stock. *Fairbanks, Morse & Co. v. Burgert*, 81 Neb. 465; *Barnett v. Pratt*, 37 Neb. 349; *Norman v. Waite*, 30 Neb. 302.
10. **Statute of Frauds:** PAROL CONTRACT. The statute of frauds can only be invoked to avoid an oral contract in case one is free from deceit and false representations.
11. **Corporations:** SUBSCRIPTION FOR STOCK: RESCISSION. When one is induced by misrepresentations to subscribe for stock by a corporation, he is entitled to a rescission of the contract in the same manner and to the same extent as between two natural persons.

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

Isidor Ziegler, for appellant.

Sutton, McKenzie, Cox & Harris and *Ralph E. Weaverling, contra.*

ALDRICH, J.

This is a law action. On August 11, 1915, Mary M. Griffin, plaintiff herein, purchased from defendant, Bankers Realty Investment Company, 1,000 shares preferred capital stock of defendant at $1.20 a share. Also on December 27, 1917, she purchased 50 shares more at $1.20 a share.

In paragraph two of plaintiff's petition she alleges as follows: "That on or about the 12th day of August, 1915, the defendant, by and through its agent Smith,

entered into an oral contract and agreement with the plaintiff, whereby it agreed with the plaintiff that the plaintiff was to purchase from the defendant a certificate of stock in said defendant company for the sum of $1,200, and the said defendant on its part agreed that, if the plaintiff should at any time thereafter, within a period of four years, desire to return said stock to the said defendant, the said defendant would pay to plaintiff, upon demand, the amount so paid by the plaintiff to the defendant, with interest thereon at the rate of seven per cent. per annum from the date of purchase to the date of demand."

It was orally agreed further that, if at any time after one year plaintiff should desire to return the stock to the defendant, plaintiff should give three days' notice in writing to the manager of the resale fund of such intention.

In compliance with the oral contract which the parties entered into, plaintiff desired to obtain from defendant the sum of $300. She made a demand for the same as provided in her oral contract for the return of $300 and interest. The defendant, strictly in conformity with this oral contract, did return to plaintiff $300 and interest.

It is admitted that pursuant to this oral contract plaintiff purchased from defendant 1,000 shares of stock, and that she did return to the defendant the stock so purchased by her, and demanded payment of the money by the defendant to the plaintiff and interest thereon from the 15th day of October, 1918, less certain sums stated which defendant acknowledged was paid to plaintiff. The defendant company was represented in this transaction by an agent named Smith who sold the 1,000 shares of stock, together with another 50 shares, at $1.20 a share. It is admitted that plaintiff purchased these shares. The defendant delivered this stock to the plaintiff and plaintiff paid the money, the purchase price, and the defendant accepted the same. Under this state of facts the case was tried to a jury under instructions

of the court, and the jury rendered a verdict for $877.86, and from this judgment defendant appeals.

Appellant in the beginning lays down the proposition of law that one who deals with an agent, knowing that he is clothed with certain circumscribed authority, cannot hold the principal where the act of the agent transcends such authority. As a general proposition of law this is good, but it is not absolute under all circumstances. A limitation of this proposition would be that a contract which by its terms may be performed within a year is not within the statute of frauds. It was said in *Carter White Lead Co. v. Kinlin,* 47 Neb. 409: "A contract not to be performed within one year, as meant by the statute of frauds, is one which by its terms cannot be performed within one year. A contract is not within the statute merely because it may or probably will not be performed within a year."

A contract providing for sale which contains an agreement to repurchase this stock is one and the same transaction, and as a matter of law may be considered as constituting but a single and original contract.

The sale and agreement to repurchase by the defendant and the acceptance of stock by the purchaser constituted a part performance sufficient to take the entire transaction out of the statute of frauds. The evidence on this proposition in the record is clear and undisputed. Further in answer to defendant's proposition hereinbefore quoted, see *Hankwitz v. Barrett,* 128 N. W. 430 (143 Wis. 639). The law laid down in that case is as follows: "The sale and delivery of stock and payment of the price, under a contract whereby the seller agreed to repurchase at the buyer's option, constituted an entire transaction which was sufficiently performed to take it out of the statute of frauds, relating to contracts for sale of goods, though the agreement to repurchase was oral."

Further answering defendant's first law proposition we call attention to the case of *Fremont Carriage Mfg. Co. v. Thomsen,* 65 Neb. 370. This case holds: "A con-

tract with a corporation by which it sells certain of its shares of stock and agrees to repurchase the same upon the happening of a certain specified event, is not *ultra vires;* and for a breach thereof the purchaser may recover of the corporation the amount agreed upon as the price of such repurchase."

In this connection we discuss the proposition that a corporation cannot be heard to contend that the sale of its stock was valid and that the contract to repurchase was void when they are made up of the same contract. In this case the corporation must approve the contract as a whole or return the purchase money and place the parties in *statu quo.* It is the overwhelming weight of authority that a private corporation while it may purchase its own stock, the transaction must be fair and in good faith. It must be free from fraud both actual and constructive. *Porter v. Plymouth Gold Mining Co.,* 29 Mont. 347, 101 Am. St. Rep. 569. That case lays down the following propositions of law:

"A private corporation may purchase its stock if the transaction is fair and in good faith, if it is free from fraud, actual or constructive, if the corporation is not insolvent or in process of dissolution, and if the rights of its creditors are in no way affected thereby.

"The mere repurchase of capital stock by a corporation does not tend to decrease the same unless the directors should absolutely merge or extinguish the stock after its purchase, within the meaning of Civil Code, sec. 438, providing that directors of corporations must not reduce or increase the capital stock except as thereinafter specially provided."

"A contract for the sale of stock by a corporation, whereby the corporation agreed to take back the stock if the purchaser should become dissatisfied therewith, is not objectionable as a secret contract between a corporation and a subscriber, by which the subscriber is at liberty to withdraw his subscription, but is valid and enforceable."

It is plain that, when a seller of stock under a contract

of purchase agreed to repurchase the same from the corporation and to pay therefor the same price, the purchaser must, as a condition precedent to the right to compel the corporation to repurchase, perform all the concurrent things necessary for the redelivery to the corporation.

It must be conceded to be true as a matter of law that, where an agent practices deceit in procuring subscriptions to the capital stock of a corporation, the subscriber is entitled to a rescission of the contract in the same manner and to the same extent as between natural persons.

There are indications that this contract was intrepreted alike by the parties, because the defendant promptly and unhesitatingly met the demand of the plaintiff and repurchased three hundred dollars worth of stock as per their contract. Therefore this must be in ratification of the terms and conditions of the oral contract as alleged by the plaintiff.

The next proposition appellant lays down is that parol evidence is not admissible to change, add to, vary or modify a written subscription for stock in a corporation. In support of this question, which we regard as axiomatic, appellant cites a formidable array of authorities. We may properly concede that as a rule these citations state the law, but they do not come within the exceptions to this rule and are not applicable under the facts of this case. A party cannot be heard to invoke authority to sustain that which works inequity and injustice and opens the doors to fraud.

It is also defendant's contention that the subscription for stock was the only contract between the parties and was a written contract that could not be varied or changed by parol testimony. It is also provided in exhibit A that each purchaser of stock shall be entitled to the services of the resale manager after one year from the date his stock certificate has been issued, and that it is the duty of the resale manager to take over such stock as is offered for resale upon such terms as such manager

shall deem for the best interest of the company. Then it is plain that, if this contract is binding between these parties, the agent Smith of the defendant company who sold the stock to plaintiff must have known of this contract and knew of this provision. These representations that he made to the plaintiff that the stock was 7 per cent. guaranteed stock and that the company would take the stock over were facts and matters peculiarly within the knowledge of this agent. These representations she had a right to believe, for it shows how the defendant company interpreted its own contract. She did not know that this resale manager would interpret the contract solely for the best interests of the defendant company. The agent knew; he was in a position to know. He was defendant's authorized representative. See *Blair v. Minzesheimer,* 108 N. Y. Supp. 799.

As a proposition of law we hold that, when a corporation enters into a contract to sell stock agreeing that at the expiration of six months from the date of the sale if the purchaser becomes dissatisfied with the investment he should be entitled to return the same, it could not be heard to say the sale was valid and the contract for repurchase was void. That would necessarily rescind the sale and return the purchase money and in this way place the purchaser in *statu quo. Porter v. Plymouth Gold Mining Co., supra.* We must assume in this case that the contract sued upon was made in a proper corporate manner and approved by the proper corporate officers. *Trenholm v. Kloepper,* 88 Neb. 236. If an officer of a corporation orally promises a prospective purchaser of the corporate stock to repay as an inducement the purchase price at any time, and the purchaser then acts upon that promise, then it is not within the statute of frauds.

It is plain that, in all the citations made by appellant, there are exceptions made, when it is necessary to get at the real intent and purpose of the contracting parties, to avoid fraud, injustice and misrepresentations.

The next proposition appellant lays down is that a contract for the repurchase of shares of stock which is not to be and cannot be performed within a year is within the statute of frauds which renders unenforceable agreements not to be performed within a year from the making thereof. The citations are eminent and contain a vast array of legal authority, but the answer to the propositions therein contained is that said in the case of *Cerny v. Paxton & Gallagher Co.*, 78 Neb. 134. This court has said that ordinarily deceit to be a ground for a recovery must relate to existing facts; but if one person by means of a promise which he makes with the secret intention of not performing it induces another to part with his money or property he is guilty of actionable fraud. That is the precise situation obvious in this case. See 2 Elliott, Contracts, sec. 837. This law constitutes the exception to the general rule argued by appellant. This proposition is well stated and to the point. There was deception and general deceit indulged in to induce the plaintiff to purchase. This appellant has received $1,500 in the sale of stock, and in consideration of doing the same cannot be heard to refuse to repurchase the same, thereby receiving the approval of the law. It has been held, and properly so, that a corporation retaining the fruits of an unauthorized contract cannot plead *ultra vires* when sued on the contract. The whole contract being an entirety and indivisible, every proposition in it must either stand or fall together. Then it naturally follows that, since the contract is indivisible, if it is claimed that a porton of it is *ultra vires* and hence a nullity, the proposition of *ultra vires* would permeate and make void the entire contract. Considering the alleged oral agreement and also the terms of the written contract, in our opinion, it makes but little difference in the result of this decision whether the contract was oral or written, because it plainly appears it was the inducements of the agent that caused plaintiff to part with her money. We believe it to be the law that, where one relies upon the statute of frauds to avoid an oral contract, he can only invoke this

defense when he himself is free from deceit and false representations; that one cannot be heard to invoke the statute of frauds as a defense in those cases and be permitted to reap the fruits or results of such a defense as this.

It is claimed by the secretary of defendant company that he had charge of issuing the stock and the general management of the sales business, and that the sales agent exceeded his written authority and that it never had the approval of the defendant company. If that is true, then why did the company upon notice and request pay to the plaintiff $300? Does not this payment indorse the contract their agent made, and does it not also show that both parties understood the contract alike? We recognize the application of the law as laid down in *Joyce & Co. v. Eifert,* 56 Ind. App. 190, wherein it was held: "Whenever an agent of a corporation duly authorized to procure subscriptions to its capital stock, induces persons to subscribe to shares of such stock by fraudulent representations or concealments, any person so defrauded will be entitled to a rescission of the contract in the same manner and to the same extent as between two natural persons."

It is an axiom of the law that he who asks relief of a court of equity must as a condition precedent to the grant of relief come into court with clean hands. While this was said with reference to a court of equity, yet we deem it just as wholesome and salutary when applied to a court of law. There was ample and sufficient evidence to sustain the verdict of the jury. As it appears in this record, the jury arrived at the only possible verdict under the evidence and the law as was given by the court in its instructions.

The judgment is

AFFIRMED.

MORRISSEY, C. J., and LETTON, J., concur in the conclusion only.

CLYDE LONGSINE V. STATE OF NEBRASKA.

FILED DECEMBER 23, 1920. No. 21584.

1. **Information:** JOINDER. It is incompetent to charge a defendant with a felony punishable by 20 years' imprisonment in the penitentiary, and join with that charge a charge of a misdemeanor, punishable only by a fine and jail sentence, when the lesser charge is not wholly proved by evidence properly introduced upon the greater.
2. ———: SUFFICIENCY: DELINQUENCY. An information which charges that the defendant "did then and there encourage, cause and contribute to the delinquency of one Ella Genevieve Meyers by giving her money and by enticing and inducing her to leave her home and run away with him, the said Ella Genevieve Meyers being a delinquent child as defined by the statutes of Nebraska," does not charge an offense under section 1263, Rev. St. 1913, in that the acts described as constituting the offense are not among those constituting the offense as enumerated in section 1244, Rev. St. 1913.
3. **Criminal Law:** DELINQUENCY: ADMISSION OF RECORD. It is an axiom of the law that a defendant shall not be affected by proceedings to which he is a stranger. He must have been directly interested in the subject-matter of the proceedings, with the right to make defense, to adduce testimony, to cross-examine the witnesses on the opposite side, to control in some degree the proceedings, and to appeal from the judgment. 10 R. C. L. 1117, sec. 323.

ERROR to the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Reversed.*

Lambe & Butler, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

ALDRICH, J.

The defendant, Clyde Longsine, is prosecuting his appeal from a conviction in March, 1920, in the district court for Furnas county for an alleged contribution to the delinquency of Ella Meyers, a fourteen-year old girl. Defendant was sentenced to 30 days in jail and a fine of $300 and costs.

The information had two counts, one charging kidnapping or child stealing and the second count thereof charging contribution to delinquency in violation of section 1263, Rev. St. 1913.

The information charges the defendant with a felony under one section of the statute and with a misdemeanor under another. These charges vary widely in the degree of punishment. Child stealing or kidnapping is punishable by imprisonment in the penitentiary for a period of 20 years, and a violation of section 1263, Rev. St. 1913, is simply a misdemeanor punishable by a fine not exceeding $500, or imprisonment in the county jail not exceeding six months, or both. It is illegal to charge defendant with a felony carrying with it a sentence second only to murder, and join that charge with a misdemeanor punishable only by fine and jail sentence, and under different sections of the statute. The defendant is handicapped in defending the charge of kidnapping carrying with it the enormous penalty, and being at the same time charged with contributing to the delinquency of a female child. It does not matter that the jury acquitted him of the larger crime. The burden of the defense of the larger crime was imposed upon him, and he had to labor against the prejudice of a heinous crime, which in the eyes of the jury might import guilt under the lesser crime. The county attorney on motion should have elected upon which count he would proceed.

In the matter of the information there is the more serious criticism that it does not charge a crime under the statute. It will be noted that the information charges that the defendant "did then and there encourage, cause and contribute to the delinquency of one Ella Genevieve Meyers by giving her money and by enticing and inducing her to leave her home and run away with him, the said Ella Genevieve Meyers being a delinquent child as defined by the statutes of Nebraska." It has frequently been held by this court that an information laid in the terms of the statute is a sufficient description of the offense in an information. But when the information goes further and describes

the specific acts upon which the pleader relies as constituting the offense, and when such specific acts are not among those described in section 1244, Rev. St. 1913, as constituting an offense, the information does not state an offense under the statute. A comparison of the various acts constituting delinquency under section 1244, *supra,* with the information will clearly disclose that giving the delinquent child money and "enticing and inducing her to leave her home and run away with him" is not one of the acts declared to be an offense.

The information charges him with giving the delinquent money, while the statute provides specifically and definitely the particular acts or things which are necessary and essential to support the charge of delinquency. There is nothing in this information which imputes in any way any particular offense under the statute, and for this reason the information was insufficient, and in the particular of delinquency did not charge a violation of section 1263, *supra.*

The county attorney in this case introduced in evidence the record made by the county judge against Ella Meyers when she was accused and convicted of delinquency after the arrest of the defendant. Such a procedure is contrary to the constitutional provisions of our state. The accused is accorded the genuine American right to have an opportunity to see and cross-examine the witnesses against him. Here the trial court resorted to the remarkable procedure of allowing necessary and essential facts to be proved against defendant by resorting to an *ex parte* proceeding to which this defendant was not a party. This is contrary to the well-considered case of *State v. Weil,* 83 S. Car. 478, 26 L. R. A. n. s. 461. The note to that case in 26 L. R. A. n. s. 461, is very instructive. It is as follows: "A judgment for or against an accused person is not admissible in a criminal prosecution wherein he is prosecuted for the transaction involved in a civil proceeding, since the parties in the two actions are not identical, and the judgment in the civil action is rendered on a mere

preponderance of the evidence, which would not be sufficient in a criminal cause to satisfy the jury beyond a reasonable doubt." This was a well-considered case and correctly lays down the law. Depositions or *ex parte* affidavits taken in a civil proceeding are not admissible in evidence to prove the guilt or innocence of one who is charged with the commission of an act which is quasi-criminal. The accused in this case did not waive his constitutional right to confront the witnesses against him, nor does the record show that he had an opportunity to confront and cross-examine them.

It may be said to be "an axiom of the law that no man shall be affected by proceedings to which he is a stranger. * * * He must have been directly interested in the subject-matter of the proceedings, with the right to make defense, to adduce testimony, to cross-examine the witnesses on the opposite side, to control in some degree the proceedings, and to appeal from the judgment. Persons not having these rights are regarded as strangers to the cause." 10 R. C. L. 1117, sec. 323. *Fitzhugh v. Croghan,* 2 J. J. Marsh. (Ky.)* 429, 19 Am. Dec. 139; *Smith v. White,* 14 L. R. A. n. s. 530; *People v. Pierro,* 17 Cal. App. 741.

Other errors are alleged, but it is unnecessary to discuss them. Those errors mentioned and discussed go to the foundation of the charge herein made. The judgment or finding must be reversed and remanded, for it is contrary to fundamental law and justice.

REVERSED AND REMANDED.

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