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# REPORTS OF CASES

IN THE

# SUPREME COURT OF NEBRASKA

JANUARY TERM, 1922

## VOLUME CVIII

HENRY P. STODDART,
OFFICIAL REPORTER

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# SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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JAMES R. DEAN, Associate Justice
CHESTER H. ALDRICH, Associate Justice
GEORGE A. DAY, Associate Justice
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CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

JANUARY TERM, 1922.

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MINNIE A. WATERS, APPELLEE, V. NEBRASKA MUTUAL INSURANCE COMPANY, APPELLANT.

FILED MARCH 1, 1922. No. 21852.

1. **Trial:** REQUESTS FOR DIRECTION OF VERDICT: FINDINGS OF FACT. Where each party to a trial by jury requests the court to direct a verdict in his favor, he waives the right to a finding or trial of the issues by the jury, and consents that the court shall find the facts and apply the law thereto.
2. **Insurance:** LOCATION OF PERSONALTY: WARRANTY. Except as to personal property that has a distinct and definite abiding place, a description in an insurance policy as to the location of the property, although it may be a warranty *in presenti*, is not, in the absence of an express stipulation, a promissory warranty that the property will remain in the location described.
3. **Appeal:** REQUESTED INSTRUCTION. Where an instruction is given upon an issue submitted to the jury at the request of a party to a suit, he will not be heard to say that there was no evidence upon which to base the instruction.
4. **Insurance:** ACTS OF AGENT. Insurer's agent, empowered to receive and transmit applications and to receive payments of the premium, binds the company by knowledge acquired in and about the preparation of the application and by representations made to the insured while so doing.
5. ———: FRAUD: EVIDENCE. Evidence of alleged fraud and misrepresentation examined and *held* not to require such inference.

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

*George E. Hager* and *James A. Brown*, for appellant.

*T. F. Nolan*, *H. D. Curtiss* and *M. F. Harrington*, *contra.*

Heard before DEAN, LETTON and DAY, JJ., CLEMENTS (E. P.) and DILWORTH, District Judges.

CLEMENTS, District Judge.

Plaintiff sues the defendant upon six causes of action, each based upon a separate policy of insurance, and alleges that the live stock described in all of said policies was totally destroyed by fire February 10, 1920, upon the Randolph Ranch, in sections 33 and 34, township 28, range 20, Rock county, Nebraska. Plaintiff also alleges that the location of the property insured was erroneously entered in each of said policies of insurance, but that the defendant, at the time that each of said policies was written, knew where the property insured was actually located and that the misdescription of location in the policies was solely the error of the defendant.

The defendant admits the execution of the policies sued upon, but defends against liability for loss under them for the following reasons: First, the defendant contends that the policies sued upon in plaintiff's third, fourth, fifth and sixth causes of action, which will hereafter be referred to as exhibits A, B, C, and D, were void and unenforceable at the time of the fire, because the property therein described had been removed from the place where it had been insured, without the knowledge and consent of the defendant, to the Randolph Ranch; second, the defendant contends that exhibit B was also void for another reason, viz., because said policy had been changed and mutilated by the plaintiff by the insertion therein of the words, "jennies and jacks;" third, the defendant contends that the policies sued upon in plaintiff's first and second causes of action, which will be hereafter referred to as exhibits E and F, never went into effect, because they were obtained by false and fraudulent representations of plaintiff as to the location of the property when it was insured.

The claims of the parties are set out in the pleadings

by suitable averments of admission, allegation, and denial, but these pleadings are too long and involved to be quoted here. Upon these issues there was a trial to a jury. At the close of all the evidence both parties moved for a directed verdict. No formal ruling was made on the motions, but in effect the court overruled the defendant's motion and sustained the plaintiff's motion by instructing the jury that the defendant was liable for the plaintiff's loss upon the policies sued on in plaintiff's first, second, third, fifth and sixth causes of action, exhibits A, C, D, E, and F. The question of defendant's liability upon plaintiff's fourth cause of action, exhibit B, and the amount of plaintiff's loss upon all of the policies was submitted to the jury. The jury returned a verdict finding generally for the plaintiff in the sum of $8,318.74. The jury also made, at the request of the defendant, some special findings as to the fourth cause of action, these special findings will be referred to later. Motion for a new trial was overruled, exceptions taken, and defendant comes here on appeal.

While the defendant alleges many errors, it really predicates its right to a reversal upon three grounds, which we will consider in the following order: First, the court erred in instructing the jury that the defendant was liable upon exhibits A, B, C, and D, because each and all of said policies were void as a result of the removal of the insured property, without the consent of the defendant, to a new and more hazardous location. In the consideration of this case it must be first noted that, as to the questions of fact taken from the jury, it comes to us on the same basis as if tried to the court without the intervention of a jury. *Dorsey v. Wellman,* 85 Neb. 262.

A careful examination of the evidence convinces us that the trial court was justified in concluding that the facts as to exhibits A, B, C, and D were as follows: For about six years prior to the issuance of these policies

the plaintiff had been writing insurance upon live stock in Rock county with the defendant company. During this time many insurance policies had been written for her by the defendant and she had suffered some losses under the policies. During all of this time the business of soliciting this insurance, preparing the applications, collecting the first premiums, adjusting and paying for losses, was done by the defendant's agent, Charlie Lanning, who resided at Long Pine, in Brown county. Mr. Lanning's practice and custom in securing this insurance was, upon receiving a request from Mrs. Waters for insurance, to go to the place where the stock was situated, look it over, agree upon the amount of insurance, and then return to his office in Long Pine and prepare an application and forward same to the company in Lincoln. Sometimes the application was signed by Mrs. Waters, but usually it was signed by Mr. Lanning or by some one in the office at Lincoln. The preparation of the application, including the description of the location of the property, seems to have been left entirely to Mr. Lanning or to the company. Up until about three years before the issuance of these policies Mrs. Waters resided upon a ranch owned by her in Rock county. At that time this ranch was sold, and ever since Mrs. Waters has resided in rented property in the village of Bassett, Nebraska. Since the sale of the ranch, live stock insured by the defendant for Mrs. Waters has been located upon various rented places in said county. Mr. Lanning and the company in preparing applications do not seem to have exercised very much care in describing the location of the live stock, and numerous errors in this respect have occurred, which were perpetuated by the practice of making up new applications from old ones in the office without reference to the then location of the property. Before exhibits A, B, C, and D were written Mr. Lanning examined the live stock; he found it located in various pastures in Rock county; he was told that the intention was to

keep the stock in these pastures until about October 1, and to then remove the same to some place for wintering. He agreed that this might be done, and told the plaintiff that he would help her find a suitable place to winter the stock. This he afterwards did by assisting her to rent the Randolph Ranch, where the stock was taken about October 15. Mr. Lanning knew of the removal of the stock and saw it at the Randolph Ranch before it was destroyed. In making up the applications for these policies no attempt seems to have been made to correctly describe the location of the property. It is apparent that the descriptions in old policies were followed, as in no instance is the location correctly given. Defendant concedes that the insurance attached at the actual location of the property when the insurance was written, but contends that the removal of the stock to the Randolph Ranch invalidated the policies. The defendant's contention that the fire hazard to the property was increased by its removal cannot be entertained. There is no evidence as to the difference in the hazard of the place where the insurance attached to this property and the place to which it was removed. The only evidence in the record as to a difference in fire hazard is as to the home place of Mrs. Waters, meaning the place sold three years before this insurance was written, and the Randolph Ranch, and as to this we are given no facts upon which to make a comparison of hazards. The bald statement of Mr. Mills that the hazard at the Randolph Ranch was greater is only a conclusion, and his testimony that the Randolph Ranch was vacant and abandoned is not sustained by the evidence, at least as to its condition after this property was taken there.

The general rule as to the change of location of insured property is stated in 19 Cyc. 740, as follows: "A description as to the location of property, although it may be a warranty *in presenti,* is not, in the absence of an express stipulation, a promissory warranty that the property will remain in the location described." It has been

held, and is no doubt settled law, that the provisions found in the New York standard policy, "while located as described herein and not elsewhere," constitute an express stipulation and promissory warranty that the property will remain in the location described. 19 Cyc. 741. It is plainly to be seen that in this clause there is coupled with the situs of the property a distinct provision that the insurance shall continue only while the property is so situated. The defendant has cited a number of cases holding that a change in location of the insured property without the consent of the insurer invalidates the insurance. It will be noted, however, that in every case cited the policy sued upon contains the clause of the New York standard policy, "while located as described herein," and so forth. Turning now to the policies in question, we find that they do not contain the New York standard policy clause, but provide for insurance "to the following described property located and contained as described herein and not elsewhere." It will also be seen that the policies contain no provision that the insurance shall be forfeited by the removal of the property. It is evident there must be some reason for this. The explanation that occurs to us is that the company realized that it would be difficult to secure insurance upon live stock if the policy plainly restricted the insurance to the time while the stock should be actually located on the premises where they were when the application was taken. If it is claimed that the policies are ambiguous, it must be remembered that an insurance policy will be strictly construed against the insurer, who prepared it, and liberally in favor of the insured. 19 Cyc. 656, *Kinney v. Farmers Mutual Fire & Ins. Society,* 159 Ia. 490, and *Noyes v. Northwestern Nat. Ins. Co.,* 64 Wis. 415, cases very much in point, hold: "Except as to personal property, which has a certain distinct and definite abiding place, a statement in the policy as to its location is not a warranty that it will be continued in its then location during the life of the policy." We

think, taking into consideration the circumstances under which this insurance was written and the form of the policy, the removal of the live stock to the Randolph Ranch did not forfeit the insurance.

Second, the defendant contends that the court erred in instructing, in substance, that if the jury find that the words, "jennies and jacks," were inserted in the policy sued upon in the plaintiff's fourth cause of action by some third person, without the knowledge or consent of the plaintiff, she could recover on the policy for the property originally described, but could not recover for the jennies and jacks. The defendant says there was no evidence upon which to base this instruction. The defendant requested the jury to make a special finding on this matter, and the jury found that the words were inserted in the policy by some third person without the knowledge or consent of the plaintiff. Having requested that this issue be submitted to the jury, the defendant will not now be heard to say that there was no evidence upon which to base an instruction framed to meet the contingency created by this request. *Farmers Bank v. Garrow*, 63 Neb. 64; *Missouri P. R. Co. v. Hemmingway*, 63 Neb. 610.

Third, the defendant bases its claim, that the policies sued upon in its first and second causes of action, exhibits E and F, were obtained by false and fraudulent representations, upon a telephone talk had with the plaintiff's husband and agent from Long Pine just prior to the time the policies were written. The material part of this conversation was an alleged statement of Mr. Waters in answer to a question of Mr. Mills, the defendant's secretary, as to where the live stock upon which this insurance was to be written was located, "Be just like the other policies, at the home place." The defendant says that Mr. Mills understood this as a representation that the property was situated upon the home place of Mrs. Waters, meaning the ranch which had been sold some three years before this, that the representation

was material, was false, and therefore avoided the insurance. We think this statement must be considered with reference to the circumstances surrounding its making. It should be remembered that after the sale of the home place Mrs. Waters wrote a number of policies of insurance with the defendant; that the defendant's agent, Mr. Lanning, who solicited this insurance, knew that this "home place" had been sold and that the property was situated elsewhere; that Mr. Lanning solicited the insurance written in exhibits E and F and knew the property was located upon the Randolph Ranch. At the time that Mr. Mills was closing up the deal for the insurance that had been commenced by Mr. Lanning, we think Mr. Waters was justified in assuming that the information as to the location of the property possessed by Mr. Lanning had been communicated to the company, and that when Mr. Waters made the statement, "Be just like the other policies, at the home place," he meant to imply that the stock to be included in the new policies was at the Randolph Ranch where the stock covered by the other policies was being wintered and where Mr. Waters was making his home to care for the stock. We do not find sufficient evidence to justify an inference of fraud or misrepresentation.

It follows, therefore, that the trial court was right in instructing that the defendant was liable upon exhibits E and F.

As it appears that none of the policies were forfeited, it will not be necessary to consider the question of waiver or estoppel.

The question of the amount of plaintiff's recovery was submitted to the jury by proper instructions. Defendant contends that the recovery is too large, but we think it is justified by the evidence.

The judgment is

AFFIRMED.

GEORGE G. FARMER, APPELLEE, V. JOHN H. PITTS, APPELLANT.

FILED MARCH 1, 1922. No. 21795.

1. **Landlord and Tenant: FORCIBLE ENTRY AND DETAINER: DEFENSE.** In a case brought under the statute for forcible entry and detainer to obtain possession of real estate by reason of a tentative failing, or neglecting or refusing to pay rent when due, it is a sufficient defense if it appears that no demand was made for the rental, and that the defendant, in good faith, mailed the rental to the landlord on the day it became due.
2. ———: **RENT: DEMAND.** The tenant is entitled to a demand for and to a reasonable opportunity to pay the rental, and there must be a neglect or refusal to pay on his part before a forfeiture of the lease can be claimed and the landlord entitled to a judgment of ouster.
3. ———: ———: **FORFEITURE.** The provision of the statute and the general stipulations for forfeiture in the lease are considered in equity as securing the rent, and not for forfeiting the lease, when the tenant acts in good faith and pays promptly on demand.
4. ———: ———: ———: **EQUITY.** The defense in forcible entry and detainer actions may be equitable as well as legal under the Nebraska Civil Code, and the tenant will be relieved from a technical forfeiture when absolute good faith is shown and the circumstances are such as to call for the exercise of equitable principles in his behalf to prevent gross injustice.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Reversed.*

*George W. Ayres* and *Peterson & Deroe*, for appellant.

*John J. Ledwith, contra.*

Heard before MORRISSEY, C.J., ROSE, ALDRICH and FLANSBURG, JJ., BUTTON and COLBY, District Judges.

COLBY, District Judge.

This is an action of forcible and unlawful detainer originally brought before a justice of the peace under sections 8466-8482, Rev. St. 1913, to obtain possession of

real estate by reason of nonpayment of rent at the time it became due. A judgment was rendered in justice court in favor of defendant, and the case was appealed by plaintiff to the district court for Lancaster county, where a jury was waived and the case tried to the court. The district court found in favor of plaintiff, and rendered judgment for the possession of the premises and ouster against the defendant, who brings his case by appeal to this court.

The plaintiff, appellee, was, at the time of the commencement of the action, the owner of the brick block, sought to be recovered, situated in south Lincoln and used for business purposes. The defendant, appellant, was one of his tenants. The lease involved in this case was made by Louis R. Wood, the grantor of the premises to appellee, George G. Farmer, to the appellant, John H. Pitts, and provided for the payment of monthly rentals in advance on the first day of each month at the office of A. P. Peterson, agent of the original lessor. It appears that the lessee attorned to the appellee after his purchase of the premises, and that the place of payment of rent was changed to 140 North Eleventh street, Lincoln, Nebraska. It further appears from the record that the lessee was in the habit and customarily paid the rent by mailing the appellee a check therefor at or about the time the rent became due; that this continued until November 1, 1919, when the appellee again changed his residence and address and notified appellant, in writing, that in the future the place of payment of the rents for the leased premises would be at 130 North Twenty-seventh street, Lincoln, Nebraska, instead of 140 North Eleventh street, where it had been payable for some time after the purchase of the property by appellee.

On the 1st day of April, 1920, the record shows, and it is agreed by stipulation between the parties, that the appellant, Pitts, mailed to the appellee his check for $40, inclosed in an envelope with a dollar bill, in payment

of the rent for the ensuing month, but that envelope and contents did not reach appellee until the 3d of April, 1920, at 12:35 p. m., and was thereupon refused by appellee. At 9 o'clock a. m., on April 3, 1920, several hours before the rent check envelope was brought to appellee, he served personally on appellant a written three days' notice to vacate said premises.

The lease contained the provision that, if any rent shall be due and unpaid, it shall then be lawful "for any of said party of the first part to reenter said premises, and party of the second part agrees to vacate said premises without notice." It is the contention of appellant that (1) he did not fail, neglect or refuse to pay the rent when the same became due, and that the mailing of the check on the 1st of April was a compliance with the terms of the lease under the custom established between the parties; and (2) that, even if there was a technical default, a forfeiture of the lease as tenant should not be enforced, since, prior to the commencement of the action, he tendered the full amount of rent due.

The propositions or contentions of appellant, Pitts, will be considered in their order.

1. Did appellant fail, neglect or refuse to pay the rent when due? It is the conclusion of the writer of this opinion, from a consideration of the stipulated facts and other evidence shown by the record, that there was no refusal, failure or neglect on the part of appellant to pay the rent when due. The appellant, according to the established custom between the parties, sent the amount of rental due on April 1 by mail to the appellee on the date the same became due, and there seems to have been no intention, as shown by the record, on the part of appellant to evade or avoid in any way the prompt payment of such rental. It is apparent from the record that appellee, Farmer, acquiesced in the payment of the rent by check and its remittance by mail, and the rule of law is well established that

"remittance by mail may constitute payment if expressly or impliedly authorized by the creditor or such payment is according to the usual course of dealing between the parties." 30 Cyc. 1186. See *Buell v. Chap'n*, 99 Mass. 594.

No demand whatever was made on lessee for payment of the rent excepting that contained in the lease, and the landlord, of his own volition and without the consent of the lessee, had moved or changed the place of such payment a mile or two farther away than that provided in the lease or the place of payment agreed upon after the purchase of the property. The lessee could not be legally required to travel all that additional distance to the new place of payment and personally pay or tender to the lessor a check or the money for such rent. Suppose the lessor, instead of going a mile or two away, had gone 10 miles, or 500 miles, certainly the lessee, neither in law nor in reason, would be obliged to travel that distance to make the payments on the exact date stipulated, or be obliged to mail the envelope containing the check days, weeks, or perhaps months, in advance in order for it to reach the lessor at the time the rent became due. The ordinary principles of reason, common sense and justice should govern in questions of this kind. The lessee, in law, had a right to assume that the post office department would do its duty and deliver the envelope containing the rent in due time, and that the lessor would, in justice, accept such rent; and if for any reason it was not received or delivered the lessee should, as a matter of ordinary fairness and justice, be advised of such fact and have a chance to remedy the same. The writer of this opinion cannot but be impressed with the idea, which seems to come from a reading of the record, that it was not the rent the lessor wanted, but rather a forfeiture of the lease contract. Now, the provision of the statute regarding a forcible entry and detention, as well as the provision in the lease as to the nonpayment of the rent, is for the security of such rental

to the lessor, not for the purpose of giving him an undue advantage and permitting him unjustly to obtain a forfeiture of the lease.

2. As to the second proposition or contention of appellant, even if there was a technical default or failure to pay the rent on the day it became due, a forfeiture of the lessee's rights as tenant should not be enforced under the facts in this case. The default, if any, in making payment on time was inconsequential, and the record shows that payment was tendered or made in the usual way by mail on the day it became due, or at least prior to the commencement of the action. According to the established rules of equity and justice this is sufficient.

In a note in 24 Cyc. 1365, it is said: "Where by accident or mistake the covenant in a lease is broken, and the lessors have not been in fact injured and can be put *in statu quo,* equity will relieve against a forfeiture. See *Mactier v. Osborn,* 146 Mass. 399.

And in *Giles v. Austin,* 62 N. Y. 486, the court say: "A covenant in a lease by the tenants to pay taxes and assessments is in the nature of a covenant to pay money, and a forfeiture incurred by a breach thereof may be relieved against on the same principles. In the absence of bad faith on the part of the tenant, and where the position of the parties has not been changed and no new rights have intervened, mere delay on the part of the tenant in making the stipulated payments will not bar him from relief."

In 1 Pomeroy, Equity Jurisprudence (4th ed.) sec. 453, it is said: "Where a lease contains a condition that the lessor may reenter and put an end to the lessee's estate, or even that the lease shall be void, upon the lessee's failure to pay the rent at the time specified, it is well settled that a court of equity will relieve the lessee and set aside a forfeiture incurred by his breach of the condition, whether the lessor has or has not entered and dispossessed the tenant. This rule is based upon the notion that such condition and forefeiture are

intended merely as a security for the payment of money." See *Sunday Lake Mining Co. v. Wakefield,* 72 Wis. 204.

"Under a lease authorizing the lessor, in case of failure of the tenant to pay an instalment of rent when due, to consider the lease forfeited, forfeiture may not be enforced and an action of forcible entry and detainer be maintained without a demand for and a reasonable opportunity to make payment." *Cole v. Johnson,* 94 N. W. 1113 (120 Ia. 667).

"Where, in a lease, it was stipulated that if the lessees failed to pay, first, rent at a certain time, or second, taxes, etc., or to refund those paid by lessor, the lease should be forfeited. * * * Where such lessors were accustomed to collect rent themselves, and the rent was due July 1st, and where the lessors were not in the state until the 5th, when the rent was tendered; held, that a sufficient and substantial compliance with the terms of the lease was shown." *Burnes v. McCubbin,* 3 Kan. 221. See *Wilson v. Jones & Tapp,* 1 *Bush* (Ky.) 173.

The adjudicated cases of the supreme court of this state are in accord with the doctrines announced in the other states. In the case of *Haynes v. Union Investment Co.,* 35 Neb. 766, Judge Maxwell, who wrote the opinion, says: "Under the decisions of this court a demand may be made by a notice to quit. *Hendrickson v. Beeson,* 21 Neb. 61. If this is a sufficient demand it is probable that a tender of payment at that time would defeat a recovery." Paragraph 2 of the syllabus reads:

"In order to work a forfeiture of a lease for nonpayment of rent there must be a demand on the tenant for the rent, although such demand may be in the form of a notice to quit."

The case of *Haynes v. Union Investment Co., supra,* is cited by the supreme court of South Dakota, in which that court lays down the general rule as follows: "Payment or tender of the rent by the lessee within three days after the notice to quit, given under Comp. Laws, sec. 6073, for nonpayment, is served, prevents a forfeiture."

*Dakota Hot Springs Co. v. Young,* 9 S. Dak. 577.

Where there is no attempt at evasion or fraud in the payment of rent, but on the contrary an honest endeavor and intention to comply with the terms of the lease, as shown by the record in this case, a forfeiture should not be given.

In the case of *Springfield F. & M. Ins. Co. v. McLimans & Coyle,* 28 Neb. 846, this court said: "Forfeitures are not favored and should not be enforced unless the courts are compelled to do so." And in the case of *Hanover Fire Ins. Co. v. Gustin,* 40 Neb. 828, this court reiterates this doctrine: "Forfeitures are odious in law and should never be enforced unless the court is compelled to do so."

In the opinion written in the case of *Estabrook v. Hughes,* 8 Neb. 496, it is said: "Where a tenant has forfeited his lease, by a breach of the covenant for the payment of the rent, courts both of law and equity consider the clause of reentry (or forfeiture) to be mainly inserted for the landlord's security, and will interfere in the tenant's behalf, although all the formalities of a common-law demand may have been complied with, upon his satisfying the rent due, and making compensation for any damages which the landlord may have sustained in consequence of this omission."

In *Ostenberg v. Scottsbluff Investment Co.,* 106 Neb. 143, this court announces the general doctrine: "Equityt has power to relieve against a forfeiture of a lease for the nonpayment of rent on the day stipulated, and such power should be exercised when the circumstances are such as to call for the exercise of equitable principles, and where, if withheld, gross injustice will follow, when the failure to pay the rent was not wilful or such culpable neglect as to amount to the same thing."

In the instant case everything in the record shows the good faith of the lessee and his intention to pay the rent promptly at the time the same became due and in the customary manner agreed upon between the parties. As this court has held, equity considers the

general stipulations for entry by the landlord on the nonpayment of rent as intended for securing the rent, and not for forfeiting the lease, if the tenant shall have acted in good faith and shall promptly pay the rent when demanded or before the landlord suffers loss or inconvenience from the delinquency. Such provisions of the law and of leases regarding forfeitures for nonpayment of rent are not for the purpose of enabling the landlord to obtain undue advantage of a tenant by a forfeiture of the lease on technical and inequitable grounds.

Under the plea of not guilty or under an answer of general denial in cases of forcible entry and detention brought by a landlord against a tenant, the tenant is entitled to all the defenses, whether of law or equity, which are warranted by the evidence, and in this case it appears that the facts, the law and the equities are all on the side of the tenant.

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

REVERSED.

FLANSBURG, J., dissenting.

I am unable to concur in that portion of the opinion, and the rule stated in the syllabus, that a tenant is entitled to a demand for and a reasonable opportunity to pay the rental before a landlord can claim a forfeiture. Our statute was intended, I believe, to put an end to that common-law rule. Where a tenant fails, refuses or neglects to pay his rent when due, he is from that moment a tenant holding over his term, and the landlord's right to eject the tenant has then become complete. Unless by some action on his part the landlord affirmatively waives the forfeiture, he need only serve the statutory notice to vacate and bring an action in forcible entry.

I agree with the rule, as stated in the opinion, that equity may relieve against the forfeiture, and that it is proper that it should do so, when it appears that the rent has been forwarded in conformity with a custom

established by the parties, but I do not agree that before the landlord can establish the legal right to a forfeiture he must make some sort of demand on the tenant for the rent; nor do I believe that the facts in this case show that, by an established custom, the landlord was to receive delayed payments. *O'Connor v. Timmermann,* 85 Neb. 422.

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CLAUDIA O. WEINGAND, APPELLANT, V. CITY OF NORTH PLATTE ET AL., APPELLEES.

FILED MARCH 1, 1922. No. 21709.

1. **Torts:** JOINT AND SEVERAL LIABILITY. Where an injury is suffered in consequence of the wrongful acts of several persons, all of whom contribute directly to cause the injury, though there was no conspiracy or joint concert of action, they are jointly and severally liable.
2. **Nuisance:** INJUNCTION: DAMAGES. An action for an injunction to restrain or abate a continuing nuisance may be maintained by any person who suffered damage or injury thereby, and he may in the same action be allowed to recover for any past or present damage which he has sustained by reason of the nuisance.
3. **Costs.** Litigants cannot escape their liability for costs in an action, where they cease the commission of the acts amounting to a nuisance after action is commenced, and where they answer to the merits and contest the right of plaintiff to the relief prayed at the trial.
4. **Nuisance:** INJUNCTION: DAMAGES. Evidence examined, and *held* to sustain the action of the trial court as to the granting of the permanent injunction; but, the trial court having made the finding that the nuisance complained of caused the damage to the plaintiff, and the amount of such damage not being in dispute, the plaintiff should be entitled to recover his damages.

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

*Halligan, Beatty & Halligan,* for appellant.

*Beeler, Crosby & Baskins, Hoagland & Carr* and *E. H. Evans, contra.*

Heard before LETTON, DEAN and DAY, JJ., CORCORAN and GOSS, District Judges.

CORCORAN, District Judge.

The plaintiff and appellant in this litigation is the lessee of the McCabe Hotel at North Platte. The defendants and appellees, except the city and its sewer inspector, are owners of buildings situated upon lots in the same city block as the hotel in question. The plaintiff filed his petition, and charged the defendants with the violation of an ordinance of the city, which prohibited the diverting of rain water from the roofs of buildings into the sanitary sewer system of the city. It was claimed by the plaintiff that each of the defendants had effected connections with the sanitary sewer in the alley back of the respective buildings, and thus diverted the rain water from the roofs of their buildings into the sewer, thus overloading the lateral sewer and causing it to back up through the toilets and wash bowels in the hotel basement and flooding the basement with sewage; that in the months of June and July, 1919, there occurred several heavy rains, and that with the rain water diverted from the roofs of defendants' buildings the sewer was overloaded and was unable to carry off the water and sewage, and as a consequence the basement of the hotel was flooded, as above set forth, to the damage of the plaintiff and his business. The plaintiff asked that the defendants and each of them be enjoined from continuing the nuisance and for damages.

The defendants filed separate answers, which answers were all very similar, and each of them contested the right of plaintiff to either an injunction or damages, and urged about every defense known to the law and our system of practice. In addition to the other defenses pleaded by the defendants, Walla Walla lodge of Odd Fellows tendered the defense that their building had

been disconnected from the lateral sewer for some months prior to the damage complained of, and this defense was sustained by the evidence and the court denied the injunction as to this defendant. The action proceeded against all the other defendants, and the decree was rendered granting a permanent injunction against maintaining these connections with the lateral sewer, but denying the allowance of any damages to plaintiff. The plaintiff has brought the case to this court upon appeal on account of the refusal of the trial court to allow his damages, which, according to the proof, amounted to $374. The defendants have perfected a cross-appeal complaining of the granting of the injunction against them.

Dr. McCabe, the owner of the hotel building, had also commenced a like suit against the same defendants which, by stipulation, was consolidated with this case and the two actions tried as one. Dr. McCabe proved that he had sustained considerable damage to his building by the flooding of the basement, including the practical destruction of the concrete floor and damages to the plumbing and fixtures, but he has prosecuted no appeal from the refusal of the court to allow damages and therefore that feature of the litigation requires no further consideration.

The evidence established without dispute that excessive rainfalls occurred in North Platte on June 4 and 8 and July 3 and 5, 1919, upon each of which dates more than an inch of rain fell in a very short time. The plaintiff claimed that upon the occasion of each of these rains, the water being conducted from the roofs of defendants' buildings into the ten-inch lateral sewer, the sewer was so overloaded that the water and sewage was backed up through the plumbing fixtures, flooding the basement to a depth of more than a foot, and that he was put to the expense and inconvenience of pumping out the water and filth, and disinfecting the premises, and also of plugging up the plumbing in the attempt to prevent the

water flooding through the fixtures. This water appeared to be backing into the building with considerable force. Shortly after the plumbing fixtures were plugged to prevent its coming in that way, the eight-inch reinforced concrete floor commenced to bulge, and in a short time was cracked and broken and raised up across the middle about one foot. This, of course, proved conclusively that there was a large amount of water in the ground, either coming from the sewer or elsewhere, and that there was sufficient pressure to break through the floor, which was well reinforced with ⅝ inch steel rods and the system of steel matting used for reinforcing and to add strength to the floor. These matters were not disputed in the evidence. The testimony of a number of competent engineers was offered by both plaintiff and defendants. These expert witnesses in all essential particulars agreed upon the proposition that the city of North Platte is situated between the North and South branches of the Platte river, about three miles above the junction of the two streams; that the ground is generally flat and level, the elevation of the ground at the hotel building being about the same as the bed of the South Platte river; that on account of the high elevation of the water in the ground it is almost impossible to maintain a cellar or a basement under any of the buildings of the city; that this ground water rises and falls with excessive moisture or the opposite condition; that, in times of continued heavy rains saturating the ground, the ground water rises close to the surface, even within two feet of it; that, while the sewers are what are known as sanitary sewers, still the joints are not made water tight, and as a consequence this ground water enters the sewer through the joints, which occur every 21½ feet, and is carried along with the sewage. At times the ground water nearly fills the sewer. The only reasonable or fair inference which can be adduced from the evidence is that the addition of the rain water from the roofs of defendants' buildings so overtaxed the carrying capacity of the sewer

that it not only contributed to but was the moving factor which caused the damage to the plaintiff. The trial court made a specific finding to this effect in the decree. It follows that in this respect the trial court erred in refusing to allow the plaintiff the damages sustained, the amount of such damages not being disputed in the evidence. The decree to this extent should be modified.

The defendants, upon each of the cross-appeals, insist that the injunction should not have been allowed against them; that the owners of the buildings are improperly joined with the city; that the damage, if any, was caused by the ground water, rather than their down-spouts; and some of them pleaded that the sewer was a public highway which all were free to use, and at the close asked to be permitted to amend their answers and plead that the plaintiff had allowed water from some small areaways to be conducted through the sewer, and that he was therefore estopped to ask to enjoin them.

The law is too well settled to warrant any extended discussion of the points raised. The ordinance of the city prohibited the conducting of rain water into the sanitary sewer system of the city. It was therefore unlawful, and the knowledge or connivance of the city officers with the unlawful use of the sewer system does not in any manner change the situation, except to furnish a valid reason for making the city and its offending officers parties to the litigation. We are aware of the provision which declares: "Nor shall any rain or surface water be admitted to the soil pipe." The object of the legislation was not to protect the soil pipe, but to protect the sanitary sewerage system of the city from being overloaded and converted into a system of storm sewers, and with the obvious intent of the city council of preventing and obviating just such conditions as arose in the present case. The rule appears to be well settled that when two or more persons act independently of each other, and diverse and disconnected, and their acts are without concert, but the action causes a single injury,

all are jointly and severally liable. *Twitchell v. Glenwood-Inglewood Co.*, 131 Minn. 375; *Virtue v. Creamery Package Mfg. Co.*, 123 Minn. 17; *Johnson v. Thomas Irvine Lumber Co.*, 75 Wis. 539; *Elkhart Paper Co. v. Fulkerson*, 36 Ind. App. 219. This is true, even though one of the parties is a municipal corporation or an officer of such corporation.

The defendants rely upon the rule stated by one of the federal courts in *Carmichael v. City of Texarkana*, 116 Fed. 845, where it was held that the inhabitants of a city are improperly joined with the city in a suit for damages and an injunction on account of the negligence of the city in the construction and operation of a sewer. This rule can have no application here. The plaintiff is not proceeding against the city on account of any negligent construction or operation of this public utility. What the plaintiff complains of is the unlawful use which the defendants have attempted to make of the sewer, to plaintiff's damage. The plaintiff would be justified in invoking the protection of the law regardless of the ordinance. If the city had never adopted such an ordinance the plaintiff might appeal to a court of equity to protect his property from the devastation shown to have been inflicted in the present case.

After the trial and before the submission of the case the defendants asked to be permitted to amend their answers and tender a new issue—that of an estoppel against the plaintiff for having allowed the rain water which fell upon some small areaways in the hotel building to be conducted through the sewer. The trial court probably believed the matter too trivial to permit the amendment; and we cannot say that there was any abuse of the exercise of a sound discretion in the refusal.

The defendants Christian Brodbeck and Harry A. Brodbeck have filed a separate brief and asked to be relieved from costs on account of having disconnected their building from the sewer after the commencement of the action and after service of summons. These de-

fendants would be in a better attitude to make this appeal for clemency if this was the issue they had tendered to the trial court. Instead, they filed an answer pleading every defense set forth by the other defendants, insisting that the sewer was a public highway, and upon the right to use it in the manner complained of, and urging every technical and legal defense which could be conjured up in the brain of their able counsel. Their situation is no different from their codefendant, Knights of Columbus, who disconnected their building on July 15 as soon as they knew of the commencement of the action. These defendants Brodbeck fought the case through to the bitter end and lost, and helped to make the expenses of this trial. They should pay their share of the costs and the damages. The city, however, is not liable for such damages, 19 R. C. L. 1102, 1106, secs. 385, 390.

The decree of the trial court granting the perpetual injunction is clearly right and should be to that extent affirmed. The cause is remanded to the district court, with directions to modify its decree, allowing the plaintiff damages against the defendants, other than the city and the sewer inspector, in the sum of $374, with 7 per cent. interest from the date of the trial, and his costs in the district court and in this court.

AFFIRMED AS MODIFIED.

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NEBRASKA STATE BANK, APPELLANT, V. E. C. HOWE, APPELLEE.

FILED MARCH 1, 1922. No. 21822.

**Evidence.** As between the indorser and indorsee, the form of indorsement of a past due note is not conclusive, but the nature of the contract may be proved by parol testimony.

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

*Warren & Hodgkin,* for appellant.

*O. A. Torgerson* and *W. J. Ballard, contra.*

Heard before MORRISSEY, C.J., ROSE and ALDRICH, JJ., FITZGERALD and WAKELEY, District Judges.

FITZGERALD, District Judge.

Plaintiff brought this action against defendant to recover from defendant on a note payable to defendant, made by P. F. Hoke, and indorsed by defendant in blank, and delivered to the plaintiff bank.

Defendant in his answer states that the note was indorsed and delivered to plaintiff after maturity, and only upon consideration that defendant would be discharged from liability on a note of about equal amount made by defendant and held by plaintiff. Defendant further stated in answer that, while his indorsement on the note here sued upon was made in blank, there was a parol agreement between plaintiff and defendant, at the time of making the indorsement and delivery of the note in question, that plaintiff would look to P. F. Hoke, the maker of the note, and to him alone, for payment thereof, and that the indorsement was made only for the purpose of transferring title to the note.

The case was tried to a jury, who found in favor of defendant on the issue as to whether or not plaintiff had agreed to hold defendant harmless on his indorsement of the note. Judgment was entered on the verdict, and plaintiff has appealed to this court.

No comment is made on the evidence in the case, and plaintiff relies for a reversal of the district court's judgment on the proposition of law as to the admissibility of parol testimony "to vary or explain the contract of a general indorser of past-due paper as between the immediate parties."

Counsel for plaintiff and appellant admit in argument and in their briefs that this court is on record in favor of the admissibility of parol evidence, but contend that

we are in the minority, and that the holdings of this court which established this doctrine cannot be sustained since the adoption by this state of the negotiable instruments law. We cannot indorse the theory of counsel for appellant. This court has been consistent in its holdings on the point from 1893, when it rendered the decision in *Holmes v. First Nat. Bank,* 38 Neb. 326, to 1903, when it affirmed the doctrine in *Jaster v. Currie,* 69 Neb. 4. The doctrine laid down by this court in *Davis v. Sterns,* 85 Neb. 121, which was after the passage of the negotiable instruments law, would, we think, fit the instant case; but there is no occasion for reliance on other than holdings of this court on the exact proposition in question before the passage of the act referred to. The statute was enacted to facilitate the circulation of negotiable paper, and was never intended to fix on an indorser a liability which he did not intend to assume, unless it should become a question as to who should lose, as between the indorser and an innocent purchaser for value. It never was intended to allow an indorsee to make certain representations to an indorser as an inducement to the indorsement, and later stand behind the legislative act while the court is taking from the indorser something which he never contracted to give, and which he specifically contracted orally that he should not give.

The jury in the instant case found that plaintiff agreed not to look to defendant for payment of the note, and that, relying on this agreement, defendant indorsed the note in blank. By this act he became a general indorser, liable on the paper to all subsequent holders in due course, but did not sacrifice his right to show by parol testimony just what the contract of indorsement was, as between plaintiff and defendant. The decisions of this court in *Holmes v. First Nat. Bank, supra, Corbett v. Fetzer,* 47 Neb. 269, *United States Nat. Bank v. Geer,* 53 Neb. 67, and *Jaster v. Currie,* 69 Neb. 4, are still the

law in Nebraska, and the decision of the district court of Cheyenne county is

AFFIRMED.

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HATTIE W. REYNOLDS, EXECUTRIX, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED MARCH 1, 1922. No. 21621.

1. **Street Railways:** CONTRIBUTORY NEGLIGENCE: QUESTION OF FACT. Whether the failure of a party injured to look and listen before undertaking to pass in front of an electric street railway car constitutes negligence is a question of fact.
2. **Instruction** No. 9, set out in the opinion, approved.
3. **Street Railways:** DUTY TO PEDESTRIAN. A motorman in charge of a street car approaching a street intersection, upon observing a pedestrian approaching the tracks, may assume that he is normal mentally, and has faculties sufficient to protect himself from injury, and will exercise ordinary care for his safety. When it is apparent that such pedestrian is heedless of his surroundings, and about to place himself in peril, the motorman must use every means that ordinary care and prudence require to avert injury.
4. ———: NEGLIGENT SPEED: QUESTION FOR JURY. The excessive speed of a street railway car is a fact from which negligence may be inferred, and whether such speed in a particular case constitutes negligence is a question for the jury.

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

*Lambert, Shotwell & Shotwell* and *William C. Dorsey,* for appellant.

*John L. Webster, contra.*

Heard before MORRISSEY, C.J., ROSE, ALDRICH and FLANSBURG, JJ., GRAVES and WELCH, District Judges.

GRAVES, District Judge.

Appellant, as executrix of the estate of Halsey W.

Reynolds, deceased, brings this action against the appellee to recover damages resulting from a collision, causing the death of her husband, Halsey W. Reynolds, with a north-bound street car of the appellee at the intersection of Mary street with Thirtieth street in the city of Omaha, which accident occurred at about 9:30 o'clock a. m., on the 5th day of May, 1919. The case was tried to a jury, resulting in a verdict for the defendant, and the case is here on appeal.

The charge of negligence made by the plaintiff in her petition against the defendant, is excessive speed of the street car, failure to sound the gong, and failure of the motorman to keep a vigilant lookout at a street intersection. The answer of the defendant specifically and generally denies the allegations of negligence, and charges the deceased, Halsey W. Reynolds, with contributory negligence in stepping upon the street car tracks before a moving car without looking, and heedless of the danger signals.

At the time in question the appellee owned and operated a double-track electric street railway on Thirtieth street, running north and south, the west track being the south-bound and the east track being the north-bound track. Mary street intersects Thirtieth street from the east, the west end thereof terminating at the west curb line of Thirtieth street. On the west side of Thirtieth street and the west terminal of Mary street, and about opposite the south curb line of Mary street, is a grocery store and to the north thereof is a drug store. At this point Thirtieth street is 40 feet and Mary street 22 feet wide from curb to curb, and 13 feet from the east or west curb line of Thirtieth street to the car tracks, each track being 4 feet 8½ inches wide, and the distance between the north and south-bound tracks being 4 feet 9½ inches.

At the time of the accident, deceased, a deaf man, about 66 years of age, a carpenter and contractor by trade, and a resident of Omaha for more than ten years,

after purchasing some tobacco at a grocery store, walked out of the east door thereof across the sidewalk in an easterly direction to the west curb line of Thirtieth street, and at a point nearly opposite the south curb or crosswalk of Mary street. At this point, and in front of these stores, along the west curb of Thirtieth street and parallel with the curb, stood two automobiles parked about 18 feet apart. Deceased passed between these automobiles and stopped at the outer or eastern side thereof in the street as a south-bound automobile passed him, and paused until said automobile moved south to a point about 150 feet, where it passed a north-bound street car. Deceased then moved eastward or northeastward, at an ordinary walk, across the west track of appellee, without looking to the north or south. The street car slowed down to almost a stop at Newport avenue, one block south of the place of the accident, and sounded the gong for a passing automobile, after which it picked up speed. On board the car, beside the motorman and conductor, were two passengers, a postman and a locomotive fireman. When within 40 or 50 feet of the intersection of Mary street the gong sounded, and when within 30 or 40 feet of the point of the accident, going at 10 or 12 miles an hour, the gong sounded vigorously and the air brakes were applied, and when at the south curb of Mary street, with the car moving about 8 miles an hour, the motorman applied the emergency and did everything in his power to stop the car. This, in substance, is the testimony of appellee's employees and the two passengers.

As to the rate of speed and the sounding of the gong, there is a sharp conflict in the evidence. Appellant's witnesses fixed the rate of speed of the car at from 10 to 35 miles an hour, and they heard no warning, and one or two witnesses claimed the motorman was looking down at his feet and did not keep a lookout.

C. V. Hertel, the motorman, testified, in substance: Q. Now, when he (Reynolds) stepped from between those

two machines about where was your car, with reference to the south curb line of Mary street? A. About 40 or 50 feet south. Q. What did you do when you saw him start to walk toward the south-bound track? A. I rang the gong, as we do to warn people, and threw off the power. Q. When you first noticed him how many times did you tap the gong? A. Well, I don't know exactly. I did not count the times. Q. Approximately, the first tap? A. A couple of times. Q. The street car then continued on its way for some distance? A. Yes, sir. Q. What did Mr. Reynolds do? A. Kept on walking. Q. After he continued walking, what did you then do? A. I put on the air and kept on ringing the gong. Q. About where was your car when you threw the air on? A. Well, about 15 or 20 feet south of the south curb of Mary street. Q. Did Mr. Reynolds then do anything with reference to looking at something in his hand? A. It looks like he was looking after something in his hands—that he was kind of working with it. Q. What did you do when you saw that he continued to walk toward your track without looking toward you? A. I put the air on full force. I put the emergency on. Q. Where were you when you slammed the emergency on? A. Just about south of the sidewalk on the south side of Mary street. Q. Now, after that what did you do with reference to operating your car? A. Well, I saw he got close to the track and I kept on ringing the gong, and I saw he did not notice me, and I put on the reverse. Q. How did you do that? A. I pulled the lever brake and threw the air off and put two points on. Q. Where was Mr. Reynolds in the street at the time you put on your reverse with reference to the south-bound track? A. He was about in close to the east rail. Q. Had he stepped over the east rail or was he between the two rails of the south-bound track? A. He was in between the two rails of the south-bound track. Q. He was just walking toward your track? A. Yes sir. Q. What was he doing? Where was he looking? A. He was looking

kind of downward at something in his hands. Q. At that time, you say, when he reached the east rail of your south-bound track, you threw your car into reverse? A. Yes, sir. Q. Up to that time did you think he was going to step toward and across your track? A. No. Q. Did you know that he was deaf? A. No. Q. Had you ever seen him before? A. Not that I know of. Q. Did you assume when you first rang the gong for him, and up until the time you reversed your car, that he was going to stop? A. I thought that he would. Q. Where was the front end of your car when you reversed it? A. At the south curb line of Mary street. Q. Tell the jury how he hit the car, what part of the car he hit, and what happened. A. He and the front corner of the car got together just a little north of the center of the street. Q. In that connection in which direction was he walking as he continued across the street while you were observing him? A. East and a little bit to the north."

Deceased, when struck by the car, was thrown through the air nine or ten feet, and from where he landed on the pavement he slid a distance of about eight or ten feet north and west, to a point between the south-bound tracks, and opposite the north property line of Mary street. The car, when brought to a stop, stood with its rear end opposite the body. Deceased died from the injuries received in a few hours. Thirtieth street is paved, practically level for several blocks, with an elevation to the north of 6/10 of 1 per cent.

Tests were made with the car driven on that occasion, to demonstrate that the same could not attain on Thirtieth street a speed in excess of 18 miles an hour. At the time of the accident the day was bright and clear, and there was nothing in the street or the intersection of Mary street to impair the view of deceased.

The testimony is convincing that deceased walked into danger without looking. And the record discloses no excuse or reason for his failure to use his vision, when,

had he looked, he could not fail to see the car and avoid the accident. He closed the only avenue of warning that nature left him.

The appellant complains of instruction No. 9, given by the court on its own motion, which instruction is as follows:

"You are instructed that a street railway company and an ordinary pedestrian have equal and reciprocal rights of travel at the intersection of streets in the city, but each must observe due care to avoid accidents, taking into account the fact that the street car is confined to the track, while the pedestrian has freedom of movement. The pedestrian should look before he attempts to cross a street railway track in order to see and avoid danger. The fact that the decedent was deaf made it incumbent upon him to be more alert in the use of his sight to protect himself from harm. In respect to these reciprocal rights and duties of the parties you are instructed that it was equally the duty of Halsey W. Reynolds to look for an approaching car and of the motorman to keep a lookout ahead of the car for a pedestrian who might be crossing the intersection."

Considering this instruction together with the other instructions given, we do not deem it reversible error.

"A street car has the right of way in case of meeting a person or vehicle, but each party, in order to avoid accident, must exercise ordinary care, and such reasonable prudence as the surrounding circumstances may require." *Hall v. Ogden City R. Co.*, 13 Utah, 243, 57 Am. St. Rep. 726.

According to the rule prevailing in this state, whether under the circumstances it is the duty of a person to look and listen for an approaching car is a question of fact and not of law, and a pedestrian's failure to look and listen before crossing a street railway track is not ordinarily negligence *per se*. If, however, the failure to look or listen in a particular case is such palpable negligence as to leave no room for a reasonable difference

of opinion, it may become negligence as a matter of law. 25 R. L. C. 1278, sec. 131.

The appellant contends that the trial court erred in not giving instructions requested by appellant on the doctrine of the last clear chance. We do not think that doctrine applicable to this case. In the case at bar the facts are not sufficient to invoke that doctrine. There was no time that deceased in crossing the street could not have avoided the injury to himself by merely looking for an approaching car, and we think that it cannot be said that deceased was discovered by the motorman to be in a state of peril at any point of time before the motorman used his utmost endeavor to stop the car. *Hooker v. Wabash R. Co.*, 99 Neb. 13; *Deane v. St. Louis Transit Co.*, 192 Mo. 575. There is no evidence whatever of any recklessness or wantonness on the part of the operators of the street car.

We are satisfied that the judgment of the lower court is right, and it is

AFFIRMED.

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JOHN L. KARSCHNER, APPELLANT, V. J. M. LATIMER, APPELLEE.

FILED MARCH 1, 1922 No. 21821.

1. **Payment:** AVOIDANCE. Payments or concessions exacted from the owner of property unlawfully withheld, in order to obtain possession thereof, where the detention is accompanied by immediate hardship or irreparable injury, may be avoided on the ground of compulsion, although not amounting to technical duress.
2. ———: ———. Evidence considered, and the case *held* not within the rule above stated.

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

*S. A. Davo, James I. Rhea* and *W. T. Thompson*, for appellant.

*A. J. Shafer* and *O. E. Bozarth, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., HOBART and PAINE, District Judges.

HOBART, District Judge.

In the year 1918 the appellant maintained a pasture in Phelps county, Nebraska, and took in cattle for hire. On the 7th day of May, 1918, the appellee put 35 head of cattle in the pasture, which were pastured therein until the 23d day of September, and in June a bull was also placed therein and pastured until said 23d day of September. When the appellee came for the cattle on September 23d, pursuant to instructions, a dispute arose between him and appellant as to the amount due for pasturage, appellant claiming $321, and appellee offering $275. After some discussion appellee agreed to give the sum appellant demanded, and gave his personal check therefor, payable to the order of appellant, received his cattle and drove them away, and as soon as he could thereafter telephoned the bank on which the check was drawn and directed it not to pay the check. In due course the check was presented to the bank for payment and payment was refused. Suit was thereafter brought by appellant against appellee for the amount due on the check. A verdict was rendered in favor of appellant for $275, and from a judgment based thereon appellant has appealed.

There is no dispute as to the number of cattle, the length of time they were in the pasture, as to the age of the cattle, or that the check was given by appellee for the pasture of the cattle and was not paid when presented for payment. The only question for our consideration in this case is as to whether or not the appellant and appellee entered into the agreement whereby the appellant was to receive $321 in full settlement for the pasturage of the cattle, and a check was given by appellee therefor, all as the result of duress.

There is no evidence of any duress of the person. Was

there, then, a duress of goods? The only evidence tending in any way to show this is that of the appellee himself, as follows:

"Q. What did you do by way of settling with him? A. I offered to give him a check for the amount of a dollar a month for the whole amount that was in there. Q. And was that the price that the contract called for? A. That is the price I understood the contract to be. Q. And what did he say about it? A. He said I couldn't take them unless I paid it. Q. What did he do by way of accepting that tender that you offered him or a dollar a month? A. He wouldn't take it. Q. Did he give any reasons why he wouldn't take it? A. He said the price was $1.50 for the cattle. Q. Then what was done? A. I argued with him and still he wouldn't take it; and, to get my cattle and get home before dark, I gave him a check for $321, and told him, if there was any way to get this out in court at the contract price, I would do it. And when I got home I phoned to the banker and told him to stop payment on the check."

It is well settled that, where a person demanding a payment is in a position to seize or detain the goods or other personal property of the person against whom the claim is made without a resort to judicial proceedings in which the parties may contest the validity of the claim, payment under protest to recover or retain the property will be considered as made under compulsion and the money can be recovered back, at least where a failure to get or retain immediate possession and control of the property would be attended with serious loss or great inconvenience. This coercion is generally embraced in the term "duress of goods." 30 Cyc. 1308. The mere apprehension, however, of legal proceedings, unaccompanied by any act of hardship or oppression, has never been held sufficient ground for the avoidance of a contract. The books, on the other hand, abound in cases holding that, where the parties are on terms of equality towards each other, one cannot postpone litigation by

paying the demand and afterwards maintain an action therefor. *Weber v. Kirkendall,* 44 Neb. 766. The evidence of the appellee, above quoted, will not justify us in saying that he comes within the rule stated. His proper remedy was to have brought an action in replevin. He could not, by merely giving his check with the intention of not paying the same, have avoided payment in full

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

REVERSED.

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HENRY SCHLAKE, APPELLANT, V. EDWARD J. HEALEY ET AL., APPELLEES.

FILED MARCH 1, 1922. No. 21917.

1. **Vendor and Purchaser:** RESCISSION. Where a vendee of real estate takes possession of the land under an executory contract of purchase, he cannot rescind the contract and recover back that portion of the purchase price paid by him, because of alleged defects in the title tendered, without first offering to surrender possession of the real estate to the vendor.

2. ———: SPECIFIC PERFORMANCE. Where an executory contract for the purchase and sale of real estate required the vendor to furnish an abstract showing good record title on or before April 1, 1920, and time was, in express terms, made an essential element of the contract, and the vendee took possession of the real estate after the abstracts of title had been delivered to him, he could not, while holding such possession, and without offering to surrender it to vendor, insist upon his right to an abstract showing good record title on April 1; and where the vendor asked the aid of a court of equity to compel specific performance, and vendee retained possession of the land up to the time of trial, a decree requiring specific performance of the contract was proper if the evidence showed good record title in vendor at the time of the trial and decree.

3. **Partnership:** DEEDS: TRUSTS. Where a partnership name contains the full name of one of the partners, a deed of real estate to such partnership, in its firm name, vests the legal title in the partner whose name is thus disclosed, who holds it in trust for the other members of the firm according to their several in-

terests in the partnership, and an equitable title is by such deed vested in the partnership, first, for the benefit of the firm business and creditors, and, second, for the adjustment of the mutual rights of the partners as between themselves and in the adjustment of their accounts with the firm.

4. ———: CONVEYANCES. Where real estate is deeded to a partnership in its firm name, and the firm name contains the name of one of the partners in full, and the partnership winds up its affairs, discontinues business, and pays all of its debts, a deed from all the members of such partnership will convey good title to the grantee.

5. **Public Lands: HOMESTEAD: VESTING OF TITLE.** Where a claimant of land under the United States homestead act has made final proof at the proper land office of having done every thing required to entitle him to a patent, he is the real owner of the land, regardless of whether the government patent has been issued or not. Until the issuance of the patent, the government holds the legal title merely as trustee for him.

6. ———: ———: ———: DEVISE FOR PAYMENT OF DEBTS. A claimant of land under the United States homestead act, who has made final proof at the proper land office of having done everything required to entitle him to a patent for the land, may, at any time thereafter, and without waiting for the issuance of the patent, devise such real estate by will, or, by adequate provisions to that end in his will, he may authorize his executor to sell such land for the payment of his debts, regardless of when such debts were contracted, and, if he dies before the patent is issued, leaving no surviving spouse, whose homestead rights under state law might intervene, a deed made by his executor in the exercise of the power of sale in the will, for the purpose of paying debts against the estate of deceased, conveys good title to the purchaser, and the patent, when issued, inures to the benefit of such purchaser and his grantees.

7. ———: ———: ———: ———. The provision of the United States homestead act which exempts a government homestead from liability for the payment of debts contracted prior to the issuance of the patent does not deprive the homestead entryman from voluntarily subjecting such land to the payment of such debts, and this he may do by suitable provisions in his will, if he leaves no surviving spouse who is in position to interpose homestead rights under the state law.

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

*A. R. Oleson,* for appellant.

*W. A. Meserve, contra.*

Heard before MORRISSEY, C. J., FLANSBURG and ALDRICH, JJ., HOSTETLER and MORNING, District Judges.

MORNING, District Judge.

On September 29, 1919, appellant, Henry Schlake, entered into a written contract with appellee, Edward J. Healey, whereby said Schlake agreed to purchase of said Healey 240 acres of land located in Knox county. The total consideration for the purchase was to be $42,000, payable as follows: Cash $2,500 to be paid at the time of entering into the contract, $7,500 on or before April 1, 1920, and the remainder of $32,000 to be secured by first mortgage on the land, payable April 1, 1930. When the contract was signed Schlake paid to Healey the cash payment of $2,500 called for by the contract, and on or about February 20, 1920, Healey delivered abstracts of title to Schlake, who turned them over to his attorney for examination. On March 2, 1920, Schlake's attorney reported the result of his examination to Schlake in writing, wherein he pointed out certain defects in the title, as shown by the abstracts, which he considered sufficiently serious to prevent him from approving the title. After receiving said abstracts, and on March 1, 1920, Schlake took possession of said land, as provided in said contract, and placed a tenant thereon, and said tenant was still in possession at the time of the trial in the lower court, and possession has never been tendered back to Healey, either by Schlake or his tenant.

On or about March 2, 1920, Schlake returned to Healey the abstracts, together with the written objections made to the title by the former's attorney.

On April 1, 1920, Schlake called on Healey, and after some controversy as to the condition of the title—Schlake insisting that the title to both tracts was bad, and Healey insisting that he considered them good—Schlake declined

to proceed further under the contract and demanded a return of the $2,500 paid by him on the purchase price but declined to have anything to do with removing his tenant from the land, stating, in substance, that, since he did not own the land, he could not dispossess the tenant On cross-examination Schlake gives the following version of what was said on that occasion:

"Q. Mr. Healey told you he was ready to give you the deed and that he thought the title was good? A Yes; he thought so. Q. You told him it wasn't? A Yes, sir. Q. But Mr. Healey said it was good? A Yes, sir. Q. After you talked the matter over at Creighton you told Mr. Healey you wouldn't go through with the deal the way the title was? A. The contract called for a clear title on or before the 1st of April. Q When you found the title was not in any different shape than when Mr. Oleson had examined the title, you decided not to go through with the deal? A. Yes, sir Q. And you tried to get Mr. Healey to say he would take the tenant as his tenant? A. Yes. Q. What did Healey say? A. He said he wasn't the right man. Q He said he wouldn't do it? A. I don't know that he said he wouldn't do it. I said I wouldn't have any more to do with it; I was through. Q. You didn't make any attempt to put Mr. Wells off? A. No; I couldn't do it; it wasn't my place. Q. You never have made any attempt to put Mr. Wells off that place? A. No; I never paid any attention to it any more."

Mr. Healey, the appellee, testified concerning this interview as follows:

"Q. Tell the court what was said by Mr. Schlake and yourself when he came up the 1st of April. A. Well, he came to the store and we talked the matter over a few minutes, and he said that he had come to settle for the land; and I told him I was ready to perform my part of the contract, and he objected to making a settlement because he claimed the title was clouded, or wasn't right. I disagreed with him. I told him I believed the title to

be right and to be good, and he wanted me to take the land back and pay him back the $2,500. I refused to, for the reason that he had already had possession. At that time I said, 'You already have possession of the land and I don't see how you can expect me to give you back the money.' I said, * * * 'I am ready to go to the bank right now and put up my deed.' And I went on to tell him if the title wasn't right in every way he could put up his money in escrow and put up the mortgage, and at the same time I would put up my deed, and that if I couldn't make the title satisfactory to him I would return every dollar he had paid. He refused to do that so, of course, he having possession of the land, I didn't feel that I wanted to return the money to him."

On April 24, 1920, appellant, Schlake, commenced this action in the court below against Healey and his wife to recover back the $2,500 paid by him on the purchase price at the time of signing the contract, basing his right to such recovery upon the alleged failure of Healey to furnish abstracts showing good record title to the land on or before April 1, 1920. Healey and wife filed their answer and cross-petition admitting the receipt of the $2,500 but alleging that they were willing and able to comply with all of the terms of said contract to be performed by them on April 1, and at all times since, and alleged further that Schlake on March 1 took possession of said land, as he was authorized to do by said contract, and that he still retained possession, and had not offered to yield up or surrender possession to defendants, and that he had thereby waived any right he may have had to forfeit or rescind said contract; and defendants, in their cross-petition, prayed specific performance of said contract. The trial in the court below resulted in a dismissal of plaintiff's petition and a decree of specific performance in favor of Healey. Schlake appealed to this court.

Did the abstracts of title furnished by Healey to Schlake show good record title in Healey on April 1,

1920? If they did not, then did Schlake, by taking and retaining possession of the land, waive the time limit specified in the contract, together with his right to rescind, and thereby place it in the power of Healey to enforce specific performance of the contract by tendering good record title at or before the time of the trial?

The contract covered two separate tracts of land, and separate abstracts were furnished for each tract. Schlake's attorney, in reporting the result of his examination of the abstracts, declined to approve the title to either tract for reasons stated by him, and these furnish the basis of Schlake's refusal to accept the title, and for his action to recover back that portion of the purchase price paid by him. The contract here involved contained the following provision:

"The party of the first part (Healey) is to furnish to the party of the second part (Schlake), or assigns, a warranty deed and a good and sufficient abstract of title showing a good title of record to the premises hereinafter described in the party of the first part, on or before April 1, 1920, assign all insurance on buildings, pay all taxes assessed against said land, and, if there is a mortgage on said property, pay interest thereon up to April 1, 1920, and give possession by March 1, 1920. It is mutually agreed that time is an essential element in this contract."

Appellant insists that, since time was of the essence of the contract, the rights of the parties are to be determined as of April 1, 1920, and by the condition of the record title as shown by the abstracts on that date, and that any corrections in the record title thereafter made or thereafter placed upon the abstracts, are immaterial. Under the circumstances disclosed by the record, we cannot agree with the appellant in this contention. Appellant received the abstracts about the 20th day of February and was charged with knowledge of the condition of the record title disclosed by them, yet thereafter, and on March 1, he took possession of the land, placed a tenant

thereon, and has continued to hold such possession. While so in possession, appellant was in no position to rescind his contract. To entitle him to do so, it was necessary that he should promptly restore possession to Healey. *Stewart v. Tate,* 103 Neb. 28; *Gallagher v. O'Neill,* 78 Neb. 671; *Alfree Mfg. Co. v. Grape,* 59 Neb. 777; *Sherrill v. Coad,* 92 Neb. 406. The excuse offered by appellant for not dispossessing his tenant is that he could not do so since he did not have title to the land. His inability to oust the tenant and restore possession of the land to Healey was the result of his own voluntary act after he received the abstracts and had knowledge, or means of knowledge, as to the condition of the title, and he cannot avail himself of his inability to oust his tenant as an excuse for not restoring possession to appellee. This was a risk assumed by him when, with knowledge of the condition of the title, he placed his tenant in possession. He was not in a position to insist upon a return of the money paid by him on the purchase price so long as he retained possession of the land, and if, at the time of the trial of the case in the district court, Healey tendered a good record title, the latter was entitled to specific performance, and the decree appealed from was proper and should be affirmed. *Seaver v. Hall,* 50 Neb. 878; *Gallagher v. O'Neill,* 78 Neb. 671; 27 R. C. L. 649, sec. 410; 25 R. C. L. 277, sec. 78.

One of the objections urged by appellant to the title is that the abstracts furnished to him prior to April 1 did not show payment of taxes for 1919. Another objection is that the abstract to one of the tracts showed an unreleased mortgage of $5,000. The evidence shows that Healey had arranged for the payment and discharge of said mortgage prior to April 1, and was, on that day, ready and able to have it discharged, but did not have it done because of appellant's refusal to proceed further under the contract. It is further shown in the evidence that all of the taxes for 1919 were paid prior to April 1,

and that said mortgage was discharged of record on April 8, 1920.

Another objection to the title to one of said tracts, as disclosed by the abstract delivered to appellant in February, 1920, is that, in the chain of title, there appeared two deeds to copartnerships as grantees, and that whatever title was thereby vested in said copartnerships has never been legally conveyed to appellee and his grantors. Said abstract shows that on October 8, 1903, an affidavit of J. E. Buxton was filed for record in the office of the register of deeds of Knox county, Nebraska, wherein said affiant states that he was a member of both of said firms, and wherein he gives the names of all of the other members thereof. The affidavit, so recorded, is *prima facie* evidence of the facts therein stated. Sections 6253, 6254, Rev. St. 1913. And the abstract shows that all the members of both of said partnerships, together with their several spouses, conveyed their several interests in said real estate to the said J. E. Buxton, who, together with his wife, conveyed the title thus derived to appellee. As we understand this objection, it is that these conveyances vested in said copartnerships an interest which the individual members of the firm could not convey by their individual deeds. There is much confusion and apparent want of harmony in the authorities as to the precise nature of the title which is conveyed by a deed to a partnership, in its partnership name, and the method by which such title may be passed on to a subsequent purchaser so as to vest good title in the latter. In *Barber v. Crowell,* 55 Neb. 571, this court held that a partnership, as such, is incapable of taking the legal title to real estate. In *Dineen v. Lanning,* 92 Neb. 545, we held that a deed to a partnership in the firm name is not void, but vests an equitable title to the real estate in the firm for the benefit, first, of the partnership business and creditors, and, second, for the individual members. In *Tattersall v. Nevels,* 77 Neb. 843, it was held that real estate standing in the firm name con-

stitutes the individual partners freeholders qualified to sign a petition for a saloon license. We do not find that this court has ever determined whether such a deed leaves the legal title in the original grantor or whether it vests in the individual partners, nor how such title may be passed on to a subsequent grantee. It is quite generally held by the authorities that, where the partnership name is a fictitious one, and does not contain either the full name or the surname of any of the partners, an equitable estate only passes to the firm, the legal title remaining in the grantor. Such a deed may be reformed in equity by inserting the names of the individual partners as grantees, and this, when done, vests the legal title in the partners. 1 Rowley, Partnership, sec. 284; *Dunlap v. Green,* 60 Fed. 242.

Where the partnership name contains either the full name or the surname of one or more of the partners, the general rule seems to be that the legal title vests in those members whose full names or whose surnames are disclosed in the partnership name, and such members hold the title in trust for all the members of the firm according to their actual interests therein. Mechem, Partnership, secs. 84, 284; 30 Cyc. 431; 1 Rowley, Partnership, sec. 269. And parol evidence may be received to show the full names of those whose surnames only are disclosed in the firm name, and to identify those members whose names do not appear at all. *Holmes v. Jarrett, Moon & Co.,* 7 Heisk. (Tenn.) 506; *Menage v. Burke,* 43 Minn. 211, 19 Am. St. Rep. 235; *Blanchard v. Floyd & Huguley,* 93 Ala. 53.

One of the deeds which is the basis of this objection ran to J. E. Buxton & Company, and the other to W. P. Todd & Company. J. E. Buxton and W. P. Todd have both conveyed whatever title they held in the land to appellee or his grantors. The affidavit of J. E. Buxton, to which reference has been made, shows that he was a member of both of said partnerships, and the names of all the other members of said firms are therein stated by

him. The abstract shows that all the members of both of said firms also conveyed their interest in said real estate to grantors of appellee. It is therefore unnecessary for us to decide whether or not the members of said firms whose names were disclosed in the firm name had legal authority to convey the entire title without the other members joining in such conveyance, since all authorities, we believe, hold that a deed from all the members of the partnership will convey good title to partnership real estate, except, under special circumstances, as against partnership creditors. Even if the rights of the parties were to be determined by the condition of the record title as shown by the abstracts on April 1, we do not believe that any right of partnership creditors would be involved. True, the affidavit of J. E. Buxton, to which we have referred, and which was of record, and was shown on the abstract, as originally delivered to appellant, did not show that there were no unpaid firm debts against either of said partnerships, nor that there were no bankruptcy or other court proceedings pending in Vermont to liquidate and wind up the affairs of said firms. The land being in Nebraska, and no steps having been taken here by any firm creditor, if there were any, to subject this real estate to the payment of partnership debts, a purchaser in good faith, receiving a deed from all the members of said partnerships, would receive good title free from danger from liability to firm creditors. In *Case v. Beauregard*, 99 U. S. 119, the United States supreme court held that simple contract creditors have no lien upon partnership property which enables them to follow the firm property into the hands of a *bona fide* purchaser. It was there held that each partner has an equitable right to insist that firm property shall be first applied to the payment of firm debts before being diverted to the individual use of any of the members, or applied to the payment of their individual debts, and that courts of equity will permit the firm creditors to avail themselves of this

equity of the partners, and, through it, enforce the application of firm property to the payment of partnership debts. It is a right, however, dependent upon certain conditions and hedged about by very definite limitations, as the court, in that case, points out thus:

"It is indispensable, however, to such relief, when the creditors are * * * simple-contract creditors, that the partnership property should be within the control of the court and in the course of administration. * * * If, before the interposition of the court is asked, the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end."

But, since appellant had taken and retained possession of the real estate under the contract, he lost his right to have the title tested in the light of the record as disclosed by the abstract on April 1. Under the circumstances, appellant brought himself within the rule announced in *Seaver v. Hall,* 50 Neb. 878, and the rights of the parties are to be determined by the state of the title, not as the abstract showed it to be on April 1, but as it was, and as the court found it to be, at the time of the trial.

The evidence shows that while this suit was pending, and on the 23d day of September, 1920, there was filed in the office of the register of deeds of Knox county another affidavit of said J. E. Buxton, in which he states that the names of the several members of said two partnerships were correctly given in his previous affidavit above referred to, that he was a member of both firms, and that in the year 1889 the business and affairs of both of said partnerships were dissolved, their affairs wound up, and all debts against them paid, and that, from that time to the present, there have existed no debts or claims against either of said firms. This affidavit

being of record, and being *prima facie* evidence of the facts stated, as provided by sections 6253, 6254, Rev. St. 1913, if there had been any possible doubt as to the title to said land being free from danger from liability to firm creditors, it was completely removed. At the time of the trial, therefore, appellant was able to show, and did show, that there was no defect in his title arising from said partnership deeds or from the method employed to convey said title from said partnerships, and from the members thereof, to appellee.

One of the objections to the title which is quite seriously urged is based upon the following facts: One of the tracts involved here was entered by Elizabeth Jamison as a government homestead, the abstract first tendered showing that the receiver's final receipt was issued to her on the 16th day of October, 1889, and that the patent was issued to her September 18, 1891. The abstract, as first tendered, showed that said Elizabeth Jamison died on July 30, 1887, leaving a will, which was admitted to probate, and that L. F. Renne was appointed and qualified as executor of said will. Said will contained this provision: "I direct that my funeral charges, the expenses of administering my estate, and all my debts be paid out of my personal property. If that be insufficient I authorize my executor hereinafter named to sell all my real estate." The inventory filed by the executor in the county court showed that said homestead and some personal property, of the value of $187.63, were all of the assets of said estate. Claims were allowed against said estate in the aggregate sum of $1,556.22. There being insufficient personal property to pay the claims allowed, and there being no other real estate, the executor, acting under the authority contained in said will as quoted above, sold said real estate to one N. Paulson, who in turn conveyed it to appellee Healey. The point sought to be made by appellant against the title thus derived is that, since this land was a government homestead, it was not subject to be sold

to pay debts of the deceased contracted prior to the issuance of the patent; that since the receiver's final receipt and the patent were both shown by the abstract to have been issued after the death of Elizabeth Jamison, she had no title to the land at the time of her death which she could dispose of by will or which her executor could, under the authority contained in the will, sell to pay her debts; that the title thus derived through the patent formed no part of the estate of the deceased, but went directly from the government to the heirs of the deceased. The abstract delivered to appellant, and upon which his objection was based, did not show when Elizabeth Jamison entered said land, nor when, if ever, she made final proof under her homestead entry. It only showed the issuance and recording of the receiver's final receipt and the patent at dates subsequent to her death. On April 1, 1920, when, under the contract between appellant and appellee, the latter was obligated to furnish an abstract showing good record title in himself, the abstract tendered did not show that Elizabeth Jamison, at the time of her death, had any interest in, or title to, said land upon which her will could operate for any purpose, and, had appellant, on that date, yielded up possession of the land, this deficiency in the abstract would, no doubt, have placed him in a position to rescind the contract and recover back the money paid by him on the purchase price, and to defend successfully against appellee's cross-petition for specific performance. This, however, he did not do, and appellant could not be called upon to refund that part of the purchase price which had been paid, so long as appellant remained in possession of the land through his tenant. And if, at any time before the decree was entered, appellee tendered an abstract whereby the defect pointed out was cured, and good record title shown in appellee, the latter was in a position to call for specific performance upon the record as it was then shown to be. At some time between the 1st of April, 1920, and the time of the trial

appellee procured from the United States general land office a certified copy of the homestead application of said Elizabeth Jamison, showing that her homestead entry was made March 16, 1883, certified copies of final proof made by said Elizabeth Jamison in person on May 17, 1887, and, also, a certified copy of a letter from the commissioner of the general land office to the register and receiver of the local land office at O'Neill, under date of August 25, 1889, advising said officers that the final proof made by Elizabeth Jamison on May 17, 1887, was satisfactory and directing them to issue the final receipt. These certified copies were placed in evidence, and are shown to have been recorded in the office of the register of deeds of Knox county, Nebraska, and are now a part of the record title to said property. These were sufficient to show that Elizabeth Jamison, during her lifetime, had done all things necessary to entitle her to a patent to said land, and that she had made satisfactory proof thereof. This gave her such interest in said land that she could dispose of it by will, or authorize its sale by her executor for the payment of claims against her estate. *Doran v. Kennedy,* 237 U. S. 362; *Axtell v. Warden,* 7 Neb. 182; *Carroll v. Patrick,* 23 Neb. 834; *Bellinger v. White,* 5 Neb. 399; *Cheney v. White,* 5 Neb. 261; *Jones v. Yoakam,* 5 Neb. 265; *Hays v. Wyatt,* 19 Idaho, 544, 34 L. R. A. n. s. 397.

The record shows that said deceased had never been married and that she had no children, and it follows that no homestead rights of a surviving husband, under our state law, are involved. In *Seaver v. Hall,* 50 Neb. 878, this court held that, where time is not made the essence of the contract, a vendor of real estate is entitled to specific performance of his contract if at any time before the entry of the decree he is in a position to furnish satisfactory title. We think appellant was in the same position as if time had not been made the essence of the contract involved in the present case, since he

deprived himself of the benefit of that provision by retaining possession of the land.

The decree of the lower court was right, and is

AFFIRMED.

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JESSE STEWART, APPELLEE, V. HARRY WEINER, APPELLANT.

FILED MARCH 1, 1922. No. 21996.

1. **Appeal:** EXCESSIVE VERDICT: REVIEW. Where prejudicial evidence has been received, although stricken out on motion, and the record shows that it may have influenced the jury, such evidence should be considered in connection with all the other circumstances in determining whether an excessive verdict is the result of passion or prejudice.
2. ———: ———. In this case, it is *held* that the verdict is excessive, and, taken in connection with the evidence, appears to be the result of passion or prejudice, and a new trial is granted.

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

*Brogan, Ellick & Raymond,* for appellant.

*Weaver & Giller, contra.*

Heard before MORRISSEY, C. J., ALDRICH and ROSE, JJ., RAPER and STEWART, District Judges.

RAPER, District Judge.

This is an appeal by the defendant from the district court for Douglas county, in an action wherein plaintiff recovered a judgment for personal injuries sustained while escaping from a fire in the defendant's hotel.

Plaintiff's petition alleges that he was a guest in defendant's hotel in a room on the fourth floor, and that a fire started in a store-room of the hotel, caused by the careless use of cigarettes by employees of the defendant; that defendant negligently failed to discover the fire in time to prevent the building from burning and injuring

plaintiff; that defendant negligently failed to extinguish the fire before it caused damage to plaintiff; that defendant negligently failed to warn plaintiff in time for plaintiff to escape from the burning hotel without injury; that defendant negligently failed to have a sufficiently large gong on the fourth floor, so that the ringing of same would have aroused plaintiff; that defendant negligently failed to arouse plaintiff after the fire started in time to permit his escape from the burning hotel, although the defendant had sufficient time and opportunity to do so; and that defendant negligently failed to ring or cause to be rung a telephone in plaintiff's room.

The cause was submitted to the jury on two of the alleged acts of negligence: (1) Whether the defendant carelessly and negligently failed to arouse plaintiff after the fire had started in time to permit plaintiff to escape from the hotel, and to prevent plaintiff's injury, although he had sufficient time and opportunity to do so; (2) that defendant negligently and carelessly failed to ring or cause to be rung a telephone in plaintiff's room.

The cause was tried before Honorable Lee S. Estelle, and the jury returned a verdict for $12,500. After the rendition of the verdict Judge Estelle died, and the motion for a new trial was submitted to Judge Leslie, who ordered a remittitur of $5,000, which was filed, and thereupon the motion for new trial was overruled, and judgment entered for $7,500, from which this appeal was taken.

The appellant relies upon three assignments of error: (1) That the evidence is not sufficient to sustain the verdict; (2) that the damages are excessive; and (3) misconduct of plaintiff's attorneys. As to this third alleged error, the supplemental motion for new trial, which alleged this ground, was not filed within three days from rendition of verdict, and, hence, must be disregarded.

On the first question, a careful examination of the evidence leads us to the conclusion that there was sufficient

evidence to sustain a verdict for plaintiff. The testimony offered by plaintiff is not entirely plain nor conclusive, but there is sufficient proof of facts from which the jury might infer that the defendant was negligent in not arousing plaintiff or ringing the telephone in his room after the fire was discovered. It does not affirmatively appear that the defendant or his employees knew that plaintiff was in the room. The room was on the fourth floor, had two beds, and was rented by seven railroad firemen, some going there to sleep in the daytime and some at night, as the exigencies of their duties demanded. Plaintiff went to this room about 10:20 or 10:30 a. m., went to bed, and at once fell asleep. After sleeping 15 or 20 minutes he was awakened by the odor of smoke. He opened the door leading into the hall, and found the hall filled with flames and smoke. He climbed from the window in his room to a corner window, 6 or 8 feet distant, opened the door of that room into another hall, and found that hall filled with flames. He then tied some bed covers together, fastened them to the window and let himself down by the covers. When about 30 or 40 feet from the ground the covers parted and he fell to the pavement, sustaining severe injuries, particularly to his right wrist. The alarm of fire came to the fire station at 10:51, and it took the firemen about two minutes to get to the fire. Plaintiff testified that when he fell it was about 10:45. It is not shown when the fire was first discovered by the defendant or his employees. The fire started in a store-room on the third floor, where old pieces of furniture and cleaning compounds were kept, and gained headway very rapidly. This short outline of the facts discloses that the question of the defendant's negligence is indeed a very close one. At the conclusion of plaintiff's case, the defendant rested, and asked the court to direct a verdict for the defendant, which was refused. We are constrained to hold that the evidence was sufficient to submit the case to the jury.

The verdict was excessive, and Judge Leslie ordered a

remittitur of $5,000. That there is something inherently wrong with the jury's finding is evident. Appellee insists that the remittitur was erroneously directed, and asks this court to direct a judgment for the full amount of the verdict. We cannot concede this. The remittitur was fully justified by the record.

Appellant claims that the verdict is so excessive as to plainly indicate passion and prejudice on the part of the jury, caused, as they assert, by the misconduct of plaintiff's attorneys in persistently and wrongfully attempting to get before the jury unfounded suspicions that defendant was responsible for the starting of the fire. There are some parts of the record which in part, at least, bear out this claim, and counsel in their zeal went too far. One witness, a state fire warden, was called by them, and an attempt was made to prove by him that he had met a colored man on the street, and the colored man had informed the witness that he was a porter at defendant's hotel at the time of the fire, and that the colored man told him the fire was caused by him throwing a match into the room. That part of the testimony which witness said the colored man said about throwing a match into the room was excluded, but enough was admitted to tend to throw suspicion on the defendant. This was the plainest kind of hearsay evidence and should not have been offered at all. This witness was further permitted to testify to certain cans in the store-room which he claimed, without sufficient knowledge, to have contained gasoline and kerosene and to smell of these inflammable liquids. The assistant fire chief was pressed by plaintiff's counsel to give his conclusion as to what started the fire. On objection his conclusion was not admitted, but he did testify that his suspicions were aroused. This statement was by the court stricken out, but perhaps the jury may not have been able to exclude it from their consideration. He further stated on direct examination that in the store-room after the fire he smelled kerosene and gasoline, and on cross-examination

he stated he had not smelled either.

At the close of the trial the judge struck out of the record that part of the testimony of the fire chief and the fire warden, all their testimony as to the cans in the storeroom and their contents, and in the instructions the jury were directed that they should not consider any statements of witnesses which were stricken out by the court. But the thought naturally arises that, the jury having received a suspicion that the fire was set by gross negligence, probably their feelings were aroused so that they may not have fairly considered the evidence, and the size of the verdict confirms this.

Another feature of the case should be noticed, although no specific objection is made thereto. The plaintiff was permitted to shake hands with each of the jurors in the trial, to show the weakened grip in his injured hand. This is demonstrative evidence of a very doubtful character, and so easily susceptible of manipulation and deceit that such practice should not be encouraged. Possibly the plaintiff did give the jury a fair exposition of the relative strength of his wrists, but it afforded an opportunity for imposition in a manner that cannot be met by other proof or by cross-examination.

The trial judge died without passing upon the motion for a new trial, and we are not given the aid of his judgment as to the verdict being the result of prejudice. The judge who ruled on the motion was satisfied that the verdict was grossly excessive. If the plaintiff's case was strong enough to lead to the conclusion that another jury would in all probability reach a verdict for the plaintiff, this cause might well be affirmed; but because of the close question of fact involved and because of the matters above stated, and being without the judgment of the trial judge, we think the cause should be reversed and a new trial granted.

REVERSED AND REMANDED.

FARMERS STATE BANK ET AL., APPELLANTS, V. PETERSBURG STATE BANK: F. JOUVENAT ET AL., APPELLEES.

FILED MARCH 1, 1922. No. 21999.

1. Contracts: INJUNCTION: ORAL CONTRACT TO REFRAIN FROM TRADE. A verbal contract, whereby parties who are officers of a state bank sell a majority of the capital stock of the bank and agree not to again engage in the banking business in the village where the bank is located, is valid, and if the vendors violate the agreement, they may be enjoined from continuing such violation.
2. ———: ———: ———: CONSIDERATION. The purchase by one party of the property of another furnishes a sufficient consideration for an agreement of the latter not to engage in a certain business again in that vicinity.
3. ———: PUBLIC POLICY. A contract to be against public policy must have a mischievous tendency, and in some way militate against the public welfare and the rights of the public.
4. ———: ———. In the absence of statutory provisions governing the subject, a seller of corporate stock may agree not to engage in a business which would compete with that of the corporation. 6 R. C. L. 795, sec. 198.

APPEAL from the district court for Boone county: FREDERICK W. BUTTON, JUDGE. *Reversed, with directions.*

*Courtright, Sidner, Lee & Gunderson* and *Williams & Williams,* for appellants.

*Albert & Wagner* and *W. J. Donahue, contra.*

Heard before MORRISSEY, C. J., ROSE and ALDRICH, JJ., RAPER and STEWART, District Judges.

RAPER, District Judge.

The plaintiffs in their amended petition allege that the Farmers State Bank of Petersburg, Nebraska, is a corporation, and that, until shortly before, it was known as the Bank of Petersburg, but by a change in its articles of incorporation the name was changed to Farmers State Bank of Petersburg, and that A. J. Miller, since December, 1919, has been a stockholder therein and president

of the bank; that about December 10, 1919, the defendants Jouvenat and Scannell were the owners of a large amount of stock in the then Bank of Petersburg, and were the president and cashier, respectively, of said bank; that on or about December 10, 1919, A. J. Miller and one B. H. Tevis, for themselves and others, entered into an oral contract for the purchase of a majority of the stock in said bank—256 shares—from the defendants Jouvenat and A. B. Scannell at a price largely in excess of the book value, and as a part of said contract the defendants Jouvenat and Scannell each agreed with plaintiff Miller and his associates that said defendants would refrain from entering into the banking business or operate or conduct a bank at Petersburg, Nebraska, in competition with the plaintiff bank; that said contract of sale was completed and Jouvenat resigned as president and Scannell resigned as cashier, and plaintiff A. J. Miller was elected president, and Miller and Tevis and their associates entered into possession and operation of said bank and have so continued ever since; that the defendants Jouvenat and Scannell had been such president and cashier of the Bank of Petersburg for a long time, and were well and personally acquainted with all the customers and depositors of the plaintiff bank, and with its entire line of business; that Petersburg is a village of about 600 inhabitants, and there was one other bank in said place at that time; that defendants, together with one Hall and one Hays, applied to the state banking department for a charter to conduct a banking business at Petersburg, and a charter was granted therefor on December 17, 1920, under the name of Petersburg State Bank, and a room was secured and furniture and fixtures obtained to open such bank for business, and that said Jouvenat and Scannell are the president and cashier, respectively, of such newly incorporated bank. Plaintiffs pray an injunction to restrain the defendants and all of them and their agents, employees and assigns from engaging in the banking business or operating or con-

ducting said Petersburg State Bank at Petersburg, Nebraska.

The defendants Jouvenat and Scannell in their answer deny the plaintiffs' allegation that they agreed to refrain from entering into the banking business or operate or conduct a bank at Petersburg. They admit substantially the claims of plaintiffs as to the other matters alleged. The defendants further plead that the alleged agreement concerning the right of defendants, or either of them, from engaging in or operating a bank at Petersburg or serving as officers or agents of said bank is illegal, in restraint of trade, and interferes with the banking laws and regulations of the state, and obstructs and impedes governmental affairs in the discharge of its lawful functions, and is contrary to public policy and void.

Trial was had, and the court found "that defendants at the time they sold their banking business in Petersburg to plaintiffs, and as part consideration therefor, promised not to enter into the banking business again in said town." The court further found that banking is a quasi-public business and subject to regulation and control by the state, and of a public nature; that the state is interested under our laws, and the public dealing with the bank is likewise interested; that the bank is interested because of its relation to the state and the public, and because whatever affects its officers must affect the bank, and also affects other banks. The trial judge in his opinion further says:

"Now several things may happen if this injunction is allowed. It will force a change in the officers of the bank. These defendants must retire as officers and new officers must be elected, also these defendants must surrender their stock or they will still be in the banking business at Petersburg; hence, the bank must buy the stock or find purchasers therefor. This may be hard to do when money is scarce and may work a hardship on the bank. Again, these officers are men in whom the customers of the bank have confidence, for they have had

experience at Petersburg in the banking business. If they are compelled to retire it may destroy confidence in the bank that is so necessary to the success of such an institution. If this happens it will or may cause a 'run' on the bank that may be disastrous. Indeed, the withdrawal of the financial or moral support of these defendants from this bank may work its utter ruin. Other banks may be thrown into confusion and the state itself seriously affected; and, if a national bank, the government itself disturbed and compelled to take a hand. All of which may cause litigation and breed a multiplicity of law suits."

And it is further stated in the opinion: "The court is forced to the conclusion that an injunction against these defendants affects seriously the rights of the bank, and that whatever affects the bank affects the public interest. Hence, the court finds generally for defendants."

The injunction was refused and the action dismissed. The case was tried on the 7th of January, 1921. The evidence discloses that the bank at the time of trial was doing business and receiving deposits.

The finding of the court that the agreement was made by the defendants is fully sustained by the evidence. The only question therefore is whether under the law such agreement is valid and should be enforced. Aside from the controverted question of fact, appellees urge as reasons for sustaining the judgment: "The alleged contract is not enforceable because it purports to bind the defendants not to engage in quasi-public business, or in conducting one of the instrumentalities of the state," and, "an injunction should not be granted when the rights of third parties will be injuriously affected."

In support of these propositions it is urged that banks under our statutes are quasi-public agents, because they are engaged in quasi-public business, and that the state banking system is as much a part of the governmental machinery of the state as a township, school district or municipality, and appellees base their claim upon this

proposition, "Whether a contract, whereby one agrees that he will not participate in the organization or management agency at a given place, contravenes public policy."

A banking corporation is quasi-public in character and as such is subject to statutory regulation for the protection of the public, but the same may be said of a private banker, in those states where private banks are permitted. The police power of a state may be exercised over many business transactions and acts of its citizens, yet it does not follow that all who have been placed under regulatory restrictions are exercising governmental agencies. The law of the state does not require any one to organize a bank or to become one of its officers. Such acts are purely voluntary; the state does pass upon the application for a charter, and when the organization is completed the stockholders, and not the state, elect officers. The state has no voice in such selections, except that some of the officers shall have certain qualifications as to residence and amount of stock held, etc.

There is no restriction on the sale of stock. It is property that may be transferred without hindrance. The defendants had full right to sell their stock on such terms and for such consideration as they deemed satisfactory. When they sought to organize a new bank it was of their volition, and not because the law required such bank. Nor were they elected officers in the bank because any public necessity or law required it. So if it be conceded that a bank is a quasi-public institution, and that no injunction could be granted against the bank that might interefere with its operations, because of its being a governmental agency (which we do not, however, decide), that is not decisive of the question at issue. Shares of stock in a corporation constitute a species of property entirely distinct from the corporate property. In *McCullough v. Maryland*, 4 *Wheat.* (U. S.) * 316, Chief Justice Marshall makes a clear distinction between the bank and its stockholders. The learned chief justice held

that the state of Maryland could not tax the bank, but expressly held that the state could tax "the interest which the citizens of Maryland may hold in this institution." In this case no attempt is made to interfere with the operations of the bank, unless it can be said that to prevent the defendants from conducting the business of the bank interferes with its operations. Most of the cases cited by the appellees refer to actions against public service corporations. *Chicago Gas Light & Coke Co. v. Peoples Gas Light & Coke Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, probably as clearly as any states the rule contended for by appellees. "Though restraint of trade imposed by contract is but partial, it will not be enforced if it is unreasonably injurious and oppressive to the public."

How can it be said that enjoining defendants from active management or conduct of the bank can injuriously or oppressively affect the public? The bank's solvency rests upon the value of its assets, and not upon the persons who happen to be its officers. It is true that their business ability may have contributed to see that the assets are good, but that does not presuppose that others may not be just as astute business men. Perhaps the defendants, because of their long and favorable acquaintance with the people of the community, may have brought business in a larger volume to the new bank than any other officers could have done, but that is the particular reason that plaintiff Miller exacted the promise from them.

Appellees further claim that the new bank's stockholders were influenced in buying their stock by these same considerations, and their rights will be injuriously affected; furthermore, that it was chartered on the theory that defendants should participate in its management, and that is a part of its contract with the state. As to this last claim it is sufficient to say that the stockholders, and not the state, selected the defendants as officers, and the stockholders can change the officers whenever it is deemed by them to be expedient. It may be that with

other officers the bank may not be able to control so large or lucrative a business, and the stock rendered of less value thereby, but that is problematic. An injunction, of course, should not issue where greater injury would be done by granting than refusing it. It cannot be said that greater injury will be done to the other stockholders in the new bank by granting the injunction than would be done to plaintiff Miller by refusing it.

The learned trial judge assumed that, if the injunction was granted, it would require not only a change in the offices of president and cashier, but also that the defendants must surrender their stock and the new bank must buy or find purchasers for the stock. If that assumption is correct his conclusion that it would work too great a hardship on the bank might be sound. This does not necessarily follow, but under our view of the case that feature need not be considered. A mere shareholder in a corporation cannot in all cases be said to be engaged in the corporate business. He puts his money in as an investment. The ownership of the stock does not place him in a managerial position. The owner of stock in a railroad or insurance company is not, merely because of such ownership, engaged in the railroad or insurance business. There is authority to the effect that it is a violation of such a covenant to become a stockholder in a corporation engaged in competing business within the prescribed limits. *Merica v. Burget*, 36 Ind. App. 453. However, in that case the suit was for damages, and the defendant became stockholder and cashier in the newly organized bank. See, also, *Kramer v. Old*, 119 N. Car. 1, 56 Am. St. Rep. 650. While the North Carolina court held it was a violation of the contract for the prohibited parties to take stock in the competing corporation, yet as a matter of fact no stock had been issued by the new concern. In construing and applying this class of contracts each case must be governed by its peculiar situation and surroundings, and its own particular facts. If the defendants had purchased some of the shares of the rival bank which was

in existence when the transfer of the stock in controversy was made, would that fact alone have given plaintiff a right of action? We do not so view the contract. The evident purpose was to prohibit the defendants from going into a new bank to conduct and operate it, to prevent them from using their well-known names as officers, and to keep them from using their presence and talents and standing in meeting customers, and personally transacting business with or for them. And while it may be that in many cases the mere subscription to stock in a newly organized rival concern, under such agreement as defendants made, would be a violation of that agreement, we hold that, in this case, the acquisition of stock itself was not inhibited by their agreement.

The Farmers State Bank is joined as plaintiff with A. J. Miller. No objection was raised in the district court to such joinder, and it is not discussed in the briefs. The plaintiff bank is not entitled to any relief as against the defendants either under the pleadings or evidence. Their agreement was personal with Miller and Tevis, and the plaintiff bank could not, under the situation disclosed by the evidence, succeed to any right given to Miller and Tevis and their associates by the defendants' promise.

The plaintiff A. J. Miller is entitled to a permanent injunction as prayed, restraining the defendants Jouvenat and Scannell from engaging in the business or operating or conducting the Petersburg State Bank; that the defendants be enjoined from holding any office, or employment therein, or from participating in any manner in the conduct of the business, or any of its operations, for such time as plaintiff Miller owns stock in the Farmers State Bank of Petersburg; but not, however, enjoining defendants from owning and holding shares of stock in the Petersburg State Bank.

The cause is reversed and remanded to the district court, with directions to enter decree in accordance with this opinion. REVERSED.

WILLIAM SEIFFERT, ADMINISTRATOR, APPELLANT, V. WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, ET AL., APPELLEES.

FILED MARCH 1, 1922. No. 21717.

1. **Railroads:** COLLISION: COMPARATIVE NEGLIGENCE. When persons approach a railroad crossing, ordinary care for their own safety requires them to look and listen, where it will be of value to look and listen, to ascertain if trains are approaching. In the absence of facts calling for the application of the doctrine of "the last clear chance," one who fails to take such a precaution, without reasonable excuse, and is injured by a collision with a train or engine, may not recover, unless his contributory negligence was slight and the negligence of the defendant was gross in comparison, Rev. St. 1913, sec. 7892.
2. ———: ———: CONTRIBUTORY NEGLIGENCE. A coemployee of the driver of a small one-seated automobile, who is standing upon the running-board of the automobile facing forwards on the side of the machine toward the direction from which a train is approaching, is required to look and listen for approaching trains, and if he fails to do so, or to notify the driver of the danger, if any, his negligence contributes to the injury.
3. ———: ———: ———. Under the facts in this case the negligence of plaintiff was more than slight in comparison with that of defendant, and, hence, he is not entitled to recover.

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

*M. F. Harrington* and *Gerald F. Harrington*, for appellant.

*Wymer Dressler*, *Robert D. Neely* and *Paul S. Topping*, *contra.*

Heard before LETTON, DEAN and DAY, JJ., SEARS and WESTOVER, District Judges.

SEARS, District Judge.

It appears that Park avenue in the city of Norfolk extends in an east and west direction, and is intersected by Seventh street running north and south. Immediately to

the east of Seventh street is the defendant's right of way, upon which several tracks of the defendant intersect Park avenue. To the west of the main line track are two switch tracks. From the main line track to the first switch track to the west is a distance of 35 feet. On the morning of the accident the plaintiff's intestate and two companions were traveling eastward along Park avenue in a Ford runabout, the deceased and the driver of the automobile being coemployees. The two companions occupied the seat of the car, one being at the wheel. Deceased was standing on the south side of the car on the running-board facing east, supporting himself by having his arm hooked around one of the bows of the Ford top, and was standing in a position where he could readily see to the east and the south. There were a number of freight cars on the first side track west of the main line track which stood about flush with the south sidewalk of Park avenue. As the occupants of the car came into Seventh street there was an unobstructed view to the south along the line of the road for a distance of more than half a mile. This view would be obstructed as the automobile was passing the end of the box cars, but after passing the end of the box cars the view south along the main line track was unobstructed. A passenger train on the defendant's line was approaching from the south, running at about 35 miles an hour. From the time the automobile entered upon Seventh street up to within 20 feet of the main line track, the automobile was running about 10 miles an hour. Neither of the parties in the automobile apparently were conscious of the approaching train until the automobile was within about 20 feet of the main line track, when the driver, observing the approaching train, in an effort to avoid a collision, threw on his brakes and turned his car toward the north. In doing so it brought the south side of the automobile in such close proximity to the passing train that deceased was struck by the breast beam of the engine, knocked to the pavement, and sustained fatal in-

juries. Deceased was familiar with the situation, having crossed the tracks on many occasions. Snow on the ground making the pavement slick interfered with the stopping of the automobile.

It appears that both the train and the automobile were running in excess of the speed limited by an ordinance of the city. The question presented by the record is, admitting that the defendant was negligent in running its train at an excessive rate of speed, was the deceased guilty of such contributory negligence as to bar a recovery? There is no question presented involving the application of the doctrine of "the last clear chance," so that that principle may be eliminated from the consideration of the case.

We think it may well be conceded that the evidence with respect to the negligence of the defendant is sufficient to take the case to the jury upon that point. The real question in the case, however, and the one upon which it must turn, is whether the deceased was guilty of such contributory negligence as to defeat a recovery. Plaintiff argues at considerable length that the negligence of the driver of the car cannot be imputed to the plaintiff's intestate, and cites a number of decisions in support of that rule. That question, however, as we view the record, is not in the case. Deceased was standing on the running-board of the automobile facing east, and on the side of the car from which the train was approaching, from a distance of from 30 to 35 feet, he had a clear opportunity of seeing the approaching train after crossing the track upon which the box cars were standing, and had even a better opportunity of observing the approaching train than the other occupants of the automobile. In this position, knowing that they were approaching the railroad crossing, it was his duty to look and listen for approaching trains. In this regard the same obligation rested upon him as though he were driving the car himself. It can be readily conceived that cases may arise in which a passenger, or a person other than the driver of the car, may be placed in such a

situation that a failure to look and listen may be reasonably excused, but the facts in this case do not present such a situation.

Some suggestion is made as to the doctrine of "the last clear chance," but the facts in the record do not call for the application of that rule. After the automobile came across the switch track from behind the box cars, it was then too late for the engineer to have avoided the collision. Until the automobile came from behind the box cars there was nothing to indicate to the engineer that the occupants were in a place of danger. Here the deceased knew that the automobile was approaching the crossing; he was in a position to look and listen for approaching trains; had he done so he could have warned the driver of the danger, or alighted from the moving automobile. Having failed to do this, his negligence contributed to his injury, and amounted to more than slight negligence in comparison with that of the defendant.

We conclude, therefore, that the action of the trial court in directing a verdict for the defendant was proper, and the judgment is

AFFIRMED.

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ANNA E. TRUMBLE, ADMINISTRATRIX, APPELLEE, V. HARRY H. LEAVITT ET AL., APPELLANTS.

FILED MARCH 1, 1922. No. 21747.

Appeal: CONFLICTING EVIDENCE. When the evidence conflicts respecting the existence of material facts, and such evidence is fairly submitted to the jury under proper instructions, the verdict will not be set aside unless manifestly wrong.

APPEAL from the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Affirmed.*

*Tyrrell & Westover,* for appellants.

*J. J. Ledwith* and *Max V. Beghtol, contra.*

Heard before LETTON, DEAN, DAY and FLANSBURG, JJ., SEARS, District Judge.

SEARS, District Judge.

This is an action for damages resulting from the death of the plaintiff's intestate, George B. Trumble, which death the plaintiff contends was occasioned by negligence on the part of the defendants, the owners of the steam threshing engine in question that the deceased was employed to operate.

The record is quite voluminous, and there were a number of items of claimed negligence charged in the petition, and with a considerable amount of evidence tending to establish each one of the claimed points of negligence in question that were submitted to the jury. No complaint is made but that the issues were fairly presented to the jury by the trial judge. Everything resolves itself down to the question of fact as to whether or not there is a quantum and quality of evidence shown in the record justifying a verdict at all for the plaintiff. This seems to stand out, viz., that under the evidence received on the trial the case could not have been taken away from the jury by the trial judge. It is clear that it is one of those cases that can only be disposed of by submission for the jury's final consideration. It would be without value to discuss the minutiæ of the evidence in the case. There are no questions of law involved, and to discuss the case further than to announce the conclusion reached would seem to serve no good purpose.

The deceased was in early middle life, with a good earning capacity, with a large family of dependents, and a fair disposition toward them. The amount of the verdict is not such that calls for any disturbance by this court, which disposes of the only other remaining point.

AFFIRMED.

WILLIAM H. HENDERSON, APPELLEE, V. GRANT HOLLIMAN, APPELLANT.

FILED MARCH 1, 1922. No. 21628.

**Drains:** DRAINAGE DISTRICTS: CREATION. The district court acquires jurisdiction to consider articles of association for the formation of a drainage district under the provisions of sections 1794-1868, Rev. St. 1913, by the filing of the articles of association purporting in good faith to be signed by the majority in interest of the landowners in the district and service of notice thereof as provided by said statute. Having acquired such jurisdiction, the court may thereafter permit additional landowners in said drainage district to join in the articles of association.

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

*Kelligar & Ferneau,* for appellant.

*Lambert & Armstrong* and *E. F. Armstrong, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., GRAVES and WELCH, District Judges.

WELCH, District Judge.

This is a proceeding to form a drainage district, under the provisions of sections 1794-1868, Rev. St. 1913.

On January 6, 1920, a petition praying that there may be declared a drainage district, signed by William H. Henderson, one of the owners of land within said proposed drainage district, who had signed the articles of association therefor, was filed in the office of the clerk of the district court for Nemaha county, Nebraska, the county in which the proposed drainage district is located. Attached to said petition were the articles of association complying substantially with the requirements of section 1797, Rev. St. 1913, purporting to be signed by a majority in interest of the owners of the land in the proposed district. Service of notice thereof was made by service of summons and by publication in the manner provided by statute.

On April 2, 1920, Grant Holliman, one of the owners of land situated in said district who had not signed said articles of association, filed in said court objections to the organization of said drainage district. He alleged as one of the grounds of his objections that a majority of the landowners within the limits of the proposed district did not sign the petition therefor.

Before the final hearing in court on said petition, several of the original signers of said articles filed in court request to withdraw their names therefrom, and several owners of land within said district filed petition that they be considered as signers of said articles of association and petitioners for the formation of said drainage district.

On June 7, 1920, after a hearing on said petition and objections thereto, the court found that the proposed drainage district included 4,184.2 acres of low, wet, submerged, or overflowed lands; that the petition, at the time it was filed, contained the names of parties representing themselves to be the owners of 2,326 acres of said land. The court further found that one Otto Putman signed for 290 acres of said land of which he claimed to be the owner, and that said Putman has possession of said land under a contract with one William Schwab, the owner of the legal title thereto, who had made a deed conveying said land to said Putman, which was placed in a bank to be delivered to said Putman when he should pay the purchase price thereof, and that a large part of the purchase price had not been paid. The court concluded that said Putman was not a legal signer, and found that at the time the petition was filed the legal signers of said articles of association owned but 2,018.59 acres of land in said district. The court further found that by withdrawals from the articles of association and by additions thereto, which additions included the signature of said William Schwab joining with said Otto Putman, there was then owned by the signers and petitioners desiring and praying for the organization of said drainage district 2,237.97 acres of said

land; and that said amount is a majority in interest of the landowners in the district. The court also found all the other facts required by the statute to authorize it to declare the drainage district a public corporation of this state. Thereupon the court overruled the objections of appellant herein, and declared said drainage district a public corporation of this state, including all the lands described in the articles of association.

The objector, Grant Holliman, appealed. The only assignment of error presented by appellant is that the petition as originally filed (articles of association) was not signed by a majority in interest of the landowners in said proposed drainage district, and for that reason the court did not acquire jurisdiction over the subject-matter, nor jurisdiction to permit names to be added to the articles of association after the same was filed and summons issued.

The statute provides that a majority in interest of the owners of land in a proposed drainage district may form such district. It further expressly provides: "The fact that the district shall contain one hundred and sixty acres or more of wet, overflowed, or submerged lands shall be sufficient cause for declaring the public utility of such improvements, and shall be sufficient grounds for declaring the organization of a public corporation of this state." Rev. St. 1913, sec. 1799.

The object and purpose of the statute requiring a hearing in court is to have a judicial determination that the land in the proposed district is of the character and quantity that the drainage thereof will be of public benefit, and that a majority in interest of the landowners therein desire the improvement. These facts must be found by the court before the land of the landowners who do not ask for the improvement can become liable for the expenses incurred therefor.

The filing in the office of the clerk of the district court of articles of association signed by owners of land in the

district purporting to be a majority in interest of such owners gives authority to issue summons and to proceed for service by publication on unknown owners and owners who are nonresidents of this state. The court has jurisdiction of the subject-matter, by virtue of the statute giving it jurisdiction to declare a drainage district a public corporation of this state, upon ascertaining the fact, in a proper proceeding therefor, that the district contains 160 acres or more of wet, overflowed, or submerged lands, and that a majority in interest of the landowners therein desire the improvement. The court acquires jurisdiction of all parties in interest by the filing of such articles of association and service of notice on the parties designated by the statute. If the court finds that any land within the proposed district will not be benefited thereby, it must, by express provision of the statute, exclude the same from the district. But such exclusion would not prevent the district from being declared a public corporation by the court, provided there remained 160 acres or more of land of the character required by the statute, and a majority in interest of the owners of the land remaining desired the improvement. In case the facts required to be set forth in the articles of association are insufficiently set forth therein, the court might permit the same to be amended. Both of the above changes, however, would not prevent the court from having jurisdiction of the subject-matter. The only purpose of requiring a majority in interest of the landowners to sign the articles of association is to advise the court that such majority desire the improvement. The signing of articles of association, after the same are filed, by other landowners in the district, is but an amendment thereto. It is simply a declaration by them that they desire the improvement and they thereby advise the court of that fact. If the court finds from the evidence that at the time it renders its decision all the necessary facts exist, there is no discretion in the court. The law requires it to declare the district a public corpo-

ration of the state. In the case of a city council acting on a petition to sell intoxicating liquors, they had discretion to grant or refuse such license, but before they could exercise that discretion in favor of granting the license, certain steps must be taken to give them jurisdiction to exercise that discretion. These steps must be strictly followed. In the case of a court which is called upon to determine and act upon the facts in the formation of a drainage district, the court has no discretion. It must declare the district a public corporation if it finds the necessary facts to exist. The court is acting judicially with power to permit amendments in the proceedings before it.

If a person, believing himself to be the owner of a sufficient interest in lands within the proposed drainage district to qualify him to sign the articles of association therefor, signs the same, the subsequent joining in such articles by the owner in fee of that land is a ratification by him of the act of the person originally signing, with respect to that land. It is but an amendment to the articles of association. No one is affected by such subsequent act but the owner of that land. The joining by the owner of the fee therein and also by the person first signing the same, if he has an equitable interest in such land, advises the court that all parties in interest in that land desire the improvement.

In our opinion the filing in the office of the clerk of the district court of articles of association, signed by persons purporting in good faith to be a majority in interest of the landowners in a proposed drainage district, which articles substantially set forth the requirements of the statute, together with service of notice as required by the statute, gives the court jurisdiction to consider whether or not the lands in the proposed district are of the quantity and character required by the statute to authorize the court to declare the drainage district organized and a public corporation of the state, provided the court finds that, at the time of such declaration of the court, a majority

in interest of the landowners in the district desires the improvement. We are further of the opinion that after the filing of such petition the court may permit amendment thereto by additional landowners of the district joining in the articles of association.

The judgment of the lower court is therefore

AFFIRMED.

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JOHN W. SHERLOCK, APPELLEE, V. H. WADE GILLIS, APPELLANT.

FILED MARCH 28, 1922. No. 21743.

1. **Taxation**: SALE: REDEMPTION: LIMITATIONS. Where a treasurer's tax deed is void on its face, an action to redeem the land from the tax liens for which the land was sold is not barred within the five-year period fixed by the general revenue law. Rev. St. 1913, sec. 6558.
2. ———: ———: ———. Where a tax deed issued upon a private tax sale is void for failure to recite that the land had been previously offered at public sale and not sold for want of bidders, the owner of the land may redeem it from the tax liens upon payment of the delinquent taxes, interest and penalties.

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

*Fawcett & Mockett, James H. Woolley* and *Francis V. Robinson,* for appellant.

*Williams, Hurd & Neighbors, contra.*

Heard before LETTON, DAY and DEAN, JJ., SEARS and WESTOVER, District Judges.

PER CURIAM.

This is an action to quiet in plaintiff title to a quarter section of land in Morrill county. Plaintiff claims title as grantee through a warranty deed executed by F. M. Knight, May 16, 1919. Knight's title rests on two tax deeds, one issued by the treasurer of Cheyenne county

March 24, 1909, and the other by the treasurer of Morrill county April 23, 1909; Morrill county having been carved out of Cheyenne county. Defendant pleaded that the tax deeds are void, that plaintiff has no interest in the land beyond his liens for taxes, interest and penalties, and that defendant has been the owner since March 28, 1898, by virtue of a warranty deed from the patentee. Defendant prays for the cancelation of the tax deeds, for permission to redeem his land from the tax liens, and for a decree quieting in himself his title. In a reply plaintiff pleaded that defendant's attack on the tax deeds is barred by the five-year statute of limitations in the general revenue law. Rev. St. 1913, sec. 6558. The trial court found the issues in favor of plaintiff and granted him the equitable relief sought by him.

On appeal defendant makes the point that the tax deeds were void on their face because they were issued upon a private tax sale and did not contain the statutory recital that the land had been previously offered at a public sale by the county treasurer, and not sold for want of bidders. This point is well taken.

"A tax deed purporting to have been issued on a private sale must contain a recital that the land had been previously offered for sale for such taxes at public sale, and not sold for want of bidders." *Ludden v. Hansen,* 17 Neb. 354, cited and followed in unpublished *per curiam* opinion found in Complete Record 121, p. 255, filed on motion for rehearing in *Opp v. Smith,* 102 Neb. 155.

In *Housel v. Boggs,* 17 Neb. 94, this court held:

"A tax deed must be valid on its face to entitle the party claiming under it to the benefit of the special limitation of the revenue law." See, also, *Towle v. Holt,* 14 Neb. 221; *Bendexen v. Fenton,* 21 Neb. 184.

Since the tax deeds were void on their face, defendant was not required to assert their invalidity within the short period of five years. It follows that he is entitled to redeem his land from the tax liens upon payment of delin-

quent taxes, interest and penalties. For that purpose the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

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JOHN O'HARA, APPELLANT, V. WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, APPELLEE.

FILED MARCH 28, 1922. No. 21656.

1. **Appeal:** DIRECTED VERDICT. "In determining whether a peremptory instruction was justified, the party against whom the verdict is directed is entitled to have every controverted question of fact resolved in his favor, and to have the benefit of every inference that reasonably can be deduced from the facts in evidence." *Schmelzel v. Leecy*, 104 Neb. 672.
2. **Master and Servant:** NEGLIGENCE OF FELLOW SERVANT. The provisions of the federal employers' liability act create a liability against the employer for the negligence of a fellow employee of an injured workman.
3. ———: NEGLIGENCE: QUESTION FOR JURY. Evidence reviewed in the opinion, and *held* that it was error for the trial court to instruct the jury to return a verdict in favor of the defendant.

APPEAL from the district court for Douglas county: CHARLES A. GOSS, JUDGE. *Reversed.*

*John O. Yeiser* and *John C. Travis*, for appellant.

*C. A. Magaw, T. W. Bockes* and *D. F. Smith, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

MORRISSEY, C. J.

Plaintiff brought this suit against defendant under the federal employers' liability act. At the conclusion of the testimony, on motion of defendant, the court instructed the jury to return a verdict in favor of defendant. From the judgment entered on the verdict, plaintiff appeals.

The facts alleged in the petition and supported by plain-

tiff's evidence are as follows: September 13, 1919, plaintiff, a boy 18 years of age, was in the employ of defendant as an unskilled laborer in the operation of a crane, or gantry, in the Union Pacific Railroad yards, in Council Bluffs, Iowa. The Union Pacific Railroad Company owned a line of railroad crossing several states and was operated by defendant, the director general of railroads, in both interstate and intrastate commerce. The gantry on which plaintiff was employed was a big type of crane used in the transfer of heavy articles of freight from "bad order cars" to "good order cars" and also for the rearrangement, or reloading, of heavy pieces of freight.

On the day of the injury, plaintiff, his fellow workmen, and foreman had transferred an interstate shipment of steel from a "bad order car" to a "good order car." When this job was completed there was then no other car of material at the gantry ready for immediate transfer, but there was in the yards awaiting such transfer a carload of poles. This was likewise an interstate shipment. In making the transfer of freight by means of the appliance known as a gantry the men sometimes made use of ropes, chains or cables. For some time prior to plaintiff's injury there had been no cable in use, but there was in the tool house, situated where the men were employed, part of a wire cable that had formerly been used on the machine itself. The foreman gave directions to his crew of workmen, which consisted of plaintiff and three fellow workmen, to prepare this old cable for use in the transfer of the car-load of poles. In obedience to this order the men took the cable from the tool house and cut therefrom a section of the required length, 20 or 30 feet; clamps, or U bolts, were procured and a loop was made at each end of the cable sling. As thus made up, at each end of this cable there was left a rough end, each separate strand of the cable being exposed. This condition endangered the hands of any workman who might handle the cable. In order to obviate this danger, cloth was procured with

which to wrap the exposed wires, and it became necessary to procure a cord or wire to tie the cloth. No suitable wire or cord had been furnished by defendant, but one of the workmen, having seen some fine flexible wire in the coal car from which these men had unloaded steel during the forenoon, went to this car and procured wire, which is described as two strands, each about four feet in length, held together at one end by a copper cylinder, or it might have been one strand of wire eight feet in length doubled and fastened in the middle by this copper cylinder. This workman testified that after procuring the wire he held it up for the foreman's inspection; that the foreman expressed the opinion that it might be suitable, but gave expression to a doubt of the quantity being sufficient, because each end of the cable would have to be wrapped. The workman testified, further, that he attempted to twist the wire loose from the cylinder, but did not succeed; that he thereupon laid the wire across a steel rail and cut off one strand with a hammer. The strand thus cut off was then used in wrapping the cloth on one end of the cable. He later cut the remaining strand from the copper cylinder. He testified that he was about to throw the cylinder, with so much of the wire as was then attached thereto, into the car where he had found it, when plaintiff either asked for it, or reached for it, or both, and the witness thereupon handed the cylinder with the short pieces of wire projecting therefrom to plaintiff. The evidence is not clear as to the length of the wires still attached to the cylinder. It is said that they were "crumpled up," but according to plaintiff and his witness they were a few inches in length. Plaintiff testified that he did not know where the wire had been procured, and had not before seen the copper cylinder and did not know what it was; he says that he took it from his fellow workman for the purpose of straightening the wire in order that it might be used in tying the wrapping upon one end of the cable. Within a very short time after plaintiff was handed this wire and

cylinder by his fellow workman the cylinder exploded.

According to plaintiff's testimony he was in total ignorance of the dangerous character of the article he had been handed by his fellow workman. The copper cylinder is described as about one and one-half inches in length and one-fourth of an inch in diameter. Plaintiff testified that he held the cylinder in his left hand while with his right hand he pulled upon the crumpled, twisted pieces of wire for the purpose of straightening them. The cylinder slipped from his left hand and with the swing of his right arm it struck the steel rail on which he sat and the impact caused it to explode. The explosion was of such force that it indented the surface of the steel rail, and destroyed the sight of plaintiff's eyes. It may be taken as established, or conceded, that this cylinder with its attachments was an electric detonator generally used in exploding dynamite. The evidence shows that the explosive matter in detonators of this character consists of mercury fulminate; that this is pressed into the lower end of the cylinder, then a similar amount of powdered fulminate is put in. The ignition apparatus is then inserted and the ends of the wires imbedded in the last fulminate; and the cylinder is then filled with melted sulphur. Although these detonators are designed to be exploded electrically, they may be exploded by heat, by a blow or shock of sufficient intensity, or by friction. There is evidence offered by defendant calculated to dispute the testimony of plaintiff as to the cause of the explosion, but the explosion itself is not denied.

Plaintiff contends that defendant was negligent in failing to provide the necessary wires, repairs, tools and machinery for the proper equipment and operation of the machine with which plaintiff worked; that the foreman was negligent in failing to inspect properly the wire picked up in the coal car by plaintiff's fellow workman, and that this wire and its explosive attachment was negligently given to plaintiff by his foreman and fellow workman as a part of the tools and materials with which he was to work.

Defendant expressly alleges that plaintiff's fellow workman was not acting within the scope and course of his employment when he handed the explosive cylinder to plaintiff; that it was not given in connection with the prosecution of defendant's business, but at the request of plaintiff to satisfy the curiosity and personal ends of plaintiff, and denies that plaintiff's injuries arose out of or in the course of his employment, or that plaintiff was acting within the scope of his employment at the time he received from his fellow workman the explosive substance, or when it was exploded. Defendant also alleges that neither he nor his agents, or employees, had any knowledge of the presence of the explosive until its discovery in the empty coal car by plaintiff's fellow workman; that neither defendant nor any of his agents, or employees, had any knowledge as to the place from whence the explosive came. It is further alleged that whatever injuries plaintiff received were due solely to his own negligence, and that when he received from his fellow workman the explosive he assumed the risk of exploding it. It is further alleged that plaintiff has no cause of action against defendant unless it is based upon the Iowa compensation law.

In the present state of the record it does not appear necessary to determine whether defendant was guilty of actionable negligence in failing to provide suitable wires, repairs, tools and machinery for the proper operation of the gantry. Passing over these allegations of negligence for the present, let us mention what appears to have been palpable negligence on the part of the fellow workman (and his negligence was the negligence of defendant) in handing this explosive to plaintiff. The fellow workman was older in years, and more experienced in service, than plaintiff; he knew that the wire was not originally designed for the work to which it was being put; that it had not been regularly furnished from the tool house or supply store. He saw it in the empty coal car, took it therefrom, discovered the copper cylinder, and testified that in his

attempts to twist the wire and break it off from the cylinder he saw a powdered substance spilling out of the cylinder. He said that it looked to him like a firecracker. Assuming that he was a man of ordinary intelligence and experience, it is strange, indeed, that these things did not suggest to his mind the likelihood of danger. That high explosives are used in the mining of coal and that detonators such as this are employed in discharging dynamite and other high explosives is a matter of common knowledge.

Plaintiff did not know at the time he was given this dangerous instrumentality that it had been picked up in an empty coal car; he did not know that his fellow workman had seen the powdered substance with which the cylinder was filled spilling therefrom as a result of the twisting and pulling of the wires. He received no warning of any kind. Indeed, his fellow workman testified that when he passed the cylinder to plaintiff he did so with the statement that it looked like a firecracker, a remark well calculated to put plaintiff off his guard. However, plaintiff does not appear to have heard the remark, and the most that can be said definitely is that it was placed in plaintiff's hands without warning. The foreman expressly denied that the wire was called to his attention, or that he had been asked to inspect it, or that he gave any general order to procure it. Defendant offered the testimony of experts, and each testified that in his opinion the detonator could not be exploded in the manner described by the plaintiff. But it may be noted that each of these witnesses gave his testimony on a question presupposing the detonator to be in the same condition as when it left the factory. The changes, if any, that may have taken place by reason of the treatment given the detonator in question do not appear to have been taken into account. From the expert testimony furnished by defendant's witnesses, and from the official government bulletins in evidence, we learn that detonators such as the one described, con-

structed to be exploded by an application of electricity, are less dangerous to handle than detonators so constructed that they may be discharged by slow burning fuses. The reason assigned is that the explosive substance, mercury fulminate, in the electrical detonators, is covered by a substance put in the cylinder above it, while in the other type of detonator the mercury fulminate is exposed in the cylinder. The testimony also shows that the mercury fulminate may be exploded not only in the ways designed by the manufacturers, but that if hot ashes are dropped into a cylinder where the explosive is exposed it may cause an explosion, or the mercury fulminate may be exploded by a scratch or by friction. It is not inconceivable that in the twisting and pulling of these wires and breaking away of the filling above the mercury fulminate the wires or apparatus intended to convey the electrical current to the explosive substance may have scratched or penetrated it, and that that, rather than the blow upon the rail, caused it to explode. But the exact cause of the explosion does not seem to be controlling.

Defendant also offered testimony from which it may be argued that plaintiff struck the cylinder with a hammer. He is said to have had a hammer in his hand very shortly before the explosion. What is said to be an exploded detonator is also offered in evidence. This exhibit was picked up near the scene of the accident shortly thereafter. It consists of a mutilated copper cylinder and a very small wire, or wires, the ends of which project beyond the cylinder less than an inch. Assuming that this is the exploded cylinder which caused the injury, it is argued that it shows that the wires had been cut off close up to the cylinder, and, therefore, plaintiff could not have been pulling upon the wires to straighten them and use them in the defendant's business, but that he had turned aside from the master's business and was attempting to gratify his idle curiosity in an effort to take the cylinder from the wires. Whatever force there may be in this argu-

ment it was for the jury to say what conclusion they would reach from an examination of the exhibit, together with all the other evidence before them. The testimony of plaintiff and his fellow workman is clear that at the time the cylinder was handed to plaintiff there were several inches of wire attached; that this wire had been crumpled and twisted close to the cylinder. Who can say that an explosion of the force and violence of that which occurred might not have broken off and blown away these several inches of wire that were knotted and twisted at the end of the cylinder? Surely not the court; this, if material, was for the jury.

"In determining whether a peremptory instruction was justified, the party against whom the verdict is directed is entitled to have every controverted question of fact resolved in his favor, and to have the benefit of every inference that reasonably can be deduced from the facts in evidence." *Schmelzel v. Leecy,* 104 Neb. 672.

Defendant filed a special appearance objecting to the jurisdiction of the court over the person of defendant and over the subject-matter of the action, and moved the court to quash the summons theretofore issued, on the ground that certain general orders of the director general of railroads set out as a part of the motion provided that suits against the director general of railroads, as authorized by general order No. 50-A, should be brought in the county or district where the plaintiff resided at the time the cause of action arose. This objection was overruled. It was again urged in the answer, and, by brief filed out of time by leave of court, it is sought to be urged now. But no cross-appeal from the ruling of the trial court was prosecuted by defendant, as required by the rules of this court, and appellee cannot be heard to urge this point now. See subdivision (b) of rule 18 of this court. 94 Neb. XV.

In the briefs on either side counsel have raised many issues not necessary to a determination of the real issues, and in the preparation of this opinion we have not under-

taken to follow them. The issues presented are simple. The statute on which plaintiff's cause of action rests gives him a right of recovery if he is able to prove the allegations of his petition, and the proof offered is of such character and weight that it was for the jury, and not for the court, to determine the issues.

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

REVERSED.

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HARRIET C. MCCOLLUM, EXECUTRIX, APPELLEE, V. JAMES P. MCCOLLUM ET AL., APPELLANTS.

FILED MARCH 28, 1922. No. 21987.

Wills: INTESTATE PROPERTY. Where a will leaves a part of the property of the testator undisposed of, such property passes to his legal heirs by virtue of the laws of inheritance, and the fact that the widow of the testator renounces the provision made for her in the will cannot operate to make the will cover and dispose of property as to which the decedent died intestate.

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

*J. C. McNerney,* for appellants.

*Good & Good, contra.*

Heard before LETTON, FLANSBURG and DEAN, JJ., DAY and GOOD, District Judges.

LETTON, J.

This case involves the construction of a will as affected by the renunciation of the provisions in her favor by the widow of the testator. The material provisions of the will are as follows:

"I give, devise and bequeath unto my wife, Harriet C. McCollum, all my property of every description, both real and personal, to have and to hold the same in her own

right during her life, with full power to grant, bargain, sell and convey the same or any portion thereof, provided however that one-half of my entire estate which may still remain in the possession and ownership of my wife at the time of her death, that is such property both real and personal of said estate of which she has not been legally divested, shall go to my brother James P. McCollum and my sister Elizabeth E. Duncan, share and share alike, that is one-fourth to James P. McCollum and one-fourth to Elizabeth E. Duncan, and in case of the death of either of the said two last named parties said share shall vest in the heirs of said party by right of representation."

Within the time limited by law the widow elected to take under the law of descent and distribution and to renounce the will. When the estate came to be distributed, the county court, and the district court on appeal, found that, by the election of the widow, the distribution of the estate was accelerated, that the will gave a life estate to the widow and one-half of the remainder at the expiration of that estate to James P. McCollum and Elizabeth E. Duncan, share and share alike, and the other one-half of the remainder to the heirs at law of the testator, as intestate property, and that the shares which were specifically devised to James P. McCollum and Elizabeth E. Duncan and the portion of said property which passed as intestate estate were ratably diminished so that said James P. McCollum and Elizabeth E. Duncan are each entitled to one-eighth of the entire estate and the heirs at law of the said Charles E. McCollum are entitled to one-fourth of said estate.

James P. McCollum and Elizabeth E. Duncan have appealed, contending that the property should be divided one-half to the widow, Harriet C. McCollum, and one-fourth to Elizabeth E. Duncan, and one-fourth to James P. McCollum; that the widow, by her election, takes the one-half of the estate undisposed of by the will, and there should be no abatement of the shares of the other bene-

ficiaries named in the will; that in satisfying the widow's claim and right by her election to take under the law the one-half of the entire estate, it is unnecessary to break the plan of the testator as expressed in his will by awarding to his widow any portion of the half of his estate devised and bequeathed to his brother and sister.

The estate was given to the widow for life with power of disposal, upon her death one-half of what was left was given by the will to the appellants, share and share alike. The other half was undisposed of by the will and was therefore property as to which the deceased died intestate. It therefore fell to his lawful heirs by the right of inheritance. As soon as the deceased passed away the heirs took a vested interest in this one-half of the undisposed of remainder, subject to be reduced or even determined by the act of the widow in conveying it during her lifetime. The action of the widow in taking under the statute instead of under the will removed from the operation of the will one-half of the estate, and left only the other half for the will to operate upon. The condition then became the same as if the widow in her lifetime had consumed one-half of the estate, as she was entitled to do. In that case the will could only operate on one-half of the half that was left, and the other half would fall to the legal heirs as intestate property. We find no warrant for changing the purpose of the testator and holding that property undisposed of by the will is affected by that instrument, or by the diminution of the estate by the act of the widow in renouncing its provisions.

When the widow elected to take against the will, the provisions as to her life interest must necessarily be treated as if she had terminated her life estate by death. She has no further interest in them or in the remainder depending upon such life interest if such remainder is disposed of by the will. *Disston's Estate,* 257 Pa. St. 537, L. R. A. 1918B, 62; *Rench v. Rench,* 184 Ia. 1372.

In *In re Estate of Grobe,* 101 Neb. 786, it was said that

the renunciation of a will by a widow will not be allowed to break the testamentary plan further than is absolutely necessary. We adhere to this principle. To hold as the appellants contend would thwart the evident desire of the testator shown by the will that one-half of the estate left at the death of his widow should be disposed of by the law of inheritance and thus fall to his legal heirs. The cases of *Pittman v. Pittman*, 81 Kan. 643, and *Lilly v. Menke*, 143 Mo. 137, relied upon by appellants, do not appear to be inconsistent with these views.

The judgment of the district court is

AFFIRMED.

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LAURA V. DROLL ET AL., APPELLANTS, V. FURNAS COUNTY ET AL., APPELLEES.

FILED MARCH 28, 1922. No. 22329.

1. **Taxation**: EXEMPTIONS: CITY WARRANTS. Warrants issued by a governmental subdivision of the state for a lawful purpose are instrumentalities of the government.
2. ———: ———. Section 2, art. VIII of the Constitution, as amended in 1921, which provides, among other things, "The property of the state and its governmental subdivisions shall be exempt from taxation," and "No property shall be exempt from taxation except as provided in this section," does not permit the taxation of any of the property or instrumentalities of the government of the state, or of any of its governmental subdivisions.
3. ———: ———. To construe the Constitution as allowing the taxation of bonds or warrants of governmental subdivisions would raise the rate of interest which such subdivisions would be compelled to pay in carrying on their activities, and the funds and property of the issuing bodies would inevitably and materially be affected by the imposition of the tax. Taxes would be required to be increased to meet the increased expenditures thus created by taxation, and a conflict would arise between the borrowing and taxing powers of the state or its municipalities.
4. ———: ———. Unless plainly provided by a constitutional provision, public property and the instrumentalities of government are not subject to taxation.

5. ———: ———. To construe the Constitution so as to hamper or impede the function of government by compelling it to tax its own instrumentalities in order to obtain money to discharge its own obligations would be unreasonable.

APPEAL from the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Reversed.*

*Lambe & Butler* and *Walter D. James,* for appellants.

*John Stevens, contra.*

Heard before LETTON, DAY and DEAN, JJ., BLACKLEDGE and TEWELL, District Judges.

LETTON, J.

Appellants are the owners of certain registered warrants of the city of Beaver City, Nebraska. The warrants were issued for money used in the extension and repair of the water and light plant owned by the city. The assessor listed the warrants in the hands of the holders for taxation for the year 1921. The petitioners allege that such warrants are not taxable under the Constitution of the state and pray that they be declared to be exempt from taxation. A demurrer to the petition was sustained and the cause dismissed.

At the time the assessment was made the provisions of the Constitution, as amended in 1921, relating to revenue were in force. Section 1, art. VIII, provides: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property. Taxes, other than property taxes, may be authorized by law. Existing revenue laws shall continue in effect until changed by the legislature."

Section 2, art. VIII, provides: "The property of the state and its governmental subdivisions shall be exempt

from taxation," and, after naming several specific exceptions, "No property shall be exempt from taxation except as provided in this section."

No new legislation as to this subject was in effect at the time the assessment was made. The provisions of the Revised Statutes of 1913, then in force under the provisions of section 1, art. IX, Const. 1875, are as follows:

Section 6290. "The term 'personal property' includes every tangible and intangible thing which is the subject of ownership and not real property as defined in the next preceding section."

Section 6293. "The word 'credit' includes every demand for money, labor or other valuable thing, whether due or to become due."

What is the proper construction to be given these provisions? Very early in the history of this country, analogous questions involving the same fundamental principles arose and were presented to the courts. The power of the United States to tax the obligations and securities of state governments, and the power of the several states to tax the obligations of the federal government, were each denied in a series of logical and convincing opinions in the United States supreme court. *McCulloch v. State of Maryland,* 4 Wheat. (U. S.) 316; *Weston v. City Council of Charleston,* 2 Pet. (U. S.) *449; *People of New York v. Commissioners of Taxes,* 2 Black (U. S.) 620; *Collector v. Day,* 11 Wall. (U. S.) 113; 1 Cooley, Taxation (3d ed.) 130.

But these decisions do not determine the question here presented. Under the constitutional provisions quoted, the state may not tax the property of the state, or its governmental subdivisions. Neither can it tax bonds and obligations of the United States, though there is no provision in the Constitution allowing such exemption. These are exempt, not by the language of the Constitution, but by necessary implication, although the Constitution provides that "No property shall be exempt from taxation except

as provided in this section," and such securities are not excepted. The language of that instrument, therefore, is subject to construction. *State v. Board of Assessors,* 35 La. Ann. 651.

The property of the state or its governmental subdivisions is exempt from taxation. Bonds, warrants, or other like obligations issued by the state or its subdivisions are not, in one sense, the property of the state or municipality issuing them, but, in another and most important sense, they partake of the nature of such property. They are instrumentalities of the government issued for a public purpose.

Shylock said:

"You take my house when you do take the prop
That doth sustain my house; you take my life
When you do take the means whereby I live."

When the state attempts by the process of taxation to reach the income from such securities, it inevitably depreciates their market value. In order to make them marketable, the rate of interest paid by the issuing body must be increased; this directly affects the property of the governmental subdivision, and its means of carrying on the functions for which it was called into being. In *Weston v. City Council of Charleston,* 2 Pet. (U. S.) *449, Chief Justice Marshall pointed out that, where the power is given to borrow money, "the right to tax the contract to any extent when made, must operate upon the power to borrow, before it is exercised, and have a sensible influence on the contract."

The supreme court of the United States holds that a tax upon the proceeds of a lease of Indian lands is "a tax upon the power to make them, and could be used to destroy the power to make them," and is invalid as a tax upon an instrumentality of the United States. *Indian Territory Illuminating Oil Co. v. State of Oklahoma,* 240 U. S. 522. In *Gillespie v. State of Oklahoma,* 42 Sup. Ct. Rep. 171, the court said: "The same considerations that invalidate a

tax upon the leases invalidate a tax upon the profits of the leases, and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards. *Weston v. City Council of Charleston,* 2 Pet. (U. S.) *449, *468." See *Farmers & Mechanics Savings Bank v. State of Minnesota,* 232 U. S. 516.

The funds of a city must be used either for some governmental purpose, or for some other purpose authorized by the legislature, and such obligations, issued in order to effectuate such a purpose, are instrumentalities of the government. After presentation and registration they draw interest at a fixed rate. The money to pay the interest must be collected by taxation. It is self-evident that an investor is concerned mainly with the net returns upon his investment, and if the state or its municipalities issues a security drawing a certain rate of interest, and at the same time taxes the owner of the security a given rate, his net return is the difference between the amount of taxes paid thereon and the amount of interest received.

The reports of the auditor of public accounts of this state show that there are outstanding public bonds of governmental subdivisions of the state drawing interest at as low a rate as 4½ per cent. At this time 5½ or 6 per cent. is perhaps the most common rate of interest on such securities outstanding. The rate of taxation for all purposes in some of the cities of the state is as high as 2.75 per cent. upon the valuation of property, assessed, as it now is, at its actual value. In such a city the resident holder of a 4½ per cent. security would receive less than 2 per cent. on his investment, and the owner of a 6 per cent. security would receive less than 3 per cent. If such securities are held to be taxable, the inevitable result will be that the rate of interest must be increased. If the rate of interest is increased, additional taxes would be required to pay it. No practical benefit would be derived. The operation of local government would be hampered and im-

peded and the funds and property of the issuing body materially affected. The majority of courts before whom this question has been directly presented have held that, unless it is clearly shown by apt language that to tax such instrumentalities of government was intended, the language of the Constitution will not be so construed. Though some of the cases involve the taxation of state bonds, there is no difference in principle, even though the obligations are in the form of warrants issued by a municipality or other governmental subdivision having taxing power.

In *Penick v. Foster,* 129 Ga. 217, 12 L .R. A. n. s. 1159, after pointing out that municipal corporations within certain limits may exercise sovereign powers, the court say: "The government, whether it be the state or one of its political subdivisions, is dependent for the due exercise of its powers on certain instrumentalities needful and proper in the matter with which it is dealing. Credit is absolutely indispensable to any government, whether it exists in the form of a state government or in the form of the government of one of the political subdivisions of the state. It becomes necessary, in the life of a state, as well as of its political subdivisions, to be able to establish credit in order to carry on successfully and properly the governmental functions. One of the most usual and ordinary methods of using the credit of a government is by the issue of securities and placing them in the markets of the world for sale."

The first paragraph of the syllabus in the case sums up the situation well and forcibly as follows: "The general rule is that public property and the various instrumentalities of government are not subject to taxation. This immunity rests upon the most fundamental principles of government; being necessary in order that the functions of government be not unduly impeded, and that the government be not forced into the inconsistency of taxing itself in order to raise money to pay over to itself."

In *National Surety Co. v. Starkey,* 41 S. Dak. 356, it is

said: "If we were to consider the bonds before us merely as property and disregard the purpose for which they were issued—disregard the fact that they are governmental instrumentalities—we should hold them taxable; but, when we regard them, not merely as property, but as governmental instrumentalities of a sovereign state, a superior intervening public policy grounded upon one of the sovereign powers of the state compels us to the conclusion (there being no express language in the Constitution to the contrary) that the public securities of a state, and of its counties and municipalities, were not intended to be included either in the term 'property' or the term 'bond' as such terms are used in that article of our Constitution relating to taxation."

The following cases are to the same effect: *State v. Board of Assessors,* 111 La. 982; *Miller v. Wilson,* 60 Ga. 505; *Mercantile Bank v. New York,* 121 U. S. 138; *In Re Assessment of First Nat. Bank,* 58 Okla. 508, L. R. A. 1917B, 294; *Macon v. Jones,* 67 Ga. 489.

There are a few early cases holding such securities taxable. In these cases the question as to the character of the obligations as instrumentalities of government was not presented to the courts. The decisions depend in large measure upon the varying language in different constitutions and statutes; but, except in the case of *State Nat. Bank v. City of Memphis,* 116 Tenn. 641, 7 L. R. A. n. s. 663, the majority of later cases are in accord with these views. In a later Tennessee case, *Keith v. Funding Board,* 127 Tenn. 441, involving the same question, two judges wrote dissenting opinions.

We conclude that under the Constitution, as amended in 1921, such securities are not subject to taxation while in the hands of residents of this state. The judgment of the district court is

REVERSED.

## STATE OF NEBRASKA V. AMERICAN STATE BANK. E. J. KREMER, APPELLEE, V. A. F. ACKERMAN, RECEIVER, APPELLANT.

FILED MARCH 28, 1922. No. 21980.

1. **Banks and Banking:** MISAPPROPRIATION OF FUNDS: IMPUTED KNOWLEDGE. Where an authorized officer of a banking corporation, acting in its interests as its sole representative, procures, while absent from the bank, specific funds, pursuant to a previous arrangement, for the special purpose of paying notes of the maker to the bank and refunding the surplus and returns to the bank, and for it receives and accepts such funds, the officer's knowledge of the transactions may be imputed to the bank, though the funds are wrongfully deposited and wrongfully checked out in the name of another corporation of which such officer is manager.
2. ———: ———: CANCELATION OF NOTES. Where a bank knowingly receives and accepts from the maker of notes payable to and held by it a specific fund for the purpose of paying them at maturity, they may be canceled thereafter in the hands of a receiver of the bank, though the funds were wrongfully disbursed and the notes were allowed to remain in the bank uncanceled.
3. ———: ———: ———: DISPOSITION OF SURPLUS. Where a bank knowingly receives and accepts from the maker of notes payable to and held by it a specific fund for the purpose of paying them at maturity and of refunding the surplus, the surplus may be treated and protected as a deposit.

APPEAL from the district court for Hamilton county: EDWARD E. GOOD, JUDGE. *Affirmed.*

*Charles E. Matson*, for appellant.

*Hainer, Craft & Edgerton, contra.*

Heard before MORRISSEY, C. J., ALDRICH and ROSE, JJ., HOBART and PAINE, District Judges.

ROSE, J.

This is a controversy between A. F. Ackerman, receiver of the American State Bank of Aurora, an insolvent corporation, and E. J. Kremer, claimant, as a depositor.

In a proceeding by the state of Nebraska to wind up the

affairs of the bank, Kremer filed a claim in which he demanded the surrender of a note in the hands of the receiver and the return of a surplus of $340.50 arising from a fund in the nature of a special deposit. The face of the note is $7,000. It is dated March 1, 1920. It was payable 30 days after date. Claimant is the maker and the bank is named as payee. Payment out of funds raised by claimant for that purpose and deposited in the bank is pleaded. The receiver resists the claims on the grounds that the note is a valid asset of the bank and that there is nothing due claimant as depositor or creditor. In a cross-petition the receiver demands judgment on the note. Upon a full hearing the district court found that the note should be marked paid, and in addition that claimant should recover $340.50. From a decree in favor of claimant on both items, the receiver has appealed.

For the purpose of determining the questions presented by the appeal, a more detailed statement of the facts is necessary. In this connection the business relations of the parties to each other are material factors.

Kremer was a dealer in real estate and a salesman for real estate brokers.

The Wentz Company was a corporation dealing in real estate, farm loans, mortgages and insurance at Aurora, Nebraska.

The American State Bank was organized as a commercial enterprise March 8, 1918. An officer of the state took charge of it in an insolvent condition March 17, 1920. Ackerman took possession as receiver May 14, 1920. The bank has not since been open for the transaction of a general banking business.

In some capacity Charles W. Wentz had exclusive control and management of the Wentz Company. He was also vice-president of the bank and as manager controlled generally its business affairs. It had a president in name only and a cashier, but the latter recognized Wentz as the superior officer and deferred to him. The business of both

corporations was generally transacted in the same building with Wentz the controlling spirit in both enterprises. The transactions of the two corporations were more or less intermingled. Their books were kept by the same persons and the office, counter, vault and safe were used in common. Kremer in his own name never had a checking account in the bank, but at different times for a number of years he had transacted business with the Wentz Company or with Wentz.

Through the agency of the Wentz Company, Kremer bought a farm, made a payment thereon in cash, and agreed to pay the vendor $25,000, the balance of the purchase price, March 1, 1920, expecting then to realize funds for that purpose out of the proceeds of another farm which he had sold, but from this source money to the extent of $15,000 did not become available until March 15, 1920. Kremer, however, met his obligation to his vendor at maturity by raising funds in the following manner:

Negotiating with Wentz in the American State Bank, Kremer indorsed and delivered a check for $10,810, which had been issued to him by the Farley Investment Company to apply on the purchase price of the farm which he had sold. The check was indorsed by the bank and paid without bearing the indorsement of the Wentz Company. In addition, at the same time, Kremer, to procure $14,190 to pay the balance of his indebtedness of $25,000 to his vendor, applied to the bank for a loan. To serve some purpose of the Wentz Company or of Wentz, the latter, instead of taking a single note for $14,190, took two notes due 30 days after date, one for $7,190, payable to the Wentz Company, and the other for $7,000, payable to the bank. Kremer signed and delivered both and was directed by Wentz to pay the bank the amount to become due on each. These notes and the check for $10,810, aggregating $25,000, were all dated March 1, 1920. The same day the bank credited the account of the Wentz Company $25,000, a deposit made up of the check and the two notes described. Kremer, as

part of the transaction resulting in the loan, relying upon Wentz in his capacity of banker, entered into a definite arrangement with him to turn over to the bank, as soon as available, the balance of the proceeds of the farm which Kremer had sold, and at the same time Wentz agreed, upon receipt of such proceeds, to cancel both notes and return them to Kremer with the surplus. Kremer, for the special purpose stated, ordered the Farley Investment Company to turn over to Wentz the balance of the purchase price due from Kremer's vendee. In this state of affairs Kremer started to California March 12, 1920. Three days later Wentz left his bank, went a block or more to the office of the Farley Investment Company and procured the check of the latter for $15,000, payable to the order of "Charles W. Wentz & Co." This check was indorsed by the Wentz Company to the bank. It was indorsed also by the bank and later marked "Paid." Wentz deposited the check in his bank to the credit of the Wentz Company. The note of Kremer for $7,190 was afterward canceled and returned to him, but his note for $7,000 was not canceled or returned, and is the note in controversy. When the state took charge of the bank in an insolvent condition, the checking account of the Wentz Company was overdrawn. Kremer's note for $7,000 subsequently fell into the hands of the receiver.

The principal argument of the receiver is directed to the proposition that, for the purpose of procuring from the Farley Investment Company the check for $15,000 and disbursing the proceeds thereof, the Wentz Company and Wentz were agents of Kremer. On this point attention is called to the fact that Wentz left the bank, procured the check while absent and deposited it in the name of the Wentz Company. It is insisted that in these transactions Wentz did not act for the bank or in its interests, and that the proceeds of the check for $15,000 were received and paid out by the bank in good faith without actual or imputable knowledge of Kremer's equities. In this con-

nection the receiver invokes the principle that a bank is not liable for money entrusted to an officer for deposit while absent from his place of business, unless it is received by the bank and deposited to the credit of the proper account. For a number of reasons it seems clear that the present case is not controlled by the doctrine invoked.

The connection of the bank with these transactions did not begin when Wentz left his place of business to procure the check for $15,000 issued by the Farley Investment Company. Kremer had previously obtained a loan from the bank under an agreement to pay his notes out of a special fund. This was a transaction to which the bank was itself a party. Thus far questions of agency and knowledge do not arise. There is no lawful way for the bank to escape knowledge of what its managing officer had done in lending its money to Kremer, in taking notes for the amount lent and in arranging for payment out of special funds. The obligation of the bank to apply the balance of the proceeds of the farm sold by Kremer, when received, to the payment of his notes was part of the agreement for the loan. It was only through the agency of some officer that this agreement could be made and performed on the part of the bank. The income from loans is a source of profit. A bank is interested in a borrower's means for the payment of debts. A cashier or a vice-president may officially and properly leave his bank to perform a contract for his principal or to procure collateral for a loan or funds to pay notes.

Kremer was on his way to California. He had made an arrangement with the bank for the payment of his notes. He did not know what was taking place in the bank, but its officer Wentz did. During all of the banking hours of March 15, 1920, the cashier was absent. There was then only one officer in charge, and that was Wentz, vice-president and managing officer. It was on this date that Wentz, pursuant to an arrangement to which the bank was itself a party, procured funds of Kremer to the

extent of $15,000 for a special purpose and deposited them in the bank. Its only source of knowledge respecting these transactions when they occurred was the agency of its officer Wentz. Through that same source the bank had lent Kremer money under a distinct arrangement that it should be repaid from the proceeds of a farm. Kremer complied with his agreement without any wrongdoing, and by order in writing and by oral instructions made the proceeds available. Wentz, as the sole representative of the bank, received and accepted for it those proceeds in the form of a check. This was the act of the bank and could be performed only by an officer or agent of the bank. Kremer had no power to appoint an officer or select an agent for the bank to perform for it a service like that. Wentz knew all about the facts and, being the sole representative of the bank for the purpose of receiving and accepting the check for deposit, the bank should not be permitted to renounce his agency and knowledge for the purpose of escaping responsibility for an unauthorized disbursement.

This case seems to fall within an exception to the general rule relating to imputed knowledge. Where an authorized officer of a banking corporation, acting in its interests as its sole representative, procures, while absent from the bank, specific funds, pursuant to a previous arrangement, for the special purpose of paying notes of the maker to the bank, and refunding the surplus, and in that capacity, for the bank, receives and accepts such funds, the officer's knowledge of the transactions may be imputed to the bank. On the established facts the bank has no lawful way to escape the agency of Wentz or his knowledge of the transactions of March 15, 1920. Both agency of Wentz and knowledge of the bank are established by uncontradicted evidence.

The receiver argues further that Kremer, as a depositor, is not entitled to recover the surplus of $340.50. The proceeds of the check from which this surplus arose went into

the bank in the nature of a special deposit for the purpose already stated. The deposit was received and accepted by the only officer in charge of the bank at the time. Knowledge of these banking transactions could only reach the bank through Wentz. He had participated in the arrangement requiring Kremer to pay his notes with the proceeds of his farm. The entries on the books were the doings of the bank in the absence of Kremer. As between the bank and Kremer those entries did not change the character of the transactions or relieve the bank from liability for a proper disbursement of the funds received by it through the agency of Wentz. Under the circumstances there could be no lawful disbursement except to apply the necessary amounts to the payment of the notes, mark them paid, and return them to Kremer with the surplus. In law and equity, the balance of Kremer's funds, having gone into the bank in the nature of a special deposit, should be protected as a special deposit.

No error has been found, and the judgment is

AFFIRMED.

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STATE OF NEBRASKA V. AMERICAN STATE BANK. BENJAMIN W. SPRINGER, APPELLEE, V. A. F. ACKERMAN, RECEIVER, APPELLANT.

FILED MARCH 28, 1922. No. 21981.

1. **Banks and Banking**: MISAPPROPRIATION OF FUNDS: IMPUTED KNOWLEDGE. Where the managing officer of a banking corporation acts as its sole representative in receiving and accepting for deposit in the bank an unindorsed check under an arrangement with the payee, a depositor, to credit it to his account, but, instead of doing so, makes the deposit and checks out the fund in the name of another corporation conducting its business in the bank and managed there by such officer, the latter's knowledge of the payee's right to credit for the check on the books of the bank may be imputed to the bank.

2. ———: ———: DEPOSIT. Where a bank knowingly receives and accepts an unindorsed check, payable to a depositor, under an ar-

rangement with him to credit it to his account, but, instead of doing so, gives another credit for the fund on the books of the bank and permits the latter to check it out, the payee may be decreed to be a depositor entitled to credit for the amount of the check, though the bank has passed into the hands of a receiver.

3. ———: ———: CUSTOM. Departure by a bank from a plain, unambiguous arrangement between it and a depositor, whereby an unindorsed check payable to the latter shall be credited to his account on the books of the bank, *held* not justified by a custom at variance with the terms of the agreement.

4. ———: ———: FALSE ENTRIES. False entries on the books of a bank, whereby one depositor is credited with the funds of another, do not change the relation of banker and depositor in regard to that particular item or relieve the bank from liability for a proper disbursement of the fund, if the bank is chargeable with knowledge of the facts.

APPEAL from the district court for Hamilton county: EDWARD E. GOOD, JUDGE. *Affirmed.*

*Charles E. Matson,* for appellant.

*Hainer, Craft & Edgerton, contra.*

Heard before MORRISSEY, C. J., ALDRICH and ROSE, JJ., HOBART and PAINE, District Judges.

ROSE, J.

This is a controversy between A. F. Ackerman, receiver of the American State Bank of Aurora, Nebraska, an insolvent corporation, and Benjamin W. Springer, claimant, as a depositor.

In a proceeding by the state of Nebraska to wind up the affairs of the bank, Springer filed a claim for a balance of $42,375.30. The deposit in controversy was never entered on the books of the bank as a credit in favor of Springer and he pleaded fraud in that respect. The receiver objected to the allowance of the claim on the ground that Springer entrusted his fund to his own agent, the Wentz Company, a corporation that deposited it in its own name and checked it out before knowledge of Springer's equities reached the bank. In a cross-petition

the receiver also demanded judgment against Springer for $2,500 on a promissory note which he had executed and delivered to the bank. Upon a full hearing the district court found the issues in favor of Springer and allowed his claim as a depositor for a balance of $39,737.80, after deducting his debts, including the amount due on his note. The receiver has appealed.

Questions of agency and imputed knowledge are presented by the appeal and require a more detailed statement of the case.

Benjamin W. Springer, claimant, owned a farm on the edge of Aurora. Acting for himself without an agent he sold it to August Matson for $54,000, June 14, 1919. The purchaser paid $3,000 down and gave his note for $2,000. The balance due Springer February 28, 1920, when the title to the farm was transferred to Matson, was $48,155, including interest. For that sum Matson then gave his check, payable to Springer. The proceeds of the check were received by the bank and paid out on checks of the Wentz Company. The claim in controversy is based largely on Springer's right to credit as a depositor on the books of the bank for the amount of this check.

The American State Bank commenced business as a commercial enterprise March 8, 1918. An officer of the state took charge of it in an insolvent condition March 17, 1920, and was succeeded by Ackerman, receiver, May 14, 1920. The bank has not since been open for the transaction of a general banking business. From May 18, 1918, until the closing of the bank Springer transacted business with it as a depositor.

The Wentz Company was a corporation dealing in real estate, farm loans, mortgages and insurance. With it Springer had transacted business at intervals for a number of years.

Charles W. Wentz was vice-president and managing officer of the bank. It had a president in name only. It had a cashier, but he recognized Wentz as the superior officer

and deferred to him. In some capacity Wentz had exclusive control and management of the Wentz Company. The business of both corporations was generally transacted in the same building with Wentz the controlling spirit in both enterprises. The transactions of the corporations were more or less intermingled. The bookkeepers in the bank kept the books for the Wentz Company. The two corporations occupied the same room and used the same counter, the same vault and the same safe. Each paid half the office rent. The officers of the Wentz Company were officers of the bank. A stamp used by Wentz in indorsing checks for the bank was used by him to indorse papers for the Wentz Company. There was no public sign to identify the corporate hand that manipulated the business devices used by Wentz in disbursing the funds of bank depositors.

The contract for the sale of the farm was drawn by Wentz in his bank and was executed there, he being a witness. On the books of the bank and on the pass-book of Springer the cash payment of $3,000 was credited to his account as a depositor. Within a short time Wentz drew a warranty deed in the bank. Later it was executed by Springer and left there in escrow for Matson upon payment of the balance of the purchase price.

Springer and Matson, vendor and purchaser, met in the bank February 28, 1920, and agreed on the balance of the purchase price including interest—$48,155. Matson said the cashier of the First National Bank of Aurora would attend to the payment. Springer told Wentz to take the deed over to that bank, to bring back the check and to credit it to the account of Springer in the American State Bank. To this Wentz assented. The Wentz Company was not mentioned. Afterward Wentz went a block or more to the First National Bank, delivered the deed, and returned to his own bank with a check in the following form:

"Aurora, Nebr., Febr. 28th, 1920.

"First National Bank.

"Pay to Ben. W. Springer or order $48,155.00 forty-

eight thousand one hundred fifty-five & no/100 dollars.
"August Matson."

On the back Wentz indorsed the check thus:

"Credited to account of Benj. W. Springer, 2/28/20."

The name "Benj. W. Springer" is in the handwriting of Wentz, who entered upon a deposit slip of his bank a credit in favor of the Wentz Company for $48,155. The check was never indorsed by Springer, the payee, who, as a depositor, had an account in his own name in the American State Bank. Under such circumstances it was a custom of banks to deposit the check to the credit of the payee. The check was presented to the bank by its managing officer Wentz, who knew all about the conditions on which it was issued and procured. The bank, acting solely through its managing officer Wentz, performed the corporate act of receiving and accepting the check for deposit. The funds of Springer were credited by the bank to the account of the Wentz Company. The bank received the proceeds of the check and paid them out on the checks of the Wentz Company. The account of the latter was overdrawn when the bank was closed and its books did not show a credit in favor of Springer for the amount of his check. Springer was not guilty of any wrongful, fraudulent or deceitful act in connection with these transactions.

The facts and the conclusions stated are proper deductions from the evidence.

For the purpose of escaping the liability of the bank for crediting the Wentz Company with the check of Springer and disbursing his money on its checks, the receiver argues that Wentz and the Wentz Company were the agents of Springer; that it was no part of the duties of Wentz as an officer of the bank to leave his place of business to collect and deposit funds for Springer; that in these respects Wentz did not act for or in the interests of the bank; that Wentz, as manager of the Wentz Company, received the funds as the agent of Springer for the purpose of paying the latter's debts and making investments in securities for

him under his own instructions; that Springer had transacted business with the Wentz Company and knew it was a custom of the latter to deposit and check out in its own name funds of its clients; that in these respects Wentz acted for Springer and the Wentz Company, and not for the bank which received and paid out the funds in good faith without actual or imputed knowledge of Springer's equities. These propositions are argued at considerable length and precedents are cited to support the principles of law invoked to defeat Springer's claim.

The receiver's view of the case and of the law applicable to the facts must be rejected. The bank was a place to deposit money subject to the check of the depositor. The Wentz Company was not a corporation of that kind. It was not engaged in commercial banking in its own name. The bank and Springer, in their respective names, entered into the relation of banker and depositor before Wentz procured the check. In transactions relating to deposits Springer, in dealing with Wentz, thought he was dealing with the bank. The situation outlined justified that view. The purchase money for the farm belonged to Springer and he had a right to say what should be done with it. He told Wentz to deliver the deed, to get the check and to credit it to Springer's account, and afterward left for California. The procuring of deposits is a legitimate matter of interest and profit to a commercial bank. Wentz, as the managing officer of the American State Bank, had authority to receive and accept the check for deposit after he returned with it. In doing so he was for all practical purposes the bank itself. In performing this corporate, banking function he was the sole representative of the bank. Springer could not appoint an officer or select an agent to represent the bank in receiving and accepting his check for deposit therein. He was not a party to any conspiracy to defraud or cheat the bank, nor was he guilty of any other wrongful act in connection with his banking transactions. It would be a shocking test of business recti-

tude to recognize the agency of Wentz as the sole representative of the bank for the purpose of receiving and accepting the check for deposit and at the same time renounce his agency for the purpose of justifying a wrongful disbursement of the proceeds. Wentz knew the terms on which the check was procured from Springer and in receiving and accepting it for the bank to be deposited therein his knowledge was imputable to the bank.

The receiver, insists, however, that Springer told Wentz to invest a portion of the fund in securities and keep the balance on deposit; that this investment was the business of the Wentz Company, and that Springer knew of its custom to deposit in its own name and check out funds of its clients in making investments for them. It is sufficient to answer that the investment could have been made without the depositing of Springer's money to the credit of the Wentz Company; that the transactions relating to the receiving and the accepting of the check for deposit were between the bank, chargeable with knowledge of the facts, and Springer; that the definite arrangement between the bank and Springer that the deposit should be made in his name and the receiving and the accepting of the check by the bank on that condition amounted to an agreement not controlled by any custom at variance with its terms.

Springer did nothing to forfeit his rights or to estop himself from asserting them.

It is clearly established by the evidence that Wentz, acting for the bank as its sole representative, received and accepted for deposit the check for $48,155, payable to Springer, knowing the latter, as a depositor, was entitled to credit for that sum on the books of the bank. The knowledge of Wentz in relation to these transactions, under the circumstances, was the knowledge of the bank. The relation of the bank to Springer and its liability for a proper disbursement of his money were not changed by the false entries on the books of the bank. The wrongs for which the bank is answerable to Springer consist in the

false credit in favor of the Wentz Company and in the disbursement on its checks.

The trial court made no mistake in its findings of fact or in its conclusions of law.

AFFIRMED.

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ELIPHAL RHINES, APPELLANT, V. SKINNER PACKING COMPANY, APPELLEE.

FILED MARCH 28, 1922. No. 22006.

1. **Corporations**: LICENSES: CONTRACTS. It is the public policy of Missouri to hold void contracts of foreign corporations, if made in that state with its residents without a license in defiance of a Missouri statute enacted to protect the public from fraud and imposition and subjecting the offenders to fine and imprisonment, though the statute does not in express terms declare such contracts void.

2. ———: ———: SALE OF STOCK. A sale of capital stock issued by a Maine corporation, having authority to transact business in Nebraska, may be declared void in Nebraska, if made in Missouri to a resident thereof without a license in defiance of a Missouri statute enacted to protect the people of that state from fraud and imposition and subjecting the offender to fine and imprisonment.

3. ———: ———: ———. Where a Maine corporation, having a principal place of business in Nebraska, sends its agents to Missouri and there persuades a resident of that state to sign a subscription for shares of stock and a note for the purchase price and there delivers the stock which is there accepted, the sale is a Missouri transaction, though made in defiance of its laws.

4. ———: ———: ———. Where the laws of a state forbid a foreign corporation to sell or attempt to sell therein shares of stock without a license, a subscription for such stock is an inhibited act and is included in a sale.

5. **Sales**: RESCISSION. The delay of a buyer in rescinding an unlawful sale, if caused by the seller's fraud, does not necessarily prevent a rescission.

6. **Corporations**: SALE OF STOCK: TENDER. Tender of shares of stock to the corporation which issued them, the sale being fradulent and void, *held* sufficient under the circumstances outlined in the opinion.

7. ———: ACTION FOR PRICE OF STOCK: NONSUIT. An involuntary nonsuit in an action to recover the price paid by plaintiff upon a void sale of corporate stock issued by defendant *held* erroneous.

APPEAL from the district court for Douglas county: L. B. DAY, JUDGE. *Reversed.*

*Crofoot, Vinsonhaler, Fraser, Connolly & Stryker,* for appellant.

*Sullivan, Wright & Thummel, Hastings, Ritchie & Canaday,* and *Arthur F. Mullen, contra.*

Heard before MORRISSEY, C. J., ALDRICH and ROSE, JJ., RAPER and STEWART, District Judges.

ROSE, J.

This is an action to recover $12,500, the purchase price paid by plaintiff to defendant for 100 shares of the latter's preferred stock. The grounds of recovery are invalidity of the sale and fraud perpetrated by defendant in persuading plaintiff to make the purchase. Plaintiff alleged that, upon discovery of the fraud, he rescinded the contract. He tendered back the stock or its equivalent. Defendant pleaded that the sale was valid and denied the fraud charged. When the evidence on behalf of plaintiff had been adduced, the trial court, on motion of defendant, excused the jury and entered an involuntary nonsuit. Plaintiff has appealed.

Plaintiff contends that the judgment should be reversed because defendant entered into the contract of sale in Missouri in violation of a penal statute of that state, the sale by reason thereof being void, and because plaintiff was induced by false representations of defendant and its agents to buy the stock. Proper deductions from the evidence in connection with the law applicable to the facts lead to the conclusion that both points are well taken and that the trial court erred.

Was the sale void? Was plaintiff, on the case made, entitled to recover back the purchase price?

A statute of Missouri declared it unlawful for a foreign corporation to sell, or attempt to sell, its stock in that state without filing with the bank commissioner thereof documents showing the nature of its organization and its methods of transacting business. Before selling, or attempting to sell, corporate stock there, defendant and its agents were required to pay a fee and to procure a license. Violations of the statute were punishable by fine and imprisonment. Rev. St. Missouri 1919, secs. 11919-11932. Defendant was a corporation organized under the laws of Maine and had a principal office in Omaha, Nebraska. There was no attempt to comply with the statute of Missouri.

Plaintiff was 80 years of age. He had been a farmer. He had sold a farm in Iowa and proceeds to the extent of $12,500 were secured by a mortgage. While he was residing in Excelsior Springs, Missouri, an agent of defendant, knowing that the mortgage would soon become due, approached defendant there, repeatedly importuned him to buy stock, and with the aid of another agent induced him to make the purchase. Plaintiff was told that the income from the stock would exceed the interest on the mortgage. Other alluring and deceitful inducements were offered. As a result plaintiff signed at Excelsior Springs a subscription contract and a note for the amount of the purchase price. Later he there received by mail from Omaha a certificate for 100 shares of the preferred stock of defendant. The note was afterward paid.

Plaintiff had a right to assume that defendant and its agents had complied with the legislative requirements of Missouri before attempting to sell stock there. The collection of fees was an incident of legislation. One of the principal purposes of the statute was to protect the public from fraud and imposition in the sale of stock issued by foreign corporations having no authority to transact business in Missouri. The penalties were directed alone to corporations and their agents. The duty of defendant

to qualify itself in Missouri before attempting to transact business there did not rest on plaintiff to any extent. He did not violate any provision of the Missouri law, nor did he participate with defendant or its agents in any criminal act. He was therefore entitled to assert his right to the protection of the Missouri statute.

The sale, if a Missouri contract, seems to be void when tested by the public policy of Missouri, as declared by the judiciary of that state in enforcing statutes of this kind. *Booth v. Scott*, 276 Mo. 1; *Amalgamated Zinc & Lead Co. v. Bay State Zinc Mining Co.*, 221 Mo. 7. Many other courts have taken the same view of similar statutes. 14a C. J. 1296, sec. 4004, note 95; *Edward v. Ioor*, 205 Mich. 617; note in 15 A. L. R. 256, 262.

To defeat the action defendant argues that the sale was a Nebraska contract unaffected by the laws of Missouri. In this connection it is asserted that the stock was obtained in Omaha, Nebraska, that the note for the purchase price was accepted there, and that it was there the final act of approving the sale was performed. This position is clearly untenable. Defendant sent its agents to Excelsior Springs, Missouri, to negotiate the sale. The representations and inducements resulting in the purchase were made there. It was there that the subscription for the stock and the purchase money note were signed. It was there the stock was received by plaintiff and accepted by him. If the concluding act in the negotiations is an important factor in determining the situs, as argued by defendant, the delivery in Missouri and the acceptance of the stock there should not be ignored. Defendant cannot evade the consequence of its unlawful acts in Missouri on this ground or thus take from plaintiff the protection of the Missouri statute. The mere attempt of defendant to make the sale in Missouri, without complying with the Missouri statute, was an unlawful act culminating in the void contract which plaintiff is attempting to rescind. The nonsuit cannot be justified on the ground that the sale

was a Nebraska contract. It was a Missouri transaction and should be litigated as such.

It is further argued by defendant that the transaction in Missouri was a subscription for, and not a purchase of, the stock. For reasons already stated this point is also without merit. Besides, "A 'sale' of shares within such a law includes an agreement to sell" and "an exchange for other stock." 15 A. L. R. 264, note.

Delay in rescission and failure of plaintiff to plead and prove an unconditional tender seem to be the principal points upon which defendant relies to sustain the nonsuit.

Plaintiff rescinded his purchase within a year and he was not too late as a matter of law, when the circumstances are considered. While the suspicion that he had been swindled arose in his mind shortly after he bought the stock, he was without definite knowledge of the facts and of his right to protection until he sought relief. In the meantime he did not get from defendant accurate knowledge of its operations and business. On the contrary, favorable reports circulated by defendant, but not justified by existing conditions, reached him frequently. Defendant thus caused the delay of which it complains. These inferences and conclusions are fairly drawn from the testimony which must be accepted as verity for the purpose of a *prima facie* case in favor of plaintiff. In this view of the evidence and the law, the judgment in favor of defendant cannot be affirmed on the ground of laches.

Was there a sufficient tender? Defendant was the "Skinner Packing Company." Plaintiff bought 100 shares of its stock December 20, 1919. In January following he exchanged them for 200 shares of the "Skinner Company," a holding corporation having the same officers as defendant. This exchange of 100 shares of the Skinner Packing Company for 200 shares of the Skinner Company was mentioned by an agent of defendant as an inducement to the original purchase. In the meantime officers of both

corporations urged defendant to make the exchange. What he had in his hands to tender back after the exchange, therefore, as the consideration for his original stock, was the stock of the "Skinner Company." Had this tender been accepted the officers of defendant would have had in their own hands all the stock received by him from both corporations. A proper tender was made at the trial and, if the plea of tender is wanting in any respect, the petition is still amendable to conform to the proof—an unnecessary formality under the circumstances at this stage of the litigation. In any event a timely, perfect tender in every respect would have been unavailing. It would have been rejected and the attitude of defendant so shows.

As the case stood when the nonsuit was entered, plaintiff was entitled to judgment as a matter of law on the undisputed facts, but, if this theory were rejected, a question of fact for the jury would remain. There was proof of material false representations upon which plaintiff relied under circumstances justifying him in doing so. He was told in effect, among other things, that there was money available for a dividend. There were no net earnings legally available for such a purpose. Real estate had been purchased by defendant for a packing industry and reappraisement showed a temporary rise in value, but the increase was not a proper basis for a dividend. No money went into the treasury from that source. The logic of such a system of finance is to pay dividends out of the proceeds of the sale of capital stock without regard to the net earnings of the industrial plant. The representation that money was available to pay a dividend was a material fact and cannot be justified by a temporary rise in the value of real estate purchased for a corporate enterprise without regard to the net earnings of the corporation.

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

REVERSED.

## STATE OF NEBRASKA V. AMERICAN STATE BANK. JULIA A. STRAUSS ET AL., APPELLEES, V. A. F. ACKERMAN, RECEIVER, APPELLANT.

FILED MARCH 28, 1922. No. 22183.

1. **Banks and Banking:** MISAPPROPRIATION OF FUNDS: IMPUTED KNOWLEDGE. Where the managing officer of a banking corporation deposits in his bank, in the name of another corporation of which he is also manager, money and securities belonging to others, for whom he is agent and trustee, and receives and accepts the deposit for the bank as its sole directing authority, his knowledge of the rights of the beneficiaries of the trust may be imputed to the bank.
2. ———: ———: TRUST FUNDS. Where the managing officer of a banking corporation deposits in his bank, to the credit of another corporation of which he is also manager, a negotiable promissory note payable to himself, but in fact belonging to beneficiaries of a trust, for whom he is trustee, neither the bank, if chargeable with knowledge of the facts, nor its receiver, in the event of insolvency, can become an innocent purchaser or holder of the note under an assignment made by the trustee for the purpose of paying with trust funds a private overdraft of the corporation to whom the credit was given.
3. ———: ———: CANCELATION OF NOTES. Where a bank knowingly receives and accepts from the makers of notes payable to and held by it a specific fund for the purpose of paying the notes at maturity, they may be canceled thereafter in the hands of a receiver of the bank, though the funds were wrongfully disbursed and the notes were allowed to remain in the bank uncanceled. *Kremer v. Ackerman, ante, p.* 92.
4. ———: INSOLVENCY: TRUST FUNDS. Where a trustee deposits in a bank, in the name of a corporation of which he is manager, trust funds belonging to others, the bank at the time having knowledge of the facts, any balance remaining on deposit, when the bank is closed on account of insolvency, inures to the benefit of the beneficiaries of the trust and may be protected in the hands of the receiver as a deposit.

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

*Charles E. Matson,* for appellant.

*Hainer, Craft & Edgerton, contra.*

Heard before MORRISSEY, C. J., ALDRICH and ROSE, JJ., HOBART and PAINE, District Judges.

ROSE, J.

This is a controversy between A. F. Ackerman, receiver of the American State Bank of Aurora, an insolvent corporation, and Julia A. Strauss and her four children, John L. Strauss, Anna R. Livingston, Mamie E. Kingston and Alvin A. Strauss, claimants.

Through the agency of the Wentz Company claimants in 1919 sold 200 acres of land near Aurora, Nebraska, to Roscoe C. Thompson, James Winters and Frank Hogg for $40,000. The purchasers paid in cash $28,000 and the balance of $12,000 was paid by two notes, one for $8,000 and the other for $4,000, secured by mortgage on 120 acres of the land sold. Of the proceeds of the sale Charles W. Wentz, managing officer of both the bank and the Wentz Company, received for claimants, directly from the purchasers, $13,000 in cash and the notes and the mortgage for $12,000. Claimants had deeded their land to the purchasers, but they have never received the $25,000 thus paid to Wentz, who took the notes in his own name as payee. Claimants have, however, traced their funds and their securities through Wentz, the Wentz Company and the bank into the hands of the receiver. They charge the bank with Wentz's knowledge of their ownership and with the obligation to restore to them their property.

In a proceeding by the state of Nebraska to wind up the affairs of the bank, claimants, by formal pleas, presented for allowance the following items: A claim that they are the owners of the two notes described, one for $8,000 and the other for $4,000, aggregating $12,000, payable on their face to Charles W. Wentz and secured by mortgage on 120 acres of land sold by claimants to Roscoe C. Thompson, the knowledge of Wentz being imputed to the bank and the latter being obliged to restore the property of claimants to them; a claim for the cancelation and the surrender

of two promissory notes, one for $5,000 and the other for $3,750, aggregating $8,750, payable to the bank, executed by claimants Julia A. Strauss and Mamie E. Kingston, respectively, payment having been made according to agreement out of the proceeds which Wentz received for claimants directly from the purchasers of the land sold by claimants, $25,000 of the same, in money and securities, having been deposited in the bank to the credit of the Wentz Company, the bank knowing the rights of claimants; a claim for the balance of the purchase money to the extent of $4,250, being part of what Wentz received and deposited in the bank to the credit of the Wentz Company, claimants asserting the rights of depositors.

The receiver pleaded that the notes were assets of the bank and that it owed claimants nothing as depositors or creditors.

The trial court found the issues in favor of claimants and directed the receiver to turn over to them the purchase money notes and securities in controversy; to cancel and surrender as paid the notes executed by claimants Julia A. Strauss and Mamie E. Kingston, respectively; to allow and pay as a deposit the claim for $4,250. From this judgment the receiver has appealed.

Questions of fact, of agency and of imputed knowledge are presented by the appeal and require a more detailed statement of the case.

The American State Bank commenced business as a commercial enterprise March 8, 1918. An officer of the state took charge of it in an insolvent condition March 17, 1920, and was succeeded by Ackerman, receiver, May 14, 1920. The bank has not since been open for the transaction of a general banking business.

The Wentz company was a corporation dealing in real estate, farm loans, mortgages and insurance.

Charles W. Wentz was vice-president and managing officer of the bank. It had a president in name only. It had a cashier, but he recognized Wentz as the superior officer

and deferred to him. In some capacity Wentz had exclusive control and management of the Wentz Company. The business of both corporations was generally transacted in the same building with Wentz the controlling spirit in both enterprises. The transactions of the corporations were more or less intermingled. The bookkeepers in the bank kept the books for the Wentz Company. The two corporations occupied the same room and used the same counter, the same vault and the same safe. Each paid half the office rent. The officers of the Wentz Company were officers of the bank. There was no public sign to identify the corporate hand that transferred paper in possession of the Wentz Company or disbursed funds in the bank. The Wentz Company had kept a checking account in the bank, but it was overdrawn more than $20,000 when the crash came.

Is there error in the order requiring the receiver to transfer to claimants their purchase money notes? He takes the position that this ruling is without support in the evidence and that it is contrary to law. He argues that in all the transactions relating to the sale, to the drawing of the papers, to the collection of the purchase price, and to the handling of the funds, Charles W. Wentz and the Wentz Company were the agents of claimants and not of the bank; that in these respects Wentz did not act in the interest of the bank; that he procured the funds in controversy as agents of claimants while absent from the bank; that his knowledge was not imputable to it; that the bank or the state department of trade and commerce or the receiver became an innocent holder for value before maturity and that the purchase money notes went into the hands of the receiver by mesne assignments as assets of the bank. These propositions are skillfully argued, but they cannot be accepted as determining factors in the case.

The purchase money notes were the property of claimants. Others could hold, use or transfer them as trustees

only unless protected by the negotiable instruments law as innocent purchasers or holders for value before maturity. The notes were traced into the hands of the receiver in the following manner: When the account of the Wentz Company was heavily overdrawn and the bank itself was in danger of going to the wall March 15, 1920, Wentz took the notes to Lincoln and Omaha intending to use them for the benefit of the bank in raising money to apply on the overdraft of the Wentz Company. While he was a drunken, nervous wreck in Omaha he there entrusted the notes to his wife. Missed from his bank the state department of trade and commerce followed him and promptly found him. In Omaha the state sheriff took the papers from the wife of Wentz in his absence and gave them to the head of the state department of trade and commerce, to whom they were subsequently assigned by Wentz while in a hospital. By mesne transfers the receiver procured them. Assuming that the officers of the state department of trade and commerce did not know that the notes belonged to claimants or that Wentz held them as trustee for claimants, was the receiver an innocent holder with authority to pay the debts or overdraft of the Wentz Company with the funds of claimants? If the bank itself had previous knowledge of the facts or was chargeable with the knowledge of Wentz, the question must be answered in the negative. The answer is not found wholly in what Wentz did as agent for claimants while absent from the bank. It is important to inquire what he did as an officer of the bank after he returned with the property of claimants.

The bank's connection with the purchase money note for $8,000 did not begin with the seizure of the state officer or with Wentz's transfer to the head of the state department of trade and commerce. Wentz had previously delivered it to the bank March 4, 1920, and then directed the cashier to credit it to the bank account of the Wentz Company, the same as if it had been a check payable to the latter. The cashier, recognizing Wentz as the superior officer

and the manager of the bank, did as directed. The cashier's act was the act of Wentz. The act of Wentz in this transaction was equivalent to the bank's acceptance of the note under an agreement to credit the amount thereof to the account of the Wentz Company. The ultimate effect was to reduce the overdraft of the Wentz Company to the extent of $8,000 with the funds of claimants—a banking transaction of financial interest to the bank. In accepting for the bank the purchase money note of claimants on the condition mentioned, Wentz did not represent claimants. They had no power to select an agent to perform corporate acts like that for the bank. In this transaction, through which the bank procured the property of claimants, Wentz performed a banking function for the bank, and for that purpose he was the bank itself, the cashier deferring to his superior. Wentz sold the land for claimants, drew the papers transferring the title to their land, and without their authority or knowledge made the purchase money notes payable to himself. He knew all about the transactions. He had no authority to hold, use or transfer the negotiable paper of claimants for his own benefit or for the benefit of the Wentz Company or for the benefit of the bank. He could lawfully hold, use or transfer the notes in the capacity of trustee only. Claimants were not guilty of any dishonest, deceitful or fraudulent conduct. They confided in Wentz, the managing officer of the bank —a chartered institution under the constant supervision of the state department of trade and commerce. The experts of that department did not keep the two corporate agencies of Wentz separate and distinct in the eyes of those who dealt with the bank or of the public at large. In a situation like that his agency for claimants should not be extended beyond strict legal bounds to justify payment of the Wentz Company's debts or overdraft with the funds of claimants. It was through the banking transaction of Wentz in directing the cashier to accept the note that the bank first accepted it. This was the agency of the

bank and the agent had full knowledge of the facts. Furthermore the bank had a previous arrangement to accept through Wentz the proceeds of the sale. Through him the bank had agreed to lend Julia A. Strauss, claimant, $5,000 and Mamie E. Kingston, claimant, $3,750. Each had accepted her loan and had executed and delivered her note for the amount of it, payable to the bank, with the distinct understanding that it would be paid out of the purchase money when entrusted to Wentz for claimants by purchasers of the land. This was a legitimate banking transaction in which Wentz was the sole representative of the bank. His knowledge in respect to it and his knowledge of the rights of claimants, when he directed the bank as its officer through its cashier to accept the purchase money note for $8,000, are in law imputable to the bank. This purchase money note for $8,000 and the other one for $4,000 grew out of the same transactions and there is no lawful way for the bank to escape either the knowledge or the agency of Wentz. It follows that neither the bank nor the receiver is an innocent purchaser or an innocent holder. There is no error in the order directing the receiver to transfer these notes to claimants.

Did the trial court err in directing the receiver to cancel and return to the makers the note for $5,000 and the note for $3,750, payable to the bank and executed by claimants Julia A. Strauss and Mamie E. Kingston, respectively? It was agreed between the bank itself and the makers of the notes that the notes should be marked "Paid" and returned when Wentz received for claimants the proceeds of claimants' land. At a time when the knowledge of Wentz was imputable to the bank he procured for claimants $13,000 in cash and $12,000 in securities, both being proceeds of the sale, and deposited in the bank, in the name of the Wentz Company, the equivalent of $25,000 belonging to claimants. The bank accepted and held these proceeds while chargeable with knowledge of Wentz's trusteeship. Under such circumstances neither the bank

nor the receiver could lawfully hold, use or transfer the trust funds or trust securities of claimants to pay the debts or overdraft of the Wentz Company. As between the bank and claimants the entries on the bank books did not change the relations of the parties or the liabilities of the bank. On this phase of the case the decision is controlled by the ruling in *Kremer v. Ackerman, ante p.* 92. The order directing the receiver to mark the notes involved in this item "Paid" and turn them over to the makers must therefore be affirmed.

The remaining item to be considered is the claim for $4,250 allowed by the trial court as the balance of a deposit. This balance is explainable as follows: Out of the purchase price Wentz received for claimants $25,000 in cash and securities. The receiver is entitled to credit for the two purchase money notes, aggregating $12,000, which he is ordered to transfer to claimants. He is also entitled to credit for the two other notes, aggregating $8,750, which he is ordered to return to the makers marked "Paid." The sum of these two credits is $20,750. The difference between the latter item and the $25,000 received by Wentz for claimants is $4,250, the amount of the claim. Was it properly allowed by the trial court as a deposit? It belonged to claimants. Wentz received it as trustee for them and it was in fact deposited in the bank. Knowledge of claimants' rights and of Wentz's trusteeship was imputable to the bank. The deposit, therefore, though made in the name of the Wentz Company, inured to the benefit of the beneficiaries of the trust, the claimants, and they are entitled to protection as depositors.

AFFIRMED.

## STATE OF NEBRASKA V. AMERICAN STATE BANK. EDITH MAUDE SHEAR ET AL. APPELLEES, V. A. F. ACKERMAN, RECEIVER, APPELLANT.

FILED MARCH 28, 1922. No. 22184.

1. **Bankruptcy:** PREFERENCES. Where a creditor, to secure a debt, procures from an insolvent debtor, within four months of the filing of a petition in bankruptcy, the assignment of a secured note, without actual knowledge of the insolvency, but with notice of facts sufficient to put the creditor on an inquiry which, if pursued, would lead to such knowledge, the assignment may be declared void under the federal bankruptcy act, if the effect of the transfer is to create in favor of the creditor a preference through which he would obtain a greater percentage of his debt than other creditors of the same class.
2. ———: ———: NOTICE. "If a debtor who is insolvent pays or secures one of his creditors, such creditor is chargeable with notice of such facts as a reasonable inquiry, in view of the circumstances with respect to the debtor's insolvency which were brought home to him, might fairly be expected to disclose." *Walter v. National Fire Ins. Co.*, 101 Neb. 639.

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

*Charles E. Matson* and *Clarence G. Miles*, for appellant.

*Hainer, Craft & Edgerton, contra.*

Heard before MORRISSEY, C. J., ALDRICH and ROSE, JJ., HOBART and PAINE, District Judges.

ROSE, J.

This is a controversy between A. F. Ackerman, receiver of the American State Bank of Aurora, Nebraska, an insolvent corporation, and Edith Maude Shear, Sarah Moore, and M. F. Stanley, trustee in bankruptcy for the Wentz Company, claimants. The property involved is a secured purchase money note for $10,000 in the hands of the receiver.

Through the agency of the Wentz Company, claimant

Edith Maude Shear sold a tract of land in Hamilton county to Homer F. Reichardt for $13,333.34. The purchaser paid in cash $3,333.34 and the balance of $10,000 was paid with a note secured by a mortgage on the land sold. Charles W. Wentz, managing officer of both the bank and the Wentz Company, was named in the note as payee. Claimant Edith Maude Shear has never received all of the purchase money, nor has she obtained possession of the purchase money note or an assignment thereof. At the time of the sale her land was incumbered by a prior mortgage, and claimant Sarah Moore was then the owner of a bond for $1,000 thus secured. Wentz had released the pre-existing mortgage, including the lien of Sarah Moore, but she never received the amount due on her bond. In this condition of affairs the Wentz Company failed, and M. F. Stanley became its trustee in bankruptcy, claiming that the purchase money note for $10,000, payable on its face to Charles W. Wentz, was an asset of the bankrupt estate of the Wentz Company, and that the transfer under which the receiver holds it created an avoidable preference within the meaning of the bankruptcy act.

In a proceeding by the state of Nebraska to wind up the affairs of the insolvent American State Bank of Aurora, Nebraska, claimants, by formal pleas in equity, presented separately the following: Claim of Edith Maude Shear to be restored to her rights under the purchase money note for $10,000, payable on its face to Charles W. Wentz; claim of Sarah Moore for the establishment of a lien for $1,000 and interest on the 10,000-dollar purchase money note and mortgage in lieu of the prior lien released by Wentz; claim of the trustee in bankruptcy for the restoration of the 10,000-dollar purchase money note as an asset of the bankrupt estate of the Wentz Company.

The receiver objected to all the claims on the ground that he is an innocent holder of the 10,000-dollar purchase money note by virtue of an assignment made by Wentz, payee, to protect an overdraft of the Wentz Company in

the American State Bank.

The trial court found that the receiver was not an innocent holder of the purchase money note and that it was not an asset of the insolvent bank; that the Wentz Company had paid liens and debts for Edith Maude Shear to the amount of $6,719.13, and that there was due her from the proceeds of her land a balance of $3,614.21, and that she was entitled to a lien on the 10,000-dollar purchase money note to that extent; that the claim of Sarah Moore should be allowed; that the trustee in bankruptcy, after payment of the claims of Edith Maude Shear and Sarah Moore, was entitled to the balance of the funds arising from a sale of the purchase money note. The receiver was directed to sell it and pay the proceeds into court for disbursement according to the findings of the trial court. From this judgment the receiver has appealed.

The controlling question on appeal arises from a traversed plea by the receiver that he is an innocent holder of the note in controversy and from the evidence on that issue. This question requires a more detailed statement of the facts.

The American State Bank commenced business as a commercial enterprise March 8, 1918. An officer of the state took charge of it in an insolvent condition March 17, 1920, and was succeeded by Ackerman, receiver, May 14, 1920. The bank has not since been open for the transaction of a general banking business.

The Wentz Company was a corporation dealing in real estate, farm loans, mortgages and insurance.

Charles W. Wentz was vice-president and managing officer of the bank. It had a president in name only. It had a cashier, but he recognized Wentz as the superior officer and deferred to him. In some capacity Wentz had exclusive control and management of the Wentz Company. The business of both corporations was generally transacted in the same building with Wentz the controlling spirit in both enterprises. The transactions of the corporations

were more or less intermingled. The bookkeepers in the bank kept the books for the Wentz Company. The two corporations occupied the same room and used the same counter, the same vault and the same safe. Each paid half the office rent. The officers of the Wentz Company were officers of the bank. The Wentz Company had kept a checking account in the bank, but it was overdrawn more than $20,000 when the bank failed.

The 10,000-dollar purchase money note was traced into the hands of the receiver in the following manner: When the account of the Wentz Company was heavily overdrawn and the bank itself was in danger of going to the wall March 15, 1920, Wentz took the note to Lincoln and Omaha intending to use it for the benefit of the bank and the Wentz Company in raising money to apply on the latter's overdraft. While he was a drunken, nervous wreck in Omaha he there entrusted the note to his wife. Missed from his bank, officers of the state department of trade and commerce followed him and promptly found him. In Omaha the state sheriff took the note from the wife of Wentz in the latter's absence and gave it to the secretary of the state department of trade and commerce, to whom it was subsequently assigned by Wentz while in a hospital in Lincoln. By mesne transfers through successive representatives of the assignee, who is secretary of the state department of trade and commerce, the receiver procured the note. Assuming that the secretary and other officers of that department knew nothing about the rights or the equities of claimants or of the insolvency of the Wentz Company, when the assignment was made, is the receiver an innocent holder?

Though the secretary of the state department of trade and commerce was prompted by good motives and a sense of public duty, his view of the assignment, as presented by the receiver, cannot be adopted. The effect of the assignment was to create a voidable preference by the Wentz Company in favor of the American State Bank, within the

meaning of the federal bankruptcy act. Proper deductions from the evidence are that the Wentz Company was insolvent when Wentz made his assignment, which was within four months of the filing of the petition in bankruptcy, and that the effect of the assignment was to create in favor of the bank a preference through which it would obtain a greater percentage of its debt than other creditors of the same class. Wentz had been the managing officer of both the bank and the Wentz Company. He owned all the stock of the Wentz Company and for all practical purposes he was the company itself. He knew all about the affairs of both corporations. The assignee, acting for and in the interests of the bank, was the secretary of the banking department of the state. He had supervisory control over the bank. He knew, or was chargeable with knowledge, that the account of the Wentz Company in the bank was overdrawn more than $20,000; that Wentz, the managing officer of both corporations, had been unable to raise money to protect the bank from the Wentz Company's overdraft; that a representative of the banking department was in charge of the bank in the absence of Wentz. The assignee knew that his official position and his superior means of acquiring knowledge of the condition of both corporations gave him an advantage over other creditors of the Wentz Company. If the assignee did not know the Wentz Company was insolvent, and if, by the course pursued by him, he hoped to save the bank, he nevertheless had notice of facts sufficient to put him on an inquiry which, if pursued, would have led to the truth—the insolvency of the Wentz Company. The circumstances and conditions are such as to call for the cancelation of the assignment as a voidable preference under the federal bankruptcy act. 9 U. S. Comp. St. 1916, sec. 9644, a-b, pp. 11538, 11539; *Walter v. National Fire Ins. Co.*, 101 Neb. 639. In this view of the law there is no error in the judgment below.

AFFIRMED.

STATE OF NEBRASKA V. AMERICAN STATE BANK.
ROSE GEORGE, INTERVENER, APPELLEE, V. A. F. ACKERMAN, RECEIVER, APPELLANT.

FILED MARCH 28, 1922. NO. 22185.

**Banks and Banking:** NOTES: INNOCENT HOLDER. Where a banking corporation is chargeable with knowledge that a note, payable on its face to the individual who is its managing officer, is trust property of another person for whom such individual is trustee, neither the bank nor the secretary of the state banking department can become an innocent holder of the note by assignment of the trustee for the purpose of paying with the trust property an overdraft in the bank by another corporation of which such trustee is also manager.

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

*Charles E. Matson*, for appellant.

*Fred W. Ashton, contra.*

Heard before MORRISSEY, C. J., ALDRICH and ROSE, JJ., HOBART and PAINE, District Judges.

ROSE, J.

This is a controversy between A. F. Ackerman, receiver of the American State Bank of Aurora, Nebraska, an insolvent corporation, and Rose George, claimant.

In the hands of the receiver there are three unmatured promissory notes for $1,000 each, payable on their face to Charles W. Wentz, executed by Jesse Evison and wife, and secured by first mortgage on a section of land in Sedgwick county, Colorado. For $3,000 claimant purchased the notes and the mortgage from Wentz March 2, 1920, but she never obtained possession of them. Wentz took them and assigned and delivered them to the secretary of the state department of trade and commerce March 22, 1920, to apply on an overdraft of the Wentz Company in the bank.

In a proceeding by the state of Nebraska to wind up the affairs of the bank, claimant by formal pleas presented a claim for an order on the receiver to restore to her the notes and mortgage. The receiver pleaded that they were assets of the insolvent bank and that they were in his hands as an innocent holder. The trial court found the issues in favor of claimant and ordered the receiver to turn them over to her and to cancel the assignments under which he received and held them. From this judgment the receiver appealed.

Is the receiver an innocent holder within the meaning of the negotiable instruments law?

Claimant bought the notes and the mortgage from Charles W. Wentz in the American State Bank March 2, 1920. Her father was a depositor therein and then gave her a check on that bank for $3,000. She indorsed it and handed it to Wentz, who gave her the receipt of the Wentz Company, reciting that the check was payment for the notes and the mortgage. He said he would give them to her in a few days. She has never received them, nor has any part of her money been refunded, though the check was paid and the proceeds went into the bank to the credit of the Wentz Company.

The American State Bank commenced business as a commercial enterprise March 8, 1918. An officer of the state took charge of it in an insolvent condition March 17, 1920, and was succeeded by Ackerman, receiver, May 14, 1920. The bank has not since been open for the transaction of a general banking business.

The Wentz Company was a corporation dealing in real estate, farm loans, mortgages and insurance. Its account in the bank was overdrawn more than $20,000 when the bank failed.

Charles W. Wentz was vice-president and managing officer of the bank. It had a president in name only. It had a cashier, but he recognized Wentz as the superior officer and deferred to him. In some capacity Wentz had ex-

clusive control and management of the Wentz Company. He owned all of its stock and for practical purposes was the company itself. The business of both corporations was generally transacted in the same building with Wentz the controlling spirit in both enterprises. The transactions of the corporations were more or less intermingled. The bookkeepers in the bank kept the books for the Wentz Company. The two corporations occupied the same room and used the same counter, the same vault and the same safe. Each paid half the office rent. The officers of the Wentz Company were officers of the bank. There was no public sign to identify the corporate hand that accepted funds for the Wentz Company or manipulated the business devices used by Wentz in disbursing funds for the bank.

Claimant was not an expert in high finance. With a 3,000-dollar check which her father had given her she went into the bank to invest her money in the three notes and the mortgage for that sum. The check was payable to her. She indorsed her name on the back of it and gave it to Wentz. She did not name the bank or Wentz or the Wentz Company as indorsee. She was told by Wentz that the paper she had bought would be delivered to her in a few days. She did not separately distinguish Wentz as an individual, Wentz as the Wentz Company, and Wentz as the bank, with his corporate medium of knowledge for the purpose of getting money into the bank and with his private ignorance for the purposes of disbursement. She did, however, stand in an open bank with a charter from the state. In common with the public at large she was impressed with the high standing won by banks generally through long periods of business rectitude. She thought she was leaving her check in the bank in a form available for her purchase upon delivery of the notes and the mortgage which she had bought in the bank while dealing with Wentz, the managing officer of the bank. The appearance justified her confidence.

The notes were traced into the hands of the receiver in

the following manner: When the account of the Wentz Company was heavily overdrawn and the bank itself was in danger of going to the wall March 15, 1920, Wentz took claimant's notes to Lincoln and Omaha intending to use them for the benefit of the bank and the Wentz Company in raising money to apply on the overdraft of the latter. While he was a drunken, nervous wreck in Omaha, he there entrusted the notes to his wife. Missed from his bank the state department of trade and commerce followed him and promptly found him. In Omaha the state sheriff took the papers from the wife of Wentz in his absence and gave them to the head of the state department of trade and commerce, to whom they were assigned March 22, 1920, by Wentz, while in a hospital in Lincoln. By mesne transfers, through officers representing the state department of trade and commerce, the receiver procured them. Assuming that those officers did not know that the notes belonged to claimant or that Wentz held them as trustee for her, was the receiver an innocent holder with authority to pay the debts or overdraft of the Wentz Company with the property of claimant? If the bank itself was chargeable with previous knowledge of the facts or was chargeable with the knowledge of Wentz, the question must be answered in the negative.

The secretary of the state department of trade and commerce acted in an official capacity when he took the assignment. As an individual he had no interest in the transaction. He was prompted by a sense of public duty in the hope of saving a bank over which he had officially a supervisory control. The assignment therefore was accepted in the interest of the bank. The official representatives, through whom the notes were transferred to the receiver, acted in the same capacity as the secretary of the state department. In taking this paper at the time, under the circumstances, they were chargeable with previous knowledge imputable by law to the bank itself, while open for the transaction of banking business. If, however, an of-

ficer of the state department could by assignment acquire in the notes a right not available to the bank itself while solvent, the assignment would be a voidable preference under the federal bankruptcy act. *Shear v. Ackerman, ante, p.* 119.

From the moment Wentz appropriated the check, assuring claimant that the notes would be delivered to her in a few days, he was her trustee for the purpose of holding her property and delivering it to her. As the sole controlling officer of the bank at the time, he directed it to receive and accept as a deposit in the name of the Wentz Company the check with which the notes were bought. As such officer he knew all about the facts. The effect was to reduce the overdraft of the Wentz Company $3,000 with the money of claimant. The business was transacted in such a manner and under such circumstances that the bank had no lawful way to escape either the agency or the knowledge of Wentz. He was claimant's trustee at the time. Knowledge of that fact was imputable to the bank. It could not become an innocent purchaser or holder of claimant's notes to pay an overdraft of the Wentz Company. The officers of the state department of trade and commerce and the receiver were in no better situation. There was no innocent holder and the notes were not assets of the bank. There are other reasons for reaching the same conclusion, but they need not be discussed. Equity traced the trust property without change in form from Wentz into the hands of the receiver and will restore it to the beneficial owner, the claimant.

AFFIRMED.

## STATE OF NEBRASKA V. AMERICAN STATE BANK. A. F. ACKERMAN, RECEIVER, APPELLANT, V. JAMES R. FARNEY, INTERVENER, APPELLEE.

FILED MARCH 28, 1922. NO. 22240.

1. **Banks and Banking:** MISAPPROPRIATION OF FUNDS: IMPUTED KNOWLEDGE. Where the managing officer of a banking corporation deposits in his bank, in the name of another corporation of which he is also manager, money or checks belonging to a third person for whom such manager is agent and trustee, and receives and accepts the deposit for the bank as its sole directing authority, his knowledge of the rights of the beneficiary of the trust may be imputed to the bank.
2. ———: ———: TRUST FUNDS. Where a trustee deposits in a bank, in the name of a corporation of which he is manager, trust funds belonging to a third person, the bank at the time having knowledge of the facts, the bank may be held liable to the beneficiary of the trust as a depositor, if the trust funds were wrongfully paid out on checks of the trustee to pay an individual debt owing by him to the bank.

APPEAL from the district court for Hamilton county: EDWARD E. GOOD, JUDGE. *Affirmed.*

*Charles E. Matson*, for appellant.

*Peterson & Devoe, contra.*

Heard before MORRISSEY, C. J., ALDRICH and ROSE, JJ., HOBART and PAINE, District Judges.

ROSE, J.

This is a controversy between A. F. Ackerman, receiver of the American State Bank of Aurora, Nebraska, an insolvent corporation, and James R. Farney, claimant.

In a proceeding by the state of Nebraska to wind up the affairs of the bank, Farney filed a claim for proceeds of lands sold by him through the agency of the Wentz Company, asserting the rights of a depositor and charging that Charles W. Wentz, managing officer of both the bank and the Wentz Company, collected for him his purchase money

and fraudulently deposited it in the bank to the credit of the Wentz Company, and that the bank accepted the deposit with knowledge that it was a trust fund belonging to him and wrongfully disbursed it on checks of the Wentz Company to pay personal debts of the latter. The receiver objected to the allowance of the claim on the ground that claimant entrusted his purchase money to his own agent, the Wentz Company, a corporation that deposited it in its own name and checked it out before knowledge of claimant's equities reached the bank. Upon a full hearing the district court found the issues in favor of claimant and allowed his claim as a depositor for a balance of $38,719.35 and interest. The receiver has appealed.

Questions of fact, of agency and of imputed knowledge are presented by the appeal and require a more detailed statement of the case.

James R. Farney, claimant, owned two farms in Hamilton county and sold them through the agency of the Wentz Company. Between February 28, 1920, and March 15, 1920, Wentz received from the purchasers for claimant the proceeds of the sales and deposited them in the bank to the credit of the Wentz Company. On its checks the bank paid out the purchase money of claimant. When the bank failed the account of the Wentz Company was overdrawn more than $20,000. There was owing to claimant at the time purchase money to the extent of $38,719.35. He did not authorize the deposit in the name of the Wentz Company, nor did he direct the bank to accept it as a deposit. Neither did he instruct the bank to make disbursements on the checks of the Wentz Company. In connection with these transactions he was not guilty of fraud or deceit or wrongdoing of any kind, but his demands for the balance of the proceeds of his farms, though traced in the form of trust funds from the purchasers through Wentz and the Wentz Company into the bank, have been unavailing. Shakespeare would have pleaded the defense of the bank in this language:

"Thou can'st not say I did it; never shake
Thy gory locks at me."

The American State Bank commenced business as a commercial enterprise March 8, 1918. An officer of the state took charge of it in an insolvent condition March 17, 1920, and was succeeded by Ackerman, receiver, May 14, 1920. The bank has not since been open for the transaction of a general banking business.

The Wentz Company was a corporation dealing in real estate, farm loans, mortgages and insurance.

Charles W. Wentz was vice-president and managing officer of the bank. It had a president in name only. It had a cashier, but he recognized Wentz as the superior officer and deferred to him. In some capacity Wentz had exclusive control and management of the Wentz Company. He owned all of its stock and for practical purposes was the company itself. The business of both corporations was generally transacted in the same building with Wentz the controlling spirit in both enterprises. The transactions of the corporations were more or less intermingled. The bookkeepers in the bank kept the books for the Wentz Company. The two corporations occupied the same room and used the same counter, the same vault and the same safe. Each paid half the office rent. The officers of the Wentz Company were officers of the bank. There was no public sign to identify the corporate hand that accepted funds for the Wentz Company or manipulated the business devices used by Wentz in disbursing funds for the bank.

For the purpose of escaping liability for the disbursement of claimant's money on the checks of the Wentz Company, the receiver argues that Wentz and his company were the agents of claimant; that it was no part of the duties of Wentz, as an officer of the bank, to represent claimant in collecting and disbursing the proceeds of the sales; that, in transacting business for claimant, Wentz and the Wentz Company did not act for or in the interests of the bank; that Wentz was not the sole representative of

the bank in the transactions resulting in the deposit to the credit of the Wentz Company on the books of the bank; that Wentz, as manager of the Wentz Company, received and deposited the funds as agent of claimant; that the bank received and paid out the funds in good faith without actual or imputed knowledge of claimant's equities. In this connection it is insisted that the cashier of the bank, without knowledge of the facts, made deposit slips directing credit in favor of the Wentz Company on the books of the bank for the funds of claimant, and that other representatives of the bank also took part in the transactions. On evidence of this nature the finding that Wentz was the sole representative of the bank is challenged as being without support in the evidence and contrary to law. The position of the receiver is untenable, when the proper deductions are drawn from the undisputed evidence. The Wentz Company was the agent of claimant in making the sales. Wentz drew the contracts of sale and the deeds transferring title. He collected the purchase price for claimant. He knew all about the facts. When he deposited the purchase money of claimant in the bank to the credit of the Wentz Company the funds became trust funds and Wentz and the Wentz Company became claimant's trustees. Thereafter the Wentz Company could lawfully use or check out the funds of claimant as trustee only. The entries on the books of the bank did not change the relation of Wentz or his company to these funds or to claimant. The bank itself, if chargeable with the knowledge of Wentz, could not lawfully use the trust funds for its own benefit or to pay the private debts of Wentz or of the Wentz Company. Accepting a deposit is banking business and is a matter of interest to the bank. The effect of depositing claimant's money to the credit of the Wentz Company was to reduce the amount of its overdraft—a banking transaction of financial interest to the bank. The test of the bank's knowledge is not what Wentz, its vice-president and manager, did as agent for claimant, but what he did with claim-

ant's money while performing banking functions as the bank's officer.

Wentz was the dominant force in the bank. When he spoke his utterance was the law of the bank. When the cashier made a deposit slip, effective for the purpose of crediting claimant's money on the books of the bank to the account of the Wentz Company, the cashier's act was the act of Wentz. If the cashier did not get a peremptory order to make the deposit slip when he received from Wentz the checks for claimant's purchase money, he acted pursuant to a business custom of Wentz which required funds belonging to clients of the Wentz Company to be deposited to its credit in the bank. In either case the will of Wentz was supreme and the act of the cashier was the mere impression of Wentz's power. The bank received and accepted these funds. This was an act of the banking corporation and could be performed alone by a representative of the bank. Wentz offered the purchase money for deposit to the credit of the Wentz Company and at the same time accepted it for the bank through its cashier. Claimant had no authority to select for the bank an agent to receive and accept a deposit from himself or from any one else. The receiving and the accepting of claimant's deposit, therefore, were not independent acts of the cashier, but were banking acts of Wentz as vice-president and manager, operating through the cashier in this respect as a mere instrument of the former's will. Notice to the banking corporation, through its cashier, that Wentz deposited to the credit of the Wentz Company and accepted for the bank trust funds of the former's clients was unnecessary, because Wentz, the managing officer, was the bank itself for practical business purposes and he knew all about the facts. The finding that Wentz was the sole representative of the bank is the only proper conclusion from the evidence on this issue.

The receiver also contends that the bank and Farney never entered into the relation of banker and depositor.

Wentz voluntarily undertook to manage for claimant his purchase money. He was himself the Wentz Company. As trustee for claimant Wentz and his company bore to the bank the relation of depositor. The trust fund went into the bank as a deposit subject to check. The bank was chargeable with knowledge of these facts. Claimant was therefore entitled to protection as a depositor. *Strauss v. Ackerman, ante, p.* 111.

There is no error in the record, and the judgment is

AFFIRMED.

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STATE, EX REL. FRANK E. BALDWIN, APPELLANT, V. JAMES DORSEY ET AL., APPELLEES.

FILED MARCH 28, 1922. No. 21910.

1. **Schools and School Districts:** HIGH SCHOOLS: NONRESIDENT PUPIL: TUITION. Where a high school district receives a pupil from a school district which maintains a nine-months' school, but maintains no high school grades, the receiving district, under chapter 153, Laws 1919, is entitled to receive $1.50 from the sending district for each week's attendance by such nonresident pupil.
2. ———: ———: ———: ———. Where a high school district receives a pupil from a school district, which is authorized under the law to send a pupil to such high school district, and the sending district, pursuant to chapter 153, Laws 1919, has become liable to the receiving district for the tuition of such pupil, neither the parent nor guardian of such pupil can be compelled to pay the receiving district for the school privileges granted to such pupil.
3. ———: SCHOOL LAWS: CONSTRUCTION. The public school laws are to be liberally construed so that all persons of school age, without distinction and without discrimination, may enjoy public school privileges.

APPEAL from the district court for Thayer county: RALPH D. BROWN, JUDGE. *Reversed, and writ allowed.*

*Charles H. Sloan, Frank W. Sloan* and *Thomas J. Keenan,* for appellant.

*J. T. McCuistion* and *J. P. Baldwin, contra.*

Heard before LETTON, DEAN and DAY, JJ., BEGLEY and HOSTETLER, District Judges.

DEAN, J.

This is a suit in mandamus brought by Frank E. Baldwin, relator. The respondents are the superintendent and the members of the board of education of the school district of Hebron in Thayer county. The Hebron school district maintains a 12-grade high school. Relator prayed for a peremptory writ commanding the respondents forthwith to permit his minor son, Dan Baldwin, to attend the Hebron high school without any charge except the statutory $1.50 a week which the high school district was then entitled to receive from school district No. 73, wherein relator maintains a legal residence and wherein a levy was made to meet the tuition fee. District No. 73 maintains a nine-months' school, but it has no high school grades. On the final hearing the temporary injunction theretofore allowed was dissolved, the suit was dismissed and relator's motion for a new trial was overruled. Thereupon he entered into an appeal undertaking, the judgment was superseded and relator has brought the case here for review.

The county superintendent of Thayer county, pursuant to chapter 152, Laws 1919, issued a certificate stating that relator's son was entitled to free high school tuition. Upon presenting the certificate to respondents, Dan Baldwin was admitted to the school as a pupil and for a time he enjoyed the school privileges there afforded. Afterwards an additional sum of $1.50 a week, over the amount allowed by statute, was demanded of relator by respondents. Upon relator's refusal to comply with the demand his son was denied further high school privileges and this suit followed.

The suit comes under the provisions of sections 6813, 6814, Rev. St. 1913, as respectively amended by chapters 152, 153, Laws 1919. Chapter 152, Laws 1919, *inter alia*, provides: "Any public school district unable to furnish

accommodations to nonresident pupils, without constructting or renting additional buildings, hiring extra teachers, or for other reasonable cause, may refuse admission to any or all such nonresident pupils." Chapter 153, Laws 1919, *inter alia,* provides: "Every public school district granting free public high school education to nonresident pupils under the provisions of this act shall receive the sum of one dollar and fifty cents for each week's attendance by each nonresident pupil from the public school district in which the parent or guardian of such nonresident pupil maintains his legal residence, at the time the application is made, and such public school district is hereby made liable for the payment of such tuition."

The foregoing sections of the high school law are so clear that they are not susceptible of strained construction. Chapter 152 plainly provides that, if certain conditions obtain within the district (describing them), such school district may refuse admission to any or all nonresident pupils. Chapter 153 just as plainly provides that, if free public high school education is granted to nonresident pupils, the high school district shall receive for each pupil $1.50 a week to be paid by the school district of the parent's or guardian's legal residence.

From time to time the legislature, evidently to meet changed conditions, has changed the tuition charge, and always on a rising scale, which may be made by the receiving district against the sending district. In 1907 the charge was 75 cents a week. Laws 1907, ch. 121. In 1915 it was raised to $1 a week. Laws 1915, ch. 119. Subsequently it was raised to $1.50 a week. Laws 1919, ch. 153. In 1921 the tuition fee was again raised to $3 a week. Laws 1921, ch. 50. The latter act, however, has no application here because it did not become effective until after this suit was commenced.

Respondents have not pointed out any statute, applicable to the facts herein, which provides that high school districts may charge and receive more than the amount

fixed by the legislature, and we know of none. In *State v. School District,* 101 Neb. 263, there is an observation which is applicable to the present case. It is there said: "The school district is abundantly fortified against imposition by reason of the statutory right that is given to it to deny admittance when its school accommodations and facilities are insufficient to give proper care and attention to its own resident pupils as well as to those seeking admittance from another school district."

A review of the legislation of this state in respect of the public school system shows that the legislature jealously guards its supervision to the end that the constitutional provision for free instruction in the public schools shall in all respects be fulfilled. Const. art. VIII, sec. 6. With this purpose in mind the legislature has prescribed a course of study for the first eight grades, and for the high school grades it has provided that a high school manual shall be issued jointly by the University of Nebraska and the state superintendent. Laws 1919, ch. 152.

In the case before us the evidence of some of the teachers discloses that the high school course at the Hebron school included several subjects which were not embraced in nor required by the high school manual, and hence it was not required that such subjects be taught in the high school in order to qualify it to accept pupils and to receive the statutory tuition fees from the school districts from which they were sent. It follows that a high school district that receives nonresident pupils from another school district, and which adds subjects or courses of study which are not required by the high school manual, may not for that reason require the sending school district to pay tuition fees for its high school privileges in excess of the tuition fee fixed by the legislature. Neither the parent nor the guardian of a nonresident pupil, under the facts in the present case, can be required to pay a tuition fee to a receiving school district.

The decisions of this court uniformly disclose that the

school laws have been liberally construed so that all persons of school age without distinction and without discrimination may enjoy public school privileges. *Martins v. School District,* 101 Neb. 258; *State v. School District,* 101 Neb. 263; *School District v. Wilson,* 101 Neb. 683; *Meyer v. State,* 107 Neb. 657. We are not in agreement with respondents' contention that the amendments of 1919 in question here are unconstitutional. *Wilkinson v. Lord,* 85 Neb. 136; *State v. School District,* 101 Neb. 263; *School District v. Wilson,* 101 Neb. 683. The holding is that, under the facts herein, and the school law, as construed in the former decisions of this court, relator's son is entitled to attend the Hebron high school and to enjoy its privileges in all respects the same as the children of parents who are lawful residents in the district.

The judgment of the district court must be, and it hereby is, reversed and the relief prayed for by relator is allowed.

REVERSED, AND WRIT ALLOWED.

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STATE, EX REL. ABEL V. SHOTWELL, APPELLEE, V. E. M. LEFLANG ET AL., APPELLANTS.

FILED MARCH 28, 1922. No. 21946.

1. **Nuisance:** DISORDERLY HOUSE: EVIDENCE. In a prosecution brought under chapter 63, Laws 1911, being sections 8775-8784, Rev. St. 1913, for keeping a place for prostitution, evidence of the general reputation of the place and of the persons frequenting it, together with other pertinent facts and circumstances relevant to the issue, are sufficient to warrant conviction. Particular acts of prostitution need not be shown by the state. *Drake v. State,* 14 Neb. 535.

2. **Appeal in Equity:** TRIAL DE NOVO. "Upon appeal in actions in equity, this court is required by the statute to try the issues *de novo,* without reference to findings of the trial court; but, when the testimony of witnesses orally examined before the court upon the vital issues in the case is conflicting, so that it would be impossible that both versions of the transaction can be true, this court will consider the fact that the trial court observed the wit-

nesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." *Shafer v. Beatrice State Bank*, 99 Neb. 317.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

*Baker & Ready* and *H. Silverman*, for appellants.

*Abel V. Shotwell* and *Raymond T. Coffey, contra.*

Heard before LETTON, DEAN and DAY, JJ., CLEMENTS (E. J.) and WELCH, District Judges.

DEAN, J.

This is an injunction suit brought in the name of the state by the county attorney for Douglas county to abate a nuisance under chapter 63, Laws 1911, being sections 8775-8784, Rev. St. 1913, and known as the Albert law. The petition alleged generally that defendants were the owner and lessee, respectively, of the Havens hotel, having 80 rooms, and that the premises were occupied and used by "defendant Izzy Fiedler for the purpose of lewdness, assignation and prostitution." The prayer of the petition in effect is that defendants be perpetually enjoined from leasing or using the property for the unlawful purposes charged, and that the nuisance be abated and the contents of the building sold pursuant to the act in question. Defendants' answer is a general denial of the allegations of the petition except as to the fact of occupancy of the building by defendant Fiedler as a tenant.

The court found that defendants were the owner and lessee respectively of the hotel building and premises; that the building was occupied and used by Fiedler, the tenant, for the purpose of lewdness, assignation and prostitution, and that the premises constituted a nuisance. It was decreed that defendant Fiedler be enjoined from using the building or premises or permitting the use thereof for the unlawful purposes complained of, and that the fixtures, furniture and other movable property be removed there-

from and that the building be closed and so remain until the further order of the court. Upon defendants' request the court ordered that all of the decree be superseded, except that portion which prohibits the use of the building or permitting its use for the purpose of lewdness, assignation or prostitution, upon the giving of a $2,000 bond. The court's order was complied with and an appeal has been prosecuted to this court.

This suit was begun November 1, 1920. In January and February of that year the hotel was raided by a company of the police force known as the moral squad. In September, 1920, the place was raided at least twice by the same officers, the last raid being made the 22d of that month. Six or eight women were then apprehended, one of them being a notorious character of long standing who was arrested in a raid of the same premises February 15, 1920.

There is evidence tending to prove that the officers raided the house several times within a period of about a year before the trial, and that on one occasion they arrested four or five women and at another time eight were arrested. Some of the persons so taken, but not all, were convicted and fined in police court. A captain of police testified that, within the year preceding, he arrested a woman who stayed at the hotel who was soliciting men on the sidewalk as they passed the building, and that she was convicted in police court. Another, who was painted and powdered and gowned in silk, and who protested that she was a hotel chambermaid, was arrested, convicted and fined. An officer testified that in December, 1920, four women were arrested at the Havens hotel and all were convicted and fines imposed. There was much more evidence of the same sort going to show that the premises had a bad reputation, but we will not discuss the details, which are set forth at length in a fairly voluminous record.

Many witnesses were examined at considerable length on the part of defendant. Some men and some women testified to having lived at the hotel for some time. They

said they never saw a lewd woman there, nor did they observe any improper conduct by any person about the place, and that they did not even suspect the house of having a bad reputation, though some knew that its former reputation was bad.

In the oral argument complaint was made that no record of the conviction of the women was introduced in evidence. It was not incumbent on the state to do so in view of section 8777, Rev. St. 1913, which expressly provides that evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of the nuisance complained of. In *Drake v. State,* 14 Neb. 535, it was held that general reputation of the house and of the persons frequenting it, together with other pertinent facts and circumstances relevant to the issue, are sufficient to warrant conviction, and that it is not necessary to show particular acts of prostitution. *State v. Ballew,* 26 S. Dak. 494; *State v. Flynn,* 175 Ia. 604; *Gregg v. People,* 65 Colo. 390; *Botts v. United States,* 155 Fed. 50. We are convinced from the evidence that the immoral practices charged as having been committed on the premises were so committed with defendants' knowledge.

This being an action in equity, we have tried the case *de novo* as required by law and, notwithstanding the conflict in the evidence, we are convinced that, in view of the record, our conclusion is supported by the great weight of the evidence. However, in reaching the conclusion herein announced we have considered the fact that, as pointed out in *Shafer v. Beatrice State Bank,* 99 Neb. 317, the trial court had an opportunity to observe the witnesses and their demeanor, an opportunity which is, of course, denied a court of review.

We do not find reversible error. The judgment of the district court is

AFFIRMED.

HENRY DUHRKOPF, APPELLANT, V. GEORGE BENNETT ET AL., APPELLEES.

FILED MARCH 28, 1922. No. 22340.

1. **Master and Servant:** ACTION FOR COMPENSATION: BAR. Evidence examined, and *held* that plaintiff is barred from maintaining his suit under the provisions of the workmen's compensation act, where such suit is commenced more than one year after the injuries have been sustained.
2. **Statutes:** STATUTORY RIGHTS: COMPLIANCE WITH STATUTE. Where a right has been created by statute which did not exist at the common law, the legislature may impose restrictions thereon, and the conditions so imposed qualify and are an integral part of the act and must be fully complied with in the manner therein prescribed.
3. **Master and Servant:** COMPENSATION: SETTLEMENT AS BAR. Where an employee has sustained personal injuries and has entered into a settlement agreement with his employer on account thereof and has accepted the agreed amount in full settlement, such employee cannot, in the absence of mistake, deceit or fraud, thereafter maintain an action under the workmen's compensation act.

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

*R. J. Greene,* for appellant.

*Frampton & Polk* and *Peterson & Devoe, contra.*

Heard before LETTON, DEAN and DAY, JJ., BLACKLEDGE and TEWELL, District Judges.

DEAN, J.

Plaintiff applied to the compensation commissioner to recover compensation for personal injuries resulting from an accident alleged to have arisen out of and in the course of his employment while he was in the employ of George Bennett and Charles Warner, defendants. Upon a final hearing the commissioner dismissed the case. His appeal to the district court was likewise dismissed, and he has brought the case here for review.

The chronology respecting the material facts leading up to the commencement of this suit, and the facts involved herein, so far as material here, follow: January 3, 1918, the accident happened. December 18, 1918, defendant Bennett settled with plaintiff for $2,000, the settlement agreement providing generally that the sum named therein "is in full and complete satisfaction of all claims of every description and kind on account of injuries sustained as above stated." February 21, 1921, plaintiff began his suit before the compensation commissioner. July 9, 1921, the suit was dismissed by that official, on the ground that it was barred by the provisions of the workmen's compensation act, namely, section 3679, Rev. St. 1913, as amended by section 14, ch. 85, Laws 1917. Within the statutory time plaintiff appealed to the district court, and his appeal, all as hereinbefore noted, was there dismissed.

So far as applicable here the section of the act in question provides: "In case of personal injury, all claim for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 3680 hereof."

Defendant Bennett contends that plaintiff, by accepting the $2,000, "elected to make a common-law settlement and elected not to avail himself of the provisions of part II of the compensation act." He contends that, in view of the settlement, plaintiff is estopped from maintaining this suit. Counsel further pleaded that, because Bennett did not have his liability insured under the "provisions of section 3687, Rev. St. 1913," he is therefore deemed to have elected not to come under part II of the act. Section 3687 was amended in 1917 (Laws 1917, ch. 85, sec. 21) and, in addition to the provision for the insurance of liability, the act as amended provides that an employer has the option to insure or to "furnish to the compensation commissioner satisfactory proof of his financial ability to pay direct the

compensation in the amount and manner and when due as provided for in this act." In view of the facts before us and of our conclusion herein, the amendment of section 3687 has no bearing upon the controversy between the parties.

It appears that under the express provisions of the workmen's compensation act, hereinbefore cited, plaintiff's suit is barred. It follows that neither the compensation commissioner nor the district court erred in dismissing the suit. The argument in the reported cases which supports our conclusion is based on the theory that, the remedy provided by the act being complete in itself and being a departure from the common law remedy, the period of limitation for beginning suit which is named in the act controls, to the exclusion of the general act of limitations with respect to the time within which actions generally may be commenced. In *Swaney v. County of Gage*, 64 Neb. 627, it was held that an action to recover, under a special statute which was held to be complete in itself, for damages occasioned by a defective bridge could not be maintained unless it was commenced within 30 days after the injuries complained of, that being the limitation provided by the act.

Massachusetts has a provision in its employers' liability act which is similar to ours. It was there held that an action thereunder must be brought within a year after the accident, and that the act is not a mere statute of limitation but states a condition precedent to a right of action. *McRae v. New York, N. H. & H. R. Co.*, 199 Mass. 418. To substantially the same effect are the following cases: *Morrison v. Baltimore & O. R. Co.*, 40 App. D. C. 391; *Partee v. St. Louis & S. F. R. Co.*, 204 Fed. 970. In *Bement v. Grand R. & I. R. Co.*, 194 Mich. 64, it was held that to maintain a suit under the federal employers' liability act it must be commenced within the time therein limited.

From the decisions and law writers we gather that where a right has been created by statute which did not

exist at the common law the legislature may impose restrictions thereon, and the conditions so imposed qualify and are an integral part of the act and, must be fully complied with in the manner therein prescribed. In 25 Cyc. 1021, on this subject, it is said generally that the time fixed in the act for beginning suit becomes a limitation or condition on the right created by the legislature and is controlling.

Plaintiff argues that the "lump sum" settlement between plaintiff and Bennett is of no effect because it was not approved by the compensation commissioner nor by the district court. The argument on this point is not tenable because plaintiff did not begin his suit before the compensation commissioner for more than three years after he sustained the personal injuries of which he complains, and which was more than two years after the settlement. Plaintiff also introduced in evidence a waiver of the statute of limitations by defendant Bennett dated June 18, 1918, upon which he relies. The instrument in question does not name any consideration. However, it provides generally by its terms that Bennett should waive the operation of the statute "for a period of at least four years from the date of the injury." In any event the settlement by plaintiff under date of December 18, 1918, which is also in evidence, effectually disposes of the waiver.

In passing it may be noted that plaintiff began an action against defendant Warner on account of the personal injuries sustained by him, but he was not successful in his suit. It is not disclosed that an appeal was prosecuted from the adverse judgment which was rendered against him.

Other questions have been raised in the respective briefs which we do not find it necessary to discuss. The judgment of the district court is right, and it is

AFFIRMED.

FRED MUHLBACH, APPELLEE, V. ILLINOIS BANKERS LIFE ASSOCIATION, APPELLANT.

FILED MARCH 28, 1922. No. 21960.

1. **Insurance:** APPLICATION: EXPRESSION OF OPINION. The question in the applicaton, "Have you, either of your grandparents, parents, uncles, aunts, brothers or sisters, wife or children, been afflicted with consumption, insanity or mental derangement, scrofula, or any hereditary disease?" calls for an expression of opinion, judgment and belief, and not for a statement of fact based on personal knowledge.
2. ———: ———: MISREPRESENTATIONS. An untrue representation made by the insured in his application, where the question eliciting such statement calls for matters of opinion, judgment, or belief, will not avoid a policy issued thereon, unless it is shown that the misrepresentation was knowingly made with intent to deceive.
3. ———: ———: ———: QUESTION FOR JURY. Evidence examined, and *held* that whether the answer to the question in the application was knowingly made with the intention to deceive was a question for the jury to determine.
4. ———: ———: ———: DEFENSE. Section 3187, Rev. St. 1913, does not prevent an insurance company from defending, in an action brought to recover upon a policy, on the ground that fraudulent representations were made by the insured in his application for insurance, where such representations related to matters material to the risk, and where if a true answer had been made no contract of insurance would have been entered into. In such case, the right of such defense is not defeated by a showing that the false statement did not contribute to the loss.

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

*F. B. Baylor* and *A. Moore Berry,* for appellant.

*Thomas Lynch, contra.*

Heard before LETTON, DEAN and DAY, JJ., BLACKLEDGE and TEWELL, District Judges.

DAY, J.

Action to recover on a life insurance policy, brought by

the beneficiary. Judgment for plaintiff. Defendant appeals.

On November 1, 1918, Nick Muhlbach, a young man not quite 21 years of age, made application to defendant company for a life insurance policy upon his life in the sum of $2,000, requesting therein that his father, the plaintiff, be named as beneficiary. The policy was issued November 19, 1918, and a few days later delivered to the insured. Early on the morning of January 21, 1919, the lifeless body of the insured, clad only in a union suit, was found lying at the base of a windmill about 200 yards distant from the house.

Two defenses were interposed: First, that the policy was obtained by fraud, in that the insured in answer to a question in his application stated that neither of his parents nor his sister had ever been afflicted with insanity, which answer was false and untrue, and known by the insured to be false and untrue at the time it was made; that the information sought to be elicited by the question was material to the risk, and that in issuing the policy the defendant company relied upon the answer given as being true. The second defense alleged that the insured came to his death by suicide, and under the terms of the policy under this contingency no liability existed. The circumstances leading up to his death were such that it was proper to leave to the determination of the jury the question whether he came to his death by suicide. The trial court submitted the issue of suicide to the jury in the form of a question to be answered yes or no, and reserved the issue of fraud for its own determination. The jury answered the question submitted to it in the negative. The court thereupon resolved the other issue against the defendant, and entered judgment on the verdict in favor of the plaintiff for the amount of the policy.

The principal contention of the defendant arises over the disposition of the issue of fraud. It is now urged that the court should have directed a verdict for the defendant

upon the evidence in support of that issue, and, failing to do this, the court should have at least submitted that issue to the jury. The argument in support of the defendant's contention discusses the question from various angles, which will appear in the course of the opinion. The application signed by the insured contained a stipulation, in substance, that the answers made by him in the application, as well as in the medical examination, were warranted to be full, complete and true, and that any untrue answers as to his personal or family history would forfeit any policy which might be issued thereon. The untrue answer upon which the defendant relies to defeat the policy is found in the medical examination, the question and answer being as follows: "Q. Have you, either of your grandparents, parents, uncles, aunts, brothers or sisters, wife or children, been afflicted with consumption, insanity or mental derangement, scrofula, or any hereditary disease? A. No." The testimony of the examining physician shows that he read this question to the insured and wrote down the answer as given by him. That the information sought to be elicited by the question was material to the risk is shown by undisputed testimony. The officers of the defendant company testified that under no circumstances would the company issue a policy upon the life of a person where his family history shows that both parents have been afflicted with insanity. It was shown beyond doubt that the father, mother, and sister of the insured had been afflicted with insanity. Although it is suggested in the argument that the answer to the question was a warranty as distinguished from a representation, we do not understand the defendant to place much reliance upon that position. This court has on several occasions announced the rule to be applied in determining whether answers in an application for life insurance are warranties or representations. In *Royal Neighbors of America v. Wallace,* 64 Neb. 330, in referring to certain questions in the applications, the court said:

"Many of them are of such a character that no person, however honest his intentions, could answer them with any degree of assurance that each of his answers was literally true. To hold that such questions and answers amount to warranties would be to impute bad faith to the association in pretending to enter into a contract of insurance with the insured which could become binding upon it by the merest chance."

In determining whether an answer to a question in an application for life insurance is to be regarded as a warranty or a representation, the court will take into consideration the situation of the parties, the subject-matter, the language employed, and will construe a statement made as a warranty only when it clearly appears that such was the intention of the contracting parties. This court has had occasion to consider cases wherein the questions and answers were analogous to the one now before us, and has held that they were representations, and not warranties. *Ætna Ins. Co. v. Simmons,* 49 Neb. 811; *Kettenbach v. Omaha Life Ass'n,* 49 Neb. 842; *Goff v. Supreme Lodge Royal Achates,* 90 Neb. 578. Under the principle announced in the foregoing cases, we think it must be held, regardless of the stipulation signed by the insured, that the answer made by him was a representation.

The first argument advanced by the defendant in support of its position that the court should have directed a verdict in its favor is based upon the theory that where an untrue answer is made in an application for insurance relating to a matter material to the risk, and which is relied upon by the insurer in issuing the policy, such misrepresentation avoids the policy, regardless of the good or bad faith of the applicant in making the answer. A number of authorities are cited supporting this view from other jurisdictions, but this court has consistently held to a line of demarcation between classes of representations in applications for insurance. Where the question in the application calls for an answer peculiarly within the knowledge

of the applicant, an untrue answer relating to a matter material to the risk and relied upon by the insurer will avoid the policy. In *Seal v. Farmers & Merchants Ins. Co.*, 59 Neb. 253, the application was for fire insurance, in which the insured falsely stated there were no liens upon the premises, and it was held the false statement avoided the policy. In *Swanback v. Sovereign Camp, W. O. W.*, 103 Neb. 34, the insured falsely stated that he had never been rejected by any other insurance company in applying for life insurance, and it was held that the false statement avoided the policy. It will be observed that the questions asked in these cases called for information peculiarly within the personal knowledge of the applicant. But where the question propounded to the applicant from its very nature calls for matters of judgment, opinion, or belief, the same rule does not and should not obtain. In such case an untrue statement made by the insured in his application will not avoid the policy, unless it is shown that the misrepresentations were knowingly made with intent to deceive the company. *Ætna Life Ins. Co. v. Rehlaender*, 68 Neb. 284; *Fox v. Scandinavian Mutual Aid Ass'n*, 104 Neb. 725. In *Royal Neighbors of America v. Wallace*, 73 Neb. 409, it is held:

"An incorrect or untrue answer in an application for life insurance in reference to matters of opinion or judgment will not avoid the policy if made in good faith and without intention to deceive."

"An untrue answer in an application for life insurance in regard to matters which are shown to be within the knowledge of the applicant and are material to the risk will avoid the policy."

In the foregoing cases the court was considering questions and answers which were similar to the one in the case at bar. Upon the authority of those cases we think it must be held that the answer to the question now under consideration was a mere expression of belief and so understood by the parties.

The defendant further urges that upon the entire testimony it has shown that the insured had knowledge that the answer he made in his application was untrue, and, therefore, the court should have directed a verdict in its favor, or at least submitted to the jury the question of whether the insured knew of the existence of insanity in his family. This involves an examination of the evidence.

The record shows without doubt that both of insured's parents were adjudged insane, and, strange as it may seem, both of them were committed to the hospital for the insane in this state on April 3, 1902. The mother never recovered, and died an inmate of that institution in February, 1906, and was buried in the hospital cemetery. The father after the expiration of ten weeks, was paroled and permitted to return to his home, being at that time in good mental and physical condition, and some months later he was discharged. The record further shows that Maymie, a sister of the insured, became insane in August, 1918, and on January 17, 1919, was committed to the hospital for the insane in this state. It appears that the three persons above named were committed to the hospital from Webster county, and that at the time the father and mother were adjudged insane the insured was four years old. At that time the sister Maymie was taken into the family of Dr. Wegmann, who resided in Webster county, where she remained until August, 1918. The insured and an older brother were taken into another family until the return of the father. When the father was paroled he returned to Webster county, and soon thereafter took his two sons to Hooker county, some 200 miles distant, where he established a new home. The insured continued to reside there until his death. It was shown by the older brother that the question of insanity of the parents was never mentioned in the home, and that none of the members of the family attended the mother's funeral. Dr. Wegmann testified that he first observed symptoms of mental failing in Maymie in August, 1918; that she was very nervous,

and appeared to be greatly exercised for fear her brothers might be killed in the war; that he thereupon wrote to the older brother calling his attention to her condition, and that he came at once to Webster county to talk the matter over; that it was then decided that it would be best that she be taken to Bailey's Sanitarium for treatment, and that the older brother and the insured each sent a check for $50 to aid in paying the expenses. The older brother testified that he told the insured that Dr. Wegmann had said that Maymie was very nervous, and that she ought to be taken to a sanitarium for rest. He also testified that he did not understand himself that the sanitarium was an institution for the treatment of mental diseases.

Under all of the facts and circumstances presented by the record, the court would not have been warranted in directing a verdict for the defendant; but we are inclined to the view that the court should have submitted to the jury the question as to whether the insured knew that his parents and sister had been afflicted with insanity.

The defendant also urges that the judgment contains no finding with respect to the issue of suicide or the issue of fraud, and for that reason the judgment must be reversed. As before intimated the question of suicide was submitted to the jury in the form of a question only, to be answered yes or no, and there was no general finding by the jury or in the judgment in favor of the plaintiff upon that issue, nor upon the issue of fraud. Of course, a judgment must be based upon findings or a verdict of a jury. The omission of findings was clearly an oversight. Were this the only question in the case, we think it might be corrected without a retrial. As it is not likely to occur again, it would seem that no further discussion is necessary.

The plaintiff seeks to justify the action of the trial court by applying the provisions of section 3187, Rev. St. 1913, to the facts of this case. It is urged that the untrue statements in the application did not contribute to the loss, and that, therefore, under the provisions of the statute above

referred to, the court was warranted in resolving the issue of fraud in favor of the plaintiff. We think the plaintiff's counsel have taken too narrow a view of this provision of the statute. This section reads as follows:

"No oral or written misrepresentation or warranty in the negotiation for a contract or policy of insurance by the insured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching unless such misrepresentation or warranty deceived the company to its injury. The breach of a warranty or condition in any policy of insurance sall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding."

It will be observed that this section of the statute is divided into two clauses. The first relates to matters of statements in the negotiations for the insurance, and it is declared that misrepresentations in procuring the insurance cannot be availed of as a defense, unless such misrepresentations deceived the company to its injury. The second clause of the section relates to breaches of conditions in the policy after it becomes effective, and it is declared that a breach of such conditions shall not avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss. It seems plain that the question now before us arises under the first clause of the section above quoted. The statute was never intended to deprive an insurance company of the defense of fraud in the negotiations for the contract of insurance. On the contrary, by its very terms it is said that the misrepresentations shall not avoid the policy unless the misrepresentations deceived the company to its injury. If, through the untrue statement of the insured, the defendant was induced to issue the policy, and thus become obligated under its contract, when it would not have done so had a truthful answer been made, it would seem clear that the

defendant was deceived to its injury, and the statute above quoted would not apply.

From what has been said, it follows that the judgment should be reversed and the cause remanded for further proceedings.

REVERSED.

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LINCOLN TRACTION COMPANY, APPELLEE, V. OMAHA, LINCOLN & BEATRICE RAILWAY COMPANY, APPELLANT.

FILED MARCH 29, 1922. No. 21942.

1. **Injunction**: STREET RAILWAYS: USE OF STREETS. It is not necessary, in order that a street railway company question the authority of another street railway company to construct tracks upon the streets of a city, so as to handle business which the first company is lawfully carrying on, that the first company should have an exclusive franchise, but, where it has a lawful right to carry on a street railway business, its right is exclusive as against any person or company which attempts to operate in competition with it upon streets where the second company has no legal authority to go.

2. ———: ———: ———: GRANT OF POWERS: IRREGULARITIES. A right accruing to a street railway company, by virtue of its construction and operation of street railway lines, under an irregular grant of power from the city, and which grant was given by the approval of a vote of the majority of the electors of the city, is a property right which cannot unlawfully be interfered with, and such company is entitled to protection against unlawful encroachment upon its business by another company, the same as if the franchise grant to it had been regular.

3. **Street Railways**: GRANT OF POWERS: CONSTRUCTION. The grant of powers under a franchise to a street railway company is to be construed most strictly against the company, and, where the grant to go upon particular streets is not expressly made, or does not follow by necessary implication from the grants which are made, or where there is any doubt about the matter, the holding will be against the grant.

4. ———: USE OF STREETS: JOINT USE OF TRACKS. A local street railway company, with its tracks upon the city's streets, does not have the exclusive right to the use of those streets, and, though its trackage system and appurtenances are private property, it

may, by legislative authority, be compelled to permit another company, where proper conditions are imposed and where compensation is provided, to use a portion of its tracks, if the public interest will be promoted thereby, and if the rendition of that use does not result in such detriment or prejudice to the company affected as to make the regulation unreasonable.

5. ———: ———: POWERS OF CITY COUNCIL. The statute (Laws 1917, ch. 216, sec. 9), providing that the city council may require a local street railway company to permit an interurban company to use its tracks, so that the interurban company may enter the city and have terminal facilities therein, is not broad enough in scope to authorize the city council to grant to an interurban company the right to use other tracks of the street railway company for the purpose of extending the interurban's local street railway business within the city and of diverting to its own lines street railway business which would otherwise have gone to the local company.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

*D. J. Flaherty* and *T. S. Allen,* for appellant.

*Field, Ricketts & Ricketts, Hall, Baird & Williams* and *E. J. Hainer, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., DICKSON and STAUFFER, District Judges.

FLANSBURG, J.

This was an action brought by the Lincoln Traction Company, plaintiff, against the Omaha, Lincoln & Beatrice Railway Company, defendant, to enjoin the defendant from building some 600 feet of street railway track in the streets of the city of Lincoln, and to enjoin the defendant from using, for the purposes of its own railway business, certain street railway tracks belonging to the plaintiff. The injunction was allowed and defendant appeals.

The Lincoln Traction Company is a Nebraska corporation and owns and operates a system of street railway in the city of Lincoln.

The Omaha, Lincoln & Beatrice Railway Company is a corporation, operating an interurban railway. Its tracks

enter the city from the east, and then pass within some 600 feet of the entrance to the farm campus of the Nebraska University, and proceed along the streets of the city in a westerly direction until Fourteenth street is reached, when the tracks proceed south, passing the east side of the city campus of the University; the city and farm campus being about two and three-quarters miles apart. These tracks, therefore, furnish a reasonably direct route between the university city campus and the university farm campus, except that at the farm campus, the tracks, at their nearest point, pass the farm entrance at some 600 feet distant, and at the city campus the tracks pass along the east instead of the south side, and several hundred feet distant from the south and main entrances to the city campus. The defendant Omaha, Lincoln & Beatrice Railway Company proposes to construct a track from the nearest point on its main line, so as to extend to the entrance to the farm campus. That track would pass along and over Idlewild Drive in the city of Lincoln, and would be some 600 feet in length. The construction of that track the plaintiff seeks to enjoin.

The Omaha, Lincoln & Beatrice Railway Company also proposes to use certain tracks, which belong to the plaintiff Lincoln Traction Company, located south of the city campus of the University of Nebraska, and which pass directly in front of the south entrances to such city campus, so as to be able to go around a loop, formed by its tracks and the tracks of the Lincoln Traction Company, and so as to be able to pass its cars, over plaintiff's tracks, in front of the south entrances.

By adding these two facilities to its present system, the Omaha, Lincoln & Beatrice Railway Company would have a trackage by which it could render a street railway service from the city campus to the entrance to the farm campus by a more direct route than could the plaintiff Lincoln Traction Company.

For some years the Lincoln Traction Company has been

rendering street railway service between the farm campus and the city campus by, in part, using the trackage facilities of the Omaha, Lincoln & Beatrice Railway Company, under an agreement and lease, entered into by and between the two companies, but the rights under that agreement have been declared terminated, and, as we do not consider the status of the parties under that agreement material in this case, that agreement, or the operation by the companies thereunder, will not be further mentioned.

The Lincoln Traction Company, however, has trackage facilities by which it is able to render, and has in the past rendered, street railway service between the city campus and the entrance to the farm campus, by going west from the city campus, then south to O street and east for a distance, and then back north again. This route between the two points, however, is longer and more indirect, and through a district where passenger traffic is heavier and where more frequent stops are required, than over the route furnished by the trackage of the Omaha, Lincoln & Beatrice Railway Company.

In June, 1920, the city council of the city of Lincoln enacted two ordinances. One of these ordinances, of date June 1, 1920, granted permission to defendant Omaha, Lincoln & Beatrice Railway Company to connect with and use, for railway purposes, the tracks of the plaintiff Lincoln Traction Company, so as to form a loop of tracks and so as to enable the Omaha, Lincoln & Beatrice Railway Company to run its cars over plaintiff's tracks and in front of the main entrance to the city campus of the University. The permission to use those tracks was intended to be granted in pursuances of statute (Laws 1917, ch. 216, sec. 9), and was to be upon "terms and conditions to be fixed by the Nebraska state railway commission."

On June 14, 1920, a second ordinance was enacted, purporting to grant permission to the Omaha, Lincoln & Beatrice Railway Company to construct, maintain and operate the proposed track, now in controversy, along and upon

Idlewild Drive. The permission to build that track was absolute and not made conditional upon the approval of the electors, nor was the question of permission to construct the track and maintain service over it ever submitted, or intended to be submitted, to a vote of the electors.

On June 14, 1920, immediately after the passage of the second ordinance, the Lincoln Traction Company, plaintiff, brought this action, to enjoin the Omaha, Lincoln & Beatrice Railway Company from constructing any track on Idlewild Drive, and from using the tracks, lying in front of and to the south of the city campus and belonging to the Lincoln Traction Company.

It is the defendant's contention that plaintiff is not entitled to bring the action to enjoin the construction of tracks by the defendant, for the reason that the plaintiff has no special interest; that it is not affected differently from any other citizen; and that the question of the authority in the defendant to construct the tracks and operate a railway service, under color of the permission granted to it by the ordinance, can only be questioned on the relation of the state. The defendant argues that the Lincoln Traction Company has no valid franchise, and that, whatever its rights are, they are not exclusive, in the sense that the city is prevented from granting to any other company the right to conduct a street railway business in the city.

The right of the Lincoln Traction Company to operate its street railway system upon certain streets in the city of Lincoln, including those tracks upon which the defendant now seeks to operate, as well as those tracks of the plaintiff company by which it is able to furnish street railway service between the city and farm campus, has been established by the decision in *State v. Lincoln Street R. Co.*, 80 Neb. 333. In that case it is said that the construction and operation of street railway lines, under a blanket permission from the electors to go upon all the streets of the city, gave to the street railway company an easement in the streets occupied, though the blanket license did not

give the right to extend lines, or to go upon other streets than those which had become occupied within a reasonable time after the grant of permission had been given.

In the case of *Herpolsheimer Co. v. Lincoln Traction Co.*, 96 Neb. 154, the right of the plaintiff company in the streets was not only recognized, but its duty to continue upon the streets occupied and to render service as a street railway company was enforced, and it was declared in that case that the traction company could not remove tracks or change service without the consent of the railway commission.

It is clear, however, that the rights of the Lincoln Traction Company to do a street railway business in the city of Lincoln is not exclusive, in the sense that the city has placed itself in a position where it is prevented from granting to some other company the right to carry on a like business. Nevertheless, the plaintiff company is lawfully upon the streets. It not only has the right, but owes the duty, to render full and adequate street railway service upon the streets occupied by it. Such street railway service is a lawful business, and the right to carry on that business—a right accruing to the plaintiff company by virtue of its construction and operation of street railway lines under a "blanket" franchise, which had received the approval of a vote of a majority of the electors of the city—is a property right which cannot unlawfully be interfered with. Where, therefore, the defendant company proposes to construct a track which it intends to utilize, with the purpose of taking from the plaintiff company a specific portion of the railway traffic, which the plaintiff company, in accordance with its right and duty, now handles, we believe that the plaintiff company, in the protection of its right, is entitled to object to the construction of such a track by the defendant company, until legal authority for such construction is granted by the city.

Though it is the general rule that injunction is the proper remedy to protect a company in the enjoyment of

an exclusive franchise, in some states it is held that, where the complaining company has not an exclusive franchise, it has no authority to question the franchise rights of a rival company, and that an action against the rival company, questioning franchise rights, can be instituted only on the relation of the state.

The majority rule, and one which we believe is sustained by better reasoning, is as stated by 5 Pomeroy, Equity Jurisprudence (2d ed.) sec. 2017, as follows: "It is not necessary, 'to entitle the owner to relief in equity, that the franchise should be an exclusive franchise in the sense that the grant of another similar franchise to be exercised and enjoyed at the same place would be void.' The theory is 'that the defendant, who has no franchise, is acting in violation of law in operating * * * without authority from the sovereign power, and that the owner of the franchise may complain of and restrain such illegal acts when they result in injury to his franchise, which, in the eye of the law, is property. As to the one who is invading his rights without legal sanction, the franchise is an exclusive franchise, although the owner of it might not be entitled to any protection as against the granting of a similar franchise to another.' "

The decisions supporting this rule are collected and discussed in the following cases and the annotations cited: *Bartlesville Electric Light & Power Co. v. Bartlesville I. R. Co.*, 26 Okla. 453; *Lindsley v. Dallas C. Street R. Co.*, 200 S. W. (Tex. Civ. App.) 207; *Puget Sound Traction, Light & Power Co. v. Grassmeyer*, 102 Wash. 482; *Memphis Street R. Co. v. Rapid Transit Co.*, 133 Tenn. 99; *Patterson v. Wollmann*, 5 N. Dak. 608; *Millville Gas Light Co. v. Vineland Light & Power Co.*, 72 N. J. Eq. 305. See note, 29 L. R. A. n. s. 77; and note, L. R. A. 1916B, 1087.

We believe the rule is applicable in this case. The suit here does not alone question the acts of another company, upon the ground that those acts are *ultra vires* of the other company's powers, as was the case of *Burns v. St. Paul*

*C. R. Co.*, 101 Minn. 363; and see note, L. R. A. 1916B, 1087; but the object of this injunction is to preserve plaintiff's right to carry on a street railway business, a right which must be based upon the consent of the electors of the city, and which is, in its nature, exclusive as against every other company, seeking to take a part of that business by operating on streets where it has no legal right to go. Though the public grant of franchise rights be irregular, an acceptance of the grant, and construction and operation under it, may estop the municipality to deny that it consented. 7 A. L. R. 1252. And where the rights of a company upon the streets are so acquired, they are as much entitled to protection against unlawful encroachment by another company as if the franchise had been regular.

The defendant does not contend that it has received any express authority, under its franchise granted it by a vote of the electors of the city, to construct the track in question upon and along Idlewild Drive, but it does claim that, by reason of grants expressly made, it has been given the implied authority to do so. The articles of incorporation of the Omaha, Lincoln & Beatrice Railway Company provide for the construction of a railroad and such branch lines as the directors may determine, such road to extend from Omaha through the city of Lincoln and to the southern boundary of the state. The franchise, granted to the Omaha, Lincoln & Beatrice Railway Company by the voters of the city of Lincoln in 1904, gave it the right to "locate, construct, maintain and operate lines of interurban railroad, its cars to be propelled by electricity or other motive power than that commonly termed steam, and the right is granted to place and maintain single and double tracks, switches, turnouts, crossings, cross-overs, spurs, and connecting tracks, poles, wires, conduits, signals and other equipments, appliances and structures necessary for the perfect operation of said railroad * * * in, over, under, upon, along and across certain streets, alleys, ways * * * and places in the city of Lincoln, to wit,"—then follows a

specific description of the streets within the city over which the lines of street railway were authorized to be constructed, including the line of railway which we have above mentioned, which passes some 600 feet distant from the entrance to the farm campus of the university.

It is true that some cases hold, as pointed out by the defendant, that, where switches, turnouts, or additional track facilities are shown to be essential and necessary to carry out the scheme of railway service, which has in fact been permitted, a grant of permission to build such additions will, though no mention is made of them in the franchise, necessarily, be held to have been implied. Where, for instance, a railway company has authority to build its system of tracks over specified streets mentioned, without mention of switches and turnouts, and must build switches and turnouts in order to operate upon such streets, or where it has authority to construct a power house or car barn, and where the specific grant given has not covered or expressly mentioned connections between such establishments and the trackage system, then an authority to construct the necessary turnouts and switches, or spur tracks, has been held to be necessarily implied, since in those cases the construction of such tracks is absolutely essential to the operation of the system as an entirety and to carry out the express purpose of the specific grant. Such a case is that of *Romer v. St. Paul C. R. Co.*, 75 Minn. 211. That rule and cases supporting it are found in 36 Cyc. 1389.

Those cases, however, are utterly different from the case here, where the spur track asked for is not something which is essential and necessary to conduct the railway service of the defendant company upon the streets where it has been specifically authorized to go. The defendant company does not seek to connect its track with a car barn, or some other establishment belonging to its system, which it must operate in connection with its tracks, nor to construct switches or turnouts upon the streets over which it has been granted authority to go, but the grant of track-

age facilities sought here is for the purpose of enlarging and adding to the extent of service that the interurban company has furnished in the past, and for the purpose of carrying its railway business upon other streets than the streets mentioned in its franchise. Clearly, there can be no implied authority to extend its lines upon other streets than where the grant of permission has been given, for the purpose of extending its service and of carrying its railway business into new territory.

The grant of powers to the defendant company under its franchise is to be construed most strictly against the company, and, where the grant to build a track is not expressly made, or does not follow by necessary implication from the grants which are made, or where there is any doubt about the matter, the holding will be against the grant. *City of Dubuque v. Dubuque Electric Co.*, 188 Ia. 1192; *Virginia R. & P. Co. v. City of Richmond*, 129 Va. 592; *United Railroads v. City and County of San Francisco*, 239 Fed. 987; 25 R. C. L. 1137, sec. 25.

The Constitution (Const. 1875, art. XIb, sec. 2) prohibits any city from granting the right to construct and operate a street railway upon the streets of a city without first obtaining the consent of a majority of the voters of such city. The ordinance purporting to grant to the Omaha, Lincoln & Beatrice Railway Company the right to construct and operate a street railway line upon and along Idlewild Drive, a street in the city of Lincoln, and without the consent of a majority of the voters of the city of Lincoln, is in direct violation of the constitutional inhibition and must be held to be invalid and inoperative.

There is, of course, no serious doubt but that the plaintiff company is possessed of such property interests as to be entitled to institute a suit to question the legal right of the defendant to use the plaintiff's tracks. 36 Cyc. 1418.

It is the defendant's contention that the city council was authorized to grant to the defendant company the right to use the tracks in question under and by virtue of the

statute (Laws 1917, ch. 216, sec. 9), providing that, "If an interurban railway company has a line or lines of railway constructed to the city limits of any city having within its corporate limits a street railway line, lines, system or systems, the city council, or other governing body, may grant to the corporation owning or operating such interurban railway the right to enter and pass through the city, and use the tracks of any street railway already in operation within said city; provided, however, that the state railway commission shall fix and determine just and reasonable terms and conditions upon which such interurban railway company may use said tracks, power, and other transportation facilities."

The purpose and intent of this statute is clear. An interurban company, whose primary business is to handle traffic between cities, necessarily must enter and have access to the central portions of the cities between which it operates, so as to be furnished with proper terminal facilities. The legislature, no doubt, had in mind that interurban business and local street railway business are of such a different character that, when each is strictly pursued, one does not conflict with the other. It is easily seen that an interurban company might be allowed to enter a town and reach the central portions thereof by traveling on the tracks of a local street railway company, and that its use of the tracks could be so limited and conditioned that the local business of the street railway company would not be unreasonably affected, while at the same time all of the objects and benefits, sought by the statute to be attained for the interurban company, would be fully accomplished. By the use of the tracks of the local street railway company an interurban company could be given the opportunity to have fair and reasonable terminal facilities in the center of town, by which it would be enabled to gather up interurban traffic and carry it over its lines. It was for the purpose only of meeting that necessity that the statute was enacted.

A local street railway company, it is true, with its tracks upon the city street, does not have the exclusive right to the use of the street (*United Railroads v. City and County of San Francisco, supra*), and even its trackage system and appurtenances, though private property, are subject to reasonable regulation and use. By legislative authority it may be compelled to permit another company, upon proper conditions and where compensation is provided, to use its tracks where the use is not for the private benefit of the other company (*Petition of Philadelphia, M. & S. Street R. Co.*, 203 Pa. St. 354), but is reasonably required by public necessity, and where the rendition of that use does not result in such detriment or prejudice to the company owning the tracks as to make the regulation unreasonable. *Pacific R. Co. v. Wade*, 91 Cal. 449; *Metropolitan R. Co. v. Highland Street R. Co.*, 118 Mass. 290; *Tulsa Street R. Co. v. Oklahoma U. R. Co.*, 76 Okl. 102; *Grand A. R. Co. v. Citizens R. Co.*, 148 Mo. 665; *Oregon-Washington R. & N. Co. v. Spokane, P. & S. R. Co.*, 83 Or. 549; *Union D. R. Co. v. Southern R. Co.*, 105 Mo. 562; *Canal & C. R. Co. v. Crescent City R. Co.*, 44 La. Ann. 485; *Sixth Avenue R. Co. v. Kerr*, 45 Barb. (N. Y.) 138; *Kinsman Street R. Co. v. Broadway & N. Street R. Co.*, 36 Ohio St. 239. Such requirement, that one company shall to a reasonable extent permit the use of its railway tracks to another, is not considered as a taking of property, but as a regulation of the use to which the property has been voluntarily dedicated, since the track, though private property, has, in a sense, become a part of the street. *General Electric R. Co. v. Chicago C. R. Co.*, 66 Ill. App. 362. In the central portions of town, where traffic is more congested and centralized, it is often the case that street railway tracks will be found on nearly all of the important streets. That does not prevent the governing authorities from granting permission to other street railway companies to use portions of those tracks, since the use of those particular streets by street railways may be essential to

the operation of a system of street railway extending out over the city and beyond. Where two street railways serve different territories, a requirement is easily justified which would compel the one company to allow the other company to use its tracks in a central district, so as to avoid the inconvenience to the public of double trackage, and so that both companies should have proper terminal facilities. Such use can be duly compensated and conditioned, and the joint use need not unreasonably interfere with the business of either company, nor result in injury to the company owning the tracks.

The statute in question is not so broad in scope as to cover the matter of the use of street railway tracks generally and, in the various conditions which might arise, to regulate the use and to prescribe when and under what conditions local street railways should permit the use of their tracks and facilities, the one to the other. It is confined to the matter of furnishing interurban companies entrance to cities and an opportunity to thus gather interurban business.

The legislature has, by the statute, recognized the necessity of an interurban railroad having entrance to a town, and that such necessity is a sufficient justification to warrant the city council in permitting the use to the interurban of the street railway tracks of a local company. The legislature, having recognized that such necessity exists, did not require that the city council, before granting such use, should first determine the question of whether or not public necessity required the joint use by the two companies, nor the question of the practicability of such use, nor the extent of inconvenience or detriment that might result to the company owning the tracks. Had the legislature intended to grant to the council authority to give one local street railway, or an interurban doing local street railway business, the right to use the tracks of another local street railway company in local street railway business, it would have conditioned that right so that permission could be

granted only where the council should find that the circumstances were sufficient to show that public necessity required the joint use, and that the use would not result in discrimination or such a detriment to the company owning the tracks as would make the regulation unreasonable.

It is suggested that the city, by its ordinance, has, to the extent that it has power and control over the streets of the city, granted to the interurban the right to go upon those streets and use the tracks of the plaintiff company, and that the railway commission has full and plenary power of regulation, legislative in character, over street railways, except in so far as that power is limited by act of the legislature (*In re Lincoln Traction Co.*, 103 Neb. 229; *Blackledge v. Farmers Independent Telephone Co.*, 105 Neb. 713), and that the railway commission has, therefore, the power, in view of the permission granted by the city, to authorize the use and fix the conditions and compensation to be paid. It would seem that, as the statute so construed does not cover the subject, whatever joint use could be justified as a regulation by legislative act, the railway commission would have authority to order, since the city, which has authority and control over the streets, has given its consent. But that question is not now presented by the record. The grant to the defendant of the use of the plaintiff's tracks was done by order of the city council. The council must find its authority to act delegated to it by statute.

The interurban company in this case has a track of its own, constructed under grant from the city. From this it is able to and does enter the city and has reasonable terminal facilities therein. Its tracks are also reasonably accessible to the city campus, since they pass immediately along the east side thereof. It does not seek the use of the tracks in question for the purpose of procuring to itself an adequate terminal for its interurban traffic, but its paramount purpose in procuring the use of plaintiff's tracks is to enlarge its trackage facilities at the city

campus for the purpose of using that trackage to divert the University traffic to its own lines and away from the lines of the plaintiff company.

We do not mean to say that the interurban company, under its franchise, is precluded from doing a local street railway business over the streets where it has been authorized to act; in fact, it may be that, as to its tracks within the city, it is subject to control and regulation as a local street railway company, and could be compelled, so far as reasonable, to serve local needs along its own line (*Jeffers v. Mayor*, 107 Md. 268; *State v. Seattle, R. & S. R. Co.*, 64 Wash. 167); but we do say that we find no legislative authority in the council of the city of Lincoln to make a final determination of the right of the interurban company to the use of the tracks of the plaintiff company for the purpose of gaining advantage to such interurban company in the conduct of that local traffic.

The statute, as we view it, was enacted with an entirely different purpose in mind.

AFFIRMED.

ROSE, J., dissents.

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EDNA N. HINDMARSH, ADMINISTRATRIX, APPELLANT, V. SULPHO SALINE BATH COMPANY, APPELLEE.

FILED MARCH 28, 1922. No. 22040.

1. **Death**: STATUTORY ACTION. Our statute (Rev. St. 1913, sec. 1428, and sec. 1429, as amended by Laws 1919, ch. 92), which provides that, whenever a person shall by wrongful act cause the death of another, he shall be liable in damages to the widow or next of kin of the deceased party, creates a cause of action, not known at common law, and one which is separate and distinct from the cause of action which the deceased party may have had, to recover damages for personal injuries.

2. ———: ACTION: REVIVOR. Where a person, by wrongful act, inflicts injuries upon another, and the injured party, in his lifetime, institutes a suit to recover damages, the action upon his

death does not abate under our statute (Rev. St. 1913, sec. 8023), but may be revived and continued by his personal representative.

3. ———: ———: DAMAGES. Where such an action was begun by the injured party in his lifetime and is pending at his death, and is revived and prosecuted to judgment by his administrator, and the deceased party has left a widow or next of kin, recovery by the administrator in the revived action must be limited to such damages as the deceased might have recovered, had he lived, but for no loss of earnings extending beyond the time of his death.

4. ———: ———: ———. In such revived action the personal representative may recover damages for pain and suffering endured by the deceased; for expenses incurred, necessitated by the injuries, in the nature of medical and hospital expenses, and the like; and he may recover the loss of earnings which the injured party sustained during his lifetime as the result of the injuries.

5. ———: ———: ———. Where a person brings an action to recover damages for personal injuries and dies from a cause other than the injury, and the action is revived and prosecuted by his personal representative, recovery may be had for loss of earnings during the lifetime of the deceased, but not for the period that he would have lived, had he lived out his expectancy of life, based upon his age and condition of health prior to the injury.

6. ———: ———: ———. The personal representative is entitled to recover for the widow and next of kin, in the statutory action for wrongfully causing death, the pecuniary loss suffered by them by reason of their being deprived of what they would have received from the earnings of the injured party, from the time of his death, during the period that he would have lived, had he lived out his entire expectancy.

7. **Action:** JOINDER. The two causes of action may be joined in the same proceeding, but when this is done they should be pleaded separately, and separate verdicts should be returned.

8. **Judgment:** BAR. Where the two actions are not joined, but the revived action is prosecuted to judgment, that judgment will not be a bar to the bringing of the other action.

APPEAL from the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Affirmed.*

*Stewart, Perry & Stewart,* for appellant.

*M. V. Beghtol* and *J. L. McPheely, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., DICKSON and STAUFFER, District Judges.

FLANSBURG, J.

This was an action by the administratrix of the estate of Roy B. Hindmarsh, deceased, to recover damages for the benefit of the widow and next of kin, charging that the death of the deceased was caused by the wrongful act of the defendant.

The defendant operates a private hospital. Roy B. Hindmarsh in November, 1919, was a patient in the hospital and under the care of a nurse of the defendant. While in a delirious condition, he escaped and leaped from a window and sustained injuries. An action, other than the one now presented for review, was begun by him in his lifetime to recover damages, alleging negligence on the part of the defendant in failing to guard and prevent him from inflicting injuries upon himself. On August 14, 1920, pending that action, plaintiff died from the injuries inflicted. Edna N. Hindmarsh, the widow of deceased, was appointed administratrix and revived the action. That action was tried upon the theory that the death of decedent was caused by the wrongful act of the defendant, and that the plaintiff was entitled to recover in the one action all the damages which the deceased could have recovered, had he been totally and permanently disabled, and had he survived and lived out his entire expectancy. Under the court's instructions a recovery was allowed for the pain and suffering endured by the deceased; for his hospital and medical expenses; and for all loss of earnings for the full period of his expectancy, based upon his age and condition of health prior to the injury. Recovery was had in the sum of $4,000.

After recovery of this judgment, the plaintiff, administratrix, brought the present action, to recover for the benefit of herself as widow and for the benefit of her child, a daughter of the deceased, under the statute (Rev. St. 1913, sec. 1428, and sec. 1429, as amended by Laws 1919, ch. 92),

which provides that, whenever the death of a person shall be caused by the wrongful act of another, when such act would, if death had not ensued, have entitled the injured party to maintain an action and recover damages, then, in every such case, the person, who would have been liable, shall be liable, notwithstanding the death of the injured person; and that every action for the recovery of such damages shall be brought by the personal representative, and shall be for the benefit of the widow and next of kin, and the amount recovered shall be distributed among the named beneficiaries in accordance with the law of descent and distribution of personal property.

The former recovery is set up as a bar to this action.

The former action, instituted by the deceased in his lifetime, was based upon the common-law right of recovery. It would have abated except for our statute (Rev. St. 1913, sec. 8023), providing that no action pending in any court shall abate by the death of either or both of the parties. *Webster v City of Hastings,* 59 Neb. 563; *Sheibley v. Nelson,* 83 Neb. 501; *Levin v. Muser,* 107 Neb. 230.

Had the former action finally terminated in a judgment prior to the death of Roy B. Hindmarsh, it seems clear that such judgment would have been a complete bar now, for, in order to recover in this action, under the statute (Rev. St. 1913, sec. 1428), it is necessary to show not only that the death resulted from a wrongful act, and that there are statutory beneficiaries for whom suit can be brought, but that, had the deceased lived, he himself would have been entitled to maintain an action. Had his cause of action been settled by him, or been reduced to judgment prior to his death, that would have eliminated one of the essential conditions to a recovery in this action, for his cause of action would have been extinguished and he would thereafter, had he lived, have had no right to sue. 17 C. J. 1250, sec. 102. Such a rule does not deny a full recovery. Had he prosecuted his suit and obtained a judgment prior to his death, he would have been entitled to an award of

damages sufficient to cover all loss of every kind sustained. He could have recovered not only for pain and suffering and for expenses incurred, but also for loss of earnings, based upon his entire expectancy of life, as shown by his condition of health and age prior to the time of the injury. Though, by the injury, his life was to be shortened, or his death caused, still that would not have deprived him of the right to the maximum recovery, based on his full expectancy of life, as stated. *Webb v. Omaha & S. I. R. Co.*, 101 Neb. 596; 17 C. J. 876, sec. 181, 906, sec. 196.

It is argued that, if such a judgment or settlement, prior to the death of the injured party, would be a bar, then a judgment in the action, brought by him in his lifetime and revived after his death, would also be a bar. That, however, does not follow. Before his death he had a right to recover the total loss of earnings, based upon his full expectancy of life; but when death occurred the actual duration and period of his life became definite and fixed and no longer open to question, and, having left a widow and next of kin, a new cause of action sprang up in their favor, entitling them to recover, for themselves exclusively, a portion of the total loss which has grown out of the extinguishment of the deceased's earning capacity. Obviously, a recovery of that same portion of the given loss cannot be awarded at the same time to statutory beneficiaries and to the estate as well, without resulting in a double payment by the defendant of a single loss. Whether or not in the event stated the administrator can, in the revived action, recover the whole amount, or whether he can recover only the loss which has been actually sustained by the deceased prior to his death, becomes a vital inquiry, since a judgment in the revived action, if it is continued as a distinct and separate action, could not become a bar except to the extent of the amount of recovery which could have been legally allowed in that action, and no further.

Under the law in this state, the legislature cannot authorize a double recovery. By a double recovery we mean

a recovery which represents more than the total maximum loss which all parties have sustained. A single wrongful act, it is true, may cause an injury to more than one person, and every person sustaining injury through it is entitled to recover his loss. The quantum of loss actually sustained by all persons concerned, in a case of this kind, has a definite limit. The limit of that loss is the damage caused to the injured party by his pain and suffering; the loss through expenditure for medical and hospital services and other such expenses; and the loss of all earnings that he would otherwise have been able to make, had he not been injured, based upon an expectancy of life, as shown by his age and condition of health prior to his injuries.

The loss of earnings is limited to the earning capacity of the deceased, and where a party is allowed to recover a portion of that loss on the theory that such an amount would have been received from the earnings of the deceased had he lived, obviously, to be consistent with that theory, no other person can be allowed a recovery on the ground that he had sustained the same injury and the same loss, for he could never have been the recipient of the same earnings. In this state exemplary damages are not recognized, nor can damages, in the nature of a penalty, be recovered. The defendant cannot be made to suffer to an extent greater than necessary to compensate for the loss which he has actually caused. The legislature may prescribe the methods by which that loss may be recovered, and may prescribe to whom the amounts recovered shall be distributed, but it cannot, by legislative act, require the defendant to pay a double loss; nor do we believe that the legislature intended to do so. The object of such statutes, both of the revival statute and of the statute giving a recovery for death caused by wrongful act, was to give and preserve to the parties damaged a complete remedy and opportunity to recover the loss sustained, a loss which, at the common law, they could not have recovered owing to the fact that

the death of the party who had sustained the injuries extinguished the cause of action.

In most, if not all, of the states in this country, the common law, by which the right of action for damages for personal injuries abated by the death of the injured party, has been changed by statutes similar to the statutes in this state, but the provisions of those statutes are varied and the decisions construing them are even more divergent.

In some states it has been held that there must be an election between the two remedies; that one action is exclusive of the other, and that either remedy is, in effect, a continuation of the common law action which is prevented from abating. In other states, notably Illinois and Kansas, it is held that, where death results from some cause other than the injuries, the only remedy is under the revival statute; but that, where death is the result of the injuries, the action by revivor is gone and an action for causing death by wrongful act is the sole remedy.

In those states, however, where the statutes are more similar to our own, and where it is held, as in this state (*Gengo v. Mardis,* 103 Neb. 164), that the two statutes cover causes of action which are distinct and separate from one another—the revived action being by statute the continuation of the common law right of action, and the remedy for death caused by wrongful act being based on a new and distinct cause of action not known at common law—it is held that the two remedies are concurrent and not exclusive.

It is readily seen that, where the remedies are held to be exclusive, the measure of damages, recoverable in behalf of the estate, should not be the same as that recoverable under statutes which are construed to provide concurrent remedies. Where the remedies are exclusive, the question of double or overlapping recoveries does not arise.

Where the remedies are held to be concurrent, and we take it they are concurrent in this state, the recovery in the revived action must be limited to such as the deceased

might have recovered, had he lived, but not extending beyond the time of his death. This is manifest from the expressed intention of the legislature that the recovery for the statutory beneficiaries for the pecuniory loss, growing out of the death, shall be for the beneficiaries *exclusively*. *St. Louis & S. F. R. Co. v. Goode,* 42 Okla. 784, L. R. A. 1915 E, 1141; and see notes, 7 A. L. R. 1320 and 1355; and see cases in dissenting opinion *Murray v. Omaha Transfer Co.,* 98 Neb. 482, 486.

In the revived action the personal representative may recover damages for pain and suffering endured by the deceased; for the expenses incurred, necessitated by the injuries, in the nature of medical and hospital expenses, and the like; and he may recover the loss of earnings, which are sustained by the injured party, during his lifetime as a result of the injuries. But in the action brought by the personal representative, in behalf of the statutory beneficiaries, to recover damages for the death caused by the wrongful act of the defendant, the recovery must be measured by the pecuniary loss suffered by those beneficiaries by being deprived of what they would have received from the earnings of the injured party from the date of his death, had he lived out his full expectancy. Under this construction, a double recovery is avoided, although the double remedy is recognized.

These two actions may be pursued separately in different suits, each being confined to its own specific limit of recovery, or they may be joined in one action and separate verdicts returned. *Hamel v. Southern R. Co.,* 113 Miss. 344; *Brown v. Chicago & N. W. R. Co.,* 102 Wis. 137; *Moyer v. City of Oshkosh,* 151 Wis. 586; *Johnson v. City of Eau Claire,* 149 Wis. 194; *St. Louis, I. M. & S. R. Co. v. Dawson,* 68 Ark. 1; *Murray v. Omaha Transfer Co.,* 98 Neb. 482. Where the original action is revived and continued and the recovery is, by law, required to be limited in the manner stated, there is no reason why a judgment

in that action should be a bar to the bringing of the other action.

In the case of *Mahoning Valley R. Co. v. Van Alstine*, 77 Ohio St. 395, an action for personal injuries was commenced during the lifetime of the injured party, and after his death was revived by the administratrix. The pleadings, however, were amended in the revived action so as to limit the recovery to the loss actually sustained by the injured party prior to his death, and the court held that the judgment rendered in that action was not a bar to a subsequent action, in which a recovery was awarded to the widow and next of kin for their pecuniary loss resulting from the death, based upon what they would have received from the earnings of deceased, from the date of his death, during the period of his expectancy of life, had he survived the injury.

It is argued that the decision in *Murray v. Omaha Transfer Co.*, 95 Neb. 175, and 98 Neb. 482, is not in accord with this holding. The effect of that decision, however, is only that, where no statutory beneficiaries exist who can recover under the statute for the wrongful death, the administrator may then recover, for the benefit of the estate, in the revived action, full compensation for the loss caused by and resulting from the injuries and consequent death, and that the recovery may then be in an amount equal to that which the deceased could have recovered, had he survived and been permanently deprived of his earning capacity. That decision is in harmony with the decisions in those states where one remedy is alone provided, or where one is held exclusive of the other. *Kyes v. Valley Telephone Co.*, 132 Mich. 281; *Maher v. Philadelphia Traction Co.*, 181 Pa. St. 391; *McCafferty v. Pennsylvania R. Co.*, 193 Pa. St. 339. The same reason, why the recovery for the benefit of the estate should be limited, does not exist where there are no statutory beneficiaries in existence who can bring the other action. Where such beneficiaries do exist, since the act provides a remedy exclusively in

their favor, the fact that the act gives them the right to a specific recovery to the exclusion of the estate, in effect cuts down the recovery which the estate might otherwise have been entitled to receive.

Had the original action, in this case, after it had been revived, been conducted solely as such action and to recover only that which the estate was entitled to recover, it would not have been a bar to the present proceeding, for the two recoveries, then, could consistently have been allowed in separate suits, and there would have been no overlapping of recoveries nor an excessive amount exacted from the defendant. The administratrix, however—the widow herself—was the plaintiff in the revived action, and the issues were, manifestly, not confined to what the estate was entitled to recover, but proceeded as an action to recover the full and maximum amount to which both the estate and the statutory beneficiaries were entitled. The question of whether or not death was the result of the injuries became an essential issue in the case. It was only upon that theory that any recovery could have been allowed for loss of earnings during a period subsequent to the death of the deceased; for, had it been conceded that he died from some cause other than the injuries complained of, all question of expectancy of life would have been removed, and recovery for loss of earnings would, necessarily, have been confined to the period of his actual lifetime. *Rouse v. Michigan U. R. Co.*, 164 Mich. 475; 17 C. J. 874, sec. 181.

Though the two causes of action were not distinctly and separately pleaded, and though separate verdicts were not returned, still the recovery was complete and full, and sufficient to meet everything that all of the parties, entitled to a remedy under either of the statutes, could have recovered. In effect, the proceeding was a joinder of the two causes of action.

Upon the administratrix is placed a double responsibility; she can disregard neither. In one capacity, she

may sue as legal representative of the estate for what belonged to the deceased. In the other, she acts as representative and trustee for the widow and next of kin, upon whom the act confers the right of recovery for the pecuniary loss inflicted upon them. In the original action after it was revived, the administratrix in this case has acted as representative in both capacities, and has recovered a judgment, based upon and sufficient to meet all of the loss sustained. The proceedings, taken in the revived action, constituted not only a prosecution of that action, but also, in effect, the prosecution of an action by the representative for the statutory beneficiaries, to recover all that those beneficiaries were entitled to recover under the statute, and, having received a judgment as representative for those beneficiaries, that judgment is a complete bar to the action which she now institutes.

The fact that separate verdicts were not returned does not necessarily invalidate the judgment (*Kansas City S. R. Co. v. Leslie,* 238 U. S. 599); nevertheless, that undivided portion of the recovery, to which the plaintiff was entitled as a representative for herself and her child, she is entitled to retain for them exclusively and as against the estate and the rights of creditors.

Where the two causes of action are joined in one proceeding, they should be pleaded in separate counts, and separate verdicts should be returned. When brought in separate proceedings, the recovery in each should be limited to the measure of damages applying in the particular case.

The judgment of the lower court is therefore

AFFIRMED.

THOMAS R. GILL ET AL., APPELLEES, V. GEORGE B. EAGLETON, APPELLANT.

FILED MARCH 28, 1922. No. 21679.

1. **Vendor and Purchaser:** EXCHANGE OF PROPERTY. Where real estate is parted with for a valuable consideration, even if only a portion thereof is money and the remainder is other property, if the bargain is made, and the value of the real estate parted with is measured in money terms, and the real estate is paid for in money or its equivalent, or in something which the parties agree to treat as having a fixed and definite value in money, the transaction is a sale, as distinguished from an exchange.
2. ———: ———: SALE. Where a 68-acre tract of land, valued at $5,100, is transferred for a gasoline tractor plow outfit, valued at $1,000, and $1,600 in cash and a note for $2,500 secured by a mortgage on the land transferred, the transaction *held* to be a sale, and not an exchange.
3. **Brokers:** CONTRACT: STATUTE OF FRAUDS. In an action to recover compensation for services rendered as a broker in effecting a sale of real estate, a petition that discloses on its face that the brokerage contract was not in writing is subject to attack by demurrer.

APPEAL from the district court for Burt county: CHARLES A. GOSS, JUDGE. *Reversed.*

*B. C. Enyart,* for appellant.

*J. A. Singhaus, contra.*

Heard before MORRISSEY, C. J., ALDRICH, FLANSBURG and ROSE, JJ., BROWN and ELDRED, District Judges.

BROWN, District Judge.

The defendant appeals from a judgment rendered against him in the district court for Burt county for a balance of commissions alleged to be due the plaintiffs as real estate brokers.

The first contention urged is that the trial court erred in overruling the defendant's general demurrer to the petition, which defendant asserts sets forth a cause of action

falling within the inhibition of section 2628, Rev. St. 1913. This necessitates a consideration of the allegations of the petition. The plaintiffs allege that at the time in question they were engaged in the real estate business; that the defendant was the owner of 68 acres of land (describing it) "which he listed with plaintiffs at $50 an acre net to him, and in the event of plaintiffs negotiating an exchange of said land for other property, plaintiffs were to have, as their commission, all they were able to obtain for said premises above that price, which said agreement, with respect to said exchange, was oral between plaintiffs and said defendant;" that one Frank W. Olinger "was the owner of a gasoline tractor plow outfit, which he was anxious to dispose of in an exchange for real estate, and he had the same listed with plaintiffs at the price of $1,000;" that they brought the defendant and the said Olinger together "and negotiated an exchange of said tractor plow outfit, at the price of $1,000, to said defendant for said premises above described, which was priced to said Olinger at $75 an acre, or $5,100, and said defendant and said Olinger entered into a written contract of exchange on said day upon the above basis, and the said defendant received upon said contract from said Olinger the sum of $500 in cash, and it was provided in said contract that the sum of $1,100 should be paid to him in cash upon March 1, 1915, and that said defendant would convey said premises to said Olinger upon said date, and receive back from him a mortgage upon said premises for the balance in the sum of $2,500, due in three years from said date, bearing interest at 5 per cent. per annum;" that, in accordance with said written contract, in addition to the $500 cash mentioned, the defendant received $1,100 in cash on March 1, 1915, and a note for $2,500 secured by mortgage on the premises, at the time of the transfer of the real estate by the defendant to said Olinger; that they, "by agreement with said defendant, took over said tractor outfit upon the date of said exchange in part payment upon their com-

mission as above set forth, at the agreed value of $1,000, and have since sold and disposed of the same and applied the same thereon;" that the defendant has secured through foreclosure of the $2,500 mortgage certain other sums of money and a new note for $1,000 secured by mortgage on said land; that they have tendered to the defendant $385.25, "which is a much larger sum than is still unpaid to him, upon his net price of said land with interest, under his said contract of exchange entered into with said Frank W. Olinger," and have demanded that the defendant assign said $1,000 note and mortgage to them, but the defendant "refused to accept said tender, and further refused to make said assignment, and refused to acknowledge that said plaintiffs had any interest in said note and mortgage, and he then and thereby converted the same wholly to his own use and benefit;" that they renew their tender; and they pray that the court decree an assignment of said $1,000 note and mortgage to them, or award them judgment for $700 and interest for the remainder due them for commissions.

It will be observed that the petition alleges that whatever contract existed between the plaintiffs and the defendant was oral, and the plaintiffs make no contention in this court that there was a written contract. They assert that the petition alleges an oral contract whereby the defendant agreed to give them as their commission all that they secured above $3,400 for the exchange of his land, that the transaction that was consummated as a result of their efforts was an exchange, as distinguished from a sale, and that therefore section 2628, Rev. St. 1913, does not apply. The defendant contends that the petition is a laborious and verbose attempt to convert a real estate sale into an exchange, and that it states a cause of action that is barred by section 2628, Rev. St. 1913, which provides:

"Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and sub-

scribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent."

We are faced in the first place, therefore, with the duty of determining whether the transaction set forth in the petition was a sale or an exchange. Summarized, this transaction consisted of the transfer of 68 acres of land at a valuation of $5,100 for a gasoline tractor plow outfit at a valuation of $1,000, $1,600 in cash, and a note for $2,500 secured by a mortgage on the land transferred. The consideration for the land was wholly money or its equivalent, except the tractor plow outfit, which was valued at $1,000 and was taken by the plaintiffs by agreement to apply upon their commission. The defendant himself received no property of any kind, as distinguished from a money consideration.

The precise question presented has never been decided by this court. The plaintiffs contend that the cases of *Lucas v. County Recorder of Cass County,* 75 Neb. 351, and *Nelson v. Nelson,* 95 Neb. 523, govern and determine the question in their favor. In the last-mentioned case the brokerage contract provided for the sale or trade of defendant's "town property or farm property or any property" that he might put in for a particular farm in Missouri. No part of the consideration was money and no fixed price was placed on any of the property. The transaction involved was treated as, and clearly was, an exchange. This court stated in the first paragraph of the syllabus that a contract to assist in securing an exchange of properties is not governed by section 2628, Rev. St. 1913; but in the later case of *In Re Estate of Brockway,* 100 Neb. 281, attention was called to the fact that this statement was not necessary and was dictum.

In the case of *Lucas v. County Recorder of Cass County, supra,* the original contract between the owner and the broker was a written one providing for a "sale" of certain

land. This was subsequently modified by an oral agreement resulting in the transfer of real estate for other real estate and a stock of merchandise. In the course of the opinion it was stated: "A sale is a transmutation of property, or of a right, from one man to another, in consideration of a sum of money, as opposed to barters, exchanges and gifts"—taking this definition from the Rapalje & Lawrence Law Dictionary. While this definition is correct, so far as it goes, it merely gives a broad and general definition of a sale, without attempting to define an exchange or to set forth the technical distinctions between a sale and an exchange. There was no occasion for a distinction, and no attempt at a technical definition of a sale. The transaction was an exchange and was so recognized.

At common law an exchange of land was a mutual grant of equal interests, not necessarily in value, but in dignity, as a fee for a fee, the one in consideration of the other, and differed from a sale, in that no fixed money price or value was placed on either of the properties exchanged. 39 Cyc. 1181; *Windsor v. Collinson,* 32 Or. 297; *Long v. Fuller, Admr.,* 21 Wis. 121; *Hartwell v. DeVault,* 159 Ill. 325; 2 Blackstone, Commentaries, *323.

However, the technical exchange of land, as known to the common law, now occurs rarely, and in modern times the term exchange has come to be used in a much broader sense. The modern view of what constitutes an exchange and the distinction between an exchange and a sale, as expressed by the courts and law writers, is well summarized in 23 C. J. 185, where it is stated that, broadly speaking, where property is transferred for property other than money it is an exchange, but where the transfer is for money the transaction is a sale, but that "it has been generally held, where the question has arisen, that any transaction whereby property is parted with for a valuable consideration, whether there be a money payment or not, provided the bargain is made and the value measured in money terms, and paid or agreed to be paid in something

which the parties agree to treat as a specified amount of money, is a sale, but that where property is transferred for property, no price being set upon either piece, the transaction is an exchange."

The rule is stated in Tiedeman, Sales, sec. 12, as follows: "The consideration must be a price in money. Although it has been sometimes held that a sale must be a transfer for money, and that every other transfer is an exchange or barter, the better opinion is that the transaction is still a sale, although the transfer is made for something else than money, provided each article is transferred at an agreed or the market value, so that the one thing is received in payment of the price of the other."

In *Gardner v. Kiburz,* 184 Ia. 1268, the contract provided for the transfer of a farm at a fixed price for a certain amount in money and another tract of land that was valued at some $10,000 more than the amount of cash paid. The court held that it was a sale, and not an exchange, quoting with approval from *Fagan v. Hook,* 134 Ia. 381, and stating: "The criterion in determining whether there has been a sale or an exchange of personal property is whether there is a fixed price at which the things are to be exchanged. 'If there is such fixed price, the transaction is a sale; but, if there is not, the transaction is an exchange.'"

Recognizing the same rule and distinction are, among other authorities: 11 Am. & Eng. Ency. Law (2d ed.) 570; *Thornton v. Moody,* 24 S. W. (Tex. Civ. App.) 331; *Westfall v. Ellis,* 141 Minn. 377; *Grace v. McDowell,* 60 Or. 577; *Ross v. Kenwood Inv. Co.,* 73 Wash. 131; *Jenkins v. Mapes,* 53 Ohio St. 110; *Fuller v. Duren,* 36 Ala. 73, 76 Am. Dec. 318; *Long v. Fuller, Admr.,* 21 Wis. 121; *Pickard v. McCormick,* 11 Mich. 68.

The foregoing authorities seem to make it clear that the transaction in question was a sale, as distinguished from an exchange. The petition alleges that the defendant's land was transferred, at the fixed and agreed price of

$5,100, for money or its equivalent and a tractor plow outfit was taken at the fixed price of $1,000. The defendant's real estate was not exchanged for other property in whole, nor for any property at an indefinite valuation, and the money consideration was more than four times as great as the valuation placed upon the personal property.

Did not the rule laid down by the weight of authorities make the above conclusion imperative, it must be apparent that the construction contended for by the plaintiffs would be wholly subversive of the plain intent of the statute. Carried to its logical conclusion, it would result in our being compelled to hold that, where the owner of real estate received as part of the consideration therefor a piece of personal property, no matter if it possessed no more intrinsic value than the proverbial trader's jack-knife, the transaction was an exchange, and not a sale, and therefore not within the protection of the statute. The result would be to defeat the very evident intention of the legislature and to render the statute in effect and operation wholly nugatory.

Having determined that the transaction in question was a sale, the oral contract alleged with respect to it between the plaintiffs and the defendant was, of necessity, under the provisions of section 2628, Rev. St. 1913, unenforceable. The next question, therefore, is whether or not the defendant could raise the bar of the statute by a general demurrer. We have held in *Pierce v. Domon,* 98 Neb. 120, that the statute in question "is virtually an extension and enlargement of the statute of frauds." The fifth paragraph of the syllabus in *Powder River Live Stock Co. v. Lamb,* 38 Neb. 339, states: "In an action upon a contract within the statute of frauds, the petition must state facts taking the contract out of the statute, or the pleading will be demurrable." This statement of the rule as applicable to contracts required to be in writing is too broad, in that it does not limit its application to petitions affirmatively showing that the contract is oral. The petition in the case

did, however, allege an oral contract. The rule is more correctly stated in the later case of *Smith v. Aultz*, 78 Neb. 453, where it is held: "In an action to recover compensation for services rendered as a real estate broker, a petition which discloses on its face that the contract of agency was not in writing is open to attack by demurrer." See, also, *Schmid v. Schmid*, 37 Neb. 629; 20 Cyc. 309, 312; Phillips, Code Pleading, secs. 333, 334. It is evident, therefore, that the defendant's demurrer properly raised the bar of the statute, and that the demurrer should have been sustained.

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

REVERSED.

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## WILLIAM H. SCHRUM V. STATE OF NEBRASKA.

FILED MARCH 28, 1922. No. 21913.

1. **Criminal Law**: PLEA IN BAR. Where, after a plea of not guilty without withdrawing or requesting to withdraw such plea, the defendant filed a plea in bar which was not sworn to by him, *held*, that such plea in bar was invalid, and that the court was justified in overruling it on its own motion, without requiring the state to demur or reply to it.
2. **Incest**: EVIDENCE OF PROSECUTRIX: CORROBORATION. The facts and circumstances necessary to corroborate the testimony of the prosecuting witness in a prosecution for incest must be proved by other witnesses. Her unsupported testimony that similar offenses occurred prior to the alleged commission of the offense charged is not corroboration of her testimony as to the commission of the principal offense.
3. **Instruction** No. 8 examined, and *held*, in view of the state of the record, to be prejudicially erroneous.

ERROR to the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

*Jamieson, O'Sullivan & Southard*, for plaintiff in error.

*Clarence A. Davis, Attorney General*, and *Mason Wheeler, contra.*

Heard before MORRISSEY, C. J., ALDRICH, FLANSBURG and ROSE, JJ., BROWN and ELDRED, District Judges.

BROWN, District Judge.

William H. Schrum was convicted in the district court for Douglas county of having committed the crime of incest upon his 12-year-old daughter, Ida Schrum, on July 8, 1920, and was sentenced to serve a term not exceeding 20 years in the penitentiary. From this judgment he has brought the case to this court for review. A number of alleged errors are relied upon in his brief and were presented on oral argument, but we deem it necessary to consider only two of them.

The most important of the errors assigned relates to the giving by the trial court of instruction No. 8, which reads as follows:

"The charge made against the defendant in the information is that he committed the act of incest, that is, had sexual intercourse with the prosecuting witness, on or about July 8, 1920, and this is the specific act charged and of which you are called upon to say whether the defendant is guilty or innocent. Evidence of other acts of like intercourse by the defendant with the prosecuting witness prior to July 8, 1920, has been admitted upon the trial; this evidence is properly admitted but for the purpose only as bearing upon the probability or improbability of the defendant being guilty of the particular act charged in the information, and it is to this extent only you should consider said testimony."

The plaintiff in error, who will for convenience hereafter be designated the defendant, urges that the portion of this instruction beginning with the words "evidence of other acts of like intercourse" specifically authorized the jury, under the evidence in the case, to consider the testimony of the prosecutrix as to other similar acts by the defendant with her as corroboration of her testimony as to the specific act charged in the information.

In order to determine whether or not this contention

is correct, it will be necessary to consider briefly certain portions of the evidence. The record discloses that the defendant secured a divorce from his wife on November 21, 1918, and that on March 10, 1919, she sent their two daughters, Ida and Myrtle, to live with the defendant. The three of them lived together up until July 10, 1920, two days after the alleged act of incest charged in the information, when the mother came and took the girls away. Ida testified that about 6 o'clock on the evening of July 8, 1920, her father sent Myrtle to a grocery store a block and a half away for groceries for supper, and, while a still younger sister, Eugina, aged 6 at the time of the trial, who had recently been sent by their mother to live with them, was in the house and Myrtle was gone, her father took her into the front bedroom and had sexual intercourse with her upon the bed; that during the act Myrtle returned from the store, entered the front door into the living room, off from which the front bedroom opened, passed through the room, stopping only long enough to glance through the partly open door into the bedroom and see her father lying on top of Ida in the act of intercourse, then went on into the kitchen and deposited her groceries, and then returned and started to go into the bedroom as though she had observed nothing; and that while Myrtle was in the kitchen her father got off from her and told her to pull down her clothes, and when Myrtle returned and entered the bedroom the defendant was making a pretense of looking about the room for a tie pin. She also testified that she did not make any complaint, but that her sister told their mother. Over the repeated objections of the defendant, she was permitted to testify further that her father had sexual intercourse with her on numerous occasions, the first time being on Christmas, 1919, and practically every week from then on up to July 8, 1920, sometimes as often as three times a week. She further testified that no one ever saw them in the act of intercourse except her sister, Myrtle, on the one occasion on July 8, 1920. Myrtle testi-

fied substantially the same as her sister with respect to the occurrence on July 8, except that she said that, after returning from the kitchen and entering the bedroom, her father in her presence got off Ida and told Ida to put down her dress. She also testified that her little sister, Eugina, was asleep on the bed in the back bedroom when she went to the store. This trial was had early in December, 1920, and the record discloses that about a month and a half prior thereto the case had been tried, resulting in a mistrial. It was shown that on this former trial Myrtle had testified somewhat differently as to the relation between her movements and what she saw after returning to the house on July 8. Both of the girls testified to the fact that, at the time of the alleged intercourse on July 8, the front door of the house was open, the screen door was not fastened, and the door of the bedroom in which Ida and her father were was not closed or locked, but was standing partly open. The record discloses that the house in question stands with houses on adjoining lots, the nearest being only 20 feet away, and in a thickly populated portion of South Omaha.

The defendant denied specifically that he had ever had or attempted to have sexual intercourse with Ida. He testified that he was 41 years old and had lived in the same house since September, 1907. He presented seven character witnesses, four women and three men, all being married and having children, and two of the men being business men in the community. All but two had lived in the community ten or twelve years or more, and those two had lived there about five years, and all had known the defendant during their residence. Two of them were the defendant's nearest neighbors. All of them testified that the defendant's reputation in the community was that of being a moral, law-abiding and decent citizen; and one of the women testified that the defendant's wife had been arrested twice while she lived there. The lady who lived next door, 20 feet away, had resided there for over 10 years, had a

grown family, and testified she saw the little girls nearly every day, showing ample opportunity for them to have made complaint.

The defendant contends that the prosecution was the result of ill-feeling and hatred toward him by his divorced wife, and there are evidences in the record that the feeling between them was not good. However that may have been, it is clear that there is no evidence in the record corroborating the testimony of Ida as to any act of intercourse other than that alleged to have occurred on July 8, 1920, and the state so admits in its brief filed in this court. In this state of the record the trial court in the eighth instruction virtually instructed the jury that Ida's uncorroborated testimony as to other acts of intercourse prior to July 8, 1920, should be considered by them "as bearing upon the probability or improbability of the defendant being guilty of the particular act charged in the information;" in other words, that Ida's uncorroborated testimony as to other acts of intercourse might constitute corroboration of her testimony as to the act of July 8. In the sixth instruction the jury had been properly instructed that Ida's testimony as to the principal act charged need not be corroborated by testimony of other witnesses, but that it would be sufficient if she were "corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, inference of guilt may be drawn." Nothing would be more natural for the jury to do under these instructions, if they concluded that credence was not to be placed in the corroborating testimony of Myrtle, because of her youth, the discrepancies between her present and her former testimony, or any other reason, than, after listening to the nauseating recital by Ida of her continued and repeated abuse by her father, and being impressed by it, as well they might be, to conclude that they were justified in wholly disregarding the defendant's denials and the evidence of his good reputation for morality and decency

offered by his neighbors who had known him intimately over a long period of years, and to accept Ida's statements of abuse on numerous other occasions as facts from which they might infer the probability that the defendant was "guilty of the particular act charged in the information."

The rule of law with respect to corroboration is no different in a case of incest than it is in a case of rape, and this case is exactly analogous to the case of *Boling v. State,* 91 Neb. 599, except that in the cited case the corroboration of the act charged was possibly more worthy of belief because it was offered by a sister 20 years' old who was not shown to have made previous conflicting or contradictory statements. In the cited case the prosecutrix's unsupported testimony as to a subsequent offense was admitted. The opinion states:

"This evidence was admitted as corroborative evidence tending to corroborate the evidence as to the bed assault, which had been testified to by both the prosecutrix and her elder sister. The court also by two instructions instructed the jury to the same effect. This action is assigned as error. Under the rule stated in *Woodruff v. State,* 72 Neb. 815, and *Leedom v. State,* 81 Neb. 585, proof of the commission of the other offense, by competent testimony, is admissible. We do not wish to be understood as holding otherwise; no thought of doing so. But the question here is: Is the unsupported testimony of the prosecutrix of other criminal acts competent as corroborative evidence? In other words, can the uncorroborated evidence of other offenses, testified to by the prosecutrix alone, corroborate her testimony as to the principal fact? Can she by her unsupported testimony corroborate herself?" The court held that she could not, and reversed the case.

In the case of *Hudson v. State,* 97 Neb. 47, error was assigned because the state was permitted to prove by the prosecutrix that the defendant had had sexual intercourse with her at other times than the one charged in the in-

formation. With respect to this assignment, this court said:

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

In view of the state of the record in this case, we are of the opinion that the giving of the eighth instruction was prejudicially erroneous to the rights of the defendant.

The defendant urges that the summary overruling by the trial court of his plea in bar, filed by him just prior to the beginning of the second trial, without requiring the state to join issues thereon, was error. As a new trial will be necessary, a proper disposition of any question relating to the plea in bar should precede such trial. Therefore this alleged error will be considered. A careful examination of the transcript shows that the action of the trial court was correct and without error for two reasons: In the first place, the plea in bar was not sworn to by the defendant, as is required by section 9094, Rev. St. 1913. In the second place, even if the plea had been sufficient in form, it was filed without requesting or securing permission to withdraw the defendant's plea of not guilty. In the case of *Davis v. State,* 51 Neb. 301, an unsworn plea in bar was filed under similar circumstances, and the court

likewise on its own motion overruled it. On reviewing the alleged error this court held: (1) That the plea was invalid; (2) that the state was under no obligation to demur or reply to it, and that the court was justified in disregarding it and, on its own motion, striking it from the files. To the same effect see *Goddard v. State,* 73 Neb. 739, *Korth v. State,* 46 Neb. 631, and *Marshall v. State,* 6 Neb. 120. We are not unmindful of the case of *George v. State,* 59 Neb. 163, but that case is distinguishable from the case at bar. In that case a motion to make the plea in bar more definite and certain was filed and sustained, issue was joined, and the plea was fully considered and was adjudged to be insufficient in law. However, the rule that a plea in bar may be disregarded, if presented while the plea of not guilty stands, was recognized, but it was held that, under the facts above recited, the plea of not guilty would be considered to have been constructively withdrawn.

Therefore, because of the error committed in giving instruction numbered 8, the judgment of the district court is reversed, and the cause remanded.

REVERSED.

ROSE, J., dissents.

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BERNETTIE SHARPE, APPELLEE, V. GRAND LODGE, ANCIENT ORDER OF UNITED WORKMEN, APPELLANT.

FILED MARCH 28, 1922. No. 21983.

1. **Evidence:** STATUTES: JUDICIAL NOTICE. The statute of Nebraska under which a fraternal beneficiary association is organized becomes and is a controlling part of the contract between the association and its members; and the courts of this state will take judicial notice of said statute.
2. **Forfeitures** are not favored, and to be available as a defense to an action must be pleaded and strictly proved.
3. **Insurance:** FORFEITURE: INCREASE OF RATES: NOTICE. Where a fraternal beneficiary association, organized under the statute of Nebraska, raises its rate of assessment, a forfeiture cannot be en-

forced against a member for nonpayment of an assessment based on said increased rate until after notice of such change of rate has been given for the time and in the manner provided for by section 3295, Rev. St. 1913; and the burden of proving such notice rests upon the party claiming such forfeiture.

4. ———: DEFENSE OF FORFEITURE: EVIDENCE. Evidence examined, and *held* insufficient to require a submission to the jury of the defense of forfeiture pleaded and relied on by defendant.

5. **Statutes:** CONSTRUCTION. The court will not give a retrospective effect to a statute, unless it is clear from the language used that the legislature intended to give it that effect.

6. **Insurance:** ATTORNEY'S FEES: CONSTRUCTION OF STATUTE. The provisions of section 2, ch. 103, Laws 1919, requiring the court to allow plaintiff an attorney's fee to be taxed as a part of the costs in certain actions against fraternal beneficiary associations, construed, and *held* to have no retrospective effect, and not to apply to actions commenced before said statute went into effect.

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

*Nelson C. Pratt, Edward J. Lambe* and *Edward F. Leary,* for appellant.

*Will H. Thompson & Son* and *L. R. Slonecker, contra.*

Heard before LETTON, DEAN and DAY, JJ., CLEMENTS (E. J.) and WELCH, District Judges.

CLEMENTS, District Judge.

The plaintiff is the widow of Marion R. Sharpe, and the beneficiary named in the fraternal benefit certificate issued by defendant to her said deceased husband, and, in this action, she seeks to recover on said certificate. The petition is in the usual form, the allegations of which are admitted in the answer. Defendant seeks to avoid liability by alleging and contending that assured failed to pay an assessment of $11.20 which became due May 1, 1917, and that by such failure he thereupon stood suspended and forfeited all of his rights as a member from and after May 28, 1917. Such forfeiture is denied by plaintiff. At the trial the defendant admitted that, under the pleadings, the bur-

den of proof rested upon it, and, at defendant's request, the trial court made an order to that effect. After the defendant had closed its case and rested, on motion of plaintiff, the court directed the jury to return a verdict for plaintiff, which was done and a judgment was rendered thereon. Defendant appeals.

The facts disclosed by the record, briefly stated, are as follows: In March, 1892, said Marion R. Sharpe became a member of the defendant society through its local lodge located at Goehner, Nebraska, and defendant thereupon issued to him the certificate sued upon. His assessment rate at that time was $1 a month. In July, 1905, it was raised to $2 and in September, 1915, to $3. Assured paid all of the assessments made against him under these various rates and all dues claimed by the defendant up to the 1st day of May, 1917. In January, 1917, defendant revised its constitution and by-laws, and thereby again raised its rates therein, stating that said new rates should go into effect May 1 of that year. By this revision Mr. Sharpe's assessment rate was increased from $3 to $11.20. Assured was a resident of Seward county, Nebraska, but on May 1, 1917, and for sometime before and after said date, he was absent from this state visiting in Kansas and California. In the early part of May, 1917, the financier of said Goehner lodge, Mr. O'Neall, received a post office money order for $3 from Sharpe's son and another for a like amount from his friend, Mr. Muir, both of which were sent for the purpose of paying Marion R. Sharpe's assessment. After receiving said money, O'Neall wrote to Sharpe telling him that his rate had been raised and that it required $8.20 more to pay his May assessment. He did not credit Sharpe on the books of the defendant for any of the money so received, but held the sum received of Mr. Muir until about the middle of June and that received of Sharpe's son until about the 1st of July, 1917, and then returned same to said parties. He refused to credit or apply this money for the expressed reason that

he understood and insisted that the new rate went into effect May 1, and the funds so received were insufficient to pay the amount required by such rate. About July 7 of that year Mr. O'Neall was notified that $11.20 had been wired to a bank in Seward to pay Sharpe's assessment, and between the 19th and 24th of July he received a post office money order of $11.20 for that same purpose, but he refused to credit or apply either of said sums, giving as his reason for such refusal that Sharpe had been suspended on May 29 and could not be reinstated without a health certificate. Sharpe died on July 21, 1917.

The defense in this case is based upon an alleged forfeiture for failure to pay an assessment. "Forfeitures are not favored, and should not be enforced unless the courts are compelled to do so." *Springfield F. & M. Ins. Co. v. McLimans,* 28 Neb. 846. "Forfeitures are looked upon by the courts with ill-favor and will be enforced only when the strict letter of the contract requires it." *Connecticut Fire Ins. Co. v. Jeary,* 60 Neb. 338; *Haas v. Mutual Life Ins. Co.,* 84 Neb. 682. "Forfeitures are not favored, and to be available as a defense to an action must be pleaded and strictly proved." *Farmers & Merchants Ins. Co. v. Newman,* 58 Neb. 504. Under the foregoing rules, in order to establish its defense, the burden was upon defendant to prove every material fact necessary to constitute a forfeiture of the certificate sued on. This necessarily included proof that the revision and increase of rates made in January, 1917, were legal and valid, and that the new rate which raised Sharpe's assessment from $3 to $11.20, and for the nonpayment of which latter sum it is sought to enforce a forfeiture, had taken effect and was in force during the month of May, 1917. Defendant recognized this, assumed the burden of proof, and attempted to prove said facts by introducing its constitution and by-laws passed in January, 1917, by which Sharpe's new rate was fixed at $11.20 a month, and in which it is stated that said new rate should be in effect on and after May 1, 1917. De-

fendant also pleaded and proved that, in the case of *Funk v. Stevens*, 102 Neb. 681, the legality and validity of said new rate was fully determined and established. We shall assume, in the further consideration of the case at bar, that the decision in the *Funk* case established the validity of said new rate and settled all material questions therein involved and determined. We have carefully examined the pleadings in the *Funk* case, which were introduced in evidence herein by defendant, and also the opinion of this court in said case, and find that neither the question of whether any notice was required to be given before said new rates could be enforced, nor the question of when said rates went into effect was in issue or determined in that case, and said questions are therefore open for determination in the instant case.

The provisions of the statute of the state under which a fraternal beneficiary association or a mutual insurance company is organized become and are a controlling part of the contract between it and its members. Bacon, Benefit Societies, sec. 53; *Farmers Mutual Ins. Co. v. Kinney*, 64 Neb. 808; *Morgan v. Hog Raisers Mutual Ins. Co.*, 62 Neb. 446. The introduction in evidence of defendant's constitution and by-laws as revised in January, 1917, which provide that the new rates shall take effect on May 1 of that year, would, we think, be sufficient proof that said rates were in force from and after that date, if there were no provisions of the statute, of which the court takes judicial notice, which modify or control the time when such changed rate could take effect.

Section 3295, Rev. St. 1913, provides that no change or raise in the schedule of rates of a fraternal beneficiary association shall be effective "until ninety days from and after due notice of such change shall have been given by the proper officer or officers of such governing body to the members of such society through its official paper and by notice thereof to the local lodges or societies by mail to the proper officers of such local orders." There is no evidence

in the record tending to show that notice was given to members by publication in defendant's official paper, and the only evidence as to notice given to local lodges is that of Mr. O'Neall, financier of Goehner lodge, who testified that he was informed of said raise of rates in the fore part of May, 1917. Plaintiff contends that defendant failed to prove that said new rate was in force in May, 1917, and therefore the right to forfeit Sharpe's certificate for failure to pay said rate has not been established, and the trial court evidently adopted this theory.

To avoid this seemingly correct conclusion and the results which would necessarily follow therefrom, defendant asserts that said section 3295 of the statute was repealed by the enactment of the Insurance Code in 1913, has not been in force since July 13 of that year, but was at that time replaced by section 3294. All of the many authorities cited to sustain this contention recognize the well-settled rule that there are at least two necessary requisites to the repeal of a statute by implication or by a general clause repealing all conflicting acts, viz.: (1) An act which repeals another must have been passed at a later date than the one repealed; and (2) the two acts must be so inconsistent and repugnant that they cannot stand together and both be enforced. An examination of the house and senate journals of the legislature of 1913 shows that the Insurance Code (Laws 1913, ch. 154), of which section 3294 is a part, was passed, without an emergency clause, on April 15, was approved by the governor on April 18, and therefore went into effect in July, 1913; that it contained a clause repealing chapter 24 of Cobbey's Annotated Statutes of 1911, and all acts and parts of acts in conflict therewith; that section 3295 (Laws 1913, ch. 236) was passed, with an emergency clause, on April 16, was approved by the governor on April 21, and therefore went into effect at that time; that it amended and expressly repealed section 6635 of Cobbey's Annotated Statutes of 1911, which was one of the sections of

said chapter 24 sought to be repealed by the Insurance Code. It will thus be seen that when the repeal of said chapter 24 went into effect in July, 1913, section 6635 was not in existence. From the foregoing it appears that section 3295 was passed and approved on later dates than that of the passage and approval of section 3294; and it is clear that the earlier act cannot repeal the later one, even if their provisions were so repugnant that they could not both be enforced. Defendant asserts that such inconsistency and repugnancy between the two sections exist, but has failed to specify or point out, and we have been wholly unable to discover, any of their provisions which are so inconsistent or repugnant that both sections may not stand and be enforced. It is true that there is considerable duplication of language in said sections; but we are satisfied that all the provisions of both sections might properly be embodied in a single section, from which all duplications should be omitted. That the legislature did not perceive any inconsistency or repugnancy between these sections is shown by the fact that in 1919 both of said sections were reenacted.

We, therefore, conclude and hold that said section 3295, ever since its passage, in April, 1913, has been in full force and effect; that its provisions requiring 90 days' notice to be given of a change in the rate of assessment must be complied with before a forfeiture for the failure to pay an assessment based on said increased rate can be enforced. As there is no evidence in the record tending to prove that the notice of the change of rates made by defendant in January, 1917, required by said statute, was given, the proof is insufficient to establish the defense of forfeiture for the nonpayment of the May assessment based on said increased rate. The money paid to Mr. O'Neall, the financier of defendant's local lodge, for Sharpe by his son and Mr. Muir, together with the sums thereafter tendered and sent to him, were more than sufficient to pay all assessments due from assured based on the old rate. The evi-

dence was therefore insufficient to require the court to submit the defense of forfeiture to the jury, and the court was right in directing a verdict for the plaintiff.

The only remaining question which it is necessary to consider is whether the trial court erred in refusing to allow plaintiff an attorney's fee to be taxed as a part of the costs herein, which question is raised by plaintiff's cross-appeal. Plaintiff claims the right to such fee under the provisions of section 2, ch. 103, Laws 1919, which provide that, "In all cases where the beneficiary * * * *brings* an action at law, * * * the court upon rendering judgment against such * * * association shall allow the plaintiff a reasonable sum as attorney's fee * * * to be taxed as a part of the costs;" and that, if "such cause" is appealed, the appellate court shall allow an attorney's fee for the appeal proceedings. The case at bar was commenced nearly one year before the enactment of said section, and the question is: Do the foregoing provisions thereof apply to actions commenced before same were in effect, or are they limited to cases brought thereafter? It does not appear that said question has been heretofore determined by this court. It seems to have been raised in *Warren v. Grand Lodge A. O. U. W.*, 104 Neb. 810, which is cited by defendant herein to sustain its contention. But plaintiff in the *Warren* case admitted in open court that the allowance of an attorney's fee was not authorized therein, and suggested that a remittitur of the amount of such fee be entered, which was done. In *Beeler v. Supreme Tribe of Ben Hur*, 106 Neb. 853, cited by plaintiff to sustain her contention, there had been two trials in the lower court, one before and one after the taking effect of said section. An attorney's fee of $700 was allowed by the lower court. Defendant therein contended that the amount so allowed greatly exceeded the value of the service in the second trial, and that fees for service rendered before said law went into effect could not properly be included. This court reduced said fee to $350. It is therefore manifest that in neither of said cases did

this court determine, or even express an opinion on, the question under consideration.

"A court will not give a retrospective effect to a statute, unless it is clear from the language used that the legislature intended to give it that effect." *State v. Stein,* 13 Neb. 529. Also, *Commercial Bank v. Eastern Banking Co.,* 51 Neb. 766; 36 Cyc. 1205. We are unable to perceive, from the language used in said statute, any indication whatever that the legislature intended to give the provisions hereinbefore quoted a retrospective effect. On the contrary, the words, "where the beneficiary * * * brings an action," seem more appropriately to apply to a beneficiary who thereafter brings an action, than to one who commenced an action before the statute took effect. We therefore hold that the provisions of said statute above referred to do not apply to actions commenced before same took effect; that the trial court did not err in refusing to allow plaintiff an attorney's fee; and that the right to the allowance of an attorney's fee on this appeal is governed by the same rule. A like construction was placed on a similar statute in *Piedmont and Arlington Life Ins. Co. v. Ray,* 50 Tex. 511.

The judgment of the district court is in all respects right, and should therefore be, and the same is, hereby,

AFFIRMED.

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The following opinion on motion for rehearing was filed June 22, 1922. *Former judgment of affirmative adhered to, except as to attorney's fees.*

Insurance: ATTORNEY'S FEES. Where plaintiff prevails in a suit on a fraternal beneficiary certificate, a reasonable attorney's fee, being part of the remedy only, may be taxed as an item of costs in favor of plaintiff, though the statute authorizing it was passed after the insurance contract was executed. Laws 1919, ch. 103, sec. 2. Holdings to the contrary in former opinion in this case, *ante, p.* 193 overruled.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

PER CURIAM.

This is an action by the beneficiary to recover $2,000 on a fraternal beneficiary certificate issued by defendant to Marion R. Sharpe. The action was defended on the ground that insured failed to pay an assessment when due and thus lost his insurance under the terms of the certificate. Upon a trial the district court rendered a judgment in favor of plaintiff for the face of the certificate and interest. A claim by plaintiff for an attorney's fee, however, was disallowed. Defendant appealed from the judgment against it, and plaintiff filed a cross-appeal from the refusal of the district court to allow an attorney's fee. Upon a review in this court, the judgment against defendant was affirmed and the disallowance of an attorney's fee for plaintiff was also affirmed. The facts are more fully stated in the former opinion, *ante p.* 193.

Defendant has filed a motion for rehearing, upon consideration whereof the principles of law announced in affirming the judgment against defendant and the conclusions of fact on which that judgment is based are adhered to. The motion of defendant for a rehearing, therefore, is overruled.

The sixth paragraph of the syllabus in *Sharpe v. Grand Lodge, A. O. U. W., ante, p.* 193, and that part of the opinion corresponding thereto, disallowing an attorney's fee, however, appear upon further consideration to be at variance with a former decision of this court. In *Johnson v. St. Paul Fire & Marine Ins. Co.,* 104 Neb. 831, an attorney's fee was allowed, though the statute authorizing it was passed after the contract of insurance was executed. In principle the case last cited follows former decisions. *Reed v. American Bonding Co.,* 102 Neb. 113: *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.,* 98 Neb. 863; *Ward v. Bankers Life Co.,* 99 Neb. 812. These decisions are ad-

hered to, and that part of the syllabus and opinion in the present case in conflict therewith is overruled.

Plaintiff asked for a reasonable attorney's fee in this court, and the same is allowed in the sum of $100, to be taxed as costs.

The cross-appeal of plaintiff is sustained and the judgment below, in so far as it disallows an attorney's fee in the district court, is reversed, with directions to tax as costs therein a reasonable attorney's fee in favor of plaintiff. All costs in both courts are taxable against defendant. The judgment for insurance is affirmed.

JUDGMENT ACCORDINGLY.

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GOLDIE M. WHITE, APPELLANT, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLEE.

FILED MARCH 28, 1922. No. 22031.

1. **Insurance:** STATUTES AND BY-LAWS: CONSTRUCTION. The fundamental principle and rule in the construction of a statute or by-law is to ascertain the intent of the body by which it was enacted or passed; and, if such intent is plainly and clearly expressed therein, there is no necessity or room for construction or interpretation.
2. **Statutes:** PROVISO: CONSTRUCTION. A proviso should be construed as referring to what immediately precedes it only, unless a different intention is apparent from the act itself.
3. **Insurance:** BY-LAW: AMENDMENT: CONSTRUCTION. The by-law set out in the opinion examined, and *held* that the amendment of 1917 thereto does not in any manner exempt a member who engages in the hazardous occupation of a brakeman on a railway freight train from paying the additional premium required by the original by-law, nor release him from the penalty, therein provided, for a failure to give notice of such change of occupation or to pay such additional premium.

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

*E. A. Wunder*, for appellant.

*De E. Bradshaw, J. M. Sturdevant* and *Heasty & Barnes, contra.*

Heard before LETTON, DEAN and DAY, JJ., CLEMENTS (E. J.) and WELCH, District Judges.

CLEMENTS, District Judge.

This is an action on a beneficiary certificate. The petition is in the usual form. The defense pleaded in the answer is that assured changed his occupation to a more hazardous one without notice and without paying the additional premium required, and that thereby he was suspended and his certificate was null and void at the time of his death. The case was tried to the court without a jury, and a judgment rendered for the defendant. Plaintiff appeals.

The certificate sued on was, in 1913, issued by defendant to plaintiff's then husband, D. Webster Powell, who was at that time 22 years old and engaged in farming. The rate required and agreed to be paid for said insurance was 80 cents a month, which assured did pay until his death, which occurred on October 31, 1918. On August 7 next preceding his demise, he entered the employ of a railroad company as a freight train brakeman and continued in said employment to the time of his death. No notice was given defendant of this change of occupation, nor was any additional premium paid because of the greater hazard resulting therefrom.

Section 43 of defendant's by-laws, in force at the time said certificate was issued, is as follows: "Sec. 43. Persons engaged in the following occupations, to wit: (a) Marine divers, structural iron workers, conductors and brakemen on railway freight trains, locomotive engineers and firemen, switchmen, hostlers and other similar railway or steamship employees, excepting agents, office men and those engaged in employment not more hazardous; those employed in mines not otherwise prohibited; sailors on seas, electric linemen, employees in electric current gener-

ating plants and enlisted men in the army and navy during war, may be admitted to membership if accepted by the sovereign physician, but their certificates shall not exceed two thousand dollars each and their rate of assessment shall be thirty cents for each one thousand dollars of their beneficiary certificate in addition to the regular rate while so engaged in such hazardous occupations. (b) If a member engages in any of the occupations or business mentioned in this section he shall within thirty days notify the clerk of his camp of such change of occupation, and while so engaged in such occupation shall pay on each asesssment thirty cents for each one thousand dollars of his beneficiary certificate in addition to the regular rate. Any such member failing to notify the clerk and to make such payments as above provided shall stand suspended, and his beneficiary certificate shall be null and void."

In 1917 said section 43 was amended. Such section, after being so amended, was practically the same as the original section, with the following added thereto:

"Provided, that all members, officers and enlisted men, now in good standing in the society, enlisted in the army or navy in defense of the United States shall be exempt from the additional premium herein required, and provided further, the sovereign executive council is hereby authorized and empowered to ascertain and put into effect a rate of insurance which it may deem adequate and which shall apply only to members, officers and enlisted men of the army or navy, and to adjust and readjust same from time to time during the continuance of war in which the United States is engaged. Provided, such rate shall apply only to persons who hereafter join the Woodmen of the World, or to certificates of increase of insurance, or for reinstatement, and provided, further, that this provision shall take effect immediately upon its passage."

By the provisions of this section before it was amended, which became and were a part of the contract between said

Powell and the defendant, his failure to notify the defendant of his change of occupation and to pay the additional premium provided for caused him to stand suspended and his beneficiary certificate to be null and void at the time of his death.

To avoid this seemingly inevitable result, which would effectually prevent a recovery in this action, counsel for plaintiff contends that, by the 1917 amendment of said section, Powell was relieved of the payment of the additional premium required by said original section and therefore was not suspended or his certificate annulled for failure to comply with said provisions. He argues that said amended section should be construed so as to make the next to the last proviso of the amendment apply to the provisions of the original section, and to make the words "such rate," therein found, refer to the rate of assessment fixed in the first paragraph of said section to be paid by parties engaging in the hazardous occupations therein specified. After careful consideration we have unhesitatingly reached the conclusion that said by-law is not susceptible of the construction sought to be placed upon it by counsel.

"In construing by-laws, the courts make use of the same general rules as in construing statutes." Boisot, By-Laws, sec. 87. "To ascertain the intent of the legislature is the cardinal rule in the construction of statutes." *People v. Weston,* 3 Neb. 312. "The fundamental principle of statutory construction is ascertainment of the intent of the legislature." *State v. School District,* 99 Neb. 338. If the intention is plain there is no room for construction or interpretation. *Shellenberger v. Ransom,* 41 Neb. 631. "A proviso should be construed as referring to what immediately precedes it only, unless a different intention is apparent from the act itself." *School District v. Coleman,* 39 Neb. 391. 2 Sutherland (Lewis) Statutory Construction (2d ed.) sec. 352.

The first clause of said amendment, which is in the form of a proviso, provides that then existing members of the society in good standing then enlisted in the army and

navy of the United States shall be exempt from the additional premium required by the original section to be paid by members engaged in the hazardous occupations therein specified, among which were "enlisted men in the army and navy during the war." Members engaged in the other specified hazardous occupations are not referred to nor in any manner exempted from the additional premium required.

The second clause of the amendment provides that the executive council of the defendant shall ascertain and put into effect a *rate* of insurance which it may deem adequate and which shall apply only to members who are officers and enlisted men of the army or navy. Then follows the proviso relied upon by plaintiff, which is in the following words: "Provided, *such rate* shall apply only to persons who hereafter join the Woodmen of the World, or to certificates of increase of insurance, or for reinstatement."

If we apply the general rules of construction that a relative word or clause will be construed as referring to its nearest antecedent, and that a proviso should be construed as referring to what immediately precedes it only, unless a different interpretation is apparent from the act itself, it clearly appears that the proviso in question and the words "such rate" therein refer only to the rate of premium to be ascertained and put in effect for members enlisted in the army and navy, and has nothing whatever to do with the additional rate required of members engaged in any other occupation.

But we think that the language of said amendment is so plain and unambiguous and the purpose and intent of the defendant to thereby exempt its members then enlisted in the army and navy from the additional premium required by the original section, and not to in any manner relieve a member engaged in any of the other specified hazardous occupations from the payment of such premium, that it requires no construction or interpretation.

By the express terms of said by-law the failure of Powell to notify the defendant of his engaging in the hazardous

occupation of a brakeman on a railway freight train, or to pay the additional premium required, caused his suspension and his certificate to become null and void. The judgment of the trial court was therefore right, and is

AFFIRMED.

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MARTIN MIKSCH, APPELLANT, V. FRED TASSLER ET AL., APPELLEES.

FILED MARCH 28, 1922. No. 21787.

1. **Appeal:** TRIAL DE NOVO. To entitle plaintiff to findings and decree in his favor in a trial *de novo* in this court, it must appear under the pleadings and from the evidence preserved in the bill of exceptions that the material facts charged in the petition are supported by a fair preponderance of the evidence.
2. **Waters:** CONSTRUCTION OF DITCH: INJUNCTION. In the hearing upon appeal in an equity suit, when it appears from the evidence that an open ditch is being constructed by defendants in, along and following the course of, but deepening and enlarging, the bed in a natural waterway on defendants' lands, the completion of such ditch will not be enjoined, unless it is also clearly shown by the evidence that the water normally contained in and carried by said waterway will thereby be diverted and discharged upon plaintiff's lands, to his damage.
3. **Appeal:** TRIAL DE NOVO. In a trial *de novo* of a suit in equity on appeal, this court, in reaching an independent conclusion without reference to the conclusion reached by the district court, as required by statute, is not precluded from considering and giving some weight to the findings of the trial court, when the record evidence is conflicting or in serious doubt.

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

*Doyle, Halligan & Doyle* and *Lewis Chapman,* for appellant.

*J. J. Harrington* and *J. A. Donohoe, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., BUTTON and COLBY, District Judges.

COLBY, District Judge.

This is a suit in equity brought in the district court for Holt county, wherein appellant, plaintiff in the lower court, is seeking to enjoin the appellees, defendants in the lower court, from constructing an open drainage ditch on the lands of defendants, which ditch would discharge its waters upon the lands of plaintiff.

The plaintiff in his amended and supplemental petition, upon which the action was tried, alleges, in substance, that he is the owner of the northwest quarter of section 3, township 29 north, range 16 west of the sixth principal meridian, in Holt county, Nebraska, about 60 acres being used for farm purposes and the remainder for hay; that defendant Edwin C. Miller is the owner of the south half of said section 3, defendant Guy A. Stone is the owner of the west half of section 10, in said township and range, which is the section south of section 3, and that defendant Fred Tassler is the owner of the northwest quarter of section 15, in said township and range, which land lies south of that owned by defendant Stone; that there is a natural depression, draw or watercourse on said quarter section owned by defendant Tassler beginning at a bridge on the section line west, which discharges the water from Pony lake, the seepage and surface water which collects from rains and the melting snows on a large territory comprising thousands of acres of land lying to the southwest; that said watercourse passes under said bridge across the quarter section of defendant Tassler in a northeasterly direction and continues in that direction until the water therein is discharged into the Elkhorn river.

The plaintiff further sets forth in his petition that defendant Tassler has constructed an open ditch, commencing at a point on the west line of his land in section 15, running thence in a northeasterly direction about 60 rods along the said draw or watercourse, then leaving said watercourse and turning north and northwest; that in digging said ditch said defendant has constructed a bank of earth to prevent the water from following the natural

drainage and watercourse to the east and northeast, thus turning the water north following the ditch so constructed; that the defendants have continued the construction of said ditch north to and across the northern part of Tassler's quarter section onto the land of defendant Stone for a distance of about 40 rods, and that defendant Stone intends to continue the construction of said ditch north across the west half of section 10 to the south line of the lands owned by the defendant Miller, and defendant Miller intends to construct said ditch and continue its construction across his lands in a northeasterly course to the lands owned by plaintiff, which ditch then and there will discharge all its collected waters in a volume upon said land of plaintiff; that the defendants are thus about to concentrate and collect the surface waters in said ditch from a large extent of country and discharge the same through said ditch, contrary to the natural course of drainage, up to and upon plaintiff's land; that defendant C. A. Davison was engaged in the work of constructing said ditch at the commencement of the action and was hired by defendants Tassler, Stone and Miller to construct said ditch across their said lands; that, if defendants are permitted to construct said ditch in the manner and location as aforsaid, said surface water, seepage and the water from Pony lake will be collected and carried onto plaintiff's land in a large and unusual amount in a body; that there is no natural watercourse upon plaintiff's land to carry off said water and the same will spread over and submerge the hay meadows belonging to plaintiff, to his great injury; and plaintiff prays for an injunction restraining the defendants and each of them from constructing said ditch or continuing the same as contemplated.

The defendants filed a joint answer to plaintiff's petition, admitting the ownership of the lands as stated, and admitting that the defendants Tassler and Stone have constructed said open ditch and defendant Miller intends to construct an open ditch connecting with the Tassler and Stone ditch, as alleged in the petition, and that defendant

C. A. Davison was engaged in the work of constructing this ditch at the commencement of the action and was hired by defendants Tassler, Stone and Miller to construct said ditch across said lands, as alleged in said petition. Defendants deny that said ditch is constructed or intended to be constructed otherwise than in the bed or channel of said natural draw or waterway, and that as constructed it will carry said water in said natural waterway across the lands of defendants and through the natural water drain and depression across the land of plaintiff; that the same is continuous from the west side of defendant Tassler's land through the lands of defendants Stone and Miller and also through the land of plaintiff, clear to Moses creek and thence to the Elkhorn river; defendants deny that plaintiff will receive any excessive water by reason of the construction and operation of said ditch; that said ditch has been constructed by defendants and is intended to be constructed by them in the lowest part of said depression and watercourse, so that water may run faster therein, thus increasing the velocity of said water and preventing said water from spreading out over a large acreage of land on both sides of said waterway, where it usually remains for fully half the summer; that by reason of the construction of said ditch the lands of defendants and of plaintiff and all other lands adjoining the same will produce more crops, more grass and a larger amount of hay than such lands would if said ditch were not constructed and maintained, and that it would be detrimental to the country and good husbandry to enjoin the construction of said ditch; and defendants deny each of the other allegations contained in plaintiff's petition, which have not been expressly admitted, and ask that plaintiff's action be dismissed.

The plaintiff filed a reply to defendants' answer, denying generally the allegations contained therein.

Upon the issues made by the petition, answer and reply the case was tried to the district court, which found generally in favor of defendants and against plaintiff, denied

the plaintiff an injunction, and dismissed his petition. From this decision, the plaintiff has appealed.

The real issue in this suit depends on the truth or falsity of the statements contained in plaintiff's petition, that defendants, in constructing said ditch, have diverted the water from the natural depression or waterway in which it is accustomed to flow, commencing at the bridge on the west side of defendant Tassler's land, and that, by reason of said ditch so constructed, large quantities of water will be diverted and carried away from their natural watercourse and drainage to the east and northeast and thrown in a mass or volume onto the land of plaintiff, to his great injury. The contention of defendants is that the natural watercourse and drainage of the Tassler land commences at the bridge, then goes northeast for a distance of about 25 or 30 rods, thence north and west onto the lands of defendant Stone, thence north and east onto the lands of defendant Miller, and then generally northeast onto plaintiff's land, and that the ditch which they so far have constructed and which they intend to construct follows the course of this natural watercourse, depression and drainage and up to and across plaintiff's land, thence to Moses creek and the Elkhorn river.

The point of divergence of the waterway claimed by plaintiff and that claimed by defendants, as it appears in the record, commences on the Tassler land at a point about 25 or 30 rods east of the bridge, the former running in a generally northeasterly direction across the east side of defendant Tassler's land, thence on with various meanderings to the Elkhorn river; that claimed by the defendants runs from such point about due north and then northwest, thence turning northeast across the Stone and Miller lands to, upon and across the land of plaintiff to Moses creek and thence to the Elkhorn river. A number of witnesses testified on behalf of plaintiff, supporting plaintiff's contention, and a large number of witnesses testified on behalf of defendants, giving evidence supporting defendants' contention.

While there is but little controversy as to the law applicable to this case, yet a brief consideration thereof will tend to clarify the issues.

Section 1771, Rev. St. 1913, provides: "Owners of land may drain the same in the general course of the natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation."

Section 1772 defines what shall constitute a "watercourse," as follows: "Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water or river or brook shall be deemed a watercourse."

This court in several well considered cases has given its interpretation of the requirements of a watercourse and has held that to constitute a watercourse the size or velocity of the stream is not material, but that it must, however, be a stream in fact as distinguished from mere temporary surface drainage occasioned by freshets or other extraordinary causes, although the flow of water need not be continuous or great in amount. *Pyle v. Richards,* 17 Neb. 180; *Morrissey v. Chicago, B. & Q. R. Co.,* 38 Neb. 406; *Town v. Missouri P. R. Co.,* 50 Neb. 768. From an intelligent application of the law contained in the statutes and in these decisions to the evidence and to the admitted facts in this case, there would seem to be no question but that the depression or draw passing under the bridge and onto the lands of defendant Tassler is a watercourse, whether we adopt the contention of plaintiff that it continues across the Tassler land to the east and northeast, and thence in a northeasterly direction to the Elkhorn river, or the contention of defendants that, after going 25 or 30 rods east from the bridge, it turns about due north and then northwest and then again northeast across the

lands of defendants Stone and Miller onto and across the land of plaintiff into Moses creek and the Elkhorn river. Either way, under the evidence, it is a depression or draw more than two feet below the surrounding lands and having a continuous outlet to a stream of water, brook or river, as defined by our statute. The dispute is which course from the point in question does the watercourse go.

This court has further decided that the owner of land cannot collect surface water in a volume upon his premises and by means of an artificial ditch discharge it upon the land of another, without the latter's consent, contrary to the natural course of drainage and to the latter's damage and detriment. *Todd v. York County,* 72 Neb. 207; *Kane v. Bowden,* 85 Neb. 347; *Shavlik v. Walla,* 86 Neb. 768. The same principal has been discussed, recognized and established by this court in the earlier cases. See *Davis v. Londgreen,* 8 Neb. 43; *Fremont, E. & M. V. R. Co. v. Marley,* 25 Neb. 138; *Lincoln Street R. Co. v. Adams,* 41 Neb. 737; *Bunderson v. Burlington & M. R. R. Co.,* 43 Neb. 545; *Town v. Missouri P. R. Co.,* 50 Neb. 768. This court has also in a number of cases announced the general common law doctrine that no landowner has the right to divert a natural watercourse so as to cause injury to another landowner. *Pyle v. Richards, supra; Roe v. Howard County,* 75 Neb. 448; *Nelson v. Wirthele,* 88 Neb. 595; *Keifer v. Shambaugh,* 99 Neb. 709.

At the hearing in the trial court the burden of proof was on the plaintiff to establish his case by a preponderance of the evidence, and on appeal this court, on a hearing *de novo,* must be satisfied from the record that all material facts charged in the petition and denied in the answer are proved by a fair preponderance of the evidence, before the plaintiff can be given the relief prayed. We are not convinced from a careful consideration of the pleadings and of all the evidence preserved in the bill of exceptions that the open ditch, so far as constructed, does and, if finished as intended, will actually divert the water from any natural depression or watercourse, or that it will conduct or

discharge the water in mass or volume onto plaintiff's land, to his damage.

The weight of the evidence seems to be that the waterway, the various depressions and the ditch were nearly filled with water at the time of the hearing; that the ponds, swales and sloughs on defendants' lands still contained water, but that the plaintiff's land was covered with grass in the depressions and swales which pass across it and was not flooded or covered with water. It also appears from the evidence that the natural waterway and the ponds situated upon the several tracts of land of defendants contain fish, and that rushes, cattails and other vegetation indicative of springs or a permanent water supply grow along the banks and edges. It is also beyond question that this whole country is more or less level, with, however, a slight general drainage to the northeast into the Elkhorn river; that the lands of defendants are more or less filled with water in the depressions, ponds or sloughs in the rainy season or when there is an excess of rain or snow, and that all waterways and water holes fill up, overflow and flow into each other, and the water passes slowly through many depressions or sloughs in a general direction northeast toward the Elkhorn river.

The undisputed testimony shows that the ditch in controversy was commenced on the west side of the northwest quarter of section 15, known as the Tassler quarter; that on the west line of this quarter is a public road, and that south of the center of such west line is a bridge over the slough or watercourse; that the ditch in question begins and goes about 25 or 30 rods east and northeast from said bridge, then turns directly north for a short distance, after which it goes in a northwesterly direction until it crosses into the west half of section 10, being the land owned by defendant Stone, continues on until it strikes the west line of section 10, then continues in a northerly direction along said west line on the land of defendant Stone. There is evidence showing that there is very little natural flow of water in this section of the country owing to the lands being

nearly level, with only a slight trend or depression generally to the northeast. It also appears that there is a depression trending northeast and reaching Moses creek to the east of plaintiff's land, and that there is another depression coming from the west or southwest which carries water, at least in time of freshets, across the Miller land onto and across plaintiff's land, and that the open ditch starting at the west side of section 15 connects with this depression or draw and will discharge its water therein, and that is liable, especially in time of high water, to pass along such depression or draw upon and across plaintiff's land. It does not appear from the evidence that the water holes on the lands of defendants Stone, Tassler and Miller drain entirely, even with the construction of the ditch in controversy, but that they fill up and overflow when the whole lands are inundated in times of excessive rainfall, snow or high water. The velocity of the water in the ditch since its construction and also in all the other draws, watercourses and depressions is very slow and the current, if any, is almost imperceptible.

It is a significant fact that the defendants in their answer state that one of the objects of the construction of the open ditch is not to change the course of channel, but to produce an acceleration of the current and make the water run faster in the natural depression or waterway, and thus aid the discharge and passage, instead of permitting the waters to "spread out over a large acreage of land on both sides of said natural waterway, draw and depression, where it usually remains for fully half the summer and only gradually finds its way through said natural depression" into the Elkhorn river.

The evidence introduced on behalf of the defendants is that the open ditch constructed by them is along the bed or bottom of the waterway created by nature, and not by man, and is in fact but an enlarging and lowering of such bed, and that said ditch has been and is intended to be constructed in the lowest part of the continuous depression or waterway extending from the bridge on the Tassler

land, across the Stone and Miller lands, to that of plaintiff. From the evidence it does not appear that the effect of this, unless the ditch is continued across plaintiff's land clear to Moses creek, a tributary of the Elkhorn river, would be to pile up or mass the waters and discharge them onto plaintiff's land, as charged in plaintiff's petition. On the contrary, it seems that the only effect would be to lower slightly the water in the ponds and other depressions sufficient to fill the ditch, and then that it would stand there for the season and be dissipated only by an almost imperceptible flow or by seepage and evaporation the same as before, except in cases of high water, when the whole country would be flooded. This would certainly be the effect under ordinary conditions, and in case of high water the overflow on plaintiff's land would be carried off in the natural depression or draw, which the evidence shows crosses the same in a northeasterly direction toward Moses creek.

It is not shown by a preponderance of the evidence that the water is drawn from the ponds and depressions on the east part of defendant Tassler's land or from the lands northeast thereof into the open ditch in controversy and then transmitted in such ditch in any considerable quantity to the north and northeast. There is no evidence showing any flowage of water from the ditch onto plaintiff's land. There is undisputed evidence that the water in the depressions or waterways on the east and northeast of the Tassler land is still slowly running on its way northeast to the Elkhorn river. The evidence does not show that this water has been diverted, stopped or perceptibly diminished in its flow in that direction, or that its course has been materially changed by or since the construction of the ditch. Of course, there is quite a conflict of evidence and the numerous witnesses who testified on behalf of plaintiff and defendants do not agree entirely on many of these points. It is in fact impossible to harmonize all of such evidence.

The statutes of Nebraska provide for a trial *de novo* in

all appeals from the district courts to the supreme court in suits in equity, wherein a review of some or all of the findings of fact is asked by appellant, and the statute further provides that upon such new trial it shall be the duty of this court to retry the issues of fact involved and "reach an independent conclusion, * * * without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." Rev. St. 1913, sec. 8198. This statute does not mean that the ordinary rules as to the burden of proof, competency and materiality of evidence do not apply, or that where the evidence is conflicting this court should not give some weight or consideration to the findings and conclusions of the lower court.

In *Corn Exchange Nat. Bank v. Jansen,* 70 Neb. 579, this court used the following language: "The findings of the trial judge, who made a thorough and painstaking original investigation, although no longer conclusive, are entitled to respectful consideration, if not to considerable evidential weight in this court."

In *Cooley v. Rafter,* 80 Neb. 181, and *Wetherell v. Adams,* 80 Neb. 584, this court holds that, when the evidence in the district court consists of oral testimony which is in sharp and irreconcilable conflict, and the conclusion derivable therefrom is dependent in part upon inferences from circumstances, some of which are in dispute, and in part upon the weight and credibility of testimony, to be determined from the degree of competency of the witnesses, their opportunity for knowledge and apparent clearness of their recollection, and the reasons therefor, the findings of the trial judge will be considered in determining the issues in this court.

There were some eight witnesses who testified to a part or all of the facts alleged in plaintiff's petition, while on the part of the defendants there were more than double that number who gave evidence in whole or in part supporting the material allegations in the answer, and in flat contradiction of the testimony given by the witnesses for

plaintiff. The district court was on the ground and perhaps personally knew a large number of these witnesses, was able to observe their manner of testifying and come to a wise and enlightened conclusion as to the truthfulness or untruthfulness of the testimony given; and it also may have known the general character of the witnesses for truth and veracity. Surely the judgment of such court in case of a serious conflict of evidence, would be far better than that of this court, which is obliged to form its conclusions from and base its judgment almost entirely upon the pleadings and the evidence preserved in the bill of exceptions. This court is at the great disadvantage of not having the opportunity for a personal contact with and the personal presence of the numerous witnesses who testified, but is obliged to obtain its information as to their credibility entirely from the typewritten pages of the record. Of course, a preponderance of the evidence does not, in every case, depend on the number of witnesses who may testify to certain material facts, but upon their means of knowledge, experience, capacity and opportunity for observation, and more especially upon the character of those testifying. If we consider the number of witnesses and their testimony in connection with the pleadings, then the findings should be against plaintiff, even on a trial *de novo*, under the requirements of the express statute, but if we add to this, as we are permitted under the decisions of this court, the weight of the findings of the lower court, which, from personal observation and contact, is our superior in ability to judge of the credibility of the witnesses and the weight to be given their testimony, there would seem to be no question but that the findings of the district court are sustained by a great preponderance of the evidence.

Based upon these considerations and upon the established principles of law applicable to this case, we conclude that the findings and judgment of the district court should be, and they hereby are

AFFIRMED.

MARY POHLE, APPELLANT V. FRANS NELSON ET AL., APPELLEES.

FILED MARCH 28, 1922. No. 21789.

1. **Limitation of Actions:** PETITION: DEMURRER. Where it appears from the statement of facts in the petition that the cause of action is on its face barred by the statute of limitations, and there are no allegations tolling the statute, a demurrer can be properly interposed to such cause of action.
2. ———. The two causes of action set forth in paragraphs 3 and 4 of plaintiff's petition having accrued over 25 years before the commencement of suit, and not containing allegations evidencing fraud or the establishment of trusts or tolling the statute, are each barred under the statute of limitations.
3. **Specific Performance:** ADOPTION: CONTRACT: CONSIDERATION. An agreement with a child sufficient as a basis for an action for specific performance of contract must be unequivocal in terms and provide for a definite amount or share of property, or for some specific property, and must be upon valid consideration. An agreement made after decree of adoption, which provides only for the services required by such decree, is void for lack of legal consideration.
4. **Adoption:** RIGHTS OF ADOPTEE. A contract with a child or a decree of adoption, which does not obligate the parents to give the child any more than one born to them in lawful wedlock, does not restrict the rights of the parents to dispose of their property by deed or will.
5. ———: ———. A decree of adoption under the laws of Nebraska or an agreement with a child granting no greater rights only confers upon such child the right to inherit what property remains undisposed of, on equal terms with the child or children born in lawful wedlock to such adopting parents.

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

*H. E. Burkett,* for appellant.

*B. Ready, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., BUTTON and COLBY, District Judges.

COLBY, District Judge.

This is a suit in equity brought by Mary Pohle, formerly Mary Nelson, for the purpose of being declared a lawful heir of John Nelson and Christine Nelson and for the specific performance of certain promises and agreements alleged in the petition. The defendants each filed demurrers to the petition, which were sustained by the district court, and the questions for consideration in this court are whether the facts alleged in plaintiff's petition are sufficient to constitute causes of action, and also whether the causes of action alleged in the third and fourth paragraphs of said petition are barred by the statute of limitations.

The petition charges that John Nelson, in the month of March, 1877, being over 44 years of age and married to a widow owning a separate estate, took the plaintiff, Mary Pohle, then a girl of five years of age, under the promise to do by her as though she were their own child, and thereafter, on October 1, 1877, upon his own motion was appointed guardian of the person and estate of plaintiff and of the plaintiff's brothers and sister, and that the said John Nelson and his wife, Christine Nelson, offered and agreed in writing to bestow upon plaintiff "all the rights, privileges, inheritance, heirship and immunities of children born in lawful wedlock," and thereafter, on July 1, 1878, the said John Nelson and Christine Nelson, husband and wife, legally adopted plaintiff as their own child, and thereby specifically conferred upon plaintiff the right of heirship and inheritance, as specially shown by the copy of the decree of adoption from the county court of Cedar county, Nebraska, attached to said petition and made a part thereof; and that also subsequent thereto the said John Nelson orally agreed with the plaintiff that if the plaintiff remained with him during her minority, rendering him faithful service as a daughter, she should receive a child's share of his property, just as though she were his own daughter; and that thereafter the said John Nelson repeatedly told plaintiff that she would get a child's share of whatever property he had at the time of his death, as she

was his girl; that for 13 years following the taking of the plaintiff by the said John Nelson and his wife he kept and controlled plaintiff, availing himself of her services and affections under said promises and agreements; the plaintiff working for him in the house and upon the farm without wages and returning him the comfort and assistance of an affectionate and faithful daughter.

In paragraph 3 of plaintiff's petition it is alleged that the plaintiff's brother, Charley Olesen, of whom the said John Nelson was also guardian, died intestate at the age of 20 years, on August 26, 1885, possessed of considerable personal property, which the said John Nelson took possession of and mingled with his own and converted to his own use and benefit, so that the same could not and cannot now be separated and distinguished, the exact value of which the plaintiff was not able to state; that plaintiff, together with her sister and brothers, were the only heirs of the said Charley Olesen.

In paragraph 4 of plaintiff's petition it is alleged that the said Christine Nelson, wife of the said John Nelson, died intestate at their residence in Cedar county, Nebraska, on September 26, 1885, possessed in her own right of considerable personal property, which was her sole and separate estate; that the said John Nelson took possession of said property and mingled it with his own, converting the same to his own use, so that it could not and cannot be separated and distinguished, the exact value of which the plaintiff is unable to state; that on May 29, 1886, the said John Nelson was married to the defendant Hannah Nelson, and the children of this marriage are the defendants John Lynn Nelson and Ollie Nelson, both born on June 12, 1888; that the said John Nelson departed this life at his residence in Cedar county, Nebraska, on December 21, 1919, and left surviving him the plaintiff, the plaintiff's brother, his adopted son, Alfred Olesen Nelson, Hannah Nelson, his widow, John Lynn Nelson, his son, and Ollie Nelson, his daughter, all of said persons being over the age of 21 years; that at the time of his death the said John Nelson was pos-

sessed of a large amount of real and personal property in Cedar county, Nebraska; that plaintiff, relying upon said promises and agreements and in pursuance thereto, went to live with and serve them as a dutiful and affectionate daughter until she was 18 years of age, conducting herself towards them as a dutiful child and receiving at their hands all the devotion and love a child should receive from parents, assisting the said Christine Nelson in the housework and taking care of and nursing her during her sickness, the said John Nelson and Christine Nelson during all of said time calling and treating plaintiff as their own child, and plaintiff discharging the duties and obligations resting upon her under said promises and agreements as a dutiful and affectionate daughter; but that the said John Nelson on June 20, 1890, wrongfully and in violation of said promises and agreements with the plaintiff, executed a will giving plaintiff only the sum of $50, which provision of said will has been renounced and rejected by the plaintiff; that the defendant Frans Nelson is the executor of the will and estate of the said John Nelson, deceased.

Plaintiff prayed in her petition that she be decreed to be the legal heir of the said John Nelson and Christine Nelson and for the specific performance of the said promises and agreements; that she be decreed to inherit and take as a daughter of the said John Nelson and inherit such share of his property as she was entitled to as an adopted daughter of the said John Nelson, to the same extent as she would have inherited had he not attempted by a last will and testament to violate said promises and agreements with the plaintiff. Exhibit A attached to said petition is a certified copy of the decree of the county court of Cedar county, Nebraska, relating to the adoption of plaintiff and her brothers and sister, and adjudges, in substance, that the said plaintiff shall have bestowed upon her by the said John Nelson and Christine Nelson all the rights, privileges, and immunities of children born in lawful wedlock; that she shall take the name of her adopting parents, and that all the relations of parents and children shall attach to said

parties; that the said plaintiff, from the date of said decree henceforth during her minority, shall be subject to the exclusive control and custody of said adopting parents and shall possess and enjoy "all the rights, privileges, inheritance, heirship and immunities of children born in lawful wedlock."

The several defendants demurred to the third paragraph and to the fourth paragraph of plaintiff's petition, which paragraphs are supposed to contain causes of action, although not separately stated or numbered, on the ground that four years have elapsed since the causes of action accrued, and also demurred generally to the petition on the ground that it does not state a cause of action. These demurrers were each sustained by the district court and plaintiff's action dismissed, and these rulings are among appellant's assignments of error.

It is doubtful if paragraphs 3 and 4, inserted in said petition, are separate causes of action, as the prayer does not ask any specific relief for the money or property alleged to have been converted by the said John Nelson to his own use, and it occurs to the writer of this opinion that perhaps these two paragraphs were not intended as separate causes of action, but merely as additional statements of equitable facts which might have a bearing upon the relief of specific performance, which appears to be the real gist or object of the action. However this may be, assuming that they are intended as separate causes of action, the petition discloses the fact that Charley Olesen died on the 26th day of August, 1885, and that Christine Nelson died on the 26th day of September of the same year, and that plaintiff attained her majority in the year 1890, so the period of more than 25 years has elapsed since these causes of action accrued to the plaintiff, and, as the petition contains no allegation of fact extending the bar of such statute, these causes of action, on their faces, are barred by the statute of limitations, and the rulings of the district court in that behalf are well taken.

The main assignment of error is the action of the dis-

trict court in sustaining the several general demurrers of the defendants to the petition or to the main cause of action contained therein, in which she demands to be decreed the legal heir of the said John Nelson and Christine Nelson, and prays a specific performance of the said promises and agreements notwithstanding said will. It is the contention of plaintiff that the said verbal and written agreements of John Nelson, the legal adoption by him and his wife of plaintiff, and a compliance on plaintiff's part with rendering services and affection, not only make the plaintiff his heir, but also prevent the said John Nelson from disposing of his property by will or otherwise as he may seek to do, and this is the important contention on which plaintiff demands relief and is the real remaining question for the court's decision.

It appears from a reading of the petition that the verbal and written agreements set forth therein were made after the decree of adoption by the county court, and that the only consideration therefor was "that, if plaintiff remained with the said John Nelson during her minority and rendered him service as a daughter, she should receive a child's share of his property, just as though she were his own daughter," "she would get a child's share of whatever property he had at the time of his death, as she was his girl." It will be observed that these verbal statements and agreements upon which the action is founded, as set forth in the petition, when taken together, are hardly as strong or as full as those contained in the decree of adoption, and there may be some question whether they should be construed as giving any greater rights and privileges to the plaintiff than those contained in said decree; but in any event the services and affection agreed to be given and given by plaintiff to her adopted parents were not more or greater than required under said decree, so there was no legal consideration whatever for said verbal or written agreements. Under the decree of adoption the plaintiff was already required and under legal obligation to render such service; the verbal and written agreements, having

been made after the child had become legally adopted, were not based upon any new or different or, in fact, upon any legal consideration whatever, since the only consideration mentioned was that the child should remain with its adopting parents during its minority and render faithful service as a daughter.

The authorities cited in appellant's brief do not give parties the right, under agreements like those set out in the petition, upon which plaintiff's claim is based, entered into after decrees of adoption, to compel a division of property or prevent the disposal of the same by will or deed. A plain interpretation of such agreements seems to be that the plaintiff would be placed in the same position as a child born in lawful wedlock, and that after and by the decree of adoption John Nelson was legally bound to do by the plaintiff as though she were his own child. This is a clear and fair inference from the language used in plaintiff's petition. The authorities cited in plaintiff's brief in support of her contention were all in suits where the agreements were made prior to and were not followed by any decrees of adoption,and were almost entirely those in which express provision was made for a definite amount or share of deceased's property or for some specific property, and hence would plainly, as a matter of justice and equity, prevent its alienation by will or otherwise.

In *Kofka v. Rosicky*, 41 Neb. 328, the contract was to leave the child all of the property of which the adopting parents might die seised. In *Peterson v. Bauer*, 83 Neb. 405, the agreement was to leave, by will, one-half of the estate to the child. In *Hespin v. Wendeln*, 85 Neb. 172, the contract expressly stated that the child should have certain personal property when he became 21 years of age, and on the death of the parent share equally with his children in the estate. In *Best v. Gralapp*, 69 Neb. 811, definite property was to be left. In *Harrison v. Harrison*, 80 Neb. 103, the contract described a specific farm and required that the claimant should reside with the owner until the owner's death. In *Johnson v. Riseberg*, 90 Neb.

217, the agreement provided for an entire farm and all personal property. In *Damkroeger v. James,* 95 Neb. 784, the contract provided for all property, and the same agreement ruled in *Hannemann v. Ott,* 98 Neb. 492, for the entire estate. In *Lacey v. Zeigler,* 98 Neb. 380, the contract made provision for a definite and certain sum of money. In *O'Connor v. Waters,* 88 Neb. 224, the contract required that claimant should remain with the owner after his majority and should have a definite tract of land; and in *Moline v. Carlson,* 92 Neb. 419, the claimant was to remain until the death of the owner and receive all the property of deceased. In *Tuttle v. Winchell,* 104 Neb. 750, the agreement to adopt substantially guaranteed that the child should become an equal heir with a daughter of the adopting parents. In this case the parents died intestate, and the court in the opinion makes the following statement: "It did not in terms restrict their right to dispose of their property before or after their death. It only gave the plaintiff the right to inherit what remained undisposed of on equal terms with the daughter." See, also, *Pemberton v. Perrin,* 94 Neb. 718.

The case of *Pemberton v. Perrin, supra,* would seem to dispose of this action and settle the law in this state. But it can not be contended from the adjudicated cases in the different states generally that the adoption of a child gives such child any other or greater property rights than those which are held by children born in lawful wedlock. The only exception which the writer has been able to find to this rule is that which exists or formerly prevailed under the Code Napoleon, which has been adopted, with amendments, as the law of the state of Louisiana. Under this Code an adopted child has been given greater rights than a child of lawful wedlock in the property of the adopting parents, and some authorities in that jurisdiction hold that the parents can neither by deed nor will deprive such adopted child of its property rights. The Code Napoleon, however, is not the law of Nebraska.

In conclusion, it appears that the agreement alleged in

plaintiff's petition cannot be enforced in this action because (1) it was without consideration by reason of having been made after the county court's decree of adoption and containing no additional consideration; (2) because such agreement and such rights and privileges as were granted under the decree of adoption did not give the plaintiff, as an adopted child, any further, superior or greater rights than those granted to children born in lawful wedlock; and (3) because, notwithstanding the decree of adoption and the subsequent agreement, the adopting parent can alienate and dispose of his property by will or otherwise as to him seems best and can devise and bequeath his property to one or more of his children to the exclusion of any or all others, whether adopted or born in lawful wedlock.

The application of the law to the admitted facts in this case seems unequivocally to support the decision of the district court in sustaining said demurrers and dismissing said petition, and such action is

AFFIRMED.

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WILLIAM H. CAMAN ET AL., APPELLEES, V. JOHN L. SCHIEK ET AL., APPELLANTS.

FILED MARCH 28, 1922. No. 22049.

1. **Petition** examined, and *held* to be a suit against defendants as partners.
2. **Judgment**: PARTNERSHIP. Where a group of business men meet and organize for the purpose of promoting a public entertainment and select certain persons as officers to conduct the same, and subsequently the officers are sued as partners, and the record discloses there was no partnership proved, a judgment against them will not be upheld.
3. **Evidence** examined, and *held* not to sustain the judgment.

APPEAL from the district court for Gage county: LEONARD W. COLBY, JUDGE. *Reversed.*

*Hazlett, Jack & Laughlin,* for appellants.

*Sabin & Vasey, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., DICKSON and STAUFFER, District Judges.

DICKSON, District Judge.

This is an appeal from the district court for Gage county wherein the appellees, William H. Caman and others, recovered a judgment for $251 against the appellants, John L. Schiek and others, hereinafter referred to as plaintiffs and defendants.

The petition alleges that the plaintiffs associated themselves together as a band under the name and style of the Beatrice Musical Band Choral Amusement Association; that the defendants associated themselves together under the style and name of the Beatrice Driving Association, and that the defendant John L. Schiek was elected president of the association, Clifford P. Fall vice-president, G. L. Mumford secretary, P. C. Drew treasurer, and W. A. Ransdell chairman of the board of directors; that the object and purpose of the driving association was to hold a race meet in the city of Beatrice, which they held and carried on in the nature of a partnership, and were equally liable for the expenses of said races, and were to receive an equal proportion of any profit that might have been made upon the said races; that, before the races, the defendants employed the band to play therefor at an agreed price of $225, and that the plaintiffs performed their part of the contract, but that the defendants failed and refused to pay the plaintiffs. The defndants' answer was a general denial. From a judgment in favor of the plaintiffs, defendants appeal.

The petition charges that the defendants, as partners, conducted the horse races and, as partners, were liable to the plaintiffs. The case was tried by the court and the jury were instructed on this theory. The instructions given by the court on its own motion, and the instructions given at the request of counsel for the plaintiffs and defendants submitted to the jury the question of partnership. Does

the evidence sustain the allegations of the petition as to a partnership? If a partnership was proved, then every member thereof would be liable. If the evidence fails to show a partnership, then there can be no recovery against the defendants, or any of them, as the petition is based and recovery sought on an allegation of partnership.

From the record it appears that, on two occasions, a number of the business men of Beatrice met in the commercial club rooms of that city, to consider the advisability of holding a race meet. A plan was agreed upon by which each was to contribute the sum of $10. This amount, it was thought, would be more than sufficient to defray the expenses, estimated at about $600. To each contributor a ticket was issued, which entitled the holder to the privilege of the grounds during the races. The defendants were selected without any collective, concerted arrangement agreement, or understanding, expressed or implied, on their part, to manage and conduct the race meet. Some were nominated and selected with their consent and others without, and others had no knowledge of their nomination and selection until sued. Defendant Ransdell had printed for his own convenience in writing to horsemen, and without the knowledge, approval, assent, or consent of his co-defendants, a letter-head in which he described himself as "Chairman Board of Directors." The other defendants were by him named on the letter-head as "John L. Schiek, president; Dr. C. P. Fall, vice-president; G. L. Mumford, secretary, and P. C. Drew, treasurer." This letter-head the plaintiffs had no knowledge of until after the performance of the services sued for. There is no evidence in the record, or claim made, that these men ever met together as individuals, officers, or representatives of the business men of Beatrice, or that they even consulted with each other as such. There is no evidence in the record that they were to or ever made a report of their doings to those who selected them, or to each other. In fact, only one or two of the defendants took an active part in the race meet; the others did nothing, either from choice or because those that

were active did all that was required. They neither collectively nor individually represented or held themselves out to be partners, nor can there be found in the record any conduct on their part, collectively or individually, which would indicate or imply that they were partners, or pretending to act as such. The plaintiffs in this action claim that they were employed by defendant Drew. This he denies. They do not claim or assert, and the record does not show, that he consulted, advised, or counseled, either collectively or individually, with his codefendants as to the employment of the plaintiffs, nor is there any evidence in the record that Drew's codefendants, or any of them, either collectively or individually, knew of the employment of the plaintiffs by Drew, if they were employed by him, unless employment be inferred from an inquiry from one of the defendants other than Drew as to when, where, and how plaintiffs should play.

Do these undisputed facts make these defendants partners? We think not. This court in *Waggoner v. First Nat. Bank of Creighton,* 43 Neb. 84, said: "Copartnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportion." This would be a true partnership. The most that can be said of the case under consideration, is that the defendants were the representatives of an association of business men formed for pleasure. To apply to them the term 'partnership' would be to misuse the term. Somewhat similar facts have been considered by the courts and a recovery allowed, not upon the proposition of partnership, but liable "because they held themselves out as agents for a principal who had no existence, or on the ground that they must, under the contract, be regarded as principals, for the simple reason that there is no other principal in existence." *Learn v. Upstill,* 52 Neb. 271, and cases cited. While the facts, to some extent, present this issue, the pleadings do not, and the rule in this state is inflexible that the allegations and

the proof, *allegata et probata,* must agree.

These defendants were sued as partners, or as members of a partnership. There is no evidence to sustain the allegations of the petition, and the judgment must be reversed and a new trial granted.

REVERSED AND REMANDED.

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STATE, EX REL. ALVIN SPELTS, APPELLANT, V. RONALD F. ROWE ET AL., APPELLEES.

FILED MARCH 28, 1922. NO. 22050.

1. **Taxation:** TAX LAWS. A tax law is a legislative enactment which defines the measure of every man's duty in support of the public burdens, and a tax thus imposed is not founded on contract, and does not establish the relation of debtor and creditor between the taxpayer and the state, and may be repealed or amended by a subsequent legislature.
2. ———: ———: EXEMPTIONS. The Constitution only limits a legislative body in the matter of property. And where a part of the taxable property within the state is not being taxed, in whole or in part, there is no pledge or agreement, expressed or implied, that the laws shall not be repealed or amended by a subsequent legislature to meet the conditions which exempt the property from taxation and the placing of it on the tax list.
3. **Constitutional Law:** TAXATION: MORTGAGED LAND. Before the amendment of sections 6350 and 6351, Rev. St. 1913, by the legislature of 1919 (Laws 1919, ch. 138), a landowner mortgaged his land to a federal land bank company, there being no provision in the mortgage that the mortgagor would pay the tax thereon, and the mortgage being exempt from taxation under a federal law, *held,* that the owner of the real estate was not, in 1920, entitled to have his interest in the land, for the purpose of taxation, fixed and determined by deducting from the assessed value the unpaid part of the mortgage, and that, in the determination of his interest in the land for taxation purposes, the federal mortgage should not be deducted from the value of the land. *Held,* further, that the act of the legislature of 1919 (Laws 1919, ch. 138), amending sections 6350 and 6351, Rev. St. 1913, relating to taxes, does not impair the obligation of a contract or destroy a vested right.
4. **Mandamus:** TAXATION. Record examined, and *held* not to entitle the relator to the relief demanded.

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

*J. S. Pedler,* for appellant.

*Lamont L. Stephens, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., DICKSON and STAUFFER, District Judges.

DICKSON, District Judge.

This is an appeal from the district court for Sherman county denying the appellant, relator below, a writ of mandamus against appellees, respondents below. There is no disputed question of fact. A brief statement only is necessary to an understanding of the questions involved.

The appellant is the owner of a farm, mortgaged on the 8th day of March, 1919, to the Lincoln Joint Stock Land Bank of Lincoln, Nebraska, for $16,000, upon which he had paid, when the action was begun, the sum of $162.40, leaving a mortgagee's interest of $15,837.60. The mortgage does not contain a tax clause or any agreement on the part of the mortgagee to pay the taxes levied and assessed against the interest of the mortgagee in the real estate. In the year 1920 the real estate was valued and assessed for taxation purposes in the sum of $16,250. Appellant alleges that the appellees, the county clerk and county assessor, although demanded, have at all times failed and refused to assess and tax the interest of the mortgagee at $15,837.60, or any other amount, and have, at all times, failed and refused to assess his interest in said real estate at the sum of $412.40, and have, at all times, refused to assess and tax said interest separately, or to assess and tax his interest separately. The appellant sought by mandamus to compel the respondents to so assess said real estate, and from a judgment denying the writ, the relator appeals to this court.

The question presented by the record is whether or not appellant should be taxed on the basis of $16,250 or $412.40, which he claims is his taxable interest in the land.

It is conceded that the interest of the mortgagee, $15,837.50, cannot be taxed to the mortgagee. If appellant's contention be right, then taxes can only be assessed and taxed on this land on the basis of $412.40, and the remaining interest, represented by the mortgagee's interest, will escape taxation. When appellant mortgaged his land the statute (Rev. St. 1913, sec. 6350) provided:

"The amount and value of any mortgage upon real estate in this state shall be assessed and taxed to the mortgagee or his assigns, and the taxes levied thereon shall be a lien on the mortgage interest; and the excess in value of the real estate above the mortgage or mortgages thereon shall be assessed and taxed to the mortgagor or owner of the premises and be a lien on the owner's interest."

Section 6351 provided: "When it is provided and agreed in any mortgage that the mortgagor shall and will pay the tax levied upon the mortgage or the debt secured thereby, such assessor or county clerk shall not enter the mortgage for separate assessment and taxation, but both interests shall be assessed and taxed to the mortgagor or owner of the property mortgaged."

These provisions of our statute had been in force since 1911, and so remained until 1919, when, by legislative act (Laws 1919, ch. 138) section 6350 was amended, and that part of the section providing for the assessment and taxation of the mortgagee's interest was amended. By the amendment it was provided:

"The amount and value of any mortgage upon real estate in this state *when taxable to the mortgagee* shall be assessed and taxed to the mortgagee or his assigns, and the taxes levied thereon shall be a lien on the mortgage interest."

Section 6351 was amended to conform with section 6350 as amended, and by the amendment it is provided:

"The value of the real estate in excess of any mortgage *taxable to* and taxed to *the mortgagee* shall be assessed and taxed to the mortgagor or owner."

The exemption from taxation of the federal land bank

mortgages necessitated the amendment of the law of 1911. Under the provisions of that law a mortgage was, by legislative enactment, declared to be an interest in real estate for the purpose of assessment and taxation, and was taxable to the mortgagee, unless the mortgagor and mortgagee agreed and the mortgage provided that the mortgagor should pay the taxes on the mortgage. In the absence of such an agreement, the mortgagor or owner's interest, only, in the real estate above the mortgage indebtedness could be assessed and taxed to him. The result was, in many instances, that the lands of those who made federal loans were escaping taxation to the extent of the federal mortgages. To remedy this condition, the law was amended in 1919, so that only such mortgages as were taxable to the mortgagee could be assessed and taxed to the mortgagee, and the value of the real estate in excess of any mortgage taxable to and taxed to the mortgagee could be assessed and taxed to the mortgagor or owner. By these amendments the owner of real estate incumbered by federal loans were prevented from deducting the amount unpaid from the assessed value of the real estate, thereby placing the federal borrowing landowner and the borrower from private sources, who contracted to pay the interest on the mortgage, on an equal and uniform taxation basis. If we are to be governed, as contended by the relator, by the law in force in 1911, then this contention must be sustained and his interest determined, assessed and taxed as provided by section 6350; that is, by deducting from the assessed value the unpaid part of the mortgage, leaving the relator's taxable interest in this case $412.50. But if, on the contrary, we are to be governed by the law as amended in 1919, then the respondents are right, and the judgment of the district court should be affirmed.

It is evident that the legislature intended this amended act to apply to all cases like the one presented by the relator. His case presents this taxation spectacle: A farm valued for taxation purposes at $16,250 to be taxed

on a valuation of $412.50. The taxpayers of the state, county, school district, and other municipal subdivisions appealed to the legislature to, by legislative act, place the lands of all borrowers on the same basis, thereby subjecting the relator's property, as well as all others similarly situated, to the payment of its just share of state, county, and other municipal tax. Such a method of taxation would seem to be just and equitable, as well as in compliance with the law as amended, and should, for these reasons, be upheld, unless to enforce the amended statute would be to impair the obligation of a contract, or destroy a vested property right, and this presents for consideration the only legal question in the case.

Does the act of 1919 impair the obligation of a contract or destroy a vested right? In passing upon this question, let us keep in mind that this court has held: "The taxing power vested in the legislature is without limit except such as may be prescribed by the Constitution itself." *State v. Board of County Commissioners,* 4 Neb. 537. And again: "The power of taxation is an attribute of sovereignty having its source in the necessities of organized society, and the limits of its exercise depending, in the absence of express limitations upon such power, upon the exigencies of the public." *Board of Directors of Alfalfa Irrigation District v. Collins,* 46 Neb. 411.

When the legislature of 1911 declared a mortgage on real estate to be an interest in real estate, and that the mortgaged interest should be taxed to the holder of the mortgage unless the mortgagor contracted to pay the tax thereon, all mortgages were taxable. That legislature did not contract or agree that conditions would not change, and that, if conditions did change, and a federal law was enacted whereby federal loans were exempt from taxation, a subsequent legislature would not change the law, either by repeal or amendment, to meet the tax necessities of the state and its municipal subdivisions. There was no pledge or agreement, expressed or implied, that the tax-

ation system would not thereafter be changed at legislative will.

"Taxes are positive acts of government, through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required. Taxes are not founded on contract, but owe their existence to the action of the legislature, and do not depend for validity upon individual assent, but operate *in invitum*. A tax law is a legislative enactment which defines the measure of every man's duty in support of the public burdens, and provides the means of enforcing it. A tax is not founded on contract, and does not establish the relation of debtor and creditor between the taxpayer and the state. It is not an obligation or debt based upon or arising out of an implied contract." 1 Desty, Taxation, p. 9.

The Constitution only limits a legislative body, in the matter of taxation of property, and where a part of the property within the state is not being taxed, in whole or in part, there is no pledge or agreement, expressed or implied, that the laws shall not be repealed or amended by a subsequent legislature to meet the conditions which exempted the property from taxation and the placing of it on the tax list. "A tax upon a new subject, or an increased tax upon an old one, does not impair the obligation of the contract." 1 Desty, Taxation, p. 140.

The legislature, by the act of 1911, said, so long as the law stands, the system of taxation therein provided for shall govern; and by no judicial construction could it be held to be a contract on the part of the legislature that the law should remain for all time as enacted. It was within the power of the legislature to increase or decrease the tax upon real estate within the state, and an increase was not in violation of the constitutional provisions prohibiting the impairing of the obligation of a contract. The act of 1911 was general in its effect, and was subject to repeal or amendment at legislative will. Its continuation was a matter of public policy only. No court has ever

held that the state, through its legislature, has not the right to change its entire system of taxation, so long as the changes made do not violate constitutional provisions. Taxes not being founded on contract, and the relation of debtor and creditor not existing between the taxpayer and the state, it follows that a change of the system of taxation would not be the impairment of a contract, nor would it deprive the taxpayer of a vested right.

These principles have been sustained almost uniformly when presented to the courts of our sister states. Wisconsin enacted a law giving a bounty on salt and exempting all property, real and personal, used for the purpose of production and manufacture of salt from taxation for any purpose. A subsequent legislature limited the bounty and also limited the exemption from taxation to five years from the organization of the company or corporation engaging in the production of salt. Whereupon a controversy arose between the salt company and the state, the salt company alleging that the bounty and right of exemption from taxation as provided by the original act became and was a vested right, and that it impaired the validity of the contract. Justice Bradley, in writing the opinion, says: "Such a law is not a contract except to bestow the promised bounty upon those who earn it, so long as the law remains unrepealed. There is no pledge that it shall not be repealed at any time. Its continuance is a matter of public policy." *Salt Co. v. East Saginaw*, 13 Wall. (U. S.) 373, affirming *East Saginaw Mfg. Co. v. City of East Saginaw*, 19 Mich. 259.

Iowa, by legislative enactment, provided that, for every acre of forest trees planted and cultivated for timber within the state, the sum of $100 an acre should be exempt from taxation upon the owner's assessment for 10 years. A subsequent legislature amended the law, providing that the amount to be deducted should not exceed one-half of the value of the realty upon which such exemption was claimed. The owner of the land contended that the amendment could have no application to his lands, because, when

he accepted the terms of the original statute and complied with its requirements, his right to exemption from taxation to the extent of $100 an acre for 10 years became complete and vested, and that it was in the nature of a contract entered into between him and the state, and the legislature had no power to impair the obligation of the contract, and the removal of the exemption was in violation of the Constitution of the United States. The supreme court of Iowa found against the contentions of the landowner. *Shiner v. Jacobs,* 62 Ia. 392.

The following cases support or follow the rule announced by the supreme court of the United States and the supreme court of Iowa: *State v. Great N. R. Co.,* 106 Minn. 303; *Hay v. Hill,* 65 Cal. 383; *Common Council of Detroit v. Board of Assessors,* 91 Mich. 78. The authorities sustain the conclusions of the court and a further consideration is unnecessary.

The judgment of the district court was right, and is

AFFIRMED.

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ALTON LAURIE V. STATE OF NEBRASKA.

FILED MARCH 28, 1922. No. 22402.

1. **Infants:** PETITION: CHARGE: JURY TRIAL. Petition set forth in the opinion examined, and *held* not to charge defendant with crime, and not to entitle him to a jury trial, and no arraignment necessary.
2. **Appeal:** IMMATERIAL EVIDENCE. A case tried to the court without intervention of a jury will not be reversed on account of the introduction of immaterial testimony, if there is sufficient competent and material evidence in the record to sustain the judgment.
3. **Evidence** examined, and *held* to sustain the judgment of the trial court.

ERROR to the district court for Hamilton county: EDWARD E. GOOD, JUDGE. *Affirmed.*

*Roscoe R. Smith* and *J. H. Grosvenor,* for plaintiff in error.

*Clarence A. Davis, Attorney General,* and *Mason Wheeler, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., DICKSON and STAUFFER, District Judges.

DICKSON, District Judge.

This is a proceeding in error from the district court for Hamilton county. From the record it appears that the county attorney filed a complaint under the juvenile court act against the plaintiff in error, a boy 15 years of age, in the county court of that county. Upon this complaint, process issued, and the boy and his parents appeared in court. Later, an amended complaint was filed. To this, as well as to the original complaint, a plea of not guilty was entered, and after a hearing the boy was, by the county court, found to be a fit subject for commitment to the state industrial school, and from the order of commitment an appeal was taken to the district court, where the county attorney filed a petition in which it was charged that the plaintiff in error, Alton Laurie, was a minor under 16 years of age, and that "said Alton Laurie is growing up under such circumstances as would tend to cause such child to lead a vicious and immoral life; that for lack of proper control he is growing up in delinquency and crime; that he is an habitual truant; that he is incorrigible; that he habitually uses obscene, profane and indecent language; that on or about February 14, 1921, and at various times during the present school year, he was guilty of immoral conduct in and about a schoolhouse in Aurora, Hamilton county, Nebraska; that on or about March 18, 1921, he was guilty of immoral conduct in a public place, to wit, on the public highways in said county; that although under 18 years of age he habitually smokes cigarettes; that although under 16 years of age he has repeatedly been guilty of operating a motor car upon the highways of this county in defiance of law and of his parents' wishes." A trial by jury was demanded and refused, and, after a hearing and trial, the court found that

the boy was "a fit subject for commitment to the state industrial school at Kearney, Nebraska," and "that said minor is growing up in delinquency and crime, and under such circumstances as would tend to cause him to lead a vicious and immoral life," and ordered his commitment to the superintendent of the state industrial school for boys at Kearney. A motion for a new trial was filed and overruled, and, from the judgment committing the boy to the industrial school, he prosecutes error to this court.

Plaintiff in error assigns many reasons why the judgment committing him to the industrial school should be set aside and a new trial granted, all of which we have carefully examined and considered.

It is contended by plaintiff in error that the court erred in denying him a trial by jury. This involves an examination of the juvenile court act, and, in principle, the case of *Bell v. State,* 104 Neb. 203, is decisive of the question. But in view of some of the provisions of the juvenile court act, and it being a new question, we deem it advisable to give consideration to the petition and its legal effect.

The act itself makes no provision for a trial by jury except where a delinquent child is charged with a crime. The complaint was intended to charge, and did charge, the boy with being a dependent, neglected and delinquent child. Dependent and neglected in this; that said Alton Laurie was growing up under such circumstances as would tend to cause such child to lead a vicious and immoral life; that, for lack of proper control, he was growing up in delinquency and crime, delinquent in this, that he is an habitual truant and incorrigible; that he has violated the laws of the state; that he habitually uses profane, obscene and indecent language; that he is guilty of immoral conduct in and about a schoolhouse and on the public highway; that he habitually smokes cigarettes and was repeatedly guilty of operating a motor car in violation of law. It is evident the specific charges in the complaint of law violation were not made with the intention of charging him with crime, but to set forth and state the facts showing him

to be a dependent, neglected and delinquent child. The statute defines dependent, neglected and delinquent children, and to bring the case within the statutory provision, it was necessary to make these allegations, and without such, or similar allegations, the petition would be subject to attack. It is not enough that the petition charge that the boy was a dependent, neglected and delinquent child, but it must go farther and set forth facts showing that he was such a child, and until such a petition was filed he would be uninformed of what he would have to meet. The petition in such cases must inform the defendant of the charge he is to meet, to enable him to prepare for his trial. And an examination of the petition brings us to the irresistible conclusion that the charge against the boy was that of delinquency. A commitment to the industrial school upon such a charge is not a conviction of a crime, or a commitment to a penal institution. This question of a right of trial by jury was before the supreme court of Wisconsin in *Wisconsin Industrial School for Girls v. Clark County,* 103 Wis. 651. The following is paragraph 5 of the syllabus in that case:

"The commitment of a child to an industrial school corporation, not as a punishment for crime, but to furnish the child needed guardianship, maintenance, and care for its benefit and that of society, is not an interference with personal liberty requiring a trial by jury to justify it."

Judge Marshall, in discussing the question of the right of a trial by jury and the object and purposes of the law, says in his opinion:

"The proceeding is not one according to the course of the common law in which the right of trial by jury is guaranteed, but a mere statutory proceeding for the accomplishment of the protection of the helpless, which object was accomplished before the Constitution without the enjoyment of a jury trial. There is no restraint upon the natural liberty of children contemplated by such a law —none whatever; but rather the placing of them under the natural restraint, so far as practicable, that should be,

but is not, exercised by parental authority. It is the mere conferring upon them that protection to which, under the circumstances, they are entitled as a matter of right. It is for their welfare and that of the community at large. The design is not punishment, nor the restraint imprisonment, any more than is the wholesome restraint which a parent exercises over his child. The severity in either case must necessarily be tempered to meet the necessities of the particular situation. There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes to its helpless members is performed just in the measure that the law is framed with wisdom and is carefully administered."

This case, and the case of *Bell v. State, supra,* are decisive of the question of the right of trial by jury, as well as the contention of counsel for plaintiff in error that "the provisions of the juvenile court law that purport to deprive minors of their liberty without due process are unconstitutional and void, especially in cases where there has been no prior conviction and no plea of guilty to a charge of misdemeanor or crime," and we deem further consideration of these questions unnecessary.

Complaint is made because the trial court failed to arraign the defendant upon the petition filed in that court. The record discloses that two complaints were filed in the county court; that to each of these complaints the defendant was arraigned and entered his plea of not guilty. Our statute gave the defendant the right of appeal as in civil cases. Whether it was necessary to file a new petition in the district court, we do not pass upon. A comparison of the petition filed in the district court and the amended

complaint filed in the county court shows them to be almost identical. To the complaints filed in the county court, he entered his plea of not guilty, and we cannot see how he was prejudiced by not being required to plead to the petition in the district court, as none of his rights were affected thereby. There was a trial upon the merits, and he was not deprived of any substantial right. He was not charged with crime, nor was he tried for crime. It was a hearing or an examination by the judge under the juvenile act, and no arraignment was necessary.

Error is predicated upon the fact that the petition differs from the original complaint filed in the county court. It was within the discretion of the county judge to permit the filing of an amended complaint. Besides, the record discloses that the plaintiff in error was represented by counsel in both the county court and in the district court, and that no objections were made to the filing of the amended complaint in the county court, nor to the petition in the district court, it being almost identical in words with the amended complaint filed in the county court, and plaintiff in error has nothing to complain of by reason of the filing of the amended complaint in the county court or to the petition in the district court.

A reversal is sought on account of the admission of the evidence of the county judge. The attorney general in his brief admits that the testimony was probably immaterial and irrelevant. Granting that it was, this would not, in itself, necessitate a reversal, if there is sufficient competent and material evidence in the record to sustain the judgment. *Wilson v. Wilson,* 94 Neb. 192.

It is vigorously contended by plaintiff in error that the judgment is not sustained by sufficient evidence. We have very carefully examined the record in this case, and have come to the conclusion there is sufficient competent and material evidence in the record to sustain the judgment. Many of the associates of the plaintiff in error were called as witnesses and testified in the case. Their testimony is undisputed and shows him to be a dependent, neg-

lected and delinquent boy, beyond the control of the constituted authorities, teachers and parents, a menace to the schools and those who come in contact with him and who, of necessity, are forced to associate with him. No one can read the record and come to any other conclusion. Specific reference to the evidence will answer no good purpose. The witnesses were before the county judge as well as the district judge. They had an opportunity to observe the boy himself, and, because of their opportunities for investigation and observation, were better able to determine the proper disposition and training of the boy than this court. To keep him in the public school would be impracticable, and that would be putting it in the mildest possible way. We realize it is a serious matter to take from the home and from the guardianship of father and mother a boy of these years; but when parents fail to perform their duty, thereby losing control of their child, they have no one to blame but themselves, and should not complain when the courts find it necessary, in the interest of society and the welfare of the community, to curb and correct the delinquent. A great majority of the juvenile delinquencies can be traced directly to the home and its environments. Present day conditions have, in a great measure, destroyed the home life. The boy and girl of 15 are today, in too many instances, allowed to follow and indulge in their own inclinations, whether right or wrong, and parents are entirely too indifferent to the child's welfare, and as a result are, in many instances, brought face to face with such conditions as confront the parents of this boy. The public is even more indulgent at times than the parents. Officials are not prone to act, and as a result, no action is taken until the public rises up in arms, so to speak, and demands that action be taken. Parents then plead, as did the parents in this case, that the child's shortcomings and misdoings were due to his or her associates and associations, realizing that they, and they only, are responsible for the child's associates and associations when it is too late.

Upon the disposition of this case by this court, the boy is again within the jurisdiction of the juvenile court, and it has the power of further investigation. The object of the law is corrective. Great discretion is given the judge of the juvenile court as to how this shall be accomplished. The act provides that it "shall be liberally construed to the end that its purpose may be carried out, to wit: That the care, custody and discipline of a dependent, neglected or delinquent child shall approximate, as nearly as may be, that which should be given by its parents, and, in all cases where it can be properly done, the child shall be placed in an approved family home and become a member of the family by legal adoption or otherwise." Rev. St. 1913, sec. 1260. If it shall appear to the court on investigation that, during the pendency of this appeal to this court, the life, habits and conduct of the boy have so changed that in the judgment of the court the order of commitment should be changed or modified, it is not too late to change or modify the same to meet the changed and existing conditions, to the end that the object and purpose of the act be carried out and his reformation brought about in some other way and place. To hold otherwise would not give effect to the object and purpose of the act.

The case is affirmed, with authority to the judge of the juvenile court to make further investigation, and to make such final disposition of the case as, in the judgment of the court, will bring about the boy's reformation.

JUDGMENT ACCORDINGLY.

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ANASTACIO ROCHA, APPELLEE, V. JOHN BARTON PAYNE, DIRECTOR GENERAL OF RAILROADS, APPELLANT.

FILED MARCH 28, 1922. No. 21990.

1. **Negligence: PROOF.** Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate,

with reasonable certainty, the negligent act complained of.

2. Appeal: HARMLESS ERROR. Erroneous instructions to the jury will not work a reversal of a case unless they are prejudicial to the complaining party.

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

*C. A. Magaw, Thomas W. Bockes* and *Thomas F. Hamer,* for appellant.

*M. F. Harrington, Gerald F. Harrington* and *W. J. McNichols, contra.*

Heard before LETTON, DEAN and FLANSBURG, JJ., DAY and GOOD, District Judges.

GOOD, District Judge.

This is an action to recover damages for personal injuries in which plaintiff had judgment, and defendant has appealed.

Plaintiff was employed as a track laborer on the tracks of the Union Pacific Railroad Company during the federal operation of the railroads. At the place where the injuries complained of were sustained the said railroad has a double main-line track running east and west. While the plaintiff was standing immediately to the north of, and driving spikes along, the north rail of the south track, another employee approached from the east driving a gasoline motor car on the north track. A short distance east from plaintiff the motor car jumped the track, veered to the south, ran into and injured the plaintiff. The negligence complained of was: "The said gasoline motor was so negligently and carelessly operated by the agent and servant in charge of said motor that it actually jumped the track, and when it did so it ran along the ground for a considerable distance, and while it was moving struck plaintiff; * * * that at the time said car was being driven along said track of the Union Pacific railroad by one of the agents of defendant, it was being driven by said agent at a reckless, careless, and high rate of speed and at a rate

of speed which actually caused it to jump said track, striking plaintiff as aforesaid."

Defendant insists that the negligent acts complained of are not sustained by sufficient evidence. The burden was on plaintiff to establish the existence of the negligent acts pleaded. There is no direct evidence in the record as to the rate of speed the car was running when it left the track, nor is there any evidence as to the rate of speed beyond which it is dangerous or unsafe to operate such a car. It is disclosed that the car, after leaving the track, traveled a considerable distance on the ground before it struck plaintiff. Some of the witnesses put the distance as the length of two or three rails, and one witness states that the distance was slightly more than three and one-half rails. When the car left the track on which it was being operated it ran over, or jumped, both rails of that track, ran the distance indicated, and struck plaintiff with sufficient force to hurl him into the center of the track on which he was working. The evidence shows that the motor car weighed about 300 pounds; that the flanges on the wheels were from three-fourths of an inch to one inch deep and were intact and in good condition, and that the car was in good order and working condition; that the railroad track was straight, level and in good condition, except that a little gravel was on the south rail at about the point where the car left the track. Are these facts and the inferences that may properly be drawn therefrom sufficient to justify a finding that the motor car was being operated at a reckless or negligent rate of speed?

Defendant contends that the doctrine of *res ipsa loquitur* is not applicable to an action for personal injuries by a servant against his master, and that without the application of that doctrine the verdict can not be sustained. We are unable to concur in this contention. The doctrine of *res ipsa loquitur* is frequently applied to cases of this character, and many cases could be cited where it has been so applied, but we are of the opinion this case does not necessarily depend on the application of the maxim.

Negligence is a question of fact, and, like any other fact, may be established by circumstantial evidence. All that the law requires is that the facts proved, together with the inferences that may be legitimately drawn from them, shall indicate with reasonable certainty the existence of the negligence complained of. That the track was straight, level and in good condition, save a little gravel on one rail, tends very strongly to negative the theory of any defect or condition of the roadbed that could have caused the car to leave the track, and the further fact that the car was in good condition, with its wheels and flanges thereof sound and perfect, tends to eliminate any suggestion that the accident was due to any defect in the car. These circumstances tend, very strongly, to exclude any other theory of the cause of the accident than that the car was recklessly or negligently operated. It is a matter of common knowledge that a light car is more likely to jump or bound upward than a heavy car if it strikes a slight impediment or obstruction while running at high speed, and that if running at moderate or slow speed a very slight obstruction would not cause it to jump. The motor car that struck plaintiff weighed but 300 pounds. The speed of the car was sufficient to cause it to go over both rails of the track on which it was traveling, run a considerable distance on the ground, and still have sufficient momentum when it struck plaintiff to hurl him a distance of several feet. This would indicate that the car was being operated at a high rate of speed. Taking into consideration all the facts and circumstances proved and the deductions that may fairly be drawn from them leads us to the conclusion that the finding is supported by sufficient evidence.

Defendant complains of two instructions given the jury. Both of them are subject to criticism. In one the court tells the jury to consider the warnings and signals given by the driver of the car to warn plaintiff of its approach. There is no evidence that any signal or warning was given. The error was in suggesting to the jury that there was

evidence of such warning. This was favorable to defendant and could not have prejudiced him. Both instructions complained of submitted to the jury the question of plaintiff's contributory negligence, and there was no evidence of any contributory negligence. Again, the error favored defendant. It is elementary that erroneous instructions will not work a reversal unless prejudicial to the complaining party. We find no error prejudicial to defendant, and the judgment of the district court is, therefore,

AFFIRMED.

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SILAS C. HYNDSHAW, APPELLEE, V. BERT L. MILLS, APPELLANT.

FILED MARCH 28, 1922. No. 21503.

1. **Trial:** VERDICT. A verdict finding for plaintiff, naming the amount of recovery, and directing that it be applied upon plaintiff's indebtedness to a stranger to the action, *held*, under the pleadings and evidence, to be not responsive to the issues, and not curable by rejection of the extraneous portions as surplusage.
2. ———: INSTRUCTIONS: PROOF. An instruction to the effect that defendant, in order to avail himself of the defense of fraud, must prove the elements of the fraud to the jury's *satisfaction* is erroneous, as requiring a greater degree of proof than the law demands in a civil action.
3. ———: ———. It is error to refuse a proffered instruction which is warranted by the evidence and correctly states the law of the case, unless the principles involved are covered by other instructions given. *First Nat. Bank v. Carson*, 30 Neb. 104.

APPEAL from the district court for Thomas county: BAYARD H. PAINE, JUDGE. *Reversed.*

*Sullivan, Squires & Johnson* and *F. A. Reisner*, for appellant.

*H. L. Wilson* and *N. T. Gadd, contra.*

Heard before MORRISSEY, C. J., ALDRICH, ROSE and FLANSBURG, JJ., HOBART, District Judge.

HOBART, District Judge.

The appellee, Hyndshaw, owned a garage business, a stock of goods incidental thereto, and certain accounts receivable. He alleges that he sold the same to the appellant, Mills, by oral contract, and that Mills agreed to pay for it as follows: (1) To pay the outstanding indebtedness that had been incurred in the previous conduct of the business; (2) to pay a note of some $2,600 which Hyndshaw owed to the Thedford bank and which was secured by a trust deed to real estate given by his mother, Dolly M. Hyndshaw; (3) to pay to Hyndshaw the balance then remaining of the purchase price, which price was to be determined by invoicing the stock on an agreed basis of values. Hyndshaw brought this action against Mills, alleging performance on his own part and acceptance of the stock of goods by Mills, and praying judgment for $6,000 under the contract. Mills, by his answer, denied the consummation of the contract, alleging that some preliminary negotiations were had, looking to such a contract, but were broken off by him upon the discovery of fraudulent misrepresentations made by Hyndshaw as to the value of the stock and the amount of indebtedness.

Upon trial to a jury the following verdict was returned:

"We, the jury, * * * do find for the plaintiff and fix the amount of his damages at $2,300, which must be applied on note of $2,673.25, and interest to date in favor of the Thedford bank and secured by trust deed on three lots owned by Dolly M. Hyndshaw."

On this verdict judgment was entered in favor of the plaintiff, Hyndshaw, and against the defendant, Mills, for $2,300 and costs, and Mills has appealed.

Numerous assignments of error are made. We shall consider first the sufficiency of the verdict to support the judgment rendered. Obviously the latter part of the verdict is of no effect, because the bank was not a party to the action. The question is whether such latter part may be rejected as surplusage, while the former part is taken as the finding of the jury upon the issuable facts. The case

of *Hallett v. Ransom*, 97 Neb. 643, is cited by appellee to support the judgment of the trial court, but we are of the opinion that the circumstances of the two cases are not sufficiently parallel. The syllabus of the cited case is:

"Where the verdict contains proper findings on the issuable facts submitted to the jury, clearly indicating the judgment which the law should pronounce, severable matter outside of the pleadings, the proof, the issues, the instructions, and the law may be rejected as surplusage."

In that case there was but one question for the jury to decide, to wit, the plaintiff's right to recover. That question being determined affirmatively, the amount of recovery was fixed by the law, the jury had nothing to do with it, and the jury had been so instructed. The jury's attempt to modify the amount was therefore, as said in the syllabus, outside the proof, the issues, the instructions, and the law. But the one issuable fact which it was the jury's province to determine was decided by the finding in favor of the plaintiff, and this court remarked that such finding was not only supported by the evidence, but responded to the demands of justice and equity.

In the case at bar the circumstances are substantially different. It appears that the defendant, Mills, was president of the Thedford bank when Hyndshaw gave to the bank the $2,600 note which Mills is alleged to have afterwards assumed as part of the purchase price of the garage. It is further fairly established by the evidence that the indebtedness which Mills is alleged to have assumed was more in the aggregate than the value of the property he would receive, so that Mills, under the contract, would not owe the plaintiff anything. It is impossible to avoid the inference, first, that the jury found nothing due from Mills to the plaintiff; second, that the jury regarded the note of Hyndshaw and his mother to the bank as being in reality an indebtedness to Mills; and, third, that the jury assumed to itself the extra-juridical function of canceling this indebtedness as a matter of poetic justice.

We cannot say in this case, as was said in *Hallett v.*

*Ransom, supra,* that a finding for the plaintiff is not only supported by the evidence, but responds to the demands of justice and equity. More than that, we cannot even say with conviction in this case that the jury intended to find in favor of the plaintiff and against the defendant, Mills. The reasonable interpretation of the verdict as returned seems to be a finding against the defendant Mills in favor of the Thedford bank, and ultimately in favor of the plaintiff's mother, Dolly M. Hyndshaw, whose property was liable to the bank's claim. This interpretation receives some support from affidavits incorporated in the record. Such a verdict, of course, was not responsive to the issues, was contrary to law, and void. It should not have been received, or judgment entered upon it.

We think there is also error in one of the instructions given by the court, which was, in part, as follows:

"One of the defenses interposed is that of fraud charged to have been committed by plaintiff. In order for defendant to be relieved by the fraud as charged, it is necessary that Mr. Mills must have proved to your satisfaction that Mr. Hyndshaw made false representations, as to the amount of the stock in the garage and the amount due to his creditors, that Mr. Mills was ignorant of the falsity thereof and believed it to be true, that such statements were made with the intent that they should be acted upon by Mr. Mills to his damage, and that he did so act and was damaged."

Complaint is made of this instruction because it requires of the defendant a higher degree of proof than the law demands in civil actions. The criticism is well founded. The defendant was obliged to establish his affirmative defense by a preponderance of the evidence only, and not to the unqualified "satisfaction" of the jury. The general legal acceptation of the term "satisfactory evidence" is that degree of proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt. 17 Cyc. 754, 762.

The defendant requested the following instruction:

"You are instructed that in this case, if you find that

the preponderance of the evidence shows that an enforceable oral contract for the sale of the property from the plaintiff to defendant was agreed upon, then the value of said property and the amount of plaintiff's debts incurred for carrying on the garage business in Thedford are material facts to be considered by the jury; and if you find from a consideration of all the evidence that the plaintiff represented to defendant that said debts were at that time much less than they really were or that the amount and actual value of his property mentioned in plaintiff's petition was much more than it really was, then you are instructed that said representations are material facts for your consideration; and in that event if you find from the whole of the evidence that defendant Mills believed such representations and relied thereon and was induced thereby to make such contract your verdict must be for the defendant, provided you find from all the evidence that defendant within a reasonable time after discovering the falsity of said representation rescinded said contract and took no benefits therefrom and restored or tendered to the plaintiff all the property which he may be shown by the evidence to have received thereunder."

This was a correct statement of the law and was responsive to the issues and the evidence. The court gave no instruction of its own motion covering this phase of the case. It is error to refuse an instruction warranted by the testimony and containing a correct statement of the law of the case, if the principles have not been covered by the charge of the court. *First Nat. Bank v. Carson*, 30 Neb. 104; *Bays v. State*, 6 Neb. 167; *Matthewson v. Burr*, 6 Neb. 312; *Robison v. Uhl*, 6 Neb. 328.

For the reasons given, the judgment of the district court is reversed and the cause remanded.

REVERSED.

JAMES W. WILSON, APPELLEE, V. MORRIS & COMPANY, APPELLANT.

FILED MARCH 28, 1922. No. 21921.

1. **Evidence** examined, and *held* sufficient to sustain a finding that the relation of employer and employee existed.
2. **Trial**: VERDICT: JOINT TORT-FEASORS. In an action where several persons are proceeded against jointly for a wrong, the mere fact that one of the joint tort-feasors is released by the jury's verdict will not necessarily release the others, and the verdict against the others may stand.
3. ———: INSTRUCTIONS: CONTRIBUTORY NEGLIGENCE. It is not error to fail to instruct on the law of contributory negligence, when no such instruction is requested and no evidence of contributory negligence is offered.

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

*James C. Kinsler,* for appellant.

*Jamieson, O'Sullivan & Southard* and *A. H. Murdock, contra.*

Heard before MORRISSEY, C. J., ALDRICH, ROSE and FLANSBURG, JJ., HOBART and PAINE, District Judges.

HOBART, District Judge.

This is an action for damages brought by appellee against the appellant and one Kennedy. The verdict was against the appellant company and in favor of the codefendant Kennedy.

One of the issues on the trial was the question whether the relation of employer and employee existed between the two defendants. This question was submitted to the jury by adequate instruction and was by the jury resolved in favor of the plaintiff. After an examination of the evidence we cannot say that it is insufficient to support such finding, and in accordance with the settled rule it will therefore be regarded as established.

The principal argument of appellant is that it was entitled to judgment in its favor, notwithstanding the verdict, since the jury found in favor of its codefendant and employee. There was, however, evidence of negligence on the part of the employer distinct from the alleged negligent acts of the employee. It is said in the opinion of this court in *Usher v. American Smelting & Refining Co.*, 97 Neb. 526:

"The mere fact that, in an action where several persons are proceeded against jointly for a wrong, one of the joint tort-feasors is released, will not release the others, and the verdict against them will be sustained."

This principle, as laid down in the case quoted from, and supported by the authorities therein cited, is controlling and must be followed.

Complaint is made of the fifth instruction given by the trial court, which was, in part, as follows: "The burden of proof is on the plaintiff to establish by a preponderance of the evidence one or more of the acts of negligence charged against the defendants in the petition, the injury to the plaintiff, and that such negligence was the proximate cause of said injury, and the amount of damages, if any, the plaintiff has sustained by reason thereof."

It is argued by appellant that this instruction in effect assumed that the defendant Kennedy was an employee of the defendant Morris & Company, by not mentioning this relationship as one of the facts necessary to be proved, and further complaint is made of this instruction in that it did not define the law of contributory negligence. On the first point, it is to be noted that the court further gave to the jury its instruction No. 7, which was as follows:

"If you find from the evidence that the defendant James Kennedy was not an employee of, but was an independent contractor for, the defendant Morris & Company, then you are instructed that under the evidence in this case Morris & Company were not in any event responsible for his acts, and in case of such finding your verdict should be in favor of the defendant Morris & Company."

This, we think, covers the omission from the former instruction, though possibly the trial court could have been more explicit in pointing out to the jury that the burden of proof was on the plaintiff to establish the relationship existing between the two defendants. However, the rule is that the instructions must be construed as a whole, and we believe that, considering them together, the jury were adequately instructed on that point.

The omission of an instruction on contributory negligence cannot now be complained of, when no such instruction was presented to the trial court. Furthermore, no evidence was submitted showing contributory negligence.

No error is found in the record, and the judgment is

AFFIRMED.

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JOHN R. HOUSE, APPELLANT, V. WILLIAM R. LEWIS, APPELLEE.

FILED MARCH 28, 1922. No. 21884.

1. **Evidence** considered, and *held* to present questions of law only.
2. **Landlord and Tenant**: RENT: PLACE OF PAYMENT. Where a lease for the payment of rent for the use of real property is silent as to the place of payment, the law fixes the place of payment upon the leased premises.
3. ———: ———: FORFEITURE. The undisputed evidence in this case shows that the lease was silent as to the place of payment; that defendant was always ready, able and willing to pay the rent upon the demised premises; that plaintiff at no time went to or sent any one to the demised premises for the rent; that plaintiff at no time or place requested payment of the rent. *Held*, that defendant was not in default under his contract and was not holding over his term, and his lease was not subject to forfeiture by the plaintiff.

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

*Curtis L. Day* and *Archie M. Smith*, for appellant.

*Keefe & Knoepfler, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, ALDRICH and FLANSBURG, JJ., HOSTETLER and MORNING, District Judges.

HOSTETLER, District Judge.

This was an action in forcible entry and detainer. The matter was tried and submitted to a jury and a verdict returned in favor of defendant. From a judgment entered thereon, the plaintiff appeals.

The defendant was in possession of certain Indian lands as tenant under a government lease. By the terms of this lease defendant was required to pay as rent $80 on the 1st of March and $80 on the 1st of November of each year. The written lease specified no place for the payment of rents, merely reciting that rents should be payable to the superintendent of the Omaha agency. Such agency was acting as trustee for the Indians to whom the lands had originally been allotted. While defendant was in possession under his lease, and on January 24, 1919, these lands were sold to the plaintiff and the deed to plaintiff immediately recorded. Plaintiff did not at once notify the defendant of his purchase of the property, but the defendant learned through others that such purchase had been made, and on March 1, 1919, sent by check to the plaintiff the $80 rental due at that time. Plaintiff did not acknowledge receipt, and defendant testifies that he was not then sure whether the rent had ever been received. However, defendant did testify, and his testimony is uncontradicted, that in June of that same year he met the plaintiff and plaintiff told him that he had purchased the land, but that defendant made no inquiry as to whether or not the March rent had been received. In August defendant again met the plaintiff, but had no further conversation with regard to the land. At the time the November rent became due, defendant testifies that he had learned that the Indians were complaining and were making statements that they were going to endeavor to get the land back from the plaintiff. Defendant testifies that he did not, at that time, send

the rental to the plaintiff, since he had decided that he would first see the plaintiff and talk the matter over with him. Defendant went to Pender some time late in the year 1919, or in the fore part of 1920, but did not find the plaintiff in town. The November rent remained unpaid, and on February 28, 1920, plaintiff served upon the defendant, in compliance with the statute, a three days' notice, ordering the defendant to vacate the premises. Defendant immediately after the service of this notice mailed a letter addressed to plaintiff at Pender, where plaintiff resided, inclosing a check in the amount of $160, to cover the rent due November, 1919, as well as the rent to become due in a few days, on March 1, 1920. This check was promptly returned by the plaintiff, with a letter stating that he would accept the past-due November rent, but that he would not accept the March rent. On March 4, 1920, the defendant went to Pender and there met the plaintiff, gave him a check for the November rent, and made a tender in currency of the rent due on March 1. The plaintiff accepted the November rent in settlement of the amount due for the period covered, but refused to accept the March rent, still insisting upon a forfeiture of the lease by reason of the defendant's default.

The trial court submitted to the jury, as issues of fact, the question of whether or not defendant knew that plaintiff had become the owner of the land and whether he knew where plaintiff could be found; the question of whether or not the defendant was in default; and the question of whether or not the plaintiff had waived such default. The jury's verdict on these issues was in favor of the defendant.

After a careful consideration of the evidence we have reached the conclusion that there were no disputed facts to submit to the jury in this case. The case must be decided as a matter of law. The lease was in writing, but did not specify where the rent should be payable.

It is the general rule that payments must be made, in the absence of an agreement fixing the place of payment, where the creditor resides, or wherever he may be found;

and ordinarily the debtor in such case is bound to seek the creditor to make payment to him, provided the creditor is within the state when the payment is due. *Esmay v. Gorton,* 18 Ill. 483; *Pomeroy v. Ainsworth,* 22 Barb. (N. Y.) 118; *Sanders' Heirs v. Norton,* 4 T. B. Mon. (Ky.) 464; *Hale v. Patton,* 60 N. Y. 233; 30 Cyc. 1185.

Such, however, is not the rule in contracts for the payment of rent for the use of real property.

In Gear, Law of Landlord and Tenant, sec. 135, it is said: "When the lease is silent as to the place of payment, rent is payable upon the leased premises." See *Burnes v. McCubbin,* 3 Kan. 221; *Fordyce v. Hathorn,* 57 Mo. 120; *Walter v. Dewey,* 16 Johns. (N. Y.) *222; *Hunter v. LeConte,* 6 Cow. (N. Y.) *728; *Van Rensselaer v. Jones,* 5 Denio (N. Y.) 449; *Livingston v. Miller,* 11 N. Y. 80, 91; Coke, Littleton, 201*b*; Sheppard's Touchstone, 378. *Bergdoll v. Spalding & Bros.,* 234 Pa. St. 588.

In Taylor, Landlord and Tenant (9th ed.) sec. 392, it is said: "And whether payable in money, or in kind, if no place of payment is specified, a tender of either upon the land is good, and prevents a forfeiture." See *Lush v. Druse,* 4 Wend. (N. Y.) 313; *Walter v. Dewey,* 16 Johns. (N. Y.) *222; *Van Rensselaer v. Jones, supra.*

"Although the tenant is not under obligation to seek the landlord, when the contract is silent as to the place of payment, a personal tender to the landlord anywhere is held sufficient." Taylor, Landlord and Tenant (9th ed.) sec. 392.

In 24 Cyc. 1191, it is said: "Where no place is appointed for payment, rent issuing out of land is payable on the land." And "Where rent is payable either in money or kind, and the lease is silent as to the place of payment, a tender of the rent by the lessee upon the land is good; and it is not required of the lessee to make the tender to the lessor personally"—citing *Fordyce v. Hathorn,* 57 Mo. 120, and other cases.

So far as our research has gone, we have found no law to the contrary. There is certainly nothing in the statutes

of Nebraska that changes this rule. If the contract is silent as to the place of payment, then the law fixes the place upon the leased premises. The law is reasonable. The landlord and tenant stand upon an equal basis. It is no greater hardship for the landlord to go to the tenant for his rent than for the tenant to go to the landlord to pay the same. In the absence of a contract specifying otherwise, the law fixes the place of payment upon the land. The landlord knows exactly where to go for his rent. If the law were to be interpreted that the tenant must pay to the landlord wherever found in the state, then a great burden might be imposed upon the tenant. If the landlord wished to be rid of his tenant, then he would be hard to find upon the first of the month when the rent was due. It is more reasonable, just and fair to have a fixed place for the rent payment as the law now fixes it, than to have the place of rent payment travel about with the person of the landlord. If the latter rule were in force, the tenant would be in constant danger of having his lease forfeited. If the parties desire to have a place of payment other than the one fixed by law, then let them agree in their contract upon that point. It is not the province of this court to change the long-established law to make it easier for the landlord to collect his rent. In the instant case the rent was by law payable on the premises. Plaintiff never went to the premises; nor did he send any one for the rent. If plaintiff had requested payment of the rent upon the premises, it would in all likelihood have been paid.

Section 8467, Rev. St. 1913, provides: "A tenant shall be deemed to be holding over his term whenever he has failed, neglected, or refused to pay the rent or any part thereof when the same became due." This provision of the law clearly means that, when a tenant has wrongfully failed, etc., to pay rent, then he shall be considered as holding over his term. So long as he has not violated the written contract between himself and the landlord he is not in default. The defendant in this case has not breached the lease. He has at all times been ready to comply with his

contract and pay the rent at the place appointed by law. The plaintiff under the contract must call or send for the rent at the place where the same is payable. If he fails to do so, he is himself in default and cannot charge dereliction to his tenant, who was ready to pay him at the place fixed by the law. The defendant was under no obligation, as said in Taylor, Landlord and Tenant, *supra,* to go out and hunt up the plaintiff and pay the rent to him. He had the right to wait until the plaintiff called for the rent at the place where the same was payable. Because defendant did go forth and try to pay plaintiff at some other place will not deprive him of his legal rights under his contract.

It is thus we believe the law to be. Under this view of the law, the undisputed evidence warrants but one conclusion, a verdict and judgment for the defendant. We do not find it necessary to consider any other proposition.

The judgment is

AFFIRMED.

FLANSBURG, J., dissenting.

I do not believe that the cases cited in the opinion are decisive of the question here.

In the case of *Burnes v. McCubbin,* 3 Kan. 221, the court only went so far as to say that, where no place of payment was mentioned in the lease, rent would be payable either at the premises *or in the city* where the property was situated. The court pointed out that the landlord in that case was a nonresident of the state and had no agent in the state, and that the tenant could not, under such circumstances, be expected to go out of the state to hunt him up and tender him the rent.

The case of *Fordyce v. Hathorn,* 57 Mo. 120, did not involve *cash rent,* but only a corn crop grown upon the premises, which renders the case distinguishable.

The New York cases were all very early decisions in that state, and were, I believe, merely a recognition of the common-law rule, requiring the landlord to go upon the premises and demand his rent before being entitled to invoke a forfeiture. By that rule, in order to work a forfeiture

of the terms of a lease, where place for payment of rent was not specified, it was necessary for a landlord to make a demand for the precise amount of rent due, just before sunset on the last day that it might be paid, and at the most notorious place on the premises. If there was a dwelling-house upon the land, it was required that the demand be made at the front door of the same. The failure to make such demand waived the right of forfeiture, but not the right to collect the rent.

The New York cases, as well as the decisions in *Bergdoll v. Spalding & Bros.*, 234 Pa. St. 588, and *Rea v. Eagle Transfer Co.*, 201 Pa. St. 273, relied on by defendant, have taken that rule, I believe, to establish that the rent is *payable* on the premises if no place for payment is specified in the lease. The question of the common-law demand for rent does not determine the question of where rent is payable. The place fixed for that demand depended, not upon the place where the rent might be considered due, but entirely upon another matter; that is, its purpose was to give notice to the tenant that the landlord intended to invoke a forfeiture of the lease.

Under the law of forcible entry and detainer, as it exists in this state, the necessity of a demand by the landlord, as required at common law, is dispensed with. The failure of the tenant to pay the rent at the place and time that it is due makes him a tenant holding over his term.

When a lease provides for *cash rent* and prescribes no place for its payment, the question is: Must the tenant seek the landlord and pay him at his residence or place of business or where he may be found if easily accessible, or must the landlord go to the premises to collect the rent?

Where an obligation is payable in articles of property, as distinguished from money, and where no place of payment is specified, it seems to be the rule that the debtor is not obligated, at his cost, to transmit such articles to the creditor, but that the creditor must call for them at the debtor's premises. *Grant v. Groshon*, Hardin (Ky.) 85, 3 Am. Dec. 725; 30 Cyc. 1185. Such is also the rule, with

regard to the payment of rent, where the rent is payable in crops grown upon the premises. Since the crop, it is said, issues from the land, the tenant, where no place of delivery is specified in the lease, is required only to gather the crop in readiness for delivery, and the landlord must accept delivery at the leasehold premises, and himself undergo the expense of transportation. *Remsen v. Conklin,* 18 Johns. (N. Y.) 447; *Fordyce v. Hathorn, supra.*

Where rent is payable in money, the transmission of which requires no outlay of expense, I see no reason why the obligation to pay rental should be treated as different from any other money obligation. The rule is well established, where a party contracts to pay money to another and no place of payment is expressly specified, that it is the duty of the debtor, at least if the creditor is in the state or has his domicile or place of business there (*State v. Kenosha Home Telephone Co.,* 158 Wis. 371; *Danser v. Dorr,* 72 W. Va. 430; *Hale v. Patton,* 60 N. Y. 233), to either make payment to the creditor in person or to make or tender payment at his residence or place of business. This rule arises from the presumption or implication of law that the intention of the parties, where the place of payment is not specified in the contract, was that payment should be made to the creditor at his place of business, residence, or wherever found; it being the general duty of the debtor to seek the creditor. *Stoker v. Cogswell,* 25 How. Pr. (N. Y.) 267; *State v. District Court,* 55 Mont. 330; *State v. District Court,* 41 Mont. 84; *Motherstadt v. Newman, Inc., Motor Cars,* 204 Mo. App. 619; *Esmay v. Gorton,* 18 Ill. 483; *Magruder v. Cumberland Telephone & Telegraph Co.,* 92 Miss. 716; *Walker v. Lovitt,* 250 Ill. 543; *Jones v. Main Island Creek Coal Co.,* 84 W. Va. 245; 30 Cyc. 1185.

It is said in 1 Tiffany, Landlord and Tenant, 1095, sec. 187*c*: "The view that a tender is sufficient if made on the premises, when no place for payment of rent is named by the lease, has been repudiated in England, * * * it being decided that the mere presence of the tenant on the premises, with the amount of rent, on the day fixed for payment,

is not a good defense, if the landlord was not there to receive it, and that a covenant to pay rent 'is analogous to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent upon the covenantor to seek out the person to be paid, and pay or tender him the money, and for the simple reason that he has contracted so to do.' " See *Haldane v. Johnson*, 8 Exch. (Eng.) 689.

I take it that such should be the rule. The defendant in this case paid his rent in March, 1919, by check, sent to the plaintiff at the town of Pender. The defendant knew where the plaintiff could be found. He knew his place of residence, and it was easily accessible. The plaintiff did nothing which would in any way mislead the defendant or prevent him from making payment of the November rent when it became due. That rent was nearly six months past due and unpaid when the landlord served a notice to vacate. I believe that the facts in the case show that the defendant was clearly in default, and that the plaintiff was entitled to insist upon a forfeiture.

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FRED E. ENO, APPELLANT, V. JOHN LAMPSHIRE, APPELLEE.

FILED MARCH 28, 1922. No. 22055.

1. **Appeal:** OBJECTION: WAIVER. "In the absence of a record showing that an objection was made in the court of original jurisdiction, a waiver of the defect will be presumed in the appellate court." *In re Estate of Graff*, 86 Neb. 535.
2. **Judgment by Default:** APPLICATION TO VACATE. Record examined, and *held* that defendant's amended application is sufficient under section 7646, Rev. St. 1913, to vacate judgment rendered against him by default.

APPEAL from the district court for Thomas county: EDWARD P. CLEMENTS, JUDGE. *Affirmed.*

*Orville L. Jones*, for appellant.

*Farrish A. Reisner, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., DICKSON and STAUFFER, District Judges.

STAUFFER, District Judge.

Appeal from order vacating judgment rendered against defendant by default.

Plaintiff brought an action June 16, 1920, against defendant in the district court for Thomas county. Service was had by publication on defendant as a nonresident. Defendant's land was attached and sold to satisfy a judgment of $212.85. The judgment was vacated at the January 19, 1921, term of court, and defendant was permitted to answer on payment of costs. Plaintiff appeals.

Plaintiff challenges defendant's answer as not being full and meritorious because not properly verified. The court below required the defendant to verify the answer which had been verified by his attorney. The verification is attacked because it was signed and sworn to by a Saline county notary, while reciting venue as laid in Thomas county. The affidavit reciting that defendant had no knowledge or notice of the pendency of the action before judgment is attacked for the same reason. Plaintiff made no objection to this below, and hence has waived the objection.

"In the absence of a record showing that an objection was made in the court of original jurisdiction, a waiver of defect will be presumed in the appellate court." *In re Estate of Graff*, 86 Neb. 535.

Had objection been made, defendant could have amended. *Rine v. Rine*, 91 Neb. 248.

Plaintiff also challenges defendant's answer, for the reason that it does not state facts sufficient to constitute a meritorious and *prima facie* defense. It denies "each and every allegation set up in plaintiff's petition." Plaintiff insists that this is not a full and meritorious answer, as a general denial ought to deny "each and every *material* allegation in the petition." Maxwell, Code Pleading, p. 388, states: "The defendant should be required, on motion, to make his denial specific. A general denial may be

substantially in the following form: 'The defendant, in answer to the petition of the plaintiff, denies each and every allegation therein contained.'" *Lewis v. Coulter,* 10 Ohio St. 451. The objection is supercritical, a mere technicality, which was not objected to below, and appellant has waived his rights thereon.

Defendant's amended application is sufficient under section 7646, Rev. St. 1913, to vacate the judgment rendered against him by default. The defendant has entitled his pleading: "Amended Petition—Answer—Motion." The pleading is not a model as regards either form or contents. But it does constitute a meritorious answer to the petition. The defendant also made it appear to the trial court, "by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense."

It is to be expressly noted that the question as to the right of the plaintiff to appeal from an order vacating a judgment obtained by default is not here decided. Such question was not raised in the instant case.

The pleading constituted a full and meritorious answer to the petition. The court below did not err in vacating the judgment.

AFFIRMED.

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STATE, EX REL. SCHOOL DISTRICT OF CITY OF SIDNEY, RELATOR, V. GEORGE W. MARSH, AUDITOR, RESPONDENT.

FILED MARCH 28, 1922. No. 22525.

1. **Schools and School Districts:** REFUNDING BONDS. A school district in a city of over 1,500 population can issue bonds for the purpose of funding its outstanding valid warrants, under chapter 143, Laws 1919.

2. **Statutes:** CONSTRUCTION: CONSTITUTIONALITY. It is not the province of the court to alter by construction an act of the legislature which is free from ambiguity and clear and explicit in its terms, upon the theory that the legislature made a mistake and did not intend to do that which its language clearly imports.

Original proceeding in mandamus to compel respondent, as auditor of public accounts, to register bonds of relator school district. *Writ allowed.*

*Holmes, Chambers & Mann,* for relator.

*Clarence A. Davis, Attorney General,* and *Mason Wheeler, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., DICKSON and STAUFFER, District Judges.

STAUFFER, District Judge.

The original jurisdiction of this court is invoked by the relator, a school district in a city of over 1,500 population, for a peremptory writ of mandamus directing the auditor of public accounts, respondent, to register bonds of the school district in the sum of $60,000. The bonds carried at a special election called by relator's board of education. The bonds were voted for the purpose of funding outstanding registered warrants of the district. The warrants had been given for the "expenses incident to the purchase of the site, enlargement and construction of a new grade school building, and repairs and maintenance of other school properties and school systems in general." A portion of the warrants represent money expended for repairs on old school buildings, and for payment of general school expenses. The bond history does not indicate what portion of the issue was for any certain part of the items above specified. Respondent refused to register the bonds, the sole objection being that they were issued for an unlawful purpose.

The question for determination is: Does chapter 143, Laws 1919, authorize a school district in a city of over 1,500 population to issue bonds for the purpose of funding its outstanding valid warrants? The statute reads in part as follows. "The aggregate school tax, exclusive of school bond and special warrant taxes, shall in no year exceed such a sum or rate as shall be necessary to raise the sum provided for by the estimate returned in accordance with

section 6970 of the Revised Statutes of Nebraska for the year 1913, provided such levy shall in no event exceed 100 mills. But the board of education may borrow money upon bonds or warrants which they are hereby authorized and empowered to issue."

Relator contends this statute authorizes it to issue bonds for any school purpose which the electors of the district approve. The question as to the validity of the issue is one of first instance in this state. The school district had outstanding warrants in the amount of $60,000, bearing 7 per cent. interest, and selling at a discount. On October 3, 1921, the board of education decided to issue these bonds drawing 6 per cent. interest annually to take up the warrants. It is not controverted that relator could have proceeded under the above statute for the purpose of voting bonds to be used only in purchasing school sites, and the erection and furnishing of school buildings. But relator went further than this. It was confronted with the problem of not only raising funds for permanent improvements, but also to provide for the payment of outstanding warrants previously issued for general school purposes. Its fiscal policy was determined by its board. The board of education is the administrative body of the district. They are elected by the legal voters of the district to administer its affairs. They decided to submit to the voters the proposition of issuing bonds to erect and furnish school buildings, as well as to fund its outstanding debt. This proposition was placed before the legal voters of the district at a special election called specifically for that purpose. The voters approved the policy of the board. A majority of the votes were cast in favor of the bond issue. The bonds have been printed, have been duly advertised for sale, and have been sold to the highest bidder. The school district now stands in the position of having deliberately chosen to impress the taxable property of the district with the obligation of these bonds, but unable to market them for the reason that the auditor of public accounts refuses to register the issue. The part played by the board in this

particular instance was that of initiating the proceedings which culminated in the carrying of the bonds. The statute safeguards the interests of the district throughout. The phraseology of the second paragraph indicates that the legislature had in mind to provide means for a school district to raise revenue in addition to the maximum amount provided in the first paragraph, to be raised by a levy. The individual legal voter of the district is the one who determines the false or true political economy of the proposition.

An examination of the statute indicates that the legislature intended limiting the amount that the school district could impress as a tax upon property within the district in any one year, by providing that "such levy shall in no event exceed 100 mills." The legislature undoubtedly had in mind that occasions might arise when this limitation, standing by itself, unmodified, would work a hardship upon the school district in restricting the amount it might raise in revenue under such limitation. The second paragraph provides a method whereby "a board of education may borrow money upon bonds or warrants which they are hereby authorized and empowered to issue." This paragraph is ushered in by the significant adversative conjunction "but." This word has been judicially defined as "except," "except that," "on the contrary," "or," "and also," "yet," and "still." See Words and Phrases. It would therefore seem that the legislature, having limited the aggregate school taxes which might be raised by levy, provided an additional method of raising money by the district, to wit, by a bond issue voted by the people. The two paragraphs of the section must be construed together and some significance must be attached to the word "but." There can be no doubt that the legislature intended to provide a law to enable school districts containing cities of over 1,500 population to borrow money according to their needs. Each individual district is the arbiter of its own needs. The statute is an authorization to issue bonds for any proper school purpose. Its terms are unambiguous.

Where the law is expressed in words which are clear and not ambiguous, no doubt as to its meaning or purpose can arise from the language employed; where to understand and know its intent it is but necessary to read, then there is no call for interpretation. *State v. Bratton,* 90 Neb. 382; *State v. Moore,* 45 Neb. 12.

It is not the province of the court to alter by construction an act of the legislature which is free from ambiguity and clear and explicit in its terms, upon the theory that the legislature made a mistake and did not intend to do that which its language clearly imports. *State v. Bratton, supra.* This case gives the history of the statute of which chapter 143, Laws 1919, is an amendment. This case also holds that the section was constitutionally enacted. The limit of taxation for general school purposes was reduced by the legislature in the original act from 2 per cent. to 15 mills. In lieu thereof the legislature provided that school districts of the class to which relator belongs could raise funds by borrowing money and issuing bonds, provided the people consented by a majority vote.

It should also be observed that, where the legislature intended to limit certain classes of school districts in borrowing money for the express purpose of erecting and furnishing school buildings, it has so provided by using unmistakable language. This is readily determined from a reading of the statutes relating to the establishment, maintenance and government of rural high schools and county high schools. See chapter 118, Laws 1915, and chapter 126, Laws 1917. These statutes expressly limit bond issues to permanent improvements. We are therefore drawn to the conclusion that, had the legislature intended chapter 143, Laws 1919, to limit school districts to issue bonds for permanent improvements only, it would have so indicated by unambiguous and unmistakable language.

The bonds in question were issued after a full compliance with all the provisions of the law. They are entitled to reg-

istration. A peremptory writ of mandamus should issue, directing the state auditor to register these bonds.

WRIT ALLOWED.

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ADOLPH ACHATZ ET AL., APPELLANTS, V. FRED A. BAILEY, APPELLEE.

FILED MARCH 28, 1922. No. 21986.

**Evidence** examined, and found to sustain the decree of the trial court.

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

*Gray & Brumbaugh* and *Macfarland & Macfarland,* for appellants.

*Sullivan & Thummel* and *T. J. McGuire, contra.*

Heard before MORRISSEY, C. J., ROSE and ALDRICH, JJ., RAPER and STEWART, District Judges.

STEWART, District Judge.

Suit by heirs of Anna Achatz, deceased, to cancel a contract for sale of real estate because of alleged weak mental condition of the seller at the time of the execution of the contract. The court dismissed plaintiff's petition and quieted title in the defendant, upon his paying into court for the plaintiffs $7,500. Plaintiffs appeal.

On August 5, 1919, Anna Achatz, a widow, entered into a written contract with the defendant, for the sale of lot 19, Keystone Park, Douglas county, Nebraska, comprising 10.76 acres, with improvements, consisting of a seven-room house and outbuildings, for $8,500. An earnest payment was made to her of $1,000, and the remainder was to be paid on or before April 1, 1920, upon delivery of an abstract of title and possession of the premises; but, in event of her death prior to April 1, defendant was to pay the $7,500 in equal amounts to her five children. Time was made an essential element of the contract, which provided

for liquidated damages of $1,000 from the defaulting party. Anna Achatz died September 15, 1919. Suit was commenced March 27, 1920, tendering repayment of $1,000 and interest thereon, and praying for annulment of said contract.

Plaintiffs' testimony tends to show they are the children and only heirs of said Anna Achatz; that two of them, with a son-in-law, resided with her; that she was about 49 years of age, and during the year 1919 she was afflicted with a cancer; that in June, 1919, she consulted doctors, one of whom prescribed the use of one-tenth grain morphine tablets, when necessary, to allay pain; that she was told by her doctor she had but a short time to live; that she was a strong-minded woman, owning two rental properties, who managed her own business affairs until about two months before her death; that, as her ailment progressed, her use of morphine tablets increased from two to three in 24 hours to about that number each hour; that about August 1, 1919, she went to a hospital for about five weeks, and until about two weeks before her death; that she was restless, nervous and in pain when not under the influence of a narcotic; that at times she imagined that she saw objects floating about the room in the air, and was forgetful of visits of friends, and of subjects she was discussing; that she was rational when not under the influence of morphine; that in June, 1919, she visited the real estate office of the defendant concerning the sale of said lot 19, and declined his offer therefor of $8,500; that about one year prior thereto defendant had offered $8,000 for said lot; that soon after going to the hospital she asked her daughter to telephone defendant that she wished to see him the following morning; that the next day she told her daughter the defendant had called and made a contract, and to take it, and the $1,000 check, and deposit in the bank $500 to the credit of the minor son, John, pay a $50 debt she owed said daughter, and to deposit $450 in her own account; that said daughter disposed of the $1,000

as directed by her mother; and that the value of said lot 19 was about $14,500.

Defendant's testimony tended to show that about one year prior thereto he was offered said lot for $9,000 and was willing to pay but $8,000; that in June, 1919, Mrs. Achatz, with members of her family, called at his office to sell said property, but declined an offer then made by him of $8,500; that about August 1, 1919, her daughter, Mrs. Hill, telephoned defendant that if he still wanted the property at $8,500 to call at the hospital and see her mother; that defendant called on Mrs. Achatz, who, in the presence of three of her children, agreed to sell the property for $8,500, payable, $1,000 at date of contract, and the remainder by April 1, 1920, but, in the event of her death, the remainder was to be paid in equal parts to her five children; that the next morning he prepared a written contract, which was duly executed by the parties before a notary public, in the presence of one of her daughters, and delivered his check for $1,000; that at all times in question her mind was bright and showed no evidence of being affected by any narcotic; and that the market value of said lot was about $8,000.

Other testimony was adduced bearing upon the matter of rescission and ratification, which, in view of our conclusions, it is unnecessary to consider.

This case involves no issue of fraud or undue influence. In order to avoid the contract in question, it is not necessary to prove either, if the insanity of the seller, at the time of its execution, is established. *Dewey v. Allgire,* 37 Neb. 6; *Wager v. Wagoner,* 53 Neb. 511.

The evidence clearly shows that Mrs. Achatz understood what she was doing, and consciously and voluntarily entered into the contract. There is no suggestion in the record that she ever had any taint of insanity, other than the occasional effect of morphine during her last illness. No unusual effects of the drug are shown. It was taken at will by her to deaden pain and to induce sleep. A continuous state of slumber will not be presumed from a

showing that it followed at different times the use of morphine. Mrs. Achatz was aware of all the conditions of the contract on the part of the defendant before he responded to her request to call at the hospital. She knew the lot he wanted to purchase, the price he was willing to pay, and that it was a cash transaction.

Mrs. Achatz was conscious of her impending death when she directed by said contract the distribution of $7,500 equally among her children, the gift of $500 to her minor son, the payment of a $50 debt to her daughter, and the deposit of the remainder of the $1,000 payment to her own credit. The contract seems to reflect her wishes at a crucial moment upon most solemn and serious affairs.

The mental soundness of the deceased is established by the evidence, and the decree of the trial court is

AFFIRMED.

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PHILIP BLOTCKY, APPELLANT, V. LOUISA M. GAHM ET AL., APPELLEES.

FILED MARCH 28, 1922. No. 22017.

1. **Landlord and Tenant:** LIABILITY OF LESSOR. The general rule is, where a lessor of a portion of a building remains in possession and control of a part, or the remaining portion thereof, in the absence of a specific agreement, or of deceit or fraud by him, he is not bound to make repairs, employ a watchman, or to maintain a fire alarm service for his lessee, nor can the lessee recover for injuries to his property received through latent defects, of which the lessor had no knowledge at the time of making the lease, and which were as patent to the lessee as to the lessor.
2. **Evidence** examined, and *held* sufficient to warrant the direction of a verdict.

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

*Smith, Schall & Howell, W. H. Howard* and *F. E. Sheehan,* for appellant.

*Stout, Rose, Wells & Martin, contra.*

Heard before MORRISSEY, C. J., and ALDRICH, J., RAPER and STEWART, District Judges.

STEWART, District Judge.

Action by tenant for damages because of alleged negligence of owners of a six-story building. At close of plaintiff's evidence, the court directed a verdict for defendants. Motion for new trial was overruled, and plaintiff brings case here for review.

In the fall of 1917 Philip Blotcky, a wholesale commission merchant, orally leased the first and second floors of the Gahm building in Omaha, No. 1208 Howard street. It was equipped throughout with a sprinkler system, commonly known as the "dry system," and consisting of two tanks above the sixth floor, connected with pipes along the ceilings. Hollow sprinkler heads, standing upright, were screwed into the top of the pipes. Each sprinkler head was plugged with a fuse that would melt quickly when exposed to a certain degree of heat. The pipes were kept empty by air pressure from some pumping arrangement in the basement. When a fuse melted, or came out from any cause, water would flow from that particular sprinkler head at the rate of about 40 gallons a minute. An electric automatic fire alarm system was attached or so arranged that, if a sprinkler head opened, a signal would immediately be given at the office of the American District Telegraph Company. Under a contract between the defendants and the Automatic Fire & Protection Company, the latter retained ownership and control of all apparatus installed, and was to operate it for $350 a year. The Omaha Gas Company occupied an adjoining part of the building. The four upper floors were vacant, and all floors were accessible by stairway leading from the basement.

December 17, 1917, three alarms, from 9:45 p. m. until 1:39 a. m., were received at the A. D. T. office, before the night manager discovered the cause, after making two trips to the building without having gone inside. The time

clock at the A. D. T. office indicated that a sprinkler head was open, or that a battery was weak. An inspector, who had been in charge of this plant for about 12 years, made an examination of the entire sprinkler plant about two weeks before the accident, and found it all right with pressure sufficient to last for two months. He again inspected it immediately after the accident, and found it in perfect condition, except the fuse was missing from the particular sprinkler head in question. No similar accident ever happened to this plant. At the time of making the lease, defendant's agent told the plaintiff that arrangements had been made for the gas company to keep two watchmen at the building, and that the A. D. T. looked after the sprinkler. Plaintiff was damaged about $5,300.

The question before this court is whether the evidence shows the plaintiff's damage resulted from the negligence or breach of any duty the defendants owed to the plaintiff. Negligence presupposes duty, and, if there is no duty, there can be no liability predicated upon a failure to do it. *Langenfeld v. Union P. R. Co*, 85 Neb. 527.

There is no allegation in the pleadings of any express agreement by defendants to furnish sprinkler or electric fire alarm service, to make repairs on demised premises, or to keep a watchman. A lessor, in the absence of specific contract so to do, is not bound to make any repairs on leased premises. *Young v. Rohrbough*, 88 Neb. 101; *Murphey v. Illinois Trust & Savings Bank*, 57 Neb. 519; *Turner v. Townsend*, 42 Neb. 376.

The same principle applies to the employment of a watchman or the maintenance of an automatic fire alarm service. The plaintiff insists that the general rule that a lessor is not liable for damages to his tenant, in the absence of an agreement, has no application where such damages result from the negligent use of the lessor's property, not covered by the leasehold. We recognize an exception to the general rule, in so far as it relates to hallways, stairs and elevators not demised to the tenant. In such cases the lessor is bound to exercise reasonable care in keeping them

ordinarily safe for those having lawful occasion to use them. *Starr v. Sperry,* 184 Ia. 540.

The general rule is, where a lessor of a portion of a building remains in possession and control of a part of the remaining portion thereof, in the absence of a specific agreement, or of deceit or fraud by him, he is not bound to make repairs, employ a watchman, or to maintain a fire alarm service for his lessee, nor can the lessee recover for injuries to his property received through latent defects, of which the lessor had no knowledge at the time of making the lease, and which were as patent to the lessee as to the lessor. These principles are in harmony with the holding of this court in *Turner v. Townsend,* 42 Neb. 376; *Rankin v. Kountze,* 101 Neb. 174, and *Lowe v. Payne,* 107 Neb. 378. Also, *Kuhn v. Sol. Heavenrich Co.,* 115 Wis. 447; 16 R. C. L. 1036, sec. 556; *Hirsch v. Radt,* 228 N. Y. 100.

Plaintiff further contends that the defendants assumed and volunteered to maintain the fire alarm service, and is therefore liable for the negligence of the A. D. T. Company. We think the rule invoked has no application under the evidence in this case. If plaintiff got no right by virtue of his lease, when did he acquire it? A complete answer to this contention of plaintiff is furnished by the fact that defendants did nothing about the sprinkler or alarm system subsequent to making the lease, other than paying rentals as provided by the original contract between defendants and the Automatic Fire & Protection Company. Defendants could not and did not assume to or voluntarily act by remaining passive.

It plainly appears from the evidence in this case that the defendants were careful in safeguarding and inspecting the sprinkler system, and that the lease in question contained no provision imposing upon the defendants the duty to maintain a sprinkler and fire alarm service, or to employ a watchman. No such duty arises by implication under such a lease between a lessor and a lessee.

The defendants were not insurers of plaintiff's goods.

No negligence being proved, a verdict for the defendants was properly directed, and the judgment is

AFFIRMED.

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J. D. AND A. B. SPRECKELS SECURITIES COMPANY, APPELLANT V. H. W. ABTS COMPANY, APPELLEE.

FILED MARCH 28, 1922. No. 22042.

1. Sales: DELIVERY. In the absence of a contract to the contrary, delivery to a common carrier of goods purchased is not delivery to the buyer, unless the shipment is consigned to the buyer, his agent, or to his order.
2. ———: ASSUMPTION OF LOSS. The following provision in a contract of sale of goods: "Buyer to assume any and all loss or damage arising while goods are in transit, from sifting, leaking, breaking and chafing. Seller's responsibility ceases upon delivery of goods to carrier"—where the shipment is consigned to the seller or his agent, and there is no contract that such consignment shall constitute delivery to the buyer, construed to limit the loss assumed by the buyer to those expressly mentioned.

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

*Garlow & Long* and *Gaines, Ziegler, Van Orsdel & Gaines,* for appellant.

*Albert & Wagner, contra.*

Heard before LETTON, DEAN and DAY, JJ., CLEMENTS (E. J.) and WELCH, District Judges.

WELCH, District Judge.

Appellant brought suit in the district court for Platte county to recover from appellee $669.91, which it claimed to be due as a balance on the purchase of a car-load of sugar from appellant by appellee. The sugar was sold by written memorandum executed by Russell Brokerage Company, for appellant, and by the appellee. This memorandum provided for the price of $8.01 a bag of 100 pounds, and freight prepaid to Columbus, Nebraska. It also stated

that such sale was subject to the terms and conditions printed on the reverse side thereof. On the reverse side of the order were the following conditions: "Loss and Damage: Buyer to assume any and all loss or damage arising while goods are in transit, from sifting, leaking, breaking and chafing. Seller's responsibility ceases upon delivery of goods to carrier. Credit: Seller reserves the right to determine limit of credit of purchaser before delivery of each car."

Appellant claims that, in pursuance of this memorandum of contract, it shipped to Russell Brokerage Company at Columbus, Nebraska, for appellee, 800 bags of sugar of 100 pounds each, for which appellee has paid but $5,609.93, leaving due therefor $669.91, after allowing 2 per cent. discount for cash.

The appellee admits that appellant sold and delivered to it a car of sugar at the price above mentioned, and alleges that said sugar was, by oral agreement with appellee, to be delivered to appellee at Columbus, Nebraska. Appellee also claims that the car of sugar delivered to it in pursuance of said sale contained but 715 sacks of sugar.

The testimony of the witnesses on behalf of appellant was to the effect that 800 sacks of sugar, each weighing 100 pounds, were loaded by it into a railroad car at San Francisco, California, the car then sealed with said sacks therein and consigned to Russell Brokerage Company, Columbus, Nebraska, with freight prepaid. This testimony is uncontradicted by any witness. Appellant also introduced evidence tending to show that the car, when turned over to appellee for unloading at Columbus, Nebraska, had its seal unbroken, and that the bags of sugar therein were in the car of a uniform height throughout. The testimony of appellant's witnesses was that the car was loaded at San Francisco with bags 9 tiers high with 40 rows thereof at each end, and in the doorway, 7 tiers 5 sacks high, 5 tiers 3 sacks high, and 6 tiers 5 sacks high. The testimony of the witnesses for appellee was that the car, when turned over to it at Columbus, Nebraska, for unloading, contained but

715 sacks of sugar. No witness denies this testimony. At the conclusion of the evidence each party moved the court to direct a verdict in its favor. The court thereupon discharged the jury and took the case under advisement. Afterwards the court found generally for the appellee, and entered judgment of dismissal and for costs against the appellant. From this judgment and order overruling its motion for a new trial, appellant appealed.

If 800 sacks were loaded into the car at San Francisco and the car then sealed, and the seals remained unbroken until broken by appellee at Columbus, there should have been 800 sacks in the car when turned over to appellee at Columbus. On the other hand, if but 715 sacks of sugar were in the car when turned over to appellee at Columbus, and the seals of the car had remained unbroken from the time of its sealing at San Francisco, there could not have been 800 sacks in the car when sealed. The testimony of appellant's witness that the seals of the car at Columbus were unbroken did not identify the seals then on the car as the identical seals which had been placed on the car at San Francisco. The seals placed on the car at San Francisco were shown to have thereon certain numbers and other identification marks. There was no evidence as to what, if any, identification marks were on the seals which were unbroken at Columbus. The evidence that at Columbus the sacks were of uniform height throughout the car, doorway and all, and the evidence that the car was loaded with the sacks piled higher at each end of the car than in the doorway, shows that there was some change in the position of the sacks in the car before its arrival at Columbus. This change must have been caused, either by movement of the car in switching, in transportation, or by some person in the car.

The finding of the court was a general finding for defendant. This was a finding that there were but 715 sacks of sugar in the car when it was turned over to appellee at Columbus. The appellant contends that the undisputed evidence proves that there were 800 sacks of sugar deliv-

ered to the carrier at San Francisco, and that such delivery to carrier was delivery to appellee. Appellant contends that there was no evidence offered to prove the allegation of defendant's answer that by oral agreement with plaintiff the sugar was to be delivered to defendant at Columbus, Nebraska. There is no reply to this answer. No place of delivery is specified in the written contract of sale, nor in the terms of sale indorsed thereon. This allegation of the answer was therefore material. It was admitted by failure of appellant by reply to deny the same. No evidence was necessary to establish the truth of that allegation. The undisputed evidence shows that by the bill of lading of the shipment, made by the appellant at San Francisco, the sugar was consigned to Russell Brokerage Company at Columbus, Nebraska. This consignee is alleged by appellant and proved to be its agent. The sugar was consigned, therefore, to the agent of appellant. This in effect was consignment to itself by appellant. This would not constitute delivery to appellee at San Francisco. The appellee could not have maintained replevin for the sugar on its arrival at Columbus, for it had no title to it until order was received from the consignee, Russell Brokerage Company, to deliver it to appellee. The evidence is that when the sugar arrived at Columbus the Russell Brokerage Company was notified by the railroad company's agent at Columbus, and thereupon said brokerage company in turn notified the agent to turn the sugar over to appellee. The consignee, the Russell Brokerage Company, might, while in transit, have diverted the shipment to some other point. It might have caused it to be delivered to some other person than the appellee, to fill a sale made to such other person.

The cases cited by appellant in support of its contention that the sugar was delivered to appellee at San Francisco on delivery to the carrier are cases in which the buyer was named as the consignee in the bill of lading.

"Where a vendor of goods delivers them to a carrier for transit to his vendee, and causes the goods to be consigned

in the bill of lading to himself, his agent, or his order, the presumption arises that he thereby intended to retain the title in himself to the goods." *Missouri P. R. Co. v. Lau,* 57 Neb. 559.

"Bills of lading are symbols of property, and, when properly indorsed, operate as a delivery of the property itself investing the indorsee with a constructive custody which serves all the purposes of an actual possession." *Union P. R. Co. v. Johnson,* 45 Neb. 57.

"A bill of lading taken deliverable to the shipper's own order is inconsistent with an intention to pass the ownership of the cargo to the person on whose account it may have been purchased." *Dows v. National Exchange Bank,* 91 U. S. 618.

The consignment of the car to appellant's agent must have been the method by which the appellant exercised its right to determine the limit of credit of purchaser before delivery of the car; this right being reserved to it by the terms and conditions of said sale printed on the back of the order for said sugar, which have hereinbefore been set forth.

The facts shown by the evidence in this case prove conclusively that the sugar was to be delivered to appellee at Columbus, and not at San Francisco, and that it was so delivered at Columbus.

The appellant also contends that, by the terms of the sale printed on the back of the order for the sugar, the appellee assumed the risk of loss in transportation from San Francisco to Columbus. The risk assumed by appellee by that clause of the terms and conditions of the sale is confined to loss and damage arising from sifting, leaking, breaking and chafing. No mention is anywhere made in the terms of sale of loss by theft or removal from the car. If the car contained 800 sacks of sugar when consigned at San Francisco, and but 715 sacks on arrival at Columbus, as found by the court, there must have been 85 sacks removed in transit. If the shipment had been made to the buyer as consignee, delivery to the common car-

rier at San Francisco would have been delivery to the buyer unless there was an express agreement to the contrary. In such case it would be unnecessary to provide in the terms of sale that such loss was assumed by the buyer. The law itself would place it upon the buyer. The sentence quoted in the terms of sale, "Seller's responsibility ceases upon delivery of goods to carrier," was properly held by the trial court to be confined to the loss and damage assumed by the buyer, in the sentence immediately preceding; that is, loss and damage arising from "sifting, leaking, breaking and chafing." This clause of the terms and conditions of sale was placed therein for the purpose of casting upon the buyer a loss which, without such provision, would be upon the consignee in cases where the buyer is not the consignee.

In case of loss by theft, the common carrier would be liable to the consignee. The common carrier would not be liable for loss from the causes herein specifically assumed by the seller. If the sentence, "Seller's responsibility ceases upon delivery of goods to carrier," was intended to relieve the seller of all responsibility for loss in transit, from whatever cause, why were the risks assumed by the buyer specifically mentioned? The provision as a whole clearly shows an intention to relieve the seller of the responsibility assumed by the buyer. The trial court was right in its construction of the terms of the sale, that loss from any other cause than that from sifting, leaking, breaking and chafing was the seller's loss. The evidence proves conclusively that the shortage of 85 sacks of sugar was not caused by sifting, leaking, breaking or chafing.

We find no error in the finding or judgment of the trial court.

Its judgment is

AFFIRMED.

ORLANDO B. MANVILLE, APPELLEE, V. GEORGE W. PARK, APPELLANT.

FILED APRIL 11, 1922. No. 21762.

1. **Appeal:** FINDINGS BY COURT. The findings of the trial judge in an action at law tried by the court without the intervention of a jury are entitled to the same weight as the verdict of a jury, and, if supported by sufficient competent evidence, will not be disturbed by this court.
2. **Brokers:** RIGHT TO COMMISSION. Defendant desired to sell or exchange a tract of land in Wyoming for other lands. He employed plaintiff, a real estate broker, at an agreed commission, to procure such sale or exchange. Under the facts set forth in the opinion, *held*, that plaintiff was entitled to recover his commission, even though an exchange of lands was finally completed through the activity of another broker, or intermediary, brought into relations with defendant by plaintiff.

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

*Williams & Kryger*, for appellant.

*Kelsey & Rice, contra.*

Heard before LETTON, DAY and DEAN, JJ., SEARS and WESTOVER, District Judges.

PER CURIAM.

Plaintiff brings this action to recover a commission which he alleges is due him from the defendant, under the terms of a written contract made by correspondence, for his services as a broker or agent in procuring the exchange of certain lands belonging to the defendant for other lands. The answer admits the correspondence, denies that plaintiff ever found a purchaser who would buy or trade for the lands on terms satisfactory to defendant, and denies that plaintiff ever made or closed any sale or exchange.

The case was tried to the court without the intervention of a jury. Judgment was rendered in favor of plaintiff for $1,250. Defendant appeals.

Plaintiff, Manville, was in business as a real estate broker or agent at Oakdale. He had formerly sold the defendant a ranch at Lusk, Wyoming. In July, 1918, some correspondence was had between the parties, in which the defendant described the ranch at Lusk, and authorized plaintiff to find a purchaser. Plaintiff proposed that he would make the exchange for $1,250 commission, and this proposition was accepted. In this letter plaintiff said: "I want the commission agreed upon regardless of deal, further than it's a deal you accept, and due upon signing of contracts. * * * I am telling whom this ranch belongs to and am working same as if I had exclusive, as I feel confident you will protect my interests wherever it's apparent I have started a deal." Plaintiff advertised the land in the Norfolk newspapers and circulated generally information that he had this ranch for disposal. One Knight, a real estate agent at Norfolk, saw this advertisement, went to see Manville, and told him that he and another agent, named Raitt, had a man at Fremont who owned land in Saunders county which perhaps might be exchanged for the ranch. They talked the matter over, and Knight, with Manville's consent, called Park over long-distance telephone in relation to the Saunders county land. He arranged with Park to accompany him to inspect this land the next day, then called up Manville and told him that Park desired Manville to meet them at the South Norfolk station. It appears that Manville and Knight had had some conversation about the matter of commission; that Manville told Knight he was only getting $1,250 commission and could not divide, and that he would have to obtain his commission in some other way. Knight desired him to raise the price of the land and give him the increase over Park's price as commission. This Manville refused to do. Manville and Knight both testified, in substance, that they met Park at the South Norfolk station, and that the matter of commission was spoken of. The conversation between Manville and Knight was related to him, and Park said: "If your land suits me and I accept the propo-

sition when I see it, you can raise the price of my ranch sufficient to pay you a commission." Manville handed Park the letter, exhibit C. This letter narrates the conversation with Knight about the land and the commission. The concluding sentence is: "I am constantly talking this ranch up and have succeeded in bringing it to the favorable attention of every dealer in Norfolk, and it is getting where some one will soon take it on. I have it thoroughly understood with Knight that he has to get his com. at his end, so don't let him hand you anything to the contrary." Park admits receiving this letter.

After examining the Saunders county land, defendant approved it. Mr. Moody, the owner of the land, examined the Wyoming ranch. After some negotiations, which took place at Fremont, the exchange was consummated. During these negotiations defendant agreed to pay Knight $2,500 commission when the exchange was made, and paid that amount to him by check. He afterwards refused to pay plaintiff any commission, giving as his reason, in a letter: "I had to pay Knight and his pal at Fremont a good stiff commission in order to get it through, and owing to the fact that you did not do very much on this deal, merely wrote me one letter and told Knight about it, think you should leave me off on this commission."

It is undisputed that Manville had been employed by Park to procure a sale or exchange of the Lusk ranch; that he put defendant into communication with Knight, and that by means of the activity of Manville and Knight the exchange was consummated. The testimony of Manville and Knight as to the conversation at the South Norfolk station is in conflict with that of Park, but the court evidently adopted their account of it. Knight was working with Raitt, who was a broker for Moody, the owner of the land in Saunders county. The fact that Park promised to pay him a commission if he procured the exchange of these lands at an increased price, and after negotiations were in progress at Fremont agreed to pay, and did pay, him a specified amount, could not affect the right of Man-

ville to his commission, since he was in fact the moving and procuring cause that brought Moody and Park into communication and negotiation, and defendant had knowledge from the correspondence that plaintiff expected a commission if he was the initial and moving cause of the negotiations. Park should have had an understanding and settlement and terminated his relations with Manville at the time he first saw Knight, if he desired to discharge himself of any obligation to pay Manville, and to employ Knight independently. He was apparently so anxious to make the exchange that he took the risk of having to pay both Manville and Knight. *Myers v. Moore,* 85 Neb. 715; *Beougher v. Clark,* 81 Kan. 250, 27 L. R. A. n. s. 198.

The fact that Manville did not show Park the Moody land is immaterial. The agent for Moody did this. Manville and Knight discussed the question as to whether Manville should accompany Moody, Raitt, and Knight to Wyoming, but Knight suggested that too many agents trying to consummate the exchange might alarm Moody, as he was "agent shy," and thus defeat the exchange. For this reason, he testifies, he did not accompany them.

The trial judge, with the witnesses before him, evidently considered the testimony on behalf of the plaintiff most convincing, and therefore found in his favor. His findings in this respect in a law case are entitled to the same weight as a verdict of a jury, and, if supported by sufficient competent evidence, will not be disturbed by this court. The evidence is sufficient to sustain the conclusion reached, and the judgment of the trial court is

AFFIRMED.

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JAMES BROWN, APPELLEE, V. JOSIAH T. BLACKWOOD ET AL., APPELLANTS.

FILED APRIL 11, 1922. No. 21967.

1. **Sales: FRAUD.** The vendor of cattle, who represents them as sound and fit for breeding purposes, with knowledge that they are

diseased and unfit for breeding purposes, to one who buys them for breeding purposes, without knowledge of their diseased condition, the disease not being capable of detection by inspection of the cattle, is guilty of fraud, and the rule of *caveat emptor* does not apply.

2. **Verdict:** SUFFICIENCY OF EVIDENCE. Upon examination of the record, the evidence is *held* sufficient to sustain the verdict of the jury.

3. **Instructions.** The rulings of the court on instructions to the jury are approved.

4. **Evidence.** When the record fails to show that the testimony of a witness was read from, or based upon, a treatise on a scientific question, the subject of investigation, it does not fall within the rule excluding such publications as independent evidence.

5. **Witnesses:** CROSS-EXAMINATION. Where from the character of the testimony, and from the record as a whole, it appears that questions improperly asked a witness on cross-examination were without prejudice to the complaining party, the judgment of the trial court will not be disturbed.

APPEAL from the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

*Lambe & Butler, O. E. Bozarth* and *Walter D. James,* for appellants.

*Stewart, Perry & Stewart* and *George C. Proud, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, ALDRICH, DAY and FLANSBURG, JJ.

MORRISSEY, C. J.

Plaintiff brought suit against defendants to recover damages alleged to have resulted from the sale of 26 head of pure-bred cattle by defendants to plaintiff. The cattle were sold at public auction for the sum of $5,355. It is alleged in the petition that prior to the sale the cattle had contracted the disease known as "contagious abortion," or had been exposed thereto; that defendants had knowledge of this fact, and plaintiff did not have such knowledge; that the cattle were sold for breeding purposes; that defendants made the cattle appear to be sound and well; that

plaintiff relied upon their appearance and purchased them for breeding purposes; that having purchased them, and without knowledge of their diseased condition, plaintiff permitted them to run with other cattle which he owned, and the cattle with which he permitted them to run became infected with the disease and became worthless for breeding purposes, and that by reason of these facts plaintiff suffered damage in the sum of $11,395.

The answer admits the sale of the cattle, but alleges that it was under the terms and conditions of a printed circular, which was offered and received in evidence, containing certain representations and agreements in regard to the cattle being fit for breeding purposes. The answer also alleges that any loss or injury sustained by plaintiff was not due to any act of the defendants, but was caused by the carelessness and negligence of the plaintiff.

On trial to a jury there was a verdict in favor of the plaintiff for $2,500, and from a judgment entered thereon defendants have appealed.

In appellants' brief it is argued that the proof does not conform to the allegations of the petition, but, since this brief was filed, a supplemental transcript has been filed by leave of court and this objection has been overcome.

It is also argued that the proof is insufficient to sustain the allegations of the petition that the cattle were fraudulently prepared for sale. If defendants' view of the meaning of this allegation, namely, the physical preparation of the cattle, is what is meant by this allegation, then there may be a failure of proof, but if, as is more likely, plaintiff intended this allegation to include, not only the physical preparation of the cattle, but the acts of defendants in advertising them for sale and representing them as being breeding animals, then the proof is sufficient to sustain that allegation of the petition. That point, however, seems to be of minor importance, for the real basis of the action rests upon the allegations that defendants, with knowledge of the alleged diseased condition of the cattle, and with knowledge of plaintiff's ignorance of their condition, made

the sale, representing the cattle to be fit for breeding purposes. But it is claimed by appellants that the mere silence of a vendor of diseased animals does not constitute fraud; that in such a case the rule of *caveat emptor* applies. An ingenious argument is made in support of this contention, and authorities are presented holding that the mere fact that the vendor is aware of a latent defect in an animal which he offers for sale, but fails to disclose his knowledge to the purchaser, does not amount to fraud, unless he makes some statement or uses some art or device calculated to deceive the buyer, or to induce him to refrain from making investigation. This is an ancient rule that has respectable support in the books but it is not applicable here. It is alleged that defendants knew of the diseased condition of the cattle, and that the plaintiff did not have such knowledge. It is conceded that the disease cannot be detected by the ordinary methods of inspection. It is a disease which unfits cattle for breeding purposes. Assuming for the present that the allegations are true, defendants, with knowledge of all the facts, in offering the cattle for sale as breeders were guilty, not of merely standing mute and failing to disclose facts, but they were guilty of positive misrepresentations in representing the cattle as fit for breeding purposes. The vendor of cattle, who represents them as sound and fit for breeding purposes, with knowledge that they are diseased and unfit for breeding purposes, to one who buys them for breeding purposes, without knowledge of their diseased condition, the disease not being capable of detection by inspection of the cattle, is guilty of fraud, and the rule of *caveat emptor* does not apply. *Puls v. Hornbeck*, 24 Okla. 288, 29 L. R. A. n. s. 202, and note; *Kitchen v. Long*, 67 Fla. 72, L. R. A. 1917C, 617, and note; 3 C. J. 56, sec. 157.

We also find that the instructions given by the court are without prejudice to defendants.

Appellant assigns as error certain rulings of the court on the admission of evidence. In this connection it is claimed that plaintiff was permitted to improperly get

before the jury the contents of a certain pamphlet being a treatise on contagious abortion in cattle.

On the examination of a veterinary surgeon, a witness for plaintiff, the witness was handed a circular written by the chief of the United States bureau of agriculture, and was asked several questions in relation thereto. He was asked to read a designated section thereof, which he did, and then gave an answer based thereon. On motion of defendants' counsel the answer was stricken. Counsel for plaintiff then said to the witness: "You will have to repeat enough to the court and jury." The witness then said: "Well, when several cows in the herd lose their calves, and so on, it is positive, ordinarily positive evidence of the presence of contagious abortion; I would say it is positive evidence." This answer does not indicate that it was read from the pamphlet or that it was even based upon the statements that the pamphlet contained. It seems to be clear that it was based upon the doctor's own knowledge and it is not subject to the objections urged.

There is another assignment in which it is alleged that the court erred in permitting questions to be asked on cross-examination as to collateral matters not mentioned by the witness in his examination in chief. The questions were not based upon any evidence that the witness had given. But we are unable to see that the testimony was prejudicial to defendants. Giving it the fullest effect, it in no way tended to prove the plaintiff's cause of action, or to augment his damage. Its admission was not of sufficient consequence to warrant a holding that it was prejudicial.

The record as a whole shows that the issues were carefully tried; the jury was correctly instructed, and the judgment is

AFFIRMED.

JOHN WEINEL, APPELLANT, V. BOX BUTTE COUNTY, APPELLEE.

FILED APRIL 11, 1922. No. 22034.

**Eminent Domain:** HIGHWAYS. "Private property in Nebraska cannot be taken or damaged for public use without just compensation therefor, and this rule applies to public authorities exercising the right of eminent domain in establishing and opening public highways." *Johnson v. Peterson*, 85 Neb. 83.

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

*Burton & Reddish*, for appellant.

*Lee Basye* and *William Mitchell, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and FLANSBURG, JJ., DICKSON and STAUFFER, District Judges.

MORRISSEY, C. J.

This is an appeal from the district court for Box Butte county. The statutory proceedings for the opening of a road were instituted in that county and the county clerk caused to be published the notice provided for by section 2870, Rev. St. 1913. The proposed road ran along the section line between two quarter sections of land owned by plaintiff. The notice published, which was in the statutory form, required that all objections to the opening of the road or claims for damages because of its opening be filed in the office of the county clerk, "on or before noon of the 7th day of January, 1920." At 1:15 p. m. January 7, 1920, plaintiff filed a claim for damages with the county clerk. The claim was rejected by the board of county commissioners. From the order of rejection an appeal was prosecuted to the district court, where the defendant county filed an answer in which it admitted that it had taken for road purposes the land described in plaintiff's claim, but denied that plaintiff was thereby damaged in any sum whatsoever, and, for a further defense, alleged that plain-

tiff's claim for damages was not filed within the time prescribed in the notice nor filed "as required by section 2871 of the Revised Statutes of the state of Nebraska for the year 1913, but was filed with the county clerk of said county at 15 minutes after 1 o'clock in the afternoon of January 7, 1920."

At the conclusion of plaintiff's evidence defendant moved the court to dismiss plaintiff's cause of action because plaintiff's claim "was filed after 1 o'clock on the 7th day of January, 1920, when the notice published and served upon him was that he should file his claim before 12 o'clock, noon, on that day." This motion was sutained by the court; and from a judgment dismissing his cause of action plaintiff appeals.

It will be noted that the answer admits that plaintiff's land has been appropriated. It does not appear that he has received any compensation, and the judgment of the court is based solely upon his failure to file his claim for damages within the time fixed by the published notice. The question is not new in this state. In *Propst v. Cass County*, 51 Neb. 736, this question was presented and the court said: "It is agreed that notice of the location of the road, and to all persons to file claims for damages caused thereby, was duly published; also that plaintiff knew, when it was being done, of the opening of the road and its physical establishment; but, however these things may have been, it was the duty of the county, before appropriating plaintiff's property, to appraise the damages and make provision for payment. This was not done, and she could, notwithstanding the time prescribed in the published notice had expired, file her claim for damages, and is entitled to recover just and fair compensation for the damages to her property."

This holding of the court was based upon the provision of section 21, art. I of our Constitution, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." In *Livingston v. County Commissioners*, 42 Neb. 277, the court

said that, to give the quoted section of the Constitution "full effect, it is necessary that a corporation which proposes to appropriate private property for public use shall take such steps as may be necessary to determine the amount of damages resulting from such appropriation and provide payment therefor. This duty should be in no way dependent upon whether or not a claim for damages has been filed by the person whose property is to be taken."

The court had a similar question under consideration in *Hogsett v. Harlan County*, 4 Neb. (Unof.) 310, and, after pointing out that the county board had never passed upon the merits of a claim for the damages suffered by reason of the appropriation of plaintiff's land, it said that if the county had attempted to open the road the landowner "could have enjoined such proceeding until his damages were ascertained and paid; or he could have waived the irregularities and want of jurisdiction in the board to locate the road, and sued in trespass to recover the amount of his damages."

In *Kime v. Cass County*, 71 Neb. 677, it is said: "In this state, the county cannot take possession and use land as a highway without assessing and paying or providing for the payment of damages to the landowner."

These cases are followed and cited with approval in *Johnson v. Peterson*, 85 Neb. 83.

In the brief of appellee there is a suggestion that, years before the proceeding herein outlined, the road in question had been used by the public as a highway for a period of more than ten years, and, therefore, appellant is estopped to present his claim for damages at this time. This question was not presented in the court below; no evidence was taken thereon, and the judgment of the trial court is based solely upon the question heretofore set out. We cannot consider the defense suggested for the first time in the brief of appellee. That question, if defendant desires, may be presented on the next trial of this cause, but is not before us now.

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

REVERSED.

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IN RE ESTATE OF SWAN M. NELSON.
J. A. SINGHAUS, ADMINISTRATOR, APPELLANT, V. JOHN F. PIPER, APPELLEE.

FILED APRIL 11, 1922. No. 22036.

1. **County Court:** APPEAL. "A district court does not acquire jurisdiction of an appeal from an order in a probate proceeding unless within forty days from the date of the order a transcript thereof and of the proceedings relative to it is filed with the district court clerk, nor unless within thirty days from the date of such order the bond upon appeal, required by the statute, has been executed and filed." *Jones v. Piggott*, 68 Neb. 140.
2. **Appeal:** SUPERSEDAS BOND. "Under section 1528, Rev. St. 1913, an executor, administrator or guardian or guardian *ad litem* is not required to give bond on appeal when the appeal is taken in his representative capacity for the benefit of the estate, or the ward; but when the appeal is taken in furtherance of his individual interests he must give bond like other suitors." *In re Langdon*, 102 Neb. 432.

APPEAL from the district court for Burt county: CHARLES A. GOSS and CHARLES LESLIE, JUDGES. *Reversed, with directions.*

*J. A. Singhaus* and *Herbert Rhoades*, for appellant.

*Montgomery, Hall & Young* and *James A. Clark, contra.*

Heard before LETTON, DAY, and DEAN, JJ., CLEMENTS and WELCH, District Judges.

LETTON, J.

On January 27, 1915, John F. Piper, administrator of the estate of Swan M. Nelson, deceased, filed in the county court of Burt county a report of his acts as such administrator from April 5, 1913, to January 21, 1915, showing a balance in his hands due the estate of $1,400.25. On Feb-

ruary 1, 1915, he filed a petition setting forth that no further service by him is required in the matter of the estate, and prayed that his report be approved, that he be directed to assign the property in his hands to the parties entitled to the same, and that upon compliance with the orders of the court he be released and discharged. Objections were filed by the heirs and a hearing had. The court made lengthy and detailed findings as to the amount of money the administrator should be charged with, amounting to over $13,000, directed him to pay certain expenses of administration, and to pay the several heirs the amounts found due each of them, respectively, and ordered that, if these amounts were not paid within 30 days, he be removed as administrator. The only remaining thing for the administrator to do was to pay over the money. The decree was rendered on June 22, 1915. On July 20, 1915, a transcript of the record was filed in the district court for Burt county. A motion to dismiss the appeal was filed by the parties interested, and by J. A. Singhaus, administrator *de bonis non,* setting forth that Piper had resigned as administrator, that J. A. Singhaus had been appointed as administrator *de bonis non* of the estate, and alleging, among other grounds for dismissal of the appeal, that said Piper as an individual had filed no appeal bond and has no standing as appellant. This application was resisted. Affidavits were filed both in support of and in resistance to the motion. On December 10, 1920, the motion to dismiss was overruled on condition that John F. Piper file a bond conditioned according to law, in the sum of $25,000. Such a bond was filed and approved by the judge of the district court that day. A motion to strike the bond for the reason that it was not filed within 30 days from the final order of the county court was filed, and was overruled. Upon the hearing on the merits, the court found that on August 29, 1916, there was due the estate from Piper the sum of $11,065.14. The administrator *de bonis non* and other parties interested, among other assignments of error, complain that the court erred in over-

ruling the motions to dismiss the appeal, to strike the appeal bond, and erred in allowing the filing of such bond.

When an administrator appeals from an order or decree finding the amount due from him to the estate on his final accounting, he is in the same position as any other debtor to the estate, and if he desires to appeal he must give bond. The jurisdiction of the district court in such appeals depends upon two conditions: The giving and approval of an appeal bond in the county court within 30 days, and the filing of a transcript of the record within 40 days after the rendition of the final order. *Jones v. Piggott,* 68 Neb. 140; *Thompson v. Pope,* 77 Neb. 338; *In re Estate of O'Brien,* 80 Neb. 125; *In re Williams,* 97 Neb. 726; *In re Estate of Craig,* 101 Neb. 439; *In re Langdon,* 102 Neb. 432.

The appeal was not perfected in accordance with the law, and the court did not acquire jurisdiction of the subject-matter of the appeal. It follows that it had no power to permit an appeal bond to be filed in the district court, and all proceedings in that court were without jurisdiction. It is argued that, by agreeing to a continuance of the hearing and by his conduct in other respects, the appellant is estopped to raise this question. If jurisdiction of the person were alone involved, this might be true, but consent cannot give jurisdiction of the subject-matter.

The judgment of the district court is reversed, with directions to dismiss the appeal from the county court.

REVERSED.

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## IN RE ESTATE OF LEWIS HALL LAFLIN. EUGENE B. LAFLIN, APPELLEE, V. GUY F. LAFLIN, APPELLANT.

FILED APRIL 11, 1922. No. 22002.

1. **Wills: MENTAL CAPACITY.** The mental capacity of a testator is tested by the state of his mind at the time he executed his will.
2. ———: ———. In the contest of a will on the ground of in-

competency, it does not necessarily follow as a matter of law from proof of temporary mental infirmities before and after the testamentary date that the jury should be permitted to pass on the state of testator's mind at that time, in absence of proof that there was then a mental disturbance.

3. ———: ———. If a testator knows the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests, he is mentally competent to make a will.

4. ———: ———: PEREMPTORY INSTRUCTION. Where the evidence in the contest of a will on the grounds of mental incompetency and duress is insufficient to sustain a verdict in favor of contestant on either of those issues, a peremptory instruction in favor of proponent is not erroneous.

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

*Burkett, Wilson, Brown & Wilson* and *Jay C. Moore,* for appellant.

*Hugh J. Dobbs* and *Rinaker, Kidd & Delehant, contra.*

Heard before DAY, DEAN, FLANSBURG and ROSE, JJ.

ROSE, J.

This is a proceeding commenced in the county court of Johnson county by Eugene B. Laflin, proponent, to probate the will of Lewis Hall Laflin, who died at his home near Crab Orchard, Johnson county, March 7, 1920. The will was executed June 4, 1919, when testator was 77 years of age. He was a widower and left surviving him five children and two children of a deceased daughter. The name and age of each of the children of testator follow: Eugene B. Laflin, 51; Edith Laflin Lovitt, 45; Guy F. Laflin, 44; Clay Laflin, 38; Katherine Laflin, now Damon, 32. All were married at the time of testator's death except Katherine, who was married afterward. The children of the deceased daughter of testator are Fred A. McMichael and America McMichael Sikyta, both of mature age and married. In his will testator gave to each of his children both personal property and real estate. To each of the children

of the deceased daughter he made a small bequest, explaining he had previously aided their parents; their father also being deceased. These two grandchildren had in fact 160 acres of valuable land, each owning an 80-acre tract and other property. In addition to bequests of money and other personalty, testator devised to his son Eugene 80 acres of land in Johnson county and 6 lots in Crab Orchard; to his daughter Edith a life estate in 160 acres of land in Johnson county and the estate in remainder to her children; to his son Guy a life estate in 80 acres of land in Johnson county and a lot in Crab Orchard and the estate in remainder to children of Guy, if any, otherwise to Lewis E. Laflin, a son of Eugene B. Laflin and a grandson of testator; to his son Clay a life estate in 160 acres of land in Gage county and the estate in remainder to Clay's children, if any; to his daughter Katherine a life estate in 160 acres of land in Johnson county and 4 lots in Crab Orchard and the estate in remainder to her children, if any, otherwise in equal shares to her surviving brothers and sister. There was also a devise of 2 vacant lots in Beatrice to a grandson of testator, Hugh Laflin, a son of Clay Laflin. This is a mere outline of the principal devises, the will itself being long and elaborate. In the county court Guy F. Laflin, contestant, a son of testator, objected to the probating of the will and instituted a contest on the grounds of incompetency and duress. Upon a hearing the objections were overruled and the will admitted to probate. Contestant appealed to the district court, where a jury was impaneled to try the issues of fact. After both sides had adduced testimony at great length the trial court directed a verdict in favor of proponent. From a judgment that the will offered for probate is the will of testator, contestant has appealed.

There was a formidable argument on the proposition that the trial court erred in directing a verdict in favor of proponent. While there is no direct evidence that testator was wanting in mental capacity when he made his will

June 4, 1919, it is insisted he was often unbalanced mentally both before and after that date, and that under all of the circumstances the jury should have been permitted to pass on his competency at the time he attempted to exercise testamentary powers. Is this position tenable?

The mental capacity of testator to make the will offered for probate is tested by the state of his mind at the time that instrument was executed. His fatal malady was Bright's disease. He had been in failing health for a year or more before his death. His mind was sometimes seriously affected by uremic poisoning. At times he was not in a condition to make a will, but this state of mind was not continuous. It occurred at intervals as the result of uremia. At other times he was master of his mental faculties.

It does not necessarily follow as a matter of law from evidence of temporary mental infirmities before and after the date of the will that the jury should be permitted to pass on the state of testator's mind at that time, in absence of any proof that there was then a mental disturbance. There was positive evidence that he was in full possession of his mental faculties when he made his will. Testator's oldest son was a capable lawyer and was successful and prosperous. He is a devisee. He offered his father's will for probate. The filial and professional relations between father and son were becoming to both. Testator passed by this son at Crab Orchard, Johnson county, March 31, 1919, and with a son-in-law went to Beatrice, the county seat of Gage county, there inquired about the professional standing of Hugh J. Dobbs as a lawyer, engaged him to draw his will, gave him the necessary data for that purpose, and executed the will after it had been drafted to conform to testator's wishes. In this will, which was executed April 1, 1919, the disposition of agricultural lands corresponded generally to prior, undelivered deeds in possession of testator at the time, and to the present will. The data for the bequests of personal property were given by testator from memory April 1, 1919. He thus disposed of

his money, household goods, farm implements, live stock, books and keepsakes without forgetting any one having a natural claim upon his bounty. This will was deposited in the county court at Tecumseh. Later testator, desiring to change it in a few minor particulars, withdrew it May 31, 1919, went alone on a train to Beatrice early in June, 1919, and engaged Hugh J. Dobbs to rewrite it. Testator furnished from memory the necessary data for the changes desired. He nominated a different executor, made slight changes in the disposition of some of the personal property, devised vacant town lots to another grandson, and made other minor changes, but left his devises of farm lands, comprising the bulk of his estate, practically unchanged. This will was executed June 4, 1919, and is the will in controversy. The evidence shows conclusively that testator then knew the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests. These are the tests of mental capacity to make a will. Dobbs testified there was no trace of insanity; that testator's language was perfectly coherent and that his thoughts seemed to be; that witness had drawn many wills. He testified further:

"I never drew a will where the maker took so complete charge of all that was done as in this case."

Testator was a sturdy character. He transacted business intelligently both before and after he made his will. The terms of that instrument correspond generally to former testamentary intention at a time when his mental capacity was not in question. He possessed and managed an estate worth perhaps $100,000 and retained it to the last moment of his life. His will, in view of surrounding circumstances, shows mental acumen and paternal love. The oldest son had accumulated a considerable estate and had demonstrated his ability to manage property successfully. He was the only child to whom farm land was devised in fee, and his tract was limited to 80 acres, while each of three other children was remembered to the extent of 160 acres. Contestant, it is true, was limited to a life

estate in 80 acres, but the reasons for this are obvious. He had been married many years and was childless. He had been improvident. His father had given him a home and the use of land, but with a start in life he had been unable to accumulate property. As late as 1915 he suffered from excessive use of intoxicating liquors. Expenses of his folly sometimes fell upon his father. He had amiable qualities, however, and retained his father's affections. He was not disinherited. On the contrary he was bequeathed $1,500 in money, a greater sum than any brother or sister will receive in cash. Provision is thus made for his present needs. In addition, his father left him a home and 80 acres of land for life—the means of a permanent livelihood. The reasons behind these provisions of the will arose in a disposing mind.

In an opinion of reasonable length the able counsel cannot be followed through all the details of evidence, covering, as it does, over 1,000 pages of the record. The outstanding facts deducible from the evidence as a whole are conclusive. The evidence is wholly insufficient to sustain a finding that testator was wanting in testamentary capacity when he made his will or that any undue influence operated on his mind during that solemn act.

The trial court, therefore, properly directed a verdict sustaining the will.

AFFIRMED.

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WESTERN NEWSPAPER UNION, APPELLANT, V. ARTHUR DEE, APPELLEE.

FILED APRIL 11, 1922. No. 22431.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT. In a proceeding under the workmen's compensation act a speedy settlement of controversies between employer and employee is contemplated by the legislature.
2. **Courts:** TRANSFER OF CASES. Where one of the judges of the district court for Douglas county calls a compensation case for trial,

hears part of the testimony, temporarily suspends the hearing with the consent of both parties pending negotiations for a settlement, permits the case to be transferred to another judge of the same court, and leaves the state for an absence of several weeks, the latter judge, if such negotiations fail, may properly hear and determine the controversy.

3. **Master and Servant:** COMPENSATION AWARD: ATTORNEY'S FEES. Under the workmen's compensation act a reasonable attorney's fee may be taxed in the district court for the benefit of the employee, if the employer appeals from the compensation commissioner and fails to procure a reduction of the award.

4. ———: ———: ———. In a proceeding under the workmen's compensation act the allowance of a reasonable attorney's fee in the district court affects the remedy only and may be taxed as an item of costs, though the injury for which compensation is allowed occurred before the legislature authorized such a fee.

5. ———: ———: PENALTIES. Where there is no reasonable ground for a controversy over the right of an injured employee to recover from his employer specific weekly payments of compensation for an obvious, temporary, total disability, the employer may be subjected to the statutory penalties, if there is a failure to pay, tender, or offer to pay the weekly compensation as it falls due.

6. ———: ———: ———. Where there is a reasonable controversy between an employer and an employee, obviously entitled to compensation for a temporary total disability, over compensation for a permanent partial loss, penalties for failure to pay or tender compensation for the latter should not be imposed.

APPEAL from the district court for Douglas county: CARROLL O. STAUFFER, JUDGE. *Reversed, with directions.*

*James C. Kinsler,* for appellant.

*W. J. Connell* and *Herbert J. Connell, contra.*

Heard before MORRISSEY, C. J., ALDRICH, DEAN and ROSE, JJ.

ROSE, J.

This is a proceeding under the workmen's compensation act. While Arthur Dee, a boy 16 years old, who appears in the record as defendant, was in the employ of the Western Newspaper Union, herein called plaintiff, and was running an elevator in the city of Omaha for $9 a week, his

left foot was caught between the moving car and a stationary floor March 12, 1918, and he was severely injured below the knee. He was in a hospital several months and there submitted to a number of operations. He was totally disabled for 94 weeks and the permanent injury to his foot was 20 per cent. of normal efficiency. Under the workmen's compensation act he was entitled to $6 a week for 94 weeks on account of his temporary total disability. Laws 1917, ch. 85, sec. 7. He was also entitled to $6 a week for 25 weeks for his permanent partial loss. Rev. St. 1913, sec. 3662; *Poast v. Omaha Merchants Express & Transfer Co.*, 107 Neb. 516. Defendant at first claimed damages in the sum of $5,000. Plaintiff, recognizing its liability for compensation, but denying liability for both a temporary total disability and a permanent partial loss, applied to the compensation commissioner for a determination of the controversy. There defendant filed an answer claiming $9 a week for both periods and also statutory penalties. From an award in favor of defendant for compensation and penalties for both periods, plaintiff appealed to the district court for Douglas county, where there was a judgment in favor of defendant for $1,139, made up of the following items: Attorney's fee, $200; compensation for temporary total disability during 94 weeks at $6 a week, $564; penalties for 71 weeks at $3 a week, $213; compensation for 30 weeks at $6 a week on account of a permanent partial loss equal to 20 per cent. of normal efficiency, $180; penalties for 30 weeks at $3 a week, $90; total $1,247, minus a credit of $108, leaving a balance of $1,139. From this judgment plaintiff has appealed.

It is first argued that the judgment of the district court is void because it was pronounced by Judge Carroll O. Stauffer, who, it is said, acted without jurisdiction in hearing and in determining the controversy. It is insisted that the case was called by Judge Willis G. Sears, who assumed jurisdiction, ordered the trial to proceed, and heard part of the testimony. Plaintiff takes the position that Judge Sears did not continue the case or finish the trial or lose

jurisdiction. On the face of the record the point does not seem to be well taken. In the midst of the trial before Judge Sears the parties entered into negotiations for a settlement. By mutual consent the hearing was temporarily suspended. In the meantime Judge Sears left for California to be gone several weeks. He had consented to a trial before Judge Stauffer, and the latter assumed jurisdiction, over the objections of plaintiff, after the attempt to make an amicable settlement had failed. There was only one court and each judge had authority to exercise its powers. Each party was entitled to a speedy determination of the issues. Defendant asserted that right under the workmen's compensation act. It is the policy of the legislature to avoid unnecessary delays in a case of this kind and to require a speedy adjudication. In some respects compensation cases take precedence over other cases by specific enactment of the legislature. Rev. St. 1913, sec. 3680. The courts take the same view. In *Beideck v. Acme Amusement Co.*, 102 Neb. 128, it was said:

"The employers' liability act was intended by the legislature to simplify legal proceedings and to bring about a speedy settlement of disputes between the injured employee and his employer."

To carry out the purposes of legislation on this subject Judge Stauffer properly assumed jurisdiction with the consent of Judge Sears during the latter's absence in California.

On the merits of the case there is little in controversy beyond the allowance of an attorney's fee and the statutory penalties for nonpayment of weekly compensation as the installments fell due.

Was an attorney's fee properly allowed? The answer depends on the terms of the statute. In 1919 the act was amended and now contains the following provision:

"Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are had before the compensation commissioner, a reasonable attorney's fee shall be

allowed the employee by the court in the event the employer appeals from the award of the commissioner and fails to obtain any reduction in the amount of such award; the appellate court shall in like manner allow the plaintiff a reasonable sum as attorney's fees for the appellate proceedings." Rev. St. 1913, sec. 3666, as amended, Laws 1919, ch. 91, sec. 4.

Though this provision was inserted by amendment after defendant was injured, the attorney's fee relates to the remedy and may be taxed as an item of costs in entering judgment on a claim that arose before the amendatory act was passed. *Reed v. American Bonding Co.*, 102 Neb. 113; *Johnson v. St. Paul Fire & Marine Ins. Co.*, 104 Neb. 831. From the compensation commissioner plaintiff appealed without reducing the award. An attorney's fee, therefore, was properly taxed in the district court and the amount allowed does not seem to be unreasonable.

Were the penalties imposed by the trial court for nonpayment of weekly compensation when due authorized by law? The objections to these penalties may be summarized thus: Defendant made no claim for statutory compensation; did not commence any proceeding for the purpose of having his rights determined; refused to accept periodical payments; demanded $5,000 and refused to accept less than $3,000. In this connection it is asserted by plaintiff that an offer to pay compensation weekly would have been foolish and futile, because it would have been rejected; that from the beginning plaintiff was willing to pay all compensation allowable under the statute, and of this defendant was advised; that there was a reasonable controversy which prevented the allowance of penalties. Plaintiff's theories of the facts and the law cannot be accepted in their entirety. Both parties demanded too much and neither is in an ideal position in that respect. In court each stands on legal rights measured by statute. Plaintiff knew soon after the injury that defendant demanded money for the injuries suffered and compensation in some form in some amount is conceded. Plaintiff sought

relief in court on terms that did not fully meet the requirements of the law. In appealing to the court to be discharged from liability without being subjected to penalties, compliance with statutory requirements by actual payment or proper tender was essential. It is the policy of the law to require an employer to pay an injured employee weekly compensation based on his weekly wages. The system does not contemplate a large payment in a lump sum. *Myers v. Armour & Co.*, 103 Neb. 407. In offering or tendering compensation this feature of the law cannot be ignored. Plaintiff knew from the first that defendant was entitled to $6 a week for a time at least. Uncertainty as to the length of the period, while defendant was in a hospital totally disabled, did not obviate the necessity of a legal tender and an offer to pay the weekly compensation as it fell due. Defendant never had an opportunity to reject a legal tender and an offer of this kind. Had plaintiff offered unconditionally to pay weekly $6 a week, during obvious, temporary, total disability within the statutory period, the same to apply on any compensation for which plaintiff should become liable, and had this offer been supplemented by a legal tender, there would have been no reason to reject the payments, and liability for penalties during that period would not have arisen. In a situation like this the trial court is not necessarily concluded by the opinion of a witness, however conscientiously expressed, that such tender and offer would have been foolish and futile. While defendant was totally disabled, plaintiff waited from March 12, 1918, until November 20, 1919, and then offered a draft for a lump sum of $456, compensation for 76 weeks at $6 a week. This was refused. It was not then the measure of plaintiff's liability. It did not include penalties already accrued for failure to pay or tender or offer to pay the weekly compensation as it fell due. It seems clear that there was no reasonable ground for controversy over the right of defendant to a weekly payment of $6 during his temporary total disability, and that he is entitled to the statutory penalties

imposed by the trial court for defaults during that period.

There was, however, a reasonable controversy over the right of defendant to recover, in addition to compensation for a temporary total disability, $6 a week for 25 weeks for a permanent partial loss of 20 per cent. of normal efficiency, and plaintiff should not have been penalized for litigating this phase of the case or for deferring payments pending a solution of that question. It has been the subject of grave consideration and just recently has been solved in favor of the employee. *Poast v. Omaha Merchants Express & Transfer Co.*, 107 Neb. 516; *Updike Grain Co. v. Swanson*, 104 Neb. 661. The period of compensation for the loss of a foot is 125 weeks under a recent amendment, instead of 150 weeks as formerly provided. Laws 1917, ch. 85, sec. 7. Twenty per cent. is 25 weeks. In estimating this period at 30 weeks under the act before it was amended and in allowing penalties during that time the trial court erred. For the purpose of correcting these errors as the record now stands, the judgment of the district court is reversed and the cause remanded at the costs of defendant in this court.

REVERSED.

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## HENRY FRANCISCO V. STATE OF NEBRASKA.

FILED APRIL 11, 1922. No. 22406.

1. **Municipal Corporations:** ORDINANCES: VIOLATION: COMPLAINT: AMENDMENT ON APPEAL. Where the proceedings in a prosecution for the violation of a village ordinance are docketed in police court, in the name of a private person as plaintiff instead of in the name of the state, it is proper practice for the district court, when error proceedings are prosecuted, to permit the complaint to be amended by substituting the name of the state as plaintiff.

2. ———: ———: ———: PROOF. "A prosecution for the violation of a city ordinance, which does not embrace any offense made criminal by the laws of the state, while in form a criminal prosecution, is, in fact, a civil proceeding to recover a penalty, and clear and satisfactory proof that the offense has been committed is suf-

ficient to sustain a conviction. Proof beyond a reasonable doubt is not required." *Peterson v. State*, 79 Neb. 132.

3. ———: ———: ———: AUTHORITY TO PROSECUTE. Evidence examined, and *held* that the village of Royal had authority to prosecute defendant under its ordinance and to impose the fine therein prescribed for its violation by defendant who was convicted of conducting a pool and billiard hall without first obtaining a license.

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

*E. D. Kilbourn,* for plaintiff in error.

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

Heard before LETTON, DEAN and DAY, JJ., CLEMENTS (E. J.) District Judge.

DEAN, J.

The defendant was convicted in police court of conducting a pool and billiard hall, wherein he kept three pool tables and one billiard table for hire and public use, in the village of Royal, Antelope county, without first having obtained a license from the village authorities. He was fined $100 and costs. By an undertaking duly approved defendant superseded the judgment of the police court and prosecuted error to the district court, where he was found guilty by a jury. Thereupon a fine of $100 was imposed, from which error has been prosecuted to this court.

Defendant complains because the prosecution in police court ran in the name of "G. A. Boyd v. Henry Francisco." In the district court, however, the title of the case, on motion of the state, was amended to read "The State of Nebraska v. Henry Francisco." The complaint before us, while criminal in form, is merely the basis of a civil proceeding which was instituted under an ordinance to recover a penalty. The ordinance in question does not include within its terms any offense made criminal by a leg-

islative act. That the complaint stated an offense clearly appears.

From the foregoing it follows that the court did not err in sustaining the motion of the state to amend the complaint, nor in retaining the case for trial after the amendment was made. *Peterson v. State,* 79 Neb. 132. With respect to a fine imposed for the violation of an ordinance, of the character involved here, it is said in the body of the opinion in the *Peterson* case that the legislature contemplated that a proceeding thereunder was in the nature of a civil action and should be prosecuted as such.

It is argued that there is no evidence showing that the village of Royal had authority to assume village functions. The record shows that village officers were elected and that they held meetings and from time to time adopted ordinances and the like. Among others was an ordinance, which was shown to have been regularly published, which provided for the licensing of billiard and pool tables and which provided a penalty for its violation. The showing with respect to the authority of the village officers in the premises and the validity of the ordinance in question is sufficient. The original records of the village were identified by the village clerk and were introduced in evidence without objection. *Arapahoe Village v. Albee,* 24 Neb. 242; *Van Valkenberg v. Rutherford,* 92 Neb. 803; *Boyd v. Francisco,* 106 Neb. 249; 15 R. C. L. 1063, sec. 6, 1083, sec. 20.

We do not find reversible error. The judgment of the district court is

AFFIRMED.

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GEORGE M. YOUNG, APPELLANT, V. RACHEL E. GILLEN ET AL., EXECUTORS, APPELLEES.

FILED APRIL 11, 1922. No. 21971.

1. **Wills: DEVISE: ORAL CONTRACT.** An oral contract for the devise of land must be clear, definite, certain and unequivocal.

2. ———: ———: ———: PROOF. A contract for the devise of land must not only be proved clearly and satisfactorily, but all the evidence used in connection therewith must be referable thereto.

3. ———: ———: ———: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* not to establish the existence of an oral contract between the appellant and his grandfather by the terms of which certain land was to be given by will or otherwise to the appellant upon the death of his said grandparent.

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

*Burton & Reddish,* for appellant.

*Mitchell & Gantz, contra.*

Heard before MORRISSEY, C. J., DEAN, ALDRICH and FLANSBURG, JJ.

ALDRICH, J.

On January 3, 1920, George W. Loer died leaving as his sole heirs at law his widow, Lydia Loer, and two daugthers, Rachel E. Gillen and Lavina Pierce. He left a will, which was admitted to probate, by the terms of which he devised and bequeathed all of his property to his widow, except the sum of $1,000 to each of his daughters. The executors of the will are Rachel E. Gillen, James V. Potmesil, Frank L. Potmesil and William Mitchell. The appellees in this case, who are defendants in the court below, are said heirs, devisees, legatees and executors, and also Edgar Pierce, husband of Lavina Pierce, and Mr. Gillen, who was the husband of Rachel E. Gillen at the time this action was tried. At the time of his death George W. Loer owned a tract of 1,120 acres in Box Butte county, about 6 miles southwest of Hemingford. A part of this land is described as the west one-half of section 7, township 26 north, range 49 west of the sixth P. M.

In the year 1912 the appellant, hereinafter termed the plaintiff, filed on a government homestead of 640 acres in Garden county, Nebraska, which he occupied until about March 1, 1914, and which he relinquished on July 28, 1914.

The plaintiff, who was a grandson of George W. Loer, commenced this action to enforce specific performance of a parol contract which he alleges was made and entered into between himself and George W. Loer in February, 1914, by the terms of which he agreed to give up and abandon his homestead and operate and manage Loer's farm until Loer's death, and in consideration thereof Loer agreed to give plaintiff a share of the crops and convey to plaintiff, at the time of his death, by will or otherwise, that part of said farm specifically described as the west one-half of section 7, township 26 north, range 49 west of the sixth P. M., in Box Butte county, Nebraska. The plaintiff alleges as a matter of fact that he has performed all of the conditions for him to execute, but that Loer failed to convey said half section of land to him by will or otherwise, as he agreed.

The appellees, hereinafter termed the defendants, by their answer admit all the material allegations of plaintiff's petition, except that they deny that any such contract alleged and set forth was ever entered into, and claim that plaintiff operated said land solely under a lease. The defendants made certain other affirmative allegations, to all of which the plaintiff replied.

The issues were submitted for trial upon plaintiff's petition, defendants' answer, and plaintiff's reply, the sole question being whether such a contract was made and whether plaintiff performed his part of it. Upon these issues the verdict was in favor of defendants.

Under this issue of fact as stated, the only question is: Has the plaintiff complied, as a condition precedent, with the rule of law as laid down by this court and in many other jurisdictions? In other words, has he proved, in a clear and satisfactory manner, with definiteness and certainty, the contract which he alleged and set forth in the petition? Is it certain to what land he refers? In late years there has been a careless, indefinite and loose manner of referring to contracts made between a person since deceased and others living. This court has established a

different rule from that which plaintiff cites and argues.

The contract presented in this case to be enforceable in equity must have the element of certainty, and the proof to establish the contract must be clear, convincing, unequivocal and satisfactory. Hence, we have adhered to the rule in the following cases: *Remaly v. Sweet,* 106 Neb. 327; *Overlander v. Ware,* 102 Neb. 216; *Moore v. Moore,* 58 Neb. 268; *Peterson v. Estate of Bauer,* 76 Neb. 652.

It will be noted that this rule is adhered to, not only in this jurisdiction, but in many others as well. It is the only safe rule to follow in cases of this kind, even though at times it might work a hardship. The rule is that the courts recognize the right of a testator to dispose of his property as he sees fit. He may have some peculiar and potent reason for disposing of his property as he has done by will or otherwise. We feel in this case that it is our duty to recognize this rule and decide the case, adhering to it, for that is undoubtedly the law.

The rule as laid down in *Overlander v. Ware,* 102 Neb. 216, is: "In an action for specific performance of an oral agreement with a deceased person to convey land, *held,* that not only must the terms of the contract be established by evidence that is clear, satisfactory and unequivocal, but the work constituting the performance required under the statute of frauds must be such as is referable solely to the contract sought to be enforced, and not such as might reasonably be referable to some other and different contract or relation. Nothing will be considered as part performance which does not put the party into a situation which is a fraud upon him unless the agreement be fully performed. Equity interferes only to prevent fraud or unconscionable advantage."

This case is precisely in point, and the quotation elucidates and amplifies and does justice to the case under consideration, and we adhere to it.

Here we want to be noted as holding that the contract in the petition is indefinite, vague and uncertain, and defeats the intention of the testator and cannot be permitted

to stand. The evidence is held to be not sufficient to sustain a finding for the plaintiff that any land was specifically contracted for. In the case of *Moore v. Moore,* 58 Neb. 268, this idea is upheld. We also wish to call attention to the case of *Davis v. Murphy,* 105 Neb. 839. It will be noted that this case upholds the following principle which is in point in the matter under consideration: "A parol contract is enforceable in a court of equity when one party has wholly performed his part and the other party has not performed his part, when it clearly appears that nonfulfilment would work a fraud upon the party who has fully performed." It should be remembered in connection with this discussion that in a suit for specific performance equity withholds or grants relief according to the circumstances of each particular case. We have recognized this doctrine in many cases. This is made plain in the case of *Kofka v. Rosicky,* 41 Neb. 328, 25 L. R. A. 207, 43 Am. St. Rep. 685. This clearly establishes the doctrine we have above announced and makes our duty plain in the consideration of the case at hand. Also, as substantiating the doctrine above cited, see *Dicken v. McKinley,* 163 Ill. 318; *Peterson v. Estate of Bauer,* 76 Neb. 652.

The testimony of Howard Young and the witness Mrs. Vaughn comes very near establishing the rule we have laid down as requiring what is necessary, but it will be noted that the contract alleged in appellant's petition was never entered into between appellant and Mr. Loer. It is a notable fact that the appellant moved onto the Loer place in 1919, and rented the land from March 1, 1920, to March 1, 1921, for a cash rent. There is not a word of evidence that the appellant ever told anyone about the contract claimed to have been entered into in this case.

Another strange and phenomenal circumstance that impresses us as important is that there is not a word of evidence that Mrs. Loer ever heard of said contract. Another notable fact we call attention to is that, when Mrs. Loer left the farm and moved to Hemingford in the fall of 1914 or 1915, nothing was ever said about their leaving the farm

at the time the alleged contract was made. It was understood that he would remain there. It is significant that the home of the deceased and his wife had been on the land plaintiff claims, and it is significant that the deceased did the natural thing and performed his duty as he ought to perform it when he gave his aged wife, Mrs. Loer, his real estate that he then owned, and to each of his daughters, $1,000. Then in this connection there is the notable fact that appellant never expended any money or improved Loer's farm after he moved on the same in 1914. He never at any time filed any claim for damages against Mr. Loer for violation of his said alleged contract. The testimony of Mrs. Vaughn comes very near meeting the requirements of this situation, but it is bad for being vague, indefinite and uncertain, and in no way refers to the contract set forth in the petition and fails to be of force and effect for that purpose.

For the reasons set forth in this discussion and substantiated by the supreme court of this state in several well-considered cases, we must assert that the appellees are entitled to an affirmance.

AFFIRMED.

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HARRIS COHEN ET AL., APPELLANTS, V. FLORENCE L. BILLS, EXECUTRIX, APPELLEE.

FILED APRIL 11, 1922. No. 22062.

**Process:** AFFIDAVIT FOR PUBLICATION. When an affidavit for publication of process recites that the defendant to be served is a nonresident of the state, and that service upon him "cannot be made," the affidavit is sufficient, though it does not specifically state that service cannot be made *within the state*, since that fact sufficiently appears.

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

*Orville L. Jones* and *William B. Haley*, for appellants.

*J. J. Harrington, James C. Quigley* and *C. C. Flansburg, contra.*

Heard before MORRISSEY, C. J., DEAN, ALDRICH and DAY, JJ.

ALDRICH, J.

This is an action to quiet title. The appellants herein filed their petition on December 22, 1920, against the defendants alleging that on October 1, 1919, the district court for Cherry county entered a decree of foreclosure in favor of Charles J. Bills, mortgagee, and ordered one certain section of land in Cherry county sold to satisfy the mortgage in question. Plaintiffs in the instant case ask that the foreclosure proceedings be set aside, and that the title to the land be quieted in them and subsequent deeds canceled. On January 27, 1921, the defendant entered a general demurrer to the petition, which was sustained. Plaintiffs elected to stand on their petition and not further plead, and a decree was entered accordingly.

The issue presented for our consideration is: Was the affidavit for publication sufficient under our statute to give the court jurisdiction in the mortgage foreclosure proceedings attacked?

Under this statement of the issue an analogous situation is found in *Pitelka v. Pitelka*, 103 Neb. 388. The case is therefore affirmed on the principle of law as laid down in the *Pitelka* case.

AFFIRMED.

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PATRICK NEVIN, APPELLEE V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED APRIL 11, 1922. No. 22067.

Evidence examined, and *held* sufficient to sustain the verdict.

APPEAL from the district court for Fillmore county: RALPH D. BROWN, JUDGE. *Affirmed.*

*Wymer Dressler, Robert D. Neely* and *Paul S. Topping,* for appellant.

*John K. Waring* and *Robert B. Waring, contra.*

Heard before MORRISSEY, C. J., DEAN, ALDRICH, DAY and FLANSBURG, JJ.

ALDRICH, J.

This is an action at law wherein plaintiff seeks to recover damages in the sum of $420, representing the alleged value of one three-year-old mare and other animals killed by one of defendant's trains as a result of insufficient right of way fences. The plaintiff sued the defendant, alleging that defendant negligently failed to properly maintain and repair its fences and cattle-guards along its right of way adjoining plaintiff's farm; that, resulting from such negligence, on or about March 23, 1920, one certain three-year-old mare belonging to the plaintiff crossed one certain fence, or got through it some way, entered upon the railroad right of way and was killed by one of defendant's trains. This was the first cause of action. The second cause of action was for a similar claim for the killing, on or about April 6, 1920, of certain hogs belonging to defendant. The defendant denies that it was in any way guilty of negligence. The cause was tried before a jury in Fillmore county, resulting in a verdict for plaintiff for $160 on the first cause of action, and $90 on the second cause of action. From this decision defendant appeals.

The verdict of the jury was rendered upon a conflicting statement of facts, and their verdict being sustained by sufficient competent evidence we will not disturb it.

The judgment is

AFFIRMED.

ARTHUR J. CALLOWAY, APPELLANT, V. EDITH DOTY ET AL., APPELLEES.

EDITH LAIR, APPELLEE, V. ARTHUR J. CALLOWAY, APPELLANT.

FILED APRIL 11, 1922. NOS. 21944, 21945.

1. **Judgment**: NUNC PRO TUNC ENTRY. "If, in any proceeding pending in a court, a judgment is actually pronounced or an order actually made, and, if for any reason, such judgment or order is not recorded, then at any time afterward, upon proper notice being given to the parties interested and the facts being shown that such judgment was pronounced or such order made, the court may cause such order or judgment to be spread upon its records as of the date it was pronounced or made." *Hyde v. Michelson*, 52 Neb. 680, followed.
2. ———: ———. "The provisions of section 609 of the Code of Civil Procedure (Rev. St. 1913, sec. 8214) are not applicable to a motion for an entry *nunc pro tunc* of a judgment or order." *Hyde v. Michelson*, 52 Neb. 680, followed.
3. ———: INTEREST. Under the provisions of section 3348, Rev. St. 1913, a judgment based upon a note which bore interest at 10 per cent. draws interest at the same rate from the date of the judgment, although the rate of interest is not expressed in the judgment.
4. ———: ———. Where the judgment is silent as to interest, it is the duty of the clerk to ascertain from the record the rate of interest which it bears. In determining this rate of interest, if the cause of action is based upon a contract which calls for less than 7 per cent., a judgment on such contract will bear 7 per cent. interest. But, where the contract calls for 7 per cent. interest, or more than 7 per cent. and not greater than 10 per cent., a judgment based thereon will bear the rate of interest fixed by the contract.
5. **Evidence** examined, and *held* sufficient to support the judgments.

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

*Fawcett & Mockett* and *Francis V. Robinson*, for appellant.

*O. B. Clark, contra.*

Heard before LETTON, DEAN and DAY, JJ., BLACKLEDGE and TEWELL, District Judges.

DAY, J.

As these two cases were briefed and argued together in this court, and the facts are substantially the same in each case, there seems to be no valid reason why they may not be disposed of in one opinion.

It appears that Edith Lair commenced an action in the district court for Lancaster county against Arthur J. Calloway upon a promissory note for $3,000, which, by its terms, was to bear interest at 10 per cent. per annum from date until paid. Pending the action the plaintiff married Montreville Doty, and thereafter the proceedings were conducted in the name of Edith Doty. On December 6, 1917, the plaintiff recovered a verdict for the amount of the principal sum, with interest at 10 per cent. from the date of the note. Thereupon the trial court entered a judgment as follows:

"It is therefore considered, ordered and adjudged by the court that, in accordance with the verdict of the jury herein, the plaintiff, Edith Lair, in her present name of Edith Doty, as ordered by the court, do have and recover of and from the defendant, Arthur J. Calloway, the said sum of $3,961.72, the amount assessed by the jury herein, together with the costs in this action, taxed at $48.70, for all of which execution is hereby awarded."

The defendant Calloway took an appeal from this judgment to this court, where the judgment was affirmed. A controversy then arose between the parties as to the rate of interest the judgment should bear. The defendant contended that, inasmuch as the judgment was silent as to the rate of interest it should bear, it drew interest at 7 per cent. from its date. The plaintiff, on the other hand, insisted that as the note provided for interest at 10 per cent. the judgment would bear interest at the same rate. On January 7, 1929, while this controversy over the interest rate was still on, the defendant paid into court the sum of $4,588.63, being the amount of the judgment with in-

terest at 7 per cent. from its date, together with the costs, as taxed by the clerk. It afterwards developed that the clerk had omitted an item of $10.05 as a part of the costs. Counsel for the plaintiff received from the clerk of the court the $4,588.63, stating in his receipt that the amount was "to apply on judgment, interest and costs," and refused to satisfy and discharge the judgment of record. In July, 1920, the plaintiff had an execution issued for the balance which she claimed was still unpaid upon the judgment, upon the theory that it bore interest at 10 per cent. At this stage of the controversy Calloway brought an action against Edith Doty and Ira Miller, Sheriff, to enjoin the collection of any further sum upon the judgment, upon the theory that it had been fully paid, and further prayed that the execution be recalled, and that the judgment be satisfied and discharged of record. Before the restraining order became effective, the execution was returned *nulla bona*. Upon the trial of the injunction suit on November 26, 1920, the court dismissed the plaintiff's action, and further adjudged that Edith Doty was entitled to collect the amount of the judgment, $3,961.72, with interest at 10 per cent. from December 6, 1917, the date of the judgment. From this judgment Calloway has appealed, the case being No. 21944.

Referring now to case No. 21945, it appears that in January, 1920, Edith Doty filed a motion in the original action of Lair v. Calloway, praying for a *nunc pro tunc* order as of date December 6, 1917, inserting in the journal entry of the original judgment the words "interest at 10 per cent. per annum from this date, and," so that the judgment will read that the plaintiff "do have and recover of and from the defendant, Arthur J. Calloway, the said sum of $3,961.72, the amount assessed by the jury herein, together with interest at 10 per cent. per annum from this date, and the costs of suit in this action, taxed at $78.70, for all of which execution is herein awarded." Upon the hearing this motion was sustained, and the journal entry of the original entry corrected accordingly. From this order cor-

recting the journal entry, Calloway has appealed.

In the latter case, it is now urged by Calloway that the court had no jurisdiction to make the *nunc pro tunc* order, because more than three years had elapsed since the rendition of the original judgment. In support of this contention his counsel cites sections 8207 and 8214, Rev. St. 1913. Section 8207, so far as pertinent to the question raised, reads as follows:

"A district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made: * * * Third, for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order."

Section 8214, is as follows: "Proceedings to vacate or modify a judgment or order, for the causes mentioned in subdivisions four, five and seven of section 648 of this Code (Rev. St. 1913, sec. 8207) must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant or person of unsound mind, and then within two years after removal of such disability. Proceedings for the causes mentioned in subdivisions three and six of the same section shall be within three years, and in subdivision nine within one year, after the defendant has notice of the judgment."

The question is then presented whether the sections of the statute above quoted were intended to operate as a limitation upon the power of a court to make a *nunc pro tunc* entry. It must be borne in mind that the proper function of a *nunc pro tunc* order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made, so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded. In other words, it is an order to make the record speak the truth. As we view it, the sections of the statute cited have no application to a *nunc pro tunc* order. Those sections relate to proceedings to vacate or modify a judgment on account of

the mistake, neglect, or omission of the clerk, or irregularity in obtaining such judgment. But this is not an action to vacate or modify a judgment rendered. It is a proceeding to have spread upon the record a judgment which was in fact rendered but not truly recorded. The power of the courts to make a *nunc pro tunc* entry is an inherent power, and does not depend upon statute. In *Hyde v. Michelson,* 52 Neb. 680, it was held: "If, in any proceeding pending in a court, a judgment is actually pronounced or an order actually made, and, if for any reason, such judgment or order is not recorded, then at any time afterward, upon proper notice being given to the parties interested and the facts being shown that such judgment was pronounced or such order made, the court may cause such order or judgment to be spread upon its records as of the date it was pronounced or made." The same principle is announced in *Clark & Leonard Investment Co. v. Rich,* 81 Neb. 321.

The next question which arises is whether the evidence is sufficient to sustain the order. In *Harris v. Jennings,* 64 Neb. 80, it is held that, in the exercise of its power to correct its own record, the court is not confined to an examination of the minutes made by the trial judge, but may proceed upon any satisfactory evidence. While the showing made in the affidavit as to the finding of the court on the question of the rate of interest is in the nature of a conclusion, its correctness was not challenged in any way, and under the circumstances we think it must be held sufficient to sustain the action of the trial court.

The next question to be considered is whether the court erred in dismissing the injunction action brought by Calloway and in refusing to satisfy and discharge the judgment of record. This, of course, depends upon whether the judgment was fully paid. That there was still a portion of the costs due is admitted, but we are not disposed to base our conclusion upon that fact, as the failure to pay the entire costs was an oversight of the clerk. Section 3347, Rev. St. 1913, fixes the legal rate of interest upon all contract obli-

gations at 7 per cent. unless a greater rate, not exceeding 10 per cent., is agreed upon by the parties. Section 3348, Rev. St. 1913, provides, in substance, that all judgments and decrees for the payment of money shall bear interest at 7 per cent. from the date thereof, provided that where a judgment or decree is based upon a contract, by the terms of which a greater rate of interest than 7 per cent. shall have been agreed upon, not exceeding 10 per cent., such judgment or decree shall bear interest at the rate agreed upon in the contract. As the note bore interest at 10 per cent., it seems plain from the language of the statute above cited that a judgment upon this note must bear interest at the same rate. This section of the statute has been construed by this court on several occasions, and the rule is now well settled that, where the parties to a contract for the payment of money have not contracted for any rate of interest, or contracted for a rate of interest less than 7 per cent. per annum, a judgment based upon such contract will bear interest at the rate of 7 per cent. from the date of its rendition, and where the parties to a contract for the payment of money have agreed upon a rate of interest, lawful, greater than 7 per cent., a judgment based on such contract will draw interest at the contract rate. *Havemeyer v. Paul*, 45 Neb. 373; *Connecticut Mutual Life Ins. Co. v. Westerhoff*, 58 Neb. 379; *Trompen v. Hammond*, 61 Neb. 446.

But, besides all this, we do not think that it is necessary that there should be a recital in the judgment that it bear a particular rate of interest in order that the judgment creditor may collect interest on his judgment, as the statute fixes the rate of interest which the amount of the judgment bears in any given case. While it is the better practice that the court should specify the rate of interest which a judgment or decree shall bear in order to obviate a possible future contention, there is nothing in the law which seems to require that this be done. In *Evans v. Fisher*, 26 Mo. App. 541, under a statute substantially the same as ours, it was said: "The rate of interest which a judg-

ment shall bear is a quality which the statute ascribes to the judgment, and it is not a necessary part of the judgment entry; and where it is not shown by the judgment entry, it is the duty of the clerk to ascertain from the record the interest which the judgment shall bear, and to issue execution accordingly; and where he refuses to perform his duty, the circuit court can direct him so to do on motion, or the defendant can compel him to do so by mandamus. *State v. Vogel,* 14 Mo. App. 187." When, therefore, the plaintiff applied to the clerk of the court for an execution for the unpaid balance due upon the judgment, it was not only proper for the clerk, but it was his duty, to ascertain from the record what rate of interest the amount of the judgment bore and issue an execution accordingly. In this case there was no basis for a difference of opinion upon that question. The note upon which the cause of action was founded bore interest at 10 per cent. and the plaintiff was entitled to interest upon the judgment at the same rate. In cases where there is uncertainty as to the rate of interest, it would be proper for the clerk to apply to the court for an interpretation of the judgment.

It follows from what has been said that the plaintiff, Edith Doty, was within her legal rights in demanding that an execution issue for the balance due upon the judgment, arising from the difference between 7 per cent., which was paid, and 10 per cent., which the judgment bore; and that, therefore, the injunction prayed for by Calloway, as well as his request that the judgment be satisfied and discharged of record, were properly denied. It also follows that the court properly issued the *nunc pro tunc* order.

The judgment of the lower court in each case is

AFFIRMED.

# NATIONAL SUPPLY COMPANY, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED APRIL 11, 1922. No. 21977.

1. **Justice of the Peace:** ERROR PROCEEDINGS: TRANSCRIPT. In an error proceeding from the justice court to the district court, a transcript, which sets out the judgment of the justice court and a recital that a bill of particulars was filed and a history of the proceedings, is sufficient to give the district court jurisdiction, though a copy of the bill of particulars is not copied in full therein.
2. ———: ———: ———: DIMINUTION OF RECORD. Where such a transcript is filed, a party to the suit may, where there is no showing of laches or unreasonable delay on his part in making application, suggest a diminution of the record and have the transcript supplemented so as to supply the omission.
3. **Evidence:** FEDERAL STATUTES: JUDICIAL NOTICE. The courts of this state take judicial notice of the federal statutes, of the president's proclamations, and of the general orders of the director general of railroads, and of the fact that the government had control of and was operating, pursuant to law, the transportation facilities and properties of a railroad during the year 1918.
4. **Pleading:** BILL OF PARTICULARS. A bill of particulars, which alleges that coal was shipped over the defendant railroad for the plaintiff, a shipper, in the year 1918, shows on its face that the shipment was conducted under the direction of the director general of railroads.
5. **Railroads:** FEDERAL CONTROL: LIABILITY. A railroad company is not liable for the acts and defaults of the federal government in the shipment of goods over its lines as a common carrier during the period that the railroad is under federal control.
6. ———: ———: ———: ERROR PROCEEDINGS. Where a bill of particulars, filed in the justice court, shows on its face that the shipments complained of were conducted over the railroad as a common carrier at a time when the railroad was under federal control, the question of the liability of the railroad company for such shipments may be raised in the district court in an error proceeding, though the company filed no written objections below.
7. **Judgment by Default:** ADMISSIONS: JUDICIAL NOTICE. The default of a defendant cannot be treated as an admission of the allegations of fact in a bill of particulars, where such allegations are contrary to facts of which the court takes judicial notice.

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

*Wymer Dressler, Robert D. Neely* and *Paul S. Topping,* for appellant.

*Burkett, Wilson, Brown & Wilson, contra.*

Heard before ROSE, DEAN, DAY and FLANSBURG, JJ.

FLANSBURG, J.

This action originated in justice court and was based upon a claim by plaintiff for damages growing out of loss of coal in shipment over the defendant's railroad. The defendant appeared and took a continuance. Later judgment was entered against defendant by default. The defendant company sought to review the judgment by error proceedings in the district court. In the district court the proceedings were dismissed. The defendant company now brings the matter here for review.

In the district court defendant company filed, within the proper time, a petition in error and a transcript of all proceedings had and done in the justice court, complete in all respects except that it did not set forth a full and exact copy of the bill of particulars. It did contain a recital, however, that the plaintiff had filed a bill of particulars, "claiming judgment against defendant for the sum of $159.76 with interest at 7 per cent. and cost of suit on account of loss and shrinkage and damages and overcharges on certain goods while in transit, and for reasonable attorney's fees," and the original bill of particulars and the other files of the justice court in the proceeding were transmitted with the transcript and filed in the district court. The original papers, under our decisions (*Smith v. Delane,* 74 Neb. 594; *Royal Trust Co. v. Exchange Bank,* 55 Neb. 663), are not a part of the transcript and cannot be so considered in a review of the judgment of the justice court in an error proceeding.

In the district court the plaintiff objected to the transcript and moved to dismiss the appeal, on the ground that

the transcript was insufficient to give the district court jurisdiction, for the reason that it did not set forth in full a copy of the bill of particulars.

Without question the transcript was defective. It should have set forth a copy of the bill of particulars, so as to fully present a record of the questions involved and determined by the judgment of the justice of the peace, and the errors complained of, resulting from the decision. However, the transcript, even in its defective form, was sufficient to give the district court jurisdiction. The statute (Rev. St. 1913, sec. 8179) recites: "The plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated or modified." The transcript did set forth the final order or judgment and a history of the proceedings. In construing the section of the statute just mentioned this court, in *Fike v. Ott*, 76 Neb. 439, said: "The jurisdictional feature of a transcript filed in this court is the 'judgment, decree or final order sought to be reversed, vacated or modified.' * * * To this should be added only so much of the remainder of the record below as is necessary to present the questions sought to be reviewed." See, also, *Moore v. Waterman*, 40 Neb. 498.

The transcript, though perhaps incomplete and defective, and insufficient, in its original form, to present for review the errors complained of, was, nevertheless, sufficient to confer jurisdiction, and the defendant was entitled, where there was no showing of laches or unreasonable delay in making application, to suggest a diminution of the record and have the transcript supplemented, so as to reflect and set forth, so far as necessary, the full record of the proceedings of the justice court. The defendant, to that end, filed a motion in the district court, asking that the justice of the peace be required to file a supplemental transcript, setting forth a copy of the bill of particulars. This request was overruled, and the error proceeding dismissed.

The plaintiff contends that the refusal of the district court to allow the filing of the supplemental transcript was

not prejudicial to the defendant, for the reason that, had the bill of particulars been made a part of the transcript, still the record would have been insufficient, even in that event, to show that the judgment of the justice court was erroneous. The error complained of by the defendant is that it was held liable for loss of coal in shipment over its railroad at a time when the entire transportation facilities of the railroad were under the control of and operated by the federal government. The bill of particulars sets forth, as a basis for cause of action, loss of coal during shipments made in August, 1918. No written objections were filed by the defendant company in the justice court, and it is the contention of the plaintiff that the allegations of the bill of particulars, by the default of the defendant company, stand admitted, and that the defendant company could not, for the first time in the district court, affirmatively raise the objection that the federal government was alone liable, and that the railroad company did not, at the time in question, have the control of and operate its transportation lines.

The courts of this state take judicial notice of the federal statutes, of the president's proclamations, and of the general orders of the director general of railroads, and of the fact that the government had control of and was operating, pursuant to law, the transportation facilities and properties of the defendant railroad during the year 1918. *Houston, E. & W. T. R. Co. v. Tanner,* 227 S. W. (Tex. Civ. App.) 713; *Moon v. Hines,* 205 Ala. 355; *McAdoo v. Booker,* 17 Ala. App. 623; *Crawshaw v. Corbett,* 264 Fed. 962; *Marshall v. Bush,* 102 Neb. 279. The allegations of the bill of particulars alone are sufficient to show that the transportation, which occurred in August, 1918, was at a time when shipments, of the kind described, must necessarily have been conducted by the federal government. The liability was not upon a claim, based upon acts of the railroad company outside of its regular duties as a carrier, as was the case in *Spring v. American Telegraph & Telephone Co.,* 86 W. Va. 192, 10 A. L. R. 951.

The default of the defendant company cannot be treated as an admission of the allegations of fact in the bill of particulars which are contrary to facts of which the court takes judicial notice.

The defendant, in our opinion, was clearly entitled to a diminution of the record and to a supplemental transcript, setting forth the bill of particulars, and it appears to us that damages, accruing to such shipments as were made during the time that the railroad was under federal control, would not give rise to a cause of action in favor of the plaintiff against the defendant railroad company (*Missouri P. R. Co. v. Ault,* 256 U. S. 554), and that the bill of particulars in the justice court, setting forth the dates of shipment, is sufficient to present that issue of law. To raise the question on error in the district court is not a departure from the issues presented below. *Houston, E. & W. T. R. Co. v. Tanner, supra.*

The plaintiff urges that the statute (Rev. St. 1913, sec. 8464) provides that a judgment by confession precludes a party from taking error proceedings from the judgment. A judgment entered by default, though the default has the effect of admitting, for the time being, all the material allegations set forth in the bill of particulars, except, at least, facts of which the court takes judicial knowledge, is not a judgment by confession, and where, after the defendant has once made a general appearance, the justice court, on a default, enters a judgment which is erroneous, the party who is injured by the erroneous ruling has the right to a review. *Crumay v. Henry,* 40 Neb. 716; *Engles v. Morgenstern,* 85 Neb. 51.

For the reason, then, that the defendant was entitled to have the transcript corrected, so as to present the bill of particulars, which, on its face, raised the error complained of, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

## RUDOLPH KRAUS V. STATE OF NEBRASKA.

FILED APRIL 11, 1922. No. 22087.

1 **Criminal Law:** TEST OF INSANITY. The test of insanity, urged as a defense to a charge of crime, is the capacity of the accused to understand the nature of the act committed and his ability to distinguish between right and wrong with respect to it.

2. ———: INSANE DELUSION. Where a person is so diseased in mind, at the time the act is charged to have been committed, that he is incapable of comprehending the nature of the act and is unable to distinguish between right and wrong with respect to it, he is not accountable, howsoever such insanity may be manifested, whether by insane delusion or in any other manner.

3. ———: ———. In case of partial insanity only, an insane delusion, which raises in the mind of the accused an imagined state of facts and so corrupts his mental processes that he is incapacitated from distinguishing right from wrong with respect to the act charged, is a defense, though the imagined state of facts, if real, would not have justified a sane man in doing the same act.

4. ——— ———. Where there is evidence that the accused was, in committing the act charged, laboring under an insane delusion, but was sane on matters not connected with the subject of his delusion, it cannot be presumed, as a matter of law, that he is able to reason with regard to the subject-matter of his delusion, the same as a sane man would as to a state of actual facts conforming to the imaginings of the accused.

5. ———: ———: QUESTION FOR JURY. The question of the effect of an insane delusion to incapacitate a person, who is otherwise sane, in his ability to distinguish between right and wrong, with regard to matters connected with his delusion, is always a question for the jury, and an instruction on insane delusions should call upon the jury to pass upon that question.

6. **Instruction** on insane delusions, being instruction No. 3, given in the case of *Thurman v. State*, 32 Neb. 224, and criticized in *Taylor v. State*, 86 Neb. 795, is disapproved and *held*, in the form given, to be erroneous.

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

*Bartos & Bartos*, for plaintiff in error.

*Clarence A. Davis, Attorney General,* and *Jackson B. Chase, contra.*

Heard before DEAN, ROSE, DAY and FLANSBURG, JJ.

FLANSBURG, J.

Criminal prosecution for murder. Defendant was convicted of murder in the first degree and appeals. This is the second time the case has made its appearance in this court. The facts, as disclosed by the evidence upon this trial, are substantially the same as at the former hearing and are fully set out in the former opinion. *Kraus v. State,* 102 Neb. 690.

The question presented now is as to the instruction on insanity.

The expert testimony in the defendant's behalf was that the defendant was a paranoiac, and that his condition was due to the continued and excessive use of alcoholic liquors. The testimony of the defendant, borne out by the testimony of disinterested witnesses, was to the effect that he had, for a long period of time, been obsessed with an insane delusion that he and his entire family were afflicted with tuberculosis. Shortly prior to the act charged, the defendant drank considerable quantities of liquor and arrived home near midnight. He was, as his testimony shows, unable to sleep and walked about in the yard under a great mental stress, harassed with the fancy that his wife and children, whom he had just seen sleeping in the house, had blood running from their mouths and were seriously afflicted with the disease mentioned. He climbed upon the windmill, with the intention of casting himself off, but was unable to do so. He heard voices calling to him that if he left this world he should take his wife and children with him. He said: "I listened, it may be from God, * * * I don't see nobody." He believed that he could not kill himself and leave his wife and children suffering from disease; he thought best that they should all go together and that he should kill them. He went into the bedroom where they were sleeping, and as they slept shot

each one in turn through the temple, first his wife, then his little four-year-old girl, and then his son, two years of age. The boy moved and defendant shot him again through the body. He then removed them, one at a time, kissing them as he did so and placing them side by side upon the floor. He left a place for himself between the two children and, lying down there, shot himself through the temple, severing the optic nerve and permanently blinding him. He then shot himself in the forehead and then through the body. Still living, he groped along the wall, leaving bloody stains from his hands, endeavoring to reach a shelf where he kept his razor, but swooned away, and the bodies were found in the positions mentioned, the accused still unconscious, the next day. It appears that the defendant had had no marital difficulties of any kind, and that he loved his wife and children, and the only motive that could be ascribed for his act, except that of insanity, was his intoxication and discouragment over farming affairs and over the condition of his prospective wheat crop.

The testimony of disinterested witnesses, as well as the testimony of experts, was to the effect that the defendant was insane; that he labored under the delusion mentioned, and that he was unable to distinguish right from wrong, with reference to his act.

The court did not instruct specifically as to the test by which the jury should be guided in determining the sanity or insanity of the accused, that test being, under our decisions, the capacity of the accused to understand the nature of the act committed, and the ability to distinguish between right and wrong, with respect to it. *Schwartz v. State,* 65 Neb. 196; *Philbrick v. State,* 105 Neb. 120. The court did, however, give the following instruction:

"You are instructed that, there being some evidence introduced in this case relative to the mental condition of the defendant at and prior to the time of the commission of the crime charged, it devolves upon the state to prove by competent evidence, beyond a reasonable doubt, that at the time of the commission of the crime charged the

defendant was of sound mind and was mentally competent to distinguish right from wrong with respect thereto. If, from all of the evidence, or the lack of evidence, a reasonable doubt is raised in your minds as to the sanity of the defendant at the time of the commission of the crime charged, it is your duty to find the defendant not guilty on the ground of insanity."

The instruction, so given, does not, as it appears, strictly define the term insanity, as fixed by the above decisions, and, though we do not approve of this as an instruction, it is not for that reason that the instruction is set out, but only for the purpose of showing its connection with the other instruction on insanity which follows. The two instructions were all that were given by which the jury were enabled to determine the issue of insanity. The other instruction is as follows:

"Evidence has been introduced in this case about hallucinations and delusions. It is not every hallucination or delusion that can be considered an insane hallucination or delusion. In order to be an insane hallucination or delusion the hallucination or delusion must be of such a character that if things were as the hallucination or delusion imagined them to be they would justify the act springing from the hallucination or delusion.

"So, in this case, if you find from the evidence that, at the time of the killing charged in the information, the defendant was laboring under the hallucination that he was commanded by the voice of God to shoot his wife, and if you also find from the evidence that the defendant believed in God, and he was moved by such hallucination, and by that alone, to shoot his wife, that would have been an insane hallucination, because, if true, it would have justified the killing.

"But. if you find from the evidence that at the time of the killing the defendant was laboring under the delusion that his wife had tuberculosis and because of that fact it would be best to kill her and that delusion moved the defendant to kill his wife, that would be no excuse for the

act on the ground of insane delusion, because if the fact had really been that his wife had tuberculosis it would not have justified the killing."

The instruction is confusing in its definition of an insane hallucination or delusion. It seems to declare that an hallucination or delusion is not attributable to insanity unless it is of such a kind as would justify the act which springs from it. An insane delusion is a false belief, springing from a mind disordered by disease, and may be defined entirely apart from the acts of the party afflicted which are the result of such delusion. It is the product of a diseased mind, as distinguished from errors of judgment or imagined conditions in a healthy mind which are brought about by processes of reasoning. It is not generated by reason or reflection, and it cannot be dispelled by them. The person afflicted has no control over it, and the images of his mind are to him facts from which he cannot escape. The effect of that portion of the instruction was to tell the jury that defendant was not insane unless his acts were justified.

Counsel for defendant complains bitterly of the latter paragraph of the instruction, and it is this paragraph which clearly presents the vital question in the case. By it the jury are instructed that, though the defendant was acting under the insane delusion that his wife was afflicted with tuberculosis and, impelled by that delusion, thought that it was best that she should be killed, such a delusion would not constitute a defense, for the reason that, had the imagined facts, springing from the delusion, been real, they would not have been a justification for taking life.

It is to be noted that the instruction does not refer to partial insanity. It is not expressly limited to insane delusions of persons who are otherwise, except for such delusion, found to be sane, but covers all insane delusions generally. It, furthermore, does not require, should it be found that the defendant was afflicted with an insane delusion but was, as to other matters, sane, that the jury inquire into or determine the question of fact as to whether

or not such delusion so corrupted defendant's mental processes that he had become incapacitated from distinguishing right from wrong, with respect to the act which he committed. It is true that in some cases the rule of partial insanity has been arbitrarily stated to be that, where a person is otherwise sane, except for an insane delusion, he cannot rely, for a defense, upon the delusion unless the facts which he falsely imagines to be true were of such a nature that, if they had been true, they would have legally justified his act. 16 C. J. 101, sec. 76. In some of those cases it seems to be assumed, as a matter of law, that, where a person has an insane delusion but is sane on other matters not connected with his delusion, he is able to reason, the same as if sane, with respect to the subject-matter of his delusion, except that he is allowed to assume that his false imaginings are true. Whether or not a person, having an insane delusion, who is impelled to act by reason of that delusion, is able to distinguish the difference between right and wrong, with respect to his act, it seems to us, must be determined as a question of fact in each particular case, and, therefore, that the jury must in all cases, where the defense of insanity, either partial or total, is presented, be required to determine whether or not the accused, at the time he committed the act, understood its nature and comprehended that it was wrong. The rule announced in some jurisdictions, that a person who is partially insane is presumed, as a matter of law, to be able to reason with regard to the imagined facts, the same as a sane person, has developed from a declaration of law in *McNaghten's Case,* 10 Clark & Fin. (Eng.) *200. McNaghten, charged with homicide, had been acquitted on the ground of insanity. The defense of insanity was new, and a debate arose in the House of Lords as to the question of the nature and extent of the unsoundness of mind which would be sufficient to excuse a crime. Five questions were propounded to the justices, calling for answers in the nature of abstract propositions of law. Preliminary to answering the questions, Mr. Justice Maule

remarked (p. *204):

"I feel great difficulty in answering the questions put by your Lordships on this occasion: First, because they do not appear to arise out of, and are not put with reference to, a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts, not inconsistent with those assumed in the questions; this difficulty is the greater, from the practical experience both of the bar and the court being confined to questions arising out of the facts of particular cases; secondly, because I have heard no argument at your Lordships' bar or elsewhere on the subject of these questions; the want of which I feel the more, the greater are the number and extent of questions which might be raised in argument; and, thirdly, from a fear, of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice, when they are cited in criminal trials."

One of the questions, in substance, inquired as to the defense of partial insanity to a charge of crime when, at the time of the commission of the crime, the accused knew that he was doing wrong, but did the act with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury or of producing some supposed public benefit. The answer was that, where there was only partial insanity, the accused, laboring under the partial delusion, must be considered in the same situation, as to responsibility, as if the facts, in respect to which the delusion existed, were real. But the premise for that answer was that the accused, in committing the act, though he had been driven to it by his delusion, comprehended at the time that he was doing wrong, Mr. Justice Maule stating (p. *205):

"There is no law, that I am aware of, that makes persons in the state described in the question not responsible

for their criminal acts. To render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong."

And Lord Chief Justice Tindal, in his answer, stated (p. *209) that, "notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law."

In that case the justices manifestly had in mind, and so expressed themselves, that, where a person was laboring under an insane delusion, he should be treated as if the matter of the delusion existed in fact, but that, if he still was not wholly insane but was able to comprehend and distinguish the difference between right and wrong, with respect to the act committed, then the fact of delusion would not be a defense unless the imagined facts were sufficient to justify him as a sane man.

In some of the decisions, and, we believe, with a proper interpretation of the rule in *McNaghten's Case,* the courts have stated that the rule as to insane delusions is simply a different manner of stating the rule generally with regard to the defense of insanity (*Cunningham v. State,* 56 Miss. 269), and that in all cases the element cannot be eliminated which requires the jury to pass upon the question whether the accused understood the nature of the act and was able to distinguish between right and wrong with respect to it. Whether or not a person suffering from insane delusions is yet, by reason of his sanity on other subjects, able to distinguish between right and wrong, with regard to the subject-matter as to which he is insane, is a question of fact, to be passed upon by the jury. An instruction, therefore, in a case presenting the defense of partial insanity, which states that a person having an in-

sane delusion cannot justify his act unless the facts imagined, if true, would have justified a sane man, and leaving out the question as to whether or not the delusion so perverted and affected the accused's mind as to incapacitate him from determining whether or not his act is right or wrong, does not sufficiently present the issue to the jury. *Ryan v. People,* 60 Colo. 425; *Oldham v. People,* 61 Colo. 413; *Parsons v. State,* 81 Ala. 577; *State v. Jones,* 50 N. H. 369; *State v. Keerl,* 29 Mont. 508; *Hotema v. United States,* 186 U. S. 413. See note, L. R. A. 1917F, 646.

In criticism of the rule that, as a matter of law, an insane delusion in a case of partial insanity is not a defense unless the imaginary facts are such as, if real, would justify or excuse the act, the court in *State v. Jones, supra,* said (p. 387):

"The doctrine thus promulgated as law has found its way into the text-books, and has doubtless been largely received as the enunciation of a sound legal principle * * * yet it is probable that no ingenuous student of the law ever read it for the first time without being shocked by its exquisite inhumanity. It practically holds a man confessed to be insane, accountable for the exercise of the same reason, judgment, and controlling mental power, that is required of a man in perfect mental health. It is, in effect, saying to the jury, the prisoner was mad when he committed the act, but he did not use sufficient reason in his madness. He killed a man because, under an insane delusion, he falsely believed the man had done him a great wrong, which was giving rein to a motive of revenge, and the act is murder. If he had killed a man only because, under an insane delusion, he falsely believed the man would kill him if he did not do so, that would have been giving rein to an instinct of self-preservation, and would not be a crime. It is true, in words, the judges attempt to guard against a consequence so shocking, as that a man may be punished for an act which is purely the offspring and product of insanity, by introducing the qualifying phrase, 'and is not in other respects insane.' That is, if insanity pro-

duces the false belief, which is the prime cause of the act, but goes no further, then the accused is to be judged according to the character of motives which are presumed to spring up out of that part of the mind which has not been reached or affected by the delusion or disease. This is very refined. It *may be* that mental disease sometimes takes a shape to meet the provisions of this ingenious formula; or, if no such case has ever yet existed, it is doubtless within the scope of omnipotent power hereafter to strike with disease some human mind in such peculiar manner that the conditions will be fulfilled; and when that is done, when it is certainly known that such a case has arisen, the rule may be applied without punishing a man for disease. That is, when we can certainly know that, although the false belief on which the prisoner acted was the product of mental disease, still, that the mind was in no other way impaired or affected, and that the *motive* to the act did certainly take its rise in some portion of the mind that was yet in perfect health, the rule may be applied without any apparent wrong. But it is a rule which can be safely applied in practice, that we are seeking; and to say that an act which grows wholly out of an insane belief that some great wrong has been inflicted, is at the same time produced by a spirit of revenge springing from some portion or corner of the mind that has not been reached by the disease, is laying down a pathological and psychological fact which no human intelligence can ever know to be true, and which if it were true, would not be *law*, but pure matter of fact. No such distinction ever can or ever will be drawn in practice; and the absurdity as well as inhumanity of the rule seems to me sufficiently apparent without further comment."

And the court in *Parsons v. State, supra,* said (p. 595) that, if that rule be correct, "it necessarily follows that the only possible instance of excusable homicide in cases of delusional insanity would be, where the delusion, if real, would have been such as to create, in the mind of a reasonable man, a just apprehension of imminent peril to life

or limb. The personal fear, or timid cowardice of the insane man, although created by disease acting through a prostrated nervous organization, would not excuse undue precipitation of action on his part. Nothing would justify assailing his supposed adversary except an overt act, or demonstration on the part of the latter, such as, if the imaginary facts were real, would, under like circumstances, have justified a man perfectly sane in shooting or killing. If he dare fail to reason, on the supposed facts embodied in the delusion, as perfectly as a sane man could do on a like state of realities, he receives no mercy at the hands of the law."

The instruction, complained of in this case, is, as we have said, not premised upon the fact of partial insanity. It does not assume that the jury must find that the accused was sane in every respect, except as to the delusion, and that in that event the delusion would not be a defense unless the imaginary facts, if true, would have justified the act; nor does it call upon the jury to determine whether or not the accused, if found to be laboring under the insane delusion that his wife was diseased, and that it was best that she should be killed, had sufficient mental capacity to distinguish between right and wrong, with respect to the act committed; but the instruction, on the other hand, inflexibly adheres to the rule that, as a matter of law, an insane delusion cannot be a defense to a criminal charge in any case, unless the imaginary facts, if true, would have justified a sane man to do the killing. It seems to us that the instruction was clearly erroneous and prejudicial. The evidence in the case very strongly points to the conclusion that the accused was insane, and he was entitled to have that defense fully protected.

The instruction in this case is based in part upon the rule as announced in the case of *Thurman v. State,* 32 Neb. 224. This court in *Taylor v. State,* 86 Neb. 795, 807, declared that it did not approve of the instruction given in the *Thurman* case, but did not discuss the reasons. The instruction given in the case of *Walker v. State,* 46 Neb.

25, also given in the case of *Taylor v. State, supra* (quoted 86 Neb. 814), on insane delusions, did submit to the jury the question of whether or not the defendant had "at the time a degree of reason sufficient to control his actions and judgment," and the ability "to distinguish between right and wrong with respect to the act charged." So far, then, as the rule, stated in the case of *Thurman v. State, supra,* is contrary to this opinion, it is overruled.

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

REVERSED.

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MARY LONG, ADMINISTRATRIX, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED APRIL 11, 1922. No. 21655.

1. **Negligence:** QUESTION FOR COURT. Where the facts are undisputed, the question of proximate or intervening cause is for the court.
2. **Death:** PROXIMATE CAUSE. The liability of a street railway company under sections 1428, 1429, Rev. St. 1913, commonly called "Lord Campbell's Act," for the death by suicide of a person made insane by a collision between an automobile in which he was riding and defendant's street car, exists only when the death is the result of an uncontrollable impulse or is accomplished in delirium or frenzy caused by the collision, without conscious volition to produce death. A voluntary act of suicide of an insane person, knowing the purpose and physical effect of his act, is such a new and independent agency as to break the line of causation between the collision and the death and prevent a recovery under said statute.
3. **Record** examined, and *held* that the trial court did not err in sustaining defendant's demurrer and dismissing the case.

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

*John O. Yeiser* and *John O. Yeiser, Jr.,* for appellant.

*John L. Webster, contra.*

Heard before LETTON, DEAN and DAY, JJ., CLEMENTS (E. J.) and WELCH, District Judges.

CLEMENTS, District Judge.

This is an action brought under the provisions of sections 1428, 1429, Rev. St. 1913, being the so-called "Lord Campbell's Act," to recover damages sustained by the widow and children of Russell James Long, whose death, it is alleged, was caused by the wrongful act of the defendant. After a jury was impaneled and the opening statements of counsel were made, defendant obtained leave to withdraw its answer and to interpose a demurrer *ore tenus* to the petition and the evidence as stated by counsel for plaintiff, which statement appears in the record. Said demurrer was sustained and the case dismissed. Plaintiff appeals.

This method of summarily disposing of a case upon the opening statement of counsel seems to be a common practice in the federal courts. It is not authorized by any express provision of the Nebraska statute and has not been passed upon by any decision of this court, so far as we are advised. However, counsel for plaintiff in his brief and oral argument said that his opening statement contained all the facts which plaintiff could prove; that he wanted his client to be bound thereby; and, as both parties consent to the determination of the cause by the method adopted by the trial court, we shall consider and determine the case as if evidence had been introduced tending to prove all statements made to the jury by plaintiff's counsel and the demurrer had been interposed thereto.

In his opening statement counsel first read plaintiff's petition, in which it is alleged that on or about August 6, 1918, a collision occurred between one of defendant's street cars and an automobile in which Russell James Long was riding, which was caused by the negligence of defendant; that Long was thrown out of said automobile and thereby injured in his spine, brain and back, and suffered a great

physical and nervous shock, impairing his mentality and rendering him insane, and, while insane from said injuries, said Long committed suicide on the 23d day of August, 1918, by purchasing a shotgun shell, saying he wanted to try it in his gun, and a few minutes later shot himself in the head; that said Long was 22 years' old and left surviving him a widow, 21 years' old, and two children, one three years' and the other seven months' old. Counsel for plaintiff in his opening statement to the jury stated that the evidence will show that Mr. Long was suffering from some mental affection before the collision in question; that he would have moody spells, reading and studying over letters an unreasonable length of time; that he did many little peculiar things; that he had a number of things which shocked him and caused worry; that sometime before the accident in question his brother-in-law had employed Long and sent him out on a farm and did not give him sufficient money to run the affair; that the brother-in-law had criticised him, and on the day of his death, or perhaps the day before, he had received a letter from said brother-in-law in which he called attention to the fact that he had sent Long $150 with which to get a mower, and that he would have the sheriff after him; that about that time Long went to a hardware store and asked for a shotgun shell, took it home, went into the house, and at that time he was found dead with the top of his head blown off; that Long's father was below normal in mentality and the son was about like his father; that after the injury he was lame and complained of a headache, which he had not complained of before; that he was nervous, and that in a little less than three weeks after the accident this suicide occurred, with no other cause contributing to it except said letter from his brother-in-law; that plaintiff expected to present expert doctors who would testify that it is their opinion that Long committed suicide by reason of the injury to the spinal cord and the shock to his system under the conditions shown by the evidence as stated above. By its demurrer defendant admitted the truth of all allega-

tions of fact in the petition well pleaded, and of all statements of competent evidence made by counsel for plaintiff in his opening statement, and in the consideration of the case the truth of same will be assumed by us.

In plaintiff's brief it is said: "There is but one question in this case, and that is: Was the negligence the proximate cause of the suicide?" The question to be determined may properly be stated in somewhat different language as follows: "Was the wrongful act of the defendant the proximate cause of the death of Mr. Long?" The trial court answered this question in the negative, and, as authority for so doing, relied on the decision of the supreme court of the United States in *Scheffer v. Railroad Co.*, 105 U. S. 249, and that of the supreme court of Massachusetts in *Daniels v. New York, N. H. & H. R. Co.*, 183 Mass. 393.

The *Scheffer* case was an action brought under the provisions of the statute of Virginia, which, like that of Nebraska, gives the right of recovery for damages sustained by death caused by the wrongful act of another, in which the executors of Charles Scheffer, deceased, sought to recover of the defendant, a railroad company, damages for his death, which they alleged resulted from negligence of the company while he was a passenger on its road. The declaration therein, after alleging the negligence of the company causing a collision between trains on December 7, 1874, then alleged that by said collision Scheffer was cut, bruised and seriously injured about his head, face, neck, back and spine, by reason of which he became sick and disordered in mind and body, had insane delusions which prostrated all of his reasoning powers and induced him to, and he did, on August 8, 1875, commit suicide; and that his death was caused by the negligence of defendant as aforesaid. A demurrer to the declaration was sustained by the trial court, and, to reverse the judgment of dismissal rendered thereon, the case was taken to the United States supreme court on error, where said judgment was affirmed. In the opinion which was delivered by Mr. Justice Miller, the case of *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S.

469, is cited and quoted from. In that case the court commented upon the difficulty of ascertaining, in each case, the line between the proximate and remote causes of a wrong for which a recovery is sought, and said: "It is admitted, that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." In the opinion the court said: "The proximate cause of the death of Scheffer was his own act of self-destruction;" that "the suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train. His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him, and his death."

The *Scheffer* case was cited and followed by the supreme court of Massachusetts in *Daniels v. New York, N. H. & H. R. Co.*, 183 Mass, 393. In that case, which was brought under the statute of Massachusetts giving a right of action for death by wrongful act, a party was injured in a collision between a wagon, in which he was riding, and defendant's locomotive at a grade crossing. He received a blow on the head at the time of the accident, which occurred on August 12, 1899, which caused insomnia, headache, melancholia, and mental aberration. On October 3 following the accident he was left alone in his bed in a room, the door of which, opening into the dining-room, was left open. After a time this door was found closed and locked from the bed-room side. An entrance to the bedroom was made through a window, and he was discovered

lying on his bed with a napkin twisted tightly around his neck and held in his hands so as to produce strangulation, from which he died. Experts testified that he was probably insane when he took his life. In the opinion it is said:

"The question is whether his life was lost by the collision within the meaning of the statute. The jury were well warranted in finding that his mental condition was caused by the collision. If his mental condition had remained normal, probably he would not have died in this way. We are thus brought to the consideration of the question which is often very difficult to decide, whether an essential condition precedent, is the active, efficient, proximate cause of a subsequent event, or is only a producer of conditions which open the door to another cause which directly and actively produces the result. Was death in this case a remote consequence of the collision, or was it an effect actively produced by it?"

In the second paragraph of the syllabus the governing rule is stated as follows: "The liability of a railroad company under Pub. St. c. 112, sec. 213, for the death by suicide of a person made insane by a collision at a railroad crossing exists only when the death is the result of an uncontrollable impulse or is accomplished in delirium or frenzy caused by the collision, without conscious volition to produce death. A voluntary act of suicide of the insane person, knowing the purpose and physical effect of his act, is such a new and independent agency as to break the line of causation between the collision and the death and prevent a recovery under the act." The conclusion of said opinion is as follows: "The burden of proof was on the plaintiff to show that the death was caused by the collision. All the evidence tended to show that the deceased, with deliberate purpose, planned to take his own life, that he closed the door and locked it with a view to exclude others and prevent interruption, and that he then took the napkin and used it effectively to strangle himself. All this points to an understanding of the physical nature and effect of his act, and to a wilful and intelligent purpose

to accomplish it. That he was insane, so as to be free from moral responsibility, is not enough to make the defendant liable. We are unable to discover any evidence that he was acting without volition, under an uncontrollable impulse, or that he did not understand the physical nature of his act. In the absence of any affirmative evidence for the plaintiff on this point, the jury should have been instructed to render a verdict for the defendant."

*Brown v. American Steel & Wire Co.*, 43 Ind. App. 560, 88 N. E. 80, was an action brought under the Indiana statute giving a right of action for death by wrongful act. In that case William Cruse was severely injured in his head, arm, back, and hip by being caught in the cog-gear of defendant's nail machine, which was, through the negligence of defendant, left uncovered, from which injuries he became and was, at the time of his death, which occurred nine months later, of unsound mind; that while in that condition he went into a corn field and committed suicide by cutting his throat with his pocket knife. In the opinion the court cited and quoted from the *Scheffer* and *Daniels* cases, *supra*, and then said: "From the cases bearing upon the subject now being considered the rule seems to be that an action under the statute may be maintained when the death is self-inflicted, only where it is the result of an uncontrollable influence, or is accomplished in delirium or frenzy, caused by the defendant's negligent act or omission, and without conscious volition of a purpose to take life: for then the act would be that of an irresponsible agent. * * * While the rule is general that an intervening responsible agent cuts off the line of causation from the original negligence, yet we are not unmindful of 'the qualification, that, if the intervening act is such as might reasonably have been foreseen or anticipated as the natural and probable result of the original negligence, the original negligence will, notwithstanding such intervening act, be regarded as the proximate cause of the injury.' *Nickey v. Steuder*, 164 Ind. 189. The burden was on appellant to prove that decedent's death was caused by the neglect of

appellee to guard the cogwheels. It is not enough to show negligence and the injury, but, in addition, the appellant must also show that appellee's negligence proximately caused Cruse's death. The decedent's right to damage, had he lived, was a common-law right, limited to the damage sustained, attributable to the negligence of the appellee. Appellant's right to recover, being statutory, depends upon whether her decedent could have maintained an action, had he lived, against appellee for a self-inflicted injury, as the active, operative, continuing, and the probable and natural sequence of the original injury." In the ninth paragraph of the syllabus in 88 N. E. 80, the following rule is announced: "Where the facts are undisputed, the question of proximate or intervening cause is for the court." It is also stated in the thirteenth paragraph of the syllabus in 88 N. E. 80: "In an action for the death of a servant, in which it was alleged that decedent received certain injuries on account of defendant's negligence; that these injuries produced insanity which produced death by suicide: evidence *held* to show that decedent's mind was capable of conceiving a purpose of taking life, as well as a knowledge of the means which would carry his purpose into effect, justifying a direction of a verdict for defendant."

The foregoing decisions are in all material respects parallel to the one at bar and fully sustain the action of the trial court in this case, and, if the rules laid down therein are followed by this court, it must result in the affirmance of the judgment herein. Counsel for plaintiff recognizes this, and, to avoid this result, strenuously insists that the holding of the supreme court of the United States in the *Scheffer* case is wrong and should not be followed. In his reply brief counsel says: "The supreme court of the United States, great as it is, is not authority on state cases and local laws. It is, of course, a pleasure to follow them when they are right; but when the reasoning, due to a misunderstanding of the science of the human body and mind, is erroneous, then state courts will point out the truth under newer science, and that great court

will later recognize its truth."

To sustain his contention that, under the allegations of the petition and the facts stated to the jury, which are admitted by the demurrer, the negligence of defendant was the proximate cause of the death of Long, counsel has cited numerous cases wherein it is held that one whose negligence causes injury to another, which injury produces or aggravates disease, is liable for damages to the injured party, or to his administrator for his death, resulting from said disease. The correctness of this rule seems to be recognized by practically all courts both state and federal. But these cases are clearly distinguishable from the *Scheffer* and kindred cases by the fact that in none of them did any voluntary act of the injured party, causing his death, intervene between the negligence and his demise, which act, such cases hold, is such a new and independent agency as to break the line of causation between the accident and the death. Among such cases cited in plaintiff's brief are several from the supreme courts of Massachusetts and Indiana. This indicates that said courts perceive no conflict between the rule laid down in those cases and the one announced in *Daniels v. New York, N. H. & H. R. Co.*, 183 Mass. 393, and *Brown v. American Steel & Wire Co.*, 43 Ind. App. 560, as both of said rules have been adopted by them.

Counsel has cited several cases, each of which was brought upon a saloon-keeper's bond by the widow of a man who committed suicide while under the influence of liquor sold him by the saloon-keeper, in which it is held that plaintiff was entitled to recover the damages sustained by herself and children in consequence of said death. These actions were brought under statutes which require a licensed dealer in intoxicating liquors to give a bond conditioned to pay all damages to any person who may be injured by reason of the selling or giving away any intoxicating liquor by the person licensed. Two of the cases so cited are from South Dakota. The liquor law of that state contains the following provision: "On the trial of any suit

under the provisions of this article, the cause and foundation whereof shall be the acts done or injuries inflicted by a person under the influence of liquor, it shall only be necessary to sustain the action, to prove that the defendant, or defendants, sold or gave away the liquors to the person so intoxicated or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed, or said injuries were received." *Palmer v. Schurz*, 22 S. Dak. 283. The distinction between actions brought under such liquor statutes and those brought under statutes similar to Lord Campbell's Act is too plain and obvious to require discussion.

The extensive research which it is evident counsel for plaintiff made in the preparation of his briefs did not enable him to cite a single case, brought under the statute of any state which gives a right of action for death by wrongful act, where plaintiff was permitted to recover damages resulting from the death of a party who committed suicide; nor has he cited any case wherein any court of last resort has disapproved or criticised the rule laid down by the United States supreme court in the *Scheffer* case, *supra*, and we have been unable to discover any such cases. On the contrary, said rule has been approved and adopted by the courts of several states. Therefore, notwithstanding the able and ingenious argument of plaintiff's counsel, we are constrained to hold that said rule is the correct one, and that it should be applied in the case at bar.

It appears, from the petition and the opening statement of plaintiff's counsel, that Mr. Long, with deliberate purpose, planned to take his own life; that he went to a hardware store, procured a shell to fit a shotgun which he had; that he carried said shell to his home, put it in the gun, and therewith shot and killed himself. All this points to his understanding of the physical nature and effect of his act, and to an intelligent and wilful purpose to accomplish it. There is nothing to show that he was acting without volition, under an uncontrollable impulse, or that he did not understand the physical nature of his act. This brings

the instant case squarely within the rule announced in the *Scheffer* and kindred cases, *supra*. It therefore follows that the trial court did not err in sustaining defendant's demurrer and dismissing the case; and that the judgment of the district court is right, and should be, and hereby is

AFFIRMED.

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GEORGE CASEY, APPELLEE, V. FORD MOTOR COMPANY, APPELLANT.

FILED APRIL 11, 1922. No. 22039.

1. **Negligence:** BUILDINGS: SAFE CONSTRUCTION. One who erects a building in which to conduct a certain business, and which he uses for that purpose, is bound to construct and maintain same in a reasonably safe condition for the purpose for which it is used; and a failure to do so may render the owner liable for damages for an injury resulting from such failure to a person who goes upon said premises by the express or implied invitation of said owner.
2. ———: QUESTION FOR JURY. Where different minds may reasonably draw diverse conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury.
3. **Evidence** examined, and *held* sufficient to justify the submission to the jury of the questions of negligence of defendant and of the contributory negligence of plaintiff.

APPEAL from the district court for Douglas county: L. B. DAY, JUDGE. *Affirmed.*

*Gurley, Fitch, West & Hickman*, for appellant.

*Crofoot, Vinsonhaler, Fraser, Connolly & Stryker* and *George A. Keyser, contra.*

Heard before LETTON, DEAN and DAY, JJ., CLEMENTS (E. J.) and WELCH, District Judges.

CLEMENTS, District Judge.

This is an action to recover damages for personal injuries which plaintiff sustained by being caught between

the lintel of a doorway in the building of the defendant, Ford Motor Company, and a load of lumber on which he was riding. It is alleged that said accident was caused by the negligence of the defendant. The defendant denies that it was guilty of negligence, and alleges that plaintiff's own negligence was the cause of the accident. The case was tried to a jury, which returned a verdict for plaintiff for $3,000, and a judgment was entered on said verdict. The defendant appeals.

There is little or no conflict in the evidence. The facts disclosed by the record, which are necessary to an understanding of the case, briefly stated, are as follows: During the year 1916 the defendant caused to be constructed a large building at the corner of Sixteenth and Cuming streets in the city of Omaha, Nebraska, which, on the 24th day of July of that year, it occupied and operated as an automobile assembling plant and for the storage and distribution of automobile parts and repairs. In the distribution of said parts and repairs the defendant purchased and had hauled into said building quantities of lumber which it used in boxing and crating same for shipment. The entrance through which vehicles were required to pass when entering said building consisted of a doorway through the outer wall on the west side, 8 feet and 11 inches in height, a passageway or vestibule extending east therefrom 15 feet, which was nine feet wide and about 15 or 16 feet high, with a doorway at its east end 8 feet and 5 inches high opening from the vestibule into the building. On July 24, 1916, defendant ordered of the C. N. Dietz Lumber Company 2,500 feet of lumber for boxing and crating, and directed that it be delivered at said building. Plaintiff, who was at that time employed by said lumber company, was sent by it with a team of horses and wagon to deliver said lumber to defendant. When he arrived with said load of lumber at the west entrance of defendant's building, he stopped his team, but was directed by some one in the building to drive in, which he proceeded to do. While doing so he was sitting on the top of the

load with his legs hanging over its front end. The distance between the upper side of the load and the top of the outer doorway was not sufficient to permit plaintiff to pass while sitting in an upright position, so he bent his body forward, and in such stooping posture passed through said doorway without difficulty. He then assumed an upright position, but again stooped forward when the inner doorway was reached. The top of said doorway being six inches lower than the outer one, the space between it and the top of the load was insufficient to permit the passage of plaintiff's body, even in a stooping position, and he was severely crushed, bruised and injured.

There is no complaint as to the damages allowed being excessive, if plaintiff were entitled to recover, which defendant insists he is not. When all the evidence was in and both parties had rested, defendant moved the court to direct the jury to return a verdict for defendant, and tendered such a written instruction, with the request that it be given. Such motion was overruled and request refused. The only assignments of error in appellant's brief on which it relies for a reversal of the judgment of the lower court are based on the ruling of the court on such motion and request. These assignments both raise the same question, viz.: Is the evidence sufficient to sustain the verdict of the jury?

Defendant contends (1) that there is no evidence in the record tending to prove negligence on the part of defendant; and (2) that the evidence shows conclusively that plaintiff's negligence was the sole cause of the accident and injuries complained of. If either of said contentions is correct, then a verdict should have been directed for the defendant, and the judgment of the lower court will have to be reversed. In the consideration and determination of these questions the following well-settled rules may properly be applied, to wit: "Where different minds may reasonably draw diverse conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the

jury." *Perrine v. Union Stock Yards Co.*, 81 Neb. 790. Also *Leon v. Chicago, B. & Q. R. Co.*, 102 Neb. 537. One who erects a building in which to conduct a certain business, and which is used for that purpose, is bound to construct and maintain the same in a reasonably safe condition for the purposes for which it is used; and a failure to do so may render the owner liable for damages for an injury resulting from such failure to a person who goes upon said premises by the express or implied invitation of said owner. *Larson v. Red River Transportation Co.*, 111 Minn. 427; *Tucker v. Draper*, 62 Neb. 66.

The evidence shows that one of the purposes for which the doorways and passageway in defendant's building were intended and used was the admission into said building of vehicles loaded with lumber which was necessary for the conduct of defendant's business; that when plaintiff entered said building at the time of the accident he did so as the invitee of the defendant. Whether said invitation was express or implied is not material, for defendant's duty and obligation to the plaintiff would be the same in either case. The first question to determine then is: From the facts disclosed by the record, may different minds reasonably draw different conclusions as to whether said entrance to defendant's building was constructed and maintained in a reasonably safe condition for the purposes to which it was put by the plaintiff?

The evidence shows that the inner doorway to said passageway was six inches lower than the outer one. The architect, Steinbough, testified that, in designing and constructing such buildings containing a vestibule or passageway at the entrance, it was the usual custom and practice to make the doorway at the inner end of the vestibule the same height as the one at the outer end. If this usual custom and practice had been followed in the construction of defendant's building, it is reasonably certain that plaintiff would not have been injured. The evidence shows that the load of lumber hauled by plaintiff was not an extraordinary or unusual one. He passed through the outer

doorway with it in safety, and would, without doubt, have passed through the inner one in like manner if it had been the same height. The evidence discloses no reason or excuse for departing from the usual and customary method of construction by making the inner doorway of the passageway in question six inches lower than the outer; and whether, under the facts and circumstances disclosed by the record, such departure and method of construction constituted negligence on the part of defendant was, we think, a question of fact for the jury.

The record discloses that a suit based on the same cause of action as that in the case at bar was first tried in the United States district court at Omaha, wherein a verdict and judgment were obtained by plaintiff; that same was taken to the United States circuit court of appeals, where said judgment was reversed and the case remanded for a new trial; that said action was thereupon dismissed by the plaintiff and the instant case was commenced in the state court. In the opinion (*Ford Motor Co. v. Casey,* 252 Fed. 120), written by Judge Carland, it is said that "it was the duty of the Ford Motor Company, in constructing the building, to use ordinary care to see that the passageway which was intended for teams and wagons was reasonably safe for the purpose for which it was intended to be used;" that there was no evidence on the part of anyone "tending to show that the passageway was not constructed in accordance with the best knowledge obtainable;" that the evidence showed that Casey had driven into the building through the entrance complained of with a load of lumber several days before, and that because of his knowledge of the passageway thus obtained he was guilty of contributory negligence in attempting to force his way through the second doorway. Defendant insists that said decision should be followed by this court and that it is decisive of the case. The fact that said court did not dismiss said case, but ordered a new trial therein, indicates that it did not consider its opinion therein decisive, but contemplated the possibility of the introduction of other evidence in re-

gard to the improper construction of the passageway and as to plaintiff's want of knowledge thereof. Such evidence, which Judge Carland said was absent from the record passed upon by him, was introduced in the case at bar. This difference in the evidence effectually removes even the persuasive value which said decision would otherwise have.

The evidence shows that plaintiff had entered defendant's building on July 5 and again on July 15 preceding the day of the accident, and defendant contends that he must then have observed and obtained knowledge of the construction of the passageway and the height of the inner door thereof. But plaintiff testified that the load of lumber which he hauled on each of said former days was small, not more than a foot or 18 inches above the bolster of the wagon; that, as he sat on the top of this small load, his head was not high enough to cause him to notice the height of the doorway; that the building was not entirely completed, and he does not know when the beam or lintel was placed above said inner doorway; that he did not notice it on his earlier visits, and did not know that it was there until the day of the accident, when he had assumed an upright position after having passed through the outer doorway, and not until he was too close to it to stop his team. These doorways were 15 feet apart. Their tops were more than 8 feet from the floor and 6 or 7 feet from the ceiling of the room. The difference in their height was only 6 inches, and it is doubtful whether the plaintiff or any other ordinary person would have been able to recognize this difference in height without measuring both. There is no evidence as to when the beam or lintel was placed over the inner doorway. It would therefore seem that the questions of whether it was there when plaintiff formerly entered the building, and, if so, whether he saw or by the exercise of reasonable care should have seen same; whether, under the circumstances, he did recognize or should have recognized the fact that the inner door was lower than the outer one; whether he did have knowledge of any of the

facts a sufficient length of time before the accident to save himself from injury; and whether, under all of the facts and circumstances disclosed by the record, plaintiff acted as an ordinarily prudent man would have done under like circumstances, are all questions of fact for the jury, and not for the court, to determine.

We have not overlooked the decisions from the courts of other states cited by counsel for defendant in support of their contention that plaintiff was guilty of such contributory negligence as to preclude a recovery herein, but think that those cases are clearly distinguishable from this one. In each of said cases there was only a single obstacle under which the party injured attempted to pass, and this was not only plainly visible, but the evidence showed that said party actually saw same, when approaching it, in time to stop and save himself from injury. In none of said cases was there any question of a second doorway lower than the first, the existence of which, plaintiff testified, was unknown to him until just as he was injured, as there was in the instant case. If Casey had been injured while passing through the outer doorway of defendant's building, the decisions cited by counsel would have been quite in point; but, because of the marked difference between the facts in those cases and the one at bar, they have little or no value as authority herein.

Section 7892, Rev. St. 1913, provides that, in cases like this, "all questions of negligence and contributory negligence shall be for the jury." We entertain no doubt that different minds may reasonably draw different conclusions from the facts and circumstances disclosed by the record as to whether or not they establish negligence on the part of defendant or contributory negligence of the plaintiff, and that the trial court did not err in refusing to direct a verdict for the defendant.

The judgment of the district court should therefore be, and is hereby,

AFFIRMED.

# CHAUNCY ABBOTT, JR., ET AL., APPELLANTS, V. FRANCES R. WAGNER ET AL., APPELLEES.

FILED APRIL 11, 1922. No. 21869.

1. **Remainders**: VENUE: SUIT BY REMAINDERMAN. Where a testator's will gives a life estate in personal property to his widow, with added power in her to dispose of and use the corpus of the property to the extent she may desire for her personal use and enjoyment, with remainder over to designated persons, and the widow, who resides in another state, fraudulently, or by gift, transfers a substantial portion of the property to another, a suit in equity by the remaindermen, seeking to charge the transferee as constructive trustee of the property so transferred, may be maintained in any county in this state where such transferee may be served with summons, no matter where the property may be located. The life tenant is not a necessary party to such suit.
2. **Process**: CONSTRUCTIVE SERVICE: TRUST PROPERTY. Where the owner of a life estate in personal property under a will, who resides in another state, wrongfully transfers such property to another by gift in fraud of the rights of the remaindermen, such property being located in this state, jurisdiction over such life tenant cannot be acquired by constructive service in an action brought by the remaindermen in a county in this state other than the county where such property is located, even though jurisdiction is acquired over the donee by personal service of summons upon him in the county where the suit is instituted and the action there properly maintainable against such donee.
3. ——— ———. Section 7627, Rev. St. 1913, which provides that, "when the action is rightly brought in any county, according to the provisions of this Code, a summons shall be issued to any other county, against any one or more of the defendants at the plaintiff's request," does not authorize service of summons upon a defendant in a foreign state in a case of this nature.
4. **Trusts**: JURISDICTION. A district court of this state has jurisdiction of a suit in equity for relief based upon a breach of a constructive trust, even though the granting of the relief prayed for involves the interpretation of a will which has been admitted to probate in a foreign state.
5. **Limitation of Actions**: TRUSTS. "The statute of limitations begins to run in favor of a trustee *ex maleficio* of a constructive trust from the time of the discovery of the wrong or fraud, for

the prevention of which the trust is imposed." *Hanson v. Hanson*, 78 Neb. 584.

6. **Wills:** RESIDUARY CLAUSE: CONSTRUCTION. A testator, by his will, after making certain specific provisions, and giving to his widow an absolute bequest, disposed of the residue of his estate as follows: "Subject only to the foregoing provisions, I give and bequeath unto my said wife, all the rest and residue of my estate real, personal and mixed wheresoever the same may be located or found for and during the full term of her natural life, the same to be her own individual property to use, enjoy and dispose of as to her shall seem fit. At the time of her decease the principal of this bequest, or what shall remain thereof, shall be divided equally between my beloved mother, Anna D. Fuller, and my said half-brother or their heirs." *Held*, that the surviving widow took but a life estate in such residue, with power to dispose of and use the principal as far as may be necessary and reasonable for her support, comfort and enjoyment.

7. ———: ———: ———. The widow of the testator to whom his residuary estate was left for life, with power "to use, enjoy and dispose of as to her shall seem fit," while entitled to the full and reasonable enjoyment of the estate consistent with her former manner of living and her circumstances in life, and considering the value of the estate, must not consume, deplete or encroach upon the corpus of the estate more than sufficient to attain the purpose of the testator, which evidently was to provide for her comfort for the remainder of her life and yet preserve to the remaindermen all of the estate not required by the widow for such purpose.

8. **Remainders:** RIGHT TO SUE. Persons who have an interest in personal property in the nature of a remainder may maintain a suit to protect and preserve their interests against the life tenant, or against one to whom the property has been transferred by gift, or who has received it under circumstances amounting to a fraud upon the rights of the remaindermen, where the transferee is not a *bona fide* purchaser, and in such suit a court of equity has power to make such orders and to require such security as may be necessary to protect and safeguard the interests of the remaindermen.

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

*Stout, Rose, Wells & Martin*, for appellants.

*William Baird & Sons, contra.*

Heard before MORRISSEY, C. J., FLANSBURG and ALDRICH, JJ., HOSTETLER and MORNING, District Judges.

MORNING, District Judge.

Nathan W. Wells died on the 12th day of August, 1909, leaving a last will which was duly admitted to probate in the surrogate court of Ulster county, New York, that being the place of his domicile. Omitting the attestation clause and the signature, the will is as follows:

"Know all men by these presents: That I, the undersigned Nathan W. Wells of Schuyler, Nebraska, being of sound and disposing mind and memory, do make, publish and declare this to be my last will and testament, that is to say:

"Item First. It is my will and I direct that all of my just debts including those of my last sickness and suitable funeral charge be first paid.

"Item Second. I give and bequeath unto my dearly beloved wife, Frances R. Wells, all and singular my life insurance policies, placed upon my life (and the entire proceeds therefrom coming to my estate) now aggregating thirty-five thousand dollars or thereabouts, the same to be her own property absolutely.

"Item Third. I give bequeath and release unto my half-brother, Chauncy Abbott, whatever he may be indebted to me at the time of my decease hereby fully acquitting him from all obligation as a debtor to my estate on account of all such indebtedness.

"Item Fourth. Subject only to the foregoing provisions, I give and bequeath unto my said wife, all the rest and residue of my estate real, personal and mixed, wheresoever the same may be located or found, for and during the full term of her natural life, the same to be her own individual property to use, enjoy and dispose of as to her shall seem fit. At the time of her decease the principal of this bequest, or what shall remain thereof, shall be divided equally between my beloved mother, Anna D. Fuller, and my said half-brother or their heirs.

"Item Fifth. I hereby nominate my said wife to be the executrix of this my last will and testament without being required to give bond as such executrix and I hereby revoke all former wills by me made and declare this instrument to be my last will and testament."

Frances R. Wells, surviving widow of the testator, named in said will as executrix, was appointed and duly qualified and continued to act as such executrix until the estate was finally closed. Settlement and distribution of the estate and discharge of the executrix was had January 9, 1911. While the estate was pending the widow married the defendant Ernest O. Wagner, and she is designated in this proceeding as Frances R. Wagner. Since the final decree was entered in said estate, and on April 2, 1916, the mother of testator, who was one of the remaindermen named in the fourth paragraph of said will, died leaving as her only heir Chauncy Abbott, half-brother of testator, who was the other remainderman named in said paragraph. On July 27, 1918, said Chauncy Abbott died leaving as his only heirs the plaintiffs in this case. On December 2, 1919, plaintiffs commenced this action in the district court for Douglas county, as the only heirs of Chauncy Abbott, deceased, against Frances R. Wagner, Ernest O. Wagner, her present husband, Wells-Abbott-Nieman Company, a corporation, having its principal place of business at Schuyler, Nebraska, and the York Milling Company, a corporation, having its principal place of business at York, Nebraska. Summons was personally served upon the defendant Ernest O. Wagner in Douglas county and on the two corporation defendants in Colfax and York counties, respectively. Frances R. Wagner, being a non-resident of, and not being found in, this state, the affidavit required by statute for constructive service was duly filed and summons was thereafter served upon her at her home in Connecticut.

The petition alleges the death of the testator, sets out his will in full, alleges that it was duly probated in the surrogate court of Ulster county, New York, the domicile

of the testator, and that defendant, Frances R. Wagner, formerly Frances R. Wells, surviving widow of testator, was appointed and qualified as executrix; that the estate was closed and the executrix discharged on January 9, 1911; that Anna D. Fuller, mother of the testator, died April 2, 1916, leaving Chauncy Abbott, the half-brother of testator, as her sole heir, and that said half-brother died July 27, 1918, leaving plaintiffs as his only heirs; that at the time of making her final report there remained in the hands of said executrix, after making all proper deductions, personal property of the value of $152,067.19, including 936 shares of the capital stock of the defendant Wells-Abbott-Nieman Company and 200 shares of the capital stock of the defendant the York Milling Company, all of which personal property was, by said surrogate court, distributed to and received by said defendant Frances R. Wagner, as residuary legatee under said will, and that she claimed and still claims all of said property in her own right, with full power to use, enjoy and dispose of it as she may deem fit, without regard to the rights of the plaintiffs, except in so much of the property as may remain undisposed of at her death. It is further alleged that said Frances R. Wagner and her present husband, the defendant Ernest O. Wagner, are hostile and antogonistic toward the plaintiffs, and have conspired and are conspiring to so manage the property of said estate as to wrongfully and fraudulently deprive the plaintiffs of their interest therein; that pursuant to said wrongful and fraudulent scheme, and in violation of her fiduciary relation toward plaintiffs, said Frances R. Wagner is wrongfully and fraudulently asserting her alleged right to use and dispose of said property so received under said will, and, in contravention of the rights of plaintiffs in said property, has already transferred by sale, as well as gift, large and valuable portions of said property, and has given the said shares of stock in said corporations to her husband, the defendant Ernest O. Wagner, without consideration, with the fraudulent intent to deprive plaintiffs of their interest

in said property; that said Ernest O. Wagner is now wrongfully asserting full right, title and interest in said shares; that said Frances R. Wagner is threatening to wrongfully and unjustly dispose of still other large and valuable portions of said property to the like detriment of plaintiffs; that the said Frances R. Wagner, instigated and encouraged by her husband, Ernest O. Wagner, has undertaken to so manage, cover up and disguise her dealings with the said property that the plaintiffs will be deprived of that interest in said property to which, under said will, they are entitled, and that she will continue this line of conduct, in violation of the rights of plaintiffs in said property, and of her duty toward plaintiffs under said will with relation thereto, unless restrained by this court; that said Frances R. Wagner has full knowledge of her dealings with reference to said property, but plaintiffs have no means of knowing in detail, though, from such information as they have, they believe these dealings to have been wrongful and fraudulent and designed to deprive plaintiffs of that property which it was the intention of said testator to give them by his will; that plaintiffs did not discover the fraud attempted by defendants Frances R. Wagner and Ernest O. Wagner, as complained of, until within two years prior to the filing of the petition; that the threatened injury is irreparable and that there is no adequate remedy at law. The prayer, in substance, is that the alleged gifts of said shares of corporation stock be canceled, and that the corporation defendants and their officers be restrained from recognizing, or in any way giving effect to, the said gifts; that said Ernest O. Wagner be restrained from in any way meddling with, or attempting to assert any control over, the property of which his wife, the said Frances R. Wagner, is custodian or trustee under said will; that said Ernest O. Wagner be declared and held by the court to be constructive trustee for the benefit of plaintiffs, under said will, of any and all property of said estate of which he has become possessed in violation of said will; that said will be construed and the rights of plain-

tiffs defined thereunder; that said Frances R. Wagner be declared a trustee of the property of said testator for the benefit of plaintiffs as set out in said will; that she be required to account to the court for her dealings with reference to said property, and that she be required to bring into court all books, papers, records, and other data which may enable the court to determine what her dealings have been, and that she be required to give good and sufficient security for the proper discharge of her duties under said will for the benefit of plaintiffs, and that, in the event of her failure to do so, the court require her to execute a proper conveyance of all said property, other than such as the court shall find she was entitled to use for her own benefit, and that the conveyance be made under order of court to such person as the court may approve as a suitable trustee to hold the property in question and administer it in accordance with the wishes of said testator as disclosed by his will, and that defendants Frances R. Wagner and Ernest O. Wagner be required to reimburse plaintiffs their costs and expenses incurred in this proceeding, and for general equitable relief.

The defendant Frances R. Wagner entered a special appearance in the case as follows:

"Comes now Frances R. Wagner, named as defendant above, and appears specially and for the sole purpose of objecting to the jurisdiction of the court over this defendant, for the reason that this is not an action *in rem* and not an action in which constructive service is authorized under the laws of Nebraska, and that the only service attempted upon this defendant is constructive service in the state of Connecticut, and that no legal service of process has been had upon this defendant."

Each of the other defendants filed separate demurrers to the petition, all identical in form, the several grounds of demurrer, which may be stated in abbreviated form, were: That the court had no jurisdiction either of the persons of the defendants or the subject-matter of the action; that it appeared from the face of the petition that

the subject of the action is solely within the jurisdiction of the surrogate court of the state of New York, and not within the jurisdiction of this court; that it appears from the petition that this court has no jurisdiction to determine and adjudicate the claimed rights of the said plaintiffs; that it appears from the petition that there is pending and undetermined a proceeding in the probate court of deceased's domicile at the time of his death, the surrogate court of Ulster county, New York, in the matter of the estate of Nathan W. Wells, deceased, commenced and pending prior to the commencement of this action, which court has sole and exclusive jurisdiction for determining and adjudicating the alleged rights of plaintiffs as set forth in the petition; that there is a defect of parties defendant; that it appears from the petition that more than four years have elapsed since the accrual of plaintiffs' alleged cause of action; that the averments of the petition, and the terms of the will, preclude plaintiffs' right of recovery; and that the petition does not state facts sufficient to constitute a cause of action.

The court below sustained the special appearance of defendant Frances R. Wagner and the several demurrers of the other defendants and dismissed the action. Plaintiffs appealed to this court.

The first question for our determination is that of jurisdiction. Broadly speaking, the action is one to impress a trust in favor of plaintiffs upon the residuary estate of Nathan W. Wells which is disposed of in the fourth paragraph of his will, and to enjoin the defendants from so dealing with said property as to injure, impair, or defeat the rights of plaintiffs as remaindermen therein. As to the nonresident defendant, Frances R. Wagner, the venue of this action is controlled by section 7619, Rev. St. 1913, which reads: "An action other than one of those mentioned in the first three sections of this chapter, against a nonresident of this state or a foreign corporation may be brought in any county in which there may be property of, or debts owing to said defendant, or where said defendant may be

found; but if such defendant be a foreign insurance company, the action may be brought in any county where the cause, or some part thereof, arose."

There is no allegation that defendant Frances R. Wagner has any property in Douglas county, nor that there are any debts owing to her in said county, nor is any part of the object of the suit to reach property of hers nor debts owing to her in said county. She was a nonresident and was not found and served in this state.

Appellants contend that, since the action was rightly brought in Douglas county as against defendant, Ernest O. Wagner, the court acquired jurisdiction of the defendant Frances R. Wagner by constructive service under section 7640, Rev. St. 1913. We cannot so interpret said statute. That section deals with service only, and not with venue. The authority for acquiring jurisdiction of defendants not served in the county, where suit is rightly brought as against some of the defendants, is derived from section 7627, Rev. St. 1913. That section provides:

"When the action is rightly brought in any county, according to the provisions of this Code, a summons shall be issued to *any other county*, against any one or more of the defendants at the plaintiff's request."

It will be seen that the above-quoted section of the statute has nothing to do with constructive service upon nonresidents. It only has to do with the issuance of summons to *other counties* for such defendants as are not in the county where the action is rightly brought. To acquire jurisdiction over a nonresident defendant by constructive service under said section 7640, the action must be one instituted because the defendant has property or debts owing to him in the county where the suit is brought, which is "sought to be taken by any of the provisional remedies, or to be appropriated in any way," or it must be a suit which "relates to, or the subject of which is real or personal property in this state," and that the nonresident defendant "has or claims a lien or interest, actual or contingent therein, or the relief demanded consists wholly or

partially in excluding him from any interest therein." This suit is not of the character contemplated by said section, and, if it were, it would not justify constructive service on defendant Frances R. Wagner in Connecticut, because there is no claim or pretense that she has any property or debts owing to her in Douglas county. By the allegations of the petition to the effect that the corporation stock referred to, which is the only portion of the estate alleged to be in this state, has been parted with by Frances R. Wagner, plaintiffs have precluded us from treating such stock as "personal property" in which said defendant "has or claims a lien or interest, actual or contingent," nor, in view of said allegations, can we treat this suit as one wherein "the relief demanded consists wholly or partially in excluding him from any interest therein." By giving said stock to her husband she has excluded herself from any further interest in it. Nor would the fact, if it were a fact, that she had property in this state give the court jurisdiction justifying constructive service, unless the property, or part of it, were situated in the county where the suit was commenced. Rev. St. 1913, sec. 7619. We think it clear that the court below acquired no jurisdiction over said defendant Frances R. Wagner by constructive service had upon her in the state of Connecticut, and that her special appearance was rightly sustained.

This action is transitory in character and is maintainable in Douglas county as against the defendant Ernest O. Wagner, since he was personally served with summons in that county. Rev. St. 1913, sec. 7620.

The action being rightly brought in Douglas county as against the defendant Ernest O. Wagner, jurisdiction was acquired over the two corporation defendants by service had upon them in the counties where they respectively maintain their principal places of business. Rev. St. 1913, sec. 7627; *Cobbey v. State Journal Co.*, 77 Neb. 619.

In the demurrers filed by the defendants, other than Frances R. Wagner, the jurisdiction of the court over the subject-matter is challenged, and this, in itself, constitutes

a general appearance by all of said defendants conferring jurisdiction over their persons. *Clark v. Bankers Accident Ins. Co.*, 96 Neb. 381. The petition contains no allegations as to where the certificates of corporation stock are located, but this is not material. In any event, the certificates are not stock but only evidence of stock ownership. The situs of corporation stock, in the absence of statutory provision to the contrary, is in the county and state where the corporation resides; that is, where it has its principal office or place of business. 2 Clark & Marshall, Private Corporations, 1152, 1157; *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1; *Hook v. Hoffman*, 16 Ariz. 540; *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 122; 5 Fletcher, Corporations, sec. 3434. If the residuary estate of the testator with which we are here concerned was impressed with a trust in favor of plaintiffs, or if, under testator's will, the life tenant owed any duty toward plaintiffs in relation thereto, and she has wrongfully transferred any part of it to her present husband, the defendant Ernest O. Wagner, under circumstances which in equity amount to a breach of trust by the life tenant, and a fraud upon the rights of plaintiffs, then plaintiffs have the right to proceed against the said Ernest O. Wagner in a court of equity, wherever he may be found and served with a summons, no matter where the property may be located, even though it may be in a state other than the one where the action is instituted. 27 R. C. L. 798; *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621; *State v. Superior Court*, 55 Wash. 328, 133 Am. St. Rep. 1030; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Roberts v. Roberts*, 124 Mich. 414; *State v. District Court of Blue Earth County*, 146 Minn. 422. In *Fall v. Fall*, 75 Neb. 104, 126, this doctrine was applied to lands lying in another state, and this court there quoted with approval the following language from the opinion of Chief Justice Marshall in *Massie v. Watts*, 6 Cranch (U. S.) 148:

"Upon the authority of these cases, and of others which are to be found in the books, as well as upon general prin-

ciples, this court is of opinion that, in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."

If the defendant Ernest O. Wagner has come into possession of any part of the estate of Nathan W. Wells referred to in the fourth paragraph of the will, under circumstances which are, in equity, sufficient to charge him as constructive trustee thereof for the benefit of plaintiffs, the court below had jurisdiction to make all suitable orders and decrees with reference thereto which might be found necessary to protect the rights and interests of plaintiffs therein, no matter where the property so wrongfully received by him may be located, and, if disposed of by him, to require him to suitably account therefor. In such matters equity acts upon the person of the defendant in bringing about desired results. Of course, the court has no power to require the said Ernest O. Wagner to account for any portion of said estate which he has not in some manner wrongfully, or in violation of said trust, received from said Frances R. Wagner. But as to that portion, if any, of said estate which he has received under circumstances such as complained of in the petition, he may be held, whether jurisdiction of the defendant Frances R. Wagner is acquired by the court or not, since she is not a necessary party to a suit involving property which she has fraudulently or wrongfully transferred to her said husband. If the allegations of the petition are true, she no longer has any interest in the property which has been transferred to her husband. She having voluntarily given it away, the court is not concerned with protecting her against the results of her own wrongful conduct. A court of equity is not charged with any duty to restore to her property with which she has wrongfully parted. She had the right to the use and income of the property for life, and this she could rightfully assign or transfer to another, and the court will be under the necessity of pro-

tecting the assignee in such use and income under such restrictions and safeguards as will, at the same time, protect the interests of the remaindermen; but the right to dispose of the corpus of the property was a limited right, as we shall hereafter show, and could be exercised only by her for her own legitimate and reasonable personal purposes, consistent with the objects for which the life estate was created, and supplemental thereto, and could not be assigned and transferred to another, except by transfers made in good faith for such fair considerations and for such objects as must have been in the contemplation of testator when making his will. Any abuse of the power of disposal conferred upon her by the will which places the rights of the remaindermen in serious danger and which indicates bad faith, fraud, or a reckless disregard of the rights of the remaindermen in the residuary estate, on the part of the life tenant, gives the remaindermen the right to ask and receive from a court of equity adequate protection. 26 R. C. L. 1373, sec. 234; 17 R. C. L. 625, sec. 15. If the allegations of the petition are true, it is the duty of the court to treat the defendant Ernest O. Wagner as constructive trustee as to any part of said residuary estate which he has wrongfully received. It is merely a question of following trust property into the hands of a party to whom, if the allegations of the petition are true, it has been wrongfully transferred to the danger or serious detriment of the rights of the remaindermen, and we do not understand that the right to maintain such an action is at all dependent upon the ability of the complaining party to bring the original trustee within the jurisdiction of the court. Any other rule would place it in the power of the life tenant of personal property, or of real estate, where a power of sale is conferred by the will, to defeat the rights of the remainderman by transferring the property to a resident of a state other than the one in which the life tenant resides, and then remaining out of the jurisdiction of the courts of such other state.

It is insisted by appellees that this suit is one to construe

a will and to define the rights of the parties thereunder, and that the probate court has exclusive original jurisdiction. If this were an action by the executrix to have the will construed for her guidance as to its proper execution and as to the proper distribution of the estate, this contention would be sound. Such, however, is not the nature of this suit. This estate has long since been administered and closed and the estate properly distributed according to the terms of the will. At the time of distribution there was no question as to the right of the surviving widow to take the residue of the estate upon the terms and conditions and for the purposes specified in the will. The necessity for the present suit arises from what is alleged to be the wrongful and fraudulent conduct of the surviving widow since distribution, in assuming to be the absolute owner of the property in question, with full power to dispose of it as she may desire for any and all purposes, when, as plaintiffs allege, she was given but a life estate by the terms of the will, with power of disposal and use limited to her own reasonable support and maintenance. If the construction placed upon the will by plaintiffs is the correct one, then there was a trust created by the will, or, at least, a constructive trust arises out of it in favor of plaintiffs, as to any residue of said property which may remain at the death of said Frances R. Wagner, the life tenant, over and above what said life tenant has, in good faith, used and consumed for her reasonable personal purposes and enjoyment; and, to protect plaintiffs' interest in said property from being dissipated and diverted to purposes other than those contemplated by testator, this suit is maintainable in the district court, even though it involves a construction of said will. *Youngson v. Bond*, 69 Neb. 356; *Andersen v. Andersen*, 69 Neb. 565; *St. James Orphan Asylum v. Shelby*, 75 Neb. 591; *Adams v. Dennis*, 76 Neb. 682; *Fisher v. Fisher*, 80 Neb. 145; *Klug v. Seegabarth*, 98 Neb. 272; *Currier v. Johnson*, 19 Colo. App. 94.

For the reasons stated, we hold that the court below had jurisdiction of the subject-matter and of the persons of all

of the defendants other than Frances R. Wagner.

We are now brought to a consideration of the question whether or not the petition states a cause of action. This involves an interpretation of the will of Nathan W. Wells. If the fourth paragraph of the will—the provision here involved—which disposes of the residue of the estate, vests the absolute title of the property in the surviving widow, the petition fails to state a cause of action. If, on the other hand, said provision of the will creates in the widow only a life estate with power of use and disposal by her for her own reasonable personal support and enjoyment, with remainder to plaintiffs as the heirs of testator's half-brother, then the petition does state a cause of action, unless, on its face, it is disclosed that such cause of action is barred by the statute of limitations.

Where a will, in express terms, creates a life estate in the donee, and annexes thereto a power of appointment or disposal, with remainder over to certain named beneficiaries, the first taker takes but a life estate. This is the rule established and adhered to by a very large majority of the courts which have been called upon to pass upon the question. It is the rule to which this court is committed. In *Loosing v. Loosing,* 85 Neb. 66, the matter is dealt with in the first section of the syllabus, as follows:

"If an estate is devised to a person generally or indefinitely with a power of disposition, it carries the fee; but, if the testator gives the first taker an estate for life only with a power to dispose of the remainder to definitely described individuals, the express limitation for life will control the operation of the power and prevent it from enlarging the life estate to a fee."

In the body of the opinion in the *Loosing* case, Judge Root took note of the fact that there were decisions holding the opposite view, and said: "While cases are not lacking to sustain the proposition that a power of sale added to a life estate in real property vests the donee with an estate in fee simple, we think the weight of authority is to the contrary. 1 Sugden, Powers, ch. 3; 4 Kent, Commentaries

(Rev. ed.) pp. *319, *536; *Fairman v. Beal,* 14 Ill. 244; *Walker v. Pritchard,* 121 Ill. 221; *Ducker v. Burnham,* 146 Ill. 9; *Burleigh v. Clough,* 52 N. H. 267; *Mansfield v. Shelton,* 67 Conn. 390; *Little v. Giles,* 25 Neb. 313."

There is appended to the case of *Steiff v. Seibert,* 128 Ia. 746, as published in 6 L. R. A. n. s. 1186, an exhaustive note in which the annotator collects and analyzes the English and American decisions on the subject now under consideration. A note on the same subject will be found appended to *Warren v. Ingram,* 96 Miss. 438, Ann. Cas. 1912 B, 424. Under the title "Powers" in 21 R. C. L. 776, sec. 5, the same conclusion is announced. See, also, 17 R. C. L. 624, sec. 13, *Burleigh v. Clough,* 52 N. H. 267.

In *Smith v. Bell,* 6 Pet. (U. S.) *68, the will under consideration provided: "I give to my wife, Elizabeth Goodwin, all my personal estate, whatsoever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies and funeral expenses; which personal estate, I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal, absolutely; the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin."

Chief Justice Marshall delivered the opinion of the court, and held that the said Jesse Goodwin, testator's son, took a vested remainder after the death of Elizabeth Goodwin. See, also, *Powers v. Wells,* 244 Ill. 558; *Underwood v. Cave,* 176 Mo. 1; *Keown's Estate,* 238 Pa. St. 343.

But counsel for appellees contend that it is not a question of whether or not the power of disposal converts what would otherwise be a life estate into a fee, b ya mere arbitrary rule of law, because, as they urge, testator, by the provision of his will here involved, did not intend to create a life estate, but that his clear intention was to vest in her the fee. It is argued that the will is complete and unambiguous in its terms, and that the language of the testator must be given its plain and ordinary meaning. Much emphasis is placed upon the language, "the same to be her own individual property to use, enjoy and dispose of as to

her shall seem fit." But we must consider the whole will, and if possible, give effect to all its provisions in arriving at the true meaning and intent of the testator. In the second paragraph of the will the testator made a definite and absolute bequest to his wife. There is no question but that he knew how to vest absolute title in his wife when such was his intention. And if testator desired to give her the same interest in the residue of his estate he could have done so in language the same or similar to that used in the second paragraph of the will, or he could have made one provision cover his bounty to his wife, rather than dealing with the subject in two separate provisions, because he had already provided for his debts and funeral expenses and expenses of his last sickness, and there was no other bequest, legacy or devise provided for in the will aside from the cancelation of a debt owing to him by his half-brother. It is very clear to us that testator, by his will, having given all of his life insurance to his wife absolutely, as he plainly does in the second paragraph of the will, intended in the fourth paragraph to give her a life estate in the residue, with ample power of disposal and use to enable her properly to manage and use it, or so much of it, as she might desire for her own reasonable comfort and enjoyment as freely as if she were the absolute owner. It will not do to lose sight of the absolute gift provided for in the second paragraph of the will, nor the introductory clause of the fourth paragraph, viz., "Subject only to the foregoing provisions, I give and bequeath unto my said wife, all the rest and residue of my estate real, personal and mixed, wheresoever the same may be located or found, *for and during the full term of her natural life,*" and the language, "the same to be her own individual property to use, enjoy and dispose of as to her shall seem fit," must be considered, not only in the light of the very definite life estate created by the language which precedes it, but also by the gift over to his mother and half-brother, or their heirs, of whatever remainder of the property there might be at the death of his wife. In order to give mean-

ing to all of these provisions, the language following the creation of the life estate, viz., "the same to be her own individual property to use, enjoy and dispose of as to her shall seem fit," must be held to refer to the *manner of the use* and to the exercise of the power of disposal, as if it said: "She to use, enjoy and dispose of the same, for said purpose, as to her shall seem fit, the same as if it were her own individual property." This was clearly the intention of the testator, as we gather it from a consideration of the whole will, and to so interpret the instrument gives effect to all of its provisions, and does violence to none.

But having held that the wife took but a life estate in the residue, with power of disposal, how far does that power extend, and for what purposes, and in what manner may it be exercised? Under what circumstances, if at all, may the remaindermen invoke the aid of a court of equity to control the conduct of the life tenant with reference thereto?

It is evident that the purpose of the testator was to make ample provision for the support, care, comfort and enjoyment of his wife, in case she survived him. He did not intend to limit her merely to the use, nor to the bare income of the property in which the life estate was created. It is obvious that the added power of disposal was bestowed upon her to enable her freely to dispose of any or all of the property, and to convert it into other forms, by exchange or reinvestment, as her judgment might dictate, and to use the principal, or so much of it as she might reasonably need or desire, for her own maintenance, pleasure, enjoyment and comfort, and she was made the sole judge of the necessity and wisdom of any such transfers, and as to the extent to which it should be necessary or desirable for her to encroach upon the corpus of the property, for the objects and purposes for which the power was bestowed. In all these matters it is obvious that testator intended to bestow upon his wife wide latitude and a large degree of discretion, but we cannot hold that testator intended to place it in her power to dispose of the corpus of the estate, or any

substantial part of it, by gifts *inter vivos,* unless we are also prepared to hold that she can dispose of it by will, to whomsoever she pleases, which would imply a fee simple estate. Having construed the will to create in the wife but a life estate with power of disposal, we feel impelled to hold that any disposal made by her must be consistent with the objects and purposes testator had in mind in creating the life estate. *Burnet v. Burnet,* 244 Mo. 491; *Shapleigh v. Shapleigh,* 69 N. H. 577. We cannot think that, having created a life estate in express terms, and having provided a gift over of such portion of the principal as might remain at the death of the life tenant, he had any thought of placing it in her power, not only to deprive herself of its use and enjoyment, but, in addition, to place it all, or any substantial part of it, beyond the reach of the remaindermen by voluntary gifts or simulated and fraudulent transfers to her second husband, or to any one else. *Farlin v. Sanborn,* 161 Mich. 615. No degree of discretion consistent with the life estate, no power of disposal conferred upon the wife short of that which would imply the bestowal of the fee title upon her in the first instance, can justify a voluntary gift or transfer of all, or a substantial part of, the property to others, so as to destroy, or materially impair, the rights of the remaindermen therein. We cannot construe this will as giving to the life tenant any such power. In dealing with a somewhat similar question, Chief Justice Holcomb, in *Smullin v. Wharton,* 73 Neb. 690, cites *Cresap v. Cresap,* 34 W. Va. 310, and quotes therefrom the following language, which we think highly pertinent to the present inquiry: "If the widow should give away the whole of the estate to strangers, can any one deny that it would defeat the testator's manifest intention? The question gives the answer and that answer is decisive." In the exercise of the power of disposal the life tenant must act in good faith. *Bevans v. Murray,* 251 Ill. 603; *Strickland v. Strickland,* 271 Ill. 614; *Brookover v. Branyan,* 185 Ind. 1; *Martin v. Barnhill,* 56 S. W. (Ky. App.) 160; *Embry's Exrs. v. Embry's Devisees,* 102 S. W.

(Ky. App.) 239; *Trustees Presbyterian Church v. Mize*, 181 Ky. 567; *Rives v. Burrage*, 110 Miss. 789; *Tyson's Estate*, 191 Pa. St. 218; *Perkinson v. Clarke*, 135 Wis. 584.

At the suit of a remainderman a life tenant may be enjoined from committing waste. *Disher v. Disher*, 45 Neb. 100; 27 R. C. L. 1041. It is the duty of a life tenant to pay the general taxes assessed against the property in which the life estate is created. If this duty is neglected the remainderman has an appropriate remedy in equity. *Disher v. Disher, supra; Speich v. Tierney*, 56 Neb. 514; 17 R. C. L. 636.

"The tenant for life is entitled to the full use and enjoyment of the property, the only restriction upon this use being that the estate of those who are to follow him in possession shall not be permanently diminished in value by his neglecting to do that which an ordinarily prudent person would do in the preservation of his own property, or by doing those things which are not necessary to the full enjoyment of the particular estate, and which have the effect to diminish the value of the future estate. Because of this duty to preserve and protect the estate in remainder, his relation to the remainderman is to a certain extent *a fiduciary one and has frequently been termed an implied or quasi trusteeship.*" 17 R. C. L. 625, sec. 15. See, also, note to 64 Am. St. Rep. 920 (*Williamson v. Jones*, 43 W. Va. 562); *Smith v. Daniel*, 2 McCord Eq. (S. Car.) *143; 16 Am. Dec. 641.

We suppose that no one would contend that the life tenant in the instant case, merely because she has the power of disposal which was bestowed upon her by the will of her late husband, would have the right wilfully to destroy the property. If she cannot rightfully do that, how can it be said that she has the power to give all or any substantial part of it away? A life estate, coupled with a power of disposal and consumption of the corpus, cannot be held to confer upon the life tenant any such arbitrary and unbridled disregard of the rights of the remaindermen, unless we are prepared to hold that the added power of

disposal and consumption wipes out the distinction between a life estate and one in fee, and this we are not prepared to do. In the case *In re Estate of Meldrum,* 149 Minn. 342, the supreme court of Minnesota had occasion to construe the provisions of a will somewhat similar to that here under consideration, in connection with an inheritance tax question. It was there said:

"The fact that relator was given the right to change the character of the property in no way enlarged her interest in the estate. As we read and construe the will, she received a life estate in the property, plus the power to sell as she might think best, remainder to the daughter. The proceeds of the property remaining in her hands at the time of her death belong to the daughter, though by the terms of the will testator was entitled to the same for her support. *Bevans v. Murray,* 251 Ill. 603. While it is true, as contended by the state, that relator took more than a life estate, *no authority was given her to invade and deplete the corpus, unless necessary for her support.* Testator's purpose was to preserve the estate for his family. * * * While relator was not required to account to the court for proceeds of any sale, yet the fee vested in the daughter at the death of the testator *and the proceeds of any sale became the property of the daughter, subject to the life interest of relator therein, and at the relator's death the daughter would be entitled to the possession thereof.* The great weight of authority is that where an estate for life is expressly given, and a power of disposition is coupled with it, the fee does not pass to the life tenant under the devise, but only the naked power to dispose of the fee."

We have no doubt that any transfers by the life tenant in the present case, if made in good faith to actual purchasers for value, would convey good title, but the consideration received, whether in money or other property, would be held by her subject to the same limitations as the will attached to the life tenant's interest in the original property, and the remaindermen would have the same interest therein. *In re Oertle,* 34 Minn. 173; *Ackerman v. Gorton,*

67 N. Y. 63; *Cox v. Wills*, 49 N. J. Eq. 130; *Trustees Presbyterian Church v. Mize, supra; Cheshire v. Cheshire*, 37 N. Car. 569.

"Where testator's will gave to his widow the use and income of all his estate without using words of inheritance and gave the power to sell the property for her support, comfort, or enjoyment, or for any other purpose for which she may wish to spend money, and for investment, the power to sell being 'to sell and to convey and transfer by deed or other instrument,' with a gift over of all that remained undisposed of at her death, the widow did not take an absolute fee; since, the power of disposition being so limited as to exclude by implication any power of conveying the property by will, there was a restriction on the power of disposition inconsistent with an estate in fee simple." *Kemp v. Kemp*, 111 N. E. 673 (223 Mass. 32).

Among other things, the prayer of the petition asks for the appointment of a trustee to take charge of the property belonging to testator's residuary estate, or that defendants be required to give adequate security for its conservation for the use of plaintiffs at the time of the death of the life tenant. The general rule seems to be that where a will creates a life estate with added power of disposal and consumption of the corpus of the property for the use and support of the life tenant, and no security is called for by the will as a condition precedent to turning the property over to the life tenant, the court will not, in the first instance, at least, require the life tenant to give security for the preservation of the property for the benefit of the remainderman. 17 R. C. L. 628, sec. 18; *Scott v. Scott*, 137 Ia. 239, 126 Am. St. Rep. 277. But if we are to recognize that the remainderman, in such a case, has any interest in the property which courts of equity will protect from waste, fraud, profligacy, and wilful and reckless extravagance on the part of the life tenant, after coming into possession, then certainly the court not only has the power, but is under a solemn duty, to do all things necessary to afford such protection either by requiring

adequate security or appointing a new trustee. And such, we believe, is the recognized rule where a course of conduct is pursued by the life tenant after coming into possession of the property, which in any manner endangers the value of the remainder estate, or threatens seriously to deplete it or to reduce or impair its value. *In re Oertle, supra; Wiley v. Wiley,* 1 Neb. (Unof.) 350; *Langworthy v. Chadwick,* 13 Conn. 42; *Trustees Presbyterian Church v. Mize, supra; Chamberlain v. Husel,* 178 Mich. 1; *Howard v. Exrs. of Howard,* 16 N. J. Eq. 486; *Cheshire v. Cheshire, supra.*

We do not think that there is any merit in the contention that it appears from the face of the petition that the statute of limitations has run against the plaintiffs' cause of action. One of the allegations of the petition is:

"That the plaintiffs did not discover the fraud attempted by the defendants, Frances R. Wagner and Ernest O. Wagner, as above set out, until within two years prior to the filing of this petition."

This action is one for relief on the ground of fraud, which gives rise to a constructive trust under the circumstances alleged in the petition. It is therefore governed by the four-year limitation under section 7569, Rev. St. 1913. Under that section the action is not considered as accruing until the discovery of the fraud. The point was passed upon in *Hanson v. Hanson,* 78 Neb. 584. The syllabus in that case upon the point now being considered is:

"The statute of limitations begins to run in favor of a trustee *ex maleficio* of a constructive trust from the time of the discovery of the wrong or fraud, for the prevention of which the trust is imposed; but the statute does not begin to run in favor of the trustee of a resulting trust until such trustee, by some act or declaration, clearly repudiates his trust."

It follows from the foregoing considerations that the action of the lower court in sustaining the special appearance of defendant Frances R. Wagner is sustained, and the order and decree of the court is in all other things re-

versed and the cause is remanded for further proceedings in harmony with this opinion.

AFFIRMED IN PART, AND REVERSED IN PART.

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## IN RE ESTATE OF PETER HOLMBERG. AUGUSTA HOLMBERG, APPELLANT, V. ESTATE OF PETER HOLMBERG, APPELLEE.

FILED APRIL 11, 1922. No. 21982.

**Executors and Administrators:** ALLOWANCE TO WIDOW: ESTOPPEL. In a suit by a husband, the court granted him a divorce and awarded alimony to the wife. The wife, in consideration of the payment of the alimony without delay, agreed to release all her claims, rights and interests in the husband's estate arising out of their marital relations and in full settlement of her property rights. The alimony was forthwith paid, and thereafter the husband died before the divorce decree became effective. Such agreement estopped the wife from allowance for her support during the administration of her deceased husband's estate.

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

*Lambert, Shotwell & Shotwell,* for appellant.

*John W. Battin, contra.*

Heard before LETTON, ROSE, ALDRICH, DAY and FLANSBURG, JJ., RAPER, District Judge.

RAPER, District Judge.

Peter Holmberg obtained a decree of divorce against his wife, Augusta Holmberg, in Douglas county on October 24, 1919, in which decree the court awarded the wife alimony in the sum of $450 and the further sum of $50 for attorney's fees. The divorce case was tried in September, but decree was not entered until October 24. There was some negotiation between the parties concerning the payment of these awards after the trial and before the formal entry of the decree, in which Mr. Holmberg's counsel told Mrs. Holmberg's attorney that Holmberg had no

money and did not want to pay the alimony, but if Mrs. Holmberg would give a quitclaim deed to the homestead and give a quitclaim deed to all of the real estate belonging to Mr. Holmberg, and give a release of all claims, rights and interests of Mrs. Holmberg in the property of Mr. Holmberg arising out of the marital relations of the parties in full settlement of the property rights since the divorce, that he, Mr. Battin, plaintiff's attorney, would help Mr. Holmberg raise the money to pay the alimony. Mr. Battin further told Mrs. Holmberg's attorney that the alimony could not be collected for six months, but that Mr. Holmberg would pay cash if this arrangement could be made. This proposition was assented to, and Mr. Battin made out the deed and gave it to Mrs. Holmberg's counsel. It was executed and acknowledged by Mrs. Holmberg on October 24, 1919, and the $500 as provided in the decree was paid, and the deed delivered, and recorded the same day. On that same day Peter Holmberg, without his wife joining, gave a mortgage on all his real estate for $622.40, for the purpose of procuring the money with which to pay the alimony. There was a prior mortgage on the real estate of $879.

Peter Holmberg died December 12, 1919. Soon after his death Mrs. Holmberg applied to the district court to have the decree vacated and set aside, which was refused, and she appealed to this court, where it was held, in *Holmberg v. Holmberg,* 106 Neb. 717, that the divorce action abated by the death of Mr. Holmberg, and the decree, so far as it related to the divorce, never became effective, but that the judgment for alimony having been fully executed was final. In January, 1920, John W. Battin was appointed executor of the last will and testament of Peter Holmberg. Augusta Holmberg asked for an allowance as the widow for her support during the settlement of the estate, and the county court allowed her $75 a month, from which the executor appealed to the district court, where the claim was rejected, and from that judgment the widow appeals.

The deed executed by appellant is in form a quitclaim, expresses a consideration of $500, described all the real estate owned by the deceased, and contains this clause: "This deed is given in settlement of and as a release of all claims, rights and interests of said Augusta Holmberg in the property of said Peter Holmberg arising out of their marital relations and in full settlement of the property rights since divorce of said parties."

The whole question at issue is dependent upon the effect of the quitclaim deed executed on October 24, 1919. If that writing does not bar appellant, then, under the law, she is entitled to the statutory allowance for her support during the administration of the estate. The appellant insists that there was no consideration for the deed; that it does not bar her from asserting her right to the allowance; and that a postnuptial agreement releasing all claim of a wife in her husband's estate does not estop her from claiming the widow's allowance.

This court in *Rieger v. Schaible*, 81 Neb. 33, 53, held that an antenuptial agreement of like purport was sufficient to bar the widow's statutory allowance, the rights of children not being involved. Mr. and Mrs. Holmberg had no children. In *In re Estate of Lauderback*, 106 Neb. 461, it was held by this court that a postnuptial agreement wherein the parties agreed to claim nothing from the property, each may now have or afterward acquire barred the surviving husband from claiming the statutory right to specific articles of personalty which the law gives to a surviving spouse. See, also, *Gould v. Superior Court*, 191 Pac. (Cal. App.) 56, and *Sovereign Camp, W. O. W., v. Billings*, 107 Neb. 218.

These cases are decisive of the propositions that such agreements bar the surviving spouse of the statutory allowances, and they are applicable to the language used in the deed, and also to the situation of the parties. They had not lived together for some time before the divorce, nor at any time afterward. As to the provision being reasonable, we are unable to say it is not fair. The parties

were married in 1914, she then being 55 years' old and he was 72. There is no showing that the wife brought any property to the family, and evidently the husband acquired none after the marriage. The property of the deceased consists of two pieces of real estate, for one of which, as testified to by Mrs. Holmberg, $2,000 was paid, and for the other $1,200 was paid many years ago. At his death there were the two mortgages existing, before referred to. There is nothing else in the record to show the value of these properties, nor that deceased had any personal estate. Under this state of the record, it cannot be said that the provision was not reasonable and fair.

The claim that there was no consideration for the deed, because the court had awarded the $500 as alimony, is the most serious one. The appellant testified, in effect, that she did not read the deed, and that nothing was said to her about appealing from the alimony judgment, nor anything concerning the statements about paying the money at once for the release of her rights, but when the negotiations were had with her attorneys, able and upright men, her negative testimony concerning these matters does not appeal to us, and probably did not to the trial court. It is highly improbable that she would have been permitted by her attorneys to sign so important an agreement without advising her concerning it. The situation, as shown by the evidence above stated, fully warrants the conclusion that there was adequate consideration to support the agreement. She received the money. It is a valid agreement, founded upon sufficient consideration, and no reason appears why the judgment of the district court should not be affirmed.

AFFIRMED.

RALPH STALDER, APPELLANT, V. SAMUEL A. MILES ET AL., APPELLEES.

FILED APRIL 11, 1922. No. 21770.

1. **Injunction:** CLOSING PRIVATE WAY. The owner of land will not be enjoined from closing a road or trail by building a fence across it, where the proof does not establish that a way has been dedicated by him or his predecessors in title, or that the public has acquired a right by prescription.
2. **Licenses:** REVOCATION. A mere license to use a way across open, uninclosed and uncultivated prairie land may be revoked at any time, regardless of how long the use has been permitted.

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

*John Wiltse* and *J. E. Leyda,* for appellant.

*Dort & Cain* and *Clarence G. Miles, contra.*

Heard before LETTON, DEAN and DAY, JJ., SEARS and WESTOVER, District Judges.

SEARS, District Judge.

The question in this case is, whether a certain road or trail across certain uninclosed lands had become a legal highway by dedication or prescription. The district court found in favor of defendants and denied the injunction which was sought to prevent the building of a fence across the alleged highway. The only questions involved are questions of fact.

To establish a road by dedication, evidence of acts upon the part of the owner showing such intent must be produced. Mere acquiescence or permission to use the road does not operate to deprive the owner of his property. *Graham v. Hartnett,* 10 Neb. 517; *Postal v. Martin,* 4 Neb. (Unof.) 534; *Van Wanning v. Deeter,* 78 Neb. 284. The road or trail had been used for many years by a few people living in the vicinity. It was what is usually termed a "neighborhood road." From a point where a fence had

been built on the line of the southwest quarter of section 29, it traversed open and uninclosed prairie land. It did not always follow the identical course, although the general direction was the same. We find no evidence to justify a finding that there was ever an intention on the part of the owners of the land at any time to establish a road by dedication.

Neither do we find convincing proof that the road had been established by prescription, under the rule of *Engle v. Hunt*, 50 Neb. 358, and *Smith v. Nofsinger*, 86 Neb. 834. The burden was upon plaintiff to prove this. The evidence convinces us that the use of the road or track had always been by permission until it was sought to inclose the land traversed by it. It crossed diagonally a tract of 800 acres owned in a body by defendant and his predecessor in title. While the fact that revocation of the license to travel this way will inconvenience plaintiff and cause him to travel a greater distance to reach one of his farms, and other farmers in order to reach a town, may be regretted, the remedy is to follow the method prescribed by the statute for the establishment of a public highway and apply to the public authorities for relief in this respect. It would serve no useful purpose to set out the evidence in detail. The judgment of the district court was right, and it is

AFFIRMED.

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THEODORE DAVENPORT ET AL., APPELLEES, V. INTERMOUNTAIN RAILWAY, LIGHT & POWER COMPANY, APPELLANT. DAVID V. MORGAN ET AL., APPELLEES, V. INTERMOUNTAIN RAILWAY, LIGHT & POWER COMPANY, APPELLANT. MARTHA C. HILBERT, APPELLEE, V. INTERMOUNTAIN RAILWAY, LIGHT & POWER COMPANY, APPELLANT.

FILED APRIL 11, 1922. Nos. 21907, 22117, 22118.

1. **Negligence:** ADMISSION OF EVIDENCE. In this an action to recover for loss caused by a fire alleged to have been communicated from an ash pile negligently kept and maintained by the defendant,

it was not erroneous to admit evidence as to the manner of handling the ashes, and tending to prove that fire had been seen in the ash pile at various times before the fire which caused the damage, and that this condition of the ash pile was continuous.

2 **Damages:** DESTRUCTION OF BUILDING BY FIRE. The measure of damages for the destruction of a building by fire, or the partial destruction thereof to such an extent that restoration would not be advisable, is, in cases where the building forms a part of the real estate and such real estate has a market value, the diminution in the value of such real estate at the time of and on account of such fire, plus interest at the legal rate.

3. **Negligence:** INSTRUCTIONS. An instruction upon the law of contributory negligence which ignores and is in conflict with the rule of comparative negligence established by section 7892, Rev. St. 1913, is erroneous.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed as to Morgan and Hilbert cases, and reversed as to Davenport case.*

*Porter & Percy* and *F. A. Wright,* for appellant.

*G. T. H. Babcock, Earl McDowell* and *M. F. Harrington, contra.*

Heard before LETTON, DEAN and DAY, JJ., BLACKLEDGE and TEWELL, District Judges.

TEWELL, District Judge.

These three actions were begun separately in the same court, the object of each of which was to recover damages alleged to have been sustained by fire originating on account of the negligence of the defendant, a corporation. The cause wherein Theodore Davenport and Home Insurance Company were plaintiffs was tried in June, 1920, and for convenience is hereinafter referred to as the Davenport case, and the other two causes, in one of which David V. Morgan and Phœnix Insurance Company were plaintiffs, which is hereinafter referred to as the Morgan case, and in one of which Martha C. Hilbert was plaintiff, which is hereinafter referred to as the Hilbert case, were by agreement tried together in November, 1920. The trials

resulted in favor of the plaintiffs in each cause, and the defendant has appealed in each cause to this court. By stipulation the three actions have been submitted to this court together and all plaintiffs have joined in one answer brief. A separate transcript and bill of exceptions have been filed in this court in each action, but the instructions of the court and bill of exceptions are alike in the two last mentioned actions. The three causes were submitted to this court without oral argument.

The defendant corporation on September 14, 1918, owned and operated an electric light plant at Chadron, Nebraska, the same being situated on lot 10, in block 4, original townsite of Chadron, just south of the Chicago & Northwestern railway, which ran east and west. Adjoining defendant's property to the south was lot 9, on the west end of which was situated a blacksmith shop and small paint shop, the rear or east end of this lot being vacant. Lot 9 and the buildings thereon belonged to plaintiff Hilbert. To the south of the Hilbert lot was lot 8, on the west end of which was situated a feed barn. A tight board fence about eight feet high ran from the east end of the feed barn and along the north line of lot 8 to the alley, which ran north and south along the rear end of said lots. This lot 8 and improvements thereon belong to plaintiff Davenport. Adjoining lot 8 to the south was lot 7, on the west end of which was situated a frame metal-covered two-story hotel, which lot and hotel were owned by plaintiff Morgan. For at least two years continuously before September 14, 1918, the defendant corporation had hauled the coal ashes from its furnaces situated on lot 10 to the vacant rear half of the Hilbert lot under some kind of an agreement with Hilbert. These ashes were hauled daily and at different times were partly hauled away in wagons. On September 14, 1918, the ashes had formed a pile three or four feet high in places, which covered a large portion of the rear half of the Hilbert lot. The south side of the ash pile was at least within a few feet of the said high board fence, and at places,

perhaps, had rolled down against the fence. On September 14, 1918, a fire broke out along this fence about half way between the alley and the feed barn; witnesses for the plaintiffs in each case claiming it started on the north wall of this fence, and witnesses for the defendant in each case claiming it started in some hay on the inside of said fence on the Davenport lot. The paint shop on the Hilbert property and the barn and fence on the Davenport property were completely destroyed and the hotel on the Morgan property was partly burned.

Assignments of error Nos. 4, 5 and 7 in the Morgan and Hilbert cases and Nos. 3, 4, 5, 6, 7, 9 and 10 in the Davenport case all relate to alleged error on the part of the trial court in permitting witnesses for plaintiffs to testify, over objection, as to the condition of the ash pile relative to containing fire in 1917, more than a year before the fire, and as to the usual manner of handling the ashes at that time, and as to conversations between employees of the defendant company at that time concerning the likelihood of fire from the ash pile, and as to fire having been seen in the ash pile at various times in 1917 and at other times prior to the date of the destruction of the buildings. It will readily be seen that the plaintiffs in each of these cases had the burden of proving, not only that the fire originated from the ash pile, but also that defendant was guilty of actionable negligence in maintaining the ash pile. The dangerous tendency of an object or condition and of knowledge thereof on the part of one charged with negligence are main elements entering into legal negligence, and competent proof of the existence of such dangerous tendency either prior or subsequent to the date of the negligence charged, and the prior knowledge thereof on the part of the one charged, should be admitted, where proof of negligence is necessary for a recovery, unless in the discretion of the trial court it seems to involve a serious inconvenience by way of unfair surprise or confusion of issues, the interval of time to which any inference will be allowed, and whether or not substantial similarity of con-

ditions shall first be proved depending upon the nature of the thing and the circumstances of the particular case. See 1 Wigmore, Evidence, secs. 437, 452. In section 437 it is said, in part:

"This general principle that a prior or subsequent existence is evidential of a later or earlier one has been repeatedly laid down, and has even been spoken of as a presumption. That no fixed rule can be prescribed as to the time or the conditions within which a prior or subsequent existence is evidential, is sufficiently illustrated by the precedents, from which it is impossible (and rightly so) to draw a general rule. They may be roughly grouped into two classes—those in which the evidence has been received without any preliminary showing as to the influential circumstances remaining the same in the interval (thus leaving it to the opponent to prove their change by way of explanation in rebuttal), and those in which such a preliminary showing is required. Whether it should be required must depend entirely on the case in hand, and it is useless to look or to wish for any detailed rules."

One should distinguish, of course, between the use of a subsequent *repaired condition* as an admission of negligence, which is not allowable, and the use of a subsequent *dangerous* condition as evidence of such dangerous condition at the time of the negligence charged. In this case the evidence shows that the ash pile was for the most part continuous, and added to daily, and we therefore think that the evidence complained of falls within the above rules and was admissible to prove the existence of a dangerous tendency or condition and notice thereof on the part of the defendant as elements of negligence, and this without further proof of substantial similarity of conditions than was made by the plaintiffs.

Assignments of error Nos. 1, 2, 3 and 4 in the Morgan and Hilbert cases, and Nos. 1 and 2 in the Davenport case all relate to the sufficiency of the evidence to sustain the verdict. There is evidence in the record in each case that complaint had been made to the manager of the defendant

corporation several times before September 14, 1918, about the existence of fire in these ashes, and the likelihood of fire being set to adjoining property, and also that on the date of the fire the ashes were very hot. The evidence on behalf of the defendant discloses that the ashes were drawn from the grates into a pit of water before being hauled to the pile, and also that a week or two before the date of the fire the defendant's employees had procured the city fire hose and had thoroughly wetted the ash pile. We think, after completely reading the record in each case, that there is sufficient evidence to warrant the finding that the fire originated from these ashes, and that the defendant was guilty of negligence in maintaining the ash pile in the condition it did, and such finding on conflicting evidence should not be disturbed on appeal.

These assignments of error as to the sufficiency of the evidence, together with assignment of error No. 13 in the Davenport case relating to the instruction given by the court as to the measure of damages, raise the question as to the sufficiency of the evidence on the amount of damage and as to the proper rule for the measure thereof. The instruction given by the trial court in the Davenport case as to the measure of damages is as follows:

"Should you find a verdict for the plaintiffs in this case, it would be your duty to allow the plaintiffs all damages which resulted from the burning of plaintiff Davenport's barn and other buildings. And in fixing the amount of such damage you will carefully consider all the evidence before you as to the value of said property at the time it was destroyed, and award the plaintiff such damages as will compensate him for his loss as shown by the evidence, however, not exceeding the amount claimed in the petition."

The evidence in the Davenport case shows that the barn was built in 1898, and whenever the land upon which it was situated was sold the building was sold as a part and parcel thereof. The evidence in the Davenport case as to the amount of the damage, which was given over objec-

tion, was the evidence of the plaintiff Davenport, as follows: "Do you know about what was its fair value, as it stood there—not to move it out, but as it stood there for the use it was intended for? Do you know about what its fair value was? A. The barn? Q. Yes; the barn and living room and all put together? A. Well, I don't know that I do. Q. You don't know what your property was worth? A. I should say $3,000"—and also evidence that the rental value of the property was $300 a year, evidence of the size of the building, and that the same was built in 1898, very meager evidence as to the quality of the material in the building, practically no evidence as to its condition of decay, and the evidence of William Weaver as to the separate items necessary to replace the building in a new condition, including labor, on the date of the fire; the total cost of such items being $2,467.56. The amount of the verdict was $1,900.

The basic principle of the law of damages is that such compensation in money shall be allowed for the loss sustained as will restore the loser to the same value of property status as he occupied just preceding the loss. No hard and fast rule can be laid down for all cases as to the measure of damages in case of the destruction of a building by fire. In some cases the property might not have any market value, or the building might not be a part of the real estate, or, in case of partial destruction, a restoration of the building might be advisable, in which cases different rules would apply. The measure of damages for the destruction of a building by fire, or the partial destruction thereof to such an extent that restoration would not be advisable, is, in cases where the building forms a part of the real estate and such real estate has a market value, the diminution in the value of such real estate at the time of and on account of such fire, plus interest at the legal rate. This court has applied this rule to cases arising out of the destruction of a perennial crop, such as alfalfa. *McKee v. Chicago, B. & Q. R. Co.*, 93 Neb. 294; *Thompson v. Chicago, B. & Q. R. Co.*, 84 Neb. 482; *Morse v. Chicago,*

*B. & Q. R. Co.*, 81 Neb. 745. The trial court applied this rule in the Morgan and Hilbert cases, but, as above shown, did not apply it in the Davenport case. We think that there was not sufficient competent evidence before the jury in the Davenport case upon which to base a verdict as to the diminution in the value of the real estate on account of the fire.

Defendant also complains about the instruction concerning contributory negligence, raised by the answer in all these cases. There is no evidence of any contributory negligence in the Morgan and Hilbert cases, and the negligence of plaintiff Davenport, if any, could not be imputed to the other plaintiffs. In the Davenport case an ordinance prohibiting the keeping of hay, trash and other combustible waste in the open was pleaded and introduced in evidence, and there was some evidence of such combustible waste having been near the ash pile and of the fire having started therein. In this regard the court instructed:

"That the burden of proof is upon the defendant, and that if the defendant has proven by a preponderance of the evidence that, at the time and before the fire in this case, the plaintiff permitted combustible material to accumulate upon his premises, as alleged by defendant, and that the fire which destroyed his property was caused by the accumulation of such rubbish and combustible materials and without fault or negligence on the part of defendant, then your verdict should be for the defendant."

This instruction was erroneous. By section 7892, Rev. St. 1913, in actions to recover damages for injuries to a person or to his property, caused by the negligence of another, contributory negligence does not bar a recovery, when such contributory negligence was slight and the negligence of the defendant was gross in comparison. *Morrison v. Scotts Bluff County*, 104 Neb. 254. No definition of slight negligence or of gross negligence is found in the instructions.

We have examined all other assignments of error in each case and believe that substantial justice has been done in

the Morgan and Hilbert cases.

For reasons above stated, the judgments rendered in the Morgan and Hilbert cases are affirmed at cost of defendant, and the judgment rendered in the Davenport case is reversed at the cost of the plaintiff therein and the said cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

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HENRY GEORGE, APPELLEE, V. LEYPOLDT & PENNINGTON ET AL., APPELLANTS.

FILED APRIL 11, 1922. No. 21940.

**Principle and Agent:** AGENCY: EVIDENCE. "While evidence of the acts or declarations of a person alleged to be an agent is not admissible for the purpose of establishing the agency, the testimony of such person, if not otherwise incompetent, is admissible for that purpose." *Nostrum v. Halliday*, 39 Neb. 828.

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

*Hoagland & Carr*, for appellants.

*Halligan, Beatty & Halligan, contra.*

Heard before LETTON, DEAN and DAY, JJ., CLEMENTS (E. J.) and WELCH, District Judges.

WELCH, District Judge.

This is an action brought by Henry George, plaintiff and appellee, to recover from Leypoldt & Pennington a balance which plaintiff claimed to be due him from defendants for seven stacks of hay which plaintiff alleged he had sold and delivered to the defendants through their agent, one Charles Carlton, at the sum of $18 a ton and for which the defendants had paid but $466. The defendants denied that said Carlton acted as their agent in the purchase of any hay from plaintiff. They further alleged that they purchased of said Carlton 24 stacks of hay, which was to be baled and placed on the cars for them at Brady, Ne-

braska, and that by virtue of said agreement defendants agreed to advance, and did advance, money to said Carlton to make advance payments to the plaintiff for hay which said Carlton purchased from plaintiff and sold to defendants. The only question in the case to be determined on the trial was whether or not said Carlton was agent for defendants, and, as such, bought the hay from plaintiff. Trial was had to a jury and verdict returned for plaintiff.

The appellants assigned herein as error that the court erred in refusing to give instruction No. 1 asked by defendants. Such refusal was not assigned in the motion for a new trial as ground therefor. This court, therefore, will not review the action of the trial court in refusing to give the instruction. *Home Fire Ins. Co. v. Phelps*, 51 Neb. 623.

Other errors assigned herein relate to the admission and rejection of evidence on the trial, and to the sufficiency of the evidence to sustain the verdict. The said Carlton, called to testify in behalf of plaintiff, testified that about March 10, 1919, he had a telephone conversation with the defendant Leypoldt, he, Carlton, being at Brady, and Leypoldt at North Platte. He testified as follows: "I told him there was some hay down there I could buy for him and asked him what he could pay for it. He asked me the quality of the hay and I told him Mr. George said it was good hay. He told me to go and look at it and if it was good quality and good color to buy it for them. * * * I went down and looked at the hay and came back and called him up. * * * I told him it was No. 1 hay, good quality and good color, around sixty ton, * * * seven stacks, and that Henry insisted on measuring the hay. * * * He said they would only buy hay by weight. * * * I says, 'Henry wants a payment down.' He says, 'Make a payment down. We want the hay.' I says, 'How much shall I pay down?' He says, 'Make him a good payment. Draw on us for the money.'" Carlton also testified that he told Leypoldt the baling and hauling was all he cared about, and that he said they could pay $24. "That would allow me $6 for

baling and hauling." After the conversation "I took him (George) over to the bank and drew a draft on Leypoldt & Pennington for $400. * * * I told him they would make him a payment down and to draw enough of the money at $18. * * * A draft was drawn for $400, the money was turned over to Mr. George." This draft was introduced in evidence. It was in favor of Henry George, and stated thereon, "Payment on hay, 7 stacks," and was duly paid by Leypoldt & Pennington. Carlton also testified that after he had looked at the hay he saw George and told him that Mr. Leypoldt would pay $18 for the hay in the stack. Carlton testifies that the hay measured 59 tons, and something; that he baled and hauled it to Brady; that all the hay was hauled there, and that he shipped it out; that Mr. Pennington billed the last two cars himself; that he would call up and they would telephone him the bill, or some of them would come down and bring the bill. He also testified that Leypoldt said to him, "to be sure to see it was measured so it would hold out."

Appellants assign as error that the court erred in admitting this testimony of Carlton tending to establish an agency between appellants and Carlton, and that the court erred in admitting the testimony of Carlton of his conversation with the plaintiff. The appellants contend that this testimony was inadmissible, for that agency cannot be proved by mere acts or declarations of an alleged agent, not brought home to the principal. The testimony of Carlton of his conversation over the telephone with Leypoldt was testimony of acts and declarations of Carlton, the alleged agent, with the alleged principal, and of the declarations of that principal. They tend directly to constitute Carlton agent of the appellants, Leypoldt & Pennington, to buy this hay of appellee for them. They are not acts or declarations not brought home to the principal. The authorities cited by appellants in support of their contention are all cases in which it was sought to prove agency by proving unsworn statements and declarations of the alleged agent. They were not cases in which the state-

ments and declarations of the agent consisted of testimony of that agent in the case then on trial, testifying to his declarations and statements to the alleged principal, and the principal's replies thereto. Appellants lay considerable stress upon the decision in the case of *Fitzgerald v. Kimball Bros. Co.*, 76 Neb. 236. In that case it was sought to prove agency by proof of what the alleged agent had said when not under oath or testifying in the case, as to the effect and nature of a conversation carried on between himself and his alleged principal by telephone. It was not sought to prove this by the testimony of the alleged agent who had the telephone conversation, but to prove it by another person testifying to what the alleged agent stated was the effect of his telephone conversation. All the other cases cited by appellants on this point are based upon acts and declarations of the alleged agent made by him when not testifying in the case on trial.

"While evidence of the acts or declarations of a person alleged to be an agent is not admissible for the purpose of establishing the agency, the testimony of such person, if not otherwise incompetent, is admissible for that purpose." *Nostrum v. Halliday*, 39 Neb. 828.

None of the authorities cited by appellants hold that the alleged agency cannot be established by the testimony of the alleged agent testifying in the case on trial as to his declarations to the alleged principal, and such principal's replies thereto.

It was proper, after this testimony of Carlton as to these conversations with said Leypoldt, for Carlton to testify as to what conversations he had with the appellee with reference to buying the hay. If Carlton was the agent of appellants his conversation with appellee was a part of the *res gestæ*. This testimony of Carlton as to his conversation with appellee was necessary in order that the jury might determine therefrom whether or not the said Carlton did buy the hay for appellants as their agent, in case the jury found he was so authorized to buy it. The declarations of an agent during the transaction of business for

his principal, within the scope of his agency, if made in relation to such business, are admitted as a part of the *res gestæ*, but not to prove the fact of agency itself. Jones, Evidence (2d ed.) sec. 255.

Appellants, however, argue that this evidence would be insufficient to authorize Carlton to buy hay in the stack for appellants. From the testimony of Carlton it appears that he told Leypoldt that George insisted on measuring the hay, to which Leypoldt said he would only buy it by weight, and Carlton then told him, "Henry wants a payment down," to which Leypoldt replied, "Make a payment down. We want the hay." He also testified Leypoldt told him to be sure and see it was measured so it would hold out. There is testimony that later, after the controversy arose about payment for the hay, Leypoldt stated in the presence of plaintiff, Carlton, and one R. H. Beatty, in the office of plaintiff's lawyers: "I will admit that Mr. Carlton bought this hay for us; that he was our agent. * * * He also bought some hay from Fred George. * * * I know I have Mr. George's hay and I will have to pay him for it some time, but before I do you will have to bring suit and you will have to get Mr. Carlton's testimony in writing before I will settle." This conversation tends to show that Leypoldt, after all the facts relating to the buying of the hay were known to him, considered that Carlton was agent of appellants in buying the hay. If the jury found that such statements were made by Leypoldt, they should consider the same with all the other evidence in the case in determining whether or not Carlton was agent of appellants in buying the hay, and whether or not he had authority to buy the hay in the stack for appellants. The evidence introduced in behalf of the appellants tended to show that Carlton was engaged in buying hay and selling it to the appellants in order that he might get the labor in baling and hauling the same. The testimony of the said Leypoldt as to his conversation over the telephone with Carlton tends to contradict the testimony of said Carlton in reference thereto. The testimony of said Leypoldt as to his said conversation

in the office of plaintiff's attorneys to some extent contradicts that introduced by plaintiff. The evidence introduced by plaintiff, if true, was sufficient to establish the agency claimed. It was for the jury to determine the truth of this testimony. By its verdict the jury found that Carlton was agent for the defendants.

Appellants contend that a letter written by appellee to appellants contradicts the testimony that plaintiff sold the hay to defendants. In that letter appellee says: "I sold seven stacks of hay to C. C. Carlton for you and same was baled and shipped in your name. I have not received the money for this hay and want you to remit me for it or pay C. C. Carlton so he can pay me." The statements in that letter are not inconsistent with a sale to defendants by the plaintiff. The letter says the hay was sold to Carlton for defendants. This can easily be construed to be a claim that it was sold to defendants through Carlton as their agent. The statement that he wanted them to remit him or pay Carlton simply shows that plaintiff was willing to trust Carlton to turn the money over to him.

Appellants assign as error the fact that they were not permitted to show by Carlton the amount of hay delivered at Brady. Carlton had testified that the hay bought of plaintiff measured fifty-nine tons; that all of the same was delivered at Brady. It was immaterial what amount of hay bought of other parties was delivered at Brady.

Appellants also assign as error the refusal of the court to permit appellants to introduce their regular records which tended to show that they had no relations or account with plaintiff, Henry George. Two of these records consisted of drafts drawn by Carlton on Leypoldt & Pennington payable to Brady State Bank. There is no evidence that either of these drafts had any connection with or relation to the hay purchased of appellee. The other record rejected appears to be an account of hay which they bought, including that of Henry George, in which account is charged payments made, the price, etc., with the name "C. C. Carlton" at the top. There is nothing in this ex-

hibit which would contradict the theory that Carlton was the agent of Leypoldt & Pennington in purchasing this hay of Henry George. It is a frequent practice of concerns, having agents at different points buying or selling for them, to keep their records of transactions at those points in an account in which they charge the agent with remittances made to him and credit him with receipts from him, and leave the matter of the transaction of their business with other persons at that agency entirely with their agent, making no accounts thereof in their own records. Furthermore, Leypoldt had testified that they had no account with Henry George. The fact that appellants had made their records show that they purchased the hay in controversy from Carlton would not make such records competent evidence against George, in an action brought by him to recover for the hay. This record was not a book of account between appellee and appellants in which charges and credits were made to said parties. The account of one person shown by books of account is not admissible in an action with another person concerning the account of such other person, to show that there was no transaction with such other person.

Appellants also claim it was error by the court in refusing to permit plaintiff to testify that he never called Leypoldt & Pennington up to verify the statements of Carlton. Objection was made to a question calling for such testimony that it was immaterial, and the objection was sustained. It was immaterial. If plaintiff did not make such inquiry, it would show that he trusted Carlton. If Carlton had not authority to buy for appellants, then he trusted him at his peril. Whether plaintiff called up defendants to make such inquiry would in no manner tend to establish the fact that Carlton was not defendants' agent.

As hereinbefore stated, there was evidence tending to establish the alleged agency. Evidence bearing thereon being conflicting, the question was one for the jury. It

was submitted to the jury. We find no error in the reception or rejection of evidence. The judgment is

AFFIRMED.

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EMIL GLOOR, APPELLANT, V. FRANK TORCZON, APPELLEE.

FILED APRIL 19, 1922. No. 22005.

1. **Justice of the Peace:** JUDGMENT BY DEFAULT: VACATION. To confer on a justice of the peace jurisdiction to set aside a judgment against defendant on the ground that it was rendered in his absence, he must make his motion in ten days, pay or confess judgment for costs, and give plaintiff the required notice in writing. Rev. St. 1913, sec. 8447.
2. **Courts:** INFERIOR COURTS: JURISDICTION. The records of inferior courts of limited jurisdiction must affirmatively show that such courts have acted within the scope of their authority.
3. ———: ———: ———: PRESUMPTION. Jurisdictional facts will not be presumed to sustain a judgment of an inferior tribunal.
4. ———: ———: ———: ———. "The doctrine of presumptions in favor of the regularity of the proceedings of courts of general jurisdiction does not apply to courts of inferior and limited jurisdiction, but as to such courts, the facts necessary to give jurisdiction must fairly appear from the record." *Muller v. Plue*, 45 Neb. 701.
5. **Justice of the Peace:** JURISDICTION. Every fact essential to jurisdiction must affirmatively appear on the record of a judgment entered by a justice of the peace.
6. ———: JUDGMENT: VACATION: RECORD. A judgment of a justice of the peace, setting aside a judgment because it was entered against defendant in his absence, is void if the record fails to show that defendant gave plaintiff the notice in writing which the statute requires.
7. ———: ———: ———: RECITALS. A mere recital in the docket entry of a judgment by a justice of the peace that proof of a notice essential to jurisdiction was filed is not legal evidence of that fact in absence of such a filing.
8. ———: ———: VALIDITY. A judgment of a justice of the peace, setting aside a former judgment against defendant because he was absent when it was rendered, may be held void in a proceeding in error, where the only record of a notice to plaintiff in writing ap-

pears in the transcript in the form of a paper purporting to be such a notice, without any officer's return or other evidence of service, except a mere recital in a docket entry of the judgment that proof of service of notice was filed, there being no such filing.

APPEAL from the district court for Platte county: A. M. POST, JUDGE. *Reversed.*

*Albert & Wagner, for appellant.*

*McElfresh & Walker, contra.*

Heard before MORRISSEY, C. J., ALDRICH and ROSE, JJ., RAPER and STEWART, District Judges.

PER CURIAM.

Plaintiff commenced this action before William O'Brien, a justice of the peace for Platte county, to recover $150 on account of the negligence of defendant in running an automobile into, and thus damaging, plaintiff's automobile on a public highway. Defendant was summoned, but made default, and upon the hearing of the evidence on behalf of plaintiff judgment was rendered in his favor July 12, 1917, for $55 and costs taxed at $4.75. The next day, July 13, 1917, defendant presented a motion to set aside the judgment on the ground that it was rendered in his absence. He also confessed judgment for costs. Whereupon the justice of the peace entered judgment against defendant for costs, conditionally vacated the judgment for damages, and set the cause for trial July 24, 1917. Plaintiff failed to appear at the time appointed. The justice of the peace then heard the witnesses on behalf of defendant, vacated the judgment for damages, dismissed the cause, and entered judgment against plaintiff for costs taxed at $8.40. To vacate this latter judgment plaintiff filed a petition in error in the district court for Platte county September 4, 1917. In that court there was a hearing upon the petition in error and the transcript of the proceedings of the justice of the peace. This resulted in a finding by the district court that there was not error in such proceedings. The judgment assailed in the pro-

ceeding in error was affirmed. Plaintiff has appealed to the supreme court.

It is argued here that the judgment of the district court is erroneous because the transcript shows on its face that the justice of the peace did not have jurisdiction to set aside the judgment in favor of plaintiff for damages. This assignment of error is based on defendant's failure to give plaintiff the statutory notice in writing before proceeding to set aside the judgment in his favor. From this position there seems to be no escape under the statute and our former decisions.

The judgment in favor of plaintiff for damages was regularly entered by the justice of the peace. Jurisdiction to set it aside because it was rendered in the absence of defendant was as essential as jurisdiction to render judgment in the first instance. The right to have a judgment set aside on that ground is an arbitrary creation of statute. Judicial exercise of the power depends on a compliance with the statute. The method of acquiring jurisdiction to set aside the judgment in favor of plaintiff for damages because it was rendered in the absence of defendant is prescribed by statute. Before defendant could invest the justice of the peace with jurisdiction for that purpose he was required (1) to make his motion within 10 days; (2) to pay or confess judgment for costs; (3) to give plaintiff notice in writing. There was compliance with the first and second conditions. Compliance with all three was necessary. The last condition applies to defendant, and reads thus:

"Third—that he notify in writing the opposite party, his agent or attorney, or cause it to be done, of the opening of such judgment and of the time and place of trial, at least five days before the time, if the party reside in the county, and if he be not a resident of the county, by leaving a written notice thereof at the office of the justice ten days before the trial." Rev. St. 1913, sec. 8447.

To show jurisdiction under these provisions of the statute, defendant relies on an entry appearing in the docket

of the justice of the peace and an unserved paper appearing in the transcript in the form of a written notice. The docket entry, which appears to be a part of the final judgment itself, recites:

"July 24, 1917, at 2 o'clock p. m., the defendant filed proof of the service of notice upon the plaintiff of the opening of said judgment and the time and place of trial."

There are two fatal objections to this docket entry. The first is that it fails to state that the notice was "in writing." The second is that the entry or recital does not disclose when or how the notice was served—facts essential to jurisdiction. *Duval v. Johnson,* 90 Neb. 503. The statute requires notice in writing. There is nothing in the transcript to show that notice in writing was given. In *Kuker v. Beindorff,* 63 Neb. 91, it was held:

"The records of inferior courts must affirmatively show that such courts have acted within the scope of their authority."

In the same case it was further held:

"Jurisdictional facts will not be presumed in order to sustain the judgments of inferior courts."

In *Muller v. Plue,* 45 Neb. 701, it was held that a personal judgment without jurisdiction of the person is void, the court saying:

"The doctrine of presumptions in favor of the regularity of the proceedings of courts of general jurisdiction does not apply to courts of inferior and limited jurisdiction, but as to such courts, the facts necessary to give jurisdiction must fairly appear from the record."

In *Howell v. Gilt Edge Mfg. Co.,* 32 Neb. 627, the rule was stated in this language:

"The judgments, in this instance, are those of an inferior court without the legal presumptions in its favor, and every fact essential to jurisdiction ought to appear affirmatively of record."

It follows, therefore, that, for the purposes of showing jurisdiction, the docket entry or final judgment setting aside the original judgment in favor of plaintiff for dam-

ages and dismissing the cause is fatally defective.

The document relied upon to show notice in writing, and, consequently, jurisdiction in connection with the docket entry described, appears in the transcript in the following form, omitting the title and the signature:

"The plaintiff is hereby notified that the judgment rendered for defendant (plaintiff) in the above cause is conditionally set aside; and a trial will be had in said action before said William O'Brien at his office in the City of Columbus, Nebr., on the 24th day of July, 1917, at 2 o'clock p. m. Dated this 14th day of July, 1917."

The fatal defect in this paper is that there is nothing in the transcript, such as a certificate or an affidavit or an officer's return or a consent or an appearance, to show that it was served on plaintiff, and the docket entry, as already shown, does not supply the omission. Service on plaintiff of the statutory notice in writing was a jurisdictional fact which does not affirmatively appear on the record of the justice of the peace as that record is shown by the transcript certified by the magistrate himself. The conclusion must necessarily be, since the transcript, importing verity, and to which no objection is made, does not contain a paper showing that "the defendant filed proof of service of the notice," that no such proof was filed. *McKenna v. Pleasant*, 96 Neb. 581.

The order of the district court affirming the final judgment of the justice of the peace setting aside the original judgment for damages and dismissing the case was therefore erroneous. On the transcript of the proceedings of the justice of the peace, as such transcript now appears in the record, the void judgment should have been vacated in the proceeding in error. It follows that the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

GEORGE W. VEST, APPELLANT, V. FARMERS COOPERATIVE ELEVATOR COMPANY ET AL., APPELLEES.

FILED APRIL 19, 1922. No. 22065.

1. **Corporations: SALE OF STOCK: MISREPRESENTATIONS: RESCISSION.** Where the manager of a corporation is authorized to sell shares of its capital stock, and in negotiating sales thereof falsely and fraudulently represents the condition of the company and the value of its capital stock, such representations will be regarded as the representations of the company; and where a purchaser, without knowledge of the true condition of the company and the value of its capital stock, relies upon such false representations, he may, upon the discovery of the fraud, rescind the contract and recover the money paid.

2. ———: ———: ———: ———. Evidence examined, and *held* that plaintiff acted with reasonable promptness to discover the fraud and to tender back the shares of stock purchased and demand a rescission of the contract of purchase.

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

*W. D. Oldham, Fred A. Nye* and *M. H. Warlock,* for appellant.

*John A. Miller, N. P. McDonald* and *J. M. Fitzgerald, contra.*

Heard before MORRISSEY, C. J., DEAN, ALDRICH and DAY, JJ.

MORRISSEY, C. J.

Plaintiff brought suit in the district court for Buffalo county against the defendant Farmers Cooperative Elevator Company, of Riverdale, Nebraska, a corporation, and its officers and directors, to rescind a contract whereby plaintiff had purchased from the corporation ten shares of its capital stock. He alleged that he had been induced to purchase the stock through the false and fraudulent representations of the defendants and their agent; tendered

back the stock; prayed that it be canceled; that he be released from all liability thereon; and that he be awarded a judgment jointly and severally against each defendant for the sum paid, together with interest.

For answer defendants admitted the corporate existence of the elevator company; that the defendant Fred Bargman was its president, and the defendant A. E. Walter was its secretary, and that the other defendants were stockholders and directors of the corporation, and that one John Bolin had been employed as its manager. They allege that plaintiff did not rescind his contract of purchase within a reasonable time, and that in reliance on his continued membership in the corporation the stockholders had paid into the treasury the sum of $8,000, in assessments on their shares of capital stock. The answer contains also a general denial and an allegation that defendants' stock is worth more than par, the purchase price. Plaintiff filed a reply in the form of a general denial of all new matter set out in the answer.

During the progress of the trial, on motion, the court dismissed plaintiff's cause of action as to all defendants except only the corporation, and its president, Fred Bargman, and its secretary, A. E. Walter. As to these defendants the trial continued until all the evidence in behalf of plaintiff and in behalf of the defendants had been introduced and the cause argued and submitted for final determination. The court then made a general finding in favor of the three defendants named, and entered a dismissal of plaintiff's cause of action. No complaint is made of the first order of the court. Plaintiff's appeal is prosecuted from the final judgment which released the corporation, its president, and its secretary from liability.

Defendant corporation was organized in 1914, by a group of farmers, primarily for the purpose of operating a grain elevator. It appears to have prospered for a number of years. Finally, it engaged in the lumber and implement business as well as in the grain business. From time to time dividends were declared, both in cash and in stock,

and the books of the corporation showed it to be prosperous, and making money. During the years 1918 and 1919, and for some time preceding, the defendant Bargman was president of the corporation. He was during the same period engaged in the banking business in Riverdale and held only a small block of stock in the corporation. Although president of the corporation, he was not actively and personally in charge of its management and business, but devoted his time chiefly to the banking business. During the same period the secretary, Walter, was a farmer and divided his time between his farm and the elevator. He was not at any time the active head or manager of the corporation. One Bolin, who is not shown to have been a stockholder or officer, was the active head and manager of the business during all the time plaintiff was negotiating for the stock which he purchased.

In addition to his authority to buy and sell grain and to conduct the lumber and implement business, Bolin had authority to sell shares of the capital stock in the corporation. Early in the year 1919 the corporation arranged to sell additional shares, and plaintiff arranged to buy one share at the par value of $100. At this time, however, the corporation had not procured from the state bureau of securities a permit for the sale of its capital stock, so, by mutual agreement, plaintiff's money was merely taken on deposit and the certificate of stock was not actually issued. Before November following the corporation procured the necessary authority for the issuance of its shares of stock, and in the interim plaintiff talked with the defendants Bargman and Walter, with the manager of the corporation, Bolin, and with others about the corporation and its business, and it is his contention that the parties mentioned falsely and fraudulently represented the financial condition of the corporation; and that he relied upon their representations, and, without knowledge of the true condition of the corporation, and believing it to be a prosperous, money-making institution, in November, 1919, paid to the corporation through its manager an additional $900 and

there was then issued to him a certificate for 10 shares of the capital stock of the corporation; that under an agreement with the manager this certificate was dated October 24, 1919, although in fact it was issued in November, 1919. Inasmuch as no certificate was issued on the deposit of the first $100 paid, and it appears to have been treated by both parties as a deposit to be used by the company only after the corporation secured permission to issue stock, and was finally merged in the payment on the certificate issued, the whole transaction may be treated as one culminating upon the day that the $900 was paid and the certificate of stock issued, November 22, 1919. Plaintiff testified that before making the first deposit he talked with the defendant Bargman, but his testimony does not show any representations made by Bargman as to the condition of the business or the value of the stock, further than to say "that they were getting along pretty good, and that they paid pretty good dividends, and that they paid 12 per cent. interest." He testified that the manager, Bolin, urged him to buy stock and represented that it was then worth $164 a share; that the corporation paid 12 per cent. "interest;" that it had been paying good dividends and that 20 per cent. stock dividends would probably be declared. He testified that he asked Mr. Walter, the secretary, why the company sold stock worth $164 for $100, and Mr. Walter explained that the company was doing that in order to escape paying income taxes, and that the money derived from the sale of stock would enable the corporation to discount its bills. He testified to a second conversation with the manager, and that the manager assured him the company was doing well, and that if it did as well for the succeeding six months as it had done during the preceding six months it would pay a dividend of 25 per cent., and that it might pay even a greater dividend, and that the stock was then worth $184 a share; that at the time of making the final payment of $900 he again talked to the manager and was assured that the lumber business was out of debt. He admitted having talked to a number

of parties, but claimed that in making the purchase he relied upon the representations made by Bargman and Bolin, "and the others."

Let us consider his testimony as to the representations made by the manager, Bolin. These representations have heretofore been indicated. The testimony of plaintiff, in so far as it deals with the statements made to him by Bolin, are not denied and we accept it as true. We find, then, that Bolin represented the company to be doing a profitable business, that it owed no debts, and that its books showed the capital stock to be worth, according to his first statement, $164 a share, and, according to his second statement, $184 a share. We think the evidence also shows that plaintiff relied upon these representations and, so relying, invested his money. It appears that at the time these representations were made Bolin was the active head and manager of the corporation; he was in charge of its business and made the sales of stock on its behalf. His representations were false and fraudulent, but we find nothing in the record to warrant a finding that either Bargman or Walter was guilty of misrepresenting the condition of the company; that they had any knowledge that it was financially embarrassed, or that its stock was of less value than the books showed it to be. Nor does it appear that either knew, or had reason to know, that the books of the company did not make a true disclosure of the condition of the company, or that the manager was making false representations as to its condition.

Whatever the condition of the company may have been, we find nothing which would warrant a judgment against the defendant Bargman, or defendant Walter. We fully concur in the conclusion reached by the trial court as to these defendants. But as to the other defendant, the corporation, we feel constrained to reach a different conclusion. As we have said, plaintiff's testimony as to the representations made by Bolin is uncontradicted. We have, therefore, a situation where the plaintiff, a farmer living in the neighborhood of this elevator, was solicited by the

manager of the company to invest in its capital stock. Its manager represented that it had in the past paid large dividends to its stockholders, that its debts were paid, and its stock was worth $164 or more a share. Relying on these representations plaintiff invested his money November 22, 1919. Before the close of that year the manager tendered his resignation. He continued to hold his place, however, until sometime in January, 1920. Upon investigation made early in the year 1920 by an attorney and an accountant employed by the stockholders to conduct an investigation into the affairs of the company, it was found that the company was insolvent, that its capital stock was not of the value it had been represented, but was of little, if any, value. It is not possible to determine from the books and records of the company its exact condition upon the very day that plaintiff paid his money, but no satisfactory explanation is made of the great difference which appears in the financial condition of the company soon after plaintiff became a stockholder and its condition as it had been represented to be by the manager when plaintiff paid for the stock. The most tangible evidence consists of the various exhibits purporting to show the condition of the company for some time before plaintiff made his investment and for some time thereafter, together with their elucidation by the oral evidence of an expert accountant. There is much of this evidence that is, perhaps, incompetent, but there appears to be sufficient competent evidence to show that the insolvent condition of the company as it was found after the resignation and retirement of the manager was not produced by anything that occurred after plaintiff became a stockholder, but rather that it was a condition that had existed for some time prior thereto. The stockholders and officers appear to have been in total ignorance of the true condition of the company and no culpability appears except such as may be charged to the manager. We cannot escape the conclusion that he, with knowledge of the true condition of the company, made the representations falsely and fraudulently, as is alleged by plaintiff, and the

corporation is bound by his acts. *Olcott v. Bolton,* 50 Neb. 779, and cases therein cited.

Appellees assert that plaintiff did not proceed within reasonable time and with due diligence after the discovery of the fraud, and that he is therefore estopped to maintain this action. After the manager tendered his resignation, the stockholders generally, plaintiff with the rest, realized that all was not well with the company. Stockholders' meetings were held. Plaintiff attended these meetings, and various methods were proposed to ascertain the condition of the company. It is claimed that plaintiff participated in these meetings. He denies that he voted in these meetings or took any part except on one issue, viz.: It was proposed that a levy be made against stockholders, and the motion was stated in such a way that it would bind plaintiff to retain his stock and continue as a member of the company. He admits that he voted on this question, but says that he voted against it. Following these meetings certain of the stockholders paid into the treasury assessments on their stock. In view of the difficulties encountered in ascertaining the true condition of the company, we cannot say that plaintiff was guilty of laches or that he might with reason be expected to move more promptly than he did.

There is the further contention that plaintiff failed to make a sufficient tender of his stock. This contention is not, however, sustained by the evidence. From the condition of the entire record it appears that, after the discovery of the fraud, with reasonable promptness, he took the necessary steps to tender back his stock, demand his money, and a rescission of the contract.

We therefore find that, as to the defendant Farmers Cooperative Elevator Company of Riverdale, the judgment of the district court should be reversed, with instructions to enter a judgment in favor of plaintiff and against said company as prayed for in plaintiff's petition, and that in all other respects said judgment be affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

JOHN B. VEST, APPELLANT, V. FARMERS COOPERATIVE ELEVATOR COMPANY ET AL., APPELLEES.

FILED APRIL 19, 1922. No. 22066.

**Case Followed.** The determination of this case is controlled by the holding in *Vest v. Farmers Cooperative Elevator Co., ante,* p. 407.

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

*W. D. Oldham, Fred A. Nye,* and *M. H. Worlock,* for appellant.

*John A. Miller, N. P. McDonald and J. M. Fitzgerald, contra.*

Heard before MORRISSEY, C. J., DEAN, ALDRICH and DAY, JJ.

MORRISSEY, C. J.

In all essentials the issues presented in this case are the same as in (No. 22065) *Vest v. Farmers Cooperative Elevator Co., ante,* p. 407. On the trial in the court below it was stipulated that the cases should be tried together and submitted to the court, "but such evidence as is not competent in one case and is competent in the other shall not be considered by the court in the decision of the case in which such evidence is not entitled to be admitted."

The evidence relating to the rights of the parties differs on immaterial matters only and the court below entered a similar judgment in each case. In the disposition of the questions presented herein we adhere to the holdings announced in No. 22065. The judgment of the district court is therefore affirmed as to the defendants Bargman and Walter, but as to the defendant Farmers Cooperative Elevator Company the judgment of the district court is set aside and the cause remanded, with directions to the district court to enter a judgment in accordance with the opinion in No. 22065.

AFFIRMED IN PART AND REVERSED IN PART.

STATE, EX REL. MANLEY E. BAIRD, APPELLANT, V. ERNEST M. SLATTERY, APPELLEE.

FILED APRIL 19, 1922. No. 22141.

1. **Mandamus: OFFICIAL BONDS: APPROVAL.** The officer, whose duty it is to approve an official bond, will not be compelled by mandamus to file and indorse his approval upon the same unless it complies with the statute.
2. ———: ———: ———. Nor, in such a case, where it is alleged in a petition, to which a general demurrer has been filed, that such officer approved the bond in violation of the statute, will he be compelled by mandamus to enter of record evidence of such approval for the benefit of one who has failed to follow the directions of the statute.

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

*F. S. Baird* and *G. T. H. Babcock,* for appellant.

*J. E. Porter* and *E. M. Slattery, contra.*

Heard before MORRISSEY, C. J., LETTON, FLANSBURG and ALDRICH, JJ.

LETTON, J.

Proceedings in mandamus to compel the county judge of Dawes county forthwith to indorse upon the official bond of relator, as county commissioner of Dawes county, his approval of the same. A demurrer to the petition was sustained and the action dismissed. Relator appeals.

The petition alleges that relator was elected county commissioner for the third commissioner district of Dawes county at the November election, 1921, for a term of four years, to begin on the first Thursday after the first Tuesday in January, 1921; that on January 6, 1921, he filed a bond in due form with a penalty in the sum of $2,000, "which bond was joint and several in form and was signed by relator, *by his duly authorized thereunto agent,* as principal therein, and by the Lion Bonding & Surety Company,

a Nebraska corporation, as surety; * * * that on January 6, 1921, defendant said he would approve said bond, and immediately he did approve it and marked the same filed and spread the same upon the records kept by him in his said office as county judge for that purpose, but he has neglected and now refuses to indorse upon said bond a certificate of approval thereof; that immediately thereafter said defendant received from relator by the hands of his agent aforesaid a properly signed and sworn-to oath of office as such commissioner. * * * And relator is entitled under the law to have the defendant as it is his official duty to indorse upon said bond the fact of its approval as well as the date of its filing."

The sections and parts of sections of the Revised Statutes, 1913, bearing upon the question are 5707, 5711, 5713, 5717, and 5721. Under these sections it is the duty of a person elected to a county office to file a bond in the penal sum required by the statute, with the oath of office indorsed thereon, on or before the time specified.

The oath of office was not indorsed upon the bond which was tendered to the county judge. This is required by two sections of the statutes. There was an evident purpose on the part of the legislature to preserve the oath and bond together, and the county judge was fully within his powers and duties if he refused to accept and approve such a bond. To approve it without the oath would be a patent disregard of the law.

Under section 5725, Rev. St. 1913, as amended by chapter 110, Laws 1917, the penalty required by law for the official bond of commissioners in counties of the population of Dawes county is in the sum of $2,000. The tendered bond did not strictly comply with the statutes in this respect. The bond in question is for double this amount, and while this irregularity perhaps would not relieve either the principal or surety in case of a breach of the bond, there was no duty resting upon the respondent to approve a bond not executed in accordance with the provisions of the law.

If the allegations of the petition are taken as true, the

purpose of this proceeding is to compel the respondent to spread upon the record evidence of the fact that he had violated the law. It is true that the demurrer admits all allegations of the petition, well pleaded, but the court will not grant the writ of mandamus to compel an illegal act, or to compel evidence of such a violation of law to be recorded for the benefit of one who has failed to follow its directions. The allegation that an oath was filed, not before, but immediately after the approval, shows that the relator was in default of his duty when he tendered the bond. If he desired to accept the position to which he had been elected, he should have complied with the conditions precedent which the statute required. If the statute is unjust, or if it places too great a penalty on dilatoriness, it is for the legislature to amend it.

It may be said that to admit the allegations of a petition by demurrer in a case where the briefs indicate that there is a conflict as to the facts is a dangerous practice for the demurrant, and is an unsatisfactory manner of presenting the true issue to a court.

We find it unnecessary to consider or discuss the question whether the plea that an official bond was signed by the principal, "by his duly authorized thereunto agent," pleads the execution of a valid and legal bond.

No legal duty is upon respondent to indorse his approval upon the tendered bond.

AFFIRMED.

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NEBRASKA NATIONAL BANK V. UNION STOCK YARDS NATIONAL BANK ET AL., APPELLEES: FREDERICK W. CLARKE, APPELLANT.

FILED APRIL 19, 1922. No. 21974.

1. **Banks and Banking:** LIQUIDATION. Where a national bank goes into voluntary liquidation, its corporate existence is preserved for that purpose.
2. ———: ———: OFFICERS: CONFIDENTIAL RELATIONS. Where a

director who is also the cashier of a national bank which goes into voluntary liquidation does not resign either office, he retains his confidential relations to the corporation and its stockholders, in absence of an agreement to the contrary, though his salary as cashier ceases.

3. ———: ———: DUTIES OF CASHIER. Services performed by the cashier of a national bank in collecting and disbursing funds with the consent of the liquidating agent pending voluntary liquidation are not outside the scope of the cashier's duties.

4. ———: ———: CASHIER: COMPENSATION. The circumstances outlined in the opinion *held* not to imply a contract between a liquidating bank or its liquidating agent and the cashier to pay the latter, who is also a stockholder and a director, compensation for services in the work of liquidation.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

*Brogan, Ellick & Raymond,* for appellant.

*Myron L. Learned* and *E. M. Morsman, Jr., contra.*

Heard before MORRISSEY, C. J., DAY, DEAN, FLANSBURG and ROSE, JJ.

ROSE, J.

This is a proceeding in the nature of a bill of interpleader. The Nebraska National Bank, plaintiff, alleged that it had in its possession to the credit of the Union Stock Yards National Bank, defendant, a balance of $13,148.55, and that defendants Engelbert F. Folda and Frederick W. Clarke claimed to be adversely interested in the funds. Upon the filing of the petition plaintiff was ordered to pay the money into court. There was a compliance with the order and plaintiff was discharged from liability for disbursement.

The funds in controversy were deposited in the Nebraska National Bank, plaintiff, to the credit of the Union Stock Yards National Bank, defendant, under the following circumstances: The latter is a liquidating bank. It went into voluntary liquidation January 3, 1911. It did not thereafter transact a commercial banking business,

but its corporate existence was prolonged for the purpose of liquidation. It has a successor with the same name, except that the word "Union" is omitted. The new bank or the successor, named the "Stock Yards National Bank," assumed generally the liabilities of the old or liquidating bank, the Union Stock Yards National Bank, defendant, and accepted most of its assets, but notes and other paper aggregating perhaps $600,000 were not included in the transfer from the old bank to the new. The principal business of liquidation was the collection of the notes and other paper retained by the old bank as its own property. Many of the notes were paid at maturity without question. Others were renewed and subsequently paid. In November, 1911, there were uncollected items aggregating in round numbers $105,000. The adjustment of these items covered a period of several years. Defendant Folda, president of the old bank, became its liquidating agent. He had been appointed by formal resolution of its stockholders December 31, 1910. The resolution provided that, in the event of his death, resignation, or incapacity, his successor, as liquidating agent, should be defendant Clarke. Folda did not die or resign or become incapacitated. He and Clarke were stockholders, directors and salaried officers of both the liquidating bank and its successor. Clarke left the latter November 1, 1913, and became president of the Nebraska National Bank, plaintiff. Both Folda and Clarke performed services in converting into cash assets retained by the liquidating bank. From the proceeds of these assets, after liquidation had run its course, there remained on deposit in the Nebraska National Bank, plaintiff, to the credit of the old or the liquidating bank, the Union Stock Yards National Bank, defendant, a balance of $13,148.55, the funds in controversy.

In an answer to the bill of interpleader the liquidating bank claimed the balance as owner, and pleaded, among other things, that Clarke had no title to or valid claim on the funds.

Clarke filed an answer containing a plea that the funds

are subject to an equitable lien in his favor to the extent of $10,000 for services performed by him in making collections during the course of liquidation under an implied contract for compensation.

Upon a trial of the issues raised by the pleadings, the district court made findings in favor of the liquidating bank, and denied the relief sought by Clarke. The latter has appealed.

The question presented by the appeal may be stated in this form: Do the circumstances imply a contract between the old bank or its liquidating agent and Clarke to pay the latter for his services in making collections? Clarke answers this question in the affirmative and invokes a rule which he quotes thus:

"A director or an officer rendering services outside the scope of his official duties may recover compensation therefor, although not provided for by express contract, if the circumstances are otherwise such as to raise an implied contract." Note to *Goodin v. Dixie Portland Cement Co.*, L. R. A. 1917F (79 W. Va. 83) 308, 319, and cases collected in note, pp. 319, 320.

On the other hand, the liquidating bank takes the view that Folda by express contract was engaged to perform these services, and that there was no implied contract with Clarke. In this connection it is argued that, in absence of an express contract, a director of a corporation is presumed to serve without compensation. *Goodin v. Dixie Portland Cement Co.*, L. R. A. 1917F (79 W. Va. 83) 308, and cases collected in a note on page 311.

Clarke performed services inuring to the benefit of the liquidating bank and its stockholders. This is conceded. He demanded payment of obligations, solicited settlements, and made adjustments; employed clerical help and attorneys; handled large amounts of money; disbursed proceeds in the form of dividends, and paid expenses of liquidation. A belief that he should charge a fee for his services was expressed in writing January 10, 1916, by Folda, the liquidating agent. Clarke's fidelity and skill in per-

forming services are not questioned. A spirit of generosity would suggest the payment of reasonable compensation without a contest. The question, however, arises on the implication of a contract, and the solution requires a view also from the standpoint of the liquidating bank and its stockholders. They exercised their power to appoint a liquidating agent and they selected Folda for that position. This was the final word on that subject from the source of power. The appointment was never revoked or changed or supplemented. Thereafter there was no meeting of the directors. Folda served as liquidating agent during the entire course of liquidation. The services performed by Clarke were generally services which Folda had been appointed to perform. Neither the liquidating bank nor Folda appointed Clarke to any new position in connection with liquidation. Clarke was not directed to reduce assets to money, nor was he promised remuneration. Independently of compensation, he was vitally interested in the assets. He was a heavy stockholder in the old bank and also a director and the cashier. He retained these relations to the end. As cashier of the old bank he handled its funds and kept them temporarily on deposit in the new bank of which he was for a time vice-president. When his salary as cashier of the old bank ceased, his salary as vice-president of the new bank commenced with an increase in amount. The new bank occupied the offices of the old. The assets retained by the old bank remained in the hands of Clarke as vice-president of the new bank and clerical help of the latter was used in the work of liquidation. The old bank remained a corporation. Its officers were the same after the change. As a director of the old bank Clarke was a fiduciary of its stockholders. He was their trustee. As cashier of the old bank he still handled their funds. These relations did not change when liquidation began. Interested as a stockholder in dividends arising from proceeds of the assets and interested in securing these trust funds for temporary deposit in the new bank of which he was vice-president, Clarke did not ask for a

fee until 1916, a period of five years, though he paid his own expenses of liquidation out of deposits under his control as cashier of the old bank. He never made any record of services or of charges therefor. While paying regular expenses of liquidation he drew personal dividends out of funds collected by him and waited five years before intimating that he expected to be paid for his services. In voluntarily notifying debtors to pay their obligations and in voluntarily receiving and disbursing funds without objections from the liquidating agent, Clarke did not go beyond the scope of his duties as cashier of the old bank under the circumstances, though he might properly have made a timely demand for compensation or have turned the assets and the entire work of liquidation over to Folda. The inference that he was prompted by personal interest in the assets and by his individual and fiduciary relations with both the old bank and the new seems stronger than the implication that the old bank or Folda agreed to pay him for his services. The opportunity to apply on compensation for voluntary services of a trustee trust funds subject to his check is a temptation to which a fiduciary should not be exposed unnecessarily. The better view of the circumstances and of the rules of law and equity applicable to the facts seems to be that Clarke is not entitled to compensation under an implied contract.

AFFIRMED.

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## A. C. DUNNING, APPELLEE, V. WESTERN UNION TELEGRAPH COMPANY, APPELLANT.

FILED APRIL 19, 1922. No. 21551.

1. **Commerce: INTERSTATE COMMERCE: POWER TO REGULATE.** Power to regulate interstate rates and the like, as affecting railroads and telegraph companies which are engaged in interstate commerce, has been conferred by congress upon the interstate commerce commission and such control cannot be interfered with by state laws.

2. **Courts:** FEDERAL STATUTES: CONSTRUCTION. When the supreme court of the United States has construed an act of congress, the meaning placed thereon by that court controls the action of the state courts.

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

*Francis R. Stark, King, Bittner & Campbell* and *Brogan, Ellick & Raymond,* for appellant.

*Mills, Beebe & Mills, contra.*

Heard before LETTON, DAY and DEAN, JJ., BLACKLEDGE and TEWELL, District Judges.

DEAN, J.

Plaintiff is a buyer and shipper of grain and operates a grain elevator at Shelby, Nebraska. Defendant is a receiver and sender of telegraph messages for hire. August 11, 1917, plaintiff sent an interstate Western Union telegram from Shelby, Nebraska, addressed to "The Andrew McClelland Mercantile, Industrial & Realty Co.," a grain dealer at Pueblo, Colorado, quoting and offering for sale a carload lot of number three oats at a price therein named. Owing to a mistake by defendant's employee, which occurred at its office, in substituting the name of another firm on the telegram of acceptance, for that of the McClelland company which accepted the offer, plaintiff alleged that he suffered damages in the sum of $225 and sued to recover that amount. The case was tried to a jury, and a judgment on the verdict in that sum was rendered, from which defendant has appealed.

Following are the material facts: The telegram containing plaintiff's offer was received at Pueblo and delivered to the McClelland company and on the same day the offer was accepted by that company by wire. But in sending the telegram of acceptance to plaintiff at Shelby the name of "Herman Merc. Co.," also a grain dealer at Pueblo, was substituted at defendant's sending office for that of "The Andrew McClelland Mercantile, Industrial &

Realty Co." A copy of the telegram as forwarded by defendant and received by plaintiff follows: "Pueblo, Colo. 8-11. To A. C. Dunning, Shelby, Nebr. Wire received book one car three white oats price quoted. (Signed) Herman Merc. Co."—so that plaintiff was not at all notified of the acceptance of the offer by the McClelland company. However, plaintiff, having no knowledge of the substitution in name, shipped the car of oats in good faith to the Herman company and wrote them that the shipment had been made. Upon receipt of plaintiff's letter the Herman company, having ordered no oats and having no previous knowledge of the shipment, wired plaintiff that, if the order was booked it should be canceled. It transpired that on the disposition of the shipment to others, about 10 days thereafter, plaintiff sustained a loss of $225 by a drop in the market. Thereupon this action was brought to recover that amount on account of defendant's' alleged negligence in the premises.

It may be here observed that plaintiff's failure to question the receipt of a telegram signed by a party other than the one to whom he had quoted the price of oats is explained by a custom which is said to prevail among grain men and which is not questioned by defendant. The custom in question is that, where a grain dealer receives such a quotation on grain, which he does not wish to buy, he hands it to some other dealer who wants to buy the offered grain at the price quoted and the latter wires an acceptance to the sender of the telegram.

On the ground that the telegram was interstate in character the Western Union Company cites and relies on the federal act of June 18, 1910 (36 U. S. St. at Large, ch. 309, sec. 7, pp. 539, 544, 8 Comp. St. 1916, sec. 8563), and denies liability in the premises. So far as applicable here the act provides:

"That the provisions of this act shall apply to * * * telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States, to any other

state, territory, or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act. * * * Provided, however, that the provisions of this act shall not apply to the * * * transmission of messages by telephone, telegraph, or cable wholly within one state and not transmitted to or from a foreign country from or to any state or territory as aforesaid. * * * All charges made for any service rendered * * * for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful; provided, that messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."

The federal act under consideration was construed in *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27. Chief Justice White in writing the opinion for the court said: "In the first place, as it is apparent on the face of the act of 1910 that it was intended to control telegraph companies by the act to regulate commerce, we think it clear that the act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the act to regulate commerce to establish, a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent and it may be conflicting local laws."

The *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U. S. 566, is a case which was decided June 1, 1921, wherein Mr. Justice Brandeis who wrote the opinion,

among other things, said: "The act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the act the companies had a common-law liability from which they might or might not extricate themselves according to views of policy prevailing in the several states. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because, when the rate is used, dissent is without effect."

On the face of the telegraph blank in evidence here the following language appears: "Send the following telegram, subject to the terms on back hereof, which are hereby agreed to." On the reverse side among other provisions we find this: "In any event the company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof."

It clearly appears that the mistake in affixing the name or designation, "Herman Merc. Co.," to the telegram by "The Andrew McClelland Mercantile, Industrial & Realty Co." to defendant's telegraph office at Pueblo was due to the negligence of defendant's employee at that office who received the message over the telephone and handed it to

the telegraph operator for transmission. To account for the mistake in taking the message over the telephone the rule of *idem sonans* has no application. It is obvious that there is almost no similarity of sound in pronouncing the names of the two firms. Certainly there is not enough to create confusion in the mind of an employee who exercised reasonable care. The evidence on this point can hardly be said to be in serious conflict and it amply supports the verdict.

The power to regulate interstate rates and the like, as affecting railroads and telegraph companies which are engaged in interstate commerce, having been conferred by congress upon the interstate commerce commission, the tariff rates of such companies when filed with and approved by the interstate commerce commission then become effective. In the present case the rates in question here were in effect when the facts occurred out of which this action arose. The federal government being supreme in the control of interstate commerce, as held by the supreme court of the United States, the state cannot of course interfere with that control. And it may be added that the act is so far reaching that the receiver of an interstate telegram, as well as the sender, comes within its meaning. *Klotz v. Western Union Telegraph Co.*, 187 Ia. 1355.

Under the law and the terms of the contract which are indorsed on the telegraph blank, and in view of the facts, plaintiff was entitled to a recovery on account of defendant's proved negligence. But defendant's liability on the ground of negligence having been limited to $50, plaintiff cannot recover more on that ground, even though, as the evidence shows, his damage considerably exceeded that sum as found by the jury.

When the supreme court of the United States has construed an act of congress, the meaning placed thereon by that court controls the action of the state courts.

For the reasons stated, the judgment is reversed and the cause remanded, with instructions to enter judgment for

plaintiff in the sum of $50 as of the date of the original judgment.

REVERSED.

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JAMES B. KING V. STATE OF NEBRASKA.

FILED APRIL 19, 1922. No. 22265.

1. **Criminal Law:** CONFESSIONS: ADMISSIBILITY. Where intimidation and threats have been used in an unsuccessful attempt to extort a confession from one charged with a felony and such person about three hours afterward makes a voluntary confession which is subsequently reduced to writing and is voluntarily signed by him two days thereafter, it is not error to receive such confession in evidence at the trial of a person for murder in the first degree.
2. ———: ———: ———. Where the evidence tends to prove that a defendant in a felony case has orally admitted his guilt, it is not error for the court to admit a written confession of substantially the same tenor which was voluntarily made and signed by him subsequent to such oral admission.
3. ———: INSTRUCTIONS. Where the court properly instructs the jury with respect to the credit that the jury should give to a written confession, it is not error to refuse to give an instruction offered by defendant which covers substantially the same ground.
4. ———: CONFESSIONS: ADMISSIBILITY. Where a defendant in a felony case is known to be a dangerous character, it is not error for those having him in charge to take reasonable and usual precautions to preserve their own and the safety of others by the use of handcuffs, and if at the time of signing a confession voluntarily made and voluntarily signed he was handcuffed, such facts cannot be successfully urged as prejudicial error.
5. ———: INSANITY: QUESTION FOR JURY. Insanity is a question of fact for the jury, and when interposed as a defense in a felony case and the evidence conflicts thereon, the verdict will not for that reason be disturbed if there is sufficient evidence to support the state's theory of sanity.
6. **Jurors:** QUALIFICATIONS. Where a prospective juror is examined with respect to his qualifications to serve as a juror in a felony case and he has stated that he felt able, notwithstanding such impression or opinion as he may have entertained from casually hearing about the case, or from reading about it in the newspapers,

to render a fair and impartial verdict, based on the evidence under the instructions of the court, it is not error for the court to overrule defendant's challenge of such juror for cause.

7. **Criminal Law**: EVIDENCE: PHOTOGRAPHS. Two photographs of a deceased person taken after his death were received in evidence in a felony case. One shows the location of a knife wound in his throat and the other shows two wounds in his back and one in his left arm. He died from the effects of the wounds, which were alleged to have been inflicted by defendant. *Held*, that reversible error cannot be predicated upon the reception of the photographs in evidence.

8. ———: CONFESSIONS: EXTORTION. Neither a sworn peace officer, nor any other person, is justified in attempting by an application of brute force to extort a confession from one then recently apprehended in the alleged commission of a homicide.

9. ———: ———: ———. Violence on the part of sworn peace officers akin to that of a frenzied mob, even though directed against one who has recently been apprehended in the unlawful taking of human life, in an attempt to extort a confession, is conduct unbecoming such officers and is condemned by the court.

10. ———: AFFIRMANCE. The assignments of alleged error examined, and *held* that the court did not err in overruling defendant's motion for a new trial, and *held* that the judgment on the verdict must be affirmed.

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

*H. A. Reese* and *Richard F. Stout*, for plaintiff in error.

*Clarence A. Davis, Attorney General*, and *Mason Wheeler, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, ALDRICH, DAY, FLANSBURG and DEAN, JJ.

DEAN, J.

James B. King was informed against in Lancaster county for murder in the first degree. The jury found him guilty and imposed the death penalty. His motion for a new trial was overruled and he was sentenced to death by electrocution. He prosecutes error to this court.

Following is a summary of the material facts: Defend-

ant is a convict who was at the time of the tragedy serving time in the penitentiary under an indeterminate sentence for burglary. His age was then 30 years. The charge is that he killed Robert L. Taylor, a penitentiary guard, by stabbing him with a knife in the throat and in the back and in his left arm. From the effect of the wounds Taylor died in less than a half hour while he was being carried by the attendants to the prison hospital. It was shown that defendant on a former occasion threatened to stab Taylor and for this he was reported at the warden's office. It also appears that Taylor afterward charged him on several occasions with the commission of offenses against the discipline of the prison and for all of these he was punished from time to time by being confined in the solitary cell house for periods ranging from three days to a week. This and other punishment, based on Taylor's reports to the warden, aroused defendant's resentment and caused his hatred for Taylor and furnished the alleged motive for the crime.

Taylor was killed May 11, 1921, at about 5 o'clock in the evening. Joe Elmore, an inmate, was the only eyewitness, being only about 10 feet away at the time. He testified that at about 4:30 in the afternoon, and shortly before the prison supper hour, he overheard Taylor and defendant engage in a dispute at defendant's cell door. He said that King stopped him as he was about to pass and said: "Taylor, you got my comb; I asked you for it once. I want it." To which Taylor replied: " 'You got a comb in there anyhow,' and walked on off, started to walking away. King says, 'That is all right, that is a state comb you took from me, and I want it; everybody is entitled to the state's stuff,' and Taylor kept going, and King says, 'Well, you will hear me.' "

Shortly after the supper hour, when the prisoners were returning from the dining room at about 5 o'clock, Taylor was standing at his post of duty as a prison guard at the foot of one of the stairways which leads up to the cells on the second and third floors. It was his duty to see that the

convicts on their way to and from the dining room marched in orderly and quiet procession. On the day in question defendant was near the head of the line when the prisoners began their march from the dining room. But as he stepped from the room into the corridor he dropped out of his place and, waiting for the others to pass, again joined the line, but this time at the rear, apparently to prevent interference with a premeditated design upon Taylor's life and to prevent ultimate detection. When defendant arrived at the place where Taylor stood on guard and alone he, without a word, drew a knife and plunged it into his throat. Taylor turned quickly and apparently tried to escape by running up the stairway, but defendant, before his victim's flight was fairly begun, again stabbed him twice in the back and once in his left arm. Taylor did not quite reach the landing at the head of the stairs, and when he was almost at the top he turned slightly to one side and, sinking down, he rolled down the stairway to the landing below. Defendant stood for a little while looking at Taylor lying at his feet and then turned away and deliberately walked to his cell.

Very soon afterward Elmore went on his way to his own cell. He testified: "I got to my cell, and he (defendant) was standing there in his door, and the only thing I heard him say was that he did not have nothing to lose." Subsequently, on the cross-examination, the witness testified that sometime before defendant stabbed Taylor, the time not being definitely fixed, he saw a knife in defendant's hand, which was about eight inches long and made out of a new file. The knife which was described by the witness corresponds with the description of the knife which is in evidence and which was found concealed in a broom in defendant's cell within less than an hour after Taylor was killed. Albert Bell, an inmate, and two or three others lifted Taylor from where he lay at the foot of the stairway to carry him to the prison hospital, but when they reached the penitentiary office he was dead.

R. T. Ritchie is an inmate who saw defendant standing in his cell door almost immediately after the killing. He

testified: "I looked around and King was standing in his door, and I walked over to King. I says, 'What is the trouble, King?' He said, 'I just killed one of them ——— that sent me to the hole (the solitary cell) the other day, and I am going to get the other one as soon as he gets to this cell?' " On the cross-examination Ritchie testified that defendant's language was: "Q. Now, somebody ran by and said that Taylor has been killed? A. Yes, sir. Q. And you walked right over to King's door? A. Yes, sir. Q. Did they say King has killed Taylor? A. Yes, sir. Q. You went right over to King's door, and you said, 'King, what is the matter?' A. Yes, sir. Q. And King said, 'I have just killed one of those ——— for putting me in the hole?' A. Yes, sir. Q. And 'there will be another one up pretty quick to search my cell and I will kill him?' A. Yes, sir. * * * Q. Had you ever seen King have a knife? A. Well, yes. * * * Q. Now, describe the knife you saw King have; well, just a minute—when did you see King have a knife? A. Three or four weeks before that. Q. What kind of a knife? A. Oh, a knife about like that. Q. How long, how big a knife? A. I don't know, a knife made out of—it looked like a piece of iron or something on there."

The prison physician testified that he saw defendant in his cell before he was taken to the warden's office and very soon after Taylor's death. He testified: "When we visited his cell first, he was sitting in a chair in his cell reading a newspaper, apparently very much unconcerned and cool. That was what aroused our suspicion." He further testified that defendant was the only man in the cells who was not standing and looking out between the bars as he and one or two others approached. The doctor said that on a subsequent occasion defendant admitted that the knife was his, but protested that he did not know how it came to be smeared with blood, nor did he know how certain spots of fresh blood happened to be on one of his shoes. The blood-stains on the knife and the blood-spots on defendant's shoe were pointed out by the doctor at the trial.

Marion Jones is a prison employee. He identified the

knife in evidence as the one that he found concealed in a broom in defendant's cell in the evening after Taylor was slain. He said that when the knife was found it was stained with blood. Jones also testified that some time afterward he heard defendant say to a convict named Anderson, in the solitary cell, that "We will expect to go to the chair in about a month. Anderson says, 'How is that, King?' King replied, saying, 'I bumped off Taylor today.'" On cross-examination Jones testified that, when he saw defendant in the evening just after the killing, he was calm, cool, collected and deliberate.

Charles Burns is a penitentiary employee. He said that he heard King talk in the solitary cell to a convict named Smith the morning after Taylor was killed. He testified: "A. Why, Smith asked King who found Taylor. He said he did not know; he said it was some slim fellow, and he says, 'Well, where was you, that you could not see who it was?' He says, 'I was in my cell planting my (knife) chisel.' Q. Did you hear anything more? A. Yes, sir; he then asked him where he found it. He said they found it in a broom; * * * he did not have any chance to ditch it any place else. Q. Did you hear him say anything else? * * * A. Oh, yes, sir; I heard him ask him how many times he had to hit him; he says, 'How many times did you hit him, King?' He says, 'three.'"

In less than an hour after the homicide defendant was hurriedly rushed by two or more of the guards into a convenient office or room at the penitentiary. The news of the tragedy having spread, they were almost immediately joined by a numerous company of persons, amongst whom were four or five peace officers, and some of these occupied positions of great responsibility. But, of course, none of these men were in any way connected with the prison nor with its management. The avowed object of the assemblage, to which we have referred, was to obtain a confession from defendant, but in spite of coarse epithets, intimidation and threats he repeatedly protested his innocence.

While the inquisition was in progress, for so indeed the unusual proceeding may well be named, some of those who participated in it, and while he was seated in a chair, brutally and repeatedly struck defendant in the face with clenched fists and otherwise maltreated him. Finally, one of the prison guards, with an oath and a vile epithet, proposed that defendant be taken out and hanged unless he confessed. It is almost needless to say that, up to this time, neither the warden nor the deputy warden were present, and it may here be added that all the guards who participated in the affair were discharged the next day by the warden. However, at about the time the boastful threat was made that defendant be executed, the deputy warden entered the room and, throwing one of the offending inquisitors aside, and with the remark that they must quit the "rough stuff," he immediately put an end to the cowardly proceeding.

The deputy warden at once took defendant alone to the prison library, where he told him that he would not talk to the men who had been abusing him, but that he would tell the deputy the truth if he would only see that the law took its course. The statement or written confession which is in evidence, which was subsequently obtained by the deputy warden, the deputy county attorney, and others, was afterwards written down. But it was not signed by defendant at the time nor until two days thereafter, namely, May 13, when, after he had two days for reflection, and after reading it, he signed it at the courthouse declaring, in the presence of witnesses, that the statements therein made were voluntary and that the signing was voluntary.

The statement consists, in very large part, of a detailed account of defendant's life and his varied experience in different parts of the country, which need not be here reproduced. When fully analyzed, so far as it has to do with the commission of the offense with which he is charged, the statement, except as to details which are elaborated at needless length, is substantially a repetition of the ad-

mission of guilt which defendant had already made to Ritchie, whose evidence has been hereinbefore noticed, and confirms the boast that Jones and Burns, penitentiary employees, overheard defendant make to fellow convicts with respect to the killing and some of the incidents connected with it. But before he made the statement in question, and before he signed it, he was very properly cautioned that it might be used against him at the trial. At most, when considered as evidence, the statement, omitting immaterial verbiage, may fairly be said to be merely cumulative.

At the courthouse, at the time of the signing, defendant appears to have been entirely composed and was, of course, in no fear of personal violence. The record does not sustain the argument that the statement in question was obtained through the hope of immunity or the fear of punishment. On the contrary defendant refused, as we have seen, to confess or to make any admissions while the gruelling tactics of the inquisitors were in progress. We hold that the admission of defendant's statement in evidence does not constitute reversible error. *Grammer v. State,* 103 Neb. 325.

Counsel argue that the court erred in refusing to give three instructions requested by defendant with respect to the credit that the jury should give to the written confession. Error cannot be predicated on the ruling complained of, in view of the court's instruction that defendant's confession and admissions alone would not warrant a conviction, but that they must be corroborated by competent evidence before he could be found guilty. That it was so corroborated sufficiently appears.

Objection is made, too, that defendant was handcuffed when he signed the statement. But in view of his then very recent conduct and a former attempt to commit great bodily injury upon Taylor when he was armed with a knife, it is not surprising that, within the bounds of humanity, reasonable precaution for personal safety should be taken.

Defendant interposed the defense of insanity. Some of the witnesses called by the parties were distinguished

alienists. Some were laymen. The evidence was not harmonious. But there was competent evidence going to show that defendant was sane. And counsel for defendant concede that some of the state's evidence on this point was competent. Insanity is, of course, a question of fact for the jury and not for the court. *Larson v. State,* 92 Neb. 24. However, it is argued that the jury were not properly instructed on this question. Defendant tendered several instructions and one so tendered was given. The others were properly refused, for the reason that the instructions which were given covered substantially all the material points which were raised in the tendered instructions. We do not find reversible error with respect to instructions given or refused.

Counsel contend that defendant was prejudiced by the court's ruling on the qualification of jurors. They insist that certain jurors were accepted, after defendant's peremptory challenges were exhausted, who were disqualified, and contend that such jurors had formed an opinion respecting the merits of the case from reading accounts of the homicide in the newspapers, or from talking with others about it soon after its occurrence. But it does not appear that any of the so-called opinions or impressions were created in the minds of the prospective jurors by talking with persons who held themselves out to know the facts or with persons who were witnesses, nor had any members of the panel read an account of the evidence in newspapers or elsewhere. The jurors who were accepted, and it may be added those who were rejected by peremptory challenge as well, testified, in substance, that they felt able, notwithstanding such impression or opinion, to render a fair and impartial verdict on the evidence submitted under the instructions of the court.

Questions relating to the impaneling of a jury, their qualifications, and the like, are discussed at some length in *Baxter v. People,* 3 Gil. (Ill.) 368. At page 377, it is said:

"Most jurors, when first inquired of as to their opinions,

have not been in the habit of carefully analyzing their minds on the subject, and the first answer which they give, especially to questions ingeniously framed to elicit a desired reply, may be very far from giving the true state of the juror's mind. Hence, it is not uncommon to observe, during the examination of the counsel on either side, the most palpable contradictions in the expressions used by jurors in giving the extent of their opinions, and that too by men of intelligence and integrity. It often happens that a juror may suppose that his belief in the existence of a certain fact, will constitute an opinion, when in truth it may be necessary to establish a great many other facts, before the guilt or innocence of the party could be established. A man may be charged with murder, and a juror may have no doubt but the person alleged to be murdered, was killed, and that the accused killed him, and yet have no sort of an idea whether the homicide were justifiable, excusable or felonious. No one will pretend that such a juror has an opinion of the guilt or innocence of the accused. If such opinions were to disqualify jurors, it would in very many, if not in a majority of instances, be utterly impossible to get a jury in these cases."

Section 468 of the Criminal Code, now section 9109, Rev. St. 1913, is an act which has to do with the selection of jurors in criminal cases. The act is construed in *Curry v. State*, 5 Neb. 412. We think the present case comes within the rule there announced. The *Baxter* case is cited with approval in the *Curry* case and, among other things, we there said:

"If, upon examination of a juror, it is shown that he has an opinion, founded upon rumor, newspaper reports, or hearsay, and it shall satisfactorily appear that the character of such opinion is such that it will not interfere with his rendering an impartial verdict, it is not error to admit him to the jury. Loose and unguarded expressions made by persons at the time the offense is committed and not thought of afterwards, are entitled to very little, if any, weight, as objections to a juror."

We adhere to the rule announced in *Curry v. State,* 5 Neb. 412. Abuse of discretion does not appear in the court's ruling in the respects noted.

Defendant complains of two photograph exhibits. Both were taken shortly after Taylor died. They show the location of the wound in the throat and of the wounds in his back and in his left arm. The argument is that they were introduced by the state for no other purpose than to inflame the minds of the jurors, and that "the offer constituted misconduct, to which the defendant took exception." Counsel argue that the same rule should apply to the introduction of photographs which has been applied to the flaunting of blood-stained garments before the jury.

There appears to be a recognized distinction in this class of cases with respect to the probative value of a photograph which accurately shows the location of the wound which caused death and the exhibition of garments which are stained with blood, unless, indeed, in the latter case it may be deemed expedient to introduce such exhibit to show the extent of the loss of blood of the deceased person. But, so far as the objection may apply to the facts before us, it must be borne in mind that, defendant having pleaded "not guilty," every issue in the case was thereby controverted and it was then incumbent on the state to introduce the best evidence within its power to controvert the plea and prove defendant's guilt. The state did nothing more than that. The pictures are not inflammatory. They are mere silent witnesses which show at a glance the location of the wounds. *People v. Elmore,* 167 Cal. 205; *Franklin v. State,* 69 Ga. 36; *People v. Lee Nam Chin,* 166 Cal. 570.

In 2 Wigmore, Evidence, sec. 1157, with respect to the introduction in evidence of material objects, and nonverbal testimony generally, it is observed that the objection in the vast majority of instances is frivolous and that such objections have almost invariably been repudiated by the courts. With respect to the introduction of photographs the same author makes this observation:

"If a qualified observer is found to say, 'This photograph

represents the fact as I saw it,' there is no more reason to exclude it than if he had said, 'The following words represent the fact as I saw it,' which is always in effect the tenor of a witness' oath. * * * Such a rule (for rejection of a photograph) may be justified as an application of the general principle permitting the rejection of cumulative testimony; but not otherwise. The judge may properly warn the jury as to the peculiar deceptive possibilities of photographs, just as he may remind them of the possibilities of perjury for interested witnesses and others; but this is all; and this sufficiently protects the opponent, since he has an equal if not a greater opportunity of exposing photographic perjury than of exposing other sorts." 1 Wigmore, Evidence, sec. 792.

"A photograph proved to be a true representation of the person, place, or thing which it purports to represent is competent evidence of anything, of which it is competent and relevant for a witness to give a verbal description." 16 C. J. 744, sec. 1528.

It is not to be inferred from our ruling in respect of the written statement or confession, which is in evidence, nor from anything we have said, that we condone the behavior of those who made an attempt, which was at once inglorious and deservedly futile, to extort a confession from defendant by the reprehensible methods employed on the night of the murder. The outrageous conduct of the parties implicated in that proceeding meets, as of course it must, with our disapproval and is censured and condemned by the court. To be sure the community was much disturbed at the thought of the untimely end which so recently befell a subordinate state officer at the hands of an assassin, and he a ward of the state. But that is not the slightest excuse for an exercise of the methods which were practiced by the defendant's inquisitors just before the timely arrival of the deputy warden. The entire proceeding was an exhibition of brutal force. Such a spectacle does not demonstrate the possession of a spirit of real bravery and real heroism. It demonstrates the opposite.

Valor does not find expression in conduct so unseemly.

It is fortunate for the ends of justice that a confession was not extorted from defendant by the crude means which were employed. A confession so obtained and received in evidence would have caused a mistrial and a reversal of the judgment in a case where no cause exists for a reasonable doubt of defendant's guilt.

All of defendant's assignments of alleged error in a voluminous record have been examined and we do not find reversible error. It follows that the judgment of the district court must be, and it hereby is, affirmed. Friday, June 9, 1922, between the hours of ten in the forenoon and four in the afternoon of that day, is fixed as the date and the hour on which the sentence of the district court shall be carried into effect.

AFFIRMED.

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JAMES C. STORY, APPELLEE, V. FRANK SRAMEK, APPELLANT.

FILED APRIL 19, 1922. No. 22078.

Trial: SPECIAL FINDINGS: POWER OF COURT. "When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." Rev. St. 1913, sec. 7859. However, where the jury have been discharged and the special finding is inconsistent with the general verdict, it is error for the court to vacate and set aside the special finding and enter judgment upon the general verdict.

APPEAL from the district court for Hitchcock county: CHARLES E. ELDRED, JUDGE. *Reversed.*

*Walter D. James* and *Lambe & Butler,* for appellant.

*J. F. Ratcliffe* and *Stewart, Perry & Stewart, contra.*

Heard before MORRISSEY, C. J., LETTON, ALDRICH and FLANSBURG, JJ.

ALDRICH, J.

In this cause of action, which is one at law, defendant is

alleged to have agreed to put plaintiff in possession of certain real estate and the growing crops thereon on March 1, 1919. Defendant is alleged to have failed to keep the terms of said contract on his part. Plaintiff brings this action to recover damages for the breach thereof. The jury in its consideration of this matter brought in a verdict for the plaintiff in the sum of $1,240.86. The court submitted two interrogatories, which were answered by the jury as follows: (1) What do you find was the value on March 1, 1919, of the crop of wheat on the land? Answer, $900. (2) What do you find was the value of possession of the land on March 1, 1919, without the wheat? Answer, nothing. Thereupon the plaintiff moved the court to vacate and set aside the special findings. This motion the court sustained. The defendant's motion for a new trial was overruled and judgment was entered on the general verdict for $1,240.86, and from this judgment appeal is taken.

Now the question is: Did the court commit reversible error when it set aside these special interrogatories and entered judgment on the general verdict? This presents a fairly easy question for our consideration.

An examination of section 7859, Rev. St. 1919, shows that what the court did in this matter in sustaining the motion of plaintiff is diametrically opposed to the provisions of the statute. That action of itself entitles defendant to a new trial. This theory of the case is upheld in the case of *Culbertson Irrigating & Water Power Co. v. Olander,* 51 Neb. 539. The third paragraph of the syllabus meets the law question precisely as we have it in the instant case and is decisive of the situation here. It does not matter what citations there are on this point, they do not or cannot overrule the section of the statute which was enacted to afford relief for this situation when it would arise in the course of litigation, and it is this section of the statute which is decisive of this case under the facts. The plain remedy in this case, in our opinion, when such an inconsistency between the general verdict and the special findings exists, is to grant a new trial. The issue in

this case is: Can a trial court vacate special findings of the jury and then enter up judgment upon the general verdict? This is what led the court to commit reversible error. *Stevens v. City of Logansport*, 76 Ind. 498. That case was cited with approval in *Kafka v. Union Stock Yards Co.*, 78 Neb. 140. These cases are entirely consistent with the provisions of the statute.

Under the facts and evidence as submitted, we must reverse this case and remand it for further disposition, for the reason that the court accepted a verdict brought about by violation of the provisions of section 7859, Rev. St. 1913.

REVERSED AND REMANDED.

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MARY PULLIAM, ADMINISTRATRIX, APPELLEE, V. GUSTAF E. MILLER, APPELLANT.

FILED APRIL 19, 1922. No. 21890.

1. **Negligence:** PLEADING: ADMISSIBILITY OF EVIDENCE. Where a petition charges specific grounds of negligence as a basis for recovery, and also contains a general allegation of negligence on the part of the defendant in causing the damage, and where no motion for a more specific statement is filed, it is competent under the general allegation of negligence to offer evidence of any fact which contributed to the injury.
2. ———: SAFETY APPLIANCES. The law does not require the owner of machinery to use the most approved appliances to prevent injury or damage. It is sufficient if he uses machinery which is generally used for the same purpose, and which is reasonably safe when operated in the customary manner.
3. ———: QUESTION FOR JURY. Under the facts as disclosed in the opinion, it was for the jury to determine whether the manner of the operation of the tractor engine was negligence, and also whether it was negligence to use the tractor engine, under all the circumstances.

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

*John F. Cordeal*, for appellant.

*C. W. Meeker* and *Stewart, Perry & Stewart, contra.*

Heard before LETTON, DEAN and DAY, JJ., ALLEN and BEGLEY, District Judges.

DAY, J.

Plaintiff recovered a judgment against the defendant for $963 as damages for having negligently destroyed by fire 30¼ acres of growing wheat owned by the plaintiff's intestate. The defendant appeals.

It appears from the record that on July 15, 1919, at about mid-afternoon, the defendant was engaged in harvesting a field of wheat owned by him, using for that purpose a combined harvester-thresher propelled by a tractor having as its motor power a gasoline engine. This harvester-thresher, as the name indicates, cut and threshed the grain as it moved along. On the under side of the tractor, and connected with the cylinder by a short pipe, was the muffler drum, approximately 16 inches long and 18 inches in diameter. Connected to the muffler drum, and extending downward, was a short pipe, known as the "exhaust pipe." This pipe was about 3 inches in diameter and 6 inches long, its lower end being within 18 inches from the surface of the ground. The exposed end was covered with a cap. Several slits or openings were cut in this pipe for the purpose of allowing the gases from the engine to escape. During the progress of the work the tractor was stopped for the purpose of oiling some of the bearings, and in cranking the engine to start the tractor there was an explosion in the muffler drum which shot out a flame through the slits of the exhaust pipe and ignited the stubble underneath the tractor. The defendant had been operating the tractor by the use of kerosene, but at the time he was cranking the engine he was priming it with gasoline. At the time of the fire defendant had the machine adjusted so as to cut only the heads of the growing grain, leaving a stubble estimated by the witnesses at from 12 to 20 inches high. There is a dispute between the plaintiff's and defendant's witnesses as to the nature of the

wind at the time. All agree that it was blowing from the south, plaintiff's witnesses saying that there was considerable wind, and defendant's witnesses testifying to the effect that it was a slight wind, but that after the fire had started the wind raised. The wheat field of the plaintiff's intestate was immediately north of the defendant's field, being separated therefrom by the highway. The place where the fire started was approximately a quarter of a mile from the wheat field of the plaintiff's intestate. Notwithstanding the efforts made by the defendant and his men employed on the machine, together with the assistance of neighbors, to extinguish the fire, it spread into the wheat field of the plaintiff's intestate and destroyed 30 and a fraction acres of the wheat just ripe for harvest. It further appears that the defendant was inexperienced in the use of a tractor, having operated one but a few days prior to the fire. There is also proof on behalf of the plaintiff, denied by the defendant, that he had on the day before the fire used a piece of sheet iron as a spark arrester underneath the exhaust pipe, but that it had come off and that he had not replaced it.

A large number of errors are assigned for a reversal of the judgment, but it seems unnecessary that all of them should be considered. At the outset there is a sharp conflict between the parties as to the grounds of negligence alleged in plaintiff's petition. Defendant admits that two grounds of negligence are well pleaded, namely: First, that the defendant was negligent in failing to have the exhaust pipe of the tractor properly protected with a spark arrester or some other safety appliance to prevent the exhaust from the engine from igniting the stubble; and, second, in negligently permitting the fire to spread after it was started, and allowing it to spread to the wheat field of the plaintiff's intestate. It is now urged by the defendant that it was error to permit the introduction of any evidence, or to instruct the jury, upon any other theory than that set forth in the two grounds of negligence above indicated. On the other hand, it is contended by the plaintiff that, in

addition to the specific grounds of negligence pleaded, there was a general charge in the petition that the defendant negligently and carelessly started the fire, and under this general allegation it was proper to introduce evidence as to the manner of operating the tractor in starting it, as well as of the general circumstances under which it was then being used. The two grounds of negligence, to which reference has been made, are very clearly stated in the petition, and, in addition thereto, there is a clause which reads as follows: "While said defendant was so harvesting his said wheat on said northeast ¼, * * * as aforesaid, by his negligence and carelessness and failure to provide proper protection and spark arresters, * * * started, set and kindled, and caused a fire to catch in said stubble." If the pleader had alleged, "by his negligence and carelessness *in* failing to provide proper protection and spark arresters, etc.," then it would seem to be a fair interpretation of the petition to say that this clause referred back to the first ground of negligence pleaded, but by the use of the conjunction "and" in the clause of the petition, it appears that a wider meaning was intended. The phrase, "and failure to provide proper protection and spark arresters," in the clause above quoted, is parenthetical, so, reading the petition and giving to it a liberal interpretation, and stripping it of all unnecessary words, it is a charge that the defendant negligently and carelessly set and kindled a fire in the stubble. It is now well settled that a general allegation of negligence is good as against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant. *Omaha & R. V. R. Co. v. Wright,* 49 Neb. 456; *Omaha & R. V. R. Co. v. Crow,* 54 Neb. 747; *Union P. R. Co. v. Vincent,* 58 Neb. 171; *Chicago, R. I. & P. R. Co. v. O'Donnell,* 72 Neb. 900. No motion was made to make the petition more definite and certain, and the general allegation of negligence must be held sufficient. *Union P. R. Co. v. Vincent,* 58 Neb. 171. It would seem, therefore, that there was no error in admitting evidence tending

to show negligence in the manner of operating the tractor, or its operation, in view of the circumstances then present.

Complaint is made of the giving and refusal of certain instructions. It may be said that at least one of the instructions given is much too favorable to the defendant. Others seem to favor plaintiff. They are somewhat confusing and uncertain; but, when considered as a whole in connection with the facts in evidence, we believe defendant was not prejudiced by the giving or refusal of any of them. Defendant was a man unaccustomed to the use of a tractor; the exhaust pipe, according to the defendant's son, who measured the distance, was only 18 inches from the ground; the stubble which was so dry that the grain was threshed as it was cut, was admitted by defendant to be 12 inches high, and another witness testified it was from 16 to 20 inches high; so that the end of the exhaust, from which sparks or flame might be and were driven by an explosion, was in close proximity to, and in fact right among, the dry stubble. These facts of themselves, it seems to us, are sufficient to establish in the minds of reasonable men that the defendant was negligent in placing a machine of such nature in such an environment.

There can be no doubt of the right of a farmer to use a gasoline engine in aid of husbandry, and in such case the law does not require that he use machinery of the most approved type. It is sufficient, as against the charge of negligence in the use of a machine, that it is of a type which is in general use for the same purpose, and which experience has shown is reasonably safe when operated in the usual and customary manner. We do not wish, however, to be understood as holding that the use of appliances and machinery such as are in general use in a like or similar business, and which are reasonably safe when operated in the customary manner, is, under all circumstances, a complete defense. On the contrary, we think there may be circumstances under which a proper machine or other instrumentality being used in the customary manner may nevertheless make its use negligence. Under ordinary circum-

stances the smoking of a pipe is not regarded as a negligent act, but the smoking of a pipe in a powder factory would be regarded as negligence in the extreme.

The manufacturer of the tractor probably did not consider that it would be used with the exhaust in such close proximity to such an inflammable substance as dry stubble. The tractor was of the usual and ordinary manufacture, and would probably have been perfectly safe if used in a place where the attending circumstances did not present such a dangerous combination. The evidence is undisputed that the fire originated directly under the tractor after an explosion, and the jury were justified in finding for plaintiff. In fact, it seems to us no other conclusion was warranted by the evidence.

It is also urged that the instruction on the measure of damages is wrong, in that it fails to take into account the cost of harvesting, threshing, and transporting the grain to market. The instruction is not entirely clear. The general rule is that the measure of damages for the destruction of a growing crop is the value thereof in the condition in which it exists at the time of its destruction. *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745. In case the crop is matured the value is usually proved by showing the market value, less the necessary cost of harvesting, threshing, and transporting to market. In the present case there was testimony tending to show that the wheat was worth $2 a bushel, and that the field would yield 20 bushels an acre. While there is testimony as to the cost of threshing the wheat, there was none as to the cost of transporting it to market. The verdict was for $1,092. The trial court ordered a remittitur of $129, which was filed. While it is not clear why the trial court ordered this remittitur to be filed, in all probability the cost of transporting the wheat to market was the principal factor considered.

AFFIRMED.