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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

JANUARY AND SEPTEMBER TERMS, 1923

VOLUME CX

HENRY P. STODDART,
OFFICIAL REPORTER

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By Henry P. Stoddart, Reporter of the Supreme Court,
For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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[1] Resigned August 31, 1923.
[2] Appointed September 1, 1923.

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UNITED STATES

CONSTITUTION

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1923.

PETSCH & MCDONALD, APPELLEE, V. WALKER D. HINES, DIRECTOR GENERAL, APPELLEE: UNION STOCK YARDS COMPANY OF OMAHA, APPELLANT.

FILED MARCH 27, 1923. No. 22254.

1. **Carriers:** NEGLIGENCE: EVIDENCE: SUBMISSION TO JURY. In a suit against common carriers for damage resulting from their alleged negligence whereby they delayed the unloading and delivery of a shipment of live stock, the evidence summarized in the opinion is *held* sufficient to raise a question of fact to be submitted to the jury, and to support the verdict.
2. ———: DAMAGES. Where there is competent evidence in support of a claim for damages resulting from delay in unloading and delivering a shipment of live stock, and from a consideration of which different minds might arrive at different amounts, the verdict of a jury will not be held excessive when it is within an amount that seems fair and reasonable under the evidence.
3. **New Trial:** MOTION: DETERMINATION AT SUBSEQUENT TERM. Where a trial court takes a motion for a new trial, which is filed during the term at which a verdict is returned, under advisement and fails to pass upon the motion until after the term has been adjourned and a subsequent term convened, it does not lose jurisdiction of the subject-matter, but may then pass upon the motion and enter judgment.
4. **Jury:** PEREMPTORY CHALLENGES. The right to peremptory challenges in civil actions did not exist at common law, and any right thereto is dependent on statutes or rules of court.
5. ———: ———: RULE OF COURT. In this state the only authority for peremptory challenges in civil actions is by rule of court.
6. ———: ———: SEVERAL PARTIES. In civil actions where there are several plaintiffs or several defendants, generally all on one side constitute but one party and are entitled to three peremptory challenges, and no more.
7. ———: ———: PARTIES UNITED IN INTERESTS. In civil actions a party and an intervener whose interests are not adverse constitute a single party within the rule governing peremptory challenges.
8. ———: ———: PARTIES NOT UNITED IN INTERESTS. In civil actions

where several plaintiffs, interveners, or defendants set up separate and distinct causes of action or defenses, and have conflicting rights among themselves which the verdict of the jury will affect, in the furtherance of justice the court will allow each of such parties three peremptory challenges.

9. ———: ———: REFUSAL TO ALLOW. *Held,* under the facts disclosed, that the refusal of the court to grant additional challenges does not constitute prejudicial error.

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

Brown, Baxter & Van Dusen, for appellant.

Harry W. Shackelford, contra.

C. A. Magaw, Douglas F. Smith and *Thomas W. Bockes,* for Walker D. Hines, appellee.

Heard before MORRISSEY, C. J., ROSE, DAY and GOOD, JJ., TROUP, District Judge.

MORRISSEY, C. J.

Plaintiffs brought this action in the district court for Douglas county against Walker D. Hines, director general of railroads, and the Union Stock Yards Company. Plaintiffs alleged that on August 23, 1919, they delivered, at Haig, Nebraska, to the director general for transportation over the lines of the Union Pacific Railroad Company to Omaha, Nebraska, six car-loads of cattle; the cattle to be delivered to its commission firm through the agency of defendant Union Stock Yards Company. The petition further alleged that the defendants negligently delayed the delivery of the cattle and negligently detained them in the cars without furnishing them with feed or water or an opportunity to rest; that the negligence charged caused a shrinkage in the weight of the cattle to the plaintiffs' damage to the amount of $327.06, and further that, the cattle being delivered late in the day at an hour when the general market for the sale of such cattle had closed, plaintiffs' commission merchants were unable to sell them upon the day of their arrival and were

obliged to hold the cattle until the following day, when they were sold upon a falling market, all to the damage of plaintiffs in the sum of $759.64.

The director general filed a separate answer in which he denied any negligence upon his part in the delivery of the cattle.

The Union Stock Yards Company filed its separate answer alleging that on the day plaintiffs' cattle arrived at Omaha there existed unusual and extraordinary conditions at its stock yards; that upon that day live stock were received in such unprecedented numbers that it was impossible to handle them in the usual and ordinary manner. And it was further alleged that an extraordinary and unusual storm occurred at Omaha on the morning when the cattle arrived, and that this storm added to the difficulties arising from the congestion caused by the great number of cattle received and prevented the expeditious delivery of the cattle. The answer further alleged that plaintiffs' cattle were found to be afflicted with an infectious disease, and were, therfore, ordered into quarantine by a representative of the United States government; that they had to be run through a dipping vat before being released from the quarantine, and that this caused a delay in delivery, for which defendant was in no wise responsible and which caused a depreciation in the market value of the cattle.

Trial was had to a jury, which returned a verdict in favor of plaintiffs and against both defendants for $650. Thereafter, upon motion of the defendant the director general, an indemnity judgment in his favor and against the stock yards company was entered for the amount of the judgment. The Union Stock Yards Company only has appealed.

The principal error assigned goes to the sufficiency of the evidence to support the judgment. It is said in appellant's brief: "Plaintiffs having proved only a *prima facie* case of delay, and defendant having proved

without contradiction an unprecedented congestion, and plaintiffs having failed to prove in reply negligence in coping with the extraordinary circumstances, the record does not support a judgment in favor of plaintiffs and against this defendant."

In support of the quoted statement many citations are given. We have not examined them, but will assume that, if the facts were as appellant assumes them to be, its proposition of law might be applicable. Our examination of the record, however, leads us to a somewhat different conclusion as to the facts. The proof shows that the cattle were loaded at Haig, Nebraska, on the evening of August 23, on a train scheduled to reach Omaha August 25 at 6 a. m.; that the train arrived ahead of its scheduled time and was switched onto appellant's track No. 4, and the way-bills delivered to appellant at 5:48, twelve minutes before the time scheduled for the arrival of the train in Omaha. Upon this uncontradicted showing the trial court instructed the jury that neither negligence nor delay could be imputed to the director general in the transportation of the cattle from Haig to Omaha, but the director general being a common carrier it was his duty to provide reasonable facilities for the delivery of the cattle at destination, and not having provided such facilities, but having employed the Union Stock Yards Company to furnish them and to unload and deliver the cattle to the consignee, the Union Stock Yards Company became in legal effect the agent and servant of the director general. And if the Union Stock Yards Company negligently failed to unload and deliver the cattle within a reasonable time, both the director general and the Union Stock Yards Company became liable to plaintiffs for any damage sustained. The court further instructed the jury that, if they found "the delay in placing the cars at the chutes and unloading was unavoidable or was due to an unusual or unprecedented number of cars being received that morning, or to un-

usual or extraordinary weather conditions, without any negligence on the part of the defendant Union Stock Yards Company, then, in such case, the plaintiffs would not be entitled to recover."

A reading of this instruction shows that the issues of fact presented by the pleadings were fairly presented to the jury. Is the evidence sufficient to support the finding? The evidence shows that in the transaction of appellant's business a day is reckoned in 24-hour periods beginning at midnight. As is customary, trains loaded with live stock began to arrive early on the morning of August 25. The first train of live stock, consisting of 57 cars, was delivered to appellant at 12:55 a. m. Between that hour and 6 a. m. appellant received 586 cars and unloaded 150 cars, an average of only 30 cars an hour, whereas by its own evidence it is shown to have an unloading capacity of 100 cars an hour. It will be seen that defendant, throughout the early hours of the day, did not operate its equipment to its ordinary capacity, and thus permitted a large number of carload shipments to accumulate upon its tracks. According to what appears to be the most reliable evidence, plaintiffs' cattle were not unloaded until about 1:20 p. m., and were not delivered to the consignee until 2:35 p. m. After being unloaded the cattle were inspected by a government agent, and, in compliance with his directions, they were put through a dipping vat. The time intervening between the unloading and the actual delivery may well be accounted for by this requirement of the government and may not fairly be chargeable against appellant. As already mentioned, the cattle were delivered to appellant at 5:48 a. m. but were not unloaded for six or seven hours thereafter. Had appellant throughout the early hours of the day unloaded the cars at the rate of 100 cars an hour, as its own testimony shows it was able to do, at the time it received plaintiffs' cattle it would have had only 86 cars entitled to a priority over plaintiffs' shipment.

This would constitute less than one hour's work and ought to have been finished by 7 o'clock a. m. It is not possible to calculate with exactness the hour at which plaintiffs' shipment might have been unloaded, but it would appear that an additional hour or two, or until 8 or 9 o'clock, would be ample time within which to unload plaintiffs' shipment. We take no note of appellant's defense of unfavorable weather conditions, because there is a total failure of proof to support this defense.

The foregoing calculation is made, also, without taking into account what appellant claims was an unusual and unprecedented rush of business, and congestion on its tracks; but an expeditious use of appellant's facilities throughout the early hours of the morning might have avoided much of the congestion. Nor are we ready to say from a consideration of all the evidence that there was such a press of business as is claimed by appellant. The proof shows that an average "run" during the period of the year when this shipment was made is from 550 to 800 cars a day, and that trains usually arrive between midnight and 7 o'clock in the morning; that cars are ordinarily unloaded within two hours after their arrival, the work being completed about 8:30 in the morning. It is claimed by appellant that on the day plaintiffs' shipment arrived it received 1,283 cars, which was the largest in all its history. There is some proof in the record to support this claim, but it is not without question even on appellant's own showing. On this point, where we might expect to find positive proof, there is marked conflict in the evidence. The evidence might support a finding that 1,283 cars were received or it might support a finding that the number was 974 cars, while from other evidence it might be found that the total number was only 844. With this conflict in the record, the number of cars received that day became a disputed question of fact. If the maximum number claimed, 1,283, were received, it was a

most unusual run. If, on the other hand, appellant received only the minimum shown, 844 cars, it was not such an unusual run as to constitute an extraordinary congestion.

In connection with appellant's claim of congestion, it is asserted that, after the train containing plaintiffs' shipment was placed on track No. 4, another train was placed upon that track, thus covering up plaintiffs' shipment and making it impossible to unload it until the second train had been unloaded. We are not prepared to say that the presence of the second train upon track 4 would constitute an excuse for defendant's failure to unload plaintiffs' cattle within a reasonable time after their receipt. In any event, it is not a sufficient defense under the circumstances of this case, for the second train was not placed upon track 4 for one hour and 40 minutes after the cars containing plaintiffs' cattle had been placed thereon, and it was removed at 9:05. Giving the evidence the construction most favorable to appellant, the track then remained open until 11:20. A jury might well have found that appellant had ample time to unload plaintiffs' cattle before the second train was placed on track No. 4; also that, had it moved with reasonable dispatch after the second train was removed from track 4, plaintiffs' cattle might have been unloaded and delivered during the early hours of the day. The evidence is sufficient to support the verdict.

It is claimed that the damages are excessive. Experience in the actual shipment and handling of large numbers of cattle enables those engaged in the business to approximate the shrinkage under given conditions. The evidence of shrinkage is perhaps as positive and satisfactory as the nature of the subject will permit. What has been said of shrinkage may also be said of live-stock markets. The shrinkage in the cattle and the drop in the market, with the reason for both, were fully gone into and explained by competent witnesses

before the jury, and, when considered in the light of the evidence, the verdict does not appear excessive.

It is said that the court lacked jurisdiction to enter judgment on the verdict. The verdict on which this judgment is based was returned December 11, 1920, at the October term. Two days later appellant filed a motion for judgment notwithstanding the verdict, as well as a motion for a new trial; and the director general filed a motion for a new trial, and a motion for an alternative judgment against his codefendant, the Union Stock Yards Company. January 15, 1921, during the October, 1920, term, the court entered an order taking under advisement the motions. Sixteen days later the court entered an order on the motion of the director general for an indemnity judgment against the Union Stock Yards Company.

Apparently the court as well as the parties were under the impression that an order overruling the motions for new trial had been made and entered, but no such order was in fact made or entered. This omission was not discovered until after the adjournment of the October, 1920, term. And upon such discovery the court, at the February, 1921, term, overruled the respective motions for a new trial and entered a general judgment upon the verdict, and again entered an alternative judgment in favor of the director general against the Union Stock Yards Company.

The court having taken the motion for new trial under advisement at the October, 1920, term, it did not lose jurisdiction merely because of the adjournment of that term of court and the convening of a subsequent term. While this was not the precise question presented in *Toogood v. Russell*, 3 Neb. (Unof.) 189, yet the principle was recognized.

As a final assignment appellant complains because the court refused to permit appellant and its codefendant each the full number of three peremptory challenges to the jury. The right to peremptory challenges

in civil actions did not exist at common law, and the right thereto is dependent on statutes or rules of court.

At the regular session of the first general assembly of the territory of Nebraska, held in 1855, certain parts of the Code of Iowa were adopted. Section 354, found on page 91, Nebraska Statutes, 1855, 1856, 1857, provides: "The plaintiff first, and afterward the defendant, shall complete his challenges for cause. They may then in turn in the same order have the right to challenge one juror each until each shall have peremptorily challenged five jurors, and no more."

The provision above quoted was modified at the January, 1857, session of the territorial legislature by the passage of section 13, ch. 14, found on page 69, Nebraska Statutes, 1855, 1856, 1857.

At the fourth session of the territorial legislature, 1857-1858, a comprehensive "Code of Civil Procedure" (Neb. St. 1857, 1858, 1859, page 109), copied almost verbatim from the Code of Ohio, was adopted, and with slight changes has remained our Code of Civil Procedure to the present day. In this enactment all mention of peremptory challenges is omitted. However, the right of peremptory challenge appears to have been still recognized by the courts.

Mr. Justice Maxwell in his valuable work on Pleading and Practice (6th ed.) p. 187, in a foot-note, says: "In the absence of any statutory authority for such challenges there is no doubt of the power of a court to provide by rule for a reasonable number on each side. The only authority in Nebraska for peremptory challenges is by unwritten rules of court." Perhaps for the purpose of putting the unwritten rules in concrete form, for the question does not appear to have been involved in the case, the court in *Kremling v. Lallman,* 16 Neb 280, announced that, upon the trial of a civil case, "neither party is entitled to more than three peremptory challenges." Just when or how the court arrived at

the number mentioned is not discoverable from the books.

In dealing with the subject in a case arising under a liquor statute which gave a cause of action to one suffering injury because of defendants' traffic in intoxicants, this court said: "When such action is brought against two or more defendants they are entitled to no more peremptory challenges of jurors than where the action is against a single defendant." *McClay v. Worrall,* 18 Neb. 44.

As to the rights of coplaintiffs or codefendants to peremptory challenges in 24 Cyc. 356, it is said: "In civil actions where there are several plaintiffs or several defendants, the general rule is that all on one side constitute but one party and are entitled only to the number of peremptory challenges allowed a single plaintiff or defendant; and statutes giving to 'each party' a certain number of peremptory challenges are uniformly so construed. A party and an intervener whose interests are not adverse constitute a single party within the application of this rule. The rule, however, is to be applied according to the reasons upon which it is based and limited (to) cases in which the positions of the several parties upon the same side are similar, so while the fact that several defendants who set up a common defense plead separately does not entitle them to any additional peremptory challenges, the rule is otherwise where they set up separate and distinct defenses presenting different issues, or where the parties on one side, although having a common cause against the other, have conflicting rights among themselves which the verdict of the jury will affect."

Coming directly to the question presented on this appeal, we find that at the opening of the trial each defendant asked that it be allowed three separate peremptory challenges. These requests were denied. Thereupon each defendant asked that the record be made to show that it exercised every peremptory chal-

lenge allowed. This request was denied, and the record fails to disclose whether defendants, or either of them, exercised any of the challenges allowed.

In view of the separate and distinct defenses set up by the defendants and the contingent right of one to recover over from the other, the court might well have allowed each defendant to exercise its separate right to three peremptories. However, under the facts disclosed by this record, the ruling cannot be held to be prejudicial, and the judgment is

AFFIRMED.

WILBER GARDINER V. STATE OF NEBRASKA.

FILED MARCH 27, 1923. No. 22977.

1. **Robbery:** EVIDENCE. In a prosecution for robbery, the evidence outlined in the opinion *held* sufficient to require the submission of the cause to the jury to determine the guilt or innocence of the defendant.
2. ———: INSTRUCTIONS. In a prosecution for robbery, where there is evidence tending to show that two persons actually confronted the person robbed and by the use of a revolver put him in fear and took from him a sum of money, and that the defendant had furnished the revolver which was used, and at the time of the robbery was standing near-by acting as a "look-out," *held* that the giving of the instruction set out in the opinion was not prejudicially erroneous.

ERROR to the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

C. E. Walsh and *John M. Berger,* for plaintiff in error.

Ora S. Spillman, Attorney General, and *C. L. Dort, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., RAPER, District Judge.

MORRISSEY, C. J.

Defendant was convicted in the district court for Douglas county of the crime of robbery, and he prose-

cutes error to reverse the judgment and sentence therein pronounced upon him.

The first assignment of error urged is the refusal of the court to instruct the jury to return a verdict of not guilty. On the evening of May 13, 1922, Asa M. Hall and Gazema Thomas, while walking upon one of the public streets of Omaha, were met by two men, one of whom presented a revolver, commanded them to halt, and took from Mr. Hall $4. While the two men mentioned were in the act of committing the robbery, or immediately thereafter, Miss Thomas saw another man across the street, who walked rapidly down his side of the street in the same direction in which the two men who then confronted Mr. Hall and Miss Thomas departed after the robbery, and he was seen by Mr. Hall and Miss Thomas to increase his speed and travel in the same direction as their assailants. Because of the darkness Mr. Hall and Miss Thomas were unable to observe the features of this man, and, upon the trial, they admitted that they were unable to identify defendant as the party. The case was tried by the state on the theory that defendant was one of a party of three, consisting of Thomas Murphy, Thomas Sheyperski, and defendant, who were jointly engaged in the enterprise. Shortly after the robbery Sheyperski was arrested by the police. The following day defendant was arrested, and the testimony of the peace officers is to the effect that he told them that he and Murphy and Sheyperski went out with the purpose of "doing some stick-ups;" that they took a street car and went to Benson where they robbed a man; that later they robbed Mr. Hall; that while Mr. Hall was being robbed by Murphy and Sheyperski defendant acted as "the look-out." The evidence also discloses that the revolver which was used was furnished by defendant. The statements of defendant were testified to by several witnesses and were not directly contradicted by any witness, defendant refraining from testifying in his

own behalf. Murphy and Sheyperski, however, who had plead guilty to the charge, testified in behalf of defendant and completely exonerated him from any connection with the crime. By several members of defendant's family, and two witnesses who were apparently disinterested, defendant undertook to establish an alibi. If the testimony of defendant's witnesses is correct as to the time and place they claim to have seen defendant, he could not have been at the scene of the robbery. However, this testimony must be considered in connection with all the facts established. Murphy and Sheyperski confessed to their part in the crime. It is admitted on all hands that the revolver used was furnished by defendant; that after the robbery it was returned to him and through his agency delivered over to the officers of the law. The statements which he made to the peace officers appear to have been freely and voluntarily made, and he even went with them and gave information which resulted in the arrest of Murphy. It is suggested in the brief that his confessions were wrung from him under "third degree methods," but there is no basis in the record for this assertion. The evidence outlined is clearly sufficient to support the verdict and the court did not err in submitting the cause to the jury.

The further assignment is made that the court erred in instructing the jury as follows:

"Where two or more defendants are charged jointly with the commission of a crime, it is not necessary that it be shown that each of the defendants, or either one of them, when tried alone, actually committed the crime charged.

"It is sufficient if it be shown that the defendants were acting together jointly for the common purpose and that the essential elements of the crime exist as to any of them, in which event all would be equally guilty of the crime, and any one of them may be prosecuted alone."

The instruction was proper under the evidence. 34 Cyc. 1806; 23 R. C. L. 1159, sec. 26.

Other criticisms of the trial have been considered, but no substantial error is found in the record, and the judgment is

AFFIRMED.

SIDNEY A. EISEMANN ET AL., APPELLEES, V. LARY ANDERSON ET AL., APPELLANTS.

FILED MARCH 27, 1923. No. 22284.

1. **Fraud:** EXPRESSIONS OF OPINION. An expression of advice, opinion or judgment made by one soliciting a consignment of wool to be sold on commission by his principal at a distant market, to the effect that the wool would sell if shipped to his principal, and scoured, for $2,000 more than the shippers allege had been offered for it in the condition it then was, will not support an action, or counterclaim by the shippers against the principal for damages based upon the fact that the wool, when scoured and sold, did not realize as much as the alleged former offer.

2. ———: ———. Such expressions of opinion as to the proceeds of a sale to be made at a distant market at a future time, being to the knowledge of both speaker and hearer, based upon a future condition liable to be affected by many factors, and being made merely to induce a consignment for sale on commission, are merely, "trade talk," and are not to be relied upon as a statement of fact for which the principal is bound to respond in damages if the wool actually sold for less than the amount stated.

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

Magney & Magney, for appellants.

Charles Battelle, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DAY, DEAN and ALDRICH, JJ., RAPER, District Judge.

LETTON, J.

Plaintiffs are wool commission brokers. The petition alleges that defendants consigned to plaintiffs a car-load of wool and drew upon them for the sum of $10,880.40, which sum was paid, and the consignment accepted;

that defendants ordered plaintiffs to scour the wool and sell to the best advantage, which was done; that the net value of the wool was $1,531.09 less than the amount of the draft plaintiffs had paid on account of it, for which sum plaintiffs pray judgment. An exhibit was attached showing in detail the items of credit and debit.

An answer and counterclaim was filed. The answer was in effect a general denial, but the counterclaim substantially alleges that in May, 1919, one Ballard was the agent of plaintiffs for the soliciting of consignments of wool to plaintiffs, and as such agent he examined the sheep of defendant, and the wool which was then being clipped; that defendants at that time had an offer of 45 cents a pound for all the wool just as it came from the sheep, which would have netted them $16,385.40, all of which Ballard knew; that he "was consulted by defendants in his capacity as a wool expert and as the representative of the Eisemann Brothers Wool House;" that he made false and fraudulent representations as follows:

"The price of 45 cents a pound is much too low for your wool and I would not accept it. You should consign it to my house and instruct them to scour it before selling. While it is dirty and muddy, it will not scour out much over 60 per cent., but even if it should scour 75 per cent., and I never saw any wool, no matter how dirty, scour out that much, still it will net you as scoured wool at least $2,000 more on the car-load than you are offered now. If you sell it for 45 cents you are just throwing $2,000 away."

That defendants had no experience in growing wool, or in scouring it, and relied on him as a wool expert; that they stated to Ballard "that they did not care to speculate or take chances with their wool, but desired to be sure of their money for it; that Ballard then repeated his assurance that the very least they could realize in excess of the offer of 45 cents a pound would

be $2,000, and that it might run much higher than that. Whereupon relying on the statements and representations so made by the said Ballard as a wool expert and as the duly authorized agent of plaintiffs, defendants consigned their wool to plaintiffs and drew on plaintiffs for $10,880.40, which was paid by plaintiffs, and which was the only money ever received by defendants for their 36,412 pounds of wool."

It is further alleged that defendants would have accepted the offer of 45 cents a pound but for the false and fraudulent representations and statements of Ballard, and because of their reliance upon the same they have been damaged the difference between the amount of the offer and the amount paid by plaintiffs, being the sum of $5,505, for which sum they pray judgment.

A general demurrer to the counterclaim was sustained. Defendants elected to stand upon the counterclaim, which was thereupon dismissed, and defendants appeal.

Do the facts pleaded in the counterclaim constitute a cause of action for damages for fraud and deceit? In the first place the plaintiffs were not endeavoring to purchase the wool. The relation created between the plaintiffs and defendants was that of commission agent and principal. There is no complaint of any fraud or false dealing thereafter, or failure to properly account for the wool which was consigned to plaintiffs for sale. Ballard was merely an agent to procure consignments of wool to be sold for the benefit of the consignor. The statement of fact made by Ballard as to the wool, in order to procure the consignment, was, "While it is dirty and muddy, it will not scour out much over 60 per cent., but even if it should scour 75 per cent. * * * it will net you as scoured wool at least $2,000 more on the car-load than you are offered now." There is no allegation that the statement was false or untrue with respect to the percentage that the wool would "scour out," and we cannot presume that the statement

was false in this respect. It furnishes no ground for complaint.

The other allegation relied upon is that Ballard said the wool "will net you as scoured wool at least $2,000 more on the car-load than you are offered now." This is not a representation of an existing fact, but is an expression of opinion that at some future time the wool would sell upon the market for $2,000 more than the prices offered. Under some circumstances, where special trust or confidence is placed in a seller, on account of the purchaser's ignorance and inability to learn the truth without examination, the purchaser is entitled to rely on the statements of the seller. This principle can hardly apply to a case where there was no confidential or trust relation, and where both parties knew that the article solicited was to be consigned for sale upon a distant public market whose prices varied and fluctuated with demand and supply. The fact that the wool market is controlled and affected by supply and demand and that it is affected by world-wide conditions must have been in the minds of both the consignor and the agent of the consignee. There was no guaranty or promise made that the wool would be sold at any definite price, and there were no instructions given that it should not be sold for less than a definite price. The consignors took the risk, relying on the opinion of Ballard as to what the wool would sell for in the future.

A representation, or statement, which merely gives the opinion, the judgment, or expectations of the maker as to the price that property will sell for in the future, even though erroneous, is not actionable, because a person is not justified in relying upon the same. General assertions as to value, the price which has been offered for property, or that it is desirable, or that it will sell for a greater price in the future, are so commonly made and often so much exaggerated that they are known as "dealer's talk," and they are not to be relied

upon as statements of fact. The expression of an opinion as to a price which is liable to be fixed in a future and fluctuating market has never, so far as we can learn, been held to form a basis for action for fraudulent representations. If it were, the courts would be clogged with actions respecting mistaken opinions as to the future price of grain, or of goods and merchandise sold upon the open market.

AFFIRMED.

CLEMENT OLMSTED, ET AL., APPELLANTS, V. JULIA A. CALDWELL ET AL., APPELLEES.

FILED MARCH 27, 1923. No. 22292.

1. **Contracts.** In order to constitute a contract, for the breach of which damages may be recovered, the minds of the parties must have met upon every essential element of the contract, leaving nothing open to be determined by future arrangements, unless the contract itself so provides.
2. **Vendor and Purchaser:** CONTRACT: EVIDENCE. Evidence examined, and *held* not to establish that a contract of sale of land was entered into between the plaintiffs and defendants.

APPEAL from the district court for Saline county: LEONARD W. COLBY, JUDGE. *Affirmed.*

R. M. Proudfit, for appellants.

B. V. Kohout and *L. O. Williams, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, DAY and DEAN, JJ., RAPER, District Judge.

LETTON, J.

This is an action brought to recover damages for the breach of an alleged written contract for the sale of land, alleged to have been made by the exchange of certain letters between the plaintiffs and defendants. A jury was waived and the cause tried to the court, which found generally for defendants. Plaintiffs appeal.

The first letter was written May 7, 1919, by Clement

Olmsted to the defendant, Julia A. Caldwell, and is as follows:

"Mrs. Julia Caldwell:

"Just a line in regarde ove that farm ove yours that joines Tobias I under stand that you would like to Sell it ef you od Drope me aline and let me know what the least dollar that will buy it and what Termes that you want and I will try and Find a buyer. Let me know in a few days, if you do not care to sell or if you do I think I can get 130 on acre and maybe 135.

"Frome Clement Olmsted, Friend, Nebr.

"P. S. Dont waite to long if you care to sell as I think I can sell this farm."

This letter evidently solicits an agency to sell the land and is not an offer to purchase. Mrs. Caldwell in return wrote Mr. Olmsted: "In regard to selling the farm if you will write my son in Peoria he will correspond with you and explain as to what you want to know"—giving his address. On May 15, 1919, plaintiffs, in the name of Olmsted Bros., wrote defendant John F. Caldwell as follows:

"Dear Sir:

"I have written to your mother about her farm near Tobias, Nebr., and she has requested that I write you about it. I believe I can find you a buyer at around $130 to $135 per acre if you can give good terms and would expect you to pay me a commission in case I make a sale for you. Please let me hear from you return mail. Yours truly,

"Olmsted Bros."

On May 17, 1919, John F. Caldwell answered as follows:

"Gentlemen:

"I have your letter of May 15th in regard to price on my mother's farm near Tobias. Will say this farm is for sale but will have to net her $150 per acre; $10,000 cash, the balance a first mortgage and would not be willing to give you more than thirty days option at

this price. Yours truly,

"Jno. F. Caldwell."

In response to this letter, in May, Caldwell received a letter from a banker inclosing contracts of sale, in duplicate, between Julia A. Caldwell and Clement Olmsted, signed by Clement Olmsted, and asking Caldwell to have his mother sign and return the contract as soon as possible, also requesting abstracts to be furnished. On May 31 John F. Caldwell wrote Olmsted Bros., as follows:

"Gentlemen:

"I am returning contract and check submitted by C. Olmsted. On consulting the various heirs of my father's estate, I find that they do not care to consider selling at this time. You doubtless are aware of the fact that mother has only a life estate in the land and cannot sell without the consent of all the heirs. Moreover, the terms of the contract as submitted would not be satisfactory to mother even had the other heirs been willing to sign. Therefore you may consider negotiations at an end. Very truly yours,

"John F. Caldwell."

Clement Olmsted testified that, at the time the letters to Mrs. Caldwell and to John F. Caldwell were written, he knew the value of the land was about $200 an acre, and it was stipulated "that at the time of writing said letters and for 40 days thereafter said land was worth $200 an acre, and there were 220 acres of land in that tract intended to be purchased."

At the conclusion of the testimony of Clement Olmsted, who was the only witness examined, both parties rested.

It is very apparent that, in the letters which initiated the correspondence, plaintiffs were soliciting employment as commission agents to sell the land. The purport of the letter of John F. Caldwell, dated May 27, was to accept their services, but fixing a different price than that suggested by them. Occupying the re-

lation of agents, it was the duty of plaintiffs, if they desired to purchase for their own account, to fully and fairly disclose to their principals the actual facts with respect to the value of the land and their desire to purchase for themselves. At the time these letters were written they knew that the land was worth $200 an acre; they were endeavoring to obtain it for $130 or $135 an acre, and finally attempted to buy it themselves at the price of $150 an acre, without disclosing its true value. Even if the letters are construed as a definite contract for the sale of the land, a contract entered into under such circumstances would be subject to rescission by the vendor upon obtaining knowledge of the true facts.

It is claimed, however, that, since Mr. Caldwell assigned as a reason for refusing to enter into the contract the fact that the heirs were not willing to sell and that his mother only had a life estate in the land, he cannot afterwards change his position by alleging that the relation existing between the parties, if any, was that of principal and agent. Even if this be granted, the evidence does not establish that the minds of the parties ever met as to all the necessary elements of a contract. The time for which the mortgage was to run, the rate of interest on deferred payments, the number of acres to be sold, the gross price for the property, and the time and place of payment, are not mentioned in the letter of Mr. Caldwell. In addition to this, the time of possession, the nature of the title to the property which must be shown by the abstract, or even whether an abstract was to be furnished, were all left indefinite. The contract submitted by Mr. Frantz contains a number of these elements which were lacking in the letter of May 17 of John F. Caldwell, and constituted in fact a counter proposition to Caldwell which was never accepted by him. In order to constitute a binding contract, it is essential that the minds of the parties meet at every point, and that nothing be left open for ar-

rangements to be made in the future, unless, as sometimes happens, the contract itself makes provision for the ascertainment and insertion in the contract, as finally written, of some fact which may and is to be made certain before final consummation. *Krum v. Chamberlain,* 57 Neb. 220; *Lopeman v. Colburn,* 82 Neb. 641. The minds of the parties never met upon the same intention, no common assent was made to the same contract, and hence there was no right of action on the part of the plaintiffs.

The judgment of the district court was clearly right and is

AFFIRMED.

SAMUEL KENNEDY, APPELLEE, V. ARAH L. HUNGERFORD, APPELLANT.

FILED MARCH 27, 1923. No. 22314.

1. **Bills and Notes:** ANSWER: DEMURRER. An answer which sets forth a contemporaneous agreement varying the terms of a written contract which is the subject of the suit, but from which it does not appear, either expressly or by necessary intendment, that such agreement was oral, is not vulnerable to a general demurrer.
2. ———: ACTION: ABATEMENT. The answer to an action at law upon a promissory note pleaded in substance that the note was secured by a mortgage upon real estate, and that, at the time the note and mortgage were executed, the payee agreed with the maker that he should not be liable personally upon the note until the remedy provided by the mortgage against the land had been exhausted, and that he should only be liable for any deficiency which might result after the application of the proceeds of a sale of the land under the mortgage had been applied upon the debt. *Held* that as between the original parties such an agreement, if adequately proved, would abate the action upon the note until the condition of the agreement had been fulfilled.
3. ———: ———: ———: PURCHASER WITH NOTICE. In such a case, if the holder of the note purchased it with full knowledge of such agreement, he stands in the shoes of the original payee, and is not entitled to enforce the note until the payee himself might do so.
4. ———: ANSWER: DEMURRER. Such facts, if alleged in an answer,

and supported by adequate proof, are sufficient to constitute a defense of the nature of a plea in abatement to an action at law upon the note, and to establish that the action was prematurely brought. Such an answer is not vulnerable to a general demurrer.

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

J. E. Porter, for appellant.

E. D. Crites and *F. A. Crites, contra.*

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

LETTON, J.

This was an action upon a promissory note signed by the defendant, Hungerford, and payable to Joseph Acker. Plaintiff alleges that the note is past due and unpaid, and that he was a purchaser in good faith before maturity.

The answer of the defendant, Hungerford, is of the nature of a plea in abatement. In substance, it is to the effect that Hungerford is a real estate broker; that defendant Acker was the owner of a tract of land which he desired to sell; that Acker, desiring to remove from the state, conveyed the land to Hungerford as a nominal purchaser for the purpose of sale by Hungerford; that Hungerford gave to Acker the note in suit secured by a mortgage upon the real estate; that Acker and Hungerford agreed that Hungerford should not be liable personally upon the note until Acker had exhausted the remedy given by the mortgage against the land, or its purchaser if sold, and should only be liable for any deficiency, and that the land had been sold to one Finney who had assumed and agreed to pay the debt and is able to pay it. It is also alleged that before plaintiff purchased the note he had full knowledge of this agreement, and that he is not entitled to enforce the note against Hungerford until he has exhausted his remedy against the land and its purchaser. A gen-

eral demurrer to the answer was sustained and judgment rendered for plaintiff. Defendant appeals.

There can be no question but that, if adequate proof were made in an action between the original parties to the note and mortgage, that they had entered into such an agreement at the time of the making of the instrument, such an agreement would be valid and enforceable. Of course, in the absence of such an agreement there is no obligation upon the part of the mortgagee to foreclose the mortgage before beginning an action at law upon the note which it is given to secure. *Grable v. Beatty,* 56 Neb. 642; *Meehan v. First Nat. Bank,* 44 Neb. 213.

The question presented here is whether such an agreement has been sufficiently pleaded. In the *Grable* case the defendant pleaded various provisions of the mortgage, and alleged that the mortgagee agreed with defendant that if default was made he would foreclose the mortgage on said real estate and sell the same to pay said debt, "all of which the plaintiff well knew when he purchased said note, *as shown by said special stipulations* so accepted by him from said Green." The court said: "By the foregoing allegation it was evidently the intention of the pleader to state a conclusion deduced by him from the facts antecedently averred. Those facts do not sustain his conclusion," meaning that the pleader relied upon the mortgage to set forth the agreement, and that no such agreement was contained among its provisions. The case does not hold that competent evidence of a contemporaneous written agreement could not be received to establish the fact alleged.

Some courts hold that an allegation that parties entered into a contract, without stating whether it was oral or in writing, is sufficient in *any* pleading. *Bradford Investment Co. v. Joost,* 117 Cal. 204; *Tucker, Exrx. v. Edwards,* 7 Colo. 209. Others hold that such an allegation in a declaration, or petition, is sufficient against

a demurrer, but is insufficient in an answer, where the contract, or agreement, pleaded is void unless it is in writing (*Reinheimer v. Carter,* 31 Ohio St. 579), the reason given for the latter view being that defendant must plead facts which disclose to the court a valid defense to plaintiff's cause of action, and that an agreement not shown to be valid on the face of the plea is no defense. But it seems to us that a petition which fails to allege a valid contract, when the law requires it to be in writing, is equally faulty. Such an agreement if not in writing might violate the rule which prohibits parol evidence to vary the terms of a written contract, and of course this objection might be waived if not made at the trial. The plea in the answer is sufficient to admit proof that the agreement was in writing. If information as to whether the agreement was in fact in writing was desired, a motion for more specific statement should have been made. We cannot assume that the defendant will be unable to establish the existence of such an agreement by competent evidence. *Tablet & Ticket Co. v. Le Feber,* 4 Neb. (Unof.) 105.

If the plaintiff was a holder of the note in due course, with no notice of any infirmity in the instrument, or defect in the title of the person negotiating it, then such an agreement between the original parties would not affect his rights. Comp. St. 1922, sec. 4663. But under section 4666: "The title of a person who negotiates an instrument is defective * * * when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." And by section 4667: "To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his actions in taking the instrument amounted to bad faith." If such an agreement was made, as the demurrer admits, then Acker, who negotiated the note,

did so in breach of faith, or under such circumstances as to amount to a fraud upon Hungerford, unless he communicated all the facts to the plaintiff. Plaintiff is deemed *prima facie* to be a holder in due course, but if it is admitted that the title of Acker was defective, to plaintiff's knowledge, the same defense can be made against him as could be made against Acker.

It is not claimed that there is any defense to the merits. Defendant states that the owner of the land is ready and willing to pay the debt, but desires a release of the mortgage. While it is true, as plaintiff argues, that if Hungerford paid the judgment he would be subrogated to the mortgage lien, this would impose upon him the burden of bringing foreclosure proceedings if Finney failed to pay. This he attempted to be relieved from by the agreement with Acker. We cannot hold that the facts pleaded, if sustained by evidence, do not entitle him to an abatement of the action at law until the proceeds of a sale of the land are exhausted. Plaintiff insists that the answer does not allege that plaintiff has not exhausted his remedy against the land, and against the purchaser. It does not do so in so many words, or in strict terms; but considering the answer as a whole, it is sufficient upon that point.

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

REVERSED.

CLAUS PETERSON V. STATE OF NEBRASKA.

FILED MARCH 27, 1923. No. 23089.

Intoxicating Liquors: INFORMATION: SUFFICIENCY. "In a prosecution under chapter 187, Laws 1917, for having possession of intoxicating liquor, the information need not negative the exceptions under which its possession may be lawful, but these are available in defense." *Fitch v. State*, 102 Neb. 361.

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

D. W. Livingston, for plaintiff in error.

O. S. Spillman, Attorney General, and *C. L. Dort, contra.*

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

LETTON, J.

Plaintiff in error was convicted of a violation of the prohibitory law, and it was also charged that he had formerly been convicted twice of a violation of the liquor laws. He pleaded not guilty, and, after a verdict of guilty, filed a motion in arrest of judgment and a motion for a new trial, which were both overruled and sentence imposed.

The first error assigned is that the information does not state facts sufficient to charge the defendant with a violation of the law. The argument is that, since a person may have liquor in his private dwelling house in a reasonable amount for personal use and needs, the place of the possession ought to be stated in the information, and the fact alleged that it was not in his private dwelling house.

In *Fitch v. State,* 102 Neb. 361, the same contention was made. It was held that in such a prosecution the information need not negative the exceptions under which the possession of intoxicating liquor may be lawful. We adhere to this construction of the statute.

The determination of this point determines also the next conplaint made, which is that it was error to overrule the motion in arrest of judgment, which was based upon the contention that the information was defective in substance.

The next assignment of error is that, since the evidence showed excessive intoxication by which the accused was deprived of reason, the fact of intoxication should have been submitted to the jury in order that it might consider whether in fact a crime had been committed. A search warrant was procured to search the

business premises of the defendant. A number of bottles were found concealed which contained intoxicating liquor, and a number of empty bottles found back of the store and in a shed attached to the store building. He was lying on the floor drunk when the officers entered the store. Afterwards he told the officers that he had bought $270 or $280 worth of liquor and that they had not found it all. Evidence of two prior convictions was also produced. On the witness-stand defendant testified that he had been in the saloon business; that afterwards he conducted a meat market and sold soft drinks, and was in that business at the time of his arrest; that a man from Omaha came and tried to sell him some liquor, but he did not buy any; that this man gave him two or three drinks; that he became intoxicated and remembered nothing more until he found himself in a cell.

Under this evidence the district court was justified in refusing the requested instructions as to the effect of the intoxication of the defendant.

AFFIRMED.

NELSON S. MERCER ET AL., APPELLANTS, V. PAYNE & CARNABY COMPANY ET AL., APPELLEES.

FILED MARCH 27, 1923. No. 22260.

1. **Specific Performance:** CONTRACT FOR LEASE. A petition for the specific performance of a contract obligating defendants to lease building lots from plaintiffs for the term of 99 years is not necessarily demurrable as indefinite and uncertain because the contract contains a provision that the lease shall contain the "usual conditions" of a 99-year lease.
2. **Customs and Usages.** A usage relating to conditions of a 99-year lease may be a provable fact.
3. **Landlord and Tenant:** CONTRACT FOR LEASE. A contract to lease building lots for 99 years is not unenforceable merely because the owner of the fee reserves the right to approve the form in which the terms of the lease, as fixed by the parties, are to be couched.

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

William H. Herdman, for appellants.

William Baird & Sons, contra.

Heard before LETTON, ROSE and DEAN, JJ., RAPER, District Judge.

ROSE, J.

This is a suit in equity for the specific performance of a contract obligating defendants to lease from plaintiffs three building lots for 99 years. The trial court sustained a demurrer to the petition on the ground that the contract is indefinite and uncertain in its terms. From a dismissal of the suit plaintiffs have appealed.

There is nothing presented by the appeal except the sufficiency of the petition to state a cause of action for specific performance. The contract was executed and delivered. A copy is attached to the petition. Plaintiffs received $2,500 as part of a stipulated cash payment of $15,000 to be paid within 60 days. The lots were described in the contract. The following terms, among others, were definitely stated in the agreement by defendants to enter into the lease: Period of tenancy 99 years; annual net rental for the first ten years, $6,000; annual net rental for the second ten years, $6,900; annual net rental for the last 79 years, $8,000; option to purchase at stated times for specific amounts.

In addition to other terms, the contract contains an expression in this form: "The lease to contain the usual conditions of a ninety-nine year (99) lease." This clause as it appears on the face of the contract is the principal ground of demurrer. It is argued by defendants that the contract thus appears to be too indefinite and uncertain for enforcement by specific performance. The position is untenable. The words, "usual conditions," in the connection employed, refer to a usage or course of dealing on conditions applicable

to the making of 99-year leases. By inserting the phrase quoted, both parties recognized the existence of a usage conforming to conditions having a definite import. For the purposes of the demurrer, it is proper to infer that the parties, in a matter of such magnitude, acted in good faith with reference to a usage which does not leave in doubt the "usual conditions" of a 99-year lease. Usage in this sense is a provable fact and is so understood by courts of equity. It is different from a custom having the effect of law. For anything appearing on the face of the contract or the petition, the provision assailed as indefinite and uncertain may be reduced by evidence to definite terms. In respect to this phase of the contract for the lease, the petition contains the plea that "the usual terms and conditions of said lease were fully and finally agreed upon by and between these plaintiffs and defendants." In addition, the "usual conditions" to which the parties are alleged to have agreed are specifically set out in a form of lease attached to the petition. The issue is one of fact and not of law. This is an instance for the application of the familiar rule declaring, "That is certain which by necessary reference is made certain." Sufficient evidence of "usual conditions" of a 99-year lease, to which the parties agreed, will, in that particular, leave nothing open for negotiation. The petition, therefore, is not demurrable on the ground that the contract pleaded is indefinite and uncertain in the respect mentioned.

It is further argued that the contract is not enforceable, because it is therein stated the form of the 99-year lease is to be approved by the owner of the fee. This condition relates alone to the approval of the form in which the terms of the lease, as fixed by the parties in their preliminary contract, are to be couched. It does not authorize the lessor to change in any manner the terms on which the minds of the parties met, when they entered into their contract for the lease. The sus-

taining of the demurrer cannot be justified on this ground.

Other grounds of demurrer are suggested, but no substantial reason has been found for holding that the petition does not state facts sufficient to constitute a cause of action for specific performance. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

HOME LUMBER COMPANY, APPELLEE, V. CHARLES GUNDERSON ET AL., APPELLANTS.

FILED MARCH 27, 1923. No. 22297.

Mechanics' Liens: SUFFICIENCY OF EVIDENCE. Evidence outlined in opinion *held* sufficient to establish a lien on leased premises for materials ordered by a tenant for permanent improvements.

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

W. P. Miles and *Halligan, Beatty & Halligan,* for appellants.

Radcliffe & Hyde, contra.

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

ROSE, J.

This is a suit to foreclose a lien for materials used in the construction of a concrete addition to a brick building on lot 5, block 2, in the town of Potter. Plaintiff furnished the materials. The amount of plaintiff's claim is $722.75, with interest. Defendants Charles Gunderson and Gustav Gunderson are owners of the lot on which the materialmen's lien was filed. The wife of each is joined as a defendant. The claim was resisted on the ground that defendants did not order or purchase the building materials or otherwise become indebted to plaintiff therefor. Upon a trial of the issues the district court rendered a decree in favor of

plaintiff May 17, 1921, for $801.15 including interest, and ordered a foreclosure of the lien. Defendants have appealed.

It is argued that plaintiff has no valid lien on the lot; that the materials in question were ordered and used by a lessee who had no authority to obligate defendants for the payment of an indebtedness thus incurred or to incumber the leased premises; that there is no evidence of any agreement or conduct on the part of defendants which subjects their lot to a lien in favor of plaintiff; that therefore the decree of foreclosure is erroneous. Are these proper deductions from the evidence and the law applicable to the facts?

When Charles Gunderson, defendant, was sole owner of the fee, December 12, 1918, he leased the lot to J. F. De Lair for a term of years at a monthly rental of $32.50. There was then a brick building on the lot. Under the lease De Lair and A. E. Buckley, as partners, used the leased premises for a garage and repair shop. Between February 24, 1919, and April 28, 1919, a concrete addition to the brick building was constructed with materials furnished by plaintiff, the charges for the items aggregating $722.75. Not long after the improvements were made De Lair and Buckley left the country and defendants took possession of the leased premises.

There is evidence tending to prove the following facts: The lessor, under a clause of the lease, granted to lessee the privilege of constructing a building in addition to the one already on the lot. De Lair and Buckley took to the office of plaintiff, a corporation dealing in building materials at Potter, a list of the materials desired. At different times while they were in plaintiff's office Charles Gunderson was there discussing the proposed building. The estimates for the materials were made for Gunderson and Buckley. The delivery slips and the book entries of plaintiff show Gunderson and Buckley to be the purchasers. Charles

Gunderson authorized them to apply the monthly rentals on plaintiff's bill and never refused payment until after De Lair left Potter. The first plaintiff knew of Charles Gunderson's denial of liability was his refusal to sign a note for the amount due, saying he wanted to impress lessee with the latter's responsibility, and assuring plaintiff it need have no concern about eventually getting its money. Charles Gunderson paid the contractor for the labor of the workmen. The materials furnished by plaintiff were used on the lot and defendants accepted the benefits of the improvements. The entrance to the brick building was through the addition constructed with the materials furnished by plaintiff. The concrete building does not indicate a temporary structure erected by tenants with a view to its removal upon the expiration of the tenancy. These facts and conclusions seem to be proper deductions from the evidence in view of the surrounding circumstances, though there is other proof of a different import.

If the evidence does not justify a finding that Charles Gunderson was a party to the purchase of the materials, as argued by defendants, it proves that he ratified the transactions of his tenants in making permanent improvements on his lot. In his lease he authorized the construction of the building. He permitted the tenants to order the materials in his presence under circumstances implying his consent. He directed his tenants to pay the bills with the rentals—his own funds. He took whatever rights his tenants had acquired under his tenancy. He paid the contractor for the labor of the workmen who constructed the addition and took the benefit of the materials and labor in the form of the permanent improvements. Such conduct, in connection with the other facts and circumstances outlined, amounts to a ratification which subjects the lot and the improvements to a lien in favor of plaintiff. The decree of foreclosure responds to the demands of equity

and justice. The pleadings and proof show that defendant Gustav Gunderson acquired his undivided half interest in the lot subject to the equities of plaintiff. No prejudicial error has been found in the record.

AFFIRMED.

CHARLES L. SHARP, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLANTS.

FILED MARCH 27, 1923. NO. 22152.

1. **Highways:** OBSTRUCTIONS: LIABILITY OF COUNTY. A county cannot evade statutory liability for damages arising out of an obstruction in a highway by a plea that the repair and upkeep of such highway at the point where the injury occurred has by the county been delegated to another.
2. ———: ———: DANGER SIGNALS. When a railroad company for its own convenience places an obstruction in a highway where automobiles and other vehicles are accustomed to pass, it is its duty to place lights or other suitable warning signs upon such obstruction that the public may be warned of danger.
3. ———: NUISANCE: POWER OF LEGISLATURE. It is elementary that the legislature cannot vest county authorities with power to permit the installation of a structure in a public highway which amounts to a public nuisance.
4. ———: OBSTRUCTIONS: INJURIES: LIABILITY. Where a personal injury grows out of the negligent continuance of an obstruction permitted by a county to be placed in the highway, such county and the person or corporation which erected the obstruction are jointly liable for personal injuries arising therefrom.
5. ———: ———: DANGER SIGNALS. Where a county board permits an obstruction to be placed in a public highway and, in the plan which provides for such construction, no reference is made to the installation of lights or other contrivances to apprise persons of danger in the nighttime from driving into such obstruction, it should not be held that such county board had planned or ordered that such warning signs should not be installed.
6. **Appeal:** AFFIRMANCE. Where, in a personal injury action, the jury are properly instructed on the question of comparative negligence, and there is sufficient evidence to justify a finding either way, the verdict in such case should not for that reason be disturbed.

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

Byron Clark, Jesse L. Root, J. W. Weingarten, Max V. Beghtol, Charles E. Matson, Harry R. Ankeny and *Max G. Towle,* for appellants.

Burkett, Wilson, Brown & Wilson, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, ALDRICH, DAY and DEAN, JJ., RAPER, District Judge.

DEAN, J.

Plaintiff, as alleged, was driving east in an automobile on a highway about five miles west of Lincoln. The highway is a continuation of west O street, one of Lincoln's main business thoroughfares, and is a part of the road then known as the Omaha, Lincoln and Denver highway. The highway is paved for about eight miles west of the city, and at a point about five miles west of the corporate limits it intersects a crossing of defendant railroad. In 1918 the railroad tracks were elevated several feet at the street intersection and a railroad bridge was constructed by the company over the highway to permit travel on the street thereunder. The subway under the track was also constructed by the railroad company. The bridge is supported by large timbers or pillars in the center of the subway, midway between the north and south borders of the paved highway. As plaintiff approached from the west his car ran into the company's central bridge support, and from the resulting impact he received serious personal injuries and his car was damaged.

Alleging that Lancaster county was also liable in that it negligently permitted the railroad to construct the bridge in a negligent manner, in that the supports were placed in the center of the road without any warning sign, plaintiff made the county a party defendant. For the personal injuries so sustained, and for the damage to his car, plaintiff recovered a verdict and

judgment for $6,750. Defendants appealed separately.

Plaintiff was an insurance solicitor. Before the accident he earned about $5,000 or $6,000 a year. He was then aged 51 years. With respect to his injuries he testified in substance that in the evening of October 8, 1920, he was driving alone to Lincoln in a Ford car; that he reached the intersection in question about 7:30 or 8 o'clock; that the night "was very dark and windy," and the "weather was very dry at that time and the dust was very bad." With respect to the immediate happening of the accident he testified:

"Well, I was on the paving and it was very dark and very dusty. The dust would come in waves, and I met several cars, and when I would meet those cars I would pull out to the side of the street and stop and wait till they got by. Nobody turned on their dimmers because it was so dark, and it would blind a person to look in them and I would pull out and stop. Then I would pull up in the center, as near as I could, in order to keep from running off either side;" that he had never seen the Burlington bridge until the night in question, though in years gone by he had traveled the road; that he did not see the piling before he struck it with his car.

He further testified: "When I hit the piling there seemed to be a flash of light, and my face seemed to be upward and I saw what I thought was a telephone pole; and I thought I had hit a telephone pole. I never thought of such a thing as there being such an obstruction in the road. I supposed I had hit a telephone pole, looking up just a moment, a second, a flash, and that is all I know. I am all through after that." That he had no recollection of how he got home or of anything that happened until Christmas; that the accident greatly impaired his memory and his ability to recognize persons; that he had eight teeth broken, his head was badly hurt, and two pieces of bone were removed from one of his fingers; that at the time of the trial his

breathing was "congested" and that it was then hard for him to breathe; that before the injury he was strong and able-bodied and his health was good and he never had any of the trouble that continuously afflicted him since then; that at Christmas he could not yet stand on his feet; that he had driven a car a great deal for about 12 years and never before had an accident; that in his business as an insurance solicitor he traveled almost exclusively in an automobile, and that at the time the car was reasonably worth $400, but was valueless afterward.

Before the examination of plaintiff closed it developed that his hearing was impaired, and that he was "deaf in one ear," and that he had difficulty in recalling names of persons. Plaintiff testified that he was a careful driver; that his rate of speed at the time was about 15 miles an hour, and that it was never more than 20 miles an hour on paved roads; that just before he struck the pier the dust whirled around so that he could not see 6 feet ahead.

Ralph Cox, a young man living 300 or 400 feet south of the intersection testified that he heard the car strike against the piling about 7:30 or 8 o'clock; that he saw the headlights of a car about 200 feet away coming from the east just a few seconds before the impact; that by the sound he thought the two cars must have collided; that he and his brother found plaintiff sitting in his car leaning forward over the steering wheel, which was in an upright position and evidently bent forward; that plaintiff "seemed to hold his chest; his hand was bleeding slightly and one limb;" that there was no warning signal at the bridge, but the piling was painted white, and that after the accident a danger signal was placed in the center of the piling. Subsequently all of the evidence respecting the "changed condition," to which the witness testified, was stricken out and the jury were instructed not to consider it at all.

The testimony of Ralph's brother, Ray, with respect

to plaintiff's condition, was substantially to the same effect, and also that of Robert Cox, the father of the young men. The latter testified, however, that the first thing he remembered hearing plaintiff say was that he did not see the piling; that plaintiff insisted that he could get out of the car without help, but he could not do so and had to be helped until he got almost to the car in which he was taken home, "then he seemed to kind of faint away." It appears from the evidence of Mr. Cox that as the bridge is approached from the west two large danger signs have to be passed and they are visible at night with the aid of ordinary automobile lights.

Three physicians were called who had attended plaintiff. Another testified as an X-ray expert. Dr. Bently, a physician of about 40 years' experience, testified that when he was called to plaintiff's residence, the night of the injury, he found him bruised and delirious; that he bandaged three fractured ribs and both lower limbs; that the back of his neck was bruised, stiff, sore and swollen; that this condition continued several weeks; that he had a glass cut near his right eye and another on the jaw and chin and a severe gash on the right leg between the knee and the ankle, and he was bruised on the left leg and on the middle finger of the right hand; that he suffered considerable pain and had to be kept under opiates; that his back was strained, "so that he had to be lifted up and down on account of the pain and soreness in the lumbar region; the chest was pretty sore, tender to touch and difficult breathing; his neck was stiff and he could not turn his head either way for two or three weeks. He had to be raised up. After we got him out of bed he had to be raised up in an elevated chair for quite a while in order to sit up at all." and he was unable to walk.

The evidence of the other two physicians substantially corroborated Dr. Bently's evidence, and one of them who was subsequently called to treat plaintiff for a con-

siderable period testified that the patient's right leg was broken and that one limb was swollen "about a quarter larger than the other." This physician testified that up to the time of the trial, which was a little more than six months after the accident, he was still "treating him for the general stiffness and inability to get around."

Plaintiff's wife testified that for 11 weeks or thereabouts her husband had to sleep in a chair, and for all of that time he was unable to bear any weight on his feet, and that he had to be carried from one chair to another; that he did not get out of the house until the second week in January and then only to the front porch.

In respect of the installation of the subway under the proposed railroad bridge, the county alleges that sometime in December, 1917, a letter was addressed by defendant railroad to the county surveyor which was by that official referred to the board of county commissioners. The contents of the letter are not shown, but from the tone of a resolution of the board, dated December 12, 1917, it appears that it purported to relate, in a very general way, to a proposed creation of a subway, under the railroad, at the intersection where the accident occurred. Following the receipt of the letter the board adopted a resolution which is incorporated in the respective answers of both defendants. The resolution, so far as material here, follows:

"Resolution. Whereas, a letter of December 11, 1917, to Arthur E. Edgren, county surveyor of Lancaster county from the Chicago, Burlington & Quincy Railroad Company, has been referred by the said Arthur E. Edgren to this board, and whereas, it is desirable that official action be taken regarding the proposed subway on the O. L. & D. road west of Cushman and east of Emerald referred to in said letter: Therefore be it resolved by the board of county commissioners of Lancaster county, Nebraska, in regular session this 12th day of December, 1917, that it is the sense of said

board that the following plans would be acceptable: First. That the Chicago, Burlington & Quincy Railroad Company construct in 1918 a double subway for vehicles, each opening sixteen feet wide and fourteen feet high with an eighteen inch drainage opening below the ground. Second. That the Chicago, Burlington & Quincy Railroad Company do all grading on its right of way for such subway, also bear the expense for the extra amount of pavement necessary to fit the double sixteen-foot opening rather than a normal width of paving eighteen feet as is provided on the rest of the road, but only so much of said extra paving as shall be on the Chicago, Burlington & Quincy Railroad right of way. * * * Fourth. This board on its part to abandon the present grade crossing during the construction period and after the subway is completed to abandon the grade crossing permanently. * * * Sixth. After the completion of the subway on the Cox crossing (presumably the crossing in question) this board will take action and consider the closing of road No. 604 over the Chicago, Burlington & Quincy Railroad track; provided that a proper petition is filed therefor, or when this board is vested with jurisdiction in the premises. Seventh. The Chicago, Burlington & Quincy Railroad to retain to itself control for grant of wires or other structures through the opening so that safety of the public and of the railroad company can be provided for, and to retain also control of the advertising features afforded by the walls of the subway so as to keep the structure free from objectionable matters."

The county denies liability, and in support of its contention cites 7 Am. & Eng. Ency. of Law (2d ed.) 947, and Elliott, Roads and Streets (3d ed.) 535. The cited authorities merely hold that a county cannot be held liable for a negligent breach of duty respecting the care of public highways where there is no statute creating the liability. But in Nebraska we have such a statute, so that the cited authorities are not in point.

Section 2746, Comp. St. 1922, provides: "If special damage happens to any person, his team, carriage or other property by means of insufficiency, or want of repairs of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county. * * * Provided, however, such action is commenced within thirty days of the time of the injury or damage occurring." *Hollingsworth v. Saunders County,* 26 Neb. 141; *Swift v. Sarpy County,* 102 Neb. 378; *Higgins v. Garfield County,* 107 Neb. 482.

Failing in that defense the county attempts to evade statutory liability by a plea that the repair and the upkeep of the road was delegated to another. But that is no defense. In Iowa it was held that the county's duty to maintain an approach to a bridge and to keep it in reasonable repair "cannot be so delegated to others as to relieve the county from liability if the approach should be negligently constructed or negligently permitted to become out of repair." *Clark v. Sioux County,* 178 Ia. 176; *Bethel v. Pawnee County,* 95 Neb. 203; *Early County v. Fain,* 2 Ga. App. 288; *Interurban R. & T. Co. v. City of Cincinnati,* 94 Ohio St. 269; *Harriman v. Moore & Co.,* 74 N. H. 277. In *Brengman v. King County,* 181 Pac. 861 (107 Wash. 306), where the court had under consideration an injury that arose from the removal of a barricade in the highway which was being repaired, the court said: "It is the duty of a county to show such lights, around a place where an obstruction exists and where automobiles are accustomed to pass, that one approaching can see that a dangerous condition exists." And this rule, as pertaining to railroad crossings, is particularly applicable to a highway in the open country where rules of the road cannot be strictly supervised.

To establish its nonliability the railroad company, *inter alia,* insists that the plan for the construction of the bridge, as built, was submitted to and approved by

the county authorities, and that the subway was excavated and the bridge built pursuant to such plan. Hence, it argues that as to it liability does not attach.

Aside from the point of law involved, we do not think the evidence of the company itself on this point, when fairly construed, sustains the argument. The county engineer, who is also county highway commissioner, testified that, as such, he was "in charge of the construction and maintenance of the roads and bridges in the county." He also testified that a plan of a proposed bridge was submitted to him by the railroad company, which he examined, and that he conferred with the county board with respect thereto. He was then asked if he "observed whether it was built according to those plans * * * and according to the resolution passed by the board? A. It was not built according to the first plan submitted. * * * Q. What were those first plans? A. The first plan was for a permanent concrete structure. Q. Was that later abandoned? A. Yes, sir. * * * Q. Did you confer with the engineers of the Burlington regarding the abandonment of that? A. Yes, sir. Q. Do you know why the plan was abandoned? Mr. Wilson: Plaintiff objects unless he shows the source of his information. Court: Overruled. Yes, or no. (Exception.) A. I do. Q. You may state why. Mr. Wilson: Plaintiff objects because it is now apparent that he got his information from the engineers of the Burlington, which would be hearsay. (Objection overruled. Exception.) A. Because it was vetoed by the director general of railroads at that time." When asked if he conferred with the board of county commissioners regarding the double passage way plan under the bridge, he testified: "I think I did."

It is to be noted that while on his direct examination the county engineer testified that the resolution of the county board, in evidence, referred to the bridge that was finally constructed, on the cross-examination he testified: "Q. At the time the county commissioners

passed this resolution the only plan that had been submitted up to that time was for the concrete bridge, was it not? A. I don't remember, but it probably was. I don't remember." So that it fairly appears, as plaintiff contends, that there was evidence before the jury upon which it might reasonably conclude that the plans of the bridge structure which was finally built had not been submitted to the board when the resolution was passed. Anyhow it was a question of fact for the jury.

There is evidence, as hereinbefore noted, tending to prove that plaintiff had no knowledge of the existence of the obstruction until he struck it. It was further shown that at a point 50 feet west of the bridge, at the edge of the paving, there was "a large concrete sign on the right-hand side of the road some four or five feet across," and that the word "danger" was cut into the concrete. The evidence on this point, which was developed by defendant on the cross-examination, would tend to support a finding by the jury that the danger sign was an admission on the part of defendant that the obstruction which it placed in the road was a menace to travelers passing that way. This evidence and the evidence that the lights on plaintiff's car were thrown directly in front, and also the evidence in respect of the dust storm and the darkness and the flash of light, evidently from the car which approached from the east, and which momentarily blinded plaintiff, all taken together doubtless tended to convince the jury that the negligence of the defendants was the proximate cause of the accident. It is elementary that the public may assume that those who are charged with the maintenance of highways have performed their duty.

In *Robertson v. Monroe,* 116 Atl. (N. H.) 92, the court held: "A person injured by the dangerous approach to a highway, created by act of the selectmen some time before, may allege both the original negligence in creating the danger and the negligent failure to erect barriers or place lights, and may recover for

whichever negligence the proof shows was the proximate cause of the injury, though a finding that failure to guard was the cause would preclude recovery for the original wrong."

In *Town of Mt. Pleasant v. City of New York,* 191 N. Y. Supp. 741, it is said: "A structure designed to carry an aqueduct across a highway consisting of solid masonry and earth embankments extending into the highway about 33 feet on its westerly side and about 13 feet on the easterly side, leaving a roadway under the arch of but 20 feet, is a public nuisance unless legal authority exists therefor. * * * It is not within the power of municipal authorities to consent to the occupation of a public highway by a permanent structure amounting to a public nuisance, nor is it within the power of the legislature to vest them with such power."

That the question of contributory negligence in a like case, was one of fact for the consideration of the jury is pointed out in *Corcoran v. City of New York,* 188 N. Y. 131. See, also, *Chisholm v. State,* 141 N. Y. 246; *Flynn v. Town of West Hartford,* 98 Conn. 83; *Kelsea v. Town of Stratford,* 118 Atl. (N. H.) 9.

In *Stone v. City of Seattle,* 70 Pac. 249 (30 Wash. 65) it was held: "A city cannot escape liability for injury from a defective sidewalk because the defect is part of the original plan of construction. Whether a city is negligent in placing an electric light so that the shadow of the pole supporting it conceals a hole in a sidewalk is a question for the jury."

Very respectable authority holds that, even though the defect is in the plan, as distinguished from the mode of execution, such fact will not relieve from liability. *Schrader v. City of Port Huron,* 106 Mich. 173; *City of Circleville v. Sohn,* 59 Ohio St. 285.

In *City of Chicago v. Seben,* 46 N. E. 244 (165 Ill. 371) it was held: "A city is liable to an individual for injury received from an unsafe condition of the street, whether arising from construction of sewer according

to an adopted plan, and its failure to remedy it, or from failure to repair defects arising after construction of the sewer."

In *Sebert v. City of Alpena*, 43 N. W. 1098 (78 Mich. 165) it was held: "Laws Mich. 1887, p. 345, requiring cities to keep streets reasonably safe and fit for travel, applies to a defect in construction as well as to neglect to repair; and the safety required extends to travel by night as well as by day." See *City of Dayton v. Taylor's Administrator*, 62 Ohio St. 11.

In *Perrotti v. Bennett*, 109 Atl. 890 (94 Conn. 533) it was held: "Although the state or highway commissioner could not be held liable for error in the adoption of a plan of highway construction whereby a sewer was improperly covered for heavy traffic, there was liability for the negligent continuance of such a condition, resulting in injury to plaintiff's motor truck." In the body of the opinion it is said that, when the plan in its execution creates a nuisance or causes direct injuries to another, liability follows for the damage done. The court further observed: "If the plan be defective from the beginning, or if its defect originate shortly after the completion of the improvement and injury be ultimately necessarily the inevitable or probable result, the municipality will be liable. Clearly this is just. Upon this assumption the city created the defective improvement and either knew of it or was chargeable with knowledge of it. Every moment of its continuance was an act of negligence by the municipality. The injury grew out of and was attributable to this negligent continuance and not to the plan so defectively conceived of, but to the operation of the plan after its defective condition was known or ought, in the exercise of reasonable diligence, to have been known to the municipality."

In *Gould v. City of Topeka*, 32 Kan. 485, it is said: "If a city or its governing board should order that a high and narrow embankment, with precipitous sides, should be made in a public street for the purpose that

the travel should pass over the embankment, and should say nothing concerning railings, guards, or other barriers, and nothing concerning street lamps or other lights, to prevent persons in the nighttime from falling or driving off the embankment and thereby being injured, it should not be held that the city had planned or ordered that no such railings, guards, barriers, lamps, or lights should be used. There should be no presumption that the city authorities had ordered or planned that a public street should be dangerous." Continuing the court observed: "It should be held that the city had made no order with reference thereto; and then we would further think that if no such railings, guards, barriers, lamps, or lights were used, and thereby injury should result, the city should be held to be liable."

In *Gulf, C. & S. F. R. Co. v. Sandifer,* 69 S. W. 461 (29 Tex. Civ. App. 356) it is said: "Where a railroad company constructs on its right of way a bridge over a ravine, together with approaches; the bridge and approaches being likewise in, and constituting a part of, the roadway of a city street; the whole leading up to the railroad crossing; and one of the approaches is dangerous to travelers, from want of a guard rail to prevent falling over its side into the rocky ravine, nine feet below, both the city and the railroad company are liable for injuries to travelers thereby occasioned."

In *People v. Delaware & H. Co.,* 69 N. E. 651 (177 N. Y. 337) it was held: "While a railroad company may carry the highway over or under its track, in its discretion, subject to its duty to restore the highway to such a state as not to impair its usefulness, the company cannot be said to have restored the highway to such a state as not to have unnecessarily impaired its use, where the restoration seriously affects its use, though it may be practicable to use it, while by restoration in another manner the use would be wholly unimpaired."

In *Harriman v. Moore & Co.,* 67 Atl. 225 (74 N. H. 277) this was said: "A traveler on a highway need not,

to hold one placing an obstruction in the highway liable for an injury sustained in consequence thereof, show that the injury was due solely to the obstruction, if his conduct in no way contributed to the injury."

If the rule is to prevail which is advanced and practiced by defendants, with respect to the approval and the adoption of a plan of highway construction by public authorities, and the construction ultimately proves to be a menace to the public, it follows that such authorities may, by some such subterfuge, wrongfully escape liability for the installation of dangerous devices and constructions.

The rule announced in the *Gould* case and in the other cases cited herein on the same point is sound, and, pursuant to the rule, which we approve, the county authorities should not have neglected to first consider the question of safeguarding the public by the installation of lights or other warning devices, and such safeguards should have been subsequently installed. The central piers are a standing menace, an ever present peril to every passing car at a point where, in the nature of things, cars would only chance to meet at intervals.

Counsel argue generally that the pier in the center of the highway under the bridge, and at the bottom of a declivity, tends to minimize the danger of cars colliding when traveling in opposite directions. We do not think so. By the same token it could be established that an unlighted row of telephone poles placed in the center of a highway in the open country would minimize the danger of travel by night and by day.

The defendants cite *Watters v. City of Omaha*, 76 Neb. 855, but that case is not in point because the dangerous nature of the construction complained of here is obvious, and besides the erection by the company of the "danger" sign, to which reference has been made, must be taken as an admission against interest. And in this connection it may be noted in passing that the resolution

of the county board, hereinbefore cited, shows that the railway company retained "to itself control for grant of wires or other structures through the opening so that safety of the public and of the railroad company can be provided for." In that paragraph the danger appears to have been recognized by the county and by the company, but no means were employed by either of the defendants to avert it, though the company was apprehensive concerning public safety.

The accident occurred almost two years after the war was ended, and there is nothing in the record to show that the railroad company was prevented from installing the proposed steel and concrete bridge, without central piers, after the war and before the date of the accident. And, besides, there is no competent evidence to show that the installation of a steel structure "was vetoed by the director general of railroads," as testified by the highway commissioner.

Defendants complain because the court, in its statement of the case to the jury, incorporated the major part of the pleadings in the instructions, a practice which has often been condemned by this court. But in the present case the objection is not clearly available for the reason that evidence was presented on every material allegation in the respective pleadings.

Other of the instructions have been assailed by defendants, and exceptions have been taken because certain instructions offered by defendants were refused, but we do not find prejudicial error on that feature of the case

Defendants argue that plaintiff's negligence was the proximate cause of the accident. But the question of comparative negligence was submitted to the jury and there was sufficient evidence to justify a finding either way. It follows that the verdict should not be disturbed on that ground. The action is based upon a plain statutory provision from which, in view of the negligence complained of, there appears to be no escape. *Raasch v. Dodge County*, 43 Neb. 508; *Hollings-*

worth v. Saunders County, 36 Neb. 141; *Roberts v. Chicago & N. W. R. Co.,* 35 Wis. 679. Every controverted fact which is material to the issues presented here was submitted to the jury by the learned trial court under instructions which are unassailable. For this court to say that the questions of fact which are involved here, any or all of them, are questions of law for the court to decide and not questions of fact for the jury to decide is to deny to that body the exercise of an ancient and time-honored prerogative. We are not prepared to go so far. *Seaton v. State,* 106 Neb. 833, at page 837.

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

AFFIRMED.

RAPER, District Judge, dissents.

ROSE, J., dissenting.

I am compelled to dissent because it seems to me that the fundamental principles of law applicable to the undisputed facts show conclusively that there was no actionable negligence on the part of either defendant and that the injuries to plaintiff were caused solely by his own negligence.

At the place of the accident the paved highway runs under the railroad bridge. A row of piers, painted white to make them conspicuous, extends lengthwise through the center of the pavement which is divided into two roadways under the railroad track. At each side of the row of piers the driveway is as wide as the pavement by which the subway is approached from both directions. There is a perpendicular wall on each side of the subway. The piers divide the traffic in the center and keep each line of travel on the right-hand side and prevent the line in one direction from crowding the line in the opposite direction, where, on account of the walls, there is no escape from reckless drivers by leaving the pavement. The feature of highway construction condemned amounts to a mere slight bend in the road. It

is a bend to which every traveler on the right-hand side of a highway is exposed where a wide roadway tapers to a narrow bridge. A mere bend in a road with white posts by the roadside is not a dangerous highway construction. Dividing a road into two branches, with a park, or a row of trees, or a line of poles, or a trolley between, is a safe and usual construction in country roads and in city streets, within the meaning of the law making counties liable for the negligent failure to keep highways in a safe condition for travel. This construction is within the knowledge of travelers generally and is as old as common covered bridges having two driveways with a wall between. These conditions are generally known to exist, and all mature, normal travelers of ordinary intelligence are acquainted with the facts or are chargeable with knowledge thereof. Highway travelers for generations have been exposed to the usual dangers of divided roadways and curves. No rational system of highway engineering requires counties or transportation companies, in discharging road-making duties, to construct roads without curves, or prevents the dividing of roads with rows of trees, or poles, or trolleys, or parks between, nor demands reflectors of light where these conditions exist in country places. The highway system of ancient Rome once included straight roads radiating from the Imperial City, but curves and branches are now everywhere recognized as necessary. Even in Italy a covered bridge, centuries old, with two driveways divided by obstructions, is still in use. The statute declaring section lines to be highways does not prevent necessary curves, or divisions, or branches, or justify a traveler in pursuing a straight course in the dark, never thinking of obstructions. Modern engineering skill is shown in the approaches to beautiful cities, where the highways divide and run through ornamental parks. In places like those described the failure of travelers to use their senses and observe and follow the curves of the roads and streets

not only courts self-injury or death but exposes others to extreme hazards.

The statute making a county liable for damages resulting from a failure to keep the highways in a safe condition for travel is not a public guaranty of the safety of travelers or a form of insurance to protect the reckless from the consequences of their own negligence. From a county's former immunity from suit to the affirmance of a judgment for plaintiff's injuries, seems to me to be a radical departure from the fundamental principles of law applicable to the indisputable facts.

On the face of the majority opinion itself evidence that plaintiff was injured solely as the result of his own negligence is as clear as the failure to prove any negligence of defendants.

According to the opinion of the majority the story of plaintiff, as told by himself on the witness-stand, shows that he had never before seen the bridge over the highway; that it was dark and windy, dry and dusty, the dust coming in waves; that the dust whirled so he could not see six feet ahead; that he tried to keep in the center of the road; that he "never thought of such a thing as there being such an obstruction in the road;" that he did not see the pier until he struck it; that the collision occurred when he was going 15 miles an hour.

The negligence of plaintiff and the resulting injuries are thus demonstrated by his own testimony. Going 15 miles an hour in a dust-storm which prevented him from seeing six feet ahead, he pursued a straight course, never thinking of an obstruction or a curve. Pursuing the same course elsewhere under similar conditions he would have run off the road at any bend, division, or branch, regardless of consequences. The darkness, the dust-storm and the approaching headlights were not creations of defendants, but were ordinary incidents of travel which mature, careful persons on a highway anticipate. The instinct and means of self-preservation bestowed by nature upon plaintiff were not under the control of de-

fendants. Had plaintiff exercised the attributes of normal, human existence, he would not have been injured. The notice of "danger" not far from the piers was no more an admission of faulty highway construction than the same familiar signal at any other ordinary bend in the road.

The injuries to plaintiff make a strong appeal to sympathy and charity, but do not legally create an involuntary public burden upon taxpayers whose representatives in office have been guilty of no actionable wrong; nor should the burden of plaintiff's negligence fall upon those who pay the expenses of railroad transportation. Judicial pronouncements which unnecessarily tend to weaken personal responsibility and reward carelessness at the expense of the public will not make litigation a better means of obtaining justice, improve the individual members of society, or aid the government in protecting law-abiding citizens from the menace of reckless drivers.

It seems to me the judgment affirmed extends liability for damages beyond legal or just bounds. As I view the undisputed facts defendants did not violate any private or public duty. Plaintiff's injuries resulted solely from his own negligence. The judgment should be reversed and the action dismissed.

LETTON, J., concurs in this dissent.

ALONZO G. DEPUTY, APPELLEE, V. MARGARET DEPUTY, APPELLANT.

FILED MARCH 27, 1923. No. 22310.

Divorce: DISMISSAL. In a proper case this court will dismiss divorce proceedings for want of equity.

APPEAL from the district court for Gage county: LEONARD W. COLBY, JUDGE. *Reversed and dismissed.*

E. O. Kretsinger and *Parsons & Mills*, for appellant.

Safranek, Dutton & Massey, contra.

Heard before MORRISSEY, C. J., ALDRICH and GOOD, JJ., BEGLEY and BUTTON, District Judges.

ALDRICH, J.

This was a suit for a divorce brought by plaintiff charging extreme cruelty and wilful abandonment on the part of the defendant. The court found generally in favor of the plaintiff upon the issues joined and granted the divorce prayed for, allowing defendant $300 alimony and $50 attorney's fees. The plaintiff was a Civil War veteran, 76 years of age; he was feeble in health and unable to perform ordinary manual labor; he has no property or means of support except his pension of $50 a month from the United States. The defendant was 73 years of age. The court found that she had $200 in money out at interest and was living with her daughter and other children who were able and willing to contribute for her support. The defendant has appealed to this court asking that the judgment of the district court be reversed and the plaintiff's action dismissed.

The parties to this suit were married in Missouri in the year 1867, and to that union seven children were born, five of whom are living. They lived in the state of Missouri for about 23 years, in a precarious way. After leaving Missouri they lived in Iowa. They have sustained marriage relations for a period of more than 50 years and they had better travel together for the remainder of life's fitful fever.

Their married life has not on the whole been altogether unsuccessful, for they have five children who are in every sense of the word trustworthy citizens.

Whatever may be said as to the shortcomings of the plaintiff herein, he was patriotic, and in the hour of his country's need offered the one great sacrifice common to all patriots; so in that respect he was a model man. In common with all patriots and heroes he now receives the compensation of a pension which will support him and his wife during the remainder of the years of their life. These two old people have been married for more than a half century and the wife, according to her own

testimony, is willing to live with him now. She has some rights which as a matter of equity and fair dealing should not be disregarded. To allow the divorce would defeat her of the benefit of a widow's pension in case he should be called first. In all fairness to both parties concerned, we conclude that this divorce suit should be dismissed for want of equity to sustain it.

The decree is therefore reversed and the suit dismissed.

REVERSED AND DISMISSED.

GILBERT NELSON, APPELLANT, V. C. S. RADCLIFFE ET AL., APPELLEES.

FILED MARCH 27, 1923. No. 22311.

Leases. It is the rule in Nebraska that a lease for a term of years is chattel or personal property. *Mulloy v. Kyle*, 26 Neb. 313, followed.

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

William B. Ross and *R. P. Kepler*, for appellant.

Radcliffe & Hyde, contra.

Heard before MORRISSEY, C. J., ALDRICH and GOOD JJ., IGLEY and BUTTON, District Judges.

ALDRICH, J.

This is an action in ejectment brought by plaintiff against defendants, with a claim for damages for alleged wrongful withholding of possession of a certain tract of school land in Cheyenne county. The case was tried in the court below upon an agreed statement of facts stipulated by the parties. Judgment was for defendants, and plaintiff appeals.

In 1899 the state of Nebraska issued to Mary Gilmer a school land lease covering section 36, township 16 north, range 52 west of the sixth P. M., Cheyenne county, Nebraska, for a period of 25 years. On or about April 8, 1920, Mary Gilmer, who was then owner of the lease, executed and delivered to the defendant bank her promissory note in the sum of $1,791.66, which note was in the

form of a collateral note, and the school lease was delivered by her to the bank in accord with a statement to that effect in the collateral note which she signed. The note authorized the bank to sell the collateral school land lease upon certain conditions.

Having advertised the lease for sale, the bank sold the same to the defendant Radcliffe, who took possession of the land described. Prior to the commencement of this action, Mary Gilmer assigned the lease to plaintiff. The parties stipulated that she may be substitued as a party plaintiff in lieu of the plaintiff Gilbert Nelson.

Appellant contends: "The leasehold estate conveyed by the state of Nebraska to Mary Gilmer was and is real estate, and that all of the proceedings of the bank relative to the sale of the lease are void and convey no title whatever to the appellee Radcliff."

The only issue presented for our consideration is whether or not the school land lease involved in this action is real or personal property. After a careful examination of the facts and the law in this case we are of the opinion that this matter is governed by *Mulloy v. Kyle,* 26 Neb. 313. Also, upon further examination of the law, we find that this is the law of this state as appears in the case of *Hibbeler v. Guthcart,* 12 Neb. 526. We find in *Souffrain v. McDonald,* 27 Ind. 269, the same rule applies in Indiana as does in Nebraska. From these different citations it is clear that a lease for a term of years is chaftel or personal property, and we cannot find any law in the state of Nebraska which changes this rule. We also find it to be the law that "An administrator may sell a lease of real estate for a term of twenty-five years, held by his intestate, as personal property, under a proper order from the county court, without obtaining a license therefor from the district court, as in case of the sale of real estate for the payment of debts." *Mulloy v. Kyle,* 26 Neb. 313. Thus, in the statement of fact and this brief discussion of the law as laid down in *Mulloy v. Kyle, supra,* we have,

in short, stated the law of the case as well as the facts involved.

Having determined upon the law and the fact that it is personalty rather than realty, it is finally determined as a matter of law that the issues herein presented are for affirmance. All the issues herein contemplated have been entered into and the appellant does not show any inclination now to entitle herself to the return of this lease under the facts and close out the issues between the parties. The issues presented here are fully resolved as a matter of law the same as they were in *Mulloy v. Kyle, supra,* and in affirming the instant case we follow the law as laid down and discussed in that case.

AFFIRMED.

ELIZABETH SPENCE, ADMINISTRATRIX, APPELLANT, V. POLENSKI BROTHERS, SCHELLAK & COMPANY, APPELLEE.

FILED MARCH 27, 1923. No. 22298.

1. **Negligence:** LICENSEE. Where a pond is formed on the premises of an owner as the natural consequence of removing clay for the manufacture of brick, and where an employee of the owner, a boy 16 years of age, during the noon hour, without the direction of the master, either express or implied, but with his knowledge and consent, voluntarily goes swimming in the pond for his own pleasure, and not in furtherance of the master's business, and is drowned, such employee is a licensee, and the master owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the master or his servants.

2. ———: PLEADING: SUFFICIENCY. Substance of petition set out in the opinion, and *held*, that demurrer of the defendant thereto on the ground that petition fails to state facts sufficient to constitute a cause of action was properly sustained.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

James & Danly, for appellant.

Tibbets, Fuller & Tibbets, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN and DAY, JJ., RAPER, District Judge.

DAY, J.

This action was brought by the plaintiff in behalf of the next of kin of Raymond Spence, to recover damages for his death, alleged to have been caused by the negligence of the defendant. The trial court sustained a demurrer to the petition upon the ground that it failed to state a cause of action. Plaintiff elected to stand on the petition; whereupon the court entered a judgment dismissing the case. The plaintiff appeals.

The only question to be determined is whether the facts pleaded state a cause of action. We deem it unnecessary to set out the petition in full. In substance it charges that the defendant is a corporation engaged in the manufacture of tile and brick; that its plant is located about a mile from the business center of the city of Hastings, Nebraska, where it occupies between five and ten acres of ground; that in conducting its business it had made large excavations upon certain portions of its property for the purpose of using the clay and sand in the manufacture of its products; that during the rainy seasons the excavations thus made filled with water and became a dangerous menace to the employees working in and about the plant; that at one place a surface water formed a pond which at the time and place in question was about 18 feet deep, and that, owing to the dark, reddish color of the water, it was impossible to judge of its depth; that the employees at the plant remained on the premises during the noon hour; that with the knowledge and consent of the defendant some of them were in the habit, during the noon hour, of wading and swimming in this pond; that on July 3, 1919, during the noon hour, Raymond Spence, a boy 16 years of age, who at the time was employed by the defendant at the plant, together with other employees, went swimming in the pond, and was drowned; that said Spence had been employed but a short time, and did not know the dangerous character of the pond, and on account of his youth did not realize or appreciate the danger; that the defendant knew that

the pond was a dangerous place, and knew that its employees were in the habit of swimming therein, and yet defendant negligently and carelessly permitted the pond to be and remain on the premises, and negligently and carelessly failed to give any notice or warning of the danger to its employees, and especially to the said Raymond Spence. The petition also contained this language: "That the death of the said Raymond Spence was caused by the negligent, careless and wrongful acts of the said defendant while the said Raymond Spence was in his usual course of employment." Other facts were alleged showing that the action was properly brought in the name of the plaintiff.

Upon the argument it was conceded that it was the intention of the pleader to base his cause of action upon the doctrine of negligence known at common law, and not upon the principles of the workmen's compensation act. It was further admitted by counsel for plaintiff, with commendable candor, that it was no part of Raymond Spence's duties to go swimming in the pond; that he went there voluntarily for his own pleasure during the noon hour, and not in furtherance of the master's business. Construing the petition in the light of this frank admission, which we are at liberty to do as being in the nature of the pleader's construction of the petition, we are led to conclude that, notwithstanding some general allegations of the petition which would seem to indicate that the deceased came to his death while in the performance of some duty, it was not intended by the petition to base the cause of action on the theory that the master had failed to exercise reasonable care to provide his servant with a reasonably safe place to work.

It is a well-settled doctrine that, before the master can be held liable for an injury to his servant growing out of such relationship, it must appear that the servant was injured through the negligence of the master, and that at the time of the injury the servant was engaged in carrying out some part of the master's business, or

going to or from the master's service along avenues provided by the master. The rule, however, does not extend to a situation where the servant at the time of the injury was acting outside of the scope of his employment, for his own purpose, without the direction of the master, either express or implied. This principle has been recognized by this court in *Blackman v. Western Electric Co.*, 97 Neb. 710, wherein it was held: "Where an employee voluntarily goes outside of the scope of his employment without the permission or the knowledge of his employer, and operates a rip-saw by which he is injured, the employer is not chargeable with actionable negligence for failing to give warnings of danger or instructions to prevent injury."

Under the facts alleged in the petition, together with the admitted facts made at the argument, we conclude that the unfortunate death of the deceased did not occur while he was in the performance of any of the duties of his employment, that he was not acting in any sense under the direction of his employer, either express or implied. It would seem, therefore, that the well-recognized principle that it is the duty of the master to exercise reasonable care to provide his servant with a reasonably safe place to work has no application to the facts before us.

What duty then did the defendant owe to the deceased? It is urged by the plaintiff that, inasmuch as the defendant knew that its employees were in the habit during the noon hour of swimming in the pond, and knew that it was dangerous to do so, therefore it was the duty of the defendant to warn the employees, and especially the deceased, of the danger. We are hardly prepared to agree with this general statement when applied to the facts in this case. Under the facts here presented we are inclined to the view that at the time and place of the accident the deceased was a licensee. It is true that the employees were permitted to remain on the premises during the noon hour, and perhaps to

roam about at pleasure, but such a privilege would hardly warrant the inference that they were invited to go swimming in the pond, even when coupled with the fact that the employer knew that the employees were in the habit of swimming in the pond. Mere knowledge or acquiescence on the part of the owner that persons are using his premises does not amount to an invitation so as to impose upon the owner the obligation which he owes to an invited guest. 20 R. C. L. 64, sec. 56.

The case here is not within the principle of *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb. 563. In that case the defendant was conducting an amusement park for hire, and a part of the amusement provided was a swimming place to which the public were invited. It was there held that it was a question for the jury whether it was negligence to fail to notify the guests of the depth of the water, or otherwise protect them from danger. Neither is the case one, where one falls into an unguarded excavation.

A case more nearly in point is *Shults v. Chicago, B. & Q. R. Co.*, 83 Neb. 272, wherein it was held: "Where one enters upon the premises of another with his consent, but without an invitation, and not in the discharge of any public or private duty, he is a bare licensee, and the occupier of the premises owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the licensor or his servants." See *Chesley v. Rochcford & Gould*, 4 Neb. (Unof.) 768.

It is next urged that the maintenance of the pond upon the premises by the defendant under the facts alleged made it an attractive nuisance to children, and brings the case within the rule announced in the Turntable cases, and that a cause of action is properly stated, based upon that theory. We are of the view, however, that the doctrine frequently announced in the class of cases generally known as the "Turntable" cases does not apply to the facts in the case at bar. By the great weight of decisions, our own included, the doctrine announced

in the Turntable cases has never been carried to the extent of including a pond within its scope. In *Richards v. Connell*, 45 Neb. 467, the facts were that the boy, ten years old, yielding to the natural impulses of childhood, using a section of a wooden sidewalk as a raft, went upon a pond on defendant's premises, from which raft he fell and was drowned. It was held: "The owner of a vacant lot upon which is situated a pond of water or dangerous excavation is not required to fence it, or otherwise insure the safety of strangers, old or young, who may resort to said premises not by invitation, express or implied, but for the purpose of amusement or from motives of curiosity."

Among the many cases which are readily to be found where children have been drowned in ponds, in which the courts have held there was no liability on the part of the owner, are the following: *City of Omaha v. Bowman*, 52 Neb. 293; *Peters v. Bowman*, 115 Cal. 345; *Stendal v. Boyd*, 73 Minn. 53; *Klix v. Nieman*, 68 Wis. 271; *Moran v. Pullman Palace Car Co.*, 134 Mo. 641; *Blough v. Chicago G. W. R. Co.*, 189 Ia. 1256.

We have not overlooked the case of *Tucker v. Draper*, 62 Neb. 66, wherein a recovery against the owner of premises was sustained for negligently causing the death of a child, three years and three months old, based upon the charge that the owner had negligently maintained upon the premises an unguarded well. The judgment was sustained upon the theory that the public generally, including the child, had been invited to use the premises, and also upon the theory that the well was in the nature of a dangerous trap, owing to the tender age of the child, and the peculiar circumstances surrounding the accident. The principle applied in that case has no application to the facts in the case at bar.

Upon a consideration of the facts alleged in the petition, we conclude that the petition fails to state a cause of action, and that the trial court was right in dismissing the case.

The judgment is therefore

AFFIRMED.

JOE DAVEY, APPELLEE, V. PAUL AEVERMANN ET AL., APPELLANTS.

FILED MARCH 27, 1923. No. 22893.

1. **Appeal:** REVIEW. This court will not review an alleged ruling of the district court where the record brought to this court fails to disclose that such ruling was, in fact, made by the trial court.
2. **New Trial:** JOINT MOTION. Where two or more defendants file a joint motion for a new trial, any assignment of error therein that is not good as to all will not be considered as to any of such defendants.
3. **Bills and Notes:** TRIAL: QUESTIONS FOR JURY. Evidence examined, and *held* sufficient to require the submission to the jury of the defense of failure of consideration and the question of whether plaintiff was an innocent holder for value without notice.

APPEAL from the district court for Dixon county: GUY T. GRAVES, JUDGE. *Reversed.*

D. Van Donsclaar and *C. H. Hendrickson*, for appellants.

J. J. McCarthy, contra.

Heard before MORRISSEY, C. J., ALDRICH and GOOD, JJ., BEGLEY and BUTTON, District Judges.

GOOD, J.

Action on negotiable promissory note by the holder against the makers thereof. Plaintiff had the verdict and judgment thereon and defendants have appealed.

Paul Aevermann, Herman Aevermann and Mrs. William Aevermann were the makers and Lou Conway the payee of the note. Plaintiff purchased the note from the payee. The petition was in the usual form. A joint answer of all the defendants alleged that the note was procured by fraud, misrepresentation and duress, but failed to allege any facts that would constitute fraud or duress as to any of the defendants except Mrs. William Aevermann. Failure of consideration was also alleged

The reply was a general denial. At the close of all the evidence, on plaintiff's motion, a verdict was directed in his favor.

1. Defendants complain that the court abused its discretion in denying them leave to file amended and substitute answers. The record fails to show any ruling of the court upon this question, and further fails to show that any request was made for leave to file any amended or substitute answers. This court will not review an alleged ruling of the district court where the record brought to this court fails to disclose that the ruling complained of was, in fact, made by the trial court.

2. Complaint is made because the trial court excluded evidence tending to establish fraud in procuring the signature of Mrs. William Aevermann to the note. If any error was committed in this respect, it was not prejudicial to any of the defendants other than Mrs. William Aevermann, because no facts constituting fraud were alleged, and the evidence offered did not tend to establish any fraud as to them; nor can the error, if any, be considered in this court as to Mrs. William Aevermann, because she did not file a separate motion for a new trial. All of the defendants joined in one motion for a new trial, and, under the rule established in this jurisdiction, if error assigned in the motion for a new trial is not good as to all, it is not good as to any of the joint movers. *Hoke v. Halverstadt,* 22 Neb. 421; *Long & Smith v. Clapp,* 15 Neb. 417; *Dorsey v. McGee,* 30 Neb. 657; *McDonald v. Bowman,* 40 Neb. 269; *Harvey v. Harvey,* 75 Neb. 557.

3. Complaint is made because the court took the case from the jury and directed a verdict for the plaintiff upon his motion. Where the verdict of a jury is directed in a law action, the parties against whom the verdict goes are entitled to have the most favorable construction put upon the evidence received and offered by them. It becomes necessary, therefore, to examine the record in this case to see whether there was sufficient evidence tending

to show that plaintiff was not an innocent holder for value in due course, and whether there was sufficient evidence, received and offered, tending to establish the defense of failure of consideration. There was evidence tending to show that plaintiff did not purchase the note until after the time claimed by him, and that within a day or two of the maturity of the note plaintiff sought to collect the note from the defendant Paul Aevermann for the payee, and threatened said defendant, if he did not pay it, that he, plaintiff, would purchase the note and enforce its payment, and that at that time he was notified by said defendant that he would not pay the note until he had received a deed in a land transaction, for which the note was given. If plaintiff had not purchased the note at that time, this information was sufficient to put him upon inquiry as to the consideration for the note and any defense thereto that might have existed. There were other circumstances, either proved or offered to be proved, which have a bearing upon the good faith of the plaintiff in the purchase of the note.

From an examination of the record, we conclude that there was sufficient evidence, tending to impeach the good faith of the plaintiff in the purchase of the note, to require the submission of that question to the jury, if there was substantial evidence, received or offered, in support of the defense alleged. There was evidence offered and excluded which tended to establish a failure of consideration for the note. Under the circumstances, this was error, and the trial court should have received this evidence and should have submitted to the jury the question of failure of consideration. Under this state of the record, the court was not justified in taking the case from the jury and directing a verdict in favor of the plaintiff.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

J. T. DYSART ET AL., APPELLEES, V. JOHN O. YEISER, APPELLANT.

FILED MARCH 27, 1923. No. 23176.

1. **Master and Servant:** WORKMEN'S COMPENSATION CASES: ATTORNEY'S FEES. Section 3031, Comp. St. 1922, construed, and *held* to limit the amount an attorney may lawfully charge or contract for as compensation for legal services or disbursements, in demands or suits arising under the workmen's compensation act, to such sum as may be approved in writing by the district judge.
2. ———: ———: ———. An attorney cannot enforce against a claimant for compensation any claim or agreement for attorney's fees, in a demand or suit brought under the provisions of the workmen's compensation act, for an amount in excess of that which is approved by the district judge.
3. ———: ———: ———: CONSTITUTIONAL LAW. Section 3031, Comp. St. 1922, restricting the amount an attorney may charge for legal services, in cases arising under the workmen's compensation act, to such sum as the district judge shall approve, is a proper exercise of the police power of the state and does not contravene the provisions of either the fifth or the fourteenth amendment to the federal Constitution.
4. **District Courts:** POWERS: SUSPENSION OF ATTORNEY. District courts are vested with jurisdiction to suspend attorneys from practice in their judicial districts upon proper showing.

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

John O. Yeiser, pro se.

Henry J. Beall and *John W. Yeager, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH, DEAN, DAY and GOOD, JJ., RAPER, District Judge.

GOOD, J.

This case is brought to this court to review an order of the district court for Douglas county, directing appellant to refund $620 to his client, Anna Burkman, within 60 days, and, on failure so to do, that he stand suspended from the right to practice as attorney at law in said county until the further order of the court.

In October, 1919, a son of Anna Burkman, while in the

employ of the Blue Taxicab Company of Omaha, and while in the performance of his duties as a driver, had a collision with a street car of the Omaha & Council Bluffs Street Railway Company, resulting in his death. Mrs. Burkman employed appellant to represent her, to recover from the Blue Taxicab Company under the workmen's compensation act. A Mrs. Mortenson was appointed administratrix of the estate of the deceased son of Mrs. Burkman, and Mr. Yeiser was employed by the administratrix to prosecute an action against the Omaha & Council Bluffs Street Railway Company for damages because of its alleged negligence in bringing about the collision, which resulted in the death of young Burkman.

Appellant contends that he made a contract with Mrs. Burkman and with Mrs. Mortenson, by the terms of which he was to prosecute both cases and receive as compensation 40 per cent. of the amount recovered. Mrs. Burkman insists that the agreement was that Mr. Yeiser should have such fee in the compensation case as the court might allow, and that he was to have a contingent fee of 40 per cent. of the recovery in the action against the street railway company. The committee appointed by the court to investigate and make report of the complaint found that the contract between the parties provided that the compensation case against the taxicab company should be prosecuted by Mr. Yeiser for such fee as the court would allow him, and the action against the street railway company on the basis of 40 per cent. of the amount recovered, and found that the compensation case was settled for a total lump sum of $3,974, and that the court allowed him, as attorney's fee in that case, the sum of $250; that Mr. Yeiser retained out of the $3,974 the sum of $870, or $620 in excess of the court's allowance.

The record shows that the action against the street railway company is still pending in the district court on a motion for a new trial, and that a settlement was made in the compensation case in July, 1921, whereby compensation was allowed to the extent of $3,974. Mr.

Yeiser settled with Mrs. Burkman and paid her the avails of the compensation case, less $870, which he still retains, and asserts the right to retain, under the contract he claims to have made with Mrs. Burkman for compensation.

Appellant assigns as error that there is not sufficient evidence to support the finding and order; that the order is contrary to law; and that the court has no jurisdiction to enter such an order.

The view we take of the questions presented for determination makes it unnecessary to determine whether the contract of employment in the compensation case was for the percentage of the recovery, as claimed by appellant, or for such fees as the district court would allow, as claimed by Mrs. Burkman.

1, 2. Section 3031, Comp. St. 1922, being a part of the workmen's compensation act, provides: "No claim or agreement for legal services or disbursements in support of any demand made or suit brought under the provisions of this article shall be an enforceable lien against the amounts to be paid as damages or compensation or be valid or binding in any other respect, unless the same be approved in writing by the judge presiding at the trial, or, in case of settlement without trial, by the judge of the district court of the district in which such issue arose. After such approval, if notice in writing be given the defendant of such claim or agreement for legal services and disbursements, the same shall be a lien against any amount thereafter to be paid as damages or compensation: *Provided,* however, where the employee's compensation is payable by the employer in periodical instalments, the court shall fix, at the time of approval, the proportion of each instalment to be paid on account of legal services and disbursements."

Appellant insists that this section of the statute, if properly construed, relates to attorney's liens, and does not place any restriction upon the right of attorneys to contract for compensation in such cases, and, if it is

construed to affect the right to contract for compensation, that it would be unconstitutional, as interfering with the right to contract.

A careful examination of the statute quoted shows that it relates to claims or agreements for legal services and disbursements, as well as to liens for attorney's fees, in actions or claims arising under the workmen's compensation act. By omitting the parts of the first sentence of the statute which relate to attorney's lien, the section would read: "No claim or agreement for legal services or disbursements in support of any demand made or suit brought under the provisions of this article shall be an enforceable lien * * * or be valid or binding in any other respect, unless the same be approved in writing by the judge presiding at the trial, or, in case of settlement without trial, by the judge of the district court of the district in which such issue arose. It seems too plain to admit of argument that the legislature intended to restrict and limit the amount an attorney could lawfully charge or contract for as compensation for legal services or disbursements, in demands or suits arising under the workmen's compensation act, to such fee or sum as should be approved in writing by the district judge. It necessarily follows that an attorney cannot enforce against a claimant for compensation any claim or agreement for attorney's fees, in a suit or demand brought under the provisions of the compensation act for an amount in excess of that which is approved by the district judge.

3. Appellant argues that the statute, if construed to regulate or restrict the right to contract between attorney and client for fees for legal services, is in violation of the provisions of the federal Constitution which guarantee "rights in property," due process of law, and equal protection of the law. These constitutional provisions are intended to, and do, guarantee the right to make and enforce contracts as property rights, but the right to make and enforce contracts may be restricted

and is subject to such limitations as the state, in the proper exercise of its police power, may impose. That is to say, it is subject to reasonable restraint and regulation in the interest of the public welfare. Laws regulating the rate of interest, commonly called usury laws; federal statute fixing the amount that may be charged for attorney's fees in pension claims; limiting the charges of railroads for carrying passengers or freight; limitation upon the employment of women and children as to the hours of service and limitation upon the hours of service of adults in certain hazardous occupations; limitations upon the right to sell intoxicating liquors, explosives, firearms, poisons and deleterious drugs, and many others might be mentioned as an exercise of this power. Even in the workmen's compensation act under consideration, the law requires the compensation to be paid in periodical sums, and not in lump sum, except when authorized by the court. The question is as to whether the regulation is reasonable and is in the interest of the public welfare. If so, it does not conflict with the constitutional provisions. It is a matter of general knowledge that a large percentage of the persons who come under the workmen's compensation act are not possessed of large means, but are dependent upon their earnings for the support of themselves and families. If the earning power of the bread-winner is destroyed or greatly impaired by an injury, he must look to the compensation provided by the statute for the support of himself and family, and, if this compensation may be depleted by an improvident or unreasonable contract for legal services, he and his dependents are likely to become public charges. It is in their interest, and the interest of the public as well, that they should be protected from contracts or charges for attorney's fees that are not reasonable. The statute does not fix an arbitrary charge, but leaves the amount to be determined and fixed by the judge. It will not be presumed that the judge will refuse to make a reasonable

allowance or to approve a fair and just charge.

We hold that the statute is a proper exercise of the police power of the state, and is not repugnant to the provisions of the federal Constitution, guaranteeing rights in property, due process of law, and equal protection of the law.

4. Appellant contends that the district court is without jurisdiction to suspend an attorney from the practice of his profession. The precise question has been heretofore determined in this court, where it was held that the district court was vested with power to suspend an attorney from practice in that court, but that such order should be limited to suspension from practicing in the judicial district. *In re Disbarment Proceedings of Newby,* 76 Neb. 482.

It is but fair to appellant to say that he in good faith believed that said section 3031, when properly construed, did not limit the amount an attorney could lawfully charge or contract for as compensation for legal services or disbursements, as against a claimant for compensation in demands or suits arising under the workmen's compensation act, and his appeal to this court was largely for the purpose of having an interpretation of said section by the court of last resort.

While there is no error in the record, we think the order should be modified so as to permit appellant to comply with the order of the court within 20 days from the issuance of the mandate of this court before the sentence of suspension shall be effective.

As modified, the judgment of the district court is affirmed. AFFIRMED AS MODIFIED.

WILLIAM KRULL, EXECUTOR, APPELLEE, V. CHARLES H. ARMAN, APPELLANT.

FILED MARCH 27, 1923. No. 22305.

1. **Executors and Administrators:** ACTION FOR DEBT: BURDEN OF PROOF. In an action by an executor to recover money alleged to have been loaned by plaintiff's testator to defendant, where de-

fendant has answered by a general denial, the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that the defendant received the money from the testator as a loan, and not as a gift.

2. **Gifts:** BURDEN OF PROOF. "The general rule that the burden of proof is on the one having the affirmative of an issue applies to actions in respect to gifts." 28 C. J. 669, sec. 71.

3. ———: INSTRUCTION. In such case, where the plaintiff calls the defendant as a witness, and defendant admits the receipt of the money and that testator was not indebted to him, and further testifies that plaintiff's testator gave him the fund, it is error for the court to instruct the jury, as a matter of law, that the receipt of the money by defendant would be presumed to be a loan, and not a gift.

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

R. J. Greene and *Hugh C. Wilson,* for appellant.

Charles E. Matson and *Clarence G. Miles, contra.*

Heard before MORRISSEY, C. J., ALDRICH, DAY and GOOD, JJ., RAPER and TROUP, District Judges.

RAPER, District Judge.

Action by William Krull as executor of the last will of Samuel S. Griffin, deceased, to recover money alleged to have been loaned by Samuel S. Griffin to defendant. The answer is a general denial, and a denial that defendant is indebted to plaintiff upon the cause of action. During the trial the plaintiff called the defendant, who was son-in-law of deceased, as a witness and proved that Mr. Griffin had given defendant a check for $8,085.14, in March, 1918 Defendant testified that Mr. Griffin owed him $2,085.15 on some grain and other transactions, and that defendant did not owe anything to Mr. Griffin. He further testified, both on direct and cross-examination, that the $6,000 was a gift from Mr. Griffin to him and his family to put into a home for the family, so they would not move away, but would remain in the vicinity. There was much other evidence tending to support and refute the claim that the money was a gift, but there is no claim or evidence that

deceased was subjected to any undue influence. The trial court gave an instruction (No. 2) in substance as follows: That since it is admitted by the defendant that the said sum of $6,000, turned over to him at said time (March, 1918) by said deceased, was not in payment of an obligation or debt due or existing against the deceased, and in favor of the defendant, the law presumes that it was a loan of so much money to the defendant, unless he satisfied you by a preponderance of the evidence that it was a gift from the deceased to him and his family, and, unless the defendant has satisfied the jury by a preponderance of the evidence that said transaction was a gift of said money to the defendant and his family, the plaintiff is entitled to recover that sum with interest at 7 per cent. from the time the defendant received the money. The jury returned verdict for plaintiff, upon which judgment was rendered; the defendant appeals.

The appellant alleges that the court erred in giving instruction No. 2, which places the burden of proof on the defendant. The petition alleged a loan. The answer was a general denial. Generally, under an issue thus formed, the burden does not shift, but remains on the plaintiff throughout the trial, and this seems to be the rule where the defendant, as in this case, claims that the money or property sued for is a gift. *Payne v. Williams*, 62 Colo. 86; *Marra v. Bigelow*, 180 Mass. 48; *Jenning v. Rohde*, 99 Minn. 335; *Leask v. Hoagland*, 205 N. Y. 171; 28 C. J., 669, sec. 71

Another vice claimed in the instructions is that it tells the jury that the receipt of the money by defendant, when shown not to be in payment of a debt owing by deceased to defendant, raises the presumption that it was a loan. Courts have in some cases laid down the rule as stated in the instruction, others have given a contrary holding. A study of these cases shows that, in most of those holding that burden is on the donee to prove the gift where he is defending his right thereto, there were special circumstances which gave rise to a situation that required such

rule, as where the donor retained possession of the property or the donee had access to the property or fund before the date of the alleged gift, or where there existed a fiduciary relation between donor and donee, or where there is evidence of or opportunity for undue influence, or some mental or physical weakness or infirmity which might be sufficient to cast doubt upon the donor's intelligent and free action in making the gift. In the absence of some of these special features, the general rule in an action to recover the property is that the burden is not on the recipient of money to prove it was a gift and not a loan. *Sterry v. Fitz-Gerald,* 95 N. J. Law, 51; 28 C. J. 669, sec. 71; *Lynch v. Lyons,* 115 N. Y. Supp. 227. However, without attempting to give a general rule as to presumptions in such cases, the facts as developed on the trial were such that the court should not have instructed as a matter of law that by the defendant's receipt of the money the transaction was presumed to be a loan and not a gift. *First Nat. Bank v. Adams,* 82 Neb. 801.

At the close of the testimony the appellant asked for a peremptory instruction on the claim that, because plaintiff called the defendant as a witness, and elicited testimony from him that deceased gave him the money, plaintiff is absolutely bound by his answers, and is estopped from setting up that they are either untrue or that the witness is not credible. Appellant cites *Nathan v. Sands,* 52 Neb. 660. This case states the correct rule, and evidence tending only to impeach such witness is not admissible. Contradiction, however, and impeachment are not synonymous. The distinction is pointed out in *De Noyelles v. Delaware Ins. Co.,* 138 N. Y. Supp. 855, quoted in 2 Words and Phrases, Second Series, under "Impeachment:" "A party may contradict his own witness, for contradiction is not impeachment, as impeaching evidence is that which is directed solely to the question of the credibility of the witness." See, also, 40 Cyc. 2561; *Dravo v. Fabel,* 132 U. S. 487; *Thorp v. Leibrecht,* 56 N. J. Eq. 499. In this last case Mr. Justice Pitney an-

nounces what appears to be a fair and comprehensive rule, as follows: "While a plaintiff who calls defendants as his witnesses cannot impeach their character for veracity generally, he may show that the whole or any part of what they had sworn to is untrue either by their own examination and the improbability of their own story or by other contradictory evidence material to the case." As stated in *Dravo v. Fabel, supra*: "The evidence must be given such weight as under all the circumstances it is fairly entitled to receive." While we refrain from expressing any opinion as to the sufficiency of the evidence, the defendant on that theory alone was not entitled to have the court assume as a matter of law that defendant's evidence could not be contradicted or overcome.

The giving of instruction No. 2 was prejudicially erroneous, and the judgment is reversed and the cause remanded for new trial.

REVERSED.

CHARLES C. COOPER ET AL., APPELLEES, V. H. R. BANE ET AL., APPELLANTS

FILED MARCH 27, 1923. No. 22231.

1. **Contracts:** EVIDENCE: PARTY IN INTEREST. A contract for the benefit of a third person may be enforced by him, although it is not made in his name and the consideration does not move from him; in other words, the real party in interest may identify his interest in the contract and enforce the same accordingly, and the facts relating thereto may be proved by parol evidence.
2. **Guaranty:** CONSTRUCTION. The stipulation in the contract that "any change or status by second party or notes representing bills receivable held by said Dunning State Bank at the time of the transfer of said stock to second party (except by payment on principal) shall relieve first parties from responsibility on note or notes so changed," construed, and *held*, while the language of the clause is somewhat obscure, the context on the whole indicates that the "change" contemplated therein is in the status of the notes, and not in the status of the person or persons handling the notes.
3. **Evidence:** SUFFICIENCY. The several issues of fact arising in the case submitted to the jury under proper instructions, evidence examined, and *held*, same supports the verdict.

APPEAL from the district court for Blaine county: BAYARD H. PAINE, JUDGE. *Affirmed.*

Sullivan, Squires & Johnson and *Hainer & Flansburg,* for appellants.

Burkett, Wilson, Brown & Wilson, contra.

Heard before MORRISSEY, C. J., GOOD, DAY and ALDRICH, JJ., RAPER and TROUP, District Judges.

TROUP, District Judge.

This case arises out of the consolidation of two banks at Dunning, Nebraska. The owners of the selling bank guaranteed its assets, and this suit is upon that guaranty. From a judgment against the guarantors, this appeal is taken.

The petition of the plaintiff, in substance, alleges that on June 1, 1918, the plaintiff entered into a contract with the defendants for the purchase of 100 shares of the capital stock of the Dunning State Bank, of Dunning, Nebraska, which said 100 shares comprises all of the stock issued and outstanding at that time. The contract is in writing and set forth in full in the petition, but we insert only such part thereof as we think needful to a proper consideration of the issues, as follows:

"Second. First parties represent all books, records and accounts of the said Dunning State Bank to be true and correct and agree to adjust any errors that may be found to have existed at the time of the transfer of the above stock to second party. First parties further represent all notes representing bills receivable held by said Dunning State Bank at the time of the transfer to second party of the within stock to be true in amount, genuine as to signature of maker, and guarantee the payment of said notes in the same proportion as the number of shares of stock herein sold bears to the entire capital stock, namely, 100 per cent. It is mutually understood and agreed that second party shall use due diligence in the handling and collection of said bills receivable and the said second party shall have fifteen days after maturity

of any note or notes representing bills receivable held by the Dunning State Bank at the time of the transfer of said stock to the second party in which to make collection of any note or notes representing such bills receivable, failing to collect the same within fifteen days after maturity and not wishing to extend or renew such note or notes the second party shall give notice in writing to first parties of his inability to collect such note or notes and first parties shall have thirty days from date of such notice in which to make such note or notes acceptable to second party, failing so to do first parties shall pay to second party in cash the full amount of such note or notes together with accrued interest thereon, and by so doing first parties shall acquire an interest in such note or notes equal to the amount so paid by them."

It was further stipulated in the contract that the notice to defendants of nonpayment of any notes covered by said guaranty, as above provided, shall be sufficient if mailed to A. C. Blanchard at Merriam, Nebraska, and that the contract shall be binding upon the heirs and assigns of all parties thereto.

The petition further alleges that the purchase price of said stock was paid in full, and the same, together with the assets of said bank, including the notes in suit, were delivered to plaintiff; that thereafter the things required by said contract to be kept and performed by the plaintiff were, in all respects, kept and performed; that thereafter the notes in suit, being among those guaranteed by defendants, became due and payable, and, the same remaining unpaid, the defendants were duly notified of the default and payment demanded and same refused by defendants, and prayer for judgment follows.

It appears that about 15 months after plaintiff commenced this suit he sold all his interest in the Home State Bank at Dunning, of which he was president and owning 90 per cent. of its stock, including all interest in the present suit, and removed permanently to the state of California. Thereupon the said Home State Bank

filed herein its petition of intervention, wherein it alleges that at all times it was and is the real party in interest in the purchase of the Dunning State Bank stock from defendants, as defendants well knew and understood at the time of entering into the transaction, and that it was agreed by all concerned that the contract therefor should be entered into by said Charles C. Cooper for and on behalf of the intervener herein, Home State Bank, said Cooper being then the president and largest stockholder therein, and that the purpose of said contract was that the assets of said Dunning State Bank were to become the property of said Home State Bank; that immediately upon the completion of the transaction the property of the Dunning State Bank became the property of the Home State Bank, the latter assuming the liabilities of the former, whereupon the former surrendered its charter to the state and became defunct, all of which was well understood and agreed to by defendants; that since said transfer certain notes included within said purchase, aggregating the sum of $5,330.53, became due and payable and remained unpaid; that notwithstanding plaintiff and intervener have kept and performed all things required of them under said contract to be kept and performed, and given defendants due notice of the nonpayment of said notes, defendants have failed and refused to pay the same, wherefore the intervener prays judgment.

The defendants, in their joint answer to the petition of intervener, admit the contract in question, but deny that Cooper entered into the same for and on behalf of the intervener; that they transferred said stock to Cooper, and not to intervener, and relied upon him personally because of their knowledge of him as a careful, energetic business man of long experience in the collection of commercial paper; they deny that either plaintiff or intervener used due diligence in any instance to collect the said notes, and deny all other allegations in said petition not otherwise admitted.

From the large volume of evidence taken and the

apparently formidable briefs filed, one's first impression is that the record probably presents some very difficult and intricate problems for solution, whereas, in fact, the questions involved are simple and easily determined.

The first complaint of the 16 assigned is that the court erred in overruling defendants' motion to strike the petition of intervention on the ground that it never had a legal standing in this action. Section 8552, Comp. St. 1922, settles this point against the defendants. See, in connection therewith, *State v. Farmers State Bank*, 103 Neb. 194, and *McConniff v. Van Dusen*, 57 Neb. 49.

The great burden of the defense seems to be that the contract between the contesting parties is that it was one so strictly personal to the plaintiff Cooper, as vendee, that the defendants have a right to demand that the duties to be performed by the vendee under the contract shall be performed by him and him only, and that any other than the plaintiff undertaking to perform the duties required, however faithfully said duties may have been performed in fact, will exonerate the defendants from all obligation to perform their part of the contract; a somewhat anomalous position to take, it would seem, in view of the very significant provision of the contract itself permitting assignment, as well as all the facts and circumstances surrounding the transaction as shown by the evidence. Counsel for plaintiff and intervener suggests that this defense is the result of an afterthought, and not an idea present in the minds of defendants at the formation of the contract, and as we read the evidence and view the whole situation we are strongly inclined to the same opinion. If, however, it appears, as a matter of fact, that the defendants did not contract with Cooper with a view of securing his personal attention to the collection and handling of said notes, and if it further appears, without serious dispute, that the person or persons who did handle them were as well or better qualified to do so successfully than Cooper could possibly be under the circumstances, then there is nothing left to

defendants' theory upon this point. One may be expected naturally to wonder to what appreciable extent the personal equation likely figured in the minds of defendants, when they knew the contract into which they were entering, and did enter, contained an express provision that the "same shall be binding upon the heirs and assigns of all parties hereto," and that the person with whom they contracted might undertake at least to assign said contract within 24 hours after its execution. This expression of wonder is all the more warranted from the incident shown by the evidence that as a matter of fact a like contract between defendants and another had been assigned to Cooper just prior to the execution of the present agreement. However this may be, we think the evidence clearly shows that defendants had no thought of reliance upon the personal knowledge of the subject-matter of the transaction by Cooper or his general acquaintance with the makers of the notes or the patrons of the bank when they were seeking a purchaser for their bank stock, for it is in evidence that very shortly before the execution of the present contract defendants sold 80 per cent. of the identical bank stock finally going to Cooper, through a brokerage house in Omaha, to a man in Council Bluffs, Iowa, whom they never saw nor heard of before, and whom they have never seen yet, so far as the evidence discloses, and entered into a contract with him identical with the present contract, so the evidence seems to show, except as the number of shares of stock. It was through an assignment of that contract by the Council Bluffs man to Cooper that the latter came to deal with defendants and make the contract in question. So it would seem defendants could not have had in mind, in the first instance at least, the selection of a purchaser upon whom, because of his acquaintance in the community and with the patrons of the bank, they relied personally to handle the bank's commercial paper, including the notes in suit. Besides, defendants knew that Cooper himself did not live at Dunning, and never did: he lived at

University Place, a suburb of Lincoln, Nebraska, and his bank at Dunning, the Home State Bank, the intervener herein, was handled by others and by the same persons who handled the notes in suit in their efforts to collect same from the makers, to which persons and bank the purchased assets of the Dunning State Bank were turned over. Again, when the first of the guaranteed notes became due and unpaid, defendant Blanchard, who by appointment represented all defendants, was notified by the intervener of the defaulted note and the same was promptly paid by defendants to the Home State Bank. So, likewise, with one or more other notes, until at one time defendants refused payment because, as Blanchard said, "thirty days not up;" and again, for a like reason, and still again, and finally, because the guarantors had no funds with which to pay, all the while corresponding and dealing with the Home State Bank and receiving letters written by the Home State Bank officials upon the Home State Bank printed stationery, and at no time until the answer was filed in this suit did defendants intimate that they relied upon Cooper personally to handle and collect the purchased assets of their bank. But, still further, the question of whether the contract in suit was the personal one of Cooper and was made by him for and on behalf of Home State Bank, with full knowledge of that fact by the defendants at the time, was submitted to the jury and by their verdict they found the latter to be the fact. This we think is equivalent to finding that defendants did not intend or expect that Cooper should be obliged to give his personal attention to the handling or collecting of the notes in question.

The question last above stated would then be the next in order to be disposed of, and we have just said that question was submitted to the jury, and that by their verdict the jury found that the contract in question was not the personal contract of Cooper, but that it was made for and on behalf of Home State Bank, the intervener herein, with full knowledge on the part of defendants at

the time it was being so made. We cannot take either the time or space to specifically point out all of the testimony in support of said finding; but, as an example of the evidence in that regard, it may be said that, not only is there direct evidence that Cooper told defendants, at the time, that the contract was made in behalf of his own bank, but that they well knew and understood that such was the only practical purpose and reason he had in making the purchase he did, namely, to close out the defendants' bank and consolidate the same with his own. Defendants knew that Cooper was the president of the Home State Bank; they surely did not suppose that he was buying their bank to continue it as a rival to his own. The finding of the jury on this point is amply supported by the evidence.

It might not be out of place here to remark, as was said in substance in the somewhat similar case of *Everson v. Gere*, 122 N. Y. 290, that if the intervener for whose benefit the contract was made fully complied with the obligations imposed upon it by the contract, the defendants having undertaken to pay the notes if the makers did not, it could make no difference to them whether they paid to Cooper or to some other person entitled to receive the same.

The next question naturally in order is: Did the Home State Bank, in whose charge the collection of the notes in suit in the first instance rested, through its officers and employees, fairly and fully perform the duties required of it by the contract? This question was also submitted to the jury for its determination and by its verdict it found that it had. We think this finding is sufficiently supported by the evidence.

Another assignment is that, the contract having been executed by Charles C. Cooper, the court erred in admitting oral testimony to show that it was in fact made for and on behalf of the Home State Bank. The rule is elementary that a contract for the benefit of a third person may be enforced by him, although it is not made in his

name and the consideration does not move from him. In other words, the real party in interest may identify his interest in the contract and enforce the same accordingly, and the facts showing him to be such may be proved by parol evidence. The cases declaring this doctrine are, of course, entirely too numerous to mention, but many of them may be found cited under 22 C. J. 1235, sec. 1648, and Mechem on Agency, sec. 769. Such evidence does not contradict the writing; "it only explains the transaction." *Ford v. Williams,* 62 U. S. 287. The following are some of the cases in our own state in which the general rule is announced: *Shamp v. Meyer,* 20 Neb. 223; *Norman v. Waite,* 30 Neb. 302; *Barnett v. Pratt,* 37 Neb. 349; *Doll v. Crume,* 41 Neb. 655; *Forburger Stone Co. v. Lion Bonding & Surety Co.,* 103 Neb. 202. In connection herewith see *Punta Gorda Bank v. State Bank,* 52 Fla. 399.

The defendants complain of the judgment rendered in the case, and claim it was entered without lawful authority and therefore void. We have carefully examined the grounds for this complaint, as disclosed by the transcript, and are satisfied that no error was committed by the court and no prejudice accrued to defendants by the manner in which the judgment was finally adjusted and entered.

The claim that defendants should be relieved from liability on the notes under the clause of the contract which provides that "any change or status by second party or notes representing bills receivable held by said Dunning State Bank at the time of the transfer of said stock to second party (except by payment on principal) shall relieve first parties from responsibility on note or notes so changed," because the notes were handled by the Home State Bank, the real party in interest, instead of by Cooper personally, is, we think, not well founded. While the language of this clause is somewhat obscure, we think that the "change" contemplated therein is in the status of the notes, and not the status of the person or persons

handling the notes. The whole context, we think, indicates this. There is no evidence showing that the status of any of the notes which defendants were called upon to pay was changed in any respect from the time plaintiff received them until defendants were called upon to pay them.

Complaint is made to the giving or refusing of many instructions, but upon examination of the same we find that virtually all have been disposed of by the decision of the main issues and therefore no separate review thereof is required.

Finding no reversible error, the judgment of the district court is

AFFIRMED.

The following opinion on motion for rehearing was filed November 16, 1923. *Former judgment of affirmance vacated, and judgment of district court reversed.*

1. **Banks and Banking:** CONTROL. The affairs and business of a Nebraska banking corporation are under the control of a board of directors. Comp. St. 1922, sec. 8007.
2. ———: PURCHASE OF STOCK. Except "to prevent loss upon a debt previously contracted in good faith," a Nebraska banking corportion cannot purchase or hold the capital stock of another corporation, including that of a rival state bank. Comp. St. 1922, sec. 8006.
3. ———: SALE OF STOCK: CONSOLIDATION. A written agreement by officers of a state bank to sell its entire capital stock to the officers of a rival state bank does not necessarily imply a contract to consolidate the two banks, even where the sellers in their contract guarantee the assets transferred with the capital stock sold.
4. ———: ———: GUARANTY OF ASSETS. If an indivisible contract to sell all the capital stock of a Nebraska banking corporation to a rival state bank is invalid because executed in violation of statute, a guaranty of assets, inserted in the same contract as an incident of the sale, falls with the principal transaction.
5. ———: CONSOLIDATION. Two Nebraska banking corporations cannot consolidate without the consent of the department of trade and commerce. Comp. St. 1922, sec. 8021.

6. ———: ———: EVIDENCE. Evidence outlined in opinion *held* insufficient to prove an agreement by officers of two state banks to consolidate them.

7. **Opinion Withdrawn.** Opinion and syllabus reported in *Cooper v. Bane ante,* p. 74, withdrawn upon a reargument.

Heard before ROSE, DEAN and GOOD, JJ., REDICK, District Judge.

PER CURIAM.

This is an action on a contract of which the following is a copy:

"Contract and Agreement.

"This contract and agreement made and entered into by and between A. C. Blanchard and A. H. Metzger of Cherry county, Nebraska, William Fleishmann of Sheridan county, Nebraska, and H. R. Bane of Blaine county, Nebraska, parties of the first part, and C. C. Cooper of Lancaster county, Nebraska, party of the second part, witnesseth: That the first parties have this day bargained and agreed to sell, assign and transfer to the party of the second part and the second party has agreed to purchase and pay for 100 shares of the capital stock of the Dunning State Bank of Dunning, Nebraska, subject to the following terms and conditions, all of which are made a part of the consideration of this contract.

"First. The agreed price is fifty (50) dollars per share above actual value on date of transfer (said actual value to be determined by adding capital, surplus, undivided profits, guaranty fund, interest, exchange and all other items of credit due to the said Dunning State Bank, deducting therefrom all interest due on certificates of deposit, unpaid bills of expense, taxes and other items of expense owing by said Dunning State Bank). Payment for said stock shall be made by second party in the following time and manner: Three thousand (3,000) dollars cash at the time of signing this contract, receipt of which is hereby acknowledged by the first parties, balance (exact amount to be determined as above provided) at the time of the

transfer of said bank stock to second party, which shall be on or before June 1, 1918.

"Second. First parties represent all books, records and accounts of the Dunning State Bank to be true and correct and agree to adjust any errors that may be found to have existed at the time of the transfer of the above stock to second party. First parties further represent all notes representing bills receivable held by the said Dunning State Bank at the time of the transfer to second party of the within stock to be true in amount, genuine as to signature of maker, and guarantee the payment of said notes in the same proportion as the number of shares of stock herein sold bears to the entire capital stock, namely 100 per cent. It is mutually understood and agreed that second party shall use due diligence in the handling and collection of said bills receivable and the said second party shall have fifteen days after maturity of any note or notes representing bills receivable held by the Dunning State Bank at the time of the transfer of said stock to the second party in which to make collection of any note or notes representing such bills receivable, failing to collect the same within fifteen days after maturity and not wishing to extend or renew such note or notes the second party shall give notice in writing to first parties of his inability to collect such note or notes and first parties shall have thirty days from date of such notice in which to make such note or notes acceptable to second party, failing so to do first parties shall pay to second party in cash the full amount of such note or notes together with accrued interest thereon, and by so doing first parties shall acquire an interest in such note or notes equal to the amount so paid by them. It is distinctly understood and agreed by both parties hereto that any change or status by second party or notes representing bills receivable held by said Dunning State Bank at the time of the transfer of said stock to second party (except by payment on principal) shall relieve first parties from responsibility on note or notes so changed.

"Third. First parties agree to resign in favor of second party all insurance, farm loan and other agencies for outside lines of business conducted in connection with the Dunning State Bank.

"Fourth. First parties agree not again to engage in the banking business in the town of Dunning, Nebraska, for a period of five years from the date of this contract under penalty of five thousand dollars ($5,000) liquidated damages to second party for violation of this paragraph of contract and agreement.

"Fifth. It is mutually understood and agreed that this contract shall be binding upon the heirs and assigns of all parties hereto.

"Sixth. Parties of the first part hereby agree that notice of nonpayment of any note or notes held as bills receivable by the said Dunning State Bank shall be sufficient if mailed to A. C. Blanchard at Merriman, Nebraska.

"Seventh. Parties to this agreement acknowledge the payment in full for amount due in the transfer of the stock of the said Dunning State Bank, Dunning, Nebraska, on this date.

"Made in duplicate, dated and signed at Dunning, Nebraska, this 1st day of June, 1918.

"(Signed) A. H. Metzger,
"A. C. Blanchard,
"W. Fleishmann,
"H. R. Bane,
Parties of the first part.
"C. C. Cooper,
Party of the second part.

"In Presence of P. Wilson."

Charles C. Cooper, named as party of the second part, commenced, as plaintiff, an action on this contract against defendants, H. R. Bane, A. C. Blanchard, A. H. Metzger and William Fleishmann, parties of the first part, February 17, 1919. Prior to June 1, 1918, Blanchard was president, Metzger vice-president, and Bane cashier

of the Dunning State Bank, a Nebraska banking corporation. In his petition Cooper pleaded that he performed the contract on his part and received from defendants pursuant thereto all the capital stock purchased by him from them, being the entire capital stock of the Dunning State Bank; that four of the notes which, under the contract, had been guaranteed by defendants had not been paid, the amount due thereon from them to him being $7,760.23; that the failure of defendants to pay him the amount due on these notes was a breach of the contract. The relief demanded by plaintiff was judgment against defendants for the sum stated.

After defendants assailed the petition of plaintiff by demurrer and answer, the Home State Bank of Dunning, also a Nebraska corporation, intervened August 5, 1920, and filed a petition pleading for its own use and benefit the identical contract pleaded by Cooper, making it part of the petition in intervention. The defendants are the same in both instances. In the two petitions the same relief is demanded for breach of the same contract, except that intervener pleads the failure of defendants to pay three only of the notes described in plaintiff's petition, the amount alleged to be due intervener from defendants being $5,336.53, for which judgment is demanded. Intervener, the Home State Bank, pleaded in substance that June 1, 1918, it agreed with defendants to purchase all the capital stock of the Dunning State Bank and thus to merge its assets into the intervening bank; that defendants then agreed to guarantee such assets; that the sale and transfer of stock were made for and on behalf of intervener through and in the name of Cooper, he being then, and for a long time thereafter, intervener's principal stockholder, its president, and a director; that, pursuant to the contract, defendants assigned the capital stock of the Dunning State Bank to intervener, it becoming the owner and assuming the liabilities of the Dunning State Bank, which became defunct; that intervener performed its agreements, and that defendants breached their con-

tract by refusing to pay intervener the amount due it on the unpaid guaranteed notes.

In an answer to the petition of intervener defendants, among other defenses, denied that Cooper entered into the contract on behalf of intervener; denied that intervener was a party to the contract or a party in interest, and denied that defendants ever entered into any contract with intervener to sell their capital stock or to guarantee payment of the notes in controversy. Defendants pleaded further that Cooper had no authority to act for intervener in purchasing the capital stock of the Dunning State Bank, and that intervener could not lawfully, and did not, make such a purchase. A trial of the controversy between intervener and defendants resulted in a verdict in favor of intervener, upon which a judgment for $6,426.36 was entered. Defendants appealed. A hearing in the appellate court resulted in an affirmance on the grounds stated in a former opinion. *Cooper v. Bane, ante,* p. 74. Upon a motion by defendants for a rehearing, the case was reargued and again taken under advisement.

At the former hearing Cooper's authority to act for the Home State Bank, intervener, in purchasing the entire capital stock of the Dunning State Bank, the legality of such a purchase in view of a statute prohibiting it, and the sufficiency of the evidence to sustain a finding that defendants sold their stock to intervener, instead of to Cooper, were propositions controverted in the argument of defendants, but not discussed as determining factors in the opinion delivered. *Cooper v. Bane, ante,* p. 74. When the case was reargued, the negative of these questions was again presented by defendants and seems to require further consideration.

Disregarding the question whether a person not disclosed by a written contract may prove by parol that it was, for his benefit, entered into by a nominal party to the written instrument, the contract here in controversy is evidence that Cooper for his individual benefit entered

into it with defendants. This is affirmatively shown by the writing itself and nothing to the contrary appears therein. The contract declares on its face that Cooper is the party of the second part. All the obligations assumed by defendants run to him, individually without any reference to agency or to any other persons or corporation. Consistently with the terms of the instrument itself, it was signed by Cooper in his own name as the party of the second part. In their pleadings defendants and intervener alike rely on the contract—the former as written and the latter as shown by parol to express a mutual intention to make intervener the party of the second part, or the real purchaser of the capital stock of the Dunning State Bank. In absence of oral proof defendants would be entitled to judgment on the face of the written instrument.

Does the evidence show that Cooper had authority to act for the Home State Bank, intervener, in buying the capital stock of the Dunning State Bank? Though he was the principal stockholder, president and a director of intervener, he was not the bank itself. Buying the capital stock of a rival state bank was not an ordinary banking transaction within the powers of a stockholder, the president, or a single director, or all combined. The statute provides:

"The affairs and business of any banking corporation transacting business under the laws of this state shall be managed or controlled by a board of directors." Comp. St. 1922, sec. 8007.

There is no evidence that, in advance, intervener's board of directors authorized Cooper as an officer or a director or a stockholder or as an agent to buy the capital stock of the Dunning State Bank or to require defendants to guarantee payment of notes as assets acquired by means of the transfer.

Assuming that the acts of Cooper were the acts of the intervening bank, could the latter by itself or by Cooper

buy the entire capital stock of the Dunning State Bank? The statute declares:

"No corporation transacting a banking business shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, or the shares of any corporation, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith." Comp. St. 1922, sec. 8006.

The capital stock in the present instance was not purchased or held "to prevent loss upon a debt previously contracted in good faith." The execution of the contract, therefore, if shown by parol to have been entered into by Cooper for intervener, was forbidden by statute, and, if thus made, was illegal and unenforceable. It necessarily follows that intervener failed to show by parol or by the contract pleaded or by both that defendants legally sold the capital stock of the Dunning State Bank to the Home State Bank, the contract itself reciting that Cooper was the purchaser.

The position of intervener cannot be maintained by separating the guaranty and the transferred assets from the sale of the capital stock. The sale by which the assets were incidentally transferred and the guaranty are parts of an indivisible contract pleaded in its entirety by both intervener and defendants. Intervener, considered as the party which purchased the capital stock from defendant, acquired the assets by means of a forbidden illegal sale. Thus considered the transfer of the notes was a mere incident of the principal transaction. Neither the Dunning State Bank nor defendants indorsed the notes. Intervener, therefore, considered as the holder of the capital stock under an invalid purchase, cannot enforce the guaranty. In that situation the guaranty falls with the invalid purchase—the principal contract.

Did defendants in entering into the contract intentionally unite with intervener in a mutual understanding to consolidate the two banks? The statute declares that

"no consolidation shall be made without the consent of the department of trade and commerce." Comp. St. 1922, sec. 8021. There is no proof that, prior to the execution of the contract, the banks, or either of them, had the consent necessary to consolidation. Defendants parted with their capital stock, transferred the assets of the Dunning State Bank to the purchaser, and resigned as officers without any permission to consolidate the two banks. Neither the shares of the capital stock of the Dunning State Bank nor the assets thereof were turned over to intervener while in the control of defendants. An assignment of each stock certificate was signed in blank by the owner, one of the defendants. The assets, including the notes in suit, were not indorsed by any defendant, or by the Dunning State Bank, but remained in that institution for ten days at least after the transfer of the capital stock. The contract was executed June 1, 1918. Immediately thereafter Cooper, at a meeting of the new stockholders, was elected president of the Dunning State Bank, one of his associates vice-president, and another cashier. In this election by the new stockholders of the Dunning State Bank, Cooper and his associates controlled its capital stock and assets as individual owners. As thus reorganized, the Dunning State Bank was conducted as a commercial banking institution in its original name until June 12, 1918. It was not definitely known until June 11, 1918, that the Home State Bank would purchase the stock and assets of the Dunning State Bank and agree to a consolidation. There is no proof whatever that the department of trade and commerce consented to a consolidation while defendants had an interest in the Dunning State Bank or the right to enter into an agreement to consolidate it with the Home State Bank. Considering the evidence in the light of the contract, reciting as it does in unambiguous language that Cooper was the purchaser, there cannot, in reason, be a finding that defendants mutually and intentionally agreed with intervener to consolidate the two banks and that they put their agreement

in the written instrument pleaded by all parties to this action. There is an inference, however, that consolidation was mentioned in the preliminary negotiations, and that one, or perhaps two, of the defendants had knowledge of a wish on the part of Cooper to consolidate the two banks. This falls far short of an agreement by defendants to unite with intervener in a mutual consolidation, even if the department of trade and commerce had consented thereto. Intervener did not make a case against defendants. The judgment against them cannot stand.

In view of the conclusion reached on these phases of the case, it is unnecessary to reexamine the principles of law announced in *Cooper v. Bane, ante,* p. 74, though criticised as unsound. The former opinion is withdrawn, the affirmance set aside, the judgment below reversed and the cause remanded for further proceedings.

REVERSED.

MANLES ACREE, APPELLEE, V. ROY NORTH ET AL.: UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED MARCH 27, 1923. No. 22294.

1. **Assault and Battery:** ABETTOR. "In an assault and battery, not only he who is the actor or actual perpetrator of the offense, but he also who, being present when the act is done, aids and abets therein, is a principal and liable as such at the suit of the injured party." *Cooney v. Burke,* 11 Neb. 258.
2. ———: INSTRUCTION. Evidence examined, and *held* an instruction embodying the above doctrine properly given.
3. **Appeal:** DAMAGES: INSTRUCTION. Where, in an instruction upon the measure of damages, the jury are inadvertently told that they might compensate plaintiff for (among other things not complained of) "loss of time, *if any * * * has been shown by the evidence,*" when it appears that plaintiff made no claim for loss of time, either in his petition or in the evidence, it will be *held* not to be reversible error, nor to require a remittitur of the judgment, where it is reasonably certain the jury were not misled thereby, and the amount of the judgment can be sustained on other elements of damage not objected to, and the defeated party makes no complaint of the amount.

4. **Assault and Battery:** REFUSAL OF INSTRUCTION. In a civil action for assault and battery, where the evidence conclusively shows that the defendants made a voluntary attack upon plaintiff without provocation, and were the sole active aggressors throughout the assault, the plea of self-defense has no proper place in the transaction, and an instruction tendered looking to the exoneration of defendants on that ground is properly refused.

5. **Evidence:** ADMISSIBILITY: PRIVILEGED COMMUNICATIONS. Where it appears from the evidence that a physician, in his professional capacity, treated the plaintiff for injuries sustained to his face and jaw from an assault by defendants, and that prior thereto he had seen plaintiff at different places on the street, but where it further appears that on one or more occasions prior to seeing him on the street he had also, in his professional capacity, treated the plaintiff for facial paralysis, such physician will not be permitted to testify, over the objection of plaintiff that the same would be a violation of the privilege existing between physician and patient, what the difference was, if any, in the appearance of plaintiff's jaw and face at the time he treated him for his injuries from the assault above mentioned and the time he had seen him on the street, at least until, if at all, it is first shown that the witness is able to and will separate and discriminate the knowledge and information gained in his professional capacity from that gained in a nonprofessional capacity and base his answer solely upon the latter, and the witness not having thus qualified himself, the objection was properly sustained.

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

C. A. Magaw, Douglas F. Smith and *Thomas F. Hamer,* for appellant.

Halligan, Beatty & Halligan, contra.

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

TROUP, District Judge.

Action on the part of plaintiff, Manles Acree, against defendants, Union Pacific Railroad Company, John Schell, and Roy North, to recover damages for assault and battery and false arrest.

For first cause of action plaintiff, in substance, alleges that defendants Schell and North were employed by de-

fendant railroad company as private detectives to guard the grounds and trains of defendant company in and about the town of Sidney, Nebraska, to prevent depredations thereon and remove trespassers therefrom; that on July 3, 1920, the plaintiff, a farm-hand living three miles east of Sidney, drove into the town in his automobile, placed the same in a garage, remained in town until about 10 o'clock p. m., at which time, leaving his car in the garage for repairs, he started to walk on the Lincoln highway toward his home; that plaintiff had proceeded on said highway to a point near the east corporate limits of the city, when defendants Schell and North, being under the impression that plaintiff had committed or was about to commit some trespass upon the property of the railroad company, made an assault upon the plaintiff, beating and striking him upon the head and face, knocking him to the ground several times, striking and beating his jaw with a revolver and cutting numerous gashes upon his head and face; that on account thereof plaintiff suffered great bodily pain and injury, was compelled to pay a physician $50 for treatment of his wounds, all to his damage in the sum of $2,550.

For his second cause of action plaintiff reavers the substance of the facts above stated, and alleges that after the commission of the assault, as above set forth, defendants Schell and North did unlawfully and forcibly arrest said plaintiff, forcing him to give bond for his release, to his damage in the sum of $450, for all of which plaintiff prays judgment for $3,000.

The defendants each file separate answers. The defendant railroad company, for its answer, admits that defendant Schell was employed by the defendant company to guard and protect its property in the yards in and about Sidney, but denies each and every other allegation in plaintiff's petition.

The answer of defendant Schell is identical in substance to that of the railroad company.

The answer of defendant North denies that he was in

the employ of defendant railroad company at the time in question, and denies each and every other allegation in plaintiff's petition, except such as may be admitted in his answer. Further answering, defendant North alleges that on the night stated he was in company with defendant Schell, who at that time was engaged as night watchman for defendant company, and that at the time referred to this defendant and Schell saw plaintiff loitering in a suspicious manner upon the right of way of defendant railroad company; that, as defendants approached plaintiff, plaintiff attempted to escape by running, and, defendants giving chase, commanded plaintiff to halt, whereupon plaintiff drew a pistol and pointing same at Schell, this defendant fearing for his life, struck plaintiff, but only with such force as was necessary to prevent great bodily injury to said Schell.

Plaintiff's several replies to the respective answers deny each and every allegation therein contained, except only such as are admissions of allegations of plaintiff's petition. A trial before a court and jury resulted in a verdict and judgment for plaintiff for $3,000. The defendant railroad company only appeals.

Except that defendant North was not in the employ of defendant company, but was a volunteer on the occasion in question, we think it fair to say that the allegations of plaintiff's petition are well sustained by the evidence as to both causes of action. We think it also fair to say that from the evidence of defendant Schell and North it appears that, as they were passing down the railroad track on the night referred to, they saw three men in the vicinity of the railroad company's cars containing merchandise, acting in a suspicious manner, and, as defendants approached, one of the three escaped in a southeasterly direction, the other two in a slightly different direction, and it was while defendants were returning from a chase of the latter two that they discovered plaintiff walking eastward on the Lincoln highway, and, supposing him to be the first of the three who escaped, accosted him, and

the assault quickly followed substantially, as plaintiff alleges. The plaintiff, however, did have a pistol in his possession at the time of the assault, which he says he took from his car in the garage as he was about to start for home, and which he says he held in his hand by his side as he proceeded homeward on the highway.

The defendant presents several assignments of error, the first of which is to an instruction designated as No. 9, wherein the court told the jury, in substance, that even if they should find from the evidence that defendant Schell did not actually strike plaintiff, yet if he was present and did aid, abet and encourage defendant North to commit the assault, and that at the time of so doing he was acting within the scope of his employment with the railroad company, as explained in other instructions, then Schell and the railroad company would be equally liable with defendant North. The defendant does not criticise this instruction as a correct statement of the law, but claims there was no place for it in the evidence. To this, of course, we cannot agree. The plaintiff testified that Schell actually struck him. While defendants deny this, they both testify that Schell climbed over the railroad fence, intercepted the plaintiff as he was walking on the public highway, commanded him to stop and throw up his hands, and, while North immediately set upon him and beat him, Schell stood by with a flashlight in one hand and a loaded revolver in the other, and after the assault took hold of plaintiff and, together with North, forced him to the courthouse, where, as the evidence shows, both Schell and North insisted that he be thrown into jail, and only upon giving bond was he released. This was amply sufficient in fact to justify the instruction. So, also, was it sufficient in law. "In an assault and battery, not only he who is the actor or actual perpetrator of the offense, but he also who, being present when the act is done, aids and abets therein, is a principal and liable as such at the suit of the injured party." *Cooney v. Burke*, 11 Neb. 258.

Objection is also made to an instruction pertaining to

the measure of damages, wherein the court told the jury it might compensate plaintiff for (among other things not complained of) "loss of time, if any * * * has been shown by the evidence." The plaintiff made no claim for loss of time either in his petition or in the evidence, and this clause evidently slipped into the instruction inadvertently. We have some doubt if its insertion is such a fault as to be characterized as being even technically erroneous. The jury were told it might compensate for loss of time, *if any has been shown by the evidence.* The plain inference follows that, if there was no loss of time shown by the evidence, then it might not compensate for that. It is reasonably certain the jury were not misled, and that it allowed nothing therefor. Certainly the inadvertence is not such error as to require a reversal of the case, nor do we think even a remittitur from the judgment. The amount, at most, would be comparatively inconsequential. The amount of the verdict can be sustained on other elements of damage not objected to, and the defendant makes no complaint as to the amount. See, upon this point, *Chicago, R. I. & P. R. Co. v. Archer,* 46 Neb. 907.

Defendant complains of the refusal to give an instruction tendered, to the effect that if the jury found certain facts not to exist the defendant Schell and the railroad company would not be liable. The court had already instructed the jury, as to the same state of facts, to the effect that if they found said facts to exist they might find defendants Schell and the railroad company liable. It can hardly be said to be necessary to repeat the same proposition in the negative form.

Another instruction tendered by all the defendants and calculated to apply to all, but refused by the court, invoked the defense of self-defense. Self-defense is an affiirmative defense, and under a general denial only evidence of justification is admissible. *Barr v. Post,* 56 Neb. 698; *Mangold v. Oft,* 63 Neb. 397, and cases cited. Neither the railroad company nor Schell pleaded self-defense, and

neither was therefore entitled to an instruction looking to exoneration on that ground. North alone pleaded self-defense, but even if all had so pleaded it would have been proper to have refused the instruction. The whole evidence utterly precludes the idea of self-defense, and no part of the evidence shows this more positively than that of the defendants Schell and North themselves. They were the active aggressors from start to finish, and the plaintiff was the aggressor at no time. It is true the defendants claim that when plaintiff got up he "came right up at him (North), started up with hands kind-of stuck up, and North hit him a couple of times more;" but it must be remembered that this was at a time after plaintiff had been knocked down once or twice, and North stood on one side of him with plaintiff's pistol in his hand and Schell on the other side with his own pistol in his hand, and plaintiff completely unarmed. Under these circumstances it is more than likely plaintiff's uplifted hands indicated a complete surrender on his part. Certainly plaintiff was in a poor position to become the aggressor, and defendants were in a worse position to claim that to knock him down under these circumstances and break his jaw they were acting in self-defense. "The doctrine of self-defense cannot successfully be invoked, however, where defendant's own acts brought on the difficulty with plaintiff." 5 C. J. 636, sec. 32. The instruction was properly refused.

Numerous assignments of error are made to the admission or rejection of testimony, only one of which, however, we think calls for special mention. Doctor Mantor was the defendant railroad company's regular physician at Sidney; he was also the physician who treated plaintiff for his injuries received from the assault, and on one or more prior occasions had treated plaintiff for other ailments, including facial paralysis. The plaintiff calling Doctor Mantor to the stand, he was asked to describe plaintiff's injuries, which he did, and among other things stated that he had sustained a fracture of the jaw. Upon

cross-examination he was asked if upon a prior occasion he had not treated the plaintiff for facial paralysis, and, upon stating that he had, he was then asked in a series of questions to state the condition of plaintiff's facial paralysis at that time; what effect the same had upon the muscular movements of the jaw or face, and what, if any, difference he observed in the condition of his face and jaw at his prior treatment and now. Objections to these questions were sustained on the ground of improper cross-examination and privileged. The defendants, then calling the doctor as a witness in their own behalf, asked him whether or not he had seen the plaintiff at different places on the street prior to the treatment of his present injuries, and, answering that he had, the witness was then asked: "Will you state whether or not there was any difference in the appearance of his jaw at the time you treated him on the 7th and in the time that you had seen him on the street prior to that?" Plaintiff objected to any answer thereto, "for the reason that the relation of physician and patient existed and any communication or information obtained by the doctor in the treatment would be privileged," which objection was sustained. This ruling seems to be regarded by defendant as a serious error and from it is sought to be raised the legal inquiry: How far may a physician be permitted to testify as to the physical condition or appearance of one from facts gained in a nonprofessional capacity whom he has before treated for the same or like conditions in a professional capacity? But we are of the opinion that upon the existing state of the record the inquiry suggested is not properly reached. The witness had not been properly qualified and the question put to him was premature, so, if but for that reason alone, the objection was properly sustained. The doctor at no time stated, nor at any time was he asked to state, whether or not he could give the information required of him by the question based solely upon his knowledge of the plaintiff derived unprofessionally, to the entire exclusion of knowledge derived profes-

sionally. This was essential to his competency to testify at all. Suppose he had been asked whether or not he could entirely separate and distinguish these two sources of knowledge and he had answered that he could not, that would have disqualified him for further inquiry. He was not asked to make this discrimination and at no time was it intimated to him that he must do so in order to render his answer to the question a proper one. Under these circumstances the witness was left at perfect liberty to draw to the fullest extent upon his experience, knowledge and information, gained while treating the plaintiff as a patient, and impress the same upon any answer he might make. This the witness could not be permitted to do. See, upon this point, *Larson v. State*, 92 Neb. 24.

Other assignments presented in defendant's brief and not mentioned herein are regarded as immaterial. Finding no reversible error in the record, the judgment of the lower court is

AFFIRMED.

CENTURY OIL COMPANY ET AL., APPELLANTS, V. DEPARTMENT OF AGRICULTURE ET AL., APPELLEES.

FILED MARCH 30, 1923. No. 23277.

Constitutional Law: INSPECTION FEES. In practical operation under existing conditions, the statutory fee of six cents a barrel for the governmental inspection of gasoline creates an excessive fund in the nature of revenue in addition to the costs of inspection, and for that reason violates the constitutional provision relating to taxation, according to the ruling in *State v Standard Oil Co.*, 100 Neb. 825, Comp. St. 1922, sec. 7456; Const. 1875, art. IX, sec. 1.

APPEAL from the district court for Douglas county: CARROLL O. STAUFFER, JUDGE. *Reversed.*

William H. Herdman, Kennedy, Holland, De Lacy & McLaughlin, Baldrige & Saxton and *Crossman & Munger*, for appellants.

O. S. Spillman, Attorney General, and *W. C. Dorsey, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE, DAY and GOOD, JJ.

PER CURIAM.

This is a suit for an injunction to prevent the enforcement of the statutory provision fixing the fee for the governmental inspection of gasoline at six cents a barrel, on the ground that the legislation is unconstitutional. The district court upheld the fee and dismissed the suit. Plaintiffs have appealed.

The decision on appeal is controlled by a former ruling. A fee of ten cents a barrel, fixed by an earlier act otherwise identical with the present one, was held to be excessive, unconstitutional, and void. In practical operation under existing conditions, the statutory fee of six cents a barrel for the governmental inspection of gasoline creates an excessive fund in the nature of revenue in addition to the expenses of inspection, and for that reason violates the constitutional provision relating to taxation, according to the ruling in *State v. Standard Oil Co.*, 100 Neb. 826. Comp St. 1922, sec. 7456; Const. 1875, art. IX, sec. 1. In considering in the case cited the provision fixing a fee of ten cents a barrel, the legislation was treated as an act limited by its title to inspection under the police power. Had the fee under an appropriate title extended to revenue or an excise tax, a different question would have been presented. The supreme court of the United States recently held that the legislature may in the same act impose upon domestic commerce in gasoline a fee sufficient to pay the expenses of inspection under the police power, and to raise also under the taxing power a surplus in the form of an excise burden, which is not a tax on property. *Texas Co. v. Brown*, 258 U. S. 466. Under the legislation as it now stands, plaintiffs are entitled to an injunction to prevent the collection of the inhibited fee. For the purpose of granting that relief, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

FRANK DE CONLY, APPELLEE, V. WINTER CREEK CANAL COMPANY, APPELLANT.

FILED APRIL 10, 1923. No. 22190.

1. **Easements:** NOTICE. One who purchases land burdened with an open and visible easement is charged with notice of the same, and the estate he purchases is servient to the easement.
2. **Waters:** EASEMENT: INJUNCTION. Where an irrigation canal company, with the consent of a drainage district and the owner of a tract of adjacent land affected by flowage, constructed works whereby it was enabled to use water discharged from the drainage ditch into its canal for irrigation purposes, which use had continued for several years, a subsequent purchaser of the land affected may not restrain this use of the water upon the ground that the canal company had not acquired the right to appropriate the water.

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

F. A. Wright and *Mothersead & York,* for appellant.

Morrow & Morrow, contra.

Heard before MORRISSEY, C. J., DEAN, LETTON and ALDRICH, JJ., TROUP, District Judge.

LETTON, J.

One De Conly brought this action to enjoin the Winter Creek Canal Company, hereinafter termed the defendant, from obstructing the flow of water in a drainage ditch belonging to Drainage District No. 1 of Scotts Bluff county, alleging that this caused his land to be damaged by seepage water and floods. De Conly afterwards died and the suit was revived in the name of his executor. A permanent injunction was allowed. Defendant appeals.

The De Conly tract of about 120 acres of land lies in the valley of the North Platte river with higher lands to the north and west. A drainage ditch flows south along the boundary of the land to a point where it intersects the north bank of the irrigation canal of the defendant. Previous to the formation of the drainage district and the excavation of one ditch nearly all of this

land was wet and swampy. This condition was caused by the seepage of water from higher lands which were under irrigation from other canals at a higher level. It was almost totally unfit for cultivation on account of this condition. Under the articles of incorporation the south boundary of the drainage district is the north bank of the canal of the Winter Creek Canal Company.

When the ditch was excavated, a concrete structure was erected at its point of discharge into the canal. This structure had several gates. One of these sluice gates, when opened, permitted the waters from the drainage ditch to flow through a sluice under the irrigation canal, discharging on the other side of the canal. Except when the gate was opened, the water in the ditch flowed through another channel in the structure, into the canal of defendant, and the waters were used for irrigation purposes.

The facts are undisputed that Harrison, the then owner of the land, took an active part in the organization of the drainage district soon after the year 1911. He was one of its directors, and was fully informed of the nature and purpose of the concrete structure erected by the canal company at the point of discharge of the waters of the ditch into the canal of defendant. He made no objection to the manner in which the outlet was constructed. The ditch was of immediate benefit to his land, reclaiming the greater part of it and rendering it susceptible to cultivation. He continued to farm the land for several years after the works were finished before he sold it to Mr. De Conly. These works were in full view of any ordinary observer. De Conly was familiar with the locality and purchased the land in 1917 with full knowledge of the existence of the easement created by the ditch. De Conly testified that the sluice underneath the irrigation canal is kept open six or seven months every year, but it is closed during the remainder of the year; that, on account of the water table in the soil being raised by the closing of the gate

and the retention and consequent elevation of the level of water in the drainage ditch, his land has become permeated with seepage water, and a large acreage of alfalfa killed.

The fact that the water level in the ditch was raised when the sluice gate was closed, and that the water was discharged into the irrigation canal by means of the concrete structure, was open and obvious. Both the irrigation canal and the drainage ditch are works of public utility. The law does not permit one who purchases land with notice that it is burdened with a public easement, to destroy the purpose which the easement subserves by means of a writ of injunction. He takes the property subject to the easement, and has no greater rights than his grantor. This is not a new question in this state. *Fremont, E. & M. V. R. Co. v. Gayton,* 67 Neb. 263; *Znamanacek v. Jelinek,* 69 Neb. 110; *Arterburn v. Beard,* 86 Neb. 733; *Seng v. Payne,* 87 Neb. 812; *Moll v. Hagerbaumer,* 98 Neb. 555; 19 C. J. 939, sec. 145.

In *Arterburn v. Beard, supra,* the evidence showed that the plaintiff, who sought an injunction, was familiar with the locality and knew of the existence and use of the ditch or canal at the time he bought the land. The court held that he was charged with notice of the easement, and the estate that he purchased was servient to the same.

This principle applies here, and plaintiff is not entitled to injunctive relief. The question whether the defendant has acquired an appropriation to the water in the ditch is not one that can be raised by De Conly, since he is not charged with the protection of public right, if any, to the use of the water.

A number of other points are raised, but under the view we take it is unnecessary to consider them. What has been said is without prejudice to a right of action, if any plaintiff has (as to which we express no opinion), for damages caused by the flooding of his crops and resulting from the negligent operation of the ditch and

sluiceway. He may therefore be permitted to amend his pleading in this suit to permit such an issue to be raised, if the facts justify it.

REVERSED AND REMANDED.

CORNELIUS DELOUGHERY, APPELLANT, V. JAMES J. LAPSLEY ET AL., APPELLEES.

FILED APRIL 10, 1923. No. 22356.

1. **Highways:** ESTABLISHMENT BY CONSENT. Consent roads cannot be established under section 2598, Comp. St. 1922, unless "the written consent of all the owners of the land to be used for that purpose be first filed in the county clerk's office."

2. ———: ———. The mere signing and filing of a petition for the establishment of a road by a landowner, a portion of whose land will be taken for the highway if it be established, is not sufficient to constitute the "written consent" required by the statute for the establishment of a road by consent, and in such case proceedings under sections 2568 and 2590, Comp. St. 1922, are required.

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

C. A. Kingsbury and *Sidney T. Frum,* for appellant.

George W. Leamer, contra.

Heard before MORRISSEY, C. J., LETTON, DAY and DEAN, JJ., BUTTON, District Judge.

LETTON, J.

Relator seeks a peremptory writ of mandamus commanding the board of county commissioners of Dakota county to order an appraisal of damages to land affected by the establishment of a certain alleged highway, and to order the highway opened and placed in condition for public travel. A general demurrer to the petition was sustained, and the proceedings dismissed. Relator appeals.

It is alleged that relator filed a petition for the location of a highway with the county clerk, signed by himself and 26 resident electors residing within five miles

of the proposed highway; that the plaintiff and Frank Davey are the owners of all the real estate over and along which the proposed highway was established; that they both signed the petition; that the board of county commissioners, while in legal session, ordered that this road be "allowed as per petition on file, damages to be appraised." It is also alleged that the board refused to order an appraisement of damages, or to open the road, as requested.

There are two methods provided by statute for the establishment and opening of public roads. One is by filing with the county clerk a petition signed by at least ten electors residing within five miles of the road, the deposit of money with that office to cover the expenses if the road is not finally established, a view and report by the county surveyor, if the report is favorable notice by personal service upon owners of land affected, and by publication of the time within which objections and claims for damages must be filed. Section 2568 *et seq.*, Comp. St. 1922.

The other method of establishing a road is as follows: "Public roads may be established without the appointment of a commissioner, provided the written consent of all the *owners of the land to be used for that purpose* be first filed in the county clerk's office; and if it is shown to the satisfaction of the county board that the proposed road is of sufficient public importance to be opened and worked by the public, they shall make an order establishing the same, from which time only shall it be regarded as a public road." Comp. St. 1922, sec. 2598. This section is a little ambiguous. It may be construed to mean that its only purpose was to dispense with the appointment of a commissioner (which was required before the amendment to section 2568, making the county surveyor commissioner), and yet retain all the other requirements of the statute, such as service of notice, filing of claims and objections, appraisement of damages, and hearing. It may, however,

be construed as providing a means for making the establishment of roads by dedication a matter of public record. The provision that "the written consent of all the owners of the land to be used for that purpose" must be filed before the road is established evidently means consent to the use of the land for the highway, as well as consent to the establishment of the road. There is a distinction between the signing of a petition for the establishment of a road and the filing of a written consent of the owners of the land to be used for the purpose. A landowner may be willing to sign a petition to have the road established, and yet be unwilling to waive damages and dedicate his land to the use of the public for a highway.

In *Warren v. Brown*, 31 Neb. 8, the facts were that a county board had made an order establishing a road. No commissioner was appointed, no notice given, and no damages appraised. It was urged that the road was established by consent, but the court said, speaking of the owners of the land sought to be taken for highway purposes: "They did not sign the petition or application made to the board for the establishment of the road, nor did they file in the county clerk's office written consent that their land might be appropriated for that purpose. The filing of such written consent was necessary to confer jurisdiction upon the county board to establish a consent road. Without it their proceedings are a nullity." It was held that the county board had no jurisdiction to establish a public road when no commissioner had been appointed to examine into and report upon its expediency, unless the written consent of all the landowners whose land was sought to be taken for that purpose was first filed with the county clerk.

This construction of the statute was made over 30 years ago and has been largely followed by county authorities. The requisite proceedings for the establishment of a consent road not having been had, the county

board was justified in its refusal to accede to the request of relator.

AFFIRMED.

JOHN NEDELA, APPELLANT, V. MARES AUTO COMPANY, APPELLEE.

FILED APRIL 10, 1923. No. 22860.

1. **Appeal:** LAW OF THE CASE. The rule known as "the law of the case" is applicable only to legal principles enunciated and rules of law laid down by a reviewing court, but has no relation to decisions upon questions of fact where the evidence at the second trial is materially different from that adduced at the first, or where evidence upon a material point which is lacking at the first trial is produced upon the second.
2. **Master and Servant:** COMPENSATION: ELECTION. Where an employer and employee enter into a contract of employment after the taking effect of the workmen's compensation act, both are presumed to contract with reference and subject to the provisions of part II thereof, but where the employer does not insure for the benefit of his employees, or fails to furnish satisfactory proof to the compensation commissioner of his ability to pay compensation awarded, as provided in section 3069, Comp. St. 1922, he is liable to an action for damages on account of negligence, if the facts so warrant, or to pay compensation under the statute, at the election of the employee.
3. ———: ———: STATUTE: CONSTITUTIONALITY. Section 3687, Rev. St. 1913, as amended, now section 3069, Comp. St. 1922, is not void and unconstitutional as being an amendment of section 3653, Rev. St. 1913, as amended, now section 3035, Comp. St. 1922, without mentioning or repealing said section, but is valid as being supplementary legislation.
4. ———: NEGLIGENCE: QUESTION FOR JURY. Evidence adduced on the part of plaintiff examined, and *held* sufficient to carry the question of the existence of negligence on the part of the employer to a jury for their decision.

APPEAL from the district court for Saline county: RALPH D. BROWN, JUDGE. *Reversed.*

Bartos & Bartos and *Grant G. Martin,* for appellant.

Crofoot, Frazer, Connolly & Stryker and *B. V. Kohout, contra.*

Heard before MORRISSEY, C. J., LETTON, DEAN and ALDRICH, JJ., RAPER, District Judge.

LETTON, J.

Plaintiff recovered a judgment against defendant for personal injuries. This judgment was appealed to this court and reversed generally (*Nedela v. Mares Auto Co.*, 106 Neb. 883), for the reason that the evidence showed that both plaintiff and defendant were under the employers' liability act.

At the second trial defendant moved that plaintiff be required to elect whether he would proceed under the common law or under the employers' liability act. Plaintiff stated that he had elected at the former trial to proceed under the common law, and he stood upon that election. At the close of plaintiff's testimony, defendant moved for a directed verdict "in conformity with the mandate of the supreme court of Nebraska heretofore returned and filed in this case, and because the plaintiff's evidence is insufficient to constitute a case in favor of the plaintiff and against the defendant." This motion was sustained and the jury instructed that, "under the opinion of the supreme court rendered in this case, you should return a verdict in favor of the defendant." The action was then dismissed. Plaintiff has appealed.

On the former appeal defendant insisted that both parties were under the employers' liability act. Plaintiff argued that the defendant had not shown that the parties were under the provisions of part II of the act, because they did not prove that they had complied with the provisions of section 3687, Rev. St. 1913, as amended, now section 3069, Comp. St. 1922, and that therefore he was entitled to recover for negligence under the common law. This court held that it was not necessary for defendant to prove compliance with this section, as this would be presumed. At the second trial plaintiff furnished conclusive proof that defendant had not complied with this section, and therefore was not within the statute.

Defendant now insists that plaintiff was not entitled to make this proof, and that the decision of this court upon the former trial settled the law to the effect that both parties were under the employers' liability act, and the district court took this view. We think the court misapprehended the effect of the former decision. The case was reversed generally. At another trial plaintiff was entitled to furnish additional evidence, if necessary, to maintain his cause. A decision of a reviewing court upon the facts does not constitute the law of the case, unless the evidence at the second trial is the same, or substantially the same, as that adduced at the first trial. When an element essential to plaintiff's recovery is lacking in the first trial, but is proved at the second trial, this additional evidence cannot be ignored, and the legal questions presented must be determined according to the new aspect of the evidence. *Lane v. Starkey,* 20 Neb. 586; *Missouri P. R. Co. v. Fox,* 60 Neb. 531; *State v. Paxton,* 65 Neb. 110; *Gadsden v. Thrush,* 72 Neb. 1; *Sowerwine v. Central Irrigation District,* 91 Neb. 457. The court therefore erred in instructing the jury that plaintiff was concluded by the opinion of the supreme court.

It is next contended that section 3687, Rev. St. 1913, as amended, now section 3069, Comp. St. 1922, is unconstitutional because it amends section 3653, Rev. St. 1913, as amended, now section 3035, Comp. St. 1922, without mentioning it. The act has been amended several times since 1913. As originally written section 3687 merely provided that an employer might take out liability insurance. The section as amended provides in substance that every employer shall insure his liability under the act, or he "shall furnish to the compensation commissioner satisfactory proof of his financial ability to pay direct the compensation in the amount and manner when due as provided for in this act," and every employer who refuses to comply with the conditions set forth in the section "shall be deemed to have elected not

to come under part II hereof, and shall be required to respond in damages * * * in like manner as if the employer had filed an election with the compensation commissioner rejecting the provisions of part II." Section 3653 (Comp. St. 1922, sec. 3035) provided: "Every such employer and every employee is presumed to accept and come under part II hereof, unless prior to accident he shall signify his election not to accept or be bound by the provisions of part II," etc. As the law stood, an employer was under part II unless he gave either written or printed notice to the employee that he does not accept the provisions of part II. Under section 3687, as amended, now section 3069, Comp. St. 1922, if the employer fails to insure or fails to satisfy the commissioner as to his financial ability, he shall be deemed to have elected not to come under part II.

The amended section does not amend section 3653, but merely furnishes another method of evidencing that the employer does not elect to bring himself within the provisions of the act. Failure to insure allows the employee to elect whether to apply for compensation under the statute, or to depend upon legal remedies for damages for negligence. *Avre v. Sexton*, p. 149, *post*.

It is next urged that the evidence does not establish any negligence on the part of defendant. Was there sufficient evidence presented by the plaintiff to require submission of this question to a jury? The former opinion does not fully state the facts. In addition to those recited in that opinion, it appears that on the evening of December 21, 1921, the manager called Nedela to a bench near which he was standing and asked him to hold the wheel of a Ford automobile which he had placed vertically upon the bench. Plaintiff held it by the rim. The manager was trying to move the ball cones from the inside of the hub. He put a punch inside the hub and struck it with a hammer. Immediately a small piece of steel flew out and entered plaintiff's eye, from the result of which it became necessary to remove the eye.

The testimony on behalf of plaintiff by men experienced in such work is that the usual and customary method of removing the ball cones from such wheels is by holding the wheel against the workman's knee, or against the bench at such an angle that, when the punch is inserted from the upper side, and struck by a hammer, there is little danger from pieces of steel flying into the face, or if the cones are difficult to remove, the wheel is placed over a nail keg, or in a vise, flatwise, so that the punch is directed downwards, it being dangerous to perform such work unless the wheel is in such a position that the sparks are not liable to be driven or fly into the eyes of the workman. There is also testimony that it is not customary for more than one man to remove these cones, as it is easily done if the wheel is properly placed.

Since a verdict was directed at the close of plaintiff's testimony, there is no evidence to contradict these statements, and there was sufficient evidence to take the question of negligence to the jury, unless the defendant's contention is sound that, a punch and hammer being simple tools, and not being shown to be in any wise defective, there can be no negligence as a matter of law in their use by the defendant's manager. Attention is called to the fact that plaintiff testified, when cross-examined, that if a punch was put against a piece of iron, or steel, and hit with a hammer, sometimes a chip might fly off. The cases cited by defendant hold that there can be no negligence if the tools furnished by a master are simple tools, defects in which can be readily observed by the workman, and, further, that a master cannot be held liable for either latent or visible defects in such tools. But it is not shown that there was any defect in either the hammer or the punch. The negligence, if any, was not in the condition of tools furnished, but was in the manner in which the tools were used, and, according to the testimony of his witnesses, in placing plaintiff in a very dangerous and

hazardous position, and which dangerous situation plaintiff, by reason of his inexperience, did not apprehend. Plaintiff had not participated in work of this nature before, although, having been a carpenter, and having had some experience in garages and with threshing machines, he had a general knowledge of the use of such tools.

Section 3643, Rev. St. 1913 (Comp. St. 1922, sec. 3025) provides: "In all cases brought under part I of this article it shall not be a defense (a) that the employee was negligent, unless and except it shall also appear that such negligence was wilful, or that the employee was in a state of intoxication; (b) that the injury was caused by the negligence of a fellow employee; (c) that the employee had assumed the risks inherent in, or incidental to, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances, which grounds of defense are hereby abolished, except as provided in the second next following section." The second section thereafter is not applicable under the facts in this case.

Aside from the plea that both parties were under the compensation law at the time of the accident, the defenses pleaded are a denial that defendant was guilty of negligence, and an affirmative plea that plaintiff assumed the risks of the employment. Under the above section, assumption of risk inherent in, or incidental to, the employment, or arising from the failure of the employer to provide suitable appliances, is abolished as a defense. The only question left, as the pleadings now stand, is whether defendant was guilty of negligence, and, if so, the amount of damages plaintiff suffered.

We are unable to say as a matter of law that defendant was not negligent in placing the plaintiff in such a position when the punch was struck by the hammer. This is a matter which a jury must decide upon a consideration of all the evidence furnished by both parties. We express no opinion as to whether defendant

was negligent, since we have only the testimony on behalf of plaintiff before us.

REVERSED AND REMANDED.

JAMES MURRAY, APPELLEE, V. ROYAL C. BAILEY ET AL., APPELLANTS.

FILED APRIL 10, 1923. No. 22228.

1. **Sales:** RESCISSION. Where the purchaser of a farm tractor is induced to buy it by material false representations on which he is entitled to, and does, rely, and is thus defrauded, he may rescind the sale and recover back the purchase price paid.

2. ———: ———: DELAY. Where the purchaser of a farm tractor was fraudulently induced by the seller to buy it and to pay for it without an opportunity to inspect it, mere reasonable delay in returning it, if caused by honest efforts to make it work by trying it before and after replacing defective parts, will not necessarily defeat rescission.

3. ———: ———: RETURN OF PROPERTY. The purchaser of personal property, if induced to buy it by material fraudulent representations and to pay for it without opportunity for inspection, is not necessarily required to return it as a condition of rescission, if he made in good faith an offer to return it and it is shown that it would not be taken back.

4. **Evidence:** ADMISSIBILITY. A reply to a letter received in due course of mail and referred to a third person who answered it, *held* admissible in evidence over the objection of the person by whom it was referred, under the circumstances outlined in the opinion.

5. **Appeal:** HARMLESS ERROR. Harmless error in rulings on evidence and in giving and refusing instructions does not of itself justify the reversal of a judgment.

APPEAL from the district court for Valley county: BAYARD H. PAINE, JUDGE. *Affirmed.*

Prince & Prince and *E. L. Vogeltanz*, for appellants.

Davis & Davis and *W. C. Heelan*, *contra*.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and DAY, JJ., TROUP, District Judge.

ROSE, J.

This is an action by the purchaser of a tractor to re-

cover from the sellers the purchase price paid and other damages on account of false representations inducing the sale. Plaintiff resides on a farm near Seneca. Defendants are dealers in tractors at Ord. The negotiations resulting in the sale were conducted by mail. Before plaintiff had seen the tractor it was delivered to him at Ord on a freight car consigned to Seneca, and it was unloaded by him before he examined it. His claim consists of the following items: Payment by check April 14, 1919, mailed to Ord, $100; payment by check April 19, 1919, at Seneca, of sight draft attached to bill of lading, being the remainder of the purchase price, $900; freight, $47.24; repairs, $51.05; special damages, $300; total, $1,398.29. The petition, liberally construed, states facts sufficient to constitute a cause of action. Defendants denied the fraud charged and pleaded that the tractor was in the condition represented by them when delivered to plaintiff at Ord on the freight car consigned to him at Seneca. Upon a trial of the issues the jury returned a verdict in favor of plaintiff for $1,000. From a judgment thereon defendants have appealed.

It is argued that the judgment is not sustained by sufficient evidence, that plaintiff failed to prove either a prompt return of the tractor or a rejected offer to return it and that therefore he was not entitled to recover back the purchase price. The letters from defendants to plaintiff contained misrepresentations of material facts. This is shown by testimony of defendants themselves. They wrote letters representing: "We have had this engine on hand for just one year, and have used it for demonstration work and would say it has not plowed ten acres of ground. It is in A No. 1 condition." "Here is a big bargain if taken at once." "We consider this engine as good as new with the exceptions of demonstration work that we have done." "You will find what we have told you is right." The truth is it was a second-hand tractor. Defendants ordered it in 1916. They had it on hand at least two years. In the meantime they sold it to

a farmer who used it and exposed it to the weather for more than five months and afterward returned it to defendants in exchange for another tractor. There was evidence to sustain findings that it was in poor condition; that the paint was scuffed; that it was an old tractor, that it was out of repair; that parts of the machinery were broken; that it would not work or perform the services for which it was intended; that plaintiff with difficulty drove it to his farm, a distance of five or six miles from the railway station at Seneca; that he demanded instructions for operating this particular make of tractor; that he complained to defendants promptly, bought new parts and tried without success to make the tractor work. There is also proof that the tractor was covered with mud when loaded on the freight car at Ord and that the defects then existed and were not apparent when the tractor was unloaded at Seneca; that plaintiff was required to pay the purchase price and freight before being permitted to make an examination. The evidence is clearly sufficient to justify a rescission on the ground of fraudulent representations.

Did plaintiff lose his right to rescind the sale by failing to act promptly in returning the tractor or in making a rejected offer to return it? He unloaded the tractor April 19, 1919. Thereafter he tried to make it work and requested instructions upon discovering latent defects. He also demanded the replacement of broken parts. As early as May 30, 1919, he wrote, and defendants received, a letter saying:

"I will return your engine and load it on the cars and you refund my money."

In a reply defendant said:

"We do not believe, Mr. Murray, you would be interested in loading that tractor onto the cars, as it would be necessary to establish a fact that the tractor was not fulfilling the manufacturer's guarantee."

This was not the first time defendants had used the words, "would be interested." In reply to a former letter

they had used that expression in a peremptory refusal to drive the tractor to Merna or Anselmo as a condition of the sale. Under the circumstances plaintiff was justified in assuming, and the jury in finding, that defendants would not have accepted the tractor, if tendered to them at Ord. The evidence seems to be sufficient to sustain a finding that the delay on the part of plaintiff was excusable under the circumstances and that an actual tender of the tractor at Ord would have been unavailing and therefore unnecessary.

The admission in evidence of two letters which plaintiff received by mail from the manufacturer of the tractor is also assigned as error. It is argued that these letters did not come from defendants, that the latter are not bound by them, and that they were admitted without the laying of a proper foundation. From the evidence as a whole the following facts or conclusions are inferable: The letters show that the tractor was sold by the manufacturer in 1916, through the agency of defendants, to a farmer residing near Ord. This, in connection with other evidence, disproves the representation by defendants that they had the tractor on hand just one year for demonstration work. Plaintiff received the first of these two letters in due course of mail in reply to a letter mailed by him to defendants, complaining about the tractor and requesting supplies to replace broken parts. The second letter to which objection was made was likewise received by plaintiff in reply to a letter on the same subject, which had been mailed by him to the manufacturer in response to the first of the two letters. Defendants referred the subject-matter of the correspondence to the manufacturer and took the initiative in prompting the letters from that source. The evidential facts shown by these letters, to which objections were made, were proved outside of the letters. The genuineness of the letters is not disputed. If the foundation was not properly laid in the first instance, it was supplied by subsequent testimony. The circumstances dis-

closed by the evidence as a whole show that there was no prejudicial error in the rulings of the trial court.

With the principal questions determined in favor of plaintiff, no prejudicial error has been found in other rulings on evidence or in the giving or refusing of instructions.

AFFIRMED.

WILLIAM G. GARRETT V. STATE OF NEBRASKA.

FILED APRIL 10, 1923. No. 23124.

1. **Homicide:** INTENT. Intent is an essential element of the crime of assault with intent to commit murder and proof of such intent is indispensable to support a conviction.

2. ———: INSUFFICIENCY OF EVIDENCE. The record examined, and, *held,* that there is no proof to show that defendant committed either of the offenses with which he is charged in the information.

ERROR to the district court for Kearney county: WILLIAM A. DILWORTH, JUDGE. *Reversed.*

Bruckman & Paulson, for plaintiff in error.

O. S. Spillman, Attorney General, and *George W. Ayres, contra.*

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ., BUTTON, District Judge.

DEAN, J.

Defendant was informed against in Kearney county and charged, in the first count of the information, with having maliciously and feloniously made an assault upon Hannah C. Garrett, his wife, with a double-barreled shotgun, with intent to kill and murder her. In the second count he was charged with having made an assault upon her with intent to inflict great bodily injury. Defendant was found guilty and was sentenced to serve 5 years in the penitentiary. He prosecutes error.

Defendant is a tenant farmer residing on a farm about five miles from Minden. April 12, 1922, the sheriff called at his home twice to serve certain writs on him,

namely, one in a suit brought by his wife for a divorce, the other was a writ of habeas corpus under which it was sought to deprive him of the custody of his six minor children ranging from five to seventeen years of age. It appears that while the sheriff was at his place defendant had a loaded shotgun under his arm and that he was much excited and greatly disturbed over the misfortunes that had overtaken him and his household.

Defendant indulged in a good deal of boisterous and ill-timed talk about shooting, before the sheriff left the premises, and made threats that might have justified a prosecution for a misdemeanor under section 9554, Comp. St. 1922, which provides for the punishment of one who "threatens another in a menacing manner." But whether defendant threatened his wife or threatened the sheriff, who was present throughout the verbal eruption, that officer testified that he did not know from anything that he said. His wife, however, testified that he threatened to shoot her and then to shoot himself and that he said that if he could not have her nobody else could have her, and that if he could not have the children she could not have them. It also appears that defendant and his wife talked together about a reconciliation soon after the threats were made.

The information was drawn under sections 9553 and 9556, Comp. St. 1922. Section 9553 provides: "Whoever shall maliciously shoot, stab, cut, or shoot at, any other person with intent to kill, wound, or maim such person, shall be imprisoned in the penitentiary, not more than twenty years nor less than one year." Section 9556 provides: "Whoever assaults another with intent to inflict a great bodily injury, shall be punished, on conviction thereof, by imprisonment in the penitentiary for not less than one year nor more than five years."

Notwithstanding defendant's extravagant talk, the proof fails to show that he committed either of the offenses with which he is charged in the information. That

he is entitled to a fair and impartial trial goes without saying. With respect to the gun maneuver, the sheriff testified that it was all over in 30 seconds, and that while defendant held the shotgun he, the sheriff, held the gun-barrel, and it was shown that defendant whether under direction of the sheriff or of his own volition does not clearly appear from the sheriff's evidence, pulled the triggers and discharged the contents of the gun into the ground. On this point defendant testified that the sheriff held the gun-barrel when it was pointed down and told him to pull both triggers. He said he did as requested and the contents of the gun were discharged. It is not shown that defendant at any time pointed the gun at any person, nor that he assaulted any person, nor that he made any attempt to inflict bodily injury upon any person. In this connection it may be added that five character witnesses testified that defendant's reputation, as a peaceable citizen, was good in his home community and their testimony was not contradicted by the state. *McDougal v. State,* 105 Neb. 553, and cases there cited.

That defendant talked much and unwisely abundantly appears and that is about all the record discloses with respect to his conduct. The law is that intent is an essential element of the crime of assault with intent to commit murder and proof of such intent is indispensable to support a conviction. *Botsch v. State,* 43 Neb. 501.

Defendant points out 55 alleged assignments of error. Of these 22 have to do with instructions given by the court and 18 point out alleged error in the refusal to give instructions tendered by defendant. The remainder are concerned for the most part with the assignments which are discussed in the opinion. In view of our conclusion we do not find it necessary to discuss the assignments in respect of the instructions.

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

REVERSED.

W. W. FEUERSTEIN ET AL., APPELLANTS, V. SAUNDERS COUNTY ET AL., APPELLEES.

FILED APRIL 10, 1923. No. 22320.

Highways: VACATION. Where a petition praying that a part of a road be vacated, signed by ten or more electors residing within five miles of such road, as provided in section 2566, Comp. St. 1922, is filed with the clerk of the board of county commissioners, and due notice thereof is given as required by law, and where objections are filed to the vacation of such road, an order of the county board granting the petition will be held to be erroneous as having been made without jurisdiction, where the proceedings of the board fail to show that a majority of the electors residing within two miles of the road sought to be vacated, and not residing within a village or city, have consented thereto, as provided by section 2565, Comp. St. 1922.

APPEAL from the district court for Saunders county: EDWARD E. GOOD, JUDGE. *Affirmed in part, and reversed in part.*

J. H. Barry, for appellants.

H. A. Bryant and *Ernest S. Schiefelbein, contra.*

Heard before MORRISSEY, C. J., ALDRICH and DAY, JJ., BEGLEY and BUTTON, District Judges.

DAY, J.

This is an appeal by W. W. Feuerstein and 14 others from a judgment of the district court for Saunders county, affirming an order of the board of county commissioners of that county establishing a public road, and also vacating a part of the road previously established.

No complaint is made of the judgment in so far as it affirms the order of the board establishing the new road. Appellants object only to that part of the judgment which affirms the order of the board vacating a part of the old road, and urge upon us that, inasmuch as the record of the proceedings before the board fails to show that a majority of the electors residing within two miles of the road sought to be vacated, and not living within a village or city, have consented to the vacation of the

road, therefore the board was without power to order a part of the road vacated.

It appears that on April 25, 1919, a petition bearing the signatures of 42 electors was filed with the clerk of the board, praying that a road specifically described by metes and bounds be established, and also praying that a part of the road theretofore existing be vacated. A few days later a supplemental petition was filed, signed by 34 additional electors, praying for the same relief. To each of these petitions an affidavit was attached to the effect that the signers were electors of the county residing within five miles of the proposed road. Later 13 of the petitioners asked that their names be withdrawn from the petition, and still later 50 electors filed objections to the vacation of the road.

The change sought to be effected by the petitions was to have the road extend along straight lines. The old road, from a given point, extended north 495 feet, at which point it veered to the left on an angle of 18 degrees and 2 minutes for a distance of about 867 feet, where it intersected the east and west section line road. The petitioners sought to have the road extend from the same given point directly north to the section line road, and also to have such parts of the old road vacated as lay outside the lines of the new road. A commissioner was duly appointed to view the proposed road, who recommended some slight changes. A notice was duly published, and a date set for hearing objections. W. W. Feuerstein and 14 others, the appellants, residing within 2 miles of the road, and not living within any village or city, filed a protest to the vacation of any part of the road. Upon the hearing the board made an order establishing a new road, and vacating the part of the old road, as prayed in the petition. From this order the protestants, appellants herein, took error to the district court, where the order of the board was sustained.

It is conceded by the appellants that the record of the proceedings before the board is sufficient to authorize

the board to establish a new road, but it is earnestly insisted that the recitals contained in the record are insufficient to show jurisdiction of the board to vacate the old road.

The question presented turns upon the construction to be given to section 2565, Comp. St. 1922, when considered in connection with section 2566. As orginally enacted section 2565 was as follows: "All roads within this state which have * * * not been vacated in pursuance of law are hereby declared to be public roads." In 1909 (Laws 1909, ch. 113), and again in 1917, this section was amended by adding the words, "and no such road or any part thereof shall be vacated or changed without the consent of the majority of the voters living within two miles of the road and not living in a village or city." Laws 1917, ch. 58. Section 2566 provides as follows: "Any person desiring the establishment, vacation, or alteration of a public road, shall file in the clerk's office of the proper county a petition signed by at least ten electors residing within five miles of the road proposed to be established or vacated, in substance as follows: (here follows a form of petition)."

It has repeatedly been held that the filing of a petition in accordance with the provisions of section 2566, Comp. St. 1922, and the giving of notice as contemplated by section 2578, are conditions precedent to the making of an order by the county board affecting public roads. *State v. Otoe County,* 6 Neb. 129; *Doody v. Vaughn,* 7 Neb. 28; *Beatty v. Beethe,* 23 Neb. 210; *Lesieur v. Custer County,* 61 Neb. 612. Under these decisions it is held that the board has jurisdiction to establish or vacate a public road, when a petition is filed signed by at least ten electors residing within five miles of the road proposed to be established or vacated, and after proper notice has been given. These decisions, however, were made before section 2565, Comp. St. 1922, was amended by the laws of 1909 and 1917, in the manner hereinbefore pointed out. What effect, then, should be given to

the added words, "and no such road or any part thereof shall be vacated or changed without the consent of the majority of the voters living within two miles of the road and not living in a village or city?" A fair construction of this language would seem to indicate that it was intended as a limitation upon the power of the board, where the purpose of the proceeding was to vacate or change a public road. A board of county commissioners is a tribunal of limited jurisdiction, which is defined by statute, and it is essential that all the facts necessary under the statute to authorize its action in any given case should be affirmatively shown. *Robinson v. Mathwick,* 5 Neb. 252. Construing sections 2565 and 2566, Comp. St. 1922, together, as we must do, because *in pari materia,* it would seem that, where it is sought to vacate or change a road, or any part thereof, in addition to the requirements of sections 2566 and 2578, Comp. St. 1922, the record of the proceedings before the board must somewhere affirmatively show that a majority of the electors residing within two miles of the road, and not living in a village or city, consented thereto. Nowhere in the record does it appear that a majority of the voters residing within two miles of the road, and not living within a village or city, consented to the vacation of the road in question. On the face of the record, that part of the order of the county board vacating a part of the road is erroneous because it fails to show jurisdictional facts.

We conclude, therefore, that the judgment of the district court, in so far as it sustains the order of the county board establishing a new road, should be affirmed; and that the judgment affirming that part of the order vacating a part of the old road should be reversed; and the cause is remanded to the district court to enter judgment in accordance with the views herein expressed.

AFFIRMED IN PART, AND REVERSED IN PART.

FRED C. HAFFKE, APPELLANT, V. MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA, APPELLEE.

FILED APRIL 10, 1923. No. 22324.

1. **Railroads:** CROSSINGS: DUTY OF TRAVELER. "It is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear; and if he fails without reasonable excuse to exercise such precautions he is guilty of negligence." *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266.

2. ———: NEGLIGENCE OF TRAVELER. Under the facts disclosed by the record, and set out in the opinion, *held*, that the negligence of the plaintiff was more than slight, as compared with the negligence of the defendant, and precludes plaintiff from a recovery.

3. **Negligence:** COMPARATIVE NEGLIGENCE: QUESTION FOR COURT. Where the facts show beyond reasonable dispute that the plaintiff's negligence was more than slight, as compared with the negligence of the defendant, it is the province of the court to direct a verdict for the defendant.

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

H. S. Lower and *Wilmer B. Comstock*, for appellant.

J. A. C. Kennedy, Yale C. Holland and *George L. DeLacy, contra.*

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

DAY, J.

This action was brought by Fred C. Haffke to recover damages for personal injuries sustained in a collision between his automobile truck and one of defendant's trains at a railroad crossing. The plaintiff claims that the collision and consequent injuries were due to the defendant's negligence. At the conclusion of the plaintiff's testimony the trial court, on motion of the defendant, directed the jury to return a verdict in favor of the defendant, which was accordingly done. Thereupon judgment was entered in favor of the defendant. Plaintiff appeals.

The error complained of by the plaintiff is the failure of the court to submit the question of negligence and contributory negligence to the jury. It appears from the record that about 9 a. m. on April 14, 1920, the plaintiff was driving his Reo automobile truck loaded with cattle, en route from Plattsmouth to Omaha, Nebraska. A short distance from where the collision occurred the highway passes over the Pappio creek bridge, and then rises gradually up to the railroad crossing some 34 yards from the east end of the bridge, the elevation at the crossing being about 6 feet above the roadway at the bridge. The bridge was about 34 yards in length. At any point from the east end of the bridge to the crossing a person traveling along the highway could see plainly down the track in the direction from which the train approached as far as the whistling post. The distance from the crossing to the whistling post is estimated by the plaintiff at 600 feet, by one of his witnesses at 1200 feet, and it is alleged in the petition that it is about 1000 feet. Just as the plaintiff drove off the east end of the bridge he looked in both directions, but saw no train. He then proceeded to approach the railroad crossing driving his truck in low gear at a speed of about two miles an hour. After leaving the bridge he did not look again for approaching trains, but listened as best he could, the noise of his machine and the wind interfering somewhat with his ability to hear. In this manner he drove upon the track when the train was about 30 yards distant, and coming toward him at a speed of about 50 miles an hour. The train collided with the truck, demolishing it, and the plaintiff sustained severe personal injuries; both of his legs were broken, and he was bruised in several places about the head and body.

We think it may well be conceded that the evidence with respect to the negligence of the defendant is sufficient to have that issue submitted to the jury, but the question upon which the case must turn is whether the plaintiff was guilty of such contributory negligence

as to defeat a recovery. Assuming that the plaintiff is correct in his estimate that an approaching train could be seen for the first time when within 600 feet of the crossing by a person traveling upon the highway between the bridge and the railroad track, that the train was running at 50 miles an hour, and that he was driving his truck at two miles an hour, it would follow that the plaintiff would be at a point about 24 feet from the crossing at the earliest possible moment it was possible for him to have seen the approaching train. To cover this distance would require about 8 1-3 seconds for both the train and the plaintiff's truck. Plaintiff concedes that, had he looked at any time while covering this distance of 24 feet, he could have seen the train. He also testified that he could have stopped his truck within a distance of one foot.

Was the failure of the plaintiff to look for an approaching train while passing over this distance such contributory negligence as to defeat a recovery? The rule is now fairly well settled in this state that it is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for approaching trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear, and if he fails without reasonable excuse to exercise such precautions, no recovery can be had arising out of a collision with a passing train. *Rickert v. Union P. R. Co.*, 100 Neb. 304; *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266; *Seiffert v. Hines*, 108 Neb. 62.

The plaintiff seeks to excuse his failure to look for an approaching train while traveling this distance of 24 feet by showing that the road was in bad condition; that it was soft; that there were some ruts almost axle deep; and that it was necessary that his whole attention be centered upon driving his machine. We do not consider, however, that the circumstances were such as to excuse him from looking. A mere glance occupying but a fraction of a second would have sufficed to warn him

of the approaching train.

The plaintiff also contends that under our comparative negligence statute (Comp. St. 1922, sec. 8834) the question of negligence and contributory negligence should have been submitted to the jury. In *Disher v. Chicago, R. I. & P. R. Co.*, 93 Neb. 224, it was held: "Where the facts in evidence tend to show both negligence and contributory negligence, the duty to make the comparison required by the statute rests with the jury, unless the evidence as to negligence is legally insufficient, or contributory negligence is so clearly shown that it would be the duty of the trial court to set aside a verdict in favor of the plaintiff. Ordinarily, wherever there is room for difference of opinion upon these questions, they must be submitted to the jury." In *Morrison v. Scotts Bluff County*, 104 Neb. 254, it was held that, if in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which under the circumstances amounts to slight negligence, the contributory negligence of the plaintiff will defeat a recovery. In *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692, it was held: "In an action for damages caused by the alleged negligence of the defendant, where it is shown beyond reasonable dispute that the plaintiff's negligence is more than slight as compared with that of the defendant, the case should not be submitted to the jury, and it is the duty of the court to enter judgment of dismissal." See *Frye v. Omaha & C. B. Street R. Co.*, 106 Neb. 333; *Bauer & Johnson Co. v. National Roofing Co.*, 107 Neb. 831.

Considering all of the circumstances surrounding this accident, we conclude that reasonable minds could come to no other conclusion than that plaintiff was guilty of more than slight negligence in comparison with the negligence of the defendant, and that the court was right in directing a verdict for defendant.

AFFIRMED.

MAX KATLEMAN, APPELLEE, V. LEON'S, INC., APPELLANT.

FILED APRIL 10, 1923. No. 22282.

Corporations: BREACH OF CONTRACT: MEASURE OF DAMAGES. In an action to recover damages for breach of a contract to issue and deliver corporate stock, the measure of recovery is the value of the stock at the time of the breach.

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

Peterson & Devoe, Lambert, Shotwell & Shotwell and *Arthur Rosenblum,* for appellant.

T. S. Allen and *Reese & Stout, contra.*

Heard before LETTON, ROSE, DAY and GOOD, JJ.

GOOD, J.

Plaintiff brought this action against the defendant to recover damages for breach of contract. Two causes of action were pleaded. For his first cause of action, plaintiff alleged that he had an oral agreement with the Benway Furniture Company, whereby the said company had agreed to lease to him, for a period of ten years, space for a storeroom at 1039 O street, in the city of Lincoln; that, with the consent of said company and before said lease was reduced to writing, he assigned and transferred the same to the defendant, and that the said Benway Furniture Company, in pursuance of said assignment, executed the lease to the defendant; that, in consideration of said assignment of lease or agreement to lease by plaintiff to defendant, it was to open and operate on the leased premises a store for the sale of men's hats and furnishings, and was to deliver to plaintiff, when the store was opened, $5,000 of the par value of the corporate stock of the defendant company, and was to employ plaintiff as manager of said store at a salary of $175 a month. He alleged the opening of the store on April 18, 1919, the refusal and failure of defendant to transfer the corporate stock, and that its value was $7,000. For his second cause of action, plaintiff alleged that he acted as manager of defendant's store from

the 18th of April, 1919, to the 31st of August, 1919; that defendant had paid to him on his salary the sum of $753.50, and that there was still due and unpaid on salary the sum of $205.50.

The defendant admitted that it leased the premises from the Benway Furniture Company for a period of ten years, but denied that any lease, or agreement for a lease, was ever assigned or transferred by plaintiff to defendant, or that plaintiff ever had any lease or agreement for a lease to the demised premises, or that it had agreed to issue any of its corporate stock to plaintiff. Defendant admitted the employment of plaintiff as manager of the store and admitted that it had paid him the sum alleged by him, but denied any agreement to pay him $175 a month, and that anything was due the plaintiff.

Plaintiff in his reply alleged that defendant received the lease from the Benway Furniture Company, pursuant to the agreement with plaintiff, and retained the same, and that the value of said lease was $15,000, and denied all other allegations in the answer.

The trial resulted in a verdict for plaintiff in the sum of $5,721.10 on the first cause of action, and $205.50 on the second cause of action, making a total of $5,926.60. Judgment was entered on the verdict, and defendant has appealed.

Defendant asserts that the evidence is insufficient to establish any consideration for the alleged contract between plaintiff and defendant, wherein it is charged that defendant was to issue to plaintiff stock in the defendant corporation of the par value of $5,000, and that the evidence does not sustain the verdict of the jury on the first cause of action. The record discloses that about the middle of February, 1919, plaintiff began negotiations with the Benway Furniture Company, with a view to leasing floor space at 1039 O street for a storeroom. Plaintiff was informed by Mr. Lloyd, manager for the Benway Company, that it had space for

rent and would be willing to lease upon certain requirements, among which were that the character of the business to be operated must be a line which would not conflict with any line that was sold by the Benway Company, and that he would also have to be satisfied as to the financial responsibility of the person or persons to whom lease was made, and, if the lessees were not financially responsible personally, that he would expect a bond to be given for the payment of the rent, or the signature of some person on the lease who was financially responsible and acceptable.

It appears that plaintiff had not sufficient capital to open and operate the proposed store alone, but he told Mr. Lloyd that he expected to interest some relatives with him, and from whom he expected financial backing. He also mentioned the name of a brother-in-law, whom he might procure as surety, and requested Mr. Lloyd to hold the matter open until the following Friday, which would be the 21st of February. Mr. Lloyd informed plaintiff that other persons were negotiating for the floor space, but that he would hold the matter open until the following Friday. The plaintiff did not again see Mr. Lloyd, of the Benway Furniture Company, until after that time. In the meantime plaintiff had seen his relatives and was not able to interest them with him in the business. On Saturday, the 22d of February, plaintiff called up Sam J. Leon, of Omaha, who was an officer and stockholder of the defendant, and talked with him concerning the establishment of a store for the sale of men's hats and furnishings in Lincoln, and at his solicitation Mr. Leon, together with his brother, Mark, came to Lincoln on Sunday, the 23d of February, and they had a conference at that time with the plaintiff. Plaintiff says that he informed them of the floor space that could be leased, being 11 feet by 50 feet, for $125 a month, and that possibly a wider space could be had and perhaps a longer time than five years might be obtained. He suggested to the Leons that they go into

partnership with him, and that they open up a store together. He testifies that they refused to entertain the partnership idea, but said that, if the location was desirable, they would rent it, open a store and put him in as manager, and would issue to him $5,000 of the capital stock of the defendant corporation. The Leons testify that they declined the partnership proposal, but told plaintiff, if the location was satisfactory, they would lease it, open a store, and give him a position as manager, and they state that plaintiff assented to this. Plaintiff then called Mr. Lloyd on the telephone and arranged for a conference between the four for that afternoon. The record discloses that the location was examined and the two Leons and the plaintiff, together with Mr. Lloyd, discussed the matter; that Mr. Lloyd informed the plaintiff that he had not come back by Friday as he had agreed to do, and that he was negotiating with other persons for the lease of the premises. The conference finally resulted in an agreement that defendant would lease a space 18 feet wide by 51 feet long, including corresponding basement underneath, for ten years at a rental of $250 a month. During these negotiations Mr Lloyd inquired of the plaintiff what his status was to be, and one of the Leons spoke up and said that plaintiff was to be in charge of the store as manager. The lease was subsequently reduced to writing and was signed by the parties thereto March 4, 1919. This, in brief, states the facts concerning the alleged lease or agreement for lease between the plaintiff and defendant.

From the record it does not appear that any definite arrangement had ever been reached between plaintiff and the Benway Company for a lease, nothing but a tentative proposition, on the one side, which had never been accepted by the other. The minds of the two parties never met. It follows that plaintiff had nothing which he could assign or transfer to the defendant. There was no consideration for the contract between plaintiff and defendant, if made as contended by plaintiff. If this

action, instead of being one to recover for the agreed price of the assignment of a lease or contract for a lease, had been one for the recovery of compensation for services rendered in procuring a lease from the Benway Company to defendant, a different situation would be presented.

There is another reason why plaintiff was not entitled to recover upon the first cause of action. It is a well-settled rule of law that the measure of recovery in an action for damages for failure to issue and deliver corporate stock is the value of the stock at the time of the breach. *Winside State Bank v. Lound,* 52 Neb. 469; *Pinkerton v. Manchester & L. R. Co.,* 42 N. H. 424; *Beaty v. Johnston,* 66 Ark. 529; *Roder v Niles,* 61 Ind. App. 4; *Belden v. Krom,* 34 Wash. 184.

The alleged contract provided that the stock should be issued when the store was opened for business. The record shows that the store was opened on the 18th day of April, 1919, and if the contract was entered into, as contended by plaintiff, this would be the date when he was entitled to have the stock issued and delivered to him, and the breach of the contract must have occurred at that time. The measure of recovery would have been the value of the stock on that date. There is no evidence in the record of the value of the stock at that time, and the only evidence of the value of the stock at any time is the testimony of plaintiff. He testified that, at the conference in Lincoln on February 23, Mark Leon said the stock was worth $100 a share.

For the reasons given, the district court should have sustained defendant's motion to direct a verdict for it on the first cause of action, because the evidence is insufficient to sustain a verdict for plaintiff on that cause of action. There are numerous other assignments of error, but we deem it unnecessary to consider them in this opinion, as we think they are not likely to occur upon a subsequent trial of the case.

Defendant makes no complaint against the verdict

upon the second cause of action. The judgment entered below was one in gross for the amount of the recovery allowed on the two causes of action.

The judgment of the district court is reversed and the cause remanded, with directions to the district court to enter judgment for plaintiff on the second cause of action in the sum of $205.50, and awarding the defendant a new trial upon the first cause of action.

REVERSED.

H. W. J. EDBROOKE, APPELLEE, V. FIRST NATIONAL BANK OF ALLIANCE, APPELLANT.

FILED APRIL 10, 1923. No. 22319.

1. **Appeal:** CONFLICTING EVIDENCE. The verdict of a jury in a law action, based on conflicting evidence will not be disturbed, unless clearly wrong.
2. ———: HARMLESS ERROR. It is not prejudicial error for the court, by an instruction, to withdraw an item of a counterclaim from the consideration of the jury, where the jury have properly determined that no right of counterclaim existed.
3. ———: ADMISSIBILITY OF EVIDENCE. A party who procures a witness to read in evidence the contents of a written instrument cannot complain of the subsequent admission in evidence of the identical instrument.

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

Burton & Reddish, for appellant.

Warren & Hodgkin and *E. C. Barker, contra.*

Heard before MORRISSEY, C. J., ALDRICH and GOOD, JJ., BEGLEY and BUTTON, District Judges.

GOOD, J.

This action was brought by plaintiff to recover a balance due for services as an architect in preparing plans and specifications for the remodeling of defendant's bank building, pursuant to a written contract between the parties. The defendant admitted the making of the contract, but alleged in its answer that it was under-

stood and agreed between the parties that the cost of the entire work, including the services of the architect, should not exceed $30,000, and alleged that, under the plans and specifications furnished, the total cost of remodeling the bank building would exceed $60,000, and that it could not and did not use the plans and specifications, and denied any liability on the contract. It further alleged, by way of counterclaim, that it had made a partial payment on the contract, and had ordered and paid for certain material for the building before it was aware that the cost of the remodeling would exceed the sum of $30,000, and that the material ordered was of such a character that it could not be used for any other purpose and was an entire loss to the defendant; and asked for judgment for the amount of the partial payments made and the cost of the material paid for. Plaintiff denied that there was any agreement to limit the cost of remodeling to $30,000. Trial was had to the court and jury, and the jury found for plaintiff in the total amount claimed by him. Defendant brings the case to this court for review.

1. It is evident from an examination of the record that the principal question, and the one which is determinative of this case, is whether or not there was an agreement between the parties that the cost of remodeling the building should not exceed $30,000. On this question the evidence was in conflict. Plaintiff testified that there was no such cost limit, while the defendant and several other witnesses testified that there was such a limitation. There is evidence in the record which tends to show that defendant knew that the cost of remodeling would exceed $35,000, and that after receiving this information it made a partial payment to the plaintiff for his services, and that the president of defendant gave other reasons for not proceeding with the work of remodeling the building. The record clearly shows that there was ample evidence to sustain a finding, in favor of plaintiff, that there was no such

limit to the cost of the remodeling, as claimed by defendant. This question was fairly submitted to the jury, and their finding is conclusive. This court will not disturb the verdict of a jury based on conflicting evidence, unless clearly wrong. *Blado v. Draper,* 89 Neb. 787; *Albrecht v. Morris,* 91 Neb. 442; *Young v. Kinney,* 85 Neb. 131.

It is evident that defendant could not be entitled to recover anything upon its counterclaim, unless there was a limitation upon the cost of the remodeling of the building. The finding of the jury for plaintiff disposed of defendant's right to recover on its counterclaim.

2. Defendant also complains of the giving of an instruction by the court which withdrew from the jury one item of the counterclaim. Since the finding of the jury disposed of any right of defendant to recover, it was not prejudicial to withdraw from the jury one of the items of the counterclaim.

3. Defendant complains of the admission in evidence of a certain written instrument. Prior to its admission, it was produced by the defendant and submitted to plaintiff, who was then on the witness-stand, with the request that he read it. The contents of the instrument were read in evidence by the witness, and the instrument was subsequently offered and received in evidence over defendant's objection. Defendant was instrumental in placing the contents of the instrument before the jury. A party who procures a witness to read in evidence the contents of a written instrument cannot complain of the subsequent admission in evidence of the identical instrument. *Robinson v. City of Omaha,* 84 Neb. 642; *Larson v. Chicago & N. W. R. Co.,* 89 Neb. 247.

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

AFFIRMED.

WALTER MCKEE, APPELLEE, V. NEBRASKA GAS & ELECTRIC COMPANY ET AL., APPELLANTS.

FILED APRIL 10, 1923. No. 22072.

1. **Waters:** DIVERSION: LIABILITY. Where the owner of a milldam wilfully diverts the water of a natural stream into a millrace cut through his own land and thereafter turns it back into the natural channel at right angles, so that the water is carried by its own momentum across the natural channel onto the land of the opposite riparian owner, he is liable for the damages resulting therefrom.

2. ———: ———: ———. A riparian owner, who by his wilful act diverts the waters of a natural stream from its accustomed channel and causes them to flow upon the lands of his neighbor, is liable for the resulting damages, irrespective of any question of negligence or malice. It is sufficient in such case if plaintiff prove that the act was wrongfully done and that he was damaged thereby.

3. ———: ———: ———. The fact that defendant may in good faith have believed that it was necessary for the preservation of its own property to cut a dike and change the course of a natural stream is no defense to an action for damages where the effect of its act was to injure the lands of plaintiff, a lower riparian owner.

APPEAL from the district court for Nance county: A. M. POST, JUDGE. *Affirmed.*

J. W. Rice and *Rose & Doyle*, for appellants.

N. D. Burch and *G. N. Anderson, contra.*

Heard before MORRISSEY, C. J., ALDRICH and GOOD, JJ., BEGLEY and BUTTON, District Judges.

BEGLEY, District Judge.

Action by plaintiff to recover damages on account of the wrongful act of defendant in diverting the waters of the Cedar river from its former channel onto and over plaintiff's land. Plaintiff prevailed, and defendant appeals.

Defendant owns and operates an electric light plant at Fullerton, Nebraska, and, prior to the acts complained of by the plaintiff, part of the power used for supplying electricity was obtained from the Cedar river by means of an ordinary dam and turbine wheel. In its natural

course the Cedar river comes down from the northwest to near the north line of the town of Fullerton. It then describes a sweeping loop to the north and, making a horseshoe bend, flows back directly south for over one-half a mile, passing the northeast corner of the town and veering to the southeast toward the Loup river. The property of the defendant is located within the peninsula formed by the north bend of the river, it being about three-fourths of a mile around the loop and about one-fourth of a mile across the neck. Defendant maintained a dam across the river near the point where it begins its swing to the north, and a millrace has been cut across the intervening neck of land from the dam to connect with the river on the east at a point directly opposite the northwest corner of plaintiff's land, which lies on the east side of the river at this point. The water from this millrace is used to operate the wheel in connection with the power plant of the defendant. The flume, wheel-house and wheels are located on this millrace about 150 feet west of plaintiff's land, and the power-plant is located about 30 feet south of the flume.

In September, 1919, the water being somewhat above its natural stage and under the pressure, the water began to escape from the south of the flume and between it and the dike. This endangered the power-plant and threatened its destruction. The defendant, through its employees, Greer and others, began combatting the escape of the waters, and being unable to do so, in order to save their own property from destruction decided to open a part of the restraining dike on the north side and permit the waters to escape on that side. A small channel was cut on the north side of the dike permitting the waters to escape, and in a very few hours this so enlarged that a channel had been cut 30 or 40 feet wide on that side, and the river had forsaken its old channel around the loop and flowed directly through the millrace and entered the river again at right angles at a point near the northwest corner of plaintiff's land.

Plaintiff, as owner of 7½ acres of land bordering on the east side of the river and opposite where the millrace connected with it, brought this action alleging that, by reason of the defendant's wrongful act in turning the channel through the millrace instead of permitting same to go around the bend, sand-bars were formed in the old channel of the river to the northwest of plaintff's land, thereby obstructing the flow of waters therein in flood time, and that thereafter on three different occasions, in 1920, heavy rains caused the Cedar river to rise to flood stage, and that by reason thereof the lands of plaintiff were flooded and damaged, his crops were destroyed and live stock drowned. This was denied by defendant.

The case was tried to a jury, and the court instructed the jury that it was undisputed that the defendant Greer by direction of his codefendant cut or opened the bank or dike at the lower end of the millrace, thereby diverting the water of said stream from its natural channel onto and over the plaintiff's land, and that such was a wrongful act for which the plaintiff was entitled to recover at least nominal damages. Defendant alleges that this was error, and that the defendant was entitled to have two questions submitted to the jury, viz: (1) Was plaintiff's injury caused by the action of defendant? (2) Was such action negligent?

The evidence shows that defendant changed the course of the river, greatly shortening it; that the bend of the river was thereafter filled up to nearly a level with the banks as they formerly existed; that the bed of the river below was filled to a depth of from two to four feet; that plaintiff's land had not been subject to overflow before, but that the first flood of the river thereafter his land was overflowed, and this was repeated at each subsequent rise of the river, although the river did not leave its banks at other points. Some effort was made by defendant to show that there had been some change in the grades of the streets of Fullerton, and in the railroad

bridge and embankments, which might have caused the overflow, but these changes were shown to have been made more than four years prior to defendant's acts, and, although the river had been as high as in 1920, no overflow had occurred on plaintiff's land. The only overflows that did occur were caused by the breaking of a dam at Erickson several years ago. Defendant changed the course of the river in such manner that, whereas it formerly flowed past plaintiff's land from north to south, when changed, it flowed east and west directly against plaintiff's west bank and at right angles thereto, the course of the stream was greatly shortened, thereby accelerating the flow of the water, and the undisputed evidence shows this caused the banks to wash away and the land to overflow. The court was therefore right in instructing the jury that the act of the defendant caused the damage, if any.

Appellant contends that there can be no recovery without first showing that the act of defendant was negligent, and that it was error for the court not to submit that question to the jury, and has cited cases holding that, where a dam is constructed by proper authority, the owner is not liable for damages caused by breakage thereof or seepage therefrom, unless it is proved that the dam has been negligently constructed or maintained. This rule may be conceded. However, this is not a case based on any negligent act of construction of maintenance of defendant's dam, but is one based on the wilful, wrongful act of defendant in cutting the dike and thereby changing the channel of the river and discharging a large volume of water into the river at right angles to plaintiff's land. The cutting of the dike and the changing of the river was the wrongful act, something defendant had no legal right to do, and no matter how skilfully it was done or what degree of care was used in the operation, or that defendant in good faith believed the act necessary for the preservation of its own property, it cannot be urged in defense of this action. It

is sufficient if plaintiff prove that the act was wrongfully done and that he was damaged thereby. "Irrespective of any question of negligence or malice, a riparian owner who, by his wilful act, diverts the waters of a natural stream from its accustomed channel, and causes them to flow upon the lands of his neighbor, is liable for the resulting damages." 27 R. C. L. 1094, 1096, sec. 32. See *Hartshorn v. Chaddock,* 135 N. Y. 116; *McKee v. Delaware & Hudson Canal Co.,* 125 N. Y. 353; *Southern R. Co. v. Lewis,* 165 Ala. 555; *Kane v. Bowden,* 85 Neb. 347; *Kay v. Kirk,* 76 Md. 41, 35 Am. St. Rep. 408; *Hulme v. Shreve,* 4 N. J. Eq. 116; *Valley R. Co. v. Franz,* 43 Ohio St. 623; *Briscoe v. Young,* 131 N. Car. 386.

Complaint is made as to the excessiveness of the recovery. The evidence of damages all comes from the plaintiff's witnesses, and was not controverted by defendant in the lower court. The amount found by the jury is within the range of the testimony.

No error being found in the record, the judgment is

AFFIRMED.

WILLIAM O. JARMAN, APPELLEE, V. NEBRASKA GAS & ELECTRIC COMPANY, APPELLANT.

FILED APRIL 10, 1923. No. 22315.

1. **Case Followed.** This case is ruled by the law as stated in *McKee v. Nebraska Gas & Electric Co., ante,* p. 137.
2. **Instructions** examined and approved.

APPEAL from the district court for Nance county: A. M. POST, JUDGE. *Affirmed.*

J. W. Rice and *C. H. Kelsey,* for appellant.

N. D. Burch and *G. N. Anderson, contra.*

Heard before MORRISSEY, C. J., ALDRICH and GOOD, JJ., BEGLEY and BUTTON, District Judges.

BEGLEY, District Judge.

This is a companion case to *McKee v. Nebraska Gas & Electric Co., ante,* p. 137. Both actions arise from the

same set of facts and counsel in both are identical, and therefore the law as stated in the case of *McKee v. Nebraska Gas & Electric Co.*, is decisive of the errors alleged in this case.

This case differs in one particular, in that this plaintiff is the owner of land joining the McKee land on the north, and when the Cedar river changed its course as a result of the act of defendant, it ceased to flow past the west side of plaintiff's land, but flowed through the millrace and joined the regular channel of the stream at a point directly west of the southwest corner of plaintiff's land, and he alleged that, as a result of such change, sand-bars formed in the unused channel to the west of his land, and when the river rose to flood stage the waters were thereby forced out of the old channel and onto his land.

The court, by proper instructions, submitted to the jury the question as to whether the flooding of plaintiff's land was caused by the wrongful act of defendant, and the amount of damages, if any, caused thereby. Appellant complains of the giving of instructions Nos. 8, 9, and 10, by the court. We have examined these instructions and find they correctly state the law.

AFFIRMED.

LILLIE LEWIS ET AL., APPELLEES, V. LAWRENCE NEWELL ET AL.: ARTHUR PARKS, APPELLANT.

FILED APRIL 10, 1923. No. 22318.

Equity: MISTAKE OF FACT: RELIEF. Equity will grant relief from a mistake, as a mistake of fact, where parties are erroneously informed that one party has an interest in certain land by reason of marital relations, and contract with reference to such erroneous information, especially where the party jeopardized thereby can be relieved without substantial injustice to the other side, and the party to be benefited by the mistake invokes the aid of equity to put him in a position where the mistake will be of advantage to him.

APPEAL from the district court for Kearney county: WILLIAM A. DILWORTH, JUDGE. *Affirmed.*

C. P. Anderbery, for appellant.

J. L. McPheely and *King & Bracken, contra.*

Heard before MORRISSEY, C. J., ALDRICH and GOOD, JJ., BEGLEY and BUTTON, District Judges.

BEGLEY, District Judge.

In 1900 one Elias Kembel died intestate, seised in fee simple of the north half of the northeast quarter of section 17, township 6 north, of range 14, Kearney county, Nebraska, leaving surviving him the plaintiffs, Mary Parks, then Mary Kembel, his widow, Lillie Kembel, now Lillie Lewis, Fred H. Kembel, and Minnie Kembel, now Minnie Nelson. His estate was duly probated, and the county court found by decree that said plaintiffs were his widow and children and assigned said land to them as follows: Mary Kembel, now Mary Parks, the dower interest therein, and to the said children the fee title in undivided shares, subject to said dower interest. Mary Kembel thereafter married the defendant, Arthur Parks, and four children were born of this union.

In 1920 plaintiffs, through the efforts of defendant Newell, a real estate agent, sold the premises to defendant Christian Peterson for $200 an acre. The family was not living on the premises at this time, and some domestic trouble had arisen between Mr. and Mrs. Parks. He was working at McCook, and she, refusing to live there, was residing at Minden. Mr. Newell informed Mrs. Parks and the other plaintiffs that by reason of his marital relations Arthur Parks had some interest in the premises and it would be necessary for him to sign the deed in order to convey a good title. Plaintiffs had the utmost confidence in Mr. Newell, and, believing that Parks' signature was necessary to convey title, sent for him to come and sign the deed. Mr. Parks, believing that his signature was necessary on the conveyance, refused to sign unless he was paid the sum of $3,000 from the proceeds of the sale, and, unless same was paid to him, would refuse to allow said deal to be

consummated. Plaintiffs demurred to this payment, and he insisted, and both parties were again informed by Mr. Newell that the sale could not be consummated unless Mr. Parks signed the deed. Plaintiffs finally agreed to pay the $3,000 to Parks on his agreement that he would invest it in a permanent home for their mother, Mary Parks. The deed was executed and signed by plaintiffs and Arthur Parks and placed in escrow in the hands of defendant Newell with written instructions to Newell to deliver same to Peterson upon payment of the purchase price on March 1 following, and to distribute the purchase money among the plaintiffs in certain proportions, including the payment of $3,000 to Arthur Parks.

When March 1, 1921, arrived, defendant Parks informed plaintiffs that he did not intend to invest his money in a home for their mother, but intended using it to educate his children and buy an automobile to take a trip to Denver. Plaintiffs then consulted a lawyer and for the first time discovered that Parks had no interest in the property. They filed this suit after the purchaser, Peterson, had paid the money into the hands of Newell, but before the delivery of the deed to Peterson. In their petition they joined Parks, Newell, and Peterson as defendants, and prayed for an injunction preventing Newell and Peterson from paying the money to Parks, and enjoining Parks from receiving the $3,000, and asking for a decree finding that same belonged to the plaintiffs. Parks answered, admitting the ownership of plaintiffs in the land, but alleging that he had a certain interest therein by reason of an oral agreement entered into between the parties that he should be compensated for work and labor and improvements erected thereon, and asked that the contract be confirmed. Defendant Peterson filed no answer. Defendant Newell filed an answer alleging that he sold the land to Peterson as agent for plaintiffs, and that at said time, and that at the time the contract was made,

he believed it would be necessary for said Arthur Parks to join in said deed; that Peterson had paid him the purchase price for the land, which he then held, together with deed, subject to the orders of the court.

The court entered a decree finding for the plaintiffs; that the agreement to pay Parks the sum of $3,000 was without consideration and unenforceable, granted the injunction as prayed, and ordered distribution of the moneys to the plaintiffs. Defendant Arthur Parks has appealed.

The evidence is insufficient to support the defendant's claim of an oral agreement to reimburse him for work and labor and improvements erected on the premises, and the only question raised by appellant is that it was a mistake of law on plaintiffs' part in entering into the agreement, and therefore a court of equity is powerless to grant relief.

It must be conceded that ignorance of the law excuses no one and equity will not relieve against pure mistakes of law. However, a distinction is made as to ignorance of general law and ignorance of one's private legal rights under the law, arising out of existing facts. In the latter case, when shared by both parties to an agreement and resulting in a loss of the rights of one of them, the agreement may be set aside at the suit of the injured party, though no fraud was practiced upon him. 6 R. C. L. 630, sec. 48.

Here the mistake consisted in an error as to the interest owned by Arthur Parks. It was assumed as a matter of fact that he had an interest, and, though this was based on a mistake of law, it was nevertheless a fact. 13 C. J. 379, sec. 267; 2 Pomeroy Equity Jurisprudence (4th ed.) sec. 839; *Freichnecht v. Meyer,* 39 N. J. Eq. 551; *Healy v. Healy,* 76 N. H. 504; *State v. Paup,* 13 Ark. 129; *Stahl v. Schwartz,* 67 Wash. 25; *Baker v. Massey,* 50 Ia. 399.

The plaintiffs brought their action while the contract was executory. No consideration was received for their

promise. The subject-matter—Parks' interest in the land—had no existence. He is now here asking a court of equity to give him relief by enforcing an inequitable bargain.

That a rescission may be had for a mutual mistake as to the private rights of parties seems to be well settled. Some courts have put it upon the ground of failure of consideration for the promise. In others, that there was a mistake as to the subject-matter, but most courts upon the broad principle that justice and equity require such a rule. In this case there are such elements of absence of consideration, of reliance upon the representations of the real estate agent, of mutual mistake, and unconscionable advantage, as should in equity and in conscience take this case out of the general rule.

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

AFFIRMED.

LIBRARY BOARD OF THE TOWNSHIP OF ARCADIA, VALLEY COUNTY, APPELLEE, V. JOHN OHLSEN ET AL., APPELLANTS.

FILED APRIL 10, 1923. No. 22323.

1. **Damages**: EVIDENCE: INSTRUCTION. Where there are elements of damage, such as expenditures, capable of pecuniary measurement, an instruction stating that it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances proved, and by considering them in connection with their knowledge, observation and experience in the affairs of life, is erroneous.

2. ———: MEASURE OF DAMAGES. Where a building contract has been substantially performed by a builder and accepted by the owner, subject to any defects being corrected by contractor, the measure of damages for such defects is the cost of remedying same and putting the building in such condition as was required under the plans and specifications, and any other damage the owner has sustained by reason of the defects from the time of the acceptance of the building until the same could have been remedied in the exercise of reasonable diligence.

APPEAL from the district court for Valley county: BAYARD H. PAINE, JUDGE. *Reversed.*

Aaron Wall and *J. S. Pedler,* for appellants.

Davis & Davis, contra.

Heard before MORRISSEY, C. J., DAY and ALDRICH, JJ., BUTTON and BEGLEY, District Judges.

BEGLEY, District Judge.

This is an action brought by plaintiff to recover damages claimed because of the failure of defendants to properly construct a certain library building in Arcadia, Nebraska, in accordance with the contract and plans and specifications. Plaintiff recovered a verdict by jury, and from the judgment thereon defendants have appealed.

Plaintiff contended that the building was not constructed according to plans and specifications, nor in a workmanlike manner, in that the roof and gutters were not water-tight and the walls, cornices, windows and doors were improperly constructed, without necessary flashings, which permitted the water to come in and damage the building. Defendants admitted the building leaked, but alleged that same was not the fault of material or workmanship, but caused by defective plans, directions and supervision of the architects, who were the agents and superintendents directing and supervising the construction of said building.

Appellants complain of the giving of instruction No. 12 by the court as follows:

"The court instructs the jury that, in case they should come to the question of damages on the issues joined under the instructions of the court, then to enable the jury to estimate the amount of damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances proved, and by considering them in con-

nection with your knowledge, observation and experience in the affairs of life."

This instruction seems to have first been given in the case of *North Chicago Street R. Co. v. Fitzgibbons,* 180 Ill. 466; a personal injury case where pain and suffering were elements of damage and incapable of pecuniary measurement, and the court was careful to point this out in approving the instruction as follows:

"Where there are elements of damage, such as expenditures, capable of pecuniary measurement, the law requires the amount shall be proved. But there are other elements in this case which are not capable of exact measurement."

The Illinois court in subsequent cases has been equally careful in limiting this sort of instruction except in personal injury cases where the damages were physical pain, suffering and inconvenience suffered or to be suffered in the future in consequence of an injury incapable of pecuniary measurement. *Hatcher v. Quincy Horse Railway & Carrying Co.,* 181 Ill. App. 30; *Barton v. Southwick,* 185 Ill. App. 24; *Harley v. Aurora, E. & C. R. Co.,* 149 Ill. App. 339; *Moore v. Aurora, E. & C. R. Co.,* 150 Ill. App. 484; *Lyman v. Chicago City R. Co.,* 176 Ill. App. 30. A similar instruction was held reversible error in a personal injury case in *Chicago, B. & Q. R. Co. v. Krayenbuhl,* 65 Neb. 889.

In this case the elements of damage were capable of exact measurement and proof, and it was therefore error to give the above instruction. This was the only instruction given on the measure of damages, and the only proof of damage offered was that it would require $180 to put in a new gutter and 60 cents a yard to replaster the building, but there was no proof of how much plaster would be required. The burden of proof is on the plaintiff to prove the amount of its damage on the several items alleged in the petition, or there can be no recovery thereon. *Fitts & Co. v. Reinhart,* 102 Ia. 311.

The contract was substantially performed by the builder and the building was accepted by the plaintiff, subject only to the guaranty contained in the contract that the roof should be perfectly water-tight, and that the contractor was to correct all defects discovered within a reasonable time, unless same was shown to be no fault of the material or workmanship, and $50 was retained as damages for discoloration of the walls at time of acceptance.

It would seem that the measure of damages would be the cost of remedying the defects and putting the building in such condition as was required under the plans and specifications, together with such other damage as plaintiff has sustained by reason of the defects from the time of the acceptance of said building until such time as same could have been remedied by plaintiff in the exercise of reasonable diligence.

Other errors are alleged, but as a new trial must be had, they will not be considered.

For the foregoing reasons, the judgment of the district court is

REVERSED.

A. AVRE, APPELLEE, V. J. R. SEXTON, APPELLANT.

FILED APRIL 10, 1923. No. 23192.

1. **Master and Servant:** EMPLOYMENT: WORKMEN'S COMPENSATION ACT. Where an employer and employee enter into a contract of employment after the taking effect of the workmen's compensation act, both are presumed to contract with reference and subject to the provisions of part II thereof.

2. ———: ———: ———: NOTICE. Either party can relieve himself of the operation of the act if he expressly state in the contract, or give written or printed notice to the other party, that he does not accept the provisions of part II.

3. ———: COMPENSATION: ELECTION. Where an employer does not take out insurance, or furnish satisfactory proof to the compensation commissioner of ability to pay, as provided in section 3069, Comp. St. 1922, such nonaction on his part has the effect to make him

liable either to an action for damages at common law, as modified by part I, or for a proceeding for compensation under part II, at the election of an injured employee.

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

Reavis & Beghtol and *C. E. Sanden,* for appellant.

Frampton & Polk, contra.

Heard before MORRISSEY, C. J., GOOD, ALDRICH and LETTON, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

This case arises under the workmen's compensation act. On or about June 28, 1922, appellant, J. R. Sexton suffered an injury in the employ of appellee, A. Avre, resulting in the total loss of the right eye. An award was made to the employee by the compensation commissioner, from which the employer appealed to the district court for Lancaster county. The district court denied compensation, finding "that at the time of said injury the employer, A. Avre, was not acting within the provisions of the employers' liability act of the state of Nebraska because of his failure to provide insurance as required by section 3069." From this decree the claimant, J. R. Sexton, has appealed.

The appellee did not insure his liability, or furnish evidence to the compensation commissioner of his ability to pay compensation, as provided in section 3069, Comp. St. 1922, and now contends that failure to comply with said section on his part deprives the appellant of the benefits of part II of the compensation act, while appellant contends that the parties hereto elected to come under the provisions of part II of the compensation act by entering into the contract without otherwise stating therein, under section 3035, Comp. St. 1922, and the only way either party can withdraw from said election is by serving notice upon the other as provided in said section.

Section 3035, Comp. St. 1922, provides: "In the oc-

cupations described in section 97 (3029) hereof, and all contracts of employment made after the taking effect of this act shall be presumed to have been made with reference and subject to the provisions of part II hereof, unless otherwise expressly stated in the contract, or unless written or printed notice has been given by either party to the other, as hereinafter provided, that he does not accept the provisions of part II. Every such employer and every employee is presumed to accept and come under part II hereof, unless prior to accident he shall signify his election not to accept or be bound by the provisions of part II. This election not to accept part II shall be by notice as follows:

"(a) The employer shall post and thereafter keep continuously posted in a conspicuous place about the place or places where his workmen are employed a written or printed notice of his election not to be bound by part II hereof, and shall file a duplicate thereof with the compensation commissioner.

"(b) The employee shall give written or printed notice to the employer of his election not to be bound by part II, and shall file a duplicate with proof of service attached thereto with the compensation commissioner."

Section 3069, provides: "Except governmental agencies, every employer in the occupations described in section 97 of this chapter (3029) shall either insure and keep insured his liability under this article in some corporation, association or organization authorized and licensed to transact the business of workmen's compensation insurance in this state, or shall furnish to the compensation commissioner satisfactory proof of his financial ability to pay direct the compensation in the amount and manner when due as provided for in this act. In the latter case the compensation commissioner may in his discretion require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred.

Every employer who fails, neglects or refuses to comply with the conditions set forth in this section shall be deemed to have elected not to come under part II hereof, and shall be required to respond in damages to an employee for personal injuries, or where personal injuries result in the death of an employee, then to his dependents, in like manner as if the employer had filed an election with the compensation commissioner rejecting the provisions of part II of the compensation act."

Every employer, after the taking effect of the act, is presumed to be within part II, and the only method of removing the application of part II of the act by an employer is for him to otherwise state in the contract, or to post a notice to that effect and file a duplicate thereof with the compensation commissioner. *Nosky v. Farmers Union Cooperative Ass'n,* 109 Neb. 489. Having made a contract with reference to the provisions of part II of the act, an employee cannot be deprived of the right of compensation, except in accordance with those provisions.

It is inconceivable that the legislature, after making it compulsory on both employer and employee to assume their relations as to accident under part II, except upon affirmative, positive election, with notice to each other, should thereupon by a single section of the statute nullify this carefully worked-out plan by providing that the employer may escape the compliance on his part by merely refusing to take out insurance, without notice of any kind to his employee. Part II of the act is more favorable to the employer in enabling him to avoid costly and vexatious lawsuits and the payment of uncertain damages at the hands of the jury, and, on his failure to fulfil the requirements by insuring or guaranteeing his liability, he is, by the terms of section 3069, penalized for such failure by being required to answer to an injured employee, or his dependents, in a common-law action for damages, as modified by part I. There is no mention made therein of the loss of any

rights acquired by the employee under section 3035, and considered in connection with the remainder of the act, section 3069 does not allow the employer to take advantage of his own default in failing to carry insurance, to the detriment of the employee.

We think that the reasonable construction of the two sections is that, where an employer and employee enter into a contract of employment after the taking effect of the workmen's compensation act, both are presumed to contract with reference and subject to the provisions of part II thereof, and the only method by which either party can relieve himself of the operation thereof is to otherwise expressly state in the contract or give written or printed notice to the other party that he does not accept the provisions of part II, and where an employer does not take out insurance or furnish satisfactory proof to the compensation commissioner of ability to pay, as provided by section 3069, such nonaction on his part has the effect of penalizing him by making him liable either to an action for damages at common law, as modified by part I, or for a proceeding for compensation under part II, at the election of the employee.

The same question has been decided under similar statutes in Connecticut and Iowa. In *Bayon v. Beckly*, 89 Conn. 154, it was held that an employee could not be penalized by reason of the employer's failure to insure, and that the employee, regardless of such failure by the employer, has the right to bring a compensation action. The court said: "It is too unreasonable to believe that the legislature intended that the employer, after having accepted part B, should be able to deprive the employee of these benefits, without notice, by simply neglecting to comply with the provisions of the act which he had accepted."

In *Elks v. Conn*, 186 Ia. 48, in construing an Iowa statute which is in many respects similar to our own, the court held that failure of the employer to carry insurance allowed the employee to sue either at common

law or under the compensation act, but did not give the employer the right to claim that he was not under the compensation act.

The district court, therefore, erred in dismissing the application and denying compensation to appellant, and the case is remanded, with directions to enter a decree allowing compensation to appellant as provided under part II of the workmen's compensation act.

REVERSED.

DIETZ CLUB, APPELLANT V. WILLIAM NIEHAUS, APPELLEE.

FILED APRIL 10, 1923. No. 23231.

1. **Master and Servant:** COMPENSATION. Section 3069, Comp. St. 1922, does not allow an employer to take advantage of his own default in failing to carry insurance, to the detriment of an injured employee who was presumed to have contracted with reference to part II, under section 3035.
2. ———: CASUAL EMPLOYMENT. When a corporation, whose business was the building, furnishing and maintaining a club-house, and all necessary and suitable ground for the promotion and encouragement of outdoor sports, and to provide entertainment, instruction and profit for its members and stockholders, employs a person for a certain period at a fixed sum per hour to care for said grounds, repair the buildings, and prepare and maintain the grounds for outdoor sports, under the direction and supervision of the officers of such corporation during the club season, *held,* such employment was not casual and such employee was engaged in the usual course of the trade and business of such corporation.
3. ———: DAMAGES. The amount of the award of compensation examined, and *held* not excessive.

APPEAL from the district court for Douglas county: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

H. T. White, for appellant.

Eugene N. Blazer, contra.

Heard before MORRISSEY, C. J., GOOD and ALDRICH, JJ., BEGLEY and BUTTON, District Judges.

BEGLEY, District Judge.

This is a proceeding brought under the workmen's

compensation act by William Niehaus, who obtained compensation for personal injuries sustained by him while employed by Dietz Club, a corporation. From a decree in district court awarding compensation, the Dietz Club has appealed.

The Dietz Club is a corporation owning a club-house and grounds in Omaha, Nebraska, for the entertainment of its members. On March 1, 1921, it employed William Niehaus for a period of six months as caretaker to put the grounds and buildings in repair and to keep them so throughout the season. While at work on the second day of his employment, Niehaus raked and burned some dry grass. The fire spread to some adjacent buildings, and in attempting to extinguish it he fell through the cover of an abandoned well and was injured.

It is first contended by appellant that it is not liable for compensation in this case, as at the time of the injury it was not acting within the provisions of part II of the employers' liability act, because of its failure to provide insurance, as required by section 3069. In the case of *Acre v. Sexton, ante,* p. 149, we held that section 3069, considered in connection with section 3035, does not allow the employer to take advantage of his own default in failing to carry insurance, to the detriment of an injured employee who was presumed to have contracted with reference to part II, under section 3035.

It is next contended that appellee was not engaged in the usual course of trade, business, profession or vocation of the Dietz Club at the time of the injury; that he was only casually employed, and then only as an independent contractor. The evidence discloses that the Dietz Club had a club-house for dancing and other amusements; that it had grounds surrounding the club-house with tennis courts and houses for the occupancy of its members; and that its business or purpose was to build, erect, equip, furnish, conduct and maintain the club-house and houses and all necessary and suitable grounds for the encouragement and promotion of outdoor and indoor

sports, entertainments and pastimes. It was necessary that these buildings, grounds and equipment be kept up and maintained to fulfil the purpose or business of the club. Appellee was employed for that purpose. His duties were fixed by the board of directors and they had supervision and direction over his work. His term of employment was definite. His contract of employment was at a stipulated rate per hour to do certain work designated by the secretary of the club on the property belonging to his employer. He was permitted to do only such work as was directed and approved by his employer. We think under these circumstances he was engaged in the usual trade and business of the Dietz Club; that his employment was not casual; and that he was not an independent contractor.

It is next contended that the amount of compensation allowed the appellee, Niehaus, is excessive. This is based on the theory that his employment was seasonal, and not steady, and that the amount should have been arrived at under section 3049, Comp. St. 1922. The evidence is conflicting as to the actual terms of employment. Appellee testified that he was engaged to work every day from eight to ten hours; that he was directed to rake the grounds and burn the rubbish; that during bad weather, when he was unable to work outside, he was to paint the inside of the club-house and do plaster work and wall-papering. The work on the tennis courts, grounds, etc., was to be done during this entire period, together with the general care of the premises; that when it was necessary to put the tennis courts in condition for use he was to work on Sundays, and that 40 cents an hour was the usual wages he had received from other employers. On the other hand, appellant's evidence was to the effect that it would not require the full time of appellee in the care of the buildings and grounds, unless in case of a rainy season or other contingencies that might add to the work.

Under this conflicting evidence the court fixed the sum

of $20 a week as the amount Niehaus would earn during a week. The findings in this case, being based on conflicting evidence, should not be disturbed.

The decree of the district court is therefore right, and is

AFFIRMED.

ROSS WHITNEY, APPELLEE, V. FARMERS COOPERATIVE GRAIN COMPANY, APPELLANT.

FILED APRIL 10, 1923. No. 22326.

1. **Agriculture:** COOPERATIVE COMPANIES: MEMBERSHIP. On account of the mutuality of interest existing between a cooperative grain company and its membership, a member leaves the community and establishes a market place elsewhere when, for any valid reason, he is so located that another market place becomes more accessible to him and he acts honestly in the matter.

2. ———: ———: REPURCHASE OF STOCK. A cooperative grain company may make a valid contract to purchase its own shares of stock, unless restrained by its charter, the statute, or by-law, provided it acts in good faith, without intent to injure creditors or stockholders. And especially is this true when the contract of sale and repurchase are inseparable parts of the same instrument.

3. ———: ———: BY-LAWS. Where a stockholder contracts to be bound by existing and future by-laws, a cooperative grain company may adopt any reasonable by-law, for its government, in harmony with its valid existing contracts and legal obligations, and its members will be bound thereby. It may not, however, adopt any by-law abrogating its valid existing contracts with its members.

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

E. S. Nickerson, for appellant.

I. J. Dunn, contra.

Heard before MORRISSEY, C. J., ALDRICH and DAY, JJ., BEGLEY and BUTTON, District Judges.

BUTTON, District Judge.

Ross Whitney brought this action in the district court for Sarpy county, Nebraska, to recover from the appellant $1,000 which he paid to said company for ten shares of

capital stock. Appellee claims he contracted with said company that, if he moved from the community and established his market place elsewhere, the company would refund his money to him. Appellee moved from the place where he lived when he purchased the stock, about one and one-half miles from Springfield, Nebraska, to a place about three and one-half miles from Springfield. Appellee claims that between his new home and Springfield there were several hills, which made it necessary for him to change his market place to Richfield, Nebraska, a town about three and one-half miles from his home. Thereupon appellee demanded a return of his money, and appellant refused to return the money, and this action was instituted.

Appellant claims appellee did not move from the community and establish another market place, and, further, that the by-law, which appellee claims was shown him, has been repealed, and that appellee contracted that he would abide by any change or modification in the by-laws after the date of purchase. A jury was waived and the case tried to the court. The court found for appellee and rendered judgment against appellant for a return of the money. To reverse this judgment, appellant has appealed to this court.

The by-law involved reads as follows: "Any shareholder selling out and leaving the community, thereby establishing his market place elsewhere, may, upon ninety days' notice to the board of directors, receive back from the company the cash he paid to the company for shares of capital stock."

Mutuality of interest is the cardinal principle upon which this organization rests. This company sought a membership which would not only purchase stock but would also patronize the concern, selling their produce to the company and buying what the company had to sell. The company did not care to sell stock and pay dividends to people who could not patronize it. And no one would wish to buy stock who could not

share the benefits growing out of membership in the concern. Out of this mutuality of interest was evolved this by-law. Community, as here used, means so much of the territory lying around Springfield as can and will make it a market center. Appellee moved to a community having Richfield as a market place. Richfield was as far away as Springfield from appellee; but it was more accessible because of hills on the Springfield road. The evidence seems conclusive on this question. We are of the opinion appellee moved out of the Springfield community as a marketing place.

Appellee signed a written contract, called a prospectus, with the company. This contract contained certain suggestions, and No. 6 thereof reads as follows: "Pay back to any shareholder leaving the territory the cash he invested." Acting upon this suggestion the by-law above quoted was prepared. The evidence is conflicting as to whether this by-law was adopted before or after appellee signed the contract. Probably before, for appellee says he refused to sign until this by-law was read to him. But whether the by-law was ever adopted, or if adopted when, or whether ever changed, all seem to depend upon conflicting evidence, and we believe the conclusions of the trial court on these questions are right. The only reasonable construction of this written contract is that appellant agreed to return to appellee the cash he invested if he removed from the territory using Springfield as a market for farm produce.

The weight of authority seems to be that a corporation may purchase its own shares of stock, unless restrained by its charter, or by statute, or by-law, provided the purchase is made in good faith without intent to injure creditors or stockholders. And especially is this true where the contract of sale and repurchase are inseparable parts of the same instrument. *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370; *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 44 L. R. A. n. s. 156; *Adam v. New England Investment Co.*, 33 R. I. 193.

Appellant urges that appellee agreed in the contract that he would be bound by future modifications and changes in the by-laws; and claims the by-law providing for refunding money paid for capital stock, where a stockholder moves into another community, had been repealed. The logical answer to this argument is that the evidence is conflicting as to whether or not this by-law has ever been changed. This being true, the finding of the trial court will not be disturbed. And what is more, there is no claim that any by-law has ever been adopted prohibiting the company from purchasing its stock. All that is claimed is that the by-law providing for refunding money to a stockholder, moving out of the community, has been repealed.

But aside from this, we do not understand that the company could abrogate its contract by a by-law. Where a stockholder agrees to abide by existing and future by-laws, there is no question but he is bound by reasonable by-laws, adopted after he becomes a member, regulating the objects and purposes of the mutual society and in harmony with its contracts and legal obligations. *Farmers Mutual Ins. Co. v. Kinney,* 64 Neb. 808; *Hall v. Western Travelers Accident Ass'n,* 69 Neb. 603.

The judgment of the lower court is right, and is

AFFIRMED.

ADOLPH C. BECK, APPELLEE, V. HERBERT O. SPRING: JOHN A. BENTLEY, APPELLANT.

FILED APRIL 10, 1923. No. 22301.

1. **Witnesses:** COMPETENCY. Evidence, set out in opinion, *held* to show that plaintiff was incompetent to testify to the value of the crop of wheat involved in the transaction.

2. ———: ———. One is not a competent witness as to the value of a tract of land, with a crop of winter wheat growing thereon, as of the date of April, 1920, when the only source of his information is from inquiries made in the neighborhood six months later.

APPEAL from the district court for Douglas county: CARROLL O. STAUFFER, JUDGE. *Reversed.*

Brogan, Ellick & Raymond, for appellant.

McKenzie, Cox, Burton & Harris and *Radcliffe & Hyde, contra.*

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

RAPER, District Judge.

Action to recover damages arising from an alleged conspiracy to defraud plaintiff in the sale of certain land in Sherman county, Kansas. From a verdict and judgment in plaintiff's favor, defendant Bentley appeals.

The alleged fraudulent misrepresentation was that plaintiff was negotiating for the purchase of a quarter-section of land in Sherman county, Kansas, and that defendants, to induce plaintiff to purchase same, represented to plaintiff that the land had been planted in October, 1919, with a good quality of winter wheat, and that the land was worth $55 an acre. This representation was made in the early part of April, 1920, and, in reliance thereon, plaintiff purchased the land for $55 an acre, and under the terms of sale was to have the wheat crop. It is further alleged that said representations were false, that the wheat had not, in fact, been planted in October, 1919, but was planted in February and March, 1920, and for that reason the crop did not mature and was worthless, and, because the crop was worthless, the land did not exceed $15 an acre in value. The defendants in the transaction were acting for the Bentley Land Company, from whom plaintiff bought the land.

Error is alleged in the court receiving in evidence the depositions of certain witnesses, residing in the vicinity of the land, over objections as to their qualifications to testify as to value of the land. All were farmers; some were landowners, and others were not, but all showed they had some probative information as to land values in the vicinity of the land in question in April, 1920. While some of it was weak, it was com-

petent, and its weight was for the jury to pass on. *Northeastern N. R. Co. v. Frazier*, 25 Neb. 53. The court did not err in admitting the depositions. The only evidence offered by plaintiff as to what the land was worth at the time of purchase, with a growing crop of wheat thereon, such as had been represented, was his own testimony.

Plaintiff lived in Nebraska, far from the land, and was wholly unacquainted with the value of the land and knew nothing of the growing of wheat. He went with defendants in April and viewed the land; saw the wheat, but could not tell whether it was as had been represented, and took the assurance of the defendants and made the purchase. He again visited the land in June and found the crop worthless, but it does not appear that he then made any inquiries as to the value of wheat crops. Again, in September, he went to the land and, from inquiries he made of people in the vicinity on that trip, he was permitted, over defendants' objection, to testify that the land, with a crop of wheat that had been planted in September or October, 1919, was worth in April $55 an acre, and, without such a crop, was worth only $15. The foundation for that testimony perhaps can best be shown by quoting his own statements. He was asked if he made any investigation about the market value of the land, and answered:

"I inquired considerably on that trip all through that section of the country. Q. Did you become acquainted with the market value of land? A. Yes, sir. Q. By becoming acquainted with the market value of this land in September, did you know the value of this land when it was sold to you? Were you able or are you able now to state what was the reasonable market value of this land when it was sold to you? A. Yes, sir. Q. In April, 1920? A. Yes, sir. Q. Now, what was the reasonable market value of that land in April, 1920, Mr. Beck, had it been sown with a crop of wheat, best grade of wheat, in September or October of 1919, or the early

fall of 1919?" Objection made and overruled. "A. $55 an acre. * * * Q. Now, what was the reasonable value of the land, Mr. Beck, in April, 1920, with the crop on there that was actually on there?" Objection made and overruled. "A. $15 an acre."

On cross-examination, he could name but two persons with whom he talked. One of these was not a witness. The other one, a Mr. Wells, was called by defendants, and he said he placed the value much higher. Further, on cross-examination, plaintiff stated that he did not obtain any information as to any sales of land in that neighborhood in April, 1920. He further stated that he talked to several farmers. His testimony is clearly incompetent. It is not shown that he talked to any one who was qualified as to the values he gave, nor that he even inquired of any one as to what was the value of a crop of wheat in April, 1920. His estimate of values in that respect does not have the foundation of even hearsay evidence, and his opinion of the value of the land is based wholly on hearsay. The admission of this testimony was clearly erroneous.

Defendants urge that, inasmuch as plaintiff has not completed the contract, entered into between him and the Bentley Land Company, he cannot maintain this action. We do not so consider it. He entered into the contract which can be enforced against him by the vendor, and defendants are not in a position to question that contract. If they made the misrepresentations alleged and plaintiff was damaged thereby, they should suffer the consequences of their acts.

Another alleged error was the refusal of the court to instruct the jury that it was the duty of the plaintiff to make inquiries about the land and crop, and his failure to do so barred him from relying on the representations. Under the circumstances shown, the plaintiff had the right to accept the statements as to the crops and rely on them.

For the admission of plaintiff's testimony as to the

value of the land with the wheat crop, as it had been represented to him, the cause is reversed and a new trial granted.

REVERSED AND REMANDED.

The following opinion on motion for rehearing was filed September 22, 1923. *Former judgment of reversal set aside and judgment of the district court affirmed.*

Appeal. Ordinarily a judgment will not be reversed for the admission of incompetent testimony, where the same fact has been established by competent testimony, and the evidence erroneously received is merely cumulative.

Heard before LETTON, ROSE, DEAN, ALDRICH, DAY and GOOD, JJ., BLACKLEDGE, District Judge.

DAY, J.

The issues involved in this case may be found in our former opinion reported, *ante*, p. 160, and need not be repeated.

In our former opinion the judgment of the lower court was reversed and the cause remanded for further proceedings, because the court improperly permitted the plaintiff to testify concerning the value of certain lands which plaintiff had been induced to purchase.

The plaintiff has filed a motion for rehearing, upon which a reargument has been had, and now contends that, while it may have been error for the trial court to permit the plaintiff to testify concerning the value of the land, it was, under the facts disclosed by the record, error without prejudice.

Upon the trial the plaintiff testified that, if the land which he purchased had been sown to wheat in the manner represented by the defendants, said land would have been worth in April, 1920, $55 an acre; that, in the condition the wheat actually was, the value of the land at that date was $15 an acre. We are still of the view that no sufficient foundation was laid to warrant the court in permitting the plaintiff to so testify. Upon the

reargument, however, it is pointed out that Bentley, the only defendant who has appealed, also testified that at the time of the sale in April, 1920, the land in question was worth from $55 to $60 an acre.

It is clear that error cannot be predicated upon the improper receipt of testimony tending to prove a given fact, where the party claiming error properly testified to the same fact. In such case the error is without prejudice. *Smith v. Chicago, B. & Q. R. Co.*, 81 Neb. 186.

It is further urged, however, that it was error to permit the plaintiff to testify concerning the value of the land in the condition it actually was; his testimony being that it was worth $15 an acre. Several other competent witnesses testified on this precise point, their estimate of the value ranging from $12.50 to $15 an acre. While the testimony of the plaintiff was improperly received, under all the circumstances we think it was error without prejudice, being merely cumulative. Ordinarily a judgment will not be reversed for the admission of incompetent testimony, when the same fact has been established by competent testimony, and the evidence erroneously received is merely cumulative.

Besides, it is quite apparent that the jury gave no credence to that part of the plaintiff's testimony to the effect that the land was worth but $15 an acre. The verdict was for $4,400, which shows that the jury allowed damages of $27.50 an acre for the quarter section. If the jury had followed the plaintiff's testimony the verdict would have been for a much larger sum.

Upon a reexamination of the record, in the light of additional argument, we conclude that our former judgment should be set aside, and that the judgment of the district court should be affirmed.

FORMER JUDGMENT SET ASIDE, AND JUDGMENT OF THE DISTRICT COURT AFFIRMED.

ANDREW J. REED, APPELLEE, V. FRANCIS WELLMAN, APPELLANT.

FILED APRIL 10, 1923. No. 22158.

1. **Statutes:** CONSTRUCTION: CONSTITUTIONALITY. In the construction of a statute, the word "shall" will be construed as "may" when necessary to sustain its constitutionality, if the intention of the legislature as disclosed by the language of the statute will be thereby accomplished.
2. ———: ———. BOUNDARIES. The word "shall" in section 4570, Comp. St. 1922, *held* to be permissive, and not mandatory.
3. **Trial:** INSTRUCTIONS: RELOCATION OF SURVEY. The court in one instruction stated fully and correctly the rules for relocating lost or obliterated corners of a government survey and stated that the question was "not how would an accurate survey locate these lands in question, but how did the original government survey and stakes locate them;" and by the following instruction referred to evidence of a survey made by one Green, saying, "if you find that said Green did follow the rules and instructions of such state surveyor, and if you find from all the evidence, not only of said Green, but all the other witnesses, and the facts and circumstances proved upon the trial, that said Green did accurately make such survey," they should find for plaintiff. *Held*, that the two instructions should be construed together, and that the latter one did not make the verdict depend simply upon the accuracy of the Green survey, but upon whether or not such survey correctly showed the line as established by the government surveyors.
4. **Landlord and Tenant:** ADVERSE POSSESSION. Possession of land acquired under a lease from the owner is not hostile, and does not become so until notice is brought home to the owner of an adverse holding by some unequivocal act of ownership by the claimant.

APPEAL from the district court for Hitchcock county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

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

J. F. Ratcliff and *Stewart, Perry & Stewart, contra.*

Heard before MORRISSEY, C. J., LETTON, DEAN, ALDRICH and DAY, JJ., REDICK, District Judge.

REDICK, District Judge.

This is an action in ejectment, brought by plaintiff and appellee against the defendant and appellant, in

which there was a verdict for the plaintiff involving about 15 acres of land claimed by the plaintiff to be a part of the north half of the southeast quarter of section 14, and by the defendant to be a part of the northeast quarter of said section. The answer contains three defenses: (1) That the court is without jurisdiction for failure of the plaintiff to comply with section 4870, Comp. St. 1922; (2) that the land in controversy is a part of the northeast quarter of said section; and (3) adverse possession of the said land by defendant for ten years. The material facts are substantially as follows: Sometime prior to 1905 the defendant filed upon the northeast quarter (and later received a patent) and took possession of the same, and was also in possession of the north half of the southeast quarter under a lease from the owner, Nettie Ferris, which lease expired March 1, 1909, at which time the plaintiff went into possession of said 80 acres under a lease from Ferris, and subsequently purchased the same. The deeds, patents and leases describe the two tracts by governmental subdivisions. Sometime between 1905 and 1908 the defendant erected a wire fence upon what he supposed was the boundary line between the two tracts above described. The evidence seems to indicate that as originally built the fence was about 120 rods long and was not completed entirely across the tract until the year 1911, but we do not deem it necessary to determine the legal question suggested by this fact. The west end of the fence was about 20 rods and the east end about 13 rods south of what the plaintiff claims is the true southern boundary of the northeast quarter. Defendant surrendered possession to the plaintiff of the land described in the lease as the north half of the southeast quarter March 1, 1909, but claimed and retained possession of all ground up to the fence just mentioned. There seems to have been no agreement, discussion or dispute between the parties as to the proper location of the boundary line until the spring of 1917, when plaintiff with some other parties

attempted to remove the fence, and had torn it down with the exception of about 30 or 40 yards at the west end, when they were stopped by defendant. Shortly thereafter plaintiff brought an action in equity in the district court for Hitchcock county to enjoin the defendant from interfering with plaintiff's possession of the 15 acres in dispute, which resulted in a decree for the plaintiff on the 21st day of May, 1918. The district court having refused to fix a supersedeas bond, the defendant removed his fence and gave up possession. The decree, however, was reversed by the supreme court, and mandate sent down April 27, 1920, on the ground that plaintiff's action should have been at law, in ejectment, the plaintiff's forcible entry not constituting an interruption of defendant's possession. *Reed v. Wellman,* 104 Neb. 292. The court, however, declined to determine any questions of title, leaving the same to an appropriate action at law. Thereupon, on the 28th day of May, 1920, this action was commenced.

We will take up the discussion of the question presented on this appeal in the order of the defenses as above given, and, first, the jurisdictional question. Section 4870, Comp. St. 1922, is as follows:

"In case of any dispute among owners of and arising for or by reason of any survey of boundaries of lands within this state, or in case of dispute or disagreement between surveyors as to said surveys of boundaries, the same shall be referred to the said state 'surveyor and draughtsman' for settlement, and he is hereby appointed as arbitrator to settle and determine such disputes or disagreements as to said surveys and boundaries, and whose decision shall be *prima facie* evidence of the correctness thereof. In making such surveys, the state surveyor and deputies shall, each of them, have power in any county of the state of Nebraska to summon and compel the attendance of witnesses before them to testify as to material facts relating to their knowledge of 'lost or obliterated' corners. Said state surveyor and deputies

are hereby authorized and empowered to administer oaths and affirmations to their assistants and to witnesses. There shall be paid to the state treasurer for the services of the said state surveyor and draughtsman in settling and disposing of the said dispute and differences the sum of eight dollars per day for each day's service actually performed by the said state surveyor and draughtsman, to be paid by the parties directly interested in the said controversy and said survey or said boundaries; and said sum or sums of money so received therefor shall be paid into the state treasury for the benefit of the general fund of the state."

The act passed in 1919 was a reenactment of section 4 of an act found in chapter 105, Laws 1903, the title to which latter act is in the following words: "An act providing for the appointment of a state surveyor and draughtsman in the office of the commissioner of public lands and buildings and to prescribe his duties." This was the first appearance of legislation of this character in this state. In 1909 (Laws 1909, ch. 137) the act of 1903 was amended and became section 5566, Rev. St. 1913. In 1919 (Laws 1919, ch. 54) section 5566, Rev. St. 1913, was amended, and said section repealed, which amendment was the reenactment above quoted (Comp. St. 1922, sec. 4870), the only change being in the *per diem* of the state surveyor from $6 to $8. The title of the act in 1919 was as follows: "An act to amend section 5563, 5565, and 5566, Revised Statutes of Nebraska for 1913, and to repeal said original sections and to declare an emergency."

It will thus be seen that it is necessary, in order to determine whether the amendments of the act of 1919 are germane to the original act or within its title, to revert to the title of the act of 1903 which is above set out; and it seems to us beyond any chance of controversy that the provisions of the act of 1919, if given the construction claimed for by the appellant, would be unconstitutional on the ground that the title to the

act gives no intimation that such provisions will be inserted and that the act to that extent, therefore, is broader than the title. The provisions specially referred to are those for the appointment of the deputy surveyor as an arbitrator to whom the parties involved in a dispute over boundaries of land must first present their respective claims and procure the decision of the surveyor thereon, which, in effect, seeks to provide a condition precedent to the presentation of the dispute to the courts of the state. The title, of course, is broad enough to compass the provision requiring the state surveyor to survey the disputed boundary and make a report thereon, because these may justly be considered as related to the performance of the duties of his office; but imagination falters when it is sought to wring from the words of the title any intention of the legislature to provide for a tribunal for the settlement of private disputes and to withdraw from the citizen his constitutional right to present his troubles to the courts and have them decided according to the law of the land, or prescribe a condition precedent to the exercise of such right.

However, it does not appear necessary at this time to determine the constitutionality of the section in question, as the section may be upheld under proper rules of construction so that the real intention of the legislature may be given effect. If the act is capable of two constructions, one of which would result in declaring it unconstitutional and the other leave it in force as a valid enactment, the latter construction, of course, must be preferred.

The concrete question then is whether the word "shall" in the sentence "the same shall be referred to the said 'state surveyor and draughtsman' for settlement" shall be construed as mandatory or permissive. If mandatory, as above suggested, we would be compelled to hold the law invalid. But the presumption always is that the legislature did not intend to do

an unconstitutional act or to pass a law in an unconstitutional manner, and where to construe the statute as mandatory would make it unconstitutional such construction will be rejected if any other is possible. *In re Picquet,* 5 Pick. (Mass.) 65. Another principle to be borne in mind in determining whether or not a statute is mandatory or permissive is that, where the words are such as would naturally be used to prescribe directions for the orderly dispatch of business, they will not be construed as mandatory in the absence of negative or prohibitive words, or words expressive of a condition precedent. *Spencer's Appeal,* 78 Conn. 301.

With these principles in view, it seems that the word "shall" should be construed as permissive rather than mandatory, which will effectuate the intention of the legislature to provide by agreement of the parties a prompt and inexpensive method of determining disputed boundaries, without interference with the common law and constitutional right of the citizen to appeal to the courts. It follows that the court had jurisdiction and the first defense is not well taken.

The second question involves the true location of the south boundary of the northeast quarter of section 14. The evidence upon this question consists of a survey made by the county surveyor of Hitchcock county and his testimony regarding the same, and the evidence of the defendant and other witnesses as to the original location of the government corners. It presents some disputed questions of fact for the jury, whose finding thereon must control unless the record discloses error in the instructions of the court on the submission of the case to the jury. The instructions were very full and complete, and defendant's first complaint refers to No. 7, as follows:

"You are instructed by the court that in determining the question as to whether the land in dispute belongs to the subdivision owned by the plaintiff, to wit, the north half of the southeast quarter of section 14, in township

3 north, of range 35 west of the sixth principal meridian, you should ascertain whether surveyor R. O. Green followed the rules and instructions of the state surveyor in locating lost and obliterated corners, and in making surveys to establish the true boundary lines in dispute in this action. If you find that said Green did follow the rules and instructions of such state surveyor, and if you find from all the evidence, not only of said Green, but all the other witnesses, and the facts and circumstances proved on the trial, that said Green did accurately make such survey, and if you further find that such survey shows the tract of land in dispute belonged to the north half of the southeast quarter of said section 14, then it will be your duty to return a verdict in favor of the plaintiff, unless you find that the defendant has secured title to said disputed tract of land by adverse possession, as in these instructions defined."

Defendant contends that this instruction gives undue prominence to the Green survey; but it will be observed that the court tells the jury that they must consider the survey with the testimony of "all the other witnesses, and the facts and circumstances proved on the trial." We think, in view of the fact that Green was the only expert testifying, the court did not infringe upon the proprieties by this instruction. The court merely told the jury that if they found from all the evidence in the case that the survey of Green was correct they should find for the plaintiff, and this instruction, when read with No. 6, quoted later, clearly informed the jury that the real question was, not where Green located it, but where the government surveyors located the boundary line.

Another objection is that the instruction left to the jury to determine whether or not, in making his survey, Green had complied with the rules of the state surveyor in locating the corners, but that the rules *in toto* were not in evidence, and, therefore, there was nothing upon which the jury could base their finding. But it

appears that several sections of the rules applicable to that particular question were read in evidence by the witness, and the instruction must be construed as referring only to that portion of the rules in evidence.

A further objection is that the instruction made the determination of the boundary to depend upon the correctness of the Green survey. But instruction No. 6 clearly told the jury that the survey, to be correct, must correspond with the corners originally placed by the government surveyor, and that corners so established could not be moved and must be accepted. We think that instruction No. 6 correctly stated the law regulating the establishment of lost or obliterated government corners, and that the two instructions together are correct, and that the jury must have understood therefrom that before they could find the Green survey correct they must be satisfied that it established the line as originally surveyed.

In this connection defendant further calls attention to the fact that the northwest corner of section 16 was erroneously located by the survey in question as established in a survey made about a year later by the witness Green. The witness, however, testified that the establishment of that corner was not necessary to the determination of the boundary line in question, which was determined by measurements on the north and south lines of the section about which there is no dispute. The evidence shows that the surveyor started at a well-established government corner at the southeast corner of section 24 and ran north to the east quarter corner of section 1, also fully established, the distance corresponding closely with the government notes, and then by proportionate distances established the east quarter corner of section 13. He then ran a line from the southwest corner of section 24 to the northeast corner of section 14 in the same manner; and then started at the southwest corner of section 14 and ran north to the

west quarter corner of section 2 (located by testimony) and by proportionate distances located the west quarter corner of section 14. A straight line drawn from the east to the west quarter corner of section 14 as thus established shows the 15 acres in dispute to be within the north half of the southeast quarter. None of these corners except the first two mentioned gave unequivocal evidence of being government corners, such as the existence of mounds or pits, but stones were found at various places where the government notes indicated the corners had been located by the government surveyor, and the corners so taken by Green had never been disputed and had been acquiesced in by the owners for many years. We think the survey of Green was based upon correct principles and calculated to establish the original location of the corners as closely as possible. The defendant Wellman testified that as late as 1915 he had seen a mound and two pits about 12 or 13 rods south of the point where Green located the east quarter corner of section 14, and defendant claims that this established a government quarter corner at that point; but this was a question for the jury, and the witness Wellman was impeached by a number of witnesses called for that purpose. The northeast corner of section 14 is not in dispute. In fact, there is testimony to the effect that the defendant assisted in the locating of that particular corner, and using this corner in connection with the east quarter corner, established by Green, and extending the lines at right angles around the northeast quarter, gives defendant approximately 160 acres and 160 acres to the southeast quarter, which are the areas called for by the government notes; while, if defendant's position is correct, the northeast quarter would contain approximately 175 acres. Our references to the government notes are taken from the Green field notes and his testimony, as the government notes, while mentioned as an exhibit in the bill of exceptions, are not attached, and

many of the questions with reference thereto raised in defendant's brief on that account cannot be considered.

On this point defendant also urges error in the refusal of the court to give to the jury his fifth request, as follows:

"You are instructed that, in determining disputed boundary lines between land, testimony of a nonexpert or nonexperts that he or they saw and located the line from government corners then in existence may be accepted by you, if you believe their testimony in preference to that of surveyors who have subsequently located a different line independently of such government corners."

This is undoubtedly a correct statement of the law, but was sufficiently covered by instruction No. 6, as follows:

"The question in this case as to the true location of the boundary line between plaintiff's and defendant's respective lands is not how would an accurate survey locate these lands in question, but how did the orginal government survey and stakes locate them. The only purpose of the evidence of surveyors, who have made recent surveys, is to enable the jury to locate the original boundaries, if possible, and not for the purpose of determining where they ought to have been, or where they would have been by an accurate survey. The original starting points and boundaries are questions of fact for the jury to find from the evidence; not only the evidence of surveyors, but all other evidence in the case bearing upon these points.

"If you believe the evidence clearly establishes the location of the orginal government corners, you are instructed that the location of such government corners, no matter how erroneous or faulty they might have been, control over all subsequent surveys at variance thereto by whomsoever made. If you believe from the evidence that the boundary line of the strip of land in con-

troversy as claimed by defendant is in accord with the location of the original government corners, if such corners are clearly established by the evidence, then your verdict should be for the defendant."

On the whole, we find no prejudicial error in the instructions upon this branch of the case and are therefore bound to accept the verdict of the jury.

The third defense is adverse possession, the defendant claiming that he had been in the open, notorious, and hostile possession of the strip in question for ten years and more prior to the commencement of this suit. In relation to this defense the facts appearing from the record are substantially as follows: The defendant was the owner of the northeast quarter, and one Nettie Ferris of the north half of the southeast quarter, and sometime prior to March 1, 1909, defendant leased of Ferris the eighty belonging to her, said lease expiring the date mentioned. Defendant went into possession of the eighty under the lease, and subsequently built the boundary fence in dispute, which at first extended only about 120 rods, the remainder not being completed until 1911. Defendant testified several times that he did not claim any land not included in the northeast quarter, but also that he claimed up to the line of the fence. The plaintiff leased from Ferris beginning March 1, 1909, and did not become the owner of the land until 1916. Upon the expiration of the defendant's lease of the north half of the northeast quarter, he surrendered possession thereof to plaintiff, but the fence remained where it was along the southern boundary of the strip in dispute. Plaintiff testified that a constable told him that, on behalf of Ferris, he had served notice upon defendant in the fall of 1909 to remove the fence. Defendant moved to strike out this testimony as incompetent, and the motion should have been sustained, though the court overruled it. Then followed the injunction suit, upon the entry of the decree in which, May 21, 1918, the court having refused to fix a supersedeas bond, defendant moved the boundary fence

in dispute to the southern boundary of the northeast quarter, as found by the court, and did not replace it until April 27, 1920, when the decree in the equity suit was reversed. This action was begun May 28, 1920.

It will thus be noted that the dispute whether the fence was erected in 1905 or 1908 is immaterial; it was erected during the term of the lease under which defendant acquired possession. When defendant surrendered possession he retained that portion of the eighty which is in dispute; as to which, therefore, as between him and Ferris, he was holding over, and this relation of the parties continued until, by some unequivocal act upon the part of the defendant, his landlord, Ferris, received notice that he claimed title. The mere fact that he did not surrender possession was not such an act, because, such possession having commenced while defendant was a tenant of Ferris, he is presumed to continue in possession as a tenant; and the failure of the defendant to move the fence after notice by Ferris was as consistent with a claim as tenant as with a claim as owner.

In *Perkins v. Potts*, 52 Neb. 110, it was held: "One who takes possession of real estate as the tenant of another cannot hold said real estate adversely to his lessor without first having actually or constructively surrendered the premises to him."

In *Schields v. Horbach*, 49 Neb. 262: "A tenant by simply 'holding over' after the expiration of his lease does not hold adversely. Until he surrenders possession of the leased premises, or by some unequivocal act notifies the landlord that he no longer holds under the lease, he cannot claim that his possession is adverse."

In *Ross v. McManigal*, 61 Neb. 90, it was held: "Before a tenant can initiate an adverse holding and set the statute of limitations running in his favor, he must either yield up possession, or else distinctly repudiate the relation created by the lease and bring home to the lessor knowledge of the fact that the tenancy has been terminated."

In *Carson v. Broady*, 56 Neb. 648: "A tenant remaining in possession of the demised property after the expiration of his term, without any open or express repudiation of the relation created by the lease, is not, in contemplation of law, holding adversely to the owner, whatever may be his secret intention." And at page 651, the court, by Sullivan, J., said: "The relation of landlord and tenant was created by the lease. The defendants, until the answer was filed in this case, did not repudiate that relation or indicate by any clear and unequivocal act their intention to hold adversely. Under these circumstances their holding was not adverse, in contemplation of law, whatever may have been their secret purpose. Besides, at the time they obtained possession, they were, with the plaintiffs, tenants in common of the land. They were negotiating for the purchase of the plaintiffs' title; they recognized its validity then, and even as late as 1889 made application to buy it. They did no act at any time evincing an intention on their part, to oust their co-tenants; and they could not by a mere silent, peaceable possession, however long continued, extinguish the plaintiffs' title (citing cases)."

It seems to us the principles of these decisions control the case at bar. Ferris and her successors in title until 1916 were entitled to notice from defendant by some unequivocal act that he was claiming adversely; the acts or language of the plaintiff while he was a mere tenant of the land would not affect the title of the owners—he was not their agent for such purpose.

The defendant requested an instruction to the effect that, where a boundary fence had been acquiesced in by joint owners for the full period of limitations, the parties were estopped from claiming its incorrectness; this instruction was refused, and the defendant assigns error therefor. The ruling of the district court was correct. Defendant argues that inasmuch as plaintiff, while a tenant, erected a fence a few feet south of defendant's fence, and broke ground up to defendant's fence in 1909,

these acts constituted a recognition of defendant's fence as the dividing line. But, as just suggested, the tenant cannot bind his landlord by such acts; the owner alone, or his duly authorized agent is the only party who may be estopped in that manner. We therefore conclude that on the undisputed facts of this record defendant's possession was not adverse. We have examined with care the instructions of the district court, and find no error therein prejudicial to the defendant, and on the entire record conclude that the judgment should be affirmed, and it is so ordered.

AFFIRMED.

FRED SCHREIFER ET AL., APPELLANTS, V. CITY OF AUBURN ET AL., APPELLEES.

FILED APRIL 21, 1923. No. 22773.

1. **Municipal Corporations:** PAVING: SPECIAL ASSESSMENTS: VALIDITY. A special assessment to pay the cost of paving is not invalid merely because the surveys and estimates to be made by the city engineer under the provisions of section 5011, Rev. St. 1913, were not made by the regularly elected engineer, but by a firm of expert engineers employed specially to render that service, where the elected city engineer was not competent to perform it.

2. ———: PAVING DISTRICTS. The city council of a city of the second class is not required to establish by ordinance a grade upon a street forming a part of a paving district as a condition precedent to the establishment of such district.

3. ———: ORDINANCES: AMENDMENT. Section 4443, Comp. St. 1922, creates no inhibition against the amendment of an ordinance enacted by the mayor and city council of a city, notwithstanding the submission of such ordinance to a vote of the electors of the city.

4. ———: PAVING: SPECIAL ASSESSMENTS: VALIDITY. A tax for special benefits arising from the laying of pavement on the street of a duly established paving district is not void merely because the city council entered into a single contract with an engineering firm under which it did the necessary engineering work and made the estimates of the cost of paving in the several districts, where the compensation for such service was based upon a percentage cost of the improvement and the property improved in each district was charged its proper share on the basis of the cost of the improvement.

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

Sterling F. Mutz, for appellants.

H. A. Lambert and *Ernest F. Armstrong, contra.*

Heard before MORRISSEY, C. J., ROSE, DEAN, DAY and GOOD, JJ.

MORRISSEY, C. J.

The city of Auburn, a city of the second class, by several separate ordinances created four paving districts and caused the several districts to be paved. The appellants in this action, who are property owners within district No. 7, filed objections to the contemplated improvement before the contracts were let or the work was done, and, when the city council convened as a board of equalization for the purpose of making special assessments against the property within the improved district, they appeared and protested against the levying of assessments upon their several properties. Feeling aggrieved by the several orders of the city council acting as a board of equalization, they prosecuted error to the district court, where the findings and orders of the city council were approved. From the judgment of the district court they have appealed. Appeals have also been taken which involve other districts and the parties have to a great extent undertaken to consolidate the issues presented for review.

1. At the time the improvement was undertaken the city was without an engineer competent to make an estimate of the cost of the improvement, therefore the city employed a firm of expert engineers for that purpose, and an estimate in due form was made by this firm.

It is argued that this was not a compliance with the statute, section 5011, Rev. St. 1913. In *Diederich v. City of Red Cloud*, 103 Neb. 688, substantially the same question was presented. That was an injunction action where the proceedings were collaterally attacked, but the discussion on the sufficiency of the estimate made by

engineers especially employed for the purpose is illuminating. The court said:

"The evidence shows that in this case, as in other towns of this class, the city engineer is chosen without reference to his qualifications to make a proper estimate of the items of cost of extensive street paving. The city engineer was a witness upon the trial, and his evidence shows that he was not qualified, and did not consider himself qualified, to make an estimate of such extensive street paving, and that the city council, with his knowledge and consent, employed competent engineers who did make the estimate. It does not appear that any objection was made to the estimate on the ground that it was not made by the city engineer until after the paving was done. While the letter of the statute is that the city engineer shall make estimates, the preceding direct statement of the improvements for which the city engineer shall make estimates might indicate that the legislature did not have extensive paving in towns of this class in view, for which it would be necessary to employ more competent engineers. When the statute was enacted in 1879, neither the legislature nor any one else contemplated that towns of this class would do extensive paving. If the present situation had been contemplated by the legislature, we may well suppose, in view of the provisions of this comprehensive act, that the language of this section would have been more explicit. Under all of the circumstances, we cannot conclude that it was the intention of the legislature to prevent the city council from securing the necessary services of competent engineers under such conditions as these."

2. "There was no ordinance establishing the grade or repealing prior ordinances establishing grade." A sufficient answer to this statement is that there is no statute pointed out which made it incumbent upon the city council to establish a grade by ordinance as a condition precedent to the organization of the paving district. The statute confers authority upon the city council to establish grades, but it does not require the exercise of

such power as a condition precedent to the establishment of the paving district.

3. "An ordinance cannot be changed when submitted under the referendum until after one year." After the passage of the ordinance creating paving district No. 7, dissatisfied parties caused it to be submitted to a referendum vote, where it received the approval of a majority of those voting thereon. The paving district as created by the ordinance extended from the north line of Twentieth and O streets to the south line of Twenty-ninth street at Twenty-ninth and O streets, and extended west along Twenty-ninth street about two blocks. After the referendum vote had been taken the city council by resolution excluded from the operation of the ordinance the paving of that part of Twenty-ninth street which had been included in the district, and the paving was subsequently laid on O street only. The council made changes in the work on O street. The ordinance originally provided for paving the roadway 50 feet in width. On petition of the property owners the paved roadway was reduced to 30 feet in width between Twenty-first street and Twenty-second street. Certain changes were also made relating to sidewalk construction. It is claimed that under section 4443, Comp. St. 1922, an ordinance cannot be changed after its submission to a referendum vote until the expiration of one year from and after the vote has been taken. We do not so construe the statute. It reads: "The mayor and city council shall have no power to enact a law which shall in any manner alter, modify, impair or render nugatory ordinances which have been enacted by a direct vote of the voters of such city under the provisions of this article, except by a yea and nay vote of two-thirds of the city council: Provided, however, no such vote shall be taken within one year from the time of its enactment." It will be seen that this relates to ordinances "which have been enacted by a direct vote of the voters." It does not purport to cover ordinances enacted by the mayor and

city council and referred to the voters for their rejection or approval under the provisions of the statute permitting a referendum.

4. It is said that following the enactment of the several ordinances which created paving districts 4, 5, 6 and 7 there was but a single contract with the engineering firm and that it covered work in the four districts, and that there was but one contract for laying the paving in the four districts; that the estimate of costs upon which the city based its advertisements for bids was made jointly as to all districts; and that the various incidental items entering into the improvements made in the several districts were consolidated, and later prorated according to the front footage in each district, and that this procedure renders the whole levy invalid. In support of this contention, it is argued that the engineering work was more difficult in one district than in another and that necessarily the charge made by the engineers might have been less in a given district had the contract been restricted to the work to be done in the district calling for the less difficult work. It is claimed also that by calling for engineers who were able to do the work in the four districts all engineers were excluded except those who were able to handle the larger projects; that if the city had sought separate engineers for each district it might have procured an engineer for each district who would have done the work at a reduced rate but who was deterred from entering the field because of the extent of the work as contemplated by the four projects. We do not say that this is not within the realm of possibility. All things are possible. But it is not within the realm of probability. Indeed, it is more probable that the engineering cost to each district was less because the engineering firm had the larger contract. The traveling expenses and overhead charges that necessarily entered into the engineering expense, in all probability, was reduced because of the method employed rather than the method suggested by counsel. The compensation of the engineering firm was

based upon a percentage cost of the improvement and each district bore its proper share and no more. Appellants' complaint on this basis is without substantial merit.

A number of complaints which we have not mentioned are contained in the brief but they are not found to be of such a character as to require specific discussion. No prejudicial error is found in the record and the judgment is

AFFIRMED.

H. R. HOWE ET AL., APPELLANTS, V. CITY OF AUBURN ET AL., APPELLEES.

C. L. MYERS ET AL., APPELLANTS, V. CITY OF AUBURN ET AL., APPELLEES.

FILED APRIL 21, 1923. No. 22817.

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

Kelligar & Ferneau, for appellants.

Heard before MORRISSEY, C. J., ROSE, DEAN, DAY and GOOD, JJ.

MORRISSEY, C. J.

The appeal in this case involves the validity of special assessments made against the property of the appellants situated in paving district No. 4 in the city of Auburn. The issues presented are substantially the same as those in the case of *Schreifer v. City of Auburn, ante,* p. 179 The cause is controlled by the opinion and judgment in that case, and, on the authority thereof, the judgment of the lower court is

AFFIRMED.

WILLIAM H. BOUSFIELD ET AL., APPELLANTS, V. CITY OF AUBURN ET AL., APPELLEES.

FILED APRIL 21, 1923. No. 22818.

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

Kelligar & Ferneau, for appellants.

H. A. Lambert and *Ernest F. Armstrong, contra.*

Heard before MORRISSEY, C. J., ROSE, DEAN, DAY and GOOD, JJ.

MORRISSEY, C. J.

The appeal in this case involves the validity of special assessments made against the property of the appellants situated in paving district No. 6 in the city of Auburn. The issues presented are substantially the same as those in the case of *Schreifer v. City of Auburn, ante,* p. 179. The cause is controlled by the opinion and judgment in that case, and on the authority thereof, the judgment of the lower court is

AFFIRMED.

GEORGE N. SEYMOUR, APPELLANT, V. STANDARD LIVE STOCK COMMISSION COMPANY ET AL., APPELLEES.

FILED APRIL 21, 1923. No. 22330.

Chattel Mortgages: WAIVER OF LIEN. "Where a mortgagee of chattels authorizes the mortgagor to sell the property described in the mortgage at private sale, and with the proceeds pay the mortgage debt, and the sale is accordingly made, the mortgagee has thereby waived his lien." *Drexel v. Murphy,* 59 Neb. 210.

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

Williams & Kryger and *J. A. Donohoe,* for appellant.

Dolezal, Spear & Mapes, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., BEGLEY, District Judge.

LETTON, J.

This action is brought against the Standard Live Stock Commission Company and the Idlewild Farm Company for conversion of certain property covered by a chattel mortgage in favor of the plaintiff. The defense is release of the mortgage lien by permission given the mortgagor

to sell the property, and also ratification of the sale by the acceptance of a part of the proceeds, with knowledge of the facts.

Plaintiff is a banker at Elgin. He was the holder of a note executed by Andrew Wytaske for $6,730.60 payable December 12, 1920. This note was secured by a chattel mortgage upon 54 head of four-year-old steers, and upon other property. One Bennett was the agent of the plaintiff, employed by him to check up and inspect property covered by chattel mortgages in which he was interested. On December 6, 1920, Bennett went to the farm of Wytaske 16 miles northeast of O'Neill. He and Wytaske had a conversation about the debt and the chattel mortgage. Wytaske requested an extension of time, but Bennett told him Mr. Seymour wanted the money. Wytaske said he would have to ship and sell the cattle in order to pay the debt. Bennett requested him to ship the cattle in Mr. Seymour's name, or to have the money sent to the Elgin State Bank.

It is clear that Bennett knew that the cattle must be sold in order to pay the debt, and that the usual and ordinary method of sale of such cattle was by shipment to South Omaha, or some other market. It seems evident from his own testimony that this was the customary method of procuring the money to pay such mortgage debts, and that he expected Wytaske to ship the cattle as soon as he could obtain cars. On December 13, Wytaske shipped the cattle to the Standard Live Stock Commission Company, defendant, at South Omaha. One of the cars was shipped in his own name, another in the name of his son, Stanley, and about half a car-load in the name of one Kraft, who also had half a car-load of cattle in the same car. The commission company paid Andrew Wytaske $600 in cash, paid Stanley Wytaske, who accompanied his father, $600 in cash, and remitted $2,887.71 to a bank at O'Neill to be credited to the account of Stanley Wytaske. There is a stipulation in the record that the commission company was directed to make this remittance by both

Andrew and Stanley. A few days afterwards Stanley withdrew $1,800 in money from the bank and absconded, and on the same day $1,087.71, the remainder of the deposit, was credited to the account of Andrew Wytaske. Plaintiff received $1,026.46 from the amount in the bank, the remainder being applied on a note due from Andrew to the O'Neill bank.

Part of the cattle were sold by the purchaser from the commission company to the Idlewild Farm Company of Fremont, and it is in order to recover the value of these cattle that that corporation is made a defendant to the suit.

Plaintiff insists that when the commission company purchased the cattle it was charged with notice of his lien, which was a matter of public record, and is therefore liable for the value of the cattle. That it was chargeable with notice may be conceded. But we are satisfied that there was permission given to Wytaske to ship and sell the cattle, and this permission released the mortgage so far. Mr. Seymour denies that he ever gave permission to sell the cattle, but Bennett told Wytaske that he might sell if he shipped the cattle in Mr. Seymour's name, or had the money sent to the Elgin State Bank, and the facts in the case justify the conclusion that he had authority to give such direction. Even though the consent to sell was made upon such conditions, this would not affect the rights of the commission company, which had no knowledge of any such condition. By this permission Wytaske was made the agent of the mortgagee to sell and account for the proceeds, and a failure on his part to carry out the confidence reposed in him can only concern the mortgagee, who trusted him. *Littlejohn v. Pearson*, 23 Neb. 192; *Drexel v. Murphy*, 59 Neb. 210; *Tucker v. Mann*, 124 Ga. 1003; *Minneapolis Threshing Machine Co. v. Calhoun*, 37 S. Dak. 542; *Rusk County Lumber Co. v. Meyer*, 126 S. W. (Tex. Civ. App.) 317; *Flenniken v. Scruggs*, 15 S. Car. 88; *Pecos Valley Bank v. Evans-Snider-Buel Co.*, 107 Fed. 654; *Anderson v. South Chicago Brew-*

ing Co., 173 Ill. 213; *Carr v. Brawley*, 34 Okla. 500, 43 L. R. A. n. s. 302.

The title to the property passed to the purchaser at the South Omaha market. The Idlewild company became vested with a good title upon its purchase from him. Furthermore, plaintiff accepted part of the proceeds of the sale after having knowledge of the transaction, and he is therefore estopped as against a purchaser to assert that the sale was invalid. *Ayres v. McConahey*, 65 Neb. 588.

AFFIRMED.

CHARLES A. FORSLUND, APPELLEE, V. HENRY F. SWENSON ET AL., APPELLANTS.

FILED APRIL 21, 1923. No. 22353.

1. **Trial:** APPORTIONMENT OF DAMAGES. A jury may not in a verdict against joint tort-feasors apportion the amount of damages which each shall pay.
2. ———: VERDICT. In an action for personal injuries against joint defendants, the jury returned into court with a verdict assessing the damages against one defendant at the sum of $5,000, and against the other at $2,500. The court refused to receive the verdict, and instructed the jury to correct the verdict by simply finding the amount of plaintiff's damages, if any. After further consideration by the jury, a verdict was returned against both defendants for $7,500. *Held*, that this was proper practice, and that the verdict, as finally delivered, was valid.
3. ———: JURY: POWERS OF COURT. Section 8806, Comp. St. 1922, relating to the polling of a jury, does not deprive the court of any of its former powers.
4. **Evidence** examined, and held to support the verdict.

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

Stout, Rose, Wells & Martin, Jefferis, Tunison & Wilson and *Ralph A. Van Orsdel*, for appellants.

Gurley, Fitch & West, contra.

Heard before MORRISSEY, C. J., LETTON, DAY and DEAN, JJ., BUTTON, District Judge.

LETTON, J.

This is an appeal from a judgment against defendants rendered in an action for personal injuries. Plaintiff alleges that he was severely injured by the overturning of an automobile which he was driving, by reason of it coming in contact with a pile of coal which had been negligently placed and suffered to remain in a street by the defendants. There is much conflict in the evidence, but the jury adopted the theory of plaintiff.

The facts are as follows: Defendant Swenson, who resides on the north side of Hawthorne avenue in Omaha, and upon the east side of a driveway leading to the rear part of the lot, had ordered from defendant Rosenblatt, a coal dealer in the city, a number of tons of semi-anthracite coal. Part of the coal was to be delivered by the coal dealer into bins in the cellar of an apartment house at No. 3624 Hawthorne avenue. According to the testimony of teamsters employed by Rosenblatt, when they attempted to deliver the coal as ordered, Mrs. Swenson told them that the bins in the cellar were not ready, and directed them to unload the coal in the street near the driveway, which they did. Several tons of the coal were unloaded, part of it in the parking space next to the north curb line, and the greater part in the street east of the driveway.

A lantern with a red light was placed upon the coal pile on the first night. The next afternoon one of Rosenblatt's men took a red lantern to Mrs. Swenson, who said she would see that it was lighted and placed upon the pile of coal that night. This was not done until after the accident. Plaintiff was driving a Ford automobile with the top down, occupying the front seat. There were two women in the back seat. He drove from the north into Hawthorne avenue a short distance west of the place of the accident, and turned eastward on that street. He testifies that he was driving about 10 miles an hour, and that it was very dark on the street.

There is some evidence that, not only was there a pile of coal near the north curb, but lumps of coal were

scattered at intervals from the north to the south curb of the street. The paved portion of the street is 20 feet in width. Plaintiff testifies that, as he drove along, the first he knew was a sudden jerk, then he felt himself going out of the car, but was unable to tell where he lit. He was found by a man, who heard the crash, lying close to the north curb of the street a few feet east of the coal pile. The automobile was lying on its left side, facing northward on the east side of the east coal pile, with the right front wheel broken and the engine still running. The women were thrown out toward the south, or at least, when first seen, were southward of the car near the south side of the street.

There was evidence on the part of defendants that there were some scratches, or marks, on the curb at the south side of the street a little west of the coal pile, and that some broken spokes from the wheel were found not very far from that point. Defendants insist that the physical facts in evidence conclusively establish that the plaintiff so carelessly drove his car against this curb as to smash the wheel, and as a result the car was diverted across the street to the position where it was found on the coal pile. We consider, however, that the determination of the question whether the car struck the south curb, which collision caused its collapse, or whether it struck a lump of coal in the street, or the coal pile on the north side of the street, was a question for the jury, and that, in the state of the evidence, the conclusion drawn by them from the testimony should not be disturbed by a reviewing court. While each of the defendants attempts to establish his freedom from negligence, we think the facts are sufficient to support the verdict for damages in favor of the plaintiff against both of them. It was negligence on the part of Rosenblatt to unload the coal in the public street and leave it without a danger signal at night. Proper precautions were taken by him the first night, but the second night he relied upon Mrs. Swenson to perform this duty, and for her negligence he is liable. It is true

she denies the testimony of Rosenblatt's witnesses, but the jury accepted their version of the facts. It was within the knowledge of defendant Swenson that the coal he had ordered had been unloaded on the street in front of his premises. Mrs. Swenson had at least apparent authority to direct the men delivering the coal as to what should be done with it, when the bins were not ready. She directed that it be placed in the street, and Swenson, having knowledge that the coal in process of delivery to him was lying in the street, took no steps to warn travelers upon the highway, or to protect them from danger incident to the coal being in such a position. The jury were warranted in finding that the accident resulted from the joint negligence of defendants.

A question arises from circumstances which happened at the trial. The jury first returned a verdict against Swenson for $5,000, and against Rosenblatt for $2,500. The court refused to receive this verdict, and instructed the jury as follows:

"Your verdict is not in proper form, in that it attempts to assess damages in different amounts against the two defendants. You should simply find the amount of plaintiff's damages and insert the same at the proper place in the form of verdict if you find for the plaintiff. Another form of verdict is submitted, which you will have your foreman sign after filling in the amount of damages, if any you find."

After further consideration by the jury, a verdict was returned against both defendants for $7,500. At the hearing, upon a motion for a new trial, it was ordered that the same should be allowed, unless defendants filed a remittitur of $1,500. This was done, and a judgment for $6,000 rendered. Rosenblatt now presents the proceedings taken in connection with the receipt of the verdict as one of the errors assigned. His argument is that the powers of the court with reference to the rendition of a verdict are limited and circumscribed by the provisions of section 7862, Rev. St. 1913 (Comp. St. 1922, sec. 8806),

and that when the first verdict came in plaintiff should either have been required to elect to take judgment against one defendant on the verdict, with the right to dismiss without prejudice as to the other, or at most judgment should have been rendered on the verdict in accordance with the terms. This section applies to the condition arising when a juror dissents when the jury is being polled, and does not deprive the court of any of its former powers.

It is pointed out in *Nashville Railway & Light Co. v. Trawick,* 118 Tenn. 273, 10 L. R. A. n. s. 191, and in the annotation to the case, that the practice of the courts has not been uniform with respect to a situation where the jury has undertaken to apportion the damages between joint tort-feasors.

In some of the states where the courts have passed upon this question, punitive damages are allowed, and in some cases in such states it is held that, where one defendant has been guilty of an aggravated trespass, or tort, and the wrongful act of another has not been accompanied with malice or wanton disregard of the rights of the injured party, the verdict should be set aside and a new trial awarded. In other states, where punitive damages are not allowed, it is usually held that the judgment against all should be for the higher sum stated in the verdict, since that is the amount of damages plaintiff has been found to have sustained. In this state, where punitive damages are not allowed, a new trial would in ordinary cases be unnecessary.

In *Halsey v. Woodruff,* 26 Pick. (Mass.) 555, a verdict of $75 was rendered against Halsey, and a separate verdict of $2 against Avery. The court rendered judgment against both for $75 and costs, saying:

"The result of the authorities, which are numerous, is that, where a joint action is brought against two for a trespass done, and there is a judgment against both, it must be a judgment for joint damages. All the legal consequences of there being a joint judgment must neces-

sarily follow; one of which is, that each is liable for all the damage which the plaintiff has sustained by such trespass, without regard to different degrees or shades of guilt."

In *Beal v. Finch,* 11 N. Y. 128, it was held, citing *Halsey v. Woodruff, supra,* that each defendant was liable for all damages sustained without regard to shades of guilt. See 2 Viner's Abr. 303.

In *Fuller v. Chamberlain,* 11 Met. (Mass.) 503, a joint action of trespass was brought against five persons. A verdict was rendered on one count assessing the damages against three defendants "at the sum of seven dollars and eighty-three cents each, $23.49." The judge informed the jury that the damages must be joint, and directed a verdict to be drawn up in the proper form for the aggregate sum of $23.49 on the third count against the three defendants named in the verdict. The defendants moved in arrest of judgment because the verdict on the third count should be for the sum of $7.83, and no more. The court said:

"The paper sealed up by the jury was not technically a verdict. Such a paper is not a verdict till it is affirmed and recorded. * * * When the sealed paper was opened, it was rightly explained to the jury, by the judge, that the law required joint damages. They had already found that the plaintiff ought to receive for his indemnity $23.49, the aggregate of the three several sums. They adopted the amendment (not having been discharged), unanimously affirmed it as their verdict, and authorized it to be so recorded."

In the case at bar the jury attempted to do what they had no power to do, apportion the damages between the wrongdoers. On this fact being properly called to their attention, they corrected the verdict, which they had a right to do. The trial court, in calling the attention of the jury to the defect in the verdict and affording them an opportunity to correct the same before ending their deliberations, adopted a simple, practical and legal method. The instructions clearly present all the issues in the case,

including contributory negligence on the part of plaintiff. We find no error.

AFFIRMED.

FRANZ SCHRAMM, PLAINTIFF: EDWARD G. MUELLER, ADMINISTRATOR, APPELLEE, V. WILBER CASEY, APPELLANT.

Filed April 21, 1923. No. 22291.

1. **Master and Servant:** APPLIANCES. A master is required to exercise ordinary care to provide reasonably safe appliances for servants, but is not necessarily required as a matter of law to furnish safe appliances.

2. ———: ———: INSTRUCTIONS. In an action by a servant to recover damages caused by the negligence of his master in knowingly furnishing, without sufficient warning, a vicious team having a propensity to frighten at motor vehicles and to run away, it may be reversible error to instruct the jury that it was the duty of the master as a matter of law to furnish a safe team.

3. **Trial:** INSTRUCTIONS. A correct instruction at variance with another instruction misstating the law and discrediting a defense interposed by a defeated defendant does not cure the error.

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

Williams, Hurd & Neighbors, for appellant.

Hastings, Ritchie, Canaday & Mantz, contra.

Heard before MORRISSEY, C. J., ROSE, DEAN, DAY *and* GOOD, JJ.

ROSE, J.

This is an action to recover damages in the sum of $10,000 for negligence resulting in personal injuries. Plaintiff, 71 years of age, was employed by defendant to haul a load of lumber from Bayard to his employer's farm, a distance of a few miles. The employment required plaintiff to use a team and a wagon owned and furnished by defendant. Plaintiff delivered the lumber at the place designated; but, while returning astride the coupling on the running gears of the empty wagon, the team took fright at a gasoline tractor on the road,

ran away, threw plaintiff under the wheels and severely injured him. The negligence imputed to defendant seems to be that of knowingly furnishing to plaintiff, without sufficient warning, a vicious team having a propensity to frighten at motor vehicles and to run away, plaintiff himself having no such knowledge. The employment, service and injuries are not in dispute, but defendant in his answer denied negligence on his part and pleaded negligence of plaintiff as the cause of his injuries. Defendant also pleaded warning of danger and assumption of risk. Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $600. Defendant has appealed from a judgment thereon.

It is contended that there was no evidence to sustain a verdict in favor of plaintiff, but the pleadings and proofs nevertheless presented issues of fact for the determination of the jury. The judgment, however, must be reversed for the giving of the following erroneous instruction:

"The defendant has admitted that the plaintiff was in his employ when the runaway complained of occurred. This fact creates the legal relationship of master and servant between the defendant and the plaintiff; and it is a fundamental rule of law that, in such a relationship, the master is to furnish the servant with such appliances (in this case a safe team and wagon) as are suitable and may be used with safety; and if the servant is injured by reason of defective appliances, placed in his hands by the master, the master will be liable unless he can clearly show that he has used ordinary care and diligence in the selection of the same."

The error consists in what practically amounts to an instruction that it was the duty of defendant to furnish "a safe team and wagon." The law is that a master is required to exercise ordinary care to provide reasonably safe appliances for his servants. *Vanderpool v. Partridge*, 79 Neb. 165. Defendant tries to justify the giving of this instruction under the first paragraph of the syllabus in

Leigh v. Omaha Street R. Co., 36 Neb. 131, as follows:

"It is the duty of a master to furnish his servants with such appliances for his work as are suitable and may be used with safety; and if the servant is injured by reason of defective appliances furnished by his master, the latter will be liable for damages unless he can show that he has used due care in the selection of the same."

The difference between the two statements of the law is obvious. One requires a master "to furnish his servants with such appliances for his work as are suitable and may be used with safety," while the jury may infer from the other that it was the duty of defendant to furnish "a safe team and wagon."

In the argument of plaintiff reference is made to another instruction to the effect that an employer is not the insurer of his employee, but this does not cure the error. It is not shown that it was harmless. On the contrary prejudice is evident. Defendant in his testimony recognized danger in driving the team, but he offered proof that plaintiff, knowing the hazard, assumed the risk. The instruction to the effect that it was the duty of defendant to furnish "a *safe* team and wagon" not only misstated the law but discredited the defense of assumption of risk—an issue on which the evidence was conflicting. The inference of prejudice seems unavoidable. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

GEORGE CRAWFORD ET AL., APPELLANTS, V. E. B. WEEKS SEED COMPANY, APPELLEE.

FILED APRIL 21, 1923. No. 22327.

1. **Sales:** SALE BY SAMPLE: IMPLIED WARRANTY. It is a general rule of law that a sale of goods by sample expresses or implies a warranty or condition that the bulk corresponds to the sample in kind and quality.

2. **Trial:** INSTRUCTIONS. It is error to submit to the jury for their

determination a question as to the existence of a material fact pleaded by both parties to the action.

3. **Sales:** INSTRUCTIONS: FACTS ADMITTED. In an action to recover damages for breach of warranty in the sale of pop-corn, where a sale by sample is pleaded by both plaintiff and defendant, it is error to instruct the jury that the mere fact that a sample was produced at the sale does not mean an absolute warranty that the bulk equals the sample in kind, quality and general fitness, if the evidence does not warrant an inference that those terms were changed, waived or abandoned.

4. **Appeal:** REVERSAL. The giving of an erroneous instruction prejudicial to the party defeated is a ground of reversal upon appeal.

APPEAL from the district court for Valley county: BAYARD H. PAINE, JUDGE. *Reversed.*

O. A. Abbott and *Bert M. Hardenbrook,* for appellants.

Munn & Norman, contra.

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

ROSE, J.

This is an action to recover damages for fraud and breach of warranty in the sale of 46,669 pounds of white-rice pop-corn in the Pacific Commercial Warehouse, Los Angeles, California, March 13, 1920. Plaintiffs were the buyers and paid the purchase price, $2,916.81, April 15, 1920. Plaintiffs pleaded in their petition that the pop-corn was purchased by sample with a warranty of kind and quality for commercial popping purposes and that the bulk did not correspond to the sample; that it was worthless for the purposes purchased; that plaintiffs, without knowledge of the condition of the bulk, were induced by the fraudulent representations of defendant and its warranty, upon which they relied, to make the purchase; that they accepted the pop-corn and paid for it without inspecting it and without an opportunity to do so; that upon discovering the fraud and the breach of warranty they resold the bulk for feed and received from that source net proceeds aggregating $1,324.83. Allowing

credit for this sum, the claim of plaintiffs, including loss of profits, amounts to $2,421.62. Defendant denied the charges of fraud, admitted the sale by sample, and pleaded that the bulk corresponded to the sample in kind and quality. Upon a trial of the issues the jury rendered a verdict in favor of defendant. From a judgment of dismissal plaintiffs have appealed.

A reversal is sought on the ground that the trial court erred in instructing the jury. One of the instructions contained this charge:

"You are instructed that one of the material matters for you to decide in this case is as to whether the seller warranted the goods sold."

Another instruction was in this form:

"You are instructed that, if a sample is produced by the seller to the buyer, there is an implied warranty that the goods sold shall be equal in kind and quality and general fitness with the sample produced. The mere fact that a sample was produced at the sale does not mean an absolute warranty as to these elements, if the bulk of the goods were there and open to the inspection of the buyer; nor unless the jury should find that the parties actually contracted with reference to the sample produced and in reliance thereon."

Errors in these instructions are obvious. In both the petition and the answer there is a plea that the sale was by sample. The general rule of law is that a sale by sample expresses or implies a warranty or condition that the bulk corresponds in kind and quality to the sample. The existence of a warranty, therefore, was not a question for the jury and should not have been submitted to them. To permit them to find there was no warranty was to authorize a verdict that the sale was not by sample—the contradiction of a fact pleaded by both parties.

In permitting defendant to escape the consequences of an "absolute warranty" that the bulk "in kind and quality and general fitness" was equal to the sample, if

the goods were open to the inspection of plaintiffs at the sale, the instruction was not applicable to the evidence. For commercial popping purposes the corn was raised in Valley county, Nebraska, shipped to Los Angeles and there sold to plaintiffs while stored in a warehouse. There is evidence tending to show these facts: It requires an expert to determine by inspection the popping quality of corn, and plaintiffs were not qualified as such. When the sale was made and when the purchase price was paid the bulk was in the warehouse. Therein plaintiffs were prevented from making an inspection. The popping quality for commercial use had been destroyed by heating before plaintiffs made their purchase. The bulk was not equal to the sample. Transfer of title and possession was effected by means of a warehouse receipt. These are not intended as findings but as mere statements of facts of which there is proof. There does not seem to be any foundation for an inference that the terms of the warranty were changed or waived or abandoned. In material respects, therefore, the instructions were erroneous.

The jury were long in deliberation and only agreed upon their verdict after an appeal to do so had been made in the form of an additional instruction from the bench. There seems to be no way to escape the conviction that the errors were prejudicial to plaintiffs.

REVERSED AND REMANDED.

ALBERT MARES, APPELLANT, V. HENRY CHALOUPKA, APPELLEE.

FILED APRIL 21, 1923. No. 22263.

1. **Appeal:** REVERSAL. When it appears in an action for personal injuries that a verdict is apparently the result of passion and prejudice and is inadequate, such verdict will be set aside and a new trial will be granted.

2. **Negligence:** INSTRUCTIONS. In a personal injury action, when there is evidence tending to show contributory negligence on the plain-

tiff's part, the jury should be instructed, under section 8834, Comp. St. 1922, on the question of comparative negligence.

APPEAL from the district court for Saline county: LEONARD W. COLBY, JUDGE. *Reversed.*

Crofoot, Fraser, Connolly & Stryker and *B. V. Kohout*, for appellant.

Bartos & Bartos and *Grant G. Martin, contra.*

Heard before MORRISSEY, C. J., LETTON, ALDRICH and DEAN, JJ., RAPER, District Judge.

DEAN, J.

Plaintiff recovered a verdict and judgment for $540 in an action for personal injuries growing out of a collision between defendant's car and a two-wheeled cart or sulky, in which he was riding on Main street in Wilber. Alleging inadequacy of the verdict, plaintiff appealed.

With respect to plaintiff's injuries a physician testified that there was "a compound fracture of the head of the big bone" and that a bone "about one inch at the top and an inch at the base" was removed; that they used "a drainage tube and put on splints," and that the Carrol-Daykin system of irrigation was used for a little more than two days; that the splints were not removed for about a month and that plaintiff was confined to his bed between four and five weeks; that he walked with crutches for about three months and afterward he used a cane; that he had "a partial stiffness of the knee" and that he did not know whether that would be permanent. The doctor said he did not render a bill, but that his charge was $250, and that it was reasonable.

Another physician who attended plaintiff for a part of the time corroborated the evidence of the doctor whose evidence has just been reviewed. He added, however, that the removal of the bone would cause a retarding of the motion in plaintiff's knee which would, in his opinion, be permanent. He testified that his charges were $100 and that they were reasonable.

Plaintiff alleged that all of his expenses amounted to $540, which, as hereinbefore noted, was the amount of the jury's verdict. The expenses, as itemized in his petition, were "expenses in connection with said accident in the sum of $350 for doctor's services, $25 nurse's expenses and compensation, $20 for repair of cart, $20 repair of harness and $125 for care of his horse during his confinement."

Only one question is presented, namely, is the verdict adequate in view of the fact that defendant's negligence was established by the verdict? He did not prosecute a cross-appeal. Had the jury believed defendant was not guilty of negligence the verdict should have been in his favor. But having found for plaintiff, and by its verdict having declared that defendant was negligent, it became the duty of the jury to assess compensatory damages in some amount. It did not do so. The verdict awarded the exact amount which plaintiff alleged in his petition he was obligated to pay for medical services, hospital attendance, and other expenses. Nothing appears to have been awarded for his injuries, which may be permanent, nor for pain and suffering which he endured, nor for loss of employment. Nor did the jury appear to consider the fact that his income was about $1,000 a year.

The record does not present a case where some unforseen emergency occurred which naturally overpowered the judgment of defendant so that for a time he was rendered incapable of promptly intelligent action. The night was misty. The windshield was covered with moisture. It was difficult to see ahead. Under all the circumstances he should have stopped when he suddenly came upon the standing cart immediately before him. We think the verdict is inadequate and must have been rendered under the influence of passion and prejudice. *Ellsworth v. City of Fairbury,* 41 Neb. 881; 29 Cyc. 847, 848.

Notwithstanding there is a good deal of conflict in

the evidence, we conclude that plaintiff, in view of the record, should have a new trial. When the case is tried again the jury should be instructed on the question of comparative negligence upon which there was no instruction in the former trial.

The judgment is vacated and a new trial ordered.

REVERSED AND REMANDED.

NATHAN FINEGOLD, APPELLANT, V. UNION OUTFITTING COMPANY ET AL., APPELLEES.

FILED APRIL 21, 1923. No. 22267.

1. **Property:** OWNERSHIP: PRESUMPTION. The presumption of the continuance of facts once shown to exist may, in a proper case, be applied in respect of the ownership or possession of property.
2. **Pleading:** ESTOPPEL. When a party alleges a material fact, in a pleading upon which he relies, he cannot afterward be heard to deny the existence of such fact.
3. **Property:** OWNERSHIP: PRESUMPTION. Possession of a vehicle which by negligent management has caused injury to the person or to the property of another warrants an inference of ownership, and, *prima facie* ownership having been found once to exist, the general rule is that it is presumed to continue until a change in ownership is affirmatively shown by the defendant.
4. **Master and Servant:** AGENCY: BURDEN OF PROOF. The presumption of the use and control of a motor propelled vehicle, which arises from proof of ownership, which by its negligent operation has inflicted damage upon the person or property of another, is not conclusive, but such facts place the burden upon the owner to show that the driver was not his agent nor in his employ.
5. **Evidence:** ADMISSIONS: ADMISSIBILITY. In a personal injury action the court may, in the exercise of sound judicial discretion, admit evidence of a conversation offered by plaintiff to show an admission by defendant's credit manager, since deceased, who was in charge of defendant's office, that an employee of defendant was sent by him on an errand, it being alleged that while in performance of the errand the employee inflicted the injuries complained of by colliding with plaintiff while such employee was operating a motorcycle.
6. ———: INFERENCES. "In a civil action, when a fact may be fairly and reasonably inferred from other and all the facts and cir-

cumstances proved, it may be taken as established." *Chicago, B. & Q. R. Co. v. Hildebrand,* 42 Neb. 33.

7. **Trial:** DISMISSAL: REVIEW. The evidence examined, and *held* that the court erred in sustaining defendant's motion to dismiss plaintiff's action.

APPEAL from the district court for Douglas county: JAMES FITZGERALD, JUDGE. *Reversed.*

R. J. Craren and *Richard S. Horton,* for appellant.

Lambert, Shotwell & Shotwell and *Kennedy, Holland, DeLacy & McLaughlin, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., RAPER, District Judge.

DEAN, J.

Plaintiff sued in Douglas county to recover damages from the Union Outfitting Company, a corporation, and William Bell, its alleged employee, defendants, in the sum of $50,000 for personal injuries sustained by plaintiff in Omaha, June 23, 1919, by being run over by a motorcycle, the alleged property of defendant company, which was propelled by its codefendant William Bell while in the performance, as alleged, of certain duties delegated to him by the company. When plaintiff rested both defendants moved separately for a directed verdict on the ground that the evidence was not sufficient to sustain a cause of action. Both motions were sustained, the jury were discharged, the suits were dismissed as to both defendants at plaintiff's costs, and he appealed.

Plaintiff alleged that he had just alighted from a street car when the collision occurred. In substance he testified that he was 36 years of age, by occupation a merchant tailor, and that his income averaged about $600 a month. In respect of the facts immediately attending the accident he testified in part:

"My hip was knocked out, what they call the—I don't know what they call it; the hip was knocked out in front there, and my head was split here. My nose was knocked over, I was all bruised up, and it was gone out

here. My nose was very split here; and my head was split in two places; and then I was paralyzed about over nine months. I can't hear, I can't do anything. I was laying all summer six or eight, not being able to move to make one step, not even on crutches to walk. I know my head gets dizzy; * * * when I bend, or anything, I can fall in the street without knowing anything, right now. I say I got numbness that was there. I can't do anything when I bend at all, I am liable to fall and not know anything."

Plaintiff's evidence with respect to his injuries was in large part corroborated by his physician who testified that his patient sustained "a dislocation of the left hip; a crushing fracture in the fourth lumbar vertebra;" that he was partially paralyzed and that his spinal injury was permanent; that he treated him seven or eight months, and that at the time of the trial he was unable to do any work. In consequence of his injuries plaintiff was confined in a hospital for a considerable period and was in a plaster cast more than four months. The nature of the injuries are in part outlined here merely to show that the questions of fact disclosed by the record are properly for the consideration of the jury.

The contention in part is that, because of the absence of a safety zone at the place of the accident, the rider of the motorcycle violated a city ordinance in failing to stop while the street car was discharging passengers, it being stipulated that a city ordinance of Omaha so provided. The stipulation follows: "'Mr. Horton: It is admitted by the parties hereto that under the ordinances of the city of Omaha, Douglas county, Nebraska, it is provided that all motor vehicles, including motorcycles, should stop when street cars are loading or unloading. When safety zones are established, they should pass only with utmost caution, and at a speed of not to exceed 12 miles per hour. Mr. DeLacy: I understand that is the ordinance; that is, they don't have to stop at safety zones; in the case of safety zones, they do not have to stop.

Mr. Horton: This is outside of safety zones. Mr. Shotwell: Yes. Mr. Horton: There were no safety zones. Mr. DeLacy: No; there weren't any safety zones in 1919. Mr. Horton: Let us admit that there was no safety zone at the intersection of Sixteenth and Webster at the time of the accident. There was a safety zone so far as you are concerned, but not as far as Mr. DeLacy is concerned. Mr. Shotwell: I do not want to make admission that there was not, if it is a fact that there was there; that is the only question. You are asking us to put in zones; and, if there is no safety zone, that is all, as far as that is concerned."

It is argued by the company that there is no proof that the motorcycle was its property or under its control at the time. With respect to ownership the following colloquy took place between the respective counsel for plaintiff and the outfitting company: "Mr. Horton: Do you admit that the Union Outfitting Company, on the 6th day of January, 1919, had a license number 3937 on a motorcycle owned by them? Mr. DeLacy: I will admit that, up to January 15, 1919, they owned a motorcycle, and it was duly registered; and I looked up the register the other day, and I do not remember what the number was; if you have the number there. Mr. Horton: Subject to correction, then, you admit that the license number taken out on the 6th day of January, 1919, was No. 3937, on the car owned by you at the time the license was taken out? Mr. DeLacy: Yes." Besides the foregoing there is evidence tending to prove that license number 3937 was at the time on the motorcycle which ran over plaintiff

The facts before us seem to make out a case of *prima facie* ownership sufficient to submit to the jury and which could be overcome only by direct proof to the contrary. The presumption of the continuance of facts once shown to exist may, in a proper case, be applied in respect of the ownership or possession of property. 16 Cyc. 1053. Possession of a vehicle which by negligent management has caused injury to the person or to the property of another

warrants an inference of ownership and, ownership having been found once to exist, the general rule is that it is presumed to continue until a change in ownership is affirmatively shown by the defendant. *Carr v. King & Tomlinson,* 184 Ia. 734; *O'Malley v. Heman Construction Co.,* 255 Mo. 386. To substantially the same effect are the following: *Hatter v. Dodge Bros.* 202 Mich. 97; *Dennery v. Great Atlantic & Pacific Tea Co.,* 82 N. J. Law, 517; *Edgeworth v. Wood,* 58 N. J. Law, 463. The presumption is not of course conclusive, but such facts place the burden upon the owner to show that the driver was not his agent nor in his employ. *Norris v. Kohler,* 41 N. Y. 42; *Joyce v. Capel,* 34 Eng. C. L. Rep. 785; *Ferris v. Sterling,* 214 N. Y. 249; *Baker v. Maseeh,* 20 Ariz. 201; *Williams v. Ludwig Floral Co.,* 252 Pa. St. 141; *Knust v. Bullock,* 59 Wash. 141.

In the briefs of both defendants it is argued that there is no evidence which identifies Bell as the rider of the motorcycle. But in the answer of the Union Outfitting Company it is alleged that "William Bell was riding on said motorcycle * * * for his own convenience and pleasure and * * * that at the time of said accident the said William Bell was not acting as its agent, servant or employee." From this, and the proofs as well, the question of the identity of the rider of the motorcycle seems to have been sufficiently established so far at least as that question may affect the company. Whether Bell was the owner of the motorcycle or whether, as owner or otherwise, he was in the company's employ or under its direction at the time are questions of fact for the jury.

James Sullivan, a railroad employee, arrived at the scene of the accident just after it happened. He testified: "Q. Did you see Mr. Finegold there? A. Mr. Finegold was laying in the street. Q. Did you notice the defendant Bell here? A. They were carrying him in the drug store, taking him in the drug store, at Sixteenth and Webster. I don't know him to see him, now."

Clearly the witness was inquired of about Mr. Bell. But because plaintiff was carried into the drug store and because there is no other evidence tending to show that Bell was carried into the drug store and because the witness added, "I don't know him to see him, now," defendants contend that the answer of the witness referred to plaintiff. While Sullivan's evidence seems to be incomplete it is not improbable, in view of plaintiff's subsequent condition, that the collision was such that the rider of the motorcycle also needed assistance and that he was carried into the drug store as Sullivan testified. Anyhow it was not a question of law for the court, but was a question of fact for the jury, to be considered, with respect to its probative value, with all the evidence in the case.

It is elementary that evidence in respect of a material fact from which fair-minded persons might reach different conclusions, when the evidence is considered in its entirety, does not present a question of law for the court, but a question of fact for the jury, which should be submitted under appropriate instructions.

With respect to the alleged liability of the company plaintiff testified that soon after he went to the hospital a man called on him who introduced himself as Mr. Hall. A photograph was introduced in evidence, which is not in the record, which he identified as the same person who called on him. Elsewhere in the record the photograph was identified as being that of Mr. Hall, and there is the evidence of an employee of the defendant company, a buyer and assistant manager of the store for 10 years, who testified that Mr. Hall, since deceased, was and for many years had been in charge of the office and was the credit manager of the company at the time. When counsel asked plaintiff to relate the conversation between Mr. Hall and himself, which took place at the hospital, defendant's objection to the introduction of his evidence on that point was sustained. Counsel then made this offer, which was denied: "The plaintiff offers to prove that the

answer of the witness would be that Mr. Hall stated that he was very sorry the accident had occurred; that he had sent Mr. Bell out on an errand that morning; that, as soon as Mr. Finegold had recovered sufficiently to come down to the store, the matter would be satisfactorily settled; that any damage by virtue of the accident was covered by indemnity insurance, and he would see that an adustment was properly made."

Mrs. Harry Filmore, an acquaintance of plaintiff, testified that she was on the same street car on which plaintiff came down town the morning of the accident and that she saw him get off the car and saw the motorcycle run over him. She also identified Mr. Hall's photograph and said that she saw him at the hospital and heard a conversation about the accident between him and plaintiff. When asked to relate the conversation the defendant company's exception was sustained. Plaintiff then made this offer of proof: "The plaintiff offers to prove and states the answer of the witness would be that Mr. Hall stated that their company was insured against such accidents; that he was very sorry it had happened; that he had sent Mr. Bell out on an errand early in the morning of the day of the accident; and that, as soon as Mr. Finegold had recovered sufficiently, the damage occasioned by the accident would be satisfactorily settled, when he had sufficiently recovered, if he would call at the store; and that, while Mr. Bell was on the errand referred to, the accident complained of occurred." The offer of proof was denied.

We think it was an abuse of sound judicial discretion for the court to exclude that part of plaintiff's evidence which purports to show that Mr. Hall said he "had sent Mr. Bell out on an errand that morning," and also that part of Mrs. Filmore's evidence wherein she testified that she heard Mr. Hall say "that he had sent Mr. Bell out on an errand early in the morning of the day of the accident." The evidence should have been submitted to the jury, under an appropriate instruction, in connection

with the other facts in the case. Whether Mr. Hall had authority to bind the company by an admission of liability we cannot decide in the present state of the record.

It seems that the rule announced in *Chicago, B. & Q. R. Co. v. Hildebrand,* 42 Neb. 33, is applicable to the facts here: "In a civil action, when a fact may be fairly and reasonably inferred from other and all the facts and circumstances proved, it may be taken as established." We think the evidence is *prima facie* sufficient to take the case out of the rule announced in *Neff v. Brandeis,* 91 Neb. 11, and *Weber v. Thompson-Belden & Co.* 105 Neb. 606, cited by defendants. The court erred in directing a verdict for defendants. The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

E. E. FIKE, RECEIVER, APPELLEE, V. RAY A. LOWER ET AL., APPELLANTS.

FILED APRIL 21, 1923. No. 22335.

1. **Mortgages:** DEED AS SECURITY. A deed absolute on its face, when given as security for a debt, will be held to be a mortgage.
2. **Evidence** examined, and *held* to sustain the findings and judgment of the trial court.

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

Jamieson, O'Sullivan & Southard, for appellants.

Stewart, Perry & Stewart and *Robert Van Pelt, contra.*

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

DAY, J.

This action was brought by E. E. Fike as receiver of the Valparaiso State Bank, hereinafter referred to as the bank, against Ray A. Lower, Zetta Lower, his wife, and William C. Elmelund. The purpose of the action was to have a certain warranty deed to lots 1 and 2, in

block 12, in the village of Valparaiso, executed by Ray A. Lower and his wife, Zetta Lower, on October 24, 1919, to William C. Elmelund, and by the latter by quitclaim deeded to the bank, declared to be a mortgage in favor of the bank; that an accounting be taken of the amount owing by Ray A Lower to the bank; and that the deed, if found to be a mortgage, be foreclosed.

Ray A. Lower admitted in his answer that he and his wife, Zetta Lower, executed a warranty deed conveying to said William C. Elmelund the property above described, and that the deed was filed for record November 12, 1919; that on the 20th day of September, 1919, for a valuable consideration he conveyed to Zetta Lower, his wife, the property above described, and that she thereby became vested with the title to said property; that on October 24, 1919, the said Zetta Lower entered into a contract with the said Elmelund, whereby he agreed to purchase the said lots for the sum of $15,000, and that in pursuance of such agreement the deed of October 24, 1919, was signed by himself and said Zetta Lower; and that said Elmelund has failed to pay any part of the consideration for the deed.

Zetta Lower, in a cross-petition, alleged that on October 24, 1919, the lots above described were her separate and individual property, having been conveyed to her by Ray A. Lower, her husband, for a valuable consideration on September 20, 1919, and that the deed was recorded on May 18, 1920. She further alleged that on October 24, 1919, she sold the premises to William C. Elmelund for an agreed sum of $15,000; that a deed was executed by her husband and herself to said Elmelund; that the consideration of $15,000 was never paid by Elmelund; that the agreement to pay said sum on the part of Elmelund was not made in good faith, but for the purpose of wrongfully and deceitfully obtaining from her the title to said property, and of defrauding her out of the same; that after obtaining the title to the property the said Elmelund transferred the same to the

Valparaiso State Bank; that said bank was not a *bona fide* purchaser for value, and had notice and knowledge of her rights to said premises. She prayed that the deed of October 24, 1919, be canceled and held for naught; that the deed from Elmelund to the bank be also canceled, and that the title to said lots be quieted and confirmed in her.

Elmelund also filed a cross-petition, in which he claimed an interest in the lots subject to the claim of the bank thereto; but, as no appeal has been taken by him from an adverse judgment against his claim in his cross-petition, no notice need be taken thereof. With respect to the claim of the Lowers, the trial court found that the deed of October 24, 1919, was given in trust to secure an indebtedness due from Ray A. Lower to the bank; that Ray A. Lower owed the bank $48,500; that the deed, while absolute on its face, was in fact a mortgage; and entered a decree foreclosing the said deed as a mortgage. From this judgment Ray A. Lower and Zetta Lower have appealed.

We first consider the evidence as bearing upon the transaction of October 24, 1919. The testimony on behalf of the plaintiff tended to show that at that time Ray A. Lower was largely indebted to the bank; that he had been its cashier and general manager, and had so conducted the affairs of the bank, and so juggled the entries in the books, that the true condition of the bank's affairs and of the amount of his indebtedness was difficult to ascertain. Interested parties were called in, as well as a representative of the department of trade and commerce, and it was agreed by Lower that he would transfer this property to Elmelund to protect the bank against loss by reason of his misconduct of the bank's affairs.

Elmelund's version of what occurred is that the property was to be transferred to him to protect the bank, as well as himself, from losses.

On the other hand, Lower and his wife both testified

that the transfer of the property by them to Elmelund for $15,000 was an out and out sale to Elmelund for that sum.

In view of all of the circumstances and the evidence upon this phase of the case, we are impressed that the plaintiff's version of the transaction is the true account, and that the transfer of the property was made to Elmelund in trust for the protection of the bank against loss arising by Lower's misconduct of the bank's affairs. It has frequently been held that a deed absolute on its face, when given as security for a debt, will be regarded as a mortgage.

With respect to the claim by Zetta Lower that on October 24, 1919, the property in question belonged to her individually, the testimony in her behalf tends to show that Ray A. Lower on September, 20, 1919, conveyed this property to her by deed, which deed was not recorded until May 18, 1920. Her claim is that marital difficulties had arisen between herself and her husband, culminating in a divorce proceeding instituted by her, and that in consideration of a dismissal of the divorce proceeding, and a reconciliation between the parties, Lower had deeded this property to her. In support of her contention a deed to the property, purporting to be dated September 15, 1919, and purporting to be acknowledged on September 20, 1919, was introduced in evidence. Testimony of other witnesses also tended to show that they had seen this deed in the possession of Mrs. Lower during the month of September. On the other hand, the notary public who took the acknowledgement testified that the deed from Lower to his wife was acknowledged on May 17, 1920, and dated back by Ray A. Lower. The evidence is clearly irreconcilable. In view of the entire record, however, we are convinced that the testimony of the notary public is true.

It is urged by the appellants that, in the accounting between Lower and the bank, it appears that he does not owe the bank anything. The testimony respecting

the accounting is extremely complicated. It is apparent that the accounts have been juggled, transferred and falsified for the purpose of concealing the true state of the bank's affairs. One of the experts who examined the books and traced the entries from one bank to another concludes that Lower's personal indebtedness to the bank amounts to $40,500. If interest were added to the several items comprising this sum of $40,500 from the dates on which the indebtedness arose, it would equal or exceed the amount of the indebtedness which the court found Lower owed the bank.

Without discussing other features of the evidence, we have become convinced from an examination of the entire record that the judgment of the trial court is fully sustained, and that it should be affirmed.

AFFIRMED.

JOHN HARRIS ET AL., APPELLEES, V. CHARLES STEELE ET AL., APPELLANTS.

FILED APRIL 21, 1923. No. 23242.

Waters: IRRIGATION: INJUNCTION. Where a landowner, for the purpose of irrigation for the benefit of himself and others, diverts water from a river through lands of others without the latter's consent, or without procuring the right by condemnation proceedings, or without obtaining the consent in writing of a majority of the residents and landowners bordering on a stream or channel through which it is proposed to conduct the water as provided in section 8458, Comp. St. 1922, such landowner may be restrained by injunction from continuing the trespass, even though permission to divert the water from the river has been granted by the board of public works of the state.

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

W. D. Oldham and *W. E. Balcom,* for appellants.

Sinclair & McDermott, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DAY and GOOD, JJ.

DAY, J.

John Harris and others, plaintiffs, obtained a judgment in the district court for Buffalo county enjoining Charles Steele and others, defendants, from flowing water over and across the plaintiffs' lands; from building a ditch across plaintiffs' lands; and from otherwise trespassing thereon. From this judgment the defendants appeal.

It appears that on December 15, 1921, Charles Steele, one of the defendants, was granted the right by the department of public works of the state to divert five cubic feet of water per second from the main channel of the Platte river for irrigation purposes. Steele's application to the board recited that the lands intended to be irrigated were located in section 14, township 8, range 18, in Phelps county, and comprised a tract of about 380 acres, of which 80 acres were owned by Steele, and the balance by three others. His application also recited that it was proposed to locate the headgate on the south bank of the main channel of the Platte river where it intersects the southwest quarter of the southwest quarter of section 7, township 8, range 18, in Buffalo county. It thus appears that the lands proposed to be irrigated were some four miles distant from the headgate. The project contemplated that the water taken from the river was to be conducted from the intake over and across an old channel or stream connecting the main channel with the south channel for a distance of about a mile and a quarter, and thence along the south channel of the river to a point in section 15 where the water was to be diverted and conducted by canals to the lands proposed to be irrigated. The old channel or stream connecting the main channel with the south channel is referred to in the evidence as the "Harris channel." The testimony shows that the title to the bed of the Harris channel is in the plaintiffs. There is a direct conflict in the testimony as to whether in recent years any water has flowed through the Harris

channel, the testimony in behalf of the plaintiffs indicating that no water flowed through the Harris channel except when the water in the main channel of the river was at a high stage. On the other hand, the testimony of the defendants indicated that there was water in the Harris channel whenever there was any water flowing in the river. It appears that the plaintiff Harris had erected a dam at the mouth of the Harris channel to prevent the waters from flowing through it, and that the bed of the channel, which was about 300 feet wide and with no specially marked banks, was used for pasture and grazing. As we view it, however, the question whether there was flowing water in the Harris channel is entirely immaterial so far as it affects the present controversy.

It further appears that on August 2, 1922, the defendant Steele, in company with a number of his employees, also defendants, went upon the Harris land and offered to pay $25 for permission to open the channel and divert the water from the river into it, which offer was refused by Harris. Defendants thereupon, without leave or permission from any of the plaintiffs, went upon the Harris land and with scrapers opened up a ditch along the Harris channel and diverted the waters from the river into the Harris channel and over and across the lands of the plaintiffs. While thus engaged, the present action was commenced and the defendants ceased work.

The answer of the defendants shows that prior to going upon the land the defendant Steele sought to obtain a right of way over the plaintiffs' lands by condemnation, but upon objection by the plaintiffs the county judge refused to appoint appraisers upon the ground that the project was purely a private enterprise. No appeal appears to have been taken from the order of the county judge, and the correctness of his ruling is not before us.

It also appears that no attempt was made by the defendants to comply with section 8458, Comp. St. 1922, which provides in substance that, before waters to be

used for irrigation can be conducted into or along any of the natural streams or channels of the state, the consent in writing of the majority of residents and landowners bordering upon such stream or channel must be obtained.

It seems clear that the defendants were upon the lands of the plaintiffs without any semblance of legal right, and were trespassers.

Defendants urge that they are financially responsible, and offer to pay any damages which the plaintiffs have sustained by reason of flowing the waters through the land; and that an injunction was not a proper remedy. We are unable to agree with this contention. The plaintiffs have the legal right to own and operate their lands free from the interference of others, in such manner as suits their own convenience or whims; and this right cannot be interfered with except in the manner provided by law. No person's land can be taken from him by another without his consent, upon the mere payment of damages, except in cases where the public interests require that it be done.

The flowing of the water over the plaintiffs' lands is a continuing trespass against which injunction is the proper remedy.

The judgment of the district court is right, and is

AFFIRMED.

PETER MANGOLD, APPELLEE, V. VERNE GRACE ET AL., APPELLANTS: SOUTHEAST QUARTER OF SECTION 7, TOWNSHIP 14, RANGE 11, DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES.

FILED APRIL 21, 1923. No. 22343.

1. **Executors and Administrators:** ADMINISTRATOR'S SALE: COLLATERAL ATTACK. An administrator's sale of his decedent's real estate, pursuant to an order of the district court, is a judicial sale and is not subject to collateral attack for irregularities.

2. ———: ———: IRREGULARITIES. The filing in the district court by

a foreign administrator of a certified copy of his appointment, instead of an authenticated copy, as required by section 1423, Comp. St. 1922, is but an irregularity which is cured by confirmation of sale.

3. ———: ———: ———. Failure of a foreign administrator to file in the district court an authenticated copy of his bond, as provided by section 1425, Comp. St. 1922, and the failure to give bond to the district judge, as provided by section 1426, Comp. St. 1922, are mere irregularities which are cured by confirmation of sale.

4. ———: ———: ———. Where an administrator has advertised lands of his decedent for sale, pursuant to an order of the district court, and offers the land for sale and receives bids but does not accept them, and adjourns the sale and later abandons it, his failure to report such attempted sale to the court is an irregularity that cannot affect a subsequent sale by the administrator, pursuant to a new notice of sale.

5. ———: ———: INADEQUACY OF PRICE. Mere inadequacy of price for which lands are sold by an administrator, pursuant to an order of the district court, cannot, after confirmation and in a collateral attack, be urged to defeat the sale.

6. ———: ———: IRREGULARITIES. Failure of purchaser at a sale of land by an administrator, pursuant to an order of the district court, to give a bond to the administrator to pay an existing incumbrance on the land, when the estate of the decedent is liable therefor, as provided by section 1422, Comp. St. 1922, is an irregularity that cannot be inquired into in a collateral attack upon the sale.

7. ———: ———: INCUMBRANCE: FAILURE TO PAY. Where a purchaser of real estate at an administrator's sale acquires land of a decedent that is incumbered by a mortgage for which the estate of decedent is liable, and fails to give to the administrator a bond for the payment of the incumbrance, as required by section 1422, Comp. St. 1922, and the administrator subsequently pays the mortgage out of the proceeds of the sale, and such purchaser later brings an action against the heirs of the decedent to quiet title to the land so acquired, equity will, as a condition to the granting of the relief demanded, require the purchaser to pay to defendants a sum equal to their interest in the fund used to discharge the mortgage, together with interest thereon from date of sale.

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

Will H. Thompson & Son, for appellants.

William H. Herdman and *O'Connor & O'Connor, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

GOOD, J.

This action involves the validity of a sale of real estate for payment of debts and costs of administration by a foreign administrator.

In 1903 Henry Schroeder, a citizen and resident of Wyoming, died intestate, leaving him surviving a widow and four children, whose ages ranged from two to eight years. At the time of his death he was possessed of real and personal property in Wyoming and also 160 acres of land in Douglas county, Nebraska, which is the subject of this controversy. Such proceedings were had in Wyoming that all of decedent's property in that state was applied toward the payment of the debts against his estate, and there still remained unpaid debts to the amount of $4,834.52 and some costs of administration. The land in controversy was subject to a mortgage of about $1,500, and the debt which it secured had been filed and allowed as a claim against decedent's estate in Wyoming. In 1905, on the petition of the administrator, license was granted by the district court for Douglas county to sell the land in controversy for the payment of the unpaid debts and costs. The land was advertised for sale and not sold for want of bidders; on readvertising bids were received, but, not being for a satisfactory sum, the sale was adjourned and abandoned. This attempted sale was not reported to the district court. The land was again advertised for sale and was purchased by the plaintiff for the sum of $12,080. The sale was reported and confirmed and deed issued to the plaintiff. Plaintiff brought this action to quiet title on the ground of adverse possession. The defendants are the heirs of Henry Schroeder, deceased. They filed an answer and cross-petition in which they assault the administrator's sale

upon various grounds, and ask to have the sale set aside and title to the land quieted in themselves. The trial resulted in a decree quieting title in plaintiff upon condition that he pay into court for the defendants the sum of $1,008.07, with interest thereon from the date of the administrator's sale. The defendants have appealed.

The widow of Schroeder consented to the sale of the real estate by the administrator, waiving her dower right in the land, but reserving to herself her right to dower in the proceeds of the sale. Subsequent to the sale she executed a quitclaim deed to the premises. The administrator, previous to granting of license, filed certified copies of his appointment and of his bond, as administrator, but did not file authenticated copies, as required by the statute. Although the administrator was licensed to sell more real estate than was necessary for the payment of debts, the district court for Douglas county did not require, nor did the administrator give, a bond to the district court, as required by section 1426, Comp. St. 1922. The notice of sale given by the administrator was for one day less than the period required by statute; nor did the district court require the purchaser to give a bond for the payment of the debt allowed against the decedent's estate, and which was secured by a mortgage on the land, as required by the statute; nor did the purchaser pay or satisfy the mortgage, and the debt which it secured was afterwards paid by the administrator out of the proceeds of the sale of the land.

Defendants urge that the sale should be set aside for the irregularities mentioned, and also for the reason that, as they allege, the bids were chilled because of the irregularities in the proceedings, and that the land did not bring an adequate and fair price, and that the administrator did not pay in the full purchase price of the land, in that he did not pay or discharge the mortgage upon the land in addition to the price bid.

1. Before entering upon a discussion of any of the questions involved in this case, it may be well to ob-

serve that this is a collateral attack on an administrator's sale. This court has heretofore held that an administrator's sale of real estate of his decedent, pursuant to the order of a district court, is a judicial sale and is not subject to collateral attack for irregularities. *Maul v. Hellman,* 39 Neb. 322; *Seymour v. Ricketts,* 21 Neb. 240; *Haight v. Hayes,* 3 Neb. (Unof.) 587. Nearly if not all of the questions raised by the defendants have previously been settled by this court and been held to be irregularities and not to avoid the sale.

2. That the failure of a foreign administrator to file an authenticated copy of his appointment in the district court, as required by section 1423, Comp. St. 1922, is but an irregularity, is evident from the holding of this court in *Myers v. McGavock,* 39 Neb. 843. In that case a guardian's sale was attacked for failure of the guardian to file an authenticated copy of his appointment. The statutory requirement as to filing by a foreign guardian of an authenticated copy of appointment is the same as for a foreign administrator. In that case a certified copy instead of an authenticated copy was filed, as was done in the instant case.

3. That the failure to file in the district court an authenticated copy of the administrator's bond, given in the Wyoming court, and that no bond was given by the administrator to the district court for Douglas county are mere irregularities, has been determined by this court in *Pohlenz v. Panko,* 106 Neb. 156. The failure to publish notice for three full weeks prior to the date of the sale, as required by the statute, has likewise been held an irregularity, cured by confirmation, in *Pohlenz v. Panko, supra,* and cases there cited.

4. Complaint is made because the administrator failed to report to the district court the second attempted sale. Had the facts been reported, it could not have availed the defendants, for no bid was accepted and no sale was made, and the court could have done nothing more than to have ordered a readvertisement of the land

for sale. The failure to report the fact was, at most, an irregularity and could not have the effect of invalidating a sale subsequently made pursuant to a new notice.

5. Defendants assign as error that bids were chilled and a fair price could not be obtained by reason of the irregularities in the proceedings previous to the sale. Mere inadequacy of price cannot be urged after confirmation in a collateral attack. Besides, the district court in this proceeding found that the land sold for a fair price, and the finding is supported by the evidence.

6. Defendants urge that the sale was confirmed without payment of the full purchase price. The record shows that the bid was $12,080, and this amount was paid in by the purchaser. The defendants evidently, by this assignment, have reference to the fact that plaintiff did not pay and discharge the mortgage debt upon the land. This was no part of the bid. It is true that, under the statute, the purchaser should have been required to give a bond to pay the debt secured by the mortgage, because it was a claim that had been allowed against the estate of the decedent, but there is no merit in the assignment that he did not pay the full purchase price; and in *In re Estate of Vasek,* 97 Neb. 617, it is held that the failure of the purchaser to give the bond is an irregularity that cannot be inquired into on a collateral attack upon the sale.

7. Defendants complain because the district court did not, as a condition to quieting title in the plaintiff, require him to pay the full amount of the mortgage debt existing against the land at the time of sale, together with interest thereon from the date of sale until entry of the decree in this action. It appears for some reason, which is not quite clear, that the district court required the plaintiff, as a condition to quieting title in him, to pay into court for the defendants but two-thirds of the amount of the mortgage debt, with interest from date of sale. In this there was error. Plaintiff brought this action in equity to quiet his title to the land. It is a

familiar maxim that he who seeks equity must do equity. Under the statute, the administrator was required to sell the land, subject to existing incumbrance. When the plaintiff took title to the land at the administrator's sale, he should have given a bond for the payment of the debt secured by the mortgage, because the mortgage debt had been previously allowed as a claim against the estate of the decedent. This he did not do. The land, however, was subject to this mortgage, which was subsequently paid by the administrator out of the proceeds of the sale of the real estate. The plaintiff had the benefit of the sum so paid to discharge the mortgage. He should be required to reimburse the defendants for the amount of their funds which were used to discharge the mortgage. Under the law, then in force, the widow of decedent was entitled to a dower interest in the land of her deceased husband. This was a life estate in one-third thereof. The widow was entitled not to one-third of the fund used to discharge the mortgage but to a life use of one-third of the fund. The court should have determined her expectancy and should have ascertained the value of her life use of that fund, and this amount should have been deducted from the total amount required to pay the mortgage debt. The remaining sum would represent the interest of the defendants in this case, and the plaintiff should have been required to pay into court such sum, together with interest thereon from the date of sale.

This is the only error we have been able to discern which was committed by the district court. In all other respects the decree of the district court is affirmed. The judgment is reversed and the cause remanded, with directions to the district court to ascertain the value of the widow's life use in one-third of the fund required to discharge the mortgage upon the land, and to enter a decree requiring plaintiff, as a condition to quieting his title, to pay to the defendants the whole sum required to pay the mortgage debt, less the value of the widow's life use of one-third thereof, and such sum to bear interest from the date

of sale to entry of decree, pursuant to the order of this court.

The judgment of the district court is affirmed in part and reversed in part and the cause remanded for further proceedings in accordance with this opinion.

JUDGMENT ACCORDINGLY.

WILLIAM E. BARKLEY, RECEIVER, APPELLEE, V. FRANK E. SCHAAF ET AL., APPELLANTS.

FILED APRIL 21, 1923. No. 22354.

Appeal: PARTIES. All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court.

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

Sterling F. Mutz, for appellants.

Good & Good, Boehmer & Boehmer and *F. C. Foster, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD JJ., BEGLEY, District Judge.

GOOD, J.

Plaintiff and appellee, as receiver of the Nebraska Hotel Company and of the Nebraska Building & Investment Company, brought this action against Frank E. Schaaf and his wife, Gertrude A., the National Bank of Commerce and others, claiming, in effect, that a fund of $6,000 in the said National Bank of Commerce, and which was represented by a certificate of deposit and a cashier's check, issued by said bank and payable to Gertrude A. Schaaf, was the property of the Nebraska Hotel Company, and claiming that the defendants Schaaf and wife were seeking to wrongfully withdraw said fund from the bank and appropriate it to their own use. The defendants Schaaf and wife answered with a general denial,

except that it was admitted that they were husband and wife, and later they filed an amended answer, in which they set up a judgment in another action which they claimed was an adjudication of the issues in this case. The plaintiff filed a reply which partakes of the nature of a supplemental petition, and in which it was admitted that a judgment had been obtained in favor of the Nebraska Hotel Company in another action against Schaaf, and asking that the money, represented by the certificate of deposit and cashier's check, be applied in part payment of that judgment. The record does not disclose the contents of the answers filed by the defendant National Bank of Commerce and the other defendants, but the decree of the district court shows that answers were filed by the said bank and other defendants.

Upon a trial of the case the court found that neither Schaaf nor his wife had any interest in the fund, and that the $6,000, or the check and certificate of deposit representing the same, was the property of the Nebraska Hotel Company, and ordered the receiver to indorse the check and certificate of deposit, turn them over to the defendant National Bank of Commerce, and ordered the bank to pay the amount represented thereby into court, and directed the fund, when paid into court, to be applied as a partial payment on the judgment in the other action, which was referred to in the amended answer and reply. The defendants Frank E. Schaaf and wife alone have appealed, but they bring no other parties to the action into court on this appeal save the appellee, William E. Barkley, as receiver.

It is apparent from an examination of the record that the defendant National Bank of Commerce is vitally interested in this appeal, and that it has not been made a party thereto. The rule seems to be well established that all parties to a cause in the trial of a case in the district court who may be affected by the modification or reversal of the judgment must be made parties to the proceedings

to review the said cause. *Richardson v. Thompson,* 59 Neb. 299, and cases there cited.

As the record discloses that at least one of the parties who might be injuriously affected by a reversal of the decree of the district court has not been made a party to this appeal, this court will not look into the merits of the decision, but the appeal will be dismissed because all of the parties who are necessary to a proper determination of the case are not before the court.

APPEAL DISMISSED.

CROWELL LUMBER & GRAIN COMPANY, APPELLEE, V. RYAN COMPANY, APPELLANT: HERMAN HOLSTEN ET. AL., APPELLEES.

FILED APRIL 21, 1923. No. 22293.

1. **Mechanics' Lien:** STATEMENT. A mechanics' lien statement is sufficient if the itemized account of materials furnished or labor performed and the affidavit attached thereto, when construed together, comply with the statute.
2. ———: EVIDENCE. Where labor and materials are contracted for use in a proposed building and delivered in pursuance of such contract and used in erecting such building, which is completed, and the prices charged therefor are fair and reasonable, and there is no testimony tending to raise even a suspicion that the materials therefor were elsewhere obtained or that those contracted for were not used therein, the seller is entitled to a mechanic's lien therefor.

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

Baldrige & Saxton, for appellant.

Montgomery, Hall & Young, Beach Hinman, Dolezal, Spear & Mapes, Joseph E. Daly and *E. L. Mahlin, contra.*

Heard before MORRISSEY, C. J., ROSE, DEAN, ALDRICH and GOOD JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

Action by plaintiff, together with cross-petitions by various defendants, to foreclose mechanics' liens. From

a decree of foreclosure defendant Ryan Company has appealed.

Herman Holsten, defendant, was the record owner of certain lots in Dodge, Nebraska, and defendant Ryan Company and Geo. W. Ryan, were the owners under contract of purchase. On or about May 1, 1919, Ryan Company entered into a written contract with defendant August A. Wunderling, by the terms of which Wunderling was to superintend the construction of a building located on said premises, and Wunderling thereafter carried out said contract and erected said building. Plaintiff entered into a contract for the furnishing of lumber and materials and did furnish certain lumber and materials. Wunderling contracted, as agent for Ryan Company, with the other defendants to furnish labor, materials and fixtures for the building. Plaintiff and the other defendants, except Holsten, filed and recorded mechanics' liens for alleged unpaid balances due them. The court found there was due Herman Holsten an unpaid purchase price of $1,809.49 and that same constituted a first lien upon the premises; that plaintiff and defendants were entitled to a lien upon said premises in the following amounts: To the plaintiff the sum of $15,086.05; Wright Electrical Construction Company, $875.62; Fremont Furnace and Metal Works, $820.75; Ryland H. Fletcher, $2,866.25; August A Wunderling $3,866.24; J. C. Nitz, $77.85, and that said parties were holders of mechanics' liens of equal priority and were entitled to a second lien on said premises.

The appellant alleges the liens, or some of them, are defective, in that they did not set out the dates when materials were furnished and that the prices charged therein were fair and reasonable. The affidavit and the account of items for materials furnished and labor performed, when construed together, substantially comply with the statutes. *Drexell v. Richards*, 50 Neb. 509. The reasonableness of the charges is a matter of evidence.

The next error alleged is that the evidence was insuf-

ficient to establish the liens. The evidence established that the labor and materials were contracted for use in the proposed building; that they were delivered in pursuance thereof and used in erecting the building, which was completed, and that the prices charged therefor were fair and reasonable. No evidence was offered by appellant to offset this, but on the contrary the contractor, who was its agent, testified to it as a fact. There was no testimony tending to raise even a suspicion that the materials therefor were elsewhere obtained or that those contracted for were not used therein. This proof was sufficient. *Seattle Lumber Co. v. Sweeney,* 43 Wash. 1; *Rice & Floyd v. Hodge Bros.,* 26 Kan. 164. There is one exception to this proof however. The electric light fixtures to the amount of $421 contained in the lien of Wright Electrical Construction Company were not delivered at nor placed in the building, but were ordered withheld by the owner, and the fixtures are still held by Wright Electrical Construction Company. Under these circumstances we think the fixtures were not furnished within the purview of the statute and such item should be disallowed.

It is alleged by appellant that certain items were improperly allowed. Section 3207, Comp. St. 1922, provides:

"Any person who shall perform any labor or furnish any material or machinery or fixtures, including gas and electric apparatus and lighting fixtures, whether detachable or undetachable, for the construction or erection * * * * of any * * * building * * * by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such * * * building * * * and the lot of land upon which the same shall stand."

The mechanics' lien statute has been held to be remedial and should be liberally construed. *Owen v. Chicago, B. & Q. R. Co.,* 86 Neb. 851. Fine distinctions

sometimes arise as to whether material is furnished in the construction of a building as a tool or machine as part of the equipment of the contractor, or is used and consumed so as to entitle the furnisher to a lien on the building for its value. The question to be determined is whether the materials are to be regarded as practically consumed in the process of the work or whether they are to be regarded as becoming part of the equipment of the contractor; a distinction being made between tools and machinery and instrumentalities constituting part of the equipment and other supplies which, although used by the contractor merely for the purpose of facilitating his work, are consumed or mutilated so as to be of little or no value for future undertakings. See note 36 L. R. A. n. s. 866.

The complaint of the appellant that certain items allowed as freight, war tax, demurrage and handling charges, is without merit, as it is shown that those items were merely a part of the cost price of materials which went into the building. It is immaterial what items of cost are considered, provided the prices charged for the article delivered were the fair and reasonable market value of the materials involved. *Barker & Stewart Lumber Co. v. Marathon Paper Mills Co.* 146 Wis. 12.

A claim for cement sacks not returned was a proper charge, as no showing was made that the sacks had been charged for in the first instance. *Snell v. Payne*, 115 Cal. 218.

Three ladder items are objected to, but there is no showing that they did not constitute a part of the building.

By the agreement between Wunderling and the owner, Wunderling was to employ men and secure liability insurance to protect the risk. Premiums on liability insurance in pursuance of this contract were proper items of lien.

A quantity of coal amounting to $99.80 was furnished in heating and drying the building. It was shown that

this was necessary in the construction of the building and was one of the items entering into its erection and was therefore allowable. *Johnson v. Starrett,* 127 Minn. 138.

On the other hand, the following items in the account of J. C. Nitz, to wit, shovel handles, pair gloves, tape, rope, one dozen files, legal cap, box matches, pulley with hook, hammer, brush, sand-screen, lamp chimney, one saw file, in a total amount of $17.40, should be disallowed. The plaintiff below also admits that an item of $1.35 for corn furnished should be disallowed.

The decree of the district court is therefore modified by striking out the allowance of the following items: Crowell Lumber & Grain Company, corn furnished, $1.35; Wright Electrical Construction Company, fixtures furnished, $421 and J. C. Nitz, $17.40. As thus modified the decree is affirmed.

AFFIRMED AS MODIFIED.

JENNIE NOVAK, APPELLEE, v. GEORGE REESON, APPELLANT.

FILED APRIL 21, 1923. No. 22332.

1. **Gifts:** GIFT OF NOTES IRREVOCABLE. Where a father, in making a loan of $4,000 to one of his sons, required said son to execute four notes in the sum of $1,000 each, payable to each of his four daughters, which said notes the father delivered to another son, with directions to hold said notes, collect the interest thereon and pay same to father during his lifetime, and at his death to deliver the notes to each of the daughters named therein, *held* a complete and irrevocable gift of the notes to the daughters.

2. ———: ———. Where a gift of notes is complete and irrevocable, the mere fact that the donor thereafter, without the knowledge or consent of the donee or holder, secured the notes from the possession of the holder and destroyed them, would not reinvest the title in the donor.

3. **Witnesses:** PRIVILEGED COMMUNICATIONS. Where an attorney is employed to draw a note which was subsequently destroyed, but is in no way consulted as to the legal effect of the instrument, he is not prevented by section 8835, Comp. St. 1922, from disclosing the terms and conditions of the destroyed note, or the statements made to him by his employer.

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

A. R. Oleson, for appellant.

P. M. Moodie, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

Action brought by Jennie Novak against her brother, George Reeson, to collect the interest on a promissory note for $1,000 executed by her brother under the following circumstances:

In April, 1918, Samuel Reeson, an aged man, had $5,000 to his credit in the bank. He, having already provided for his sons, was desirous of giving $1,000 of this to each of his four daughters, namely, Jennie Novak, Martha Pospishel, Mary Baker, and Charlotte Hietzman, and to retain $1,000 for himself. However, his son George Reeson, desired to borrow $4,000 from his father for a period of three years. The father only desired to loan the money for one year. Finally he called to him his sons Walter and Charles and explained to them the situation and stated that he consented to let his son George have the $4,000 for three years; that in turn George was to sign four notes for $1,000 each in favor of each of his four daughters above named; that said notes were to be held by Walter, the interest collected and paid to the father during his lifetime, and at his death the notes were to be turned over to the daughters named therein. Thereafter, in accordance with this plan, Samuel Reeson went to D. W. Merrow, an attorney in Omaha, Nebraska, and had him draw up four notes in the sum of $1,000 each, payable to each of his four daughters, due in three years, with interest at the rate of 5 per cent. per annum, payable annually, and, together with a check for $4,000 payable to George Reeson, transmitted the same to his son Walter, with directions to turn over to George

Reeson the $4,000 check upon his signing each of the four notes, and for Walter to hold the notes in accordance with previous directions. This was accordingly done, and the notes were duly signed by George and placed in the possession of Walter Reeson, who placed them in his box in the bank, which was entirely under his control and to which he had the only key, and they remained in such possession over three months. Later the father, Samuel Reeson, came to live with his son Walter and had some receipts and other papers in Walter's bank box, and, when requested to do so, Walter went with him to the box and opened it so that his father could look over his other papers. Then came a time in July, 1918, when the father wanted to look at some papers in the box. Walter was too busy to go with him, so he took the box home, gave his father the keys, and, without the knowledge or consent of Walter, the father took therefrom the four notes and burned them in the kitchen stove, stating to one daughter that he did so to save trouble after his death. Thereafter Walter discovered the loss of the notes, and the father stated he had destroyed them and admitted he had done wrong.

The father died September 23, 1918. George paid the interest due on the notes to Walter up until the time of the father's death. After her father's death Jennie Novak brought this action to recover the interest due upon the note made in her favor, and the trial court, at the close of the evidence, directed a verdict in favor of the plaintiff for the full amount of the interest claimed. From this verdict and judgment thereon defendant has appealed.

The main question argued by the appellant is that the evidence is insufficient to show the delivery of this note to the appellee, in that there was not a completed gift of the note and the same was canceled and destroyed by the donor during his lifetime while it was within his control, and, therefore, any previously intended gift thereof was revoked and annulled.

It may be conceded without argument that in all gifts a delivery of the thing given is essential to their validity and, if there be no delivery, the gift must fail. In order to effectuate delivery in this case the father must have delivered the note to his son Walter for the benefit of appellee, the payee therein eventually, and have expressed his intention to that effect, and also, at the time of such delivery to his son, the father must have parted with both the possession of the note and all dominion and control over it. The undisputed evidence shows the father caused these notes to be made out with the names of his daughters as payees, with the express purpose to give them the proceeds, except such interest as might accrue in his lifetime. In order to carry out this purpose he caused them to be delivered to his son Walter, who was to pay him the interest while he lived and at his death to turn the notes over to the several payees. Walter held them in his own exclusive possession in his bank box, to which he alone held the key. By this act the father made his son Walter the holder of the notes for the express purpose stated by him. He put the notes beyond his control, into the hands of his son, with express directions to carry out the trust. He did everything that could be done to carry out his plan of caring for himself during his lifetime with the income, assisting his son George with a loan, and also doing his duty by his daughters who had a claim on his bounty. This was a completed and irrevocable gift. In *Dinslage v. Stratman,* 105 Neb. 274, the question of delivery of a gift *inter vivos* is thoroughly discussed, various authorities cited and applied, and it was held that, where the proof is clear of an intention to make an absolute gift *inter vivos* of a chose in action arising from a debt not in writing, an unqualified direction by the donor to the debtor to pay the debt to the donee instead of to the creditor was a sufficient delivery of the gift, and the fact that actual enjoyment of the gift is to be deferred

until the donor's death does not render the gift either conditional, testamentary, or invalid.

The gift being completed and irrevocable, the mere fact that the donor thereafter, without the knowledge or consent of the trustee or the donee, secured the notes from the trustee's box and destroyed them did not reinvest the title in the donor. In *Brooks v. Brooks,* 105 Neb. 235, the father, who was the donor, obtained possession of an unrecorded deed, which had been delivered to his son and had been placed in a writing desk in the bedroom of the father, and burned it, saying that he wanted to make different arrangements. It was held that the title had passed by the deed. In *Svanda v. Svanda,* 86 Neb. 203, it was held that destruction by the grantor of a deed conveying real estate, after delivery and without the consent of the grantee, did not divest the grantee of the title. In *Brown v. Hartman,* 57 Neb. 341, it was held the destruction of a deed after its delivery did not divest the title of the grantee, even though the deed was surrendered by the grantee to the grantor.

The evidence affirmatively shows that before her father's death the appellee was informed by her father that Walter held the four notes and that after his death they became the property of the daughters. The daughter Charlotte also testified to a conversation wherein her father told her about the notes, referred to the destruction of them, and said that "George was as honest a boy as he ever had, and he said he would pay them without the notes—he would give them to us girls." The plan of withholding enjoyment of the money from the daughters during the lifetime of the father was planned to benefit the appellant, who desired the use of this money for three years. He was present at most of the conversations concerning the arrangement between the other sons and the father. He owes the money and agreed in the note to pay it to the appellee and this agreement is enforceable. *Tweeddale v. Tweeddale,* 116 Wis. 517.

Objection is made to the testimony of D. W. Merrow,

attorney who drew the notes, because communications had with him by Samuel Reeson are claimed to be privileged. Mr. Merrow testified as to the form and contents of the destroyed notes and as to the directions and statements made by Samuel Reeson at the time. He was not consulted as to the legal effect of the delivery of the notes and his evidence was not privileged. *Turner v. Warren,* 160 Pa. St. 336.

The trial court was right in directing a verdict, and the judgment is therefore

AFFIRMED.

MORRISSEY, C. J., dissenting.

From an examination of the record, I reach the conclusion that the father never intended to make, and did not make, such delivery of the notes as to divest him of their control and ownership.

PAUL F. BOCKELMAN, APPELLEE, V. F. K. SPIRES, APPELLANT.

FILED APRIL 21, 1923. No. 22344.

1. **Sales:** SALES AT AUCTION. If in an auction sale certain terms and conditions are announced publicly at the opening of the sale, a purchaser at such sale is bound thereby, whether he was present or not when they were made.
2. **Vendor and purchaser:** SETTLEMENT: ELECTION. Where a real estate contract provides for alternative methods of settlement, with the right of election in the first instance in the purchaser, and he refuses to exercise his right, the right of election then shifts to the seller.
3. **Specific Performance:** DECREE. A court of equity may properly enter a decree for specific performance providing that, on vendee's default in payment of the price, the premises be sold and judgment entered against him for the deficiency.

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

John C. Martin, for appellant.

Harold M. Morse and *Reeder & Lightner, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

Plaintiff brought a suit for specific performance of a certain contract for real estate. From a decree granting specific performance defendant has appealed.

On August 26, 1920, plaintiff, appellee herein, being the owner in fee of the real estate called Morningside addition to Clarks, Nebraska, offered all the lots therein for sale at public auction under certain terms and conditions which were printed and distributed before the sale and publicly announced at the opening of the sale. The lots were sold to the highest bidder, who immediately after the same were sold to him signed a memorandum evidencing the sale and purchase. The defendant purchased four lots for a total sum of $2,290, and thereafter refused to settle for the same. He defended on two grounds: First, that plaintiff agreed to give an abstract of title with each lot purchased and failed to carry out said agreement; second, that plaintiff agreed not to sell the lots in the addition below a certain figure. He also contends that false representations were made by plaintiff which induced him to sign the memorandum.

Appellant was not present at the opening of the sale, and the evidence is undisputed that at the opening of the sale the auctioneer announced that an abstract of title brought down to the time of the platting of the addition, together with the opinion of an attorney thereon, was deposited in a local bank and could be inspected by any of the purchasers, but that no abstract of title would be furnished with each lot purchased. Appellant is bound by the announcement and printed terms, whether he was present or not when they were made at the opening of the sale, or whether or not he read the printed announcement. 6 C. J. 828, sec. 20.

The evidence as to whether the auctioneer, after commencement of sale, made announcement as to furnishing

abstracts and as to whether he agreed not to sell lots under a certain price is conflicting, and the findings of the court thereon will not be disturbed. Moreover, appellee offered to furnish abstract, but appellant refused to pay purchase price.

There is some dispute as to what was said at the time the appellant signed the memorandum, but the defendant, when he appeared for settlement at the bank, gave as his only reason that he had paid too much for the lots and attempted to secure a reduction of the price. His defense of misrepresentation inducing him to sign the memorandum appears to be an afterthought.

Complaint is made of the form of the decree. The court decreed specific performance; held the entire purchase price due and payable; ordered the premises sold on foreclosure, and, if they failed to bring the purchase price, ordered a deficiency judgment against the appellant.

The memorandum provided that the purchase price should be paid "in cash or a note approved, as announced by the auctioneer." The auctioneer announced that the purchaser had the option of paying cash, less 5 per cent. discount on two-thirds of purchase price, or of paying the purchase price in three instalments, one-third cash and two deferred payments at six and twelve months each, with 8 per cent. interest. The appellant having refused to settle with the seller upon any terms at all, and the contract in question providing for alternative methods of settlement, with the right of election in the first instance in the promissor, the rule is well settled that, if the person who is given the first right of election fails or refuses for a considerable length of time to exercise his right, it then shifts to the other party. 36 Cyc. 575; 6 R. C. L. 860, sec. 247; *Noah v. Pierce,* 85 Mich. 70.

Where a contract for the sale of real estate is mutual, that is, if the vendee could maintain specific performance, then the vendor can do likewise, a deficiency judgment

and a decree in favor of vendor for specific performance, providing that, on the vendee's default in payment of the price, the premises be sold and judgment entered against him for the deficiency, is proper. *Loveridge v. Shurtz*, 111 Mich. 618.

The decree of the district court is therefore right and is

AFFIRMED.

SECURITY STATE BANK OF ARNOLD, APPELLEE, V. CHARLES W. BROWN, APPELLANT.

FILED APRIL 21, 1923. No. 22348.

1. **Bills and Notes:** BONA FIDE PURCHASER. Where a note, at the time of its purchase, is not stamped as required by the revenue laws of the United States, such failure to stamp does not destroy its negotiability, but is a circumstance to be considered in connection with all the other evidence in the case in determining whether or not the indorsee is in fact a holder in due course.

2. **Depositions:** IRRELEVANT MATTER. Where a deposition was taken and filed, covering several matters not in controversy in the suit, and plaintiff offered all of the deposition covering the subject-matter of the suit, *held* not error for the court to refuse to require plaintiff to read other incompetent or irrelevant facts and statements therein contained.

3. **Principal and Agent:** AUTHORITY OF AGENT. Where an agent of the payee of a note had written authority to indorse the note, which said authority was exhibited to the indorsee before the purchase, and the evidence establishes that the agent had such authority and had previously negotiated notes in the same manner, and where the proceeds of the note were placed by the bank to the payee's credit and paid out on order of the payee of the note, *held* sufficient to establish the authority of the agent to indorse the note to the plaintiff bank.

4. **Bills and Notes:** BONA FIDE PURCHASER. The issuing of a negotiable certificate of deposit, especially where it has been negotiated to a holder in due course and subsequently paid, is parting with value.

5. ———: GOOD FAITH: QUESTION FOR JURY. Where plaintiff, an indorsee of a note, called as witnesses the officers who conducted the negotiation for the purchase of the note, who testified to their good faith in the purchase of the note, the question as to whether

that was sufficient proof of good faith on behalf of plaintiff was a question of fact for the jury.

6. **Instructions** examined and approved.

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

Hoagland & Carr, Stewart, Perry & Stewart and *W. T. Thompson,* for appellant.

Cosgrave, Campbell & Ankeny, A. Moore Berry and *Walter D. James, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

Action to recover on a promissory note executed by defendant and purchased by plaintiff before maturity. The note was given to Sarvis Lumber Company in payment for certain shares of stock and by its agent, Perry Anthony, indorsed to plaintiff. Defendant admitted execution of the note, but alleged fraud in its inception. Plaintiff claimed to be a holder in due course. Trial was had to a jury in the district court for Logan county, Nebraska, and a verdict was returned for plaintiff, from a judgment on which the defendant has appealed.

It is first contended that the note was nonnegotiable because at the time it was purchased it was unstamped as required by the revenue laws of the United States, but such omission is only a circumstance to be considered with all the other evidence in the case in determining whether or not plaintiff was in fact a holder in due course.

The next error claimed is that the court erred in not requiring the plaintiff to read all of a deposition and in permitting it to offer only part thereof. It appears from the record that a deposition was taken covering several matters which were not in controversy in this suit. The plaintiff offered all of the deposition covering the subject-matter of this suit and defendant insisted on the whole

deposition being read. The court ruled that, all that part of the deposition which related to the subject under consideration having been read, the reading of the remainder should not be required. In 18 C. J. 737, sec. 347, it is held: "A party introducing or reading a deposition in evidence may omit incomptent or irrelevant facts and statements therein contained, and answers that are not responsive, by direction of the court, or upon the court's deciding such facts or statements to be incompetent." Defendant made no offer to either have the evidence stricken out or to introduce the remainder of the deposition. We find no error in the court's ruling.

It is next contended that the agent of the payee had no authority to indorse the note to the plaintiff bank. The evidence shows that the agent had written authority to indorse the note, which was exhibited to plaintiff before the purchase. The president of the Sarvis Lumber Company testified that the agent had such authority and had previously negotiated notes in the same manner. Moreover, the proceeds of the note were placed by the bank to the credit of Sarvis Lumber Company and by them transferred and assigned to others, who drew them out. This evidence is sufficient to show the authority of the agent to indorse the note. Comp. St. 1922, sec. 4630; *Commercial Nat. Bank v. Brill,* 37 Neb. 626.

Defendant contends that the bank was not a holder in due course because it advanced no value for the note prior to notice of infirmities therein. When the note was taken by the plaintiff on April 16, 1919, it issued a negotiable certificate of deposit to Sarvis Lumber Company payable in one year. The certificate of deposit was negotiated to Bills & Cline, who presented it to plaintiff on May 3, 1919, and it was canceled and a new certificate of deposit issued in lieu thereof to Union Fire Insurance Company, which was paid when due. No evidence of fraud, collusion or bad faith is shown on the part of plaintiff in reissuing the certificate of deposit. The evidence is in dispute as to whether the plaintiff received

notice of any infirmity in the note prior to the time the same became due. The issuing of a negotiable certificate of deposit, especially where it has been negotiated to a holder in due course and subsequently paid, is parting with value. Brannan, Negotiable Instruments Law (3d ed.) sec. 52; *Elmore County Bank v. Avant,* 189 Ala. 418.

It is contended that the evidence is insufficient to support the findings of the jury because plaintiff failed to show that all the officers of the bank who took part in the negotiation for the purchase of the note acted in good faith and without notice of any defense or infirmity in the note. Defendant contends that C. W. Robinson, the assistant cashier, had some part in the transaction regarding the purchase of the note. He was a witness for plaintiff and his only evidence was that he affixed the stamps after the purchase. Failure of proof as to being a holder for value, like any other question of evidence, sometimes resolves itself into a question of law and at other times into a question of fact. In *Riverton State Bank v. Walker,* 107 Neb. 672, we held there was a failure of proof as a matter of law, where the defendant's evidence affirmatively showed bad faith on the part of the cashier who conducted negotiations for the purchase of the note, and who failed to deny the defendant's statements on the witness-stand; but in this case the plaintiff called as witnesses the persons who transacted the business which resulted in the negotiation of this note and there was testimony as to their good faith and no notice of any defenses to the note. Whether that was sufficient proof of good faith to satisfy the jury was a question of fact for the jury. *McLaughlin-Gormley-King Co. v. Hauser,* 195 Ia. 224.

Certain instructions of the trial court are criticized, but an examination of the instructions as a whole shows that the case was fairly submitted to the jury upon the theory advanced by defendant. By instruction No. 8 the jury were told that, if the defendant established the

defense of fraud in the inception of the note as alleged, the verdict should be for the defendant, unless plaintiff satisfied them by a preponderance of the evidence that it acquired said note as a *bona fide* holder in due course.

We find no error in the record, and the judgment of the district court is therefore

AFFIRMED.

EDWARD E. GUSTIN & COMPANY, APPELLEE, V. NEBRASKA BUILDING & INVESTMENT COMPANY ET AL., APPELLANTS: F. B. BAYLOR, TRUSTEE, INTERVENER.

FILED APRIL 21, 1923. No. 22268.

1. **Damages:** CONTRACT: CONSTRUCTION: LIQUIDATED DAMAGES. Whether the sum mentioned as damages in a building contract and indemnity bond is a penalty or liquidated damages may be a question of construction. In determining this question, the subject-matter of the contract, the consideration, the intention of the parties, all the evidence, facts and surrounding circumstances, and the language and context of the contract, must be carefully considered. And where the damages are uncertain, and not readily capable of exact ascertainment by any known rule, and the parties surveyed the whole situation at the time of contract, and agreed upon the amount of damages, in case of a breach in the contract to construct a building by a certain time, such sum, in case of a breach, is the true measure of recovery and is liquidated damages and not a penalty.
2. **Evidence** examined, and *held* that this action was not prematurely brought.

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

Johnson, Moorhead & Rine, Good & Good and *A. W. Lane,* for appellants.

Stewart, Perry & Stewart, for appellee.

Johnson, Moorhead & Rine and *F. B. Baylor,* for Baylor, Trustee.

Heard before MORRISSEY, C. J., GOOD and ALDRICH, JJ., BEGLEY and BUTTON, District Judges.

BUTTON, District Judge.

On the 20th day of February, 1919, Edward E. Gustin & Company, appellee, entered into a 99-year lease with the Nebraska Building & Investment Company, one of the appellants, to a parcel of ground, belonging to appellee, and situated between the Lincoln Hotel and the Lincoln Drug Company on P street, Lincoln, Nebraska, one of the business sections of the city. There were buildings situated on these premises at the time, of the value of $15,000; but they were in a bad state of repair, and to render them fit for rental purposes required an outlay of considerable money. By the terms of the lease these buildings were to be razed to the ground and removed. And, also, by the terms of the lease, appellant was to erect a new fire-proof edifice, at least four stories high, and complete the same by January 1, 1921. The covenant to erect this new building was the inducement that caused appellee to enter into the lease. Appellant agreed to pay $250 a month during the life of the lease as rental, and to pay taxes, keep up repairs, ordinary and extraordinary, and to pay all assessments, and keep up insurance, etc. The lease further provided that, if appellant failed to erect the building as agreed, appellee's actual damages should be $15,000. To procure the faithful performance of this lease an indemnity bond in the sum of $15,000 was given, with the Nebraska Building & Investment Company as principal and certain other of the appellants as sureties.

Appellant began the actual erection of a building, excavating, building footings and concrete walls and other foundation work, and then defaulted and ceased work entirely. After January 1, 1921, the Nebraska Building & Investment Company went into the hands of a receiver. One William E. Barkley was appointed receiver, and later the leasehold interest in the premises was sold to one Eugene C. Eppley, who is now in possession. In all other respects there has been no default in

the terms of the lease, and the taxes and rentals are paid.

After January 1, 1921, this action was instituted on the bond, to recover the $15,000 damages. A trial by the court without a jury resulted in a judgment for appellee for the full amount. To reverse this judgment appellants have prosecuted an appeal to this court.

Appellants argue that the excavation and foundation work that has been done on the property has added value to the property far in excess of $15,000, and hence appellee is the gainer and the damages provided for in the bond should be treated as a penalty and recovery denied. This argument overlooks the rights of appellee under the contract. The inducement that caused appellee to enter into the contract was the building of the new structure. Possibly appellee did not have the money to put up the building itself. If not, of what value will this hole in the ground and foundation work be to appellee? If the old buildings had been repaired, appellee might have realized a better rental; without the building being erected appellee is not sure of his rent.

A modern building should last practically forever. If so, this would be a very valuable property at the end of the lease with such a building standing upon it. Then, too, is such a contract to be treated so lightly? Is it something to be brushed aside as a sort of a dream? If appellee could have erected the building itself, its rentals, no doubt, would have been large from such a structure. But it contracted to forego these large rentals and accept $250 a month and apply the balance for 99 years to pay for the new edifice. If we figure from this standpoint, appellee will pay a pretty big price for its building in 99 years. Everything considered, it seems to us that in this larger view, looking to the future, almost a century, rather than to the present, appellee is the loser rather than the gainer. And his rent has been rendered insecure, problematical, and very uncertain. The consideration for this contract is ample.

The intention of the parties to this contract was to make certain the payment of the rent through the years to come, and to this end the inducement was the construction of this building. In determining the amount of the bond, it seems quite natural that the value of the old buildings removed should be adopted. Rentals to the amount of the value of the old buildings, at least, should be protected.

We now come to the question of damages. The evidence shows a six-story building of fire-proof construction would cost about $581,000. The evidence shows a four-story building of like construction would cost one-fourth less. At least such a building, then, would cost more than $400,000. It was the duty of appellants to keep the building in repair, so that on the termination of the lease the building should be worth at least what it cost. Under such circumstances the measure of damages is the cost of construction. 24 Cyc. 1109; 1 Tiffany, Landlord and Tenant, sec. 117; 2 Underhill, Landlord and Tenant, sec. 542; *Barnhart v. Boyce,* 102 Ill. App. 172. And some courts adopt the measure as the present worth of the cost of construction; that is, such a sum as will, at the legal rate of interest, produce the fair cost of the building at the end of the term. *Wentworth v. Manhattan,* 218 Mass. 91.

It is reasonably certain the actual damages will far exceed $15,000. Indeed, the damages from the failure to pay rent are liable to far exceed $15,000. This is one of these situations where the damages are uncertain, problematical, and not readily ascertainable by any known rule. These facts were all considered by the parties, and a careful survey of the situation made. After due deliberation and careful thought, the parties themselves agreed that the damages should be $15,000. *Gillilan v. Rollins,* 41 Neb. 540; *Lee v. Carroll Normal School Co.,* 1 Neb. (Unof.) 681. In the light of the foregoing authorities we are of the opinion the true measure of damages in this case is the $15,000 named in the lease

and bond and that the same are liquidated damages and not a penalty. 17 C. J. 960, sec. 259; *Crawford v. Heatwole*, 110 Va. 358, 34 L. R. A. n. s. 587.

It is also argued that this action was prematurely brought. The lease reads that a four-story building of fire-proof construction shall be completed by January 1, 1921; and the bond reads that the principal and sureties will pay $15,000 as liquidated damages on or before January 10, 1921, if a breach occurs in the covenant to build. Section 9 of the lease reads as follows:

"The lessee agrees that within one year after receiving possession it will begin erection of a building of fire-proof construction covering the entire ground of a basement and grade (or first) story and as many stories above the first story as lessee may choose to build, and such stories may be in such form as lessee shall desire. Lessee will add other stories whenever it desires so to do, but at least four (4) stories by January 1, 1921."

The last part of the bond reads as follows:

"Now, therefore, the Nebraska Building & Investment Co., as principal, and Frank E. Schaaf, J. H. Gore, E. O. Gregg, H. L. Lohmeyer, R. W. Johnston and Joseph Sukovaty, Jr., as surety, do separately and collectively for themselves, their heirs, administrators, successors and assigns firmly bind themselves to the payment to lessor on or before January tenth, nineteen twenty-one, of the sum of fifteen thousand ($15,000.00) dollars as liquidated damages should lessee fail in its covenants as set forth in section nine (9) of said lease."

There is little room for construction here. The intent seems plain. Since the life of the lease runs beyond the life of this generation, some time had to be fixed for the completion of the structure. If the life of the lease had been for some short period of time, say five or ten years, it might not have been necessary to fix a time, for parties might reasonably expect to outlive their lease and enforce it at the end thereof, if necessary. But in a

lease to run for nearly a century it was necessary to fix a time for completing the building, for parties have a right to know whether contracts are being fulfilled, so they may enforce them while living, if they are not.

It appearing that some time was necessary to be fixed for completing the building, a reasonable time became a proper subject of contract. Two years was certainly a reasonable time.

The breach occurred January 1, 1921. The statute of limitations began running against an action on the bond at that time. There was no assurance that Eppley intended to build. The lower court was unable to tell what Eppley's intentions were, and we are not from the record before us. Everything considered, we are of the opinion the action was timely and not prematurely brought.

The judgment of the lower court is right, and is

AFFIRMED.

LILLIAN E. BAKER, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 21, 1923. No. 22328.

1. **Street Railways:** USE OF STREETS. The right to use street intersections in cities by street cars and pedestrians is mutual, relative, and reciprocal.

2. **Negligence:** CONTRIBUTORY NEGLIGENCE: DAMAGES. "If, on the trial of an action 'brought to recover damages for injuries to a person or to his property caused by the negligence of another,' plaintiff is found to be guilty of negligence directly contributing to the injury complained of, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith; and if, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which, under the circumstances, amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, the contributory negligence of plaintiff, however slight, will defeat a recovery. And even when plaintiff has established his right to recover under this rule, it is the duty of the jury to deduct from the amount of damage sus-

tained such amount as his contributory negligence, if any, bears to the whole amount of damage sustained. Rev. St. 1913, sec. 7892." *Morrison v. Scotts Bluff County*, 104 Neb. 254.

3. **Trial:** INSTRUCTIONS. The charge of the court examined, and *held* to be free from reversible error, and to fairly include matters contained in instructions tendered by appellant and refused by the court.

4. **Damages.** *Held*, that under all the evidence, facts, and circumstances, the verdict in this case is not excessive.

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

John L. Webster, for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ., BUTTON, District Judge.

BUTTON, District Judge.

Lillian E. Baker was, at about 7:45 o'clock a. m., on October 4th, 1920, a passenger on one of appellant's street cars and was traveling north on Twenty-fourth street, Omaha, Nebraska. She alighted from the front end of this car at the intersection of Twenty-fourth and Evans streets where the car stopped to discharge its passengers. She passed to the south to the rear end of this car and then proceeded to cross the tracks near the rear end of the car from which she had alighted. She was a student of the University of Omaha, located near this intersection, and was on her way to school. The track upon which this car had arrived, and upon which it was standing while discharging its passengers, was paralleled by another track upon which cars traveling in the opposite direction passed. These tracks were a little more than four feet apart, but the space between the sides of the cars, as they passed each other, was only about ten inches. As Miss Baker passed around the rear of the car, and was crossing the tracks, she says she listened for an approaching car, but heard no signal. She also says she looked for an approaching car as she passed the side of the standing car, and claims she then saw the approaching car and heard

the gong, but at that very instant was struck by the front end and side of the passing car, which, it is claimed, was running at a rapid and unlawful rate of speed. Another passenger, just ahead of Miss Baker, had stepped upon the passing track and was struck, but Miss Baker was struck just at the instant she was about to step upon the passing track, but before she had done so.

There is a sharp conflict in the testimony as to the rate of speed at which this passing car was running at the time of the collision. And there is also a sharp conflict as to whether Miss Baker looked and listened before attempting to make the crossing. Appellee's witnesses place the rate of speed at the time of the impact at from 18 to 25 miles an hour, much in excess of 15 miles an hour, the maximum allowed by the ordinance of the city. The testimony of appellant brings the rate of speed well within the maximum allowed by the ordinance and at all times reasonable and proper. The appellant also offered some testimony as to the distance in which a car, moving at 25 miles an hour, could be stopped, in an effort to show 25 miles an hour impossible.

The situation created at this crossing was a very dangerous one. The duty of the appellant and appellee was a mutual one. Each should have used a reasonable degree of care to avoid an accident. If the car was operated at a high rate of speed as it passed the standing car discharging its passengers, under the circumstances it was gross negligence on the part of appellant. If appellee failed to look and listen for an approaching car before trying to make the crossing, she was guilty of contributory negligence that was more than slight, and she cannot recover, even though appellant's negligence was gross. After a careful examination of the evidence, we cannot say, as a matter of law, that the negligence of appellant was less than gross, nor that the negligence of appellee was more than slight, in comparison. Under the comparative negligence statute of this state, the court must find one of these two things to exist before it

is justified in taking a case from the jury, or that there was more than slight contributory negligence, as a matter of law. We believe the rate of speed of this car at the time of the impact, whether or not appellee looked and listened before attempting to make the crossing at a time when by listening she might have heard the signal from the car, and by looking she might have seen the car in time to have prevented the accident, and whether or not the speed of the car was so great that it could not be stopped in time to have prevented the collision, were all questions of fact to be submitted to the jury under proper instructions.

Many of the cases cited by appellant are from courts where the statute of comparative negligence does not exist. In some of those jurisdictions slight contributory negligence prevents a recovery. To apply this rule in this jurisdiction would be to render nugatory our statute. And some of the cases cited are out of harmony with the rule prevailing in this state and, as we believe, against the weight of authority.

The right to use street intersections in cities by street cars and pedestrians is mutual, relative, and reciprocal. And if both appellant and appellee were guilty of negligence in the exercise of such use, unless the court can say as a matter of law, from all the evidence, facts, and circumstances, the negligence of the appellant was less than gross, or that the negligence of the appellee was more than slight, in comparison, or that the negligence of appellee was more than slight, as a matter of law, regardless of whether appellant was guilty of negligence or not, the questions involved were matters of fact calling for the services of the jury under proper instructions by the court, if there were sufficient evidence to support a verdict for the plaintiff. *Morrison v. Scotts Bluff County*, 104 Neb. 254; *Stewart v. Omaha & C. B. Street R. Co.*, 88 Neb. 209; *Bremer v. St. Paul City R. Co.*, 107 Minn. 326, 21 L. R. A. n. s. 887; *Burton v. Lincoln Traction Co.*, 106 Neb. 521.

Appellant excepts to the last part of instruction No. 9 which reads as follows:

"It is the duty of a pedestrian to look before he crosses the track, and, if there is an obstruction which interferes with his view he should use additional care."

Appellant claims the clause, "he should use additional care," is vague and uncertain. Yet appellant's request No. 6, contains practically the same language. When instruction No. 9 is read in connection with the whole charge we believe the clause complained of is not misleading.

Appellant's complaint with reference to instruction No. 10 is based upon his construction of the evidence. Of course, if appellee were guilty of more than slight negligence, whether appellant was guilty of negligence or not becomes immaterial, it was the duty of the court to have directed a verdict for appellant. We do not so construe the evidence. As said before, we are unable to say, as a matter of law, that appellant's negligence was more than slight; hence, the question was one for the jury under the comparative negligence statute. This instruction simply called attention to this statute, and the court gave a proper instruction explaining the application of this statute.

The matters set forth in instructions Nos. 4 and 6 are fully covered by the court in its own instructions and these instructions were properly refused.

The evidence with reference to appellee's injuries seems ample to sustain the verdict. The medical experts differ to some extent. However, Dr. Kennedy was very conservative and knew all the facts, and his testimony alone is sufficient to sustain a verdict if believed by the jury; and it evidently was. We are of the opinion, under all the evidence, that the verdict is not excessive.

Finding no reversible error in the record, the judgment is

AFFIRMED.

EDITH KERWIN, ADMINISTRATRIX, APPELLANT, V. THOMPSON, BELDEN & COMPANY ET AL., APPELLEES.

FILED APRIL 21, 1923. No. 22275.

1. **Municipal Corporations:** BUILDING ORDINANCE NOT RETROACTIVE. A city ordinance which requires all elevator shafts in all fire-proof buildings erected after the passage of the ordinance to be inclosed in fire-proof partitions is not retroactive so as to apply to buildings erected before the passage of the ordinance.
2. **Negligence:** MAINTENANCE OF ELEVATOR SHAFT. The maintenance of an elevator shaft built before the passage of the ordinance without being so inclosed is not such a violation of a legal duty as to give rise to an implication of negligence, because of the ordinance.
3. ———: EXPOSURE TO KNOWN DANGER. A person who knowingly and of his own volition exposes himself to an obvious danger cannot recover damages for any injury which he might have avoided by the use of reasonable care.
4. ———: PRESUMPTION. Where there was no witness to an accident causing death, the presumption is, in the absence of evidence to the contrary, that decedent exercised due care; but this presumption is rebutted when the circumstances proved show that decedent was negligent.
5. ———: CONTRIBUTORY NEGLIGENCE. Evidence examined, and *held* insufficient to show that defendants were guilty of negligence, and, further, that the death of decedent was caused by his own negligence.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

Switzler, Ringer, Switzler & Shackelford and *Gurley, Fitch & West, contra.*

Heard before MORRISSEY, C. J., LETTON, ALDRICH and DEAN, JJ., RAPER, District Judge.

RAPER, District Judge.

Action by plaintiff as administratrix to recover damages for negligence in causing the death of her husband, Albert Kerwin. At the close of plaintiff's testimony the court excused the jury and dismissed the case.

The proof established that about 1905 defendant Hoagland erected a building and leased same to defend-

ant Thompson, Belden & Company. An elevator was installed in the building soon after its erection. The shaft of the elevator was protected by a wire mesh or grating up to about seven feet from the floor, and from the top of this mesh to the ceiling, about six or seven feet, the shaft was unguarded. Several years before the date in question, Thompson, Belden & Company procured the American District Telegraph Company to install and keep in repair a night watch and fire and burglar alarm. This alarm system also included several other large business buildings. The wires for this alarm system in the Hoagland building were run up the elevator shaft, and on the second floor the wires left the elevator shaft at the top of the wire mesh and ran around the walls to a clock, where watchmen were required to periodically register, and thus give notice of their presence to the A. D. T. Company central office. A short time before the day of the accident Thompson, Belden & Company in making some alterations on the second floor of the building by way of new shelving, had caused the wires running to the clock to be disengaged from their usual place and some new shelving to be built against the wall. This shelving was constructed up to the elevator shaft; the top was about two or three feet wide and six feet above the floor. The wires that had been loosened were laid on top of this new shelving, and there is some evidence that might indicate that the wires in the elevator shaft had at one time been fastened to the wall of the elevator shaft but had become loosened. The owner of the building had no knowledge of the installation of the alarm system. The A. D. T. Company located and installed the wires without the location being designated by Thompson, Belden & Company; the A. D. T. Company placing the wires and apparatus where it deemed advisable. The deceased had been employed about three years by the A. D. T. Company as a "trouble shooter." In case of trouble on a line the chief operator would send out a "trouble shooter," whose duty it was to test

the lines and locate the break or source of the trouble. A "trouble shooter" in his efforts to locate a break or trouble would go to any place on the line where he might desire, and the process of testing was to cut one of the three insulated wires that formed the connecting circuit and open it up at the end, then, when test was made, twist the ends together again and put tape around it. That was what they called a test station. It was not the custom of these linemen to notify the people in any of the buildings when the "trouble shooter" went to make a test. On two occasions somewhere around spring or fall prior to the day in question the deceased went with another lineman and made tests of the system in the Thompson, Belden & Company Store, these tests, as a matter of convenience, were made near the elevator shaft.

In 1914, after the erection of the building, and the elevator shaft, the official building code of the city of Omaha was enacted by the city council. This code required all fire-proof buildings "hereafter erected" to have elevator shafts inclosed in fire-proof partitions, extending from the street level to the top of the building, and by another section provided that no wires, except such as necessary to operate or light the elevator, should be placed in the shaft of any elevator; declared such wires a nuisance, and required their removal on 30 days notice by the building inspector.

About 10:30 o'clock on the morning of January 3, 1920, deceased went to the second floor of the Thompson, Belden & Company store to test the circuit, and a descending elevator cage struck him on the top of the head producing almost instant death. No one saw the accident, and the manner of his death must be deduced from the circumstances. At that time the place was well lighted. The elevator was running in the usual manner, and by looking at the wire cables it could be plainly seen whether the elevator cage was below or above the place. The deceased did not tell any one in the building of his presence or purpose, and no

notice was given Thompson, Belden & Company, or the person operating the elevator, or any of their employees, of the presence or purpose of deceased. There was a counter about three feet high a short distance in front of the newly-placed shelving above referred to. Deceased probably got on this counter, and from there climbed to the top of the shelving against the wall, unwrapped and cut one of the wires about six or eight inches from the point where the wires left the elevator cage, evidently to make a test of the circuit. The elevator cage was descending in the usual manner, when it came to a stop, rattled and felt as though it was wedged. Then the man's head was seen wedged between the side of the elevator carriage and the grating, the body extending along the top of the wall case or shelving. There was a space of about six inches between the grating and the side of the elevator. The testimony indicates that deceased probably would be kneeling while making test of the wires.

Appellant alleges that there is sufficient evidence to require the submission of the case to the jury, and that the court erred in refusing to do so. The negligence alleged is the failure of the defendants to inclose the elevator shaft from the floor to the ceiling; and permitting the wires of the A. D. T. Company signal system to be placed in the elevator shaft; that the wires were taken down from their former location and the new shelving placed so as to require the lineman to work near the open elevator shaft; that defendants knew, or should have known, that A. D. T. would work at the place of the accident, and that each and all of these alleged acts of negligence required the submission of the case to the jury. The petition sets out the alleged acts of negligence in great detail, but the foregoing appears sufficient to cover all that is necessary. The district court found that "the unfortunate death of the deceased was brought about by his own act of negligence in allowing a portion of his body to be in this elevator shaft

where he must have known that the elevator was running up and down, and there is no legal liability on either defendant in this case."

Strong emphasis is placed by appellant on the alleged violation of the Omaha ordinance, the building code, which, it is claimed, constitutes negligence *per se*, and the principle announced in *Stevens v. Luther*, 105 Neb. 184, is invoked, that the failure to perform a mandatory and affirmative duty imposed upon owners of property by statutes and ordinances is negligence *per se*, and if any person to whom the duty is owed, or for whose protection the law was enacted, is injured in consequence of such violation, a case is made. Taking up, first, the provision of the ordinance which forbids the placing of wires in an elevator shaft. Under the terms of the ordinance such wires are directed to be removed on notice. There is no proof of notice to either defendant to remove them, and for that reason appellees insist that no negligence can be imputed to them. But, aside from the question of the legal duty, if any, resting on the defendants, or either of them, by virtue of the ordinance, there does not seem to be any relation between the position of the wire in the elevator shaft and the injury to deceased. However glaring an infraction of the ordinance may have been committed or permitted by the defendants, unless the placing of the wires contributed to cause the death, the defendants, of course, are not answerable for it. Nowhere does it appear in the evidence, either by direct testimony or by any reasonable inference from the proved facts, that deceased was injured because the wires ran up the elevator shaft. The mere fact that the test station by deceased's own choice was made near the elevator shaft does not tend to prove that the location of the wires in the elevator shaft had any direct relation to the accident. Deceased was not required to work near the elevator shaft. He chose the place of work. As a convenience to himself he selected the place near the elevator. Neither of the defendants

nor their employees knew of his presence, or that he intended to work, or where he might choose as a place to test the wires. No circumstances were developed which indicate that the wires in the elevator shaft required his attention. His choosing a place to work near the elevator is far from proving that the fact of the wires being in the elevator contributed in any way to the injury.

The building was erected by defendant Hoagland and occupied by Thompson, Belden & Company before the ordinance was enacted. The ordinance does not include buildings already erected, where it provides for the manner of inclosing elevator shafts; the wording being: "In all fire-proof buildings hereafter erected, all elevators, whether passenger, freight or dumb-waiter elevators, shall be inclosed in fire-proof partitions," etc. It is probable that the main purpose of these provisions was to guard against the spread of fires, but whether it was for that purpose or to prevent persons from being injured, or both, we need not stop to consider. The ordinance by its plain terms does not apply to the building in question, so it lacks the requisite legislative "mandatory and affirmative" or compulsory obligation to place it within the rule announced in *Stevens v. Luther, supra*. Furthermore, it may be said of the elevator shaft, as has been said of the wires, that nothing appears in the evidence that indicates any necessity for the deceased to work in the elevator shaft, or even near it. The shelf on top of the wall case was two or three feet wide, giving safe and ample room for deceased to work. He knew, or must have known, that the elevator was being continuously operated, and could definitely tell whether the cage was above or below him, and to place his head in the shaft below a descending elevator would be extremely hazardous. It follows that the maintaining of the elevator shaft was not the proximate cause of accident.

Appellant urges the rule that the presumption is, in

the absence of eye-witnesses, that at the time the deceased was killed he was in the exercise of ordinary care. This presumption, however, is rebutted whenever the evidence shows the situation to have been such that deceased, if he had looked, would have realized the danger and avoided it. The evidence is clear that deceased was no more than a licensee of the lessee of the building; that he went on the premises to perform a duty for his master; that he did not inform any of the defendants or their employees of his presence or intended work; that he voluntarily chose the place of his work near the elevator shaft; that the place where he did choose to work was reasonably safe; that no part of his duties required him to place his body in the elevator shaft; that, even if he found it necessary to look into the shaft, the danger attending such act was so obvious as to conclusively overcome the legal presumption of due care on his part.

The trial judge rightfully held that the deplorable accident was due wholly to the negligence and fault of the deceased, and the judgment of dismissal must be

AFFIRMED.

LOUIS A. KROPP, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED MAY 15, 1923. No. 22338.

Railroads: INJUNCTION: WEIGHT OF EVIDENCE. When, in a suit in equity between the owner of a farm and a railroad corporation, the question at issue is the adequacy of a subway which the corporation purposed to build under its line of track to serve as a passageway for the live stock kept upon the farm, the witnesses for the farmer have not seen such a subway in actual use, but, basing their testimony upon their experience as farmers and stockmen and their general knowledge of live stock, testify that the subway will prove inadequate, while the witnesses for the railroad corporation testify that they have used similar subways or have seen them in use, and that they proved entirely adequate, the testimony of the witnesses who base their testimony upon actual use, or observation, will be held to have the greater weight.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed and dismissed.*

E. J. White, J. A. C. Kennedy and *Yale C. Holland*, for appellant.

D. W. Livingston, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ., BUTTON, District Judge.

MORRISSEY, C. J.

Plaintiff is the owner of a farm of 160 acres in Otoe county, Nebraska, which is crossed by defendant's line of railroad. The farm buildings and feed lots, occupying approximately 20 acres, are situated upon the west side of defendant's track, while the remainder of the farm is situated on the east side of the track. Plaintiff and his grantors have owned and occupied the farm for upwards of 50 years. Defendant's track was constructed in 1887 and has been continuously operated since its construction. At a point on plaintiff's farm where it is crossed by the railroad there is a valley or depression in the surface of the earth. At this point defendant erected a trestle, or bridge, which was 12 to 15 feet in length and about 8 feet in height. When first erected this trestle served to support the track for defendant's trains, while leaving a passageway underneath the track which was used by the occupant of the farm as a runway for his live stock, and a road for his teams. As the years went on the construction of the trestle was somewhat changed by the addition of piling and the filling in of the embankment until the opening became too small for the passage of teams and wagons, but it has always remained adequate for the passage of hogs, cattle and horses from the feed lots to the pasture, and *vice versa*. In addition to this subway passage there has been, and is, maintained a grade crossing such as is in general use in this state where a farm is intersected by a line of railroad. Prior to the filing of this suit defendant made plans for the substitution of concrete boxes or subways for the wooden

trestles along its lines of track, and in the particular instance with which we are dealing it arranged to remove the wooden trestle and erect in its place a concrete box, or subway, 4 feet wide, 6 feet high, and 43 feet in length. Plaintiff brought this action to restrain defendant from making the substitution planned, claiming, so far as is necessary to mention here, that the concrete box would not furnish an adequate passageway for plaintiff's live stock. The issues were tried to the court, and from a judgment in favor of plaintiff defendant has appealed. A number of issues were presented on the trial below and argued in the brief on appeal which we shall not mention in this opinion, because it is conceded that, if the concrete box which defendant purposes to install be found adequate as a passageway for plaintiff's live stock, such finding will necessarily control the judgment of the court and a discussion of the other issues would be futile.

Plaintiff, an experienced farmer and live-stock breeder, testified that he had never seen such a subway as defendant purposed to install, and, therefore, could not say from actual experience as to its sufficiency. He stated that the only purpose for which he desired the subway was for a passageway for live stock; and that it had not been used in recent years for the passage of teams and vehicles. He described the horses upon his farm as being of the large type used for farm purpose, weighing between 1,400 and 1,600 pounds, between 5 and 6 feet tall at the withers, and about 7 feet to the top of the horses' heads when held in their natural positions. He conceded that the proposed subway would be ample for the passage of hogs, and that cattle could pass through. However, he expressed the belief that it would, to some extent, become filled with snow and ice in the winter; that this would reduce the size of the opening, make the floor of the subway slippery, with the consequent danger of animals falling, and that in such case the opening would prove too narrow to permit proper

handling of the animals. Plaintiff called as witnesses several farmers and stockmen who concurred in what plaintiff had said and pointed out the difficulty in case two animals should undertake to enter the opening at the same time. These witnesses say that it would be impossible for the two animals to travel side by side through the subway. They testified also that live stock traveling in opposite directions might meet in the subway and because of its limited width it would be impossible for any of them to turn around and one animal or group of animals would be compelled to back out of the subway. Furthermore, that in case of such occurrence, if any animal should be unable to protect itself against the stronger animals, it might be trampled under foot and injured. These witnesses with one accord expressed the opinion that the proposed subway would be too narrow for the use of cattle, and both too narrow and too low for the use of horses. On the other hand, defendant offered the testimony of its district engineer who stated that the type of subway which defendant intended to install was the standard type and size in general use on the tracks of the defendant corporation; that such subways had been installed under his personal supervision and were in use in Kansas, Missouri, Arkansas, Oklahoma, and Louisiana; that a thorough test of their adequacy as passageway for stock had been made; that he had personal knowledge of the subject, and that cattle and horses readily adapted themselves to the use of such subways; that the openings do not fill up with ice or snow; and that the bottoms are built of concrete and do not become wet or muddy. Another of defendant's engineers testified that he had observed such subways on numerous occasions when in actual use; that the largest horses passed through them readily; and that he had taken pictures of cattle and horses passing through subways such as defendant purposed to install. These pictures are in evidence and they are of a persuasive nature. Hereford cattle appear to be passing

freely through. A horse said to weigh 1,600 pounds is likewise seen emerging from the subway, and apparently he had ample room. We are not unmindful of the pranks that a camera may play, but the pictures presented by the camera seem to have abundant support in the oral testimony, not only of the officers and employees of defendant, but in the testimony of farmers whose lands are traversed by defendant's line of railroad and where subways of the size and type under consideration are in actual use. The testimony of these witnesses is based upon an actual experience and they say such subway is adequate for plaintiff's needs.

All witnesses apparently are men of character. The witnesses for plaintiff testified as to the inadequacy of the proposed subway, in their judgment, but their testimony is not based upon actual experience or personal observation, while the witnesses for defendant based their testimony upon personal observation and actual use.

From a consideration of all the evidence, we reach the conclusion the evidence preponderates in defendant's favor, and that the subway proposed to be installed is adequate to serve the purposes for which it is intended. The judgment of the district court is set aside and plaintiff's action dismissed.

REVERSED AND DISMISSED.

EMMET CROUCH, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED MAY 15, 1923. No. 22339.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed and dismissed.*

E. J. White, J. A. C. Kennedy and *Yale C. Holland*, for appellant.

D. W. Livingston, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ., BUTTON, District Judge.

MORRISSEY, C. J.

This appeal presents substantially the same issues as those presented in the case of *Kropp v. Missouri P. R., Co., ante,* p. 257. The cases were tried together in the court below and presented together in this court. They are so closely related that the finding in one case necessarily becomes the finding in the other. This being true, the judgment of the district court is set aside and plaintiff's petition dismissed.

REVERSED AND DISMISSED.

CAMILLO BUZZELLO, ADMINISTRATOR, APPELLANT, V. THEODORE SRAMEK, APPELLEE.

FILED MAY 15, 1923. No. 22378.

1. **Negligence:** RES IPSA LOQUITUR. Where, in an action for damages against the owner of an automobile who parked the car against the curb of a public street having a 10 per cent. grade, stopped the engine and securely set the brakes, which were in good condition, the car is shown to have remained at the place where parked from 10 to 20 minutes, and, then, propelled by gravity, to have run down the street and produced the injury complained of, and third persons are shown to have been in proximity to the car while it was parked, in the absence of evidence tending to show that the car was started through some agency for which defendant was responsible, the rule of *res ipsa loquitur* will not be applied.
2. **Appeal:** RULINGS ON INSTRUCTIONS. The defeated party cannot successfully complain of the rulings of the court on the giving or refusing to give instructions where the court would have been justified in directing the jury to return a verdict in favor of the other party.
3. **New Trial:** NEWLY DISCOVERED EVIDENCE. "In order to obtain a new trial on the ground of newly discovered evidence, the evidence alleged to have been newly discovered must be such that the party applying for the new trial could not with reasonable diligence have discovered and produced it at the trial." *Van Horn v. Cooper & Cole Bros.*, 88 Neb. 687.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

John O. Yeiser and *E. A. Conaway,* for appellant.

Kennedy, Holland, DeLacy & McLaughlin, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

MORRISSEY, C. J.

This action was brought by plaintiff as administrator of the estate of Raffaelle Buzzello, a child two years of age, who was fatally injured May 24, 1920, by an automobile belonging to defendant which defendant had left standing upon one of the streets of the city of Omaha. The street descended at a 10 per cent. grade to the west, and it is alleged that defendant left his car on the south side of the street facing west with the engine running, without having the brakes securely set or the wheels "at the proper degree against the curb;" that the vibrations of the engine caused the car to break the hold of the brakes, and through the force of gravity descend the street, cross the curb thereof, and produce the injury complained of.

In his answer defendant made a general denial of negligence, and alleged that he had parked the car against the curb and securely set the brakes, which were in good condition, shut off the engine and left the car in such a position that it could not be moved without the interference of some outside agency, and that the movement of the car was the result of some person, unknown to defendant, having tampered with the car and released the brakes. The cause was tried to a jury, and from a verdict and judgment for defendant, plaintiff has appealed.

Plaintiff offered the testimony of a neighbor who witnessed the accident. He testified that he had seen the car parked at the curb in front of defendant's home; that it was parked "in a diagonal shape." He saw the car run down the hill and strike the child. He went to the car immediately after the accident, but could not say whether the engine was running or not. Having been recalled for redirect examination, and being again cross-

examined as to the position of the car when parked, in answer to the question, "The front wheels were up against the curb?" he answered, "It looked that way; yes, sir." Two other witnesses who saw the car strike the child were called by plaintiff. But they had not seen the car at the curb, knew nothing of the way in which it had been parked or of the agency which put it in motion.

Defendant testified that he parked the car at an angle of about 45 degrees to the curb, with the emergency brake securely set, and that he stopped the engine. In this he is corroborated by the testimony of his sister-in-law, who was a passenger with him at the time he parked the car, and by the testimony of a pedestrian who passed on the north side of the street after the car had been parked and who subsequently saw the car running down the hill, and witnessed the accident. A neighbor who lived across the street described the parking of the car in substantially the same way. From the testimony of all the witnesses we may say that it is conclusively shown that from 10 to 20 minutes elapsed between the parking of the car and the time of the accident. The physical facts were such that, if the car was parked with one wheel against the curb and the brakes, which are shown to have been in good condition, securely set, the car could not have left the curb and run down the hill without the intervention of some agency for which defendant was not responsible. There is testimony to show that between the time of parking the car and its descent of the hill two or three boys were playing in the street close to the car. They are not shown to have meddled with the car, and we are left to conjecture as to whether they turned the steering wheel and released the brakes. However, there is a total failure of proof of any negligence on the part of defendant, unless we do as requested by plaintiff, namely, apply the rule of *res ipsa loquitur*. Under the record presented this we cannot do.

The fact that the automobile remained in the position

in which it was parked from 10 to 20 minutes before it descended the hill is corroborative of defendant's testimony; it indicates that the car was properly parked, and the circumstances surrounding the accident are more consistent with the view that it was caused by some unknown person releasing the brakes and turning the steering wheel than by the defendant's negligence.

As announced in *Keber v. Central Brewing Co.* 150 N. Y. Supp. 986: "The rule of *res ipsa loquitur* cannot apply, where no negligence of defendant is shown by direct evidence, and it is apparent that there may have been other causes than defendant's negligence which led to the accident."

Appellant complains of the instructions of the court; but, inasmuch as plaintiff has wholly failed to make out a case against defendant and the court would have been justified in directing the jury to return a verdict in defendant's favor, it is unnecessary to review the instructions.

In support of the motion for a new trial plaintiff filed affidavits showing the discovery of two witnesses by whom it is alleged he could furnish new or additional evidence. According to the showing only one of these could contribute anything material to the issue. At the time of the accident this witness was a tenant of plaintiff and for several months thereafter she continued to reside on the same lot with plaintiff and his family. The intercourse between the families appears to have been cordial, and sufficient reason is not shown for the failure to produce this witness at the trial.

"In order to obtain a new trial on the ground of newly discovered evidence, the evidence alleged to have been newly discovered must be such that the party applying for the new trial could not with reasonable diligence have discovered and produced it at the trial." *Van Horn v. Cooper & Cole Bros.*, 88 Neb. 687.

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

AFFIRMED.

HENRY WILSON, APPELLANT AND CROSS-APPELLEE, V. CITY OF NELIGH, CROSS-APPELLEE: CHARLES H. FRIDLEY ET AL., INTERVENERS, APPELLEES AND CROSS-APPELLANTS.

FILED MAY 15, 1923. No. 22255.

1. **Vendor and Purchaser:** CONTINGENT SALE. Where the holder of the legal title to a small tract of real estate has sold to another the right of possession until the happening of a contingency, the fact that the duration of the term depends upon a condition which may, or may not, take effect, does not operate to defeat the sale.
2. **Quieting Title:** DISCLAIMER: DECREE. Where, in an action against a city to quiet title to a strip of land formerly claimed by the city as a street, the city disclaims all title or interest in the property, the decree should quiet the title in the owners as against the city, without imposing any limitation or qualification in its favor.

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

J. F. Boyd, for appellant.

A. R. Oleson, contra.

Heard before MORRISSEY, C. J., LETTON, DAY and DEAN, JJ., BUTTON, District Judge.

LETTON, J.

This is an action against the city of Neligh to quiet the title in plaintiff to a strip of land 80 feet wide along the north side of blocks 126 and 139 in the city of Neligh, and south of a tract of land owned by the interveners, Charles H. and Rose Fridley. It seems that the city of Neligh in April, 1914, recovered a judgment in the district court adjudging said real estate to be a street of the city. The judgment was appealed to the supreme court by certain of the defendants, but not by the plaintiff in this case, who was a defendant in that case. Afterwards plaintiff sold to Charles H. and Rose Fridley, by a written contract, about 24 acres immediately north of

this strip. These parties intervened in this cause, seeking to quiet the title and possession of this strip in them. This written contract, after providing for sale of the 24-acre tract, contained the following provision:

"Inasmuch as a certain tract of real estate (describing the strip in dispute here) has been determined by judgment of the district court of Antelope county, Nebraska, entered on the 18th day of April, 1914, to be a street of the city of Neligh, Nebraska, of which 80-foot strip the parties of the first part (plaintiff in this case and his wife) are in possession, and which it is within the range of possibilities might remain their property and not be opened as a street, it is therefore agreed that the parties of the first part shall turn over to the parties of the second part, on the 1st day of September, 1915, the possession of said 80-foot strip, which they may retain until possession is required of them by the city of Neligh, the consideration of the above tract being the consideration for the use and possession of said real estate."

Immediately following this provision, as the contract was originally typewritten, there was a clause to the effect that Fridley should pay for this strip in case the supreme court held that there was no street there. While negotiations were pending, Fridley objected to this, saying that if this provision was in the contract he would have to pay for this strip twice. This clause was then stricken out by ink lines drawn across it before the contract was signed. Plaintiff admits signing the contract, but says he misunderstood this provision, but he does not allege any fraud in the transaction. Fridley asserts that, under the quoted provisions of the contract, he is entitled to the title and possession of the 80-foot strip, and asks to have the title quieted in him. The trial court quieted the title in plaintiff as against the city. It also found that, by the terms of the contract, the strip of land in controversy was treated by the parties thereto as a street of the city, to be opened at the option of the

city, and, as between the plaintiff and Fridley, the contract constituted a continuing offer of dedication of the land as a street, which may be accepted by the city at any time, by the passage of an ordinance therefor, before the same has been canceled by the consent and agreement of both the plaintiff and the Fridleys; that by the terms of the contract the interveners are entitled to possession of the premises until possession is desired by the city for use as a street; that the city is estopped from claiming any title or interest in the premises against the interveners other than the right to open it as a street prior to the revocation of such offer by the parties making the same; that plaintiff holds the naked, legal title to the premises, subject to the right of possession by the interveners until the same shall be required of them by the city of Neligh for a street. Plaintiff appealed, and interveners filed a cross-appeal.

The city of Neligh by the pleadings disclaimed any interest or right to the strip in controversy, and makes no complaint of the decree. The question as to the respective rights of the interveners and the plaintiff in the disputed strip depends upon the terms of the written contract, and more especially upon that portion of the same above quoted.

What are the respective rights of the plaintiff and of the interveners? No appeal having been taken by plaintiff, the judgment of the district court in the former action deciding that the city was entitled to the strip as a street was final as to him. Plaintiff, however, was entitled to the possession of the strip until the city desired to open it for public use. He was rightfully in possession when he entered into the contract with interveners. This possessory right he could sell and convey, and this he did by the quoted provision of the contract. By their purchase interveners are entitled to hold possession until the condition that the city requires the possession of the strip for a street arises. But the city having disclaimed, in this proceeding, title or interest in

the property whatever interest it had by virtue of the judgment reverts to plaintiff, the owner of the legal title, subject, however, to the right of possession in the interveners. Interveners bought and paid for this possessory right, but they did not buy the title in fee. They are entitled to a decree finding their right of possession, but are not entitled to a decree granting the legal title in them, as they ask. The city is not entitled to a judgment, or finding, in its favor in any respect. It asked for nothing, and expressly disclaimed any interest in the property. The court properly quieted the legal title in plaintiff, subject to the possessory right sold to interveners by the contract. Further than this the decree does not seem to be warranted. The decree of the district court is therefore modified so as to quiet the legal title in the property involved in plaintiff, subject, however, to the right of possession in interveners, as granted by the quoted provisions of the contract.

The parties are left in a somewhat anomalous situation as to their rights in the strip, and, yet, it is not infrequent that one person may have the legal title to real estate subject to a right of possession in another. The right to sell or buy remains open if it is desired to unite the two estates.

As above modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

HENRY H. MOLLER, APPELLEE, V. JAMES MALLORY ET AL., APPELLANTS.

FILED MAY 15, 1923. No. 22381.

1. **Principal and Agent:** FRAUD OF AGENT: RETENTION OF BENEFITS. A principal who retains benefits derived from the fraudulent conduct of his agent after notice of the fraud is chargeable with the instrumentalities employed by the latter in carrying out the fraudulent purpose.

2. **Fraud:** EXCHANGE OF LANDS: MEASURE OF DAMAGES. Where the owner of land, through an agent, under circumstances such as shown

in this case, has pointed out, to one desirous of exchanging other lands for the same, land which he did not own as the land which he owned and proposed to convey, and afterwards conveyed land of much less value than that which was pointed out, and which he, the grantee, supposed he was to acquire, the party defrauded may recover the difference in value between the land shown him and the land which was actually conveyed to him.

3. **Estoppel:** EXCHANGE OF LANDS: FRAUD. The statement in a contract for the exchange of land, "We each have inspected each other's property and are dealing solely on our own judgment," etc., will not estop one of the parties, to whom other and better land than that described in the contract had been fraudulently shown by the agent of the grantor in order to induce him to enter into the same, from showing the fraud in an action for damages for deceit.

4. **Fraud:** EXCESSIVE DAMAGES. Evidence as to value of land examined, and *held* that the amount of recovery is excessive.

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

A. R. Davis and *Baldrige & Saxton,* for appellants.

McKenzie, Cox, Burton & Harris, contra.

Heard before MORRISSEY, C. J., LETTON, DAY and DEAN, JJ., BUTTON, District Judge.

LETTON, J.

This is an action to recover damages on account of an alleged fraud perpetrated by the defendants upon the plaintiff in a transaction concerning the exchange of certain real estate. There is a direct conflict in almost every essential and material question of fact in the evidence, but, the jury having accepted plaintiff's theory of the case, the facts will be stated accordingly.

Plaintiff was a farmer residing at Burwell, Nebraska. He was more or less a buyer and seller of real estate, mostly carrying out his transactions through the aid of a real estate man in Omaha named Patzman. He had become vested with the title to 320 acres of land in Cedar county, Nebraska, which he had never seen. On his way to examine the land, he stopped at Wakefield, Nebraska, and was accosted by defendant Mallory, a real estate

dealer of that place. He informed Mallory that he desired to dispose of the Cedar county land. After some conversation he gave Mallory the address of Patzman in Omaha, and told him if he found any property which might be exchanged for the Cedar county land to communicate with Patzman. Mallory did this, and informed Patzman that defendant Stageman, who lived at Randolph, owned 520 acres of land in South Dakota, which he might be willing to exchange for the Cedar county land. Patzman then made arrangements with Mallory to meet plaintiff in Sioux City, and to go with him to look at the land. When they arrived at Nowlin, a small town near where the land was situated, Mallory procured a man by the name of Jacobson to drive them out to the land. After driving several miles, Mallory said to plaintiff, "This is your land," showing a slightly rolling and apparently fertile tract in section 35. After their return to Nebraska, Mallory and Patzman, in Omaha, drew up duplicate forms of contracts which were taken by Mallory to Randolph for submission to Stageman. After some negotiations between Stageman and Patzman over long distance telephone, certain changes were made in each contract. They were thereafter signed by each of the parties. Deeds of conveyance were afterwards made in accordance therewith. Some time afterwards, when plaintiff came to examine the the land in sections 28 and 29, which was described in his deed, he found that it was not the same land which had been shown to him. The land was rough and of poor quality, a creek ran through it, with a number of ravines or draws running into the creek, with banks from 10 to 20 feet high. Very little of it is cultivable, and that only in small patches, and the land is worth a great deal less than the land in section 35 which had been shown to him. He then began this action for damages on account of fraud and deceit.

The evidence in the case is voluminous. One of the chief points in controversy is whether Mallory was the

agent of Moller or the agent of Stageman. Stageman made a special appearance in the action, objecting to the jurisdiction of the court for the reason that the action was brought and Mallory summoned in Douglas county; that he was served with summons in Cedar county; that there is not a joint cause of action against both defendants; that the allegations in the petition charging joint liability are a mere artifice and device to bring Stageman into the jurisdiction of the court in Douglas county. This special appearance was overruled. The same objections were preserved by the answer.

We are convinced from an examination of the testimony that there is evidence to warrant the finding that Mallory was Stageman's agent, that Mallory was guilty of active participation in the fraud, and that Stageman, having received and retained the fruits of the fraudulent actions and representations of Mallory after the same were brought to his knowledge, is a joint wrongdoer with him. A summons therefore might properly issue from Douglas county to be served upon him in Cedar county in the case.

The contract contains the following printed clause: "We each have inspected each other's property and are dealing solely on our own judgment, and not upon any representations that had been made to us, and have carefully read this contract before signature." It is insisted by defendants that plaintiff is estopped by reason of this recital from asserting that he has been defrauded. But the land that was shown to him, and as to which he spoke in this statement, was other land than that which was described in the contract, and, as the jury found, he was deceived and misled when he signed the paper containing this recital. Under such circumstances an estoppel cannot arise.

It is asserted that the court erred in instructing the jury with respect to the measure of damages. They were instructed that if they found for the "plaintiff he would be entitled to receive the difference between the reason-

able market value of the 360 acres of Jackson county, South Dakota land that was pointed out to the plaintiff, and the reasonable market value of the 360 acres of Jackson county land which the plaintiff actually received in the said exchange on the 4th day of June, 1918." While some states have adopted a different measure of damages in such cases, the rule stated by the trial court is that which is accepted here. *Odell v. Story,* 81 Neb. 437; *Dresher v. Becker,* 88 Neb. 619. See cases collected in note in 8 L. R. A. n. s. 806.

Exceptions were taken to the rulings of the court as to the admission or exclusion of certain evidence. Considering all the testimony introduced at different periods of the trial, we think defendant suffered no prejudice therefrom, except perhaps as to the testimony of plaintiff with respect to the values of the land in South Dakota.

It is contended that Stageman cannot be held to have ratified the act of Mallory if he in fact pointed out other and better land to plaintiff than that afterwards conveyed to him. The testimony shows that Stageman is no novice in the exchange and transfer of lands. He has made no offer of rescission since acquiring knowledge of the conduct of his agent, but has insisted on the contract being carried out. He retains the fruits of the transaction, and the fact that he willingly paid Mallory a commission of $1,000 for consummating the exchange is worthy of note.

It is complained that the verdict is so excessive that it must be the result of passion and prejudice. We think there is some cause for this complaint. Excluding the testimony of plaintiff, who testified to the highest value placed upon the land by any witness, and for whose testimony an insufficient foundation was laid, four witnesses as to value testified on behalf of plaintiff. One of them valued the land in section 35, which was shown to plaintiff, as being worth $35 an acre, while that in sections 28 and 29 he valued at $3.50 an acre. Two

other of plaintiff's witnesses testified the land shown was worth $30 an acre, and the land conveyed $3.75 to $5 an acre; while another witness called by plaintiff testified that the land in section 35 was only worth $10 an acre, and the rough land $3.75 an acre. On the other hand, the witnesses for defendants, one of whom had been a register of deeds of the county, and also township assessor, testified that the land shown was worth about $20 an acre, and the rough land about $10. The highest estimate of the value of the land shown by other of defendants' witnesses was $25 an acre, and the lowest from $15 to $20, and the estimate of the rough land varied from $7.50 to $15 an acre.

The jury found the difference in value between the two tracts to be $25 an acre, or $9,000 in all. Considering the testimony with respect to the value of the land, we are convinced that it does not sustain a verdict for $9,000 as the difference in value. The jury having found in favor of plaintiff, he is entitled to recover his actual damages, but he is not entitled to a speculative, or excessive, award. Considering the mass of testimony and the cost of a new trial, we are reluctant to set aside the verdict *in toto*. The testimony as to value, all elements being considered, satisfies us that the verdict is excessive to the extent of $4,500. If plaintiff, therefore, is willing to remit the sum of $4,500 as of the date of judgment, the judgment, as thus reduced, will be affirmed, otherwise it will stand reversed.

The testimony in the case is peculiar, and would be unsatisfactory whether the jury found for plaintiff or for defendant. The zeal of plaintiff's attorney led him in some instances rather close to the border line during his examination of witnesses, but if there is a second trial he will probably be a little more circumspect in his suggestions and implications to the jury.

The judgment is reversed unless plaintiff file a remit-

titur in the above sum within 20 days. In such case it will stand affirmed.

AFFIRMED ON CONDITION.

NATIONAL BANK OF COMMERCE, PLAINTIFF, V. HENRY J. LEFFERDINK ET AL., DEFENDANTS: FRED R. FITZPATRICK, RECEIVER, ET AL., APPELLEES: BERT BUNNELL, APPELLANT.

FILED MAY 15, 1923. No. 22394.

1. **Deeds:** INTEREST CONVEYED: RENTALS. "Rent reserved by lease of real estate, and not accrued at the time of a conveyance of the reversion, passes with such conveyance to the grantee. Every conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." *Eiseley v. Spooner*, 23 Neb. 470.

2. **Vendor and Purchaser:** RENTALS. A grain buyer who knowingly receives from a tenant the landlord's share of crop rent must at his peril pay the proceeds to the person entitled thereto, and where the former owner has transferred the title to the land, and the conveyance has been made a matter of public record, the crop being immature at that time, payment to the former owner will not discharge the purchaser of the grain from liability to account to the real owner for such proceeds.

3. **Estoppel:** GRANTORS. H. J. L., the owner in fee of a tract of real estate in this state, conveyed the same by warranty deed to a foreign corporation. In a proceeding to recover rent which they had received after such conveyance, F. E. L., claiming as assignee of H. J. L., and B., acting for him, assert that the title had never passed from H. J. L., for the reason that the grantee corporation was incompetent to take title to real estate in this state. *Held*, that H. J. L. would be estopped to question the competency of his grantee to take title for that reason, and that F. E. L., and B., being in privity with him, are likewise estopped.

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

Doyle, Halligan & Doyle, for appellant.

Hainer & Flansbury and *Hall, Cline & Williams, contra.*

Heard before MORRISSEY, C. J., LETTON, DAY and DEAN, JJ., BUTTON, District Judge.

LETTON, J.

The controversy in this appeal is not between the original parties to the suit, which was for the foreclosure of certain mortgages. It is concerned with the right to the rents accruing in the year 1919 upon the 480 acres of land affected by the decree. During the crop season of 1919 the land was occupied by tenants under leases providing for a share of the crops as rent, Henry J. Lefferdink, the owner of the fee title, being the lessor. This action was begun June 24, 1919. On March 25, 1919, Henry J. Lefferdink conveyed the land in pursuance to a contract made in February, 1919, to the Bankers Land, Cattle & Development Company, an Arizona corporation. This deed was filed for record in April, 1919. In July, 1919, the Arizona corporation conveyed the legal title to the land to the First Trust Company of Lincoln, Nebraska. The trust company executed an agreement to collect the rents from the land and apply the proceeds upon the incumbrances involved in this litigation. This deed was filed for record July 21, 1919. About August 1, 1919, one of the tenants delivered the landlord's share of his wheat crop to one Bert Bunnell, a grain dealer of Denton, who purchased the same, and on September 9, 1919, paid the proceeds to T. J. Doyle, as the agent or attorney of Frank E. Lefferdink, who claimed it under assignment, or power of attorney, for Henry J. Lefferdink.

A decree of foreclosure was rendered on November 18, 1919. The court found that the proceeds of sale of the property would probably be insufficient to pay the liens adjudged to exist, appointed George W. Holmes receiver, and directed him to control the land and rent the premises, also to collect the rents for 1919. Afterwards Frank E. Lefferdink filed a petition in the case, making all parties in interest parties to the proceeding, except Bunnell, and praying the court to determine the right to the rent for 1919. Answers were filed. In the answer of the receiver he alleged that he had the right to

the crops, and asked that Bunnell be made a party. The court ordered this to be done, but he was not served with summons in time to appear when the matter was set for hearing. Frank E. Lefferdink claimed the rent upon two grounds: First, an oral assignment made in November, 1918, when Henry J. Lefferdink, upon borrowing money from a bank of which Frank E. Lefferdink was then cashier, and in February, 1919, upon borrowing from Frank individually, told Frank to apply the rent from this land upon the debts; second, upon a power of attorney executed to him by the Arizona corporation authorizing him to collect the rents. On May 21, 1920, a hearing was had. The court found that Frank E. Lefferdink had no right, title or interest in the rents, and the receiver was directed to collect the rents for the year 1919 and apply the proceeds in accordance with the further orders of the court. It was also found that one of the tenants has paid to Bert Bunnell, of Denton, rents which should have been paid to the receiver. The receiver was directed to collect the remainder of the rents for the year 1919, including the sums paid to Bert Bunnell, and the matter was continued for hearing as to Bunnell. No appeal was taken from this decree. It is therefore final as to all parties then before the court.

Afterwards Bunnell answered, admitting the delivery of the rent wheat to him, alleging that Frank E. Lefferdink claimed to be the owner and demanded the proceeds, having a written assignment of the rents; that he had paid the rents for former years to Frank E. Lefferdink, and that in good faith, without notice, he had paid to him the $513 realized from the wheat delivered to him by Dalton from the 1919 crop, and that this payment was made on September 9, 1919, before Holmes had been appointed receiver.

The reply of the receiver alleges that at the time Bunnell paid the money to Lefferdink he knew there was a controversy over the ownership of the wheat, and de-

manded and received an indemnity bond before he paid it; denies that it was paid in good faith and without notice; alleges that the decree of May 21, 1920, is *res judicata* as to the right of Frank E. Lefferdink to the rents for 1919, and that Bunnell knew that the lienholders were claiming ownership of the rent. At the trial the evidence taken at the former hearing was received in evidence. Bunnell made the same defense that Frank E. Lefferdink had made at the former hearing. It was not shown that this crop was in existence at the time of the alleged oral assignment, and it was shown that the written power of attorney under which Frank claimed had never been authorized by, or executed by, the Arizona corporation, and was a mere nullity. The claim is now made that the deed from Henry J. Lefferdink to the Arizona corporation is void because a foreign corporation is incompetent to take title to real estate in Nebraska. Henry J. Lefferdink, the grantor to the corporation, is estopped to take this position. *Eiseley v. Spooner,* 23 Neb. 470. Both Frank E. Lefferdink and Bunnell, who stand in his shoes in this respect, are likewise estopped.

As to the defense based on lack of notice, the statute provides: "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." Comp. St. 1922, sec. 5591.

In *Eiseley v. Spooner,* 23 Neb. 470, the first paragraph of the syllabus is as follows: "Rent reserved by lease of real estate, and not accrued at the time of a conveyance of the reversion, passes with such conveyance to the grantee. Every conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." See, also, *Allen v. Hall,* 66 Neb. 84; *In re Estate of Andersen,* 83 Neb. 8; *In re Estate of Pope,* 83 Neb. 723; *Cooper v. Kennedy,* 86 Neb. 119. This is the general rule. 1 Tiffany, Landlord and Tenant, sec. 180.

When Henry J. Lefferdink parted with the title in March, 1919, he conveyed all his interest in the growing crop, and no one could derive any right or title to it from him thereafter. The conveyance to the Arizona corporation and by it to the First Trust Company were upon record at the time Bunnell paid the money to Mr. Doyle for Frank E. Lefferdink. This was all the notice required by law in this state. In England a statute requires a purchaser to notify a tenant of a change of title in order to hold the tenant liable if he pay the rent to the former landlord, but there is no such statute in this state. Furthermore, that Bunnell had doubts as to the right of Frank E. Lefferdink to receive the rent is apparent from the fact that he would not pay the money to Frank E. Lefferdink's attorneys until he received a guaranty from him against loss by so doing. He explains this by saying that he had heard that there was a controversy between the brothers, and that he insisted on having the guaranty to protect himself in the event that Henry, and not Frank, was entitled to the money. The guaranty is not in the record. So far as we can tell from his statement of its terms, it may be broad enough to protect him. The money in his hands belonged to the holder of the title to the land, and he was bound at his peril to know that Frank E. Lefferdink was entitled to the money before he paid it to him. *Taylor, Cole & McLeod v. Pope,* 5 Cold. (Tenn.) 413; cases collected, 20 A. L. R. 132.

The judgment of the district court is

AFFIRMED.

W. L. HUFFMAN AUTOMOBILE COMPANY, APPELLANT, V. MOLINE PLOW COMPANY ET AL., APPELLEES.

FILED MAY 15, 1923. No. 22397.

1. **Appeal:** MOTION FOR NEW TRIAL. The filing of a motion for a new trial is unnecessary to obtain a review in this court of a judgment dismissing a cause before any evidence is taken for the reason that

the petition does not state facts sufficient to constitute a cause of action. *Horton v. State*, 60 Neb. 701.

2. ———: ———: TRANSCRIPT: TIME. In such a case, the filing of a motion for a new trial in the district court is improper, and is of no avail to extend the time within which a transcript of the judgment must be filed in this court in order to confer jurisdiction upon it to review the judgment of dismissal.

3. ———: ———: REVIEW. A judgment of dismissal for the reason that the petition does not state a cause of action was rendered in the district court on June 8, 1921. No evidence was adduced and no issue of fact submitted. A motion for a new trial was filed, and was overruled on July 5, 1921. The præcipe on file recites that this appeal is taken from a judgment rendered on the 5th day of July, 1921. A transcript was filed in this court less than three months from the overruling of the motion, but nearly four months from the judgment of dismissal. *Held*, that the filing of a motion for a new trial was not proper and was useless in such a case; that this court never acquired jurisdiction to review the judgment of dismissal; that it did acquire jurisdicton to review the order of the district court overruling the motion for a new trial, and that such motion was properly overruled.

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

John O. Yeiser and *John O. Yeiser, Jr.*, for appellant.

Nolan & Woodland and *Stout, Rose, Wells & Martin, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., BEGLEY, District Judge.

LETTON, J.

A judgment of dismissal was rendered in this case on June 8, 1921. A transcript and præcipe for appeal were filed in this court on October 3, 1921, nearly four months after the judgment. A motion for a new trial was filed in the district court on June 10 and overruled on July 5, 1921. The præcipe on appeal recites: "This appeal is from a judgment rendered in the district court of Douglas county, Nebraska, on the 5th day of July, 1921." There is no bill of exceptions. The record shows that a jury was impaneled, and the opening statements

of counsel made. Defendants then objected to the introduction of evidence. The court sustained the objections, "for the reason that the petition of plaintiff does not state a cause of action." The jury was discharged, and the action dismissed. A motion for a new trial was filed June 10, alleging that the court erred in sustaining the motion of each defendant to direct a verdict, and that the court erred in dismissing the plaintiff's petition. Since no verdict was directed, the first two grounds fail, so that the sole error alleged is that the court erred in dismissing the plaintiff's petition.

Section 8825, Comp. St. 1922, defines "new trial" as follows: "A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court."

In *Horton v. State*, 60 Neb. 701, paragraphs 6 and 7 of the syllabus are as follows:

"6. A motion for a new trial is proper only where there has been a trial of an issue of fact on the pleadings.

"7. A final judgment based upon a pleading defective in substance may be reviewed without a motion for a new trial having been filed and ruled upon."

In that case a peremptory writ of mandamus was allowed by the district court against a corporation and its officers, without notice to the respondents, and in their absence. Counsel for the relators contended that the judgment was not subject to review because the errors committed were not brought to the notice of the district court by a motion for a new trial. The court say: "Upon this point it is, we think, sufficient to say that there was no trial or semblance of a trial. The petition, which, in the absence of an alternative writ, must be regarded as a pleading, was considered and held to state facts sufficient to entitle the relators to the relief demanded. The question decided was one of law and not of fact. A motion for a new trial is proper only where there has been a trial of an issue of fact on the pleadings."

In *Claflin v. American Nat. Bank*, 46 Neb. 884, it is

said: "Rulings which do not pertain to the trial in such a sense as to make them assignable as causes for a new trial, such as rulings upon demurrers, *motions addressed to pleadings,* and motions to dismiss, need not be called to the attention of the trial court by motion for a new trial."

In *Bennett v. Otto,* 68 Neb. 652, where the question involved was to be decided by the record, the court say: "Here there was a mere examination of the record presented, and a motion for a new trial could have alleged nothing except that the court erred in deciding the matter incorrectly upon the record."

In *First Nat. Bank v. Sutton Mercantile Co.,* 77 Neb. 596, the third paragraph of the syllabus is: "Where a judgment at law is rendered on the pleadings alone, a motion for a new trial is not necessary to obtain a review in this court." In the same case it is said: "A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court (Code, sec. 314); and a motion for a new trial is a motion for such reexamination. The judgment was rendered without an examination of any of the issues of fact, consequently there could be no reexamination of any such issues, and it would be absurd to hold that the defendant was required to ask what the court could not possibly grant. *Bannard v. Duncan,* 65 Neb. 179. The judgment involved a mere construction of the pleadings, and in such a case no motion for a new trial is required in order to obtain a review in this court. *Scarborough v. Myrick,* 47 Neb. 794; *Hays v. Mercier,* 22 Neb. 656; *Claflin v. American Nat. Bank,* 46 Neb. 884."

To the same effect are *Slobodisky v. Curtis,* 58 Neb. 211; *Walker v. Burtless,* 82 Neb. 214; *Anderson v. Union Stock Yards Co.,* 84 Neb. 305; *Fairbanks, Morse & Co. v. Austin,* 96 Neb. 139. The courts of California, Kansas, Indiana, and Oklohoma hold to the same effect. *Morange v. Morris,* 32 Barb. (N. Y.) 650; *Dodge City Water-Supply Co. v. City of Dodge City,* 55 Kan. 60. The pro-

cedure in the latter case was identical with that of the case at bar, except that the motion for a new trial was stricken from the files at the succeeding term of the trial court upon the ground that the motion was improper and unauthorized. *Werley v. Huntington Water-Works Co.*, 138 Ind. 148; *Wagner v. Atchison, T. & S. F. R. Co.*, 73 Kan. 283; *Russell v. First Nat. Bank*, 65 Ia. 242; *Doorley v. Buford & George Mfg. Co.*, 5 Okla. 594.

In view of this long-settled rule, the motion for a new trial could not extend the time for taking an appeal from the judgment. There having been no trial of an issue of fact, but only a ruling upon the sufficiency of the petition, there could be no "new trial" as defined in the statute.

According to the præcipe, this appeal is only taken from the judgment, or order, of July 5, 1921, overruling the motion for a new trial. The transcript was filed in time to appeal from this order. The motion for a new trial might properly have been stricken from the files by the district court, but to overrule it could not be prejudicial. The transcript was not filed in this court for nearly a month after the time for taking an appeal from the judgment of dismissal, and this court therefore never acquired jurisdiction to review the same. The judgment of the district court overruling the motion for a new trial is affirmed. The appeal from the judgment of dismissal is dismissed for want of jurisdiction.

APPEAL DISMISSED.

SAMUEL NATHAN, APPELLEE, V. MARTIN JENSEN, APPELLANT.

FILED MAY 15, 1923. No. 22418.

1. **Contracts:** ALTERATIONS: PRESUMPTION. In the absence of evidence as to the fact, the presumption is that alterations appearing on the face of a written contract were made before its execution.

2. ———: ———. If all the facts with respect to the making of an alteration in one of two duplicate written contracts are in evidence.

the determination of how, when or with what motive the change is made is for the trier of fact.

APPEAL from the district court for Douglas county: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Nolan & Woodland, for appellant.

Stout, Rose, Wells & Martin and *James O'Hara, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., BEGLEY, District Judge.

LETTON, J.

Plaintiff seeks to reform a lease and to recover rent which is due under its terms, if reformed as plaintiff desires. Duplicate leases were drawn up whereby the plaintiff leased to the defendant a room in Omaha to be used for a saloon for the sale of liquor. The leases were prepared by plaintiff's lawyer, and were signed in his office. Both instruments were introduced in evidence. Under the terms of the lease produced by plaintiff, the lease was absolute for two years, with an option to the lessee for an extension for three years. The optional provision had a clause providing that, if prohibition went into effect during the time of the extension, the lease should be terminated. This clause was slightly ambiguous, and it is this defect in expression which plaintiff seeks to have reformed in his lease (exhibit No. 1). This clause is typewritten throughout. In the duplicate copy produced by defendant at the trial (exhibit No. 2), by the change of a comma to a period, the change of a small letter to a capital, so as to begin a new sentence at that point, and the elimination of the word "or" (the changes being made with pen and ink), the provision that the adoption of prohibition would terminate the lease was made to apply to the whole term of the lease, instead of only to the optional three-year extension period. One lease is not a carbon duplicate of the other, and in both the disputed clauses are typewritten, except that in exhibit 2 the changes noted have been made.

Plaintiff and his attorney testified that no alterations had been made in either lease at the time it was signed, and that each document as originally prepared was exactly in accordance with the agreement arrived at after the negotiations of the parties. They also testify that the leases never left the attorney's office after they were prepared for signature until they were executed and delivered.

On the other hand, defendant testifies that a few days prior to the signing of the lease he procured from plaintiff, at his office or store, one of the duplicate leases (exhibit No. 2); that he submitted same to one Smith, an employee of a brewing company, who was familiar with such leases; that Smith changed this copy to the form in which it now appears; that the change was called to the attention of plaintiff at his place of business, who agreed to the same; that plaintiff said the other copy was in the office of his attorney, and that he would have it changed to correspond; that defendant took the changed copy to the attorney's office, where it was signed by both parties in the presence of each other, as was the copy produced by plaintiff, but that no change was made in the latter. Defendant went into possession and paid rent until May 1, 1917, when prohibition went into effect. He insists that the lease then terminated, as evidenced by his duplicate lease. Smith testifies substantially to the same effect as to the manner in which the changes were made. There is some other testimony which tends to support defendant's theory.

After a careful consideration of the entire evidence, we are satisfied that the plaintiff has sustained the burden of proof. The testimony on behalf of defendant contains some inherent weakness and improbabilities. The rule in this state, which is different from that in some jurisdictions, is that, in the absence of evidence as to the fact, alterations made in an instrument are presumed to have been made before its execution. *Dorsey v. Conrad*, 49 Neb. 443. But since the duplicates were executed at the

same time, since the typewritten clause is identical in both, and one of them appears with the original typewriting unchanged, and since all the facts attending the actual execution are in evidence, this removes this presumption, and the question as to how, or when, or with what motive the alteration was made was for the trier of fact to determine under all the evidence.

On the whole case we agree with the district court that plaintiff is entitled to the reformation sought, and that the instrument produced by him expresses the true terms of the lease. The judgment of the district court is

AFFIRMED.

EDWARD PERRY ET AL., APPELLEES, V. RICHARD RITZE ET AL., APPELLANTS.

FILED MAY 15, 1923. No. 22333.

1. **Specific Performance:** DEFENSES. Want of mutuality in respect to the remedy of specific performance in a suit by vendors of land to enforce the contract of purchase is not a defense, where they complied with, or tendered performance of, their contractual obligations.
2. **Vendor and Purchaser:** DESIGNATION OF GRANTEE AS TRUSTEE. The mere insertion of "trustee" after the name of grantee in a patent for land does not prevent the title from passing to the person named nor prevent him from transferring it to another, where a trust or a beneficiary is not disclosed.
3. **Homestead:** CONVEYANCE. Under the statute in force in 1870, a husband having title to a homestead could transfer it independently of his wife.
4. **Dower.** In 1870 an equitable interest in government land prior to the issuance of a patent was not a freehold estate or an estate of inheritance to which dower attached.
5. **Vendor and Purchaser:** DEEDS: CORRECTION OF ERRORS. In a chain of title to land, as shown by an abstract, mere errors in deeds, such as initials in names and variances in the spelling of names of the same persons, may be cured by affidavits showing the identity of grantors and grantees.

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

A. R. Oleson, for appellants.

A. R. Davis and *C. H. Hendrickson, contra.*

Heard before MORRISSEY, C. J., ROSE, DEAN, ALDRICH, and GOOD, JJ., BEGLEY, District Judge.

ROSE, J.

This is a suit in equity to enforce specific performance of a contract to purchase real estate. The property consists, with improvements, of a quarter section and two 40-acre tracts of land near Wayne. Plaintiffs were vendors and defendants were vendees. The making of the contract July 28, 1920, is pleaded in the petition and admitted in the answer. The date fixed by the parties for performance was March 1, 1921. The purchase price was $80,000, of which defendants paid $11,000 in cash. Defendants agreed to assume a mortgage for $50,000, to pay $14,000 March 1, 1921, and to give plaintiffs a second mortgage on the land for $5,000, payable March 1, 1923. Plaintiffs were to furnish "a warranty deed, and a good, merchantable abstract of title, on or before March 1, 1921," and they pleaded a tender of both. Defendants resisted specific performance on the ground that the contract was void for want of mutuality, and they also pleaded plaintiffs' failure to furnish an abstract showing "a good and merchantable title," and prayed for a cancelation of the contract and for a judgment for that part of the purchase price paid in cash. The district court found the issues in favor of plaintiffs and ordered specific performance. Defendants have appealed.

Is want of mutuality a defense? It is argued that specific performance as a remedy was available to plaintiffs but not to defendants, and that therefore the mutuality essential to a valid contract was wanting. The plea is that plaintiffs were married, that the wives did not sign the contract of sale, and that consequently it could not have been specifically enforced in a contested suit by defendants. Both plaintiffs executed a warranty deed in which the wife of each joined as a grantor and this

was tendered by plaintiffs in performance of the contract in that respect. While the opinions on this subject are not harmonious in different jurisdictions, the rule in Nebraska is that want of mutuality in respect to the remedy of specific performance in a suit by vendors to enforce the contract of purchase is not a defense, where they complied with, or tendered performance of, their contractual obligations. *Bigler v. Baker,* 40 Neb. 325.

Did the warranty deed tendered by plaintiffs to defendants convey "a good and merchantable title?" One objection to the abstract is based on entries showing that the United States by patent dated July 1, 1871, conveyed to "Moses B. I. Goddard, trustee," 80 acres of the land in controversy, and that the latter executed a "special warranty deed" to Robert H. I. Goddard, a grantor in the chain of title. It is argued that the power of the trustee to make the transfer is not shown and that the interests of the beneficiaries of the trust may be outstanding estates. The position thus taken is untenable. The patent did not disclose a trust or the name of a beneficiary. The mere insertion of "trustee" after the name of the grantee did not prevent the title from passing to the person named nor prevent him from transferring it to another. *Farrell v. Reed,* 46 Neb. 258; *Cowell v. Springs Co.,* 100 U. S. 55. In the argument on this point reference is made to *Snyder v. Collier,* 85 Neb. 552, containing an expression to the effect that the word "trustee," following the name of grantee in a deed, "is sufficient to put those dealing with him concerning the property upon reasonable inquiry as to the existence and nature of the trust." There the person described as "trustee" acquired in that capacity title for the beneficiaries of an existing trust. In the present instance inquiry for 50 years would not have disclosed an unexecuted trust or a beneficiary with an outstanding interest under the patent. A statute passed since the decision in *Snyder v. Collier,* 85 Neb. 552, was rendered, and before the contract of sale in the present case was executed, makes conclusive the pre-

sumption of the patentee's authority to transfer title. Comp. St. 1922, sec. 5659.

In the chain of title to a quarter section of the land in controversy objection is made to a deed executed by J. M. Searl, without anything to show that he was unmarried; William Stewart being named as grantee. In this connection defendants say the possibility that Searl had a wife with an outstanding interest makes the title unmarketable. The deed in question was executed October 11, 1870. At that time a husband having title to his homestead could transfer it independently of his wife. Referring to the homestead law then in force the following language was used in an early case:

"The legislature never intended, by this statute, to assume a guardianship over the owner of a homestead, and render him disqualified to make valid contracts respecting it. It imposes no restraint upon him whatever in this respect. Even the wife, when the title is in the husband, has no power to prevent him from making such disposition of it as he may think best." *Rector v. Rotton*, 3 Neb. 171.

This language was quoted with approval in *State Bank v. Carson*, 4 Neb. 498, and in *Schields v. Horbach*, 49 Neb. 262.

Assuming that Searl had a wife when he executed his conveyance October 11, 1870, she did not have a dower interest in the land, because he did not then have a freehold estate or an estate of inheritance to which dower could attach. The patent to this tract was issued to William Stewart, assignee of Searl, November 10, 1870, a month after Searl had transferred his equitable interest to Stewart. This interest was not affected by dower. *Norfolk Nat. Bank v. Wood, Bancroft & Co.*, 33 Neb. 113; *Hall v. Crabb*, 56 Neb. 392.

Other objections to the title are based on initials in names and on variances in the spelling of names in deeds. Minor errors of this kind are corrected by affidavits properly indentifying grantors and grantees.

There are still further criticisms relating to dormant judgments and to liens not properly satisfied of record. Some of the objections are met by the production of public records, others by judicial decrees, and the rest by affidavits. Upon a critical examination of all the objections to the abstract the conclusion is that it shows a good and merchantable title in plaintiffs. In addition, title by adverse possession is conclusively shown. It follows that defendants have no legal or equitable right to a rescission of the contract of purchase. Specific performance, therefore, was properly decreed.

AFFIRMED.

THOMAS G. DINSDALE, APPELLANT, V. SPRAGUE TIRE & RUBBER COMPANY, APPELLEE.

FILED MAY 15, 1923. No. 22342.

1. **Principal and Agent:** UNAUTHORIZED CONTRACT: RETENTION OF BENEFITS. A principal cannot knowingly retain the benefits of a sale procured by a soliciting agent and escape legal obligations assumed by the agent in the name of the principal as a condition of the purchase.

2. **Corporations:** SALE OF STOCK: CONTRACT. Where soliciting agents of a corporation sell some of its capital stock, without notice of any limitation on their power, and at the same time execute in writing, as a condition of the purchase, an option granting to the purchaser the right to cancel the sale, if the corporation fails to resell within six months half the capital stock thus sold for the price originally paid for the whole, the subscription and the option may be considered parts of the same transaction, constituting a single contract.

5. ———: ———: SECRET AGREEMENT. The doctrine that a secret agreement to procure capital stock at a price less than the uniform price paid by other stockholders is void may not apply to a sale at the established price on condition of granting to the purchaser an option to cancel the sale, if the corporation fails to resell within six months half his stock at the price originally paid for the whole.

4. ———: ———: POWERS. A corporation selling its capital stock under a subscription, providing on its face that shares sold without payment in cash shall be retained by the corporation as collateral for unpaid notes for the purchase price, may be held to have power

to buy, hold and resell its own capital stock, in absence of proof that it has no such power.

5. ———: ———: FRAUD. It is not necessarily a fraud upon a corporation and its stockholders generally for a purchaser of some of its capital stock to exact from its soliciting agents, as a condition of the purchase, a written option granting to him the right to cancel his purchase, if the corporation fails to resell within six months half the stock purchased at the price originally paid for the whole.

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

J. C. Martin and *Sullivan, Wright & Thummel,* for appellant.

Gaines, Van Orsdel & Gaines, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., BEGLEY, District Judge.

ROSE, J.

This is a suit in equity to cancel a contract for the purchase of capital stock issued by a corporation, to require the surrender of a note for half the purchase price, and to recover back the amount paid for the other half. Plaintiff is the purchaser and defendant is the corporation that issued and sold the stock. The sale contract was executed July 24, 1919. The stock purchased consisted of 100 shares, each of the par value of $100. The purchase price was $7,500, paid by two notes of $3,750 each, due in 6 months. The right of plaintiff to the relief demanded is based on written terms of the purchase. His theory of the case is that the sale was a conditional one and granted him an option to cancel it, a right which he exercised according to contractual conditions. The controversy arose in the following manner: Defendant incorporated for the purpose of manufacturing tires and appointed Weaver & Meredith fiscal agents to sell its capital stock. They supplied E. A. Jenkins and George Hasman with subscription blanks and sent them out as soliciting agents to procure subscriptions. Hasman and Jenkins, without immediate success, importuned plain-

tiff, a dealer in live stock, hay and grain at Palmer, to purchase stock, but finally induced him, July 24, 1919, to sign the subscription and the notes described. Before closing the transactions plaintiff exacted for the subscription and the notes a receipt bearing the signature of defendant by Jenkins and Hasman, agents. On the back of it there is the following agreement:

"Palmer, Neb. July 24, 1919.

"It is agreed that if we do not sell 50 shares of stock in the Sprague Tire & Rubber Co. belonging to Mr. Tom Dinsdale for $150 per share before the notes given in payment for the same become due that the company will, at Mr. Dinsdale's option, either cancel this agreement or, by the payment of the interest due thereon, extend the notes from time to time until the same are paid.

"Sprague Tire & Rubber Co.,
"By E. A. Jenkins, Special Rept.
"Geo. Hasman, Agent."

One of the notes was sold to an innocent purchaser to whom plaintiff bound himself for payment. The proceeds of the sale of this note, less the commission of the agents for selling the capital stock, were sent to and retained by defendant with the subscription and the other note. The capital stock for which plaintiff subscribed was never delivered to him, but was held by defendant as collateral security for the unpaid note. Defendant did not resell for plaintiff, within 6 months, 50 shares at $150 a share. Before the time for exercising the option expired, plaintiff made a futile demand for the cancelation of the subscription, for the surrender of the unpaid note, and for the amount of the note transferred to the innocent holder. This suit was begun to obtain the relief thus demanded. On issues raised by the pleadings, the facts narrated are either admitted or conclusively established by the proofs.

The defenses may be summarized as follows: The soliciting agents had no authority to enter into the agreement indorsed on the back of the receipt. Without

knowledge of the unauthorized agreement, defendant accepted the subscription, the unpaid note and the partial payment out of the proceeds of the other note. The sale of all capital stock was open to purchasers on uniform terms prescribed in the subscription contracts supplied to the soliciting agents. Plaintiff exacted the fraudulent conditions. The unauthorized agreement was void as a fraud upon other subscribers and upon defendant. Plaintiff was an active participant in the fraud and is bound by his subscription as an unconditional purchaser without any legal right to enforce the void option to cancel the purchase upon failure of defendant to resell half his capital stock at the price paid for the whole. The facts upon which these defenses are based appear in an answer pleading a counterclaim for judgment on the unpaid note. The trial in the district court resulted in a dismissal of plaintiff's suit and in a judgment in favor of defendant for the full amount of its counterclaim. Plaintiff has appealed.

Did the trial court take an erroneous view of the facts and the law? The inquiry is not complicated by parol evidence contradicting a written instrument. The transactions were reduced to writing. The soliciting agents represented defendant alone. Through them plaintiff dealt with defendant. They approached him with a form of subscription furnished by defendant, but containing no warning that their powers were limited. The agents appeared to have the powers which they exercised on behalf of defendant in executing the option. They could not have sold the stock to plaintiff without granting to him the right to cancel the sale on the terms to which they subscribed on behalf of their principal. The sale itself depended on the agency through which the option was executed. After defendant learned the conditions of the sale it retained the subscription thus procured and refused to restore the consideration to plaintiff. The agents, by virtue of their actual authority to solicit subscriptions without notice of limitations on

their powers, not only had the apparent or ostensible authority which plaintiff recognized as genuine in exacting the option, but defendant itself, after it acquired knowledge of what they had done, retained the fruits of their efforts and thus adopted the means employed by them in consummating the sale. These are circumstances under which a principal cannot retain the benefits of a sale procured by a soliciting agent and escape the obligations assumed by the agent in the name of the principal as conditions of the purchase.

What is the nature of the transactions? If legitimate, they amount to a conditional sale with a buyer's option to cancel the purchase upon failure of the seller to resell half the stock within 6 months at the price of the whole. All terms of both the sale and the option are parts of the same transactions, constitute a single contract, and must stand or fall together, unless plaintiff is answerable for some wrong amounting to a fraud upon other purchasers of stock.

Defendant invokes the rule that a secret agreement by a purchaser to buy capital stock at a price less than other purchasers similarly situated are required to pay is a fraud upon them and upon creditors. Defendant received from plaintiff the regular price in the form of cash and a collectable note. These considerations would have been retainable had defendant resold 50 shares of plaintiff's stock at $150 a share. In that event defendant would have received from plaintiff the same price as that paid by other stockholders. Owing to the failure of defendant to prevent the conditional sale from becoming absolute, it has on hand the shares of stock involved in the transactions. If the stock cannot be resold at the original price, the loss is attributable to defendant, and not to plaintiff who did nothing to cause it except to exercise the option granted in writing by defendant as a condition of his purchase. The doctrine invoked, therefore, is not applicable to the facts.

The record does not show that defendant, while mak-

ing the sale to plaintiff, was without power to buy, hold and resell its own stock. The subscription declared on its face: "It is agreed that the shares of stock are to be held as collateral to the note of the purchaser." This was not the utterance of agents. It was a condition of sale demanded by defendant itself. The pledge implies, if it does not express, power of the corporation to hold and sell its stock for the benefit of itself and its stockholders. Want of power as a defense is not proved.

Did plaintiff by joining in the option commit a fraud which defeated the cancelation of the purchase? There was no evidence of fraud on his part; unless fraud is inferable from the condition relating to the resale of half the shares purchased for the price conditionally paid for the whole. Under the circumstances this does not establish fraud. Profit in some form is the motive for the purchase of corporate stock. Without the hope of gain no one would make an investment in such property. In a period of inflation, during which prices of property doubled in a short time, an agreement for the payment of twice what corporate stock cost, as a condition of the resale, did not of itself constitute fraud on the part of plaintiff who had no means of knowing how fast defendant's stock would increase in value, but the agents of defendant represented that half of what he bought could be sold again within 6 months for double its original cost. Plaintiff, in executing the notes for the purchase price, risked his credit on that basis alone, as he had a right to do, and did not himself commit any fraud.

There was no defense to the petition and the prayer thereof should have been granted. The counterclaim should have been dismissed. For the purpose of granting this relief, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

BEN POULOS ET AL., APPELLEES, V. JACK SKREKAS, APPELLANT.

FILED MAY 15, 1923. No. 22365.

Landlord and Tenant: LEASE: CANCELATION. An unreasonable delay by lessor in performing his agreement to equip a leased room for a confectionery store may justify a court of equity in canceling the lease, notes given in advance by lessees for the purchase price of the equipment, and a chattel mortgage on the equipment to secure the notes, where lessees have not contributed to or waived the delay or taken possession of the leased premises.

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

Martin L. Sugarman, for appellant.

Wayne E. Sawtell, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

ROSE, J.

This is a suit in equity to cancel a lease for a room to be equipped by lessor and used by lessees for a confectionery store in Omaha, notes aggregating $5,400 given in advance by lessees to lessor for the purchase price of the equipment, and a chattel mortgage on the equipment to secure payment of the notes. Judgment for a cash payment of $600 on the equipment is also sought. Plaintiffs are lessees, and Jack Skrekas, lessor, and his partner are defendants. The lease was dated April 8, 1920, and the room was to be equipped by lessor for business on or before July 1, 1920, but it was not then ready. Defendants admitted the making of the lease, but denied other material allegations of the petition. The trial court upon a full hearing granted the prayer of the petition, and defendants have appealed.

The only question presented is the sufficiency of the evidence to entitle plaintiffs to equitable relief. Lessor did not equip the leased room or have it ready for occupancy on or before July 20, 1920. It was not equipped until September. Plaintiffs never took possession. As

early as October lessor and his partner were using the leased premises and the equipment to carry on the enterprise for which plaintiffs had procured the lease. It is shown by a preponderance of the evidence that futile demands for performance were made, that plaintiffs did not contribute to or waive the delay, and that it was unreasonable under the circumstances and kept plaintiffs out of business during a busy season of the year, while their notes for the purchase price of the equipment and their obligations for rents were outstanding. The trial court was right in granting equitable relief to plaintiffs.

AFFIRMED.

WILLIAM F. SMITH, APPELLEE, V. FRED LEU ET AL., APPELLANTS.

FILED MAY 15, 1923. No. 22398.

1. **Fraud:** PLEADING. In an action by a purchaser of personal property to recover damages for false representations inducing the sale, his petition should allege that he relied on the false representations.
2. ———: MEASURE OF DAMAGES. The measure of damages in an action by a purchaser for false representations in the sale of personal property permanently retained by him, if worth anything, is generally the difference between its actual and represented value when sold.

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

George N. Gibbs, for appellants.

W. E. Flynn, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., BEGLEY, District Judge.

ROSE, J.

This is an action to recover damages for false representations by which defendants induced plaintiff to purchase from them the lease of a lot occupied by them as a garage, the property connected with it and the business therein conducted. The purchase price was paid by means of a certificate of deposit for $1,000 issued to plain-

tiff by the Bank of Lincoln county at Hershey, with accrued interest amounting to $20, and plaintiff's personal check on the same bank for $2,000. On this paper defendants procured from plaintiff $3,020, the amount of damages claimed. This was accomplished by fraudulent representations, according to the petition, without any consideration whatever, while plaintiff was helpless in a hospital and mentally incapable of transacting business. In the answer of defendants they denied the fraud charged, pleaded their contract of sale, and alleged performance on their part. Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $3,245.50. From a judgment thereon defendants have appealed.

The overruling of a demurrer to the petition is the first assignment of error presented. It is insisted that the petition does not contain the necessary allegation that plaintiff relied on the fraudulent representations pleaded by him. Unfortunately the petition is a crude and ungrammatical pleading, mingling material and immaterial facts. Reliance on the false representations pleaded is not directly alleged in, but is implied by, the petition which might be held sufficient after a trial on the merits, including the issue of such reliance, if the record were otherwise free from error; but the petition was assailed by a preliminary demurrer and plaintiff should have been required to amend, a right which has not been lost.

The principal assignment of error is directed to the following language in one of the instructions:

"If the jury believe, from the evidence, that at the time of making the contract and purchase involved herein, you find that plaintiff's mind was so weak, unsound, or diseased, that he was incapable of understanding the nature of his contract, the nature of the acts to be by him performed thereunder, or the consequence of his contract, then the two minds did not meet, and because of such fact, the contract is not binding, and you should find for plaintiff in the amount paid thereon, with interest there-

on, at the rate of seven per cent. per annum from November 1, 1919, to this date."

This was not applicable to the issues or the proofs. The trial court properly construed the petition to be one for damages for false representations. Otherwise plaintiff did not plead facts constituting a cause of action. He retained what he received under the contract and did not rescind it. Plaintiff did not plead a cause of action to recover back the consideration for a rescinded purchase. The measure of damages for false representations was misstated by the trial court and the jury rendered a verdict for the amount authorized by the erroneous direction—the consideration paid by plaintiff and interest. The rascality constituting the fraud and the worthlessness of what defendants pretended to sell to plaintiff for $3,020 were vehemently urged to show there was no prejudicial error in the instruction. The fallacy in the argument, however, is that it disregards the jury as triers of fact on the issue of damages. Under the contract alleged by plaintiff to have been procured by fraud, he took possession of the garage and occupied it for a time as a business venture. There is evidence tending to prove that he acquired from defendants and retained valuable rights and property under his purchase. These the jury, under the instruction quoted, were authorized to, and did, disregard in determining the amount of plaintiff's award. If the privileges, rights and property acquired by plaintiff were of no value, contrary to some of the testimony, the jury should have been permitted to find that fact. The measure of damages in an action by a purchaser for false representations in the sale of personal property permanently retained by him, if worth anything, is generally the difference between its actual and represented value when sold. The error in the instruction, therefore, is obviously prejudicial to defendants. The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

GREENWOOD CEMETERY OF WAYNE ET AL., APPELLANTS, V. CITY OF WAYNE ET AL., APPELLEES.

FILED MAY 15, 1923. No. 23085.

1: **Municipal Corporations:** PAVING: EXEMPTION OF BURIAL LOTS. Under a statute exempting from execution only burial lots sold by a cemetery association for the sole purpose of interments, unsold lots are not exempt from an assessment for special benefits conferred by the paving of a street.

2. ———: ———: SPECIAL ASSESSMENTS: TAXATION. A municipal assessment for a special benefit accruing to private property through a public improvement is not "taxation" within the meaning of a statute exempting property from taxation.

3. ———: ———: ———: EXEMPTION. A statute exempting property from "sale on execution on any judgment" does not apply to a sale of property to pay an assessment by a city for special benefits conferred by a public improvement.

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

C. H. Hendrickson, for appellants.

F. S. Berry, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

ROSE, J.

This is a proceeding to review an assessment of property of a cemetery association for special benefits derived from the paving of a public street. The board of equalization of the city of Wayne made the assessment. The property affected belongs to the Greenwood Cemetery, a private corporation organized under statutory authority for the purposes indicated by its name. Comp. St. 1922, sec. 588. The proceedings of the city in paving the street and in thus benefiting the cemetery association are conceded to be regular, but the validity of the assessment for special benefits is said to be void for the reason that cemetery property is exempted by statute. On petition in error the assessment by the board of equalization was reviewed in the district court, where it was held that the

cemetery was specially benefited by the pavement to the extent of $3,437.76. From an order permitting the payment of this sum out of general funds available for improvements the association has appealed.

Did the legislature exempt the property of cemeteries from assessments for local improvements? In absence of an exemption the city that paved the street or avenue had power to levy a special assessment on adjacent property of the cemetery in proportion to the special benefits conferred. Comp. St. 1922, sec. 4283. The street or avenue improved led to the cemetery and its land was adjacent thereto. A purpose to which funds of the cemetery may be appropriated is the improvement of avenues leading thereto. Comp. St. 1922, sec. 592. A statute invoked to show exemption from assessments for benefits declares:

"Burial lots sold by such association shall be for the sole purpose of interments, and shall be subject to the rules prescribed by the association, and shall be exempt from taxation, execution, attachment, or any other claim, lien or process whatever, if used exclusively for burial purposes, and in no wise with a view to profit." Comp. St. 1922, sec. 593.

Only "burial lots sold" for the "sole purpose of interments" are exempted, "if used exclusively for burial purposes." It is shown without dispute that the cemetery has 420 unsold burial lots. It is therefore clear that these lots are not exempted by the statute quoted.

The following legislation, however, is cited to show that unsold burial lots cannot be sold under any form of legal process:

"Lands appropriated and set apart as burial grounds, either for public or private use, and so recorded in the county clerk's office of the county where such lands are situated, shall not be subject to sale on execution on any judgment to be hereafter recovered, to taxation, to dower, nor to compulsory partition." Comp. St. 1922, sec. 596.

It is settled law that a municipal assessment for a special benefit accruing to real estate through a public improvement is not "taxation" as that word is used in the statute.

The "sale" forbidden is a sale "on execution on any judgment." The "judgment" to which reference is made by the legislature is a judgment at law in a court of justice, and does not include an assessment by a municipal board of equalization for a special benefit conferred by the paving of a street. Exemption is an exception to the general rule and to be available must be found in the terms of the statute. It seems clear that the unsold lots are not exempt from the assessment for special benefits. It follows that the city board of equalization had power to make an assessment for the proper benefits, which are shown to be $3,437.76.

Happily a forced sale of lots is unnecessary. The cemetery has on hand available funds amounting to $3,799.05 which may legally be applied to the expenses of improvements. Out of this fund the entire assessment may be paid at once or payments may be made as they fall due.

AFFIRMED.

COMMERCIAL NATIONAL BANK OF COLUMBUS, APPELLEE, V. S. D. RUFF ET AL., APPELLANTS: JOHN C. BYRNES ET AL., APPELLEES.

FILED MAY 15, 1923. No. 22308.

1. **Appeal:** CONFLICTING EVIDENCE. Where a jury is waived and the witnesses in respect of material issues are orally examined before the court, and where in such case the evidence is conflicting, and the case is appealed, we are not unmindful of the fact that the trial court had a better opportunity to judge of the truth or the falsity of the statements of the witnesses than a reviewing court can have from a printed record.
2. **Record** examined, and *held* that the judgment is without prejudicial error.

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

J. J. Gleeson and *Dolezal, Spear & Mapes,* for appellants.

Albert & Wagner and *Cain & Johnson, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., BEGLEY, District Judge.

DEAN, J.

Defendants, who are husband and wife, executed and delivered to John C. Byrnes, September 8, 1919, a promissory note in the sum of $2,000, and November 1, 1919, they executed and delivered to Byrnes another promissory note for $1,500; Mr. Ruff signing both notes as surety. The notes were made payable to Byrnes' order; the latter note, however, was payable at the plaintiff bank. Both notes were given as a first payment on the purchase price of a farm in Boone county and are in the usual negotiable instrument form and drawing 7 per cent. annual interest. March 1, 1920, the notes matured. Plaintiff alleged, in the usual form, that it bought the notes from Byrnes for a valuable consideration in the usual course of business and without knowledge of infirmities or of any defenses claimed by the makers. John C. Byrnes and C. A. Miller, his alleged partner, were made parties defendant on the defendants' application. In their amended answer and cross-petition the Ruffs admitted the execution and delivery of the notes, but alleged that they were obtained by fraud and misrepresentation practiced upon them by Byrnes and Miller, with the bank's connivance, and prayed that the notes be held for naught. A jury was waived. When the parties rested the court took the case under advisement and thereafter rendered judgment in favor of plaintiff and against S. D. Ruff and Elizabeth Ruff for $4,053.13, the full amount represented by the notes. The court further found generally in favor of defendants

John C. Byrnes and C. A. Miller, as against defendants S. D. Ruff and Elizabeth Ruff, and decreed that their cross-petition be dismissed. From the foregoing judgment defendants Ruff appealed.

In defendants' "substitute answer and cross-petition" they renewed the allegations of the former answers as against the bank. With respect to the cross-defendants, Byrnes and Miller, they alleged generally that they conspired together for the purpose of cheating and defrauding them; that a contract of purchase was entered into September 8, 1919, between Byrnes as seller and Mrs. Elizabeth Ruff as buyer of the Boone county farm, and that by its terms Mrs. Ruff agreed to pay $51,842.50 for the farm, the notes in controversy representing the first payment, the contract providing for subsequent payments which were to be secured by a mortgage on the land; the purchaser, however, by the terms of the contract, reserving to herself the privilege of paying all or any part of the purchase price March 1, 1920.

However, it is alleged by the Ruffs that it was orally agreed between them and Byrnes, the latter being represented by Miller, that the notes in suit should be retained in Byrnes' possession until Mrs. Ruff could sell her Dodge county farm, or otherwise raise the money, and that if she could not sell the farm or raise the money some other way the notes and the contract should be returned to her; that they relied upon the promises and representations so made and would not have delivered the notes but for the aforesaid verbal agreement; that about October 15, 1919, Mrs. Ruff being unable to sell her farm in Dodge county demanded a return of the notes and notified Byrnes and Miller that she, Mrs. Ruff, would proceed no further in the enterprise and that they were at liberty to sell the real estate in question to other parties. It is charged that neither Byrnes nor Miller ever intended to carry out their agreement but that the transaction was a scheme on their part to cheat and defraud the Ruffs of their money. It is not alleged that the land purchased

by defendants was of less value than that represented by the sellers at the time.

In their answer to the cross-petition of the defendants Ruff, both Byrnes and Miller denied all of the material allegations therein, and alleged that defendant Byrnes, "ever since the execution of the said contract, has been and still is able, ready and willing to keep and perform all and singular of the terms and conditions thereof on his part to be kept and performed, and has kept and performed the same in all respects, so far as thereunto permitted by said cross-petitioner, Elizabeth Ruff."

In support of the allegations of their cross-petition both Mr. and Mrs. Ruff testified that the oral agreement was made. This was denied by both Byrnes and Miller. Besides, it was shown that the Ruffs paid the interest on one of the notes and renewed it. So that their conduct is shown to be inconsistent with their plea that the notes were delivered conditionally to Miller for Byrnes. At best they are mistaken in their contention.

It plainly appears that Byrnes was able, willing and ready to perform his part of the contract. He tendered a valid deed in court, but the offer was refused. The tender, however, was not incumbent on him in view of the refusal of his adversary to comply with the conditions of the contract on her part to be performed. The defendants Ruff did not offer to perform their part of the contract which they entered into and which they themselves pleaded as an exhibit. Under the facts before us they cannot now be heard to say that plaintiff was in default.

That the plaintiff bank purchased the notes without knowledge of any infirmities therein and without knowledge of any defenses by the makers appears from the evidence. The president of the bank testified that he bought them from Mr. Byrnes on behalf of the bank, and that he had not heard of the claim, since made by defendants, that Mr. Byrnes would hold the notes until the makers disposed of certain land owned by them, and that he had

no knowledge that Mr. or Mrs. Ruff claimed any defense against the notes. He further testified that when the notes were purchased he, as was his custom, asked Mr. Byrnes about the responsibility of the makers and was informed that they had a farm near North Bend.

Where a jury is waived and the witnesses in respect of material issues are orally examined before the court, and where in such case the evidence is conflicting, and the case is appealed, we are not unmindful of the fact that the trial court had a better opportunity to judge of the truth or the falsity of the statements of the witnesses than a reviewing court can have from a printed record.

Other assignments of alleged error are urged by counsel, but upon examination we find that prejudicial error does not appear.

The judgment is

AFFIRMED.

CHARLES J. MILLER, APPELLEE, V. CENTRAL TAXI COMPANY, APPELLANT.

FILED MAY 15, 1923. No. 22359.

1. **Evidence.** Ordinarily a question involving the rate of speed of a motor-propelled vehicle is not a question for expert testimony. *Oakes v. Omaha & C. B. Street R. Co.*, 104 Neb. 788.

2. **Trial:** WITNESSES: CROSS-EXAMINATION. Where a plaintiff in a personal injury action seeks by appropriate interrogatories on the cross-examination to discover whether the defendant is indemnified from loss by an insurance company, it is error for the court to sustain an objection to interrogatories which tend to develop the fact on that question.

3. **Appeal:** REMITTITUR. Where plaintiff in a personal injury action recovers a verdict and the trial court directs a remittitur and the defendant appeals, this court will on request of plaintiff, in a proper case, set aside such remittitur either in whole or in part as the evidence may warrant.

4. **Trial.** It is elementary that the jury and not the court is the trier of questions of fact.

5. **Damages.** Evidence examined, and *held* that the required remittitur

is excessive, and all over $2;000 thereof is ordered vacated under authority of section 9154, Comp. St. 1922.

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

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

John M. Berger, George A. Keyser and *James C. Kinsler, contra.*

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

DEAN, J.

This action was brought to recover for personal injuries sustained by plaintiff, as alleged, in a collision between plaintiff's car, which he was driving, and one of defendant's taxicabs driven by an employee of defendant in a negligent and wrongful manner and at an excessive and careless rate of speed. Plaintiff recovered a verdict for $9,250 for personal injuries and $350 for his damaged car, or a total of $9,600. At the trial the late Judge Lee S. Estelle presided. Subsequent to Judge Estelle's death his Honor Judge Charles A. Goss overruled defendant's motion for a new trial on condition that a remittitur be filed in the sum of $4,250. Plaintiff, in compliance with the order, filed the remittitur and judgment was rendered in the sum of $5,350, from which defendant has appealed.

Immediately before the accident plaintiff was employed by the Burlington railroad as a locomotive fireman on a switch engine and had been so engaged about seven years. He was then earning from $125 to $150 a month. At the time he was a strong and able-bodied man 42 years of age. The accident happened on the Eleventh street viaduct at Omaha, February 21, 1919, about 11:30 at night. Plaintiff was driving south in a Ford automobile. His wife was seated at his side in the front seat and two of his married sisters and a baby occupied the rear seat. The party was returning from a social visit with friends. Defendant's taxicab was driven by

a man named Sullivan, an employee of defendant. He had three passengers, two women and one man, and was driving from the south. The collision occurred not far from the south end of the viaduct, which is about two blocks in length.

When the taxicab was about a block away, plaintiff testified that he first saw its approaching lights; that it came upon the viaduct in a "zigzag" manner and at a speed of from 40 to 45 miles an hour; that the speed of his car at no time exceeded 10 or 12 miles an hour; that when the taxicab struck his car he had driven close up to the west or righthand side of the viaduct and was about 6 inches from the sidewalk, and was just bringing his car to a stop when the impact occurred. In the matter of the position and the speed of the respective cars his evidence was corroborated by Mrs. Tams who was an occupant of the car.

To show the force of the impact, it may be added that the evidence tends to prove that the right front wheel was broken off, the axle and fender were broken, the frame of the car was bent and the top was broken down. It was made worthless for practical purposes, but was valued at from $80 to $100. It also appears that the taxicab continued on its course about 15 or 20 feet after the collision, ran over the opposite sidewalk and then turned over on its side. Its occupants were not seriously if at all injured. Plaintiff testified that when he got out of the car the driver of the taxicab was leaning up against the banister of the viaduct and that he was drunk. On the cross-examination he testified that the driver's conversation and manner indicated drunkenness and that he had the smell of intoxicating liquor on his breath.

In respect of his injuries plaintiff testified that the top of his head was severely bruised and cut and his neck was injured and that a throat trouble was induced; that a piece of broken glass from the windshield went through his cheek and that he had other cuts on his face which were less severe; his hand was injured and

became swollen and in a week or so the swelling began to disappear and he discovered that a bone in his hand was broken; that as a result of the injuries to his head he had almost daily headaches and dizzy spells and at times would stagger and almost fall, and that he could not stoop to shovel coal into the locomotive firebox for any considerable length of time. He testified that he returned to his work as fireman on a switch engine about 10 days or two weeks after the accident; that he worked a few days and on account of headaches and dizziness and the injury to his hand he was laid off; that he continued to work intermittently at his occupation one-half or two-thirds of the time for from three to five months; that while he was so occupied the engineer changed work with him and let him run the engine, while working in the railroad yards, while he, the engineer, did the firing, and that but for the engineer's assistance he could not have continued in his work. Plaintiff further testified that he suffered much pain from his injuries and that he was at times prostrated by nervous attacks; that his sleep was broken and he was unable to rest, and that at the end of four or five months, on account of his injuries, he was compelled to discontinue work on the engine. Subsequently he obtained temporary employment with a brother-in-law where his work was light and his earnings were about $4 a day. It also appears that for a time thereafter he again worked for the railroad company and wheeled sand to a drying device; that for a part of the time he shoveled the sand and at other times it was shoveled by others. When asked to explain how he could at all shovel coal into the firebox of a locomotive or shovel sand, he testified that when using a shovel he was left-handed and that the left hand consequently bore the load, and that with the thumb and the forepart of his right hand he could manipulate the outer end of the shovel. After he left the Burlington he took a contract to run a coal chute which was operated by a gasoline engine, but he

had to have a man to start the engine and he could then operate it. The contention is that the injuries to his head and neck and right hand are permanent, and that from the injuries generally he suffered a nervous shock which has resulted, as the doctors testified, in traumatic neurasthenia.

Plaintiff's evidence in regard to changing work with the engineer, and his assistance in firing the engine, and his evidence with respect to the manner of using the shovel while firing was corroborated by the engineer. He testified that a locomotive fireman has to be left-handed because he must stand near the left-hand side of the engine when shoveling coal into the firebox. The engineer also testified that after the accident plaintiff frequently complained of headaches and dizziness, but that he made no such complaint before he was injured.

Three or four physicians testified at great length with respect to plaintiff's injuries. One made an examination about 15 months after the accident and this was only a few days before the trial. He testified that one of the incisions on plaintiff's cheek extended clear through to the inside, but that aside from the scars left on his face no other bad result should be anticipated; that he found a scar about three-fourths of an inch long on top of plaintiff's head which was due to a cut or a blow; that there were indications of a scar on his right hand, and on examination he found a diminished strength of grip which would doubtless be permanent; that plaintiff had some disorder in the muscles and ligaments in the right side of the neck, and that they were tender to the touch and responded to pressure, and these disorders had a marked tendency toward a permanent condition; that plaintiff was very nervous, restless and uneasy; that he did not have control of himself and was without normal poise and rest; that the tenderness of the tendons in the neck was due to irritation of the nerve which supplied that part of the body; that the dizziness of which plaintiff complained was probably due to the brain substance

having been injured from concussion, and that there might be a continued hemorrhage of brain tissue resulting from laceration. His expressed opinion was that plaintiff's then condition probably resulted from the injuries that he found on his head and neck, and that the general physical state and the depressed condition would naturally result from such injuries as plaintiff appeared to have sustained. With respect to the continuation of pain in the future the doctor testified: "The probability is that the symptoms will continue, varying perhaps in character, or may diminish some." He further testified that the results of head injury are very numerous and very indeterminate and almost any form of nervous disorder may result from a blow on the head.

Another physician corroborated the material evidence of the physician whose evidence has just been reviewed. In addition thereto he went somewhat into detail and testified that in plaintiff's right arm he found that the reflexes were wholly retarded from the shoulder down, and that he discovered a displacement of the right index finger or knuckle and a callous condition on the wrist which indicated either a fracture or a displacement of the small bones; that he believed the injury to the hand was permanent, and that the affection of the neck was the result of nerve injury which would gradually increase; that with respect to dizziness he put the plaintiff through certain movements which did not seem to induce unbalancing, but when the patient looked down or backward he lost his balance and staggered slightly. He further testified that plaintiff's condition "expresses itself in a tremor of the arms, and also his legs shaky in some degree."

A physician called by the court was interrogated with respect to the injuries generally and the consequent nervous shock which was the outgrowth of the accident. He testified: "There has been probably some impairment, but I think it is largely of mental origin. Q. Of mental origin? A. Yes, sir. Q. And being of mental origin,

to what would you attribute it, conceding the man to have been perfectly normal prior to his receiving the injury or shock which was occasioned by a collision between two automobiles, one going at the rate of 40 miles an hour, and the impact being of such a character that the large taxicar was thrown a distance of 10 or 15 feet? Would you not say that that would contribute to it; that could be easily a contributing factor to the psychological condition? A. Yes. Q. And the shock or the effect connected with the injury which you have discovered on this man's head, notwithstanding the fact that it had been practically healed, would produce what you have just called 'traumatic neurasthenia?' That is correct? A. Yes, sir; it might produce what he complained of largely, traumatic neurasthenia, usually produces a traumatic neurasthenia; yes." The doctor further testified: "'Trauma' means—is a blank term: the derivation of the term means nerve weakness; and it is dependent, or the fact is that it is largely dependent, on the mental state of the individual. Q. But it is a weakening of the nerve, of course; that is true? A. Weakening of the nervous energy; yes; lessening of the nervous energy."

Defendant complains because Mrs. Tams was permitted to testify that the oncoming taxicab was traveling at the rate of 40 miles an hour. Her evidence merely corroborated that of plaintiff on this point and there was no evidence to the contrary. Ordinarily a question involving the rate of speed of a motor-propelled vehicle is not a question for expert testimony. *Oakes v. Omaha & C. B. Street R. Co.*, 104 Neb. 788. Judge Cooley observed that the speed of a passing train involves no question of science and is not a question for experts, and added: "Any man possessing a knowledge of time and of distances would be competent to express an opinion upon the subject." *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99.

Counsel complains of misconduct on the part of plaintiff in that he offered to show that Mr. Borsky, the

president of the defendant company, went to the viaduct soon after the accident to make some surface measurements, and that he took with him an attorney for an insurance company to assist him who was not an attorney employed by him in the present case. The offer was denied. The argument is that plaintiff sought by this means to convey to the jury the intelligence that the company was indemnified against loss by an insurance company. Complaint is also made in that an apparent attempt was made to convey the same intelligence to the jury in the cross-examination of Mr. Borsky. The witness was not permitted to answer. We think the court erred in its ruling.

The question is not new in this state. We held in a like case that, if the defendant was not resisting plaintiff's demand in its own behalf, but that some insurance company was defending, under the cover of defendant's name, plaintiff had a right to make that fact known to the jury. *Egner v. Curtis, Towle & Paine Co.*, 96 Neb. 18.

Plaintiff maintains that the remittitur is excessive. Under section 9154, Comp. St. 1922, this court, in a proper case, is empowered to reduce the amount of the required remittitur in whole or in part. The act provides: "That whenever the court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal said action, then the party remitting shall not be barred from maintaining that said remittitur should not have been required either in whole or in part."

It may be observed that the remittitur was not required by the judge who presided at the trial, but by a judge who did not see the witnesses nor have an opportunity to weigh the spoken word of evidence as it was pronounced in open court. We think there is merit in plaintiff's contention that the amount required to be remitted was excessive. From a review of the evidence we are unable to find that the verdict as returned by the jury, the trier of questions of fact, should have been re-

duced almost in half by the court's order. We think that under all the cirucumstances a deduction of $2,000 would be more nearly in keeping with the facts as disclosed by the evidence. It may here be added, parenthetically, that this class of litigation is well known to be a grievous burden to litigants.

That the collision was the proximate cause of plaintiff's injuries and of the resulting nervous shock is plainly apparent. The fact that the physical injuries are permanent and that the resultant mental ailment is of a progressive type and that its evil effects will increase with the passing years is established by competent evidence of men who are learned in the medical profession. On this question two of the doctors are in perfect accord.

At the time of the accident plaintiff, then a man of 42, was in life's prime. He had never known a day's illness and for about seven years had worked continuously at the laborious occupation of a locomotive fireman. So far as the record shows his daily task was without intermission. He now approaches middle age with a body maimed and a mind clouded as a direct result of the gross negligence of the defendant company. As plaintiff's ailment progresses from stage to stage his earning capacity will more than correspondingly decrease. Before he has reached the end of man's allotted span of life for active, productive labor he may himself become a dependent while yet there remains under his roof those who are dependent upon his daily labor for their daily bread.

It is ordered that the remittitur in excess of $2,000 be vacated and a judgment entered for plaintiff for $7,600 as of the date of the rendition of the judgment in the district court. As herein modified the judgment is affirmed.

AFFIRMED AS MODIFIED.

INEZ A. MOOREHEAD, APPELLEE, V. ARAH L. HUNGERFORD ET AL., APPELLANTS.

FILED MAY 15, 1923. No. 22370.

Mortgages: FORECLOSURE: MATURITY OF DEBT. "A provision in a mortgage given to secure a promissory note stipulating for the payment of interest semiannually, and that, if the interest is not paid when the same is due, the whole of the debt and interest shall immediately become due and payable and the mortgage may be foreclosed, is permissive merely, and the entire debt will not become due unless the mortgagee elect so to declare by instituting an action on the note or to foreclose. See *Lowenstein v. Phelan*, 17 Neb. 429." *McCarthy v. Benedict*, 89 Neb. 293.

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

J. E. Porter, for appellants.

Daniel F. Osgood, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ., BUTTON, District Judge.

DEAN, J.

Plaintiff began this suit to foreclose a real estate mortgage, made by A. L. Hungerford and wife, to secure the payment of certain promissory notes and interest coupons thereto attached. Subsequently and some time before the suit was commenced the land was sold by the mortgagor to L. W. Graff, the principal defendant herein, and, as a part of the purchase price, he assumed and agreed to pay the mortgage indebtedness. The Hungerfords have no interest in this suit. Certain interest coupons, which were payable March 7, 1920, became delinquent, and the suit was commenced March 26 following. Plaintiff in the petition, on account of delinquency in payment of interest, declared the whole amount due and obtained a judgment for $6,983. 56, that being the indebtedness represented by the notes and mortgage, with interest, the day the judgment was rendered. The defendants Graff have appealed.

When the action was tried the parties stipulated with

respect to certain material facts, which, in addition to those hereinbefore stated, in effect are that the equity of redemption was in defendant Graff; that the deed of conveyance from the Hungerfords to Graff was recorded before this suit was begun and that Graff was then in possession of the mortgaged premises; that Graff and wife were made parties defendant for the reason that plaintiff was informed they were in possession of the land; that plaintiff had no personal knowledge of the sale of the land to Graff; that no demand for payment of interest, or of any sort, was ever made upon Graff by or in behalf of plaintiff; that Graff was never notified that the notes in suit, either for interest or principal, were ever presented to the First National Bank at Crawford for payment, where by their terms they were made payable, and that Graff had no knowledge that the interest notes were due until the summons was served. Defendants Graff offered in evidence, as a part of the stipulation, a question and answer from the deposition of plaintiff, which reads: "Q. You may state if the interest payment due March 7, 1920, has ever been paid or offered to be paid? A. The interest has never been paid, that is, the notes for interest due March 7, 1920. I received a letter from some one after the foreclosure suit was commenced offering to pay the interest if I would dismiss the suit." It was stipulated that the "some one" referred to in plaintiff's deposition was written by some person in behalf of Graff.

Just before the case was closed defendants offered to pay all interest then due under the terms of the note and the interest coupons and all court costs. The offer was refused. They now contend that the trial court should have held that plaintiff was obliged to accept the offer. Under repeated decisions of this court error cannot be predicated on the court's ruling.

The suit was originally commenced May 25, 1920, and on November 15, 1920, a demurrer to the petition having been sustained, the petition was amended by

interlineation and refiled. The contract, or mortgage, between the original parties, *inter alia,* provides: "That a failure to pay any of said money, either principal or interest, when the same become due, or a failure to comply with any of the foregoing agreements, shall cause the whole sum of money herein secured to become due and collectable at once at the option of the mortgagee." The coupon bonds, or principal notes, which are secured by the mortgage, provide that, "upon any failure to pay any of said interest within five days after due, the holder may elect to consider the whole note due and it may be collected at once."

The notes and the mortgage, taken together, constitute a valid and enforceable contract. Defendants as purchasers having assumed and agreed to pay the mortgage indebtedness as a part of the purchase price were bound by the terms of the instruments which constitute the contract. The mortgage having been recorded, defendants were chargeable with notice of its provisions.

This form of contract, and the controversy arising thereunder, presents a question that is not new in this state. *Northwestern Mutual Life Ins. Co. v. Butler,* 57 Neb. 198, is a similar case, where we held that, in default in the payment of past-due interest, specific notice to the mortgagor before beginning a foreclosure suit was not necessary, commencement of the suit being sufficient notice of the mortgagee's election, or option, in the premises. In *National Life Ins. Co. v. Butler,* 61 Neb. 449, we held that, if the mortgagee so elect, he may "proceed at once, without notice, to enforce his security," and that "the commencement of a foreclosure suit is notice of his election, and no other notice is necessary." To substantially the same effect is *McCarthy v. Benedict,* 89 Neb. 293, and cases there cited. In the *McCarthy* case a rehearing was denied.

It is held generally that a stipulation in a mortgage, such as is involved here, does not create a penalty or a forfeiture, but is merely a permissive provision, and when

exercised by the mortgagee it does not cause the unpaid installments of interest to mature, nor does it cause the statute of limitations to run against the mortgage debt. 27 Cyc. 1101.

Other questions have been raised by defendants in their brief which we have considered but do not find it necessary to discuss.

Finding no reversible error, the judgment of the district court is AFFIRMED.

WILLIAM BORGMANN ET AL., APPELLANTS, V. FRED BORGMANN ET AL., APPELLEES.

FILED MAY 15, 1923. No. 22312.

1. **Deeds:** CANCELATION: MENTAL CAPACITY: BURDEN OF PROOF. "Where it is sought to cancel a deed for the want of mental capacity of the grantor to make the instrument, the burden of proof is on the one who alleges the mental incapacity." *Brugman v. Brugman,* 93 Neb. 408.
2. ———: EXECUTION: MENTAL CAPACITY. "In determining the mental capacity of the grantor to execute a deed, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of his property, and what he proposed to do with it, and to decide intelligently whether or not he desired to make the conveyance, it cannot be said that he was incompetent or incapable of executing the instrument." *Brugman v. Brugman,* 93 Neb. 408.
3. ———: FRAUD: PROOF. If fraud in the execution of a deed is alleged and denied, in the absence of proof showing such fraud, the deed will not be set aside.

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

W. C. Frampton and *D. J. Flaherty,* for appellants.

H. J. Whitmore, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

ALDRICH, J.

Suit in equity brought in the district court for Lancaster county by William Borgmann and five other children and a grandson of Christian Borgmann and

Katherina Borgmann against Fred Borgmann to set aside a deed conveying 80 acres of land from Christian and Katherina Borgmann to Fred Borgmann. The trial court found for defendant and dismissed plaintiffs' petition. Plaintiffs appeal.

Since the filing of the appeal in this court, Minnie Busboom and Christian Borchers have filed disclaimers and asked to have the appeal dismissed as to them. The appellants here are William Borgmann, Marie Borchers and Louise Vogelsing.

The principal issue is the validity of the deed in litigation. Before discussing the propositions involved, a brief historical and biographical sketch of the principal figures in this lawsuit will be instructive and conclusive to a clear understanding of the facts.

Christian Borgmann, born in Germany, May 7, 1831, came to the United States while still a young man. He worked for a time in Missouri, then went to Iowa, where he married Katherina Taves. In 1865 he removed to Nebraska and homesteaded the northeast quarter of section 20, township 10, range 5, in Middlecreek precinct, Lancaster county. Here he and his wife reared their family. Six of their children are involved in this lawsuit: Louise, born April 3, 1859; William, born January 2, 1861; Minnie, born March 17, 1864; Herman, born February 24, 1869; Marie, born August 27, 1871, and Fred, born January 6, 1875. Christian Borchers, only son of Emma Borgmann, a deceased daughter, is also named in the pleadings.

When the sons William and Herman married in 1884 and 1893, respectively, the father gave each 80 acres of land, a team of horses and some farming equipment. The daughters at marriage received $200 in cash or personal property.

Fred, the youngest son, and defendant in this case, lived at home after the other children had left, and he worked the farm without wages until 1898, when he was 23 years of age. At that time he married Mary Schmale

and at the request of his parents brought his bride to the home place to live. For three years he rented the home place on shares. On December 12, 1898, the parents deeded to him the east eighty of the original homestead, but the deed was not delivered or recorded until the year 1901.

During the first year Fred and his wife lived on the place, a 14 by 18 addition was made to the house, and the first story of this was fitted up for the father and mother. The cost of the addition was paid in equal shares by Fred and his father. The father and mother took their meals with the family. Four children were born to Fred and his wife, and peace and harmony ruled in the home during all of the 21 years that elapsed from Fred's marriage to the death of his father. Neither Fred nor his wife received any compensation for the care and maintenance of his parents during all that time.

The father and mother, on February 9, 1915, executed to Fred a deed of the remaining or west eighty of the original homestead. The consideration recited was $1 and the agreement of the grantee, Fred Borgmann, "to support and take the best of care of the said grantors, Christian and Katherina Borgmann, during their lifetime." This is the deed involved in this lawsuit.

At the time the deed was executed Christian Borgmann was almost 84 years old and Katherina Borgmann was 77. In November, 1915, nine months after the deed was executed, Katherina Borgmann died from pneumonia. Christian Borgmann lived until September 12, 1919, or 4½ years after the making of this deed. No attempt was ever made by the grantors or either of them to repudiate or set the deed aside.

In February, 1921, the plaintiffs instituted this suit to have the deed of February 9, 1915, canceled and title quieted and confirmed in the heirs of Christian Borgmann.

Were the parents improperly influenced in deeding this west eighty to Fred in 1915, or was it a simple act of

justice and a fair recognition of his services to them? The evidence seems to answer in the negative as to improper influence and in the affirmative as to fair recognition of services. Was the kindness and affection worthy of reward and naturally reciprocated? No presumption of fraud arises from the relationship of parent and child. On this proposition see *Winslow v. Winslow*, 89 Neb. 189; *Ward v. Ward*, 86 Neb. 744; *Gibson v. Hammang*, 63 Neb. 349.

Another question raised is: Did Christian Borgmann have the mental capacity necessary to perform this transaction at the time he did in 1915? It is our opinion that he was as competent as any man of his age. Several witnesses who had known him for years and who had no interest in the outcome of the case testified that he was of sound mind at the time the deed was executed and was capable of attending to all his own business. He worked up almost to the last year of his life and was very active for his age. Witnesses testified that they never heard his mental capacity questioned until this suit was commenced. Dr. Hohlen, the family physician, gave strong and positive testimony that the grantor was mentally competent in 1915, and afterwards up to his death. This witness spoke of a slight shaking the grantor had in his hands, but explained that it accompanied old age and in this case did not in the least affect his mentality.

Mr. Hagensick, the notary public, who acknowledged the deed, testified that both the grantor and his wife were competent to attend to this business and apparently knew exactly what they were doing and what they wanted done.

On the question of fraud appellants contend that the grantor was made to believe he was giving Fred an option to buy the place. Their evidence at the trial was to the effect that the grantor thought he was giving Fred a right to build a barn on the place and be the preferred buyer. Such we do not believe was the case. Witnesses for plaintiffs testified that he made some such state-

ments. This was about a year after the death of Katherina Borgmann. The grantor was being harassed and annoyed by William and his daughters.

The notary public, Mr. Hagensick, took particular pains to read and explain the deed to the old people in German as well as English. Nothing was said at the time about an option. The grantor knew he was executing a deed.

The evidence shows that Christian Borgmann, a man of great age and feeble health, had the good sensible discretion to divide his property as he wanted it done, because he remembered it all, the amount each had received and the value thereof.

The judgment is

AFFIRMED.

Morrissey, C. J., dissents.

C. D. COE, GUARDIAN, APPELLEE, V. NEBRASKA BUILDING & INVESTMENT COMPANY, APPELLANT: F. B. BAYLOR, TRUSTEE, INTERVENER.

May 15, 1923. No. 22372.

1. **Parties.** A person with whom or in whose name a contract is made for the benefit of another may bring an action without joining with him the person for whose benefit it is prosecuted. Comp. St. 1922, sec. 8528.
2. **Insane Persons:** CONVEYANCES: RATIFICATION. "Neither the county court, nor a person under guardianship because of insanity, nor the guardian of the latter, nor all together, can ratify or confirm a conveyance of lands by the ward made previous to the guardianship but while he was insane." *Gingrich v. Rogers*, 69 Neb. 527.
3. **Guardian and Ward:** SALE OF PERSONALTY. In Nebraska, the guardian may not sell personal property of a ward except under order of the court and after due and proper notice. Comp. St. 1922, sec. 1603.
4. **Contracts:** AVOIDANCE: MENTAL CAPACITY. Imbecility or weakness of mind to such a degree as to render one incapable of understanding and protecting his own interests will avoid his contracts or conveyances.

5. **Evidence** examined, and *held* sufficient to sustain the verdict of the jury.

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

Doyle, Halligan & Doyle and *Good & Good,* for appellant.

C. M. Skiles, for appellee.

F. B. Baylor and *Johnson, Moorhead & Rine,* for Baylor, Trustee.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

ALDRICH, J.

Action at law brought by C. D. Coe as guardian of the estate of Fannie E. Griggs, insane, against the Nebraska Building & Investment Company to recover $44,245, for stock purchased by Fannie E. Griggs in the defendant company. Plaintiff's amended petition, filed February 16, 1921, alleged, among other things, that Fannie E. Griggs was adjudged insane August 10, 1920, and committed to the state hospital for insane at Lincoln on that date; alleged the appointment on September 4, 1920, of C. D. Coe and his qualification as her guardian; alleged further, in substance, that through fraudulent representations of defendant's agents and salesmen she, being insane at the time, was induced to purchase 411 shares of 7 per cent. preferred stock in the defendant company at $100 a share, part purchased in March, 1917, part in September, 1918, with the agreement of the company that the money paid could be withdrawn within one year and 30 days; that because of fraud practiced upon her by the defendant company, its agents and officers, and because she was mentally incompetent at the times of the transactions, and because of the promises of defendant, its manager and president and other agents to return the money paid by her, the defendant company was liable in the sum of $44,245, for which judgment was prayed.

Defendant attacked the petition by motions, demurrers, and plea in abatement, all of which were overruled by the trial court. Issues were framed by plaintiff's petition, the defendant's answer, and plaintiff's reply on the question of the insanity of Fannie E. Griggs and of fraud practiced by defendant. The case was tried to a jury resulting in a verdict in plaintiff's favor for the sum of $43,410.72. Judgment was entered accordingly and defendant, Nebraska Building & Investment Company, appeals. The action was dismissed as to the other defendants, officers and agents of the company.

In Nebraska, the guardian may not sell personal property except under order of court and after due notice. In support of this, see *Hendrix v. Richards,* 57 Neb. 794.

Was the ward, Fannie E. Griggs, of sound mind and could she rescind, ratify or make a valid contract at the times she did, and how has this proposition been considered by our court? The answer to this proposition is decisive of the case.

In 14 R. C. L. 587, sec. 42, it is said: "It is well settled that the party who is sane is estopped to set up the objection that the other party is insane for the purpose of avoiding the contract. The right to avoid is for the protection of the insane person, and those who deal with him have no corresponding right." This proposition is in *Lincoln v. Buckmaster,* 32 Vt. 652; *Lindsey v. Lindsey,* 50 Ill. 79, 99 Am. Dec. 489, and note; *Hill v. Nash,* 41 Me. 585, 66 Am. Dec. 266, and note; *Jackson v. King,* 4 Cow. (N. Y.) 207, 15 Am. Dec. 354, and note.

The evidence as to Fannie E. Griggs' insanity at the time of these transactions is overwhelming and was known and acted upon to some extent by defendant company's agents and salesmen. At least they took advantage of her condition and ignorance in transacting business.

The jury, under ample and abundant evidence on insanity and fraud, found the verdict for plaintiff and

there is no error on the part of the trial court that is sufficient or material in any way to reverse that finding. Fraud and misrepresentation having been passed upon by the jury when the same was duly submitted to them, and their investigation in that regard having been thorough, and justice having been done in all respects, this verdict as found by the jury is for affirmance.

AFFIRMED.

SHERMAN A. LOWE V. STATE OF NEBRASKA.

FILED MAY 15, 1923. No. 23200.

1. **Criminal Law:** CIRCUMSTANTIAL EVIDENCE. "To justify conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together or as a whole, must be of such a character as to be consistent with each other, and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence." *Smith v. State*, 61 Neb. 296.
2. **Evidence** examined, and *held* insufficient to sustain the verdict.

ERROR to the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Reversed.*

Butler & James and *Edward J. Lambe*, for plaintiff in error.

O. S. Spillman, Attorney General, and *George W. Ayres, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

ALDRICH, J.

The plaintiff in error (hereinafter termed defendant) was prosecuted in the district court for Furnas county, upon an information charging him with murder in the first degree of one D. N. Campbell. The jury found him guilty of manslaughter. Motion for new trial was overruled and a sentence of three years' imprisonment in the penitentiary was imposed by the court. Defendant

now presents the record of his conviction to this court for review.

The principal assignments of error are as follows: Insufficiency of evidence; verdict is contrary to evidence; evidence does not connect defendant with the crime with which he is charged. This in short presents the propositions upon which defendant relies for reversal.

The record discloses that on September 6, 1922, the deceased, D. N. Campbell, was employed by the J. J. Grier Company as cook of a boarding train camp conducted for the railroad trackmen engaged in work at Edison, Nebraska. Defendant was employed as a waiter. The train camp, consisting of a number of box cars, was located on a side-track. Defendant's dining car was located next to the kitchen car where the deceased was found dying at 1:30 p. m. The kitchen and dining cars had swinging doors at each end and were connected by board planks laid between the cars.

There is no direct evidence that defendant stabbed the deceased, but, so far as the record shows, he was the last man to see Campbell before he was found stabbed. The witness Miller, a waiter, testified that he had been in the kitchen car a few minutes after 1 o'clock; that defendant was there at the time wanting to help Campbell with his work; that about five minutes after the witness left the car defendant called to him and said, "The cook is dead." When Miller came to the door Campbell was still alive, but before the commissary clerk arrived from town he was dead.

These three witnesses, Miller, the commissary clerk, and the defendant, testified as to what took place in the kitchen car about the time the deceased was said to have been killed. In all essential particulars their testimony presents no discrepancy.

An ordinary paring knife was found on a table in the kitchen car by Edwards, the commissary clerk, and was received in evidence. There was no blood on the knife

and nothing to show it had been used by defendant for any other purpose than peeling potatoes.

Another circumstance in defendant's favor is the absence of evidence of provocation or intent to commit the crime. It is true their language was coarse, rough and uncouth. But, as a matter of law: "Mere words, however abusive and insulting, will not justify an assault, nor constitute a sufficient provocation to reduce to manslaughter what would otherwise be murder." *State of Kansas v. Buffington,* 71 Kan. 804, 4 L. R. A. n. s. 154. See, also, *Braunie v. State,* 105 Neb. 355.

From the bill of exceptions we quote the following testimony of Dr. Fast: "I found this man was suffering with a disease known as paresis, or pares; the common term is softening of the brain; another familiar term that people might understand better is general paralysis of the brain. * * * Q. Now, what would you say, doctor, about the patient having the disease in the stage you found Mr. Lowe to be in, with reference to being able to control the muscles of the body, especially in times of excitement? A. There would be times when he would not be able to control his muscular act. Q. And at other times, what would you say as to his being mentally competent? A. At other times he would be normal. Q. Do you know anything, doctor, about the term of 'gooseing'? A. Yes. Q. And what would you say as to the effect this 'gooseing' would have on the patient in the condition you found Mr. Lowe to be in as to his being able to control the muscles, and his actions? A. A man that is subjected to anything that will produce an irritability of the nervous system, continuously, even pointing the finger at him, or any one with a shrill sharp noise, that might be irritable to his system."

Our court has said: "Where it is sought to establish homicide by circumstantial evidence, the circumstances, when taken together, should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral

certainty that the accused, and no one else, committed the offense charged." *Casey v. State*, 20 Neb. 138.

It may be true that the state failed to prove facts that show at least a probability, yet it also failed to prove beyond a reasonable doubt the fact that the defendant, and defendant alone, could have been the only one who could have committed this crime. It is a matter of law in this state that: "It is essential that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis. *Commonwealth v. Webster*, 5 Cuch. (Mass.) 295, 319." *Casey v. State, supra.*

Where the state for conviction relies on circumstantial evidence, circumstances and material facts should point to the guilt of the defendant.

The defendant testified: "Dan (deceased) was on the bed and I went to the ice box and I raised up the lid to get those potatoes; they were in a steamer, and I pulled the potatoes out and set them on the bread box directly to the left, and, as I raised it, something on the range attracted his attention, and I was there ready to let the door down when he immediately got up and 'goosed' me, and, as he did so, in order to get away from him, I dropped the ice box lid and turned around and came in contact with him, and as he always followed me up in his playful way, to try to get me again, and I had three broken ribs at that time, I ran directly clean on out into the other car; clear in the east of the car, the kitchen, and I did not stay; I went on into my dinner, and I was kind of nervous, and I stopped and went to the door and stood there, and I think it was Tony Tracy came along and talked to him a minute, and took a drink of water, and while standing there in the door talking I heard a fall back in the kitchen car, I immediately stepped over to where I could see into the kitchen, and I saw that Dan was on the floor, and I made a run for him, and got there just as quick as I could, and when I

came there I saw he had been wounded, and I immediately got some water, but he could not drink. I went out and called Adam Miller to come and go and get Mr. Edwards at once, which he did; and I remained right there, and I tried to revive him, and pulled off my apron and put over him, and I did all I could, and to no avail, He lived possibly ten minutes."

The conclusion is that the verdict is not sustained by the evidence. It follows that the judgment must be, and it hereby is, reversed, and the cause is remanded.

REVERSED.

JOHYN TRAGAS, APPELLEE, V. CUDAHY PACKING COMPANY, APPELLANT.

FILED MAY 15, 1923. No. 23256.

1. **Master and Servant:** WORKMEN'S COMPENSATION: REVIEW. "A finding of the district court on an issue of fact in a compensation case will not be set aside on appeal, where it is supported by sufficient evidence, or where the evidence is substantially conflicting, unless the finding is clearly wrong." *Simon v. Cathroe Co.*, 106 Neb. 535.

2. **Evidence** examined, and *held* sufficient to sustain the findings and judgment of the trial court.

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

Sears, Horan & Sears, for appellant.

Wayne E. Sawtell, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

ALDRICH, J.

This is a proceeding under the workmen's compensation law. The case was originally brought before the compensation commissioner by plaintiff, an employee of defendant, the Cudahy Packing Company. From the commissioner's award of compensation defendant appealed to the district court for Douglas county.

Plaintiff in his petition alleged, in substance, that on

or about October 26, 1921, and for a long time prior thereto, he was employed by defendant as a "handy man;" that among other things plaintiff racked meat and washed rennets and racks; that to properly clean the rennets and racks it was necessary to use not only a steel brush but some sharp-edged instrument; that he used a chisel for this purpose; that on or about October 26, 1921, he sustained an injury to his right hand while grinding the chisel on one of defendant's grindstones which was not equipped with the safety guard as provided by law; that his right hand was so mutilated that it became necessary to amputate the first and second joints of the fourth or little finger, and the third finger; that the second and first fingers were so injured as to render them permanently useless. Plaintiff further alleged he was earning at the time $21.60 a week, and was entitled to the sum of $14.40 a week for 100 weeks, and prayed for compensation in that amount.

Defendant's defense was that the injury did not arise out of and in course of plaintiff's employment, and that the injury was due to plaintiff's own wilful negligence.

Upon issues being joined by plaintiff's reply, the cause was tried to the court without a jury, and resulted in a finding in plaintiff's favor and in an award of compensation to plaintiff at the rate of $14.40 a week for 100 weeks, also awarding an attorney's fee and hospital expense. Defendant appeals.

Appellant contends the verdict is not in accordance with the evidence and is contrary to law. In perusing the record we are prone to say that there is ample evidence and abundant law to sustain this judgment. The facts portrayed truth and it is not our duty to disprove the same. It has been repeatedly held that findings of fact by the trial court in this class of cases, when supported by sufficient competent evidence, will not be set aside unless clearly wrong. We held that in *Simon v. Cathroe Co.*, 106 Neb. 535, and such is the law in Nebraska today.

Perry v. Huffman Automobile Co., 104 Neb. 211, is also instructive in deciding this case. It might be well to observe that the employer's liability act is construed liberally and is intended to avoid formal and technical court procedure.

In the case at bar the law fixes the amount paid weekly and the number of weeks for total loss. This is just and fair, and when the plaintiff receives this amount he receives under this law all he is entitled to, in our judgment.

In the case of *Radtke Bros. & Korsch Co. v. Rutzinski,* 174 Wis. 212, it is held: "In proceedings under the workmen's compensation act, the crucial question is whether at the time of the accident the employee was performing services growing out of and incidental to his employment; and a defendant may be held liable for compensation although he has used the utmost care, and a claimant may recover although he has been guilty of contributory negligence."

As a matter of fact, at the time of his injury plaintiff was engaged in sharpening a chisel for the purpose of cleaning some pans. This work was done during the noon hour and was, as a matter of fact, done on his own time, but was clearly incidental to his employment. For a complete discussion analogous to this, see *Farmers Grain & Supply Co. v. Blanchard,* 104 Neb. 637.

Thus it is plain that this injury occurred while plaintiff was under the employment of the defendant, and he was entitled to the benefit of the law growing out of compensation, and was not guilty of contributory negligence. This case in many respects is not unlike *State v. District Court,* 129 Minn. 176.

At the risk of repetition, we cite *American Smelting & Refining Co. v. Cassil,* 104 Neb. 706, for the purpose of of emphasizing the position of this court, and from which we refuse to depart. We believe that this position so clearly does justice to the plaintiff that we will base

the decision on it. This being our position, we are for the affirmance of this case.

In the matter of allowance of attorney's fees we are of the opinion that services of counsel for plaintiff should be settled by defendant paying into court the sum of $100.

The judgment is

AFFIRMED.

EARL F. SALLANDER, APPELLEE, V. PRAIRIE LIFE INSURANCE COMPANY, APPELLANT.

FILED MAY 15, 1923. No. 22309.

1. **Evidence:** PRODUCTION OF DOCUMENTS. When a party to an action has secured an order of court to produce a book, paper or document in the possession or control of the adverse party, as provided by section 8901, Comp. St. 1922, and the adverse party refuses to comply with such order, the proper practice is for the party desiring to use the book, paper or document in evidence to offer an affidavit setting forth the contents of such book, paper or document. It then becomes the duty of the court to instruct the jury to presume that the contents of the book, paper or document is such as the affidavit alleges it to be.
2. **Evidence** examined, and *held* not sufficient to sustain the verdict.

APPEAL from the district court for Douglas county: CARROLL O. STAUFFER, JUDGE. *Reversed.*

Blackburn & King, for appellant.

McKenzie, Burton & Harris, contra.

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ., BUTTON, District Judge.

DAY, J.

This action was brought by plaintiff to recover $4,319.32 alleged to be due from the defendant for services performed under two oral contracts. The trial resulted in a verdict for the plaintiff for $3,297.12, with interest from January 1, 1920, upon which judgment was entered. Defendant appeals.

Plaintiff alleges in his amended petition, and the

amendment thereto, in substance, that on November 29, 1916, the parties to this action entered into a written contract whereby the plaintiff agreed to become the agent of the defendant to solicit life insurance upon a commission basis; that a few days thereafter a question arose as to the meaning of certain parts of the contract, whereupon the plaintiff and the defendant entered into an oral contract, by the terms of which, in addition to the provisions of the written contract, the plaintiff was to receive commissions on renewals and overwritings on policies theretofore procured by him; that there was due and owing to the plaintiff as commissions on renewal premiums more than $1,500, and on overwritings more than $1,000. It was also alleged that between December 15, 1918, and January 15, 1919, a second oral contract was entered into between the parties, by the terms of which the plaintiff was to receive an additional salary of $100 a month and expenses for the year 1919; that there was due and unpaid upon this second oral contract $1,200 as salary and $619.32 expenses.

The defendant denied that the alleged oral contracts were made; denied that it was indebted to the plaintiff in any sum whatever; averred that the only contract existing between the parties was the written contract of November 29, 1916; and further alleged that any item of commissions, renewals or overwritings alleged to be due prior to May 1, 1916, is barred by the statute of limitations. With respect to this second oral contract the defendant denied that the contract was ever made, and averred that the alleged oral agreement was by its terms not to be performed within one year, and was void under the statute of frauds.

It is first urged by the defendant that the evidence was not sufficient to warrant the court in submitting to the jury the question whether there was an oral contract between the parties relating to the payment of commissions on renewals and overwritings. The testimony upon this issue is so interwoven with the testimony as to the

meaning of the written contract that it is difficult to understand. The cross-examination of the plaintiff was long and technical, and many of his answers were somewhat inconsistent with his theory that a new and independent oral contract had been made a few days after the written contract of November 29, 1916. After a careful examination of the testimony, we have concluded that the evidence was sufficient to submit this issue to the jury.

It is also urged that the plaintiff's testimony bearing upon the alleged second oral contract showed that the contract, if entered into at all, was made in December, 1918; that it was not to be performed within a year, and hence was void under the statute of frauds. Here again there is confusion in the testimony. The plaintiff first testified that this second oral contract was made in December, 1918. Later he was again called to the stand, and made it clear that he desired his testimony to be understood as fixing the date of the second oral contract in January, 1919. The court instructed the jury upon this phase of the case that, if they believed from the testimony that the contract was made in December, 1918, the plaintiff could not recover upon the second oral contract. We think under the circumstances this issue was properly submitted to the jury.

The defendant next contends that the court erred in permitting the affidavit of the plaintiff to be introduced in evidence as proof of the amount of commissions owing to him on renewals and overwritings. This affidavit was offered by the plaintiff, and received in evidence by the court upon the theory that it was competent under section 8901, Comp. St. 1922. This section of the statute provides, in substance, that either party to an action may demand in writing of the adverse party an inspection of any book, paper or document in his possession or under his control containing evidence relating to the merits of the controversy; that, if compliance with the request is not made within four days, the court or

judge upon notice may in their discretion order the adverse party to give the other within a specified time an inspection of the book, paper or document desired, and on failure to comply with such order the court may exclude the book, paper or document from being used in evidence, or, if wanted in evidence by the party applying for it, may direct the jury to presume it to be such as the party by affidavit alleges it to be.

It appears that a proper demand was made by the plaintiff for an inspection of certain books and records of the defendant showing the renewals and overwritings of policies procured by the plaintiff or his agents. This demand not having been complied with, the court made an order commanding the defendant to produce in court at 9 a. m. on September 2, 1920, certain of the books and records of the defendant for inspection by the plaintiff. Apparently this order was not complied with, as it appears that on September 4, 1920, the defendant filed certain objections to the production of its records. No ruling appears to have been made upon the objections. Afterwards the plaintiff filed an amended petition, and secured a second order from the court requiring the defendant to produce for plaintiff's inspection certain designated books and records. In this order no time was designated within which the books should be produced. Apparently this order was not complied with. Later, on December 20, 1920, the plaintiff filed an amendment to his amended petition, and secured from the court a third order requiring the defendant to produce its books and records for the plaintiff's inspection. This order also failed to state within what time the books should be produced. It appears that the plaintiff was accorded the privilege of making only a partial examination of the books. Upon the trial the plaintiff offered in evidence, and the court received, plaintiff's affidavit setting forth in general terms the contents of the books and records demanded with reference to renewals and overwritings. Defendant's main objection to the in-

production of the affidavit in evidence is that no proper preliminary order for the production of the books and records was made by the court. The point is stressed that the order of the court did not state the time within which the books and records should be produced. This is true of the second and third orders. The first order of the court specifically stated a time. So far as the record shows, the first order was never set aside or modified. In this state of the record we are of the view that the court did not abuse its discretion in issuing the orders for the inspection of the books and records, and further that a sufficient preliminary order was made to permit the affidavit to be used in evidence.

Defendant also urges that the evidence is not sufficient to sustain the verdict. The only evidence bearing upon the amount which the plaintiff claimed for renewals and overwritings was the affidavit above referred to. This affidavit recited in substance that defendant's books would show that from November 1, 1913, to May 10, 1920, the plaintiff and his agents wrote 927 policies in defendant company; that 463 of said policies have been renewed; that the total aggregate of renewal premiums paid to the defendant was $18,901.45, upon which plaintiff was entitled to a commission of 5 per cent., amounting to $2,703.05 (this is a manifest error); that there was paid to the plaintiff on said account $1,203.05, leaving a balance due thereon of $1,500; that the amount of overwritings due the plaintiff was $716.70; that the last payment on account of commissions, renewals and overwritings was made in December, 1919.

Upon the issue presented under the second oral contract the plaintiff testified that there was due him $1,200 for salary, and $619.32 for expenses, making a total of $1,819.32. It will be observed that the plaintiff's testimony shows his claim to be made up of items as follows:

On first oral contract for renewals.....$1,500.00
On first oral contract for overwritings.... 716.70

On second oral contract salary and expenses 1,819.32

Total.....$4,036.02

At the defendant's request the court instructed the jury that in no event could the plaintiff recover any commissions shown to be due and unpaid more than four years prior to the institution of the present action, which was on May 15, 1920. Whether this instruction was proper in view of the alleged payment on the account it is not necessary to determine, as plaintiff makes no objection to the instruction. The affidavit of plaintiff shows that the renewals and overwritings were earned between November 1, 1913, and May 10, 1920, a a period of something over six years. No date is given showing when any particular part of the renewals and overwritings were earned by the plaintiff. The aggregate of the renewals and overwritings, according to the affidavits, is $2,216.70. Under the court's instruction the jury were not permitted to allow any commissions earned prior to four years before the commencement of this action. It is plain that the jury had no data before it from which it could determine what part of the total sum was earned within the four-year period. Confronted with this situation it is quite apparent from the verdict rendered that the jury undertook to apportion the total amount earned during the six-year period by allowing 2/3 thereof for the four-year period, as is shown by the following summary:

2/3 of $1,500 claimed on renewals.....$1,000.00
2/3 of $716.70, overwritings 477.80
Salary of $100 a month for one year, and expenses of $619.32 ..... 1,819.32

Total.....$3,297.12

This is the exact amount of the jury's verdict. Under this state of facts we think it is clear that there was not sufficient evidence to sustain the verdict. It cannot be

presumed that the commissions earned within the four-year period amounted to 2/3 of the entire amount for a period of six years.

Other objections have been urged by the defendant, which have been considered, but which seem to us unnecessary to determine.

It follows from what has been said that the judgment should be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ROSY KUNES ET AL., APPELLEES, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLANT.

FILED MAY 15, 1923. No. 22367.

1. **Insurance:** AGENCY. "Where the by-laws of a fraternal beneficiary association authorize the clerk of a local camp to collect arrearages from members who have been suspended for nonpayment of assessments, to restore their names to the membership list, and to report reinstatements to the soverign camp, he is the agent of the association in performing those duties." *Henton v. Sovereign Camp, W. O. W.*, 87 Neb. 552.

2. ———: REINSTATEMENT: ESTOPPEL. "A fraternal beneficiary association may be bound by the action of a local camp clerk who collects arrearages from a member suspended for nonpayment of assessments and restores his name to the membership list without demanding or receiving a health certificate required by the by-laws, where the clerk acts with full knowledge that the member is sick at the time, and where there is no fraud on the latter's part." *Henton v. Sovereign Camp, W. O. W.*, 87 Neb. 552.

3. ———: BY-LAWS: INCREASE IN ASSESSMENTS. Where a regularly enacted by-law of a fraternal beneficiary association provides for the payment of an increased rate of assessments by its members after January 1, 1920, and further provides that members who had become such before that date by continuing to pay at the prior rate thereby elected to annul the provision in the certificate calling for the payment by the association of $100 for a monument, *held*, such by-law is reasonable; that a member by continuing to pay at the old rate thereby forfeited his right to monument benefits.

APPEAL from the district court for Colfax county:

FREDERICK W. BUTTON, JUDGE. *Remanded, with directions.*

De E. Bradshaw and *George W. Wertz,* for appellant.

W. C. Hronek and *W. I. Allen, contra.*

Heard before MORRISSEY, C. J., ALDRICH, DAY and GOOD, JJ.

DAY, J.

This is an action on a fraternal beneficiary certificate to recover $1,000 for life insurance, and an additional sum of $100 for a monument. The certificate was issued by the defendant, a fraternal beneficiary association, on October 3, 1903, to Jendrich Studnica, who died May 6, 1920. The plaintiffs are children of the insured, and are the beneficiaries named in the certificate. The defendant denied liability on the ground that the certificate was forfeited by the failure of the insured to pay the assessments as provided in the by-laws of the association, which it is alleged were a part of the insurance contract. With respect to the provisions of the certificate relating to the payment of $100 for a monument, it was specially pleaded that the insured had consented to an annulment of that part of the contract by paying assessments at the old rate, as provided might be done by the provisions of certain by-laws enacted by the sovereign camp of the association in 1919. The reply pleaded a waiver of the forfeiture, and also a general denial. A jury was waived, and trial was had to the court, resulting in a judgment in favor of the plaintiffs. As orginally entered the judgment was for $1,000 with interest from May 6, 1920, and the additional sum of $100 for a monument, as provided in the certificate, making a total of $1,183. On considering the defendant's motion for a new trial, the court became convinced that under the by-laws of the association, and the facts presented, the insurance should be scaled down, and the judgment was reduced to $155. The judgment as

finally entered was for $1,028. From this judgment defendant appeals.

It appears that the defendant is a fraternal beneficiary association, which, in addition to other features, provides insurance for its members. A part of its general plan is carried on through local or subordinate camps. The insured was a member of one of these subordinate camps, known as "Zapadni Dub Camp No. 17," located at Dodge, Nebraska. To retain his membership and keep his insurance, the by-laws of the association, which were a part of his agreement, obligated him to pay certain monthly assessments. The by-laws provided that the assessments for each month were payable on or before the first day of the following month, and that if a member failed to pay his assessments within that time he should stand suspended, and during such suspension all rights under his certificate were void. The by-laws also provided that a suspended member might be reinstated on certain conditions, among them the payment of all assessments in arrears, and the furnishing of a certificate of good health.

It appears that at the biennial session of the sovereign camp of defendant association, held in July, 1919, certain by-laws were enacted and others amended, which became effective December 31, 1919. The effect of these new by-laws was to raise the assessments upon all members commencing January 1, 1920.

Under these new by-laws members who became such prior to January 1, 1920, had the option of continuing to pay assessments at the old rate. These by-laws provided in substance that, if a member continued to pay at the old rate, he thereby elected to have the amount of insurance named in his certificate reduced as provided in a table attached to the by-laws. This reduction as applied to the facts in the case at bar amounted to $155. The adoption of the higher rate of assessment, which no doubt was necessary, proved to be very unpopular. When the new rate became effective the insured, together with

22 other members of the Zapadni Dub Camp, refused to pay the assessments at either the old rate or the new rate, and were suspended. The insured was suspended February 3, 1920. The clerk of the local camp, acting under the direction of the sovereign camp, made special efforts to induce the suspended members to pay their assessments and be reinstated. He called upon the insured and also talked with insured's son (not the beneficiary in the certificate) and induced him to pay up his father's assessments. On March 30, 1920, the son paid the assessments for the months of January, February, and March, and also arranged with the clerk for the payment of subsequent assessments, and the insured was reinstated. The clerk promptly remitted the amount of the assessments for the months of January, February, and March to the sovereign camp, as having been paid by the insured. The defendant accepted the assessments and retained the same, together with two subsequent assessments, until the date of the trial in July, 1921, when it was tendered back. At the time the payment was made and the insured reinstated no health certificate was demanded by the clerk of the local camp. He testified that he had never had any health certificate blanks; that he knew the condition of the insured's health; knew that he had undergone an operation for the removal of his tonsils, but regarded him as in fairly good health. It is not claimed that the insured or his son who paid the assessments perpetrated any fraud upon the clerk of the local camp or the defendant in procuring the insured's reinstatement.

Under the plan of organization of the defendant association it collected the assessments through the clerks of the several local camps. That the clerk of the local camp was the agent of the defendant in doing what he did cannot be doubted under the decisions of this court. *Henton v. Sovereign Camp, W. O. W.*, 87 Neb. 552.

It is clear that the provisions of the by-laws respecting the conditions upon which a suspended member might be

reinstated are for the benefit of the association and may be waived by it. From the reports of the clerk of the local camp the defendant knew that the insured had been suspended. It also knew when the remittances were made in payment of the assessments for January, February, and March, that the clerk was reinstating the insured, as otherwise there would be no purpose of remitting the money for these months. By being charged with the knowledge of its agent, the defendant knew that no certificate of good health had been furnished by the insured. Under these circumstances we think the defendant cannot now claim that the certificate was forfeited for the nonpayment of the assessments, or that the insured was improperly reinstated.

Under the facts before us we think the case falls within the rules announced in *Modern Woodmen of America, v. Colman,* 68 Neb. 660, *Pringle v. Modern Woodmen of America,* 76 Neb. 388, and *Henton v. Sovereign Camp, W. O. W.,* 87 Neb. 552. In the *Henton* case it was held: "Where the by-laws of a fraternal beneficiary association authorize the clerk of a local camp to collect arrearages from members who have been suspended for nonpayment of assessments, to restore their names to the membership list, and to report reinstatements to the sovereign camp, he is the agent of the association in performing those duties." And, further: "A fraternal beneficiary association may be bound by the action of a local camp clerk who collects arrearages from a member suspended for nonpayment of assessments and restores his name to the membership list without demanding or receiving a health certificate required by the by-laws, where the clerk acts with full knowledge that the member is sick at the time, and where there is no fraud on the latter's part."

It is urged by the defendant that the court erred in rendering a judgment requiring the defendant to pay $100 toward a monument to be erected over the grave of the insured. At the biennial session of the sovereign

camp held in July, 1919, as above stated, a by-law was also enacted which provided in substance that a member who continued to pay at the old rate after January 1, 1920, thereby consented to the annulment of that part of the certificate relating to monument benefits. At the time the insured became a member of the association he agreed, among other things, to be bound by such by-laws as then existed or which might thereafter be enacted. Under the circumstances disclosed by the record it seems that the by-laws enacted at the biennial session of 1919 relating to the scaling down of the amount to be paid upon certificates, and also the annulment of monument benefits, are reasonable, and that the insured was bound thereby. We think, therefore, that the court erred in rendering judgment for $100 for the erection of a monument.

It is next urged by the defendant that neither the insured nor the beneficiaries paid the assessments. We see no merit in this contention. Assuming that the payment was made without the knowledge of the insured or the beneficiaries, still it could be ratified by them. The fact that the beneficiaries are here insisting upon the payment of this certificate is a sufficient ratification of the act of their brother in paying the assessments.

From what has been said it follows that the court erred in including in the judgment $100 for a monument, but in all other respects the judgment is fully sustained. We think a new trial is entirely unnecessary, but the cause is remanded, with directions to enter judgment in conformity with the views herein expressed.

REMANDED, WITH DIRECTIONS.

WILLIAM WHETSTONE, APPELLANT, V. JOHN SLONAKER ET AL., APPELLEES.

FILED MAY 15, 1923. No. 22303.

1. **Criminal Law:** PROHIBITED LEGISLATION. Section 2, ch. 195, Laws 1905 (Comp. St. 1922, sec. 1194), in so far as it attempts to confer jurisdiction upon the county court to impose both a fine of $500 and

imprisonment in the county jail for six months, is unconstitutional and void.

2. **Constitutional Law**: PROHIBITED LEGISLATION. An act of the legislature that is forbidden by the Constitution at the time of its passage is absolutely null and void, and is not validated by a subsequent amendment to the Constitution authorizing it to pass such an act.

APPEAL from the district court for Brown county: ROBERT R. DICKSON, JUDGE. *Reversed, with directions.*

J. J. Harrington, for appellant.

Clarence A. Davis, Attorney General, John M. Cotton and *D. R. Mounts, contra.*

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

GOOD, J.

This is a proceeding commenced in the district court for Brown county by William Whetstone, petitioner, for a writ of habeas corpus. Petitioner alleges that he is unlawfully deprived of his liberty by the sheriff of said county and prays for his release. The sheriff admits the imprisonment and attempts to justify it. In his return he shows that in a prosecution before the county judge of said county, sitting as a juvenile court, petitioner was charged with the offense of contributing to the delinquency of a child. Petitioner was convicted as charged, and the county judge sentenced him to pay a fine of $500 and to serve six months in the county jail. It was from imprisonment under this sentence that petitioner applied for the writ of habeas corpus. The district court denied the writ, and petitioner has appealed.

Petitioner was prosecuted under section 1193, Comp. St. 1922, which was enacted as section 1, ch. 195, Laws 1905. Said section provides, for its violation, a penalty of a fine not exceeding $500 or imprisonment in the county jail for a period of not exceeding six months, or both such fine and imprisonment. Section 2 of said chapter 195 (Comp. St. 1922, sec. 1194) provides in part as follows: "The district and county courts in the

several counties shall have concurrent jurisdiction over all cases coming within the provisions of this article." If said section 1194 is valid, the county court was vested with jurisdiction to hear and determine the case and impose the penalty.

1. When said chapter 195 was enacted, the Constitution of 1875 contained a provision that county courts shall not have jurisdiction in criminal cases in which the punishment may exceed six months' imprisonment or a fine of over $500. We think it is too clear to admit of argument that the jurisdiction, attempted to be conferred by section 1194, Comp. St. 1922, being section 2, ch. 195, Laws 1905, is greater than was authorized by the Constitution. The power of the legislature was circumscribed by this constitutional provision. It was powerless to confer the jurisdiction which it attempted.

It is held in *Finders v. Bodle,* 58 Neb. 57, that an act of the legislature, passed in violation of the Constitution, is void from the date of its enactment, and that "An unconstitutional statute creates no new rights and abrogates no old ones. It is for all purposes as though it had never been passed."

It is held by the United States supreme court in *Norton v. Shelby County,* 118 U. S. 425, 442: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Cooley in his work on Constitutional Limitations (7th ed.) at page 259, lays down the rule thus: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and

which, consequently, is to be regarded as having never, at any time, been possessed of any legal force."

It follows that said section 2, ch. 195, Laws 1905 (Comp. St. 1922, sec. 1194), in so far as it attempts to confer jurisdiction upon the county court to impose both a fine of $500 and imprisonment in the county jail for six months, is unconstitutional and void.

2. On September 21, 1920, the Constitution of the state was amended so that it now provides that county courts shall not have jurisdiction in criminal cases in which the punishment may exceed six months' imprisonment or a fine of over $500, or both. Const., art. V, sec. 16. Had chapter 195, Laws 1905, been enacted subsequent to the amendment to the Constitution, it would not be violative thereof. It is argued that the amendment to the Constitution has the effect of vitalizing a statute which was before inoperative. We think this position is not sound. The statute, in so far as it attempts to enlarge the jurisdiction of the county court, is not only inoperative, but is inert and was lifeless from its passage.

If the law-making body goes through the form of enacting a law, which it is prohibited by the Constitution from enacting, its action is wholly void and cannot be validated by a subsequent amendment to the Constitution so as to confer authority upon the legislature to pass such a law. *Seneca Mining Co. v. Osmun*, 82 Mich. 573; *Dewar v. People*, 40 Mich. 401; *Village of Mount Pleasant v. Vansice*, 43 Mich. 361; *Ex parte Sparks*, 120 Cal. 395; *Norton v. Shelby County, supra*.

"An act of the legislature, not authorized by the state Constitution at the time of its passage, is absolutely null and void, and is not validated by a subsequent adoption of an amendment to the Constitution authorizing it. *State v. Tufly*, 20 Nev. 427. To the same effect, *Fleming v. Hance*, 153 Cal. 162.

It follows, therefore, that section 2, ch. 195, Laws 1905 (Comp. St. 1922, sec. 1194) did not and does not

confer jurisdiction upon the county court to impose both a fine of $500 and imprisonment for six months in the county jail, and that the subsequent amendment to the Constitution does not have the effect of vitalizing such statute.

Petitioner is therefore unlawfully deprived of his liberty, and it was error for the district court to deny the writ of habeas corpus. The judgment of the district court is reversed and the cause remanded, with directions to allow the writ and release the petitioner from his unlawful imprisonment.

REVERSED.

EDWARD PERRY, APPELLEE, V. CHARLES MEYER, JR., APPELLANT.

CHARLES MEYER, JR., APPELLANT, V. EDWARD PERRY, APPELLEE.

FILED MAY 15, 1923. No. 22385.

1. **Contracts:** RESCISSION. The principal relief to be effected by a rescission of a contract is to place the parties in substantially the same condition as they were in prior to the making of the contract. It is incumbent upon one seeking the rescission of a contract, where the parties cannot be placed in *statu quo*, to furnish to the court such evidence that it can do equity between the parties.

2. **Vendor and Purchaser:** RESCISSION. "Where, with knowledge of all the facts on which a rescission of a contract for the sale of land may be based, the vendee does some act which prevents him from placing the vendor in *statu quo* he cannot claim a rescission of the contract." *Stewart v. Tate*, 103 Neb. 28.

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

W. K. Amick, for appellant.

A. R. Davis and *C. H. Hendrickson, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

GOOD, J.

Edward Perry commenced an action against Charles

Meyer, Jr., to foreclose a real estate mortgage, given to secure a part of the purchase price of 365 acres of land sold and conveyed by Perry to Meyer. Charles Meyer, Jr., commenced an action against Edward Perry to rescind the contract of sale of said land and for a cancelation of the mortgage on the ground that a merchantable title to the land had not been furnished. The two actions were consolidated and tried together, resulting in a decree foreclosing the mortgage and a dismissal of the cross-action for a rescission of the contract and cancelation of the mortgage. Charles Meyer, Jr., has appealed. Hereafter in this opinion Edward Perry will be referred to as plaintiff and Charles Meyer, Jr., as defendant.

On July 26, 1919, the parties entered into a written contract which provided that plaintiff would, on March 1, 1920, furnish a good and sufficient abstract of title and warranty deed to the 365 acres of land, and that defendant would pay therefor the sum of $135,375, of which $5,000 was to be paid in cash, and on March 1, 1920, the further sum of $25,000 was to be paid and a mortgage given on the land to secure the sum of $105,375. When March 1, 1920, arrived, plaintiff was not able to furnish a merchantable title to the land, but both parties were desirous of carrying out the contract. It was then arranged that plaintiff would, not later than November 1, 1920, perfect title to the land and furnish abstract showing merchantable title, and he then gave to the defendant a bond in the sum of $10,000, with surety, that title would be perfected, and that defendant should be held harmless from all loss, expense and damage by reason of said title being defective. Thereupon plaintiff delivered a warranty deed and possession of the lands to the defendant, who then paid the $25,000 of the purchase price then due, and executed and delivered to plaintiff a mortgage for $105,375.

The record shows that plaintiff immediately took steps to correct the defects in the title which had been pointed

out by counsel for defendant, and, among other things, an action to quiet title was prosecuted in the name of defendant, who verified the petition and signed the affidavit for service by publication, which action was prosecuted to a final decree, quieting the title in the name of the plaintiff in that action, the defendant herein. Apparently, when all of the defects which had been pointed out by counsel for defendant had been, or were about to be, fully complied with, defendant discharged his attorney and employed others, who in turn examined the abstracts and pointed out some additional defects. Plaintiff then attempted to comply with these requirements, and, apparently when the defects were about to be removed so as to satisfy defendant's counsel, defendant again discharged his counsel, employed still another, who declared the title not merchantable, and demanded a rescission of the contract. Plaintiff began the action of foreclosure on the 3d day of March, 1920, and defendant began the action for rescission a few days later. The record shows that defendant had been in possession of the lands for a little more than a year and received the rents, profits and income therefrom; that he had cut and manufactured into lumber a considerable quantity of timber, which was growing upon the premises, and had removed therefrom certain fence posts, gates, wires and other material.

Defendant alleges in his cross-petition that on the 1st of March, 1920, he was induced to accept a deed to the premises, make the cash payment of $25,000 and execute a mortgage for the remainder of the purchase price of the premises, upon the promise and representation of the plaintiff that he would, not later than November 1, 1920, perfect title to the land so as to make it marketable, and in the event of failure so to do, he would cancel the sale contract. While the evidence on this question is conflicting, the trial court found against defendant on this proposition, and from a careful examination of the

evidence we are of the opinion that the finding is supported by a preponderance of the evidence.

The trial court made elaborate findings as to each of the defects alleged to exist in the title, and found against defendant on each and every one of them, and that a good, merchantable title to the whole premises was vested in the defendant; and further found that the real estate in question had decreased in value to the extent of 30 per cent., and that the final objections by defendant to the title are technical and unsubstantial, and not such as would cause an ordinarily prudent man, desiring to purchase land and acquire title thereto, to entertain a just apprehension of future trouble therefrom, and that the objections to title were not for the purpose of having plaintiff perfect title, but were made in order to enable defendant to claim grounds for rescission of the contract, and for a recovery of the part purchase price paid, and to avoid liability for the balance of the purchase price remaining unpaid. The court also found that, by reason of the cutting of the timber and the removal of material from the premises, the parties could not be placed in *statu quo*, and for that reason the defendant was not entitled to a rescission of the contract.

We have examined the record and find that most, if not all, of the objections to the title are not substantial or meritorious, and some are positively frivolous. We do not deem it necessary, however, to consider the objections in detail, because we are of opinion that defendant is not in a position to demand a rescission of the contract.

1. It is a general and well-established rule that there can be no rescission of a contract unless the parties can be placed in *statu quo* or substantially so. *Bell v. Keepers*, 39 Kan. 105; *Mather v. Barnes, Keighley & Greer*, 146 Fed. 1000; *Carlton v. Hulett*, 49 Minn. 308; *Whitlock v. Denlinger*, 59 Ill. 96; *Vaughn v. Smith*, 34 Or. 54; 39 Cyc. 1423. The principal relief effected by rescission is to place the parties in the same condition as they were in before the making of the contract sought to

be rescinded. It is incumbent upon one seeking the rescission of a contract, where the parties cannot be placed in *statu quo,* to furnish to the court such evidence that it can do equity between the parties. The record in this case shows that defendant received the rents, income and use of the 365 acres for one year. It shows that he cut and removed a large number of trees and removed from the land gates, fence posts and wires, but there is not one scintilla of evidence in the record to show what was the value of the use and occupation of the land, or of the timber cut, or of the materials removed from the premises. Defendant failed to furnish the court with any evidence by which it could determine the amount that defendant should be charged as an equivalent for the things received by him, and do justice and equity.

2. The record discloses that, after defendant knew of the defects in the title of which he complains, he continued to cut timber and convert it into lumber. This is an act inconsistent with a right to rescind. "Where, with knowledge of all the facts on which a rescission of a contract for the sale of land may be based, the vendee does some act which prevents him from placing the vendor in *statu quo* he cannot claim a rescission of the contract." *Stewart v. Tate,* 103 Neb. 28.

The fact that after defendant knew there were defects in the title he consented to accept a deed and went into possession of the land, and at the same time took a bond from the plaintiff to indemnify him and hold him harmless from all loss, expenses and damage by reason of said title being defective, clearly indicates a purpose to accept the title and rely upon an action upon the bond for damages, in the event that title was not perfected according to the contract.

We are clearly of the opinion that defendant was not entitled to a rescission of the contract, and it therefore follows that the decree of the district court in denying

a rescission and awarding foreclosure of the mortgage is right, and it is therefore

AFFIRMED.

BILLY GEORGIS ET AL., V. STATE OF NEBRASKA.

FILED MAY 15, 1923. No. 22981.

1. **Criminal Law:** EVIDENCE UNLAWFULLY OBTAINED: ADMISSIBILITY. "Where articles or information are offered in evidence, which are pertinent to the issue, the court will not exclude them because they may have been obtained in an irregular or illegal manner." *Billings v. State,* 109 Neb. 596.

2. ———: CONSPIRACY: DEFENSES. It is no defense to a criminal prosecution for conspiracy to obtain money from another by a confidence scheme, which, had it been successful, would amount to grand larceny, that the person to be defrauded intended to participate in an unlawful transaction.

3. ———: INSTRUCTIONS. Before error can be predicated upon the failure to charge the jury upon a given point, there must have been a request therefor, unless it is upon a question where a statute or positive rule of law requires the giving of such instruction.

4. **Larceny.** If a person obtains possession of money from the owner by fraud, with the intent to appropriate the same to his own use and deprive the owner of his property therein, the taking is larceny; and, where fraud is practiced to obtain possession, no actual violence is necessary, for the fraud takes the place thereof.

ERROR to the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Organ & Bohan and *J. R. Lones*, for plaintiffs in error.

O. S. Spillman, Attorney General and *Lee Basye, contra.*

Heard before MORRISSEY, C. J., ALDRICH, DAY and GOOD, JJ., BUTTON, District Judge.

GOOD, J.

Billy Georgis and Louis S. Dochoff, plaintiffs in error and hereinafter referred to as defendants, have brought this case to this court for a review of the record of their conviction upon an information, charging them with the

offense of conspiring to commit grand larceny. Each of the defendants was sentenced to imprisonment in the state penitentiary for a term of two years and to pay a fine of $10,000.

The evidence indicates that defendants represented to one Todoroff that they could purchase from the secretary of the United States treasury paper like that used in making United States currency, but that it could be purchased only in quantities costing $10,000, and which quantity, when printed, would make $1,500,000 in counterfeit money that would pass as genuine, and that they possessed a machine for printing counterfeit money; that they had $6,700 and required $3,300 more, in order to purchase a consignment of paper. They attempted to persuade and induce Todoroff to furnish the $3,300 for the unlawful purpose. Todoroff was shown samples of the paper and a new $5 bill, which they claimed was one that had been recently made. Todoroff feigned interest in their proposition and promised to furnish $3,000 for the unlawful scheme. He suggested giving them a check, but they insisted on having money and in large denominations, preferably $100 bills. He promised to go to the bank and get the money, and fixed upon a time and place when and where he would meet them and turn over to them the $3,000. Todoroff then communicated with officers of the United States secret service, and was furnished a package of counterfeit bills, which he was instructed to turn over to them instead of the real money. He met them at the time and place agreed upon and turned over the package of counterfeit bills, and instantly the defendants were arrested by the officers of the law. They were searched, and, after disclosing where their room was in an Omaha hotel, police and United States secret service officers visited their room, made some observation therein, and then a little later, with one of the defendants, returned to the room and searched the same and took therefrom papers and documents, some of which

were of an incriminating nature and which were used as evidence in the trial of the case.

1. Prior to the commencement of the trial, the defendants filed a motion in which they represented that certain documents and papers that were their private property had been unlawfully taken and removed from their custody and possession without their consent, and asked the court to enter an order directing the return of the property so taken from them. This motion was overruled, and the ruling thereon is assigned as error.

When some of these papers and documents, so taken, were offered in evidence, the defendants objected thereto, because they had been unlawfully taken from them, in violation of the provisions of both the federal and state Constitutions against unreasonable searches. This question has recently received careful attention in this court in the case of *Billings v. State,* 109 Neb. 596, wherein it was held: "Where articles or information are offered in evidence, which are pertinent to the issue, the court will not exclude them because they may have been obtained in an irregular or illegal manner." In that case, as in this, before trial motion was made for a return to the defendant of the articles seized by the officer. It is true that in that case the officer had a search warrant, but the articles seized were not on the premises described in the search warrant, and the decision is not based upon the fact that the officer had held a search warrant to search certain premises other than those where the articles were found. In that case there is a full discussion of the question and citation of the authorities.

2. Defendants contend that the evidence fails to disclose an indictable conspiracy, and argue that a conspiracy to be indictable must be one against an innocent person, and that the design of the law is not the protection of one rogue dealing with another, but rather to protect those who, for some honest purpose, are induced, upon fraudulent representations, to part with their money or property. The contention is unsound. It is

immaterial whether Todoroff intended to participate in a scheme for the making of counterfeit money. It is needless to say that defendants had no intention of using his money to purchase paper from the secretary of the United States treasury, to be used in making counterfeit money. They schemed and conspired, by appealing to his supposed cupidity, to obtain his money. His intent or purpose could in no way lessen their culpability. It is no defense to a criminal prosecution for conspiracy to obtain money from another by a confidence scheme, which, had it been successful, would amount to grand larceny, that the person to be defrauded intended to participate in an unlawful transaction. *People v. Martin*, 102 Cal. 558; *Gilmore v. People*, 87 Ill. App. 128; *Perkins v. State*, 67 Ind. 270; *People v. Watson*, 75 Mich. 582; *Cunningham v. State*, 61 N. J. Law, 67; *Horton v. State*, 85 Ohio St. 13; *State v. Martin*, 226 Mo. 538; 25 Cyc. 43.

Defendants' contention is unsound because there is nothing in the evidence that warrants a belief that Todoroff ever intended to participate in any fraudulent or unlawful transaction.

3. It is assigned as error that the court failed to instruct the jury that defendants could not be convicted unless the testimony of Todoroff was corroborated. This is urged apparently upon the assumption that Todoroff was a coconspirator with the defendants. The evidence does not warrant any such assumption. Todoroff was a competent witness, and it was for the jury to determine the weight to be given his testimony. It may be further noted that defendants requested no such instruction. Before error can be predicated upon the failure to charge the jury upon a given point, there must have been a request therefor, unless it is upon a question where a statute or positive rule of law requires the giving of such instruction. *Gettinger v. State*, 13 Neb. 308; *Edwards v. State*, 69 Neb. 386; *Goemann v. State*, 94 Neb. 582; 16 C. J. 1058, sec. 2500.

4. Defendants contend that there is a variance be-

tween the proof and the averments of the information; that the information charges a conspiracy to commit grand larceny, and that, if any offense is proved, it is a conspiracy to obtain money by false pretenses. The evidence is sufficient to sustain a finding that defendants conspired to obtain from Todoroff $3,000 of his money, with the intent to deprive him of his property therein and to appropriate to the use of the defendants. If a person obtains possession of money from the owner by fraud, with the intent to appropriate the same to his own use and deprive the owner of his property therein, the taking is larceny. While it is generally true that in larceny the taking must be a trespass against the owner's possession, yet, where fraud is practiced to obtain possession, no actual violence is necessary, for the fraud takes the place of violence. *Crum v. State*, 148 Ind. 401; *State v. Dobbins*, 152 Ia. 632; 25 Cyc. 40.

Defendants complain that the judgment is too severe and the sentence excessive. Defendants attempted by fraud to deprive another of his earnings acquired by years of toil. No mitigating circumstances are shown. For the protection of society it is necessary that such detestable conduct should be severely dealt with. We have little sympathy for those who seek to cheat and defraud the unwary and unsophisticated. The defendants richly deserve the penalty imposed.

No prejudicial error is disclosed, and the judgment is

AFFIRMED.

JENNIE M. FILLEY, APPELLEE, V. GOLDIE DICKINSON, APPELLANT.

FILED MAY 15, 1923. NO. 22405.

1. **Descent and Distribution:** REALTY OF HUSBAND. Under section 1224, Comp. St. 1922, the right of the wife to inherit the real estate of her husband is barred by the sale of such real estate under execution or other judicial sale during the lifetime of the husband.

2. **Dower:** LANDS SOLD AT FORECLOSURE. A decree of foreclosure of a

mortgage on the husband's land, other than his homestead, and a sale thereunder during his lifetime, which was valid as to him, conveyed a valid title to the purchaser, and left no interest in the wife which will sustain her action to redeem said real estate after the death of her husband because she was not made a party defendant in the foreclosure proceedings.

3. **Homestead.** Evidence examined, and *held* to sustain the finding of the trial court that defendant has no right of homestead in the premises in controversy.

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

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

George N. Foster and *Bert A. Button, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

This is an action in which the plaintiff prays that her title to certain real estate be quieted against the defendant, who it is alleged has no right or title therein. The defendant alleged that the title of the plaintiff depends upon a sale under foreclosure to which the defendant was not a party; that, as the widow of the mortgagor, the defendant has both the equity of redemption and right of homestead in the property, and that by reason of such fact the title of the plaintiff cannot be quieted against the defendant, and prays that her equity of redemption and homestead interest be adjudicated and established. The trial court found generally in favor of the plaintiff and entered a decree quieting title in the plaintiff, and defendant has appealed.

The evidence discloses that on March 6, 1906, John William Dickinson, the husband of the defendant, was the owner of lot 11, block 6, Elm Park addition to the city of Lincoln, Lancaster county, Nebraska; that he and the defendant herein, as husband and wife, executed a mortgage thereon to the Lincoln Savings & Loan Association, and that in 1915 said Lincoln Savings & Loan As-

sociation foreclosed said mortgage against John William Dickinson without making his wife, the defendant herein, a party to the proceedings; that a sale was had under said decree of foreclosure and the property purchased by the Lincoln Savings & Loan Association, who went into possession thereof, and same was afterward sold to the plaintiff, Jennie M. Filley. John William Dickinson, former owner of the title to the property in question, died intestate on May 28, 1920, leaving surviving him the defendant, his widow, and two minor children.

The first question presented on appeal is whether a wife has an equity of redemption in her husband's property, and, if so, whether it can be cut off by the foreclosure of a mortgage without making her a party thereto. If appellant has any rights in the property in question as the widow of John William Dickinson, it must be by reason of statutory authority. In 1907 the statute abolished dower and curtesy. Comp. St. 1922, sec. 1223. By section 1220, Comp. St. 1922, it is provided that, when a husband shall die, leaving a wife surviving, all the real estate of which the deceased was seised of an estate of inheritance at any time during the marriage, which has not been lawfully conveyed or devised, and "which has not been sold under execution or judicial sale, * * * shall descend subject to his * * * debts and the rights of homestead," in a certain manner; in the present case being a one-third part to his surviving wife. As if to emphasize the above quoted provision, section 1224, in speaking of the right of the wife to inherit, provides: "Such right to inherit may also be barred by the sale of such real estate under execution or other judicial sale, during the lifetime of the owner of the title." Under these sections of the statute, during the lifetime of the holder of the title, the real estate, other than a homestead, may be sold under execution or judicial sale and the purchaser takes the title free from any claim of inheritance by the wife after the death of her husband. If, however, the husband dies prior to the judicial sale,

the wife would become vested with an interest therein. These sections of the statute have been so construed in this state in the case of *Arent v. Arent,* 104 Neb. 562. In Iowa, where the statute contains similar restrictions as to dower, the court in the case of *Bowden v. Hadley,* 116 N. W. 689 (138 Ia. 711), held: "The decree of foreclosure of a mortgage on the husband's land and the execution sale, having been valid against him, terminated the wife's inchoate right of dower, and left her no interest which will sustain her action to have the sale decreed void because notice was not served on her in the foreclosure proceedings." The judicial sale in this case being valid as against the husband during his lifetime, the wife is not entitled to equitable relief as against the purchaser at said sale, or his subsequent grantees.

The next question presented for determination is whether in the instant case the property in question was the homestead of the owner, and therefore, after his death, exempt to his widow who was not a party to the foreclosure action. The evidence is in conflict as to the purpose for which the lot was purchased and the building erected thereon. The appellee's evidence discloses that appellant's husband obtained title to the disputed property in 1906, and he secured this loan for the purpose of erecting a house thereon. He, being a carpenter by trade, stated that his purpose was to build the house and sell it; that, after partly completing the house, he was unable to proceed further for want of funds and entirely abandoned the property; that he and his wife are colored people and the lot is located in a white neighborhood; that appellant and her husband had domestic trouble, and she was living apart from him in Iowa at the time of the foreclosure suit. The appellant and other witnesses testified that the intention was to occupy the premises as a homestead, when completed, and that only lack of funds and the foreclosure proceedings prevented the occupancy. There being no actual occupancy of the premises and the evidence not being clear as to the *bona*

fide intention to occupy the premises as a homestead, the finding of the trial court that defendant had no homestead interest therein is right, and the decree of the district court is, therefore,

AFFIRMED.

PAUL MCCOY V. STATE OF NEBRASKA.

FILED MAY 15, 1923. No. 22775.

Criminal Law: MOTION FOR NEW TRIAL. The district court has no jurisdiction to permit an amendment to a motion for a new trial in a criminal case, when motion therefor is filed eight days after the expiration of the three-day period provided by statute and four days after the term at which the verdict was rendered.

ERROR to the district court for Lancaster county: ELLIOTT J. CLEMENTS, JUDGE. *Affirmed.*

Frank C. Yates and *Hugh C. Wilson,* for plaintiff in error.

O. S. Spillman, Attorney General, and *George W. Ayres, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

The plaintiff in error was tried and convicted in the district court for Lancaster county, Nebraska, on January 17, 1922, of the crime of robbery. Two days after he was found guilty he filed in the district court a motion for a new trial; the same omitted grounds of newly discovered evidence, and made no mention of additional evidence obtained after the trial as grounds for a new trial. The term of court was adjourned on January 26, 1922, and on January 30, 1922, four days after the adjournment of the term, and while the original motion was pending, plaintiff in error filed a motion to supplement and amend the original motion by setting out the ground of newly discovered evidence material to his defense, which he could not with reasonable diligence have discovered and

produced at the trial. This motion was overruled on January 30, 1922, and at said time the court also overruled the motion for a new trial, and defendant was thereupon sentenced to imprisonment in the state reformatory for a period of not less than three years nor more than fifteen years at hard labor. The plaintiff in error has brought the case to this court for review.

The only claim of error made is that the court erred in refusing to permit him to amend the original motion for a new trial after the adjournment of the term and before the hearing on the original motion. The motion to amend the original motion was supported by an affidavit of the complaining witness, James Hand, who on the trial had positively identified the defendant as the man who committed the robbery upon him, who stated that since testifying, by reason of investigations and examinations personally made, he would, if called as a witness, qualify his testimony already given to this extent: "That the man who held him up on December 21, 1921, resembled Paul McCoy, but that affiant would testify, if called at this time, that Paul McCoy was not the man who held him up." The materiality and importance of this evidence cannot be denied. Hand was the only witness for the state and positively identified the defendant as the man who committed the robbery. The only question involved is as to the jurisdiction of the court to entertain such an amendment after the time for filing the motion for a new trial and after the term has adjourned.

Whatever may be the holding in other states, the law seems to be well settled in Nebraska that such a motion cannot be entertained. No such provision is found in the statute, section 10158, Comp. St. 1922. *Dodge v. People*, 4 Neb. 220.

"The authority of the district courts to grant new trials in criminal cases, and especially after the term at which a conviction is had, must, we think, if existent, be found in the statute, and, if not there, the remedy

shall be an appeal to the executive, who is clothed with the pardoning power." *Hubbard v. State,* 72 Neb. 62. The syllabus reads: "The district court possesses no inherent or common-law power to grant new trials in criminal cases, on the ground of newly discovered evidence, at the subsequent term to that at which a verdict was found."

In *Evers v. State,* 87 Neb. 721, we held: "The district court has no jurisdiction to grant a new trial, in a criminal case, upon application by petition signed after the term of the trial."

In *Fouse v. State,* 83 Neb. 258, it is held: "This court will not review an order made by a district court refusing a defendant permission to file an amendment to his motion for a new trial, where such application is made more than three days after the return of the verdict."

In *Lillie v. State,* 83 Neb. 268, the defendant, more than three days after the return of the verdict, by leave of court, was permitted to file an amendment to his motion for a new trial. He did not claim that he was unavoidably prevented from including said assignment in his motion for a new trial, which was filed within time. It was held that the refusal of the court to grant a new trial for any reason set out in said amendment will not be reviewed in this court.

These cases seem conclusive of the point raised by appellant, and, no reason being advanced as to why the statutory ground of newly discovered evidence was not included in the assignment in his motion for a new trial, the court was right in overruling said motion.

The judgment of the court is, therefore,

AFFIRMED.

STATE, EX REL. L. N. BUNCE, APPELLANT, V. CHARLES H. KUBAT ET AL., APPELLEES.

FILED MAY 15, 1923. No. 23291.

1. **Justice of the Peace.** Sections 1, 18, and 19, art. V of the Con-

stitution, authorize the legislature to provide for the election of justices of the peace within such districts, for such term, and to have and exercise such uniform jurisdiction, as the legislature may provide by law, and the legislature is further authorized to substitute other courts for justices of the peace within said districts.

2. ———: DISTRICTS. Section 202, Comp. St. 1922, apportions the state into justice of the peace districts with uniform jurisdiction, and therefore does not violate section 19, art. V of the Constitution.

3. ———: MUNICIPAL COURTS. Sections 1915 and 1916, Comp. St. 1922, substitute the municipal court for that of justice of the peace in districts having a metropolitan city, within the meaning of section 1, art. V of the Constitution.

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

Joseph O. Burger, for appellant.

W. W. Slabaugh and *Henry Beal, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

Action in mandamus to compel the county commissioners of Douglas county to approve a hold-over bond of relator as justice of the peace. Relator was the duly elected and qualified justice of the peace of district No. 16, Douglas county, Nebraska, for the term of two years ending on January 4, 1923. In 1921 a statute was enacted providing that, in each justice of the peace district in which there was located a city of the metropolitan class, "municipal courts, as heretofore or hereafter established, are hereby substituted by law for the justice of the peace within such district." Said act was not to take effect until after the term of office of the present incumbents should have expired, which would be on the first Thursday after the first Tuesday in January, 1923. Sections 1915, 1916, Comp. St. 1922. By reason of these provisions no election was held for justice of the peace in district No. 16, and relator contends that said sections, together with section 202, are unconstitutional and void as

being in conflict with section 19, art. V of the Constitution, and he is entitled to qualify and hold over. A demurrer was sustained to the alternative writ, and, relator refusing to plead further, the action was dismissed and relator has appealed.

The first question presented is as to the limitation placed on the legislature under the provisions of article V of the Constitution. Section 1 provides:

"The judicial power of the state shall be vested in a supreme court, district courts, county courts, justices of the peace, and such other courts inferior to the supreme court as may be created by law; but other courts may be substituted by law for justices of the peace within such districts, and with such additional civil and criminal jurisdiction as may be provided by law."

Section 18, provides: "Justices of the peace shall be elected in and for such districts for such term and have and exercise such jurisdiction as may be provided by law."

Section 19 provides: "The organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments and decrees of such courts, severally, shall be uniform."

These sections were adopted in 1920 as amendments to the Constitution of 1875. Formerly the Constitution contained no provision for substituting other courts for justices of the peace, and the legislature had attempted to establish municipal courts with exclusive jurisdiction within the limits of counties over all civil matters up to $1,000. This court held that the legislature had no such authority under the Constitution. *State v. Magney*, 52 Neb. 508. It was the purpose of the framers of these amendments to the Constitution to broaden the constitutional provision to permit such legislation. To carry out the intent and purpose of the several sections, it is necessary to harmonize them, if possible, and, if found inconsistent, then section 1, being a special provision for

substitution of justice courts, must prevail over section 19, containing a general provision for uniformity. The sections, when read together, authorize the legislature to provide for the election of justices of the peace within such districts, for such terms and to have and exercise such jurisdiction as the legislature may desire; said jurisdiction and powers, however, to be uniform; and the legislature is further authorized to substitute other courts for justices of the peace within said districts. This, then, calls for an examination of two questions: (1) Did the legislature apportion justice of the peace districts throughout the state with uniform jurisdiction? (2) If so, did the legislature thereafter legally substitute a municipal court for the justice of the peace court in district No. 16?

The assault made on the uniformity of justice of peace districts apportioned under section 202, Comp. St. 1922, is that counties are adopted as a political unit of dividing the state into justice districts, except Douglas county, wherein two districts are created. Each justice in 92 districts has jurisdiction over his entire county, whereas the justice in district No. 16 is limited to Omaha and district No. 15 is limited to territory outside of Omaha in Douglas county. Relator cites *State v. Magney,* 52 Neb. 508, and *People v. Meech,* 101 Ill. 200, to support this proposition. These cases would apply were it not for the increased grant of power under the constitutional amendments. The power to substitute other courts for justice of the peace districts necessarily presupposes the right to apportion such districts territorially so as to permit such substitution. The legislature in apportioning the districts had in view the distinction between the administration of justice in a metropolitan city and in outside districts, and by making the territorial jurisdiction of district No. 16 coextensive with the city of Omaha they provided that the laws of the state should be administered by a justice of the peace within the city, not as a mark of distinction or difference as to that dis-

trict, but for the convenience of the people within the district. This did not violate the rule as to uniformity. Each justice of the peace exercised the same powers and jurisdiction within his district as every other justice. "If a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, it is not objectionable as wanting uniformity of operation." *State v. Berka,* 20 Neb. 375.

This brings us to the second question. Had the legislature, after apportioning the justice of the peace districts, passed a special act substituting a municipal court for the justice of the peace court in district No. 16, no question could have been raised as to the constitutionality of the act, but relator's complaint is that the legislature attempted to make a general substitution of all municipal courts, with a jurisdiction limited to the boundaries of metropolitan cities, for justice of the peace courts with different territorial limits. It will be noted the law provides for two kinds of substitution—one of courts heretofore established, and another of courts hereafter to be established. It is not necessary to decide as to the validity of the provision relating to courts hereafter to be established, as this feature of the act has no application to the present case, and, as the remainder is a completed act, it will be disregarded. *Redell v. Moores,* 63 Neb. 219. The only municipal court heretofore established was the municipal court within the city of Omaha, and its territorial limits were coextensive with the limits of district No. 16. By substituting the municipal court for the justice of the peace court in Omaha, the legislature was merely carrying out the purpose of the constitutional amendments by adopting a scheme of local government for the city of Omaha, whereby the ordinances of the city and laws of the state might be enforced through one court, thereby abolishing the offices of justice of the peace and police magistrate within the city and providing an adequate system of pro-

cedure to carry out the plan arranged for. The legislature having first apportioned the state into justice of the peace districts with uniform jurisdiction, and then having established municipal courts in cities of the metropolitan class, with powers of the justice of the peace court and with the territorial limits equal to a justice of the peace in district No. 16, and having thereafter substituted the municipal court for justice of the peace court in district No. 16, the office of justice of the peace in district No. 16 was abolished and the relator was not entitled to hold over as justice of the peace within said district.

The judgment of the district court in sustaining the demurrer is therefore

AFFIRMED.

VILLAGE OF DAVENPORT, APPELLEE, V. MEYER HYDRO-ELECTRIC POWER COMPANY, APPELLANT.

FILED MAY 15, 1923. No. 22368.

1. **Electricity**: FRANCHISE: ESTOPPEL. Ordinance 48, with the acceptance thereof, constituted the franchise contract under which the parties to this controversy operated. And where, as in this instance, the village had the power to contract for electric current for 25 years, following the legislation of the year 1919 (Laws 1919, ch. 49), and the parties continued, after this legislation, to operate under such contract, and where to have cut off the current would have worked an irreparable injury to the inhabitants of the village and caused injustice and a legal wrong, the company was estopped to claim the village acted *ultra vires* at the time it entered into the contract in 1915.

2. ———: ———: RATES: EVIDENCE. In this action the question of rates was not involved, and the trial court ruled correctly in excluding all testimony on this subject, as the right of the village to compel the service rested upon the contract only.

APPEAL from the district court for Nuckolls county: LEONARD W. COLBY, JUDGE. *Affirmed.*

Buck & Brubaker and *George A. Lee*, for appellant.

M. S. Gray and *Charles H. Sloan, contra.*

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ., BUTTON, District Judge.

BUTTON, District Judge.

In the year 1915 the village of Davenport, Nebraska, and Ernest Meyer entered into a contract, whereby Meyer agreed to furnish electric current to the village at rates specified in the contract, and the village agreed to accept such current and pay therefor. To this end ordinance No. 48 was passed, whereby a contract was tendered Meyer for a term of 25 years. This ordinance fixed a minimum and maximum rate, and provided for current for Meyer for milling purposes, and contained many provisions unnecessary to recite herein. This tender was accepted by Meyer, in what is termed a contract, of date May 21, 1915. This ordinance, contract and written acceptance, constituting one contract, was consummated by the parties by Meyer bringing into the village the current and the village receiving the same and paying therefor. All went well for the five years mentioned in the written acceptance and for more than one year thereafter. The Meyer Hydro-Electric Power Company, of which Meyer was president, was the real party in interest, and, after furnishing the service for six years, claimed it could no longer furnish current at contract rates, as they were no longer compensatory, and had, in fact, become confiscatory, on account of changed conditions, and the company threatened to discontinue the service unless the village would pay a higher rate. This the village refused to do, and began injunction proceedings, which resulted favorably to appellee, and appellant has appealed to this court.

Ordinance No. 48, conveying the franchise, and the acceptance thereof, was the contract. *Vicksburg v. Vicksburg Water-Works Co.*, 206 U. S. 496; McQuillen, Municipal Ordinances, sec. 565.

Appellant claimed this contract was *ultra vires* on the part of the village and void. Appellee met this conten-

tion with a plea of estoppel. We will dispose of this question of estoppel first, for, if it be sustained, many other questions are eliminated.

The village stood upon its contract and sought its enforcement. The Meyer Hydro-Electric Power Company also wished to stand upon its contract, but desired to prevent the village from doing so, because, as it asserted, under the law as existing in 1915, the village had no express or implied power to enter into such contract. The company did not offer to surrender its franchise and repudiate the contract which it claimed was void; rather, the company insisted upon its contract, said to the village, in effect: "We had a contract with you but, on account of changed conditions you must now pay a higher rate than provided therein, and if you do not do it we will shut off your current until you do. In the meantime, we shall retain our franchise, we shall maintain our lines, we shall continue the right to furnish the current to ourselves. You have always paid us for the current in the past, and we intend you shall do so in the future at a higher rate, and, in short, we intend to stand upon, and insist upon, our contract; but you must pay a rate which will be compensatory and not confiscatory as we claim the present rate is."

The Meyer Hydro-Electric Power Company asked for a 10-year contract and got a 25-year contract. A letter, of the date January 13, 1921, contains a threat to cut off the service, and also the following language, to wit: "We have gone to considerable expense installing another power unit in view of improving our service, and hope to have same in operation soon. I think you gentlemen will agree with us that no business will continue very long if not maintained on a paying basis. Therefore we are asking for a small increase in rates, as we would like to continue in business. Hoping you gentlemen may see fit to reconsider our proposition, we remain, Meyer Hydro-Electric Pwr. Co." It seems clear, therefore,

the company wished to stand upon its contract, but desired a higher and compensatory rate.

The company asserts in its brief "that an illegal and void contract cannot be made the groundwork of an estoppel," and cites a long line of authorities to support this contention. We have no quarrel with these decisions in a proper case; but it is equally elementary that one cannot stand upon and ask performance of a contract and at the same time declare the contract illegal and void. The company is estopped to assert the invalidity of this contract.

We believe the company is estopped to claim the village acted *ultra vires*. To cut off the service from the village now would work an irreparable injury to its inhabitants, endanger life, and property, and health. It is altogether possible that the village acted irregularly in entering into this contract for 25 years in the year 1915. But since the legislation of 1919 (Laws 1919, ch. 49) the village does have the power to operate under such a contract. Both parties to the contract have recognized this fact by acting under it. And, as stated in *Central Power Co. v. Central City*, 282 Fed. 998: "Nor will it avail the company to contend that the 1919 act required adoption of such contracts in a particular form, namely, by popular vote. This contract was an exercise of the proprietary or private business powers of the city, rather than a governmental power, and where dire injury would, as here, result from sustaining a plea of *ultra vires*, the form of exercising a given power of this character will not be permitted to work injustice. *Bell v. Kirkland*, 102 Minn. 213, 13 L. R. A. n. s. 793, 120 Am. St. Rep. 621."

The village probably had the power to enter into a contract like the one involved, but for 5 years instead of 25 years. If the village had the power to contract for electric current, mere irregularities, such as making it for 25 years and without proper appropriations, did not take away the power. And what was more, appellant had always received its pay for the service.

If this contract had been entered into since the legislation of 1919, exactly as it was in 1915, but without submission to a vote, and the parties had acted under it, this would be a mere irregularity, and would not have taken away the power of the village and made possible the defense of *ultra vires*. *Stickel Lumber Co. v. City of Kearney,* 103 Neb. 636; *Rogers v. City of Omaha,* 80 Neb. 591.

Both parties having ratified and acted under the contract of 1915, since the legislation of 1919, had recognized the power of the village to operate under such a contract, even if the village had not the power previous to 1919, which is not conceded, and the doctrine of estoppel was available to the village as a defense. And, further, we do not believe the doctrine of *ultra vires* was available where it would have defeated the ends of justice and worked a legal wrong as in this case. *Ohio & M. R. Co. v. McCarthy,* 96 U. S. 258; *In re Waterloo Organ Co.,* 134 Fed. 341; *Red Cross Protective Society v. Wayte,* 171 Fed. 643; *Central Power Co. v. Central City,* 282 Fed. 998.

There was in the answer a plea that the contract rates, on account of changed conditions, were no longer compensatory, and, in fact, had become confiscatory, and appellant's property about to be taken without due process of law, and its private property about to be taken for public use without just compensation; and evidence was offered tending to sustain this contention and was rejected by the court. This action of the trial court is now assigned as error.

The court had nothing to do with rates and was correct in sustaining objections to this line of evidence. On account of mutuality of interest, if the company were permitted to escape from its contract because rates were not compensatory, then, applying the same logic, the village could have defeated the contract if it could have shown the rates in excess of compensatory. In the last analysis there could be no such thing as a contract. Men

have made bad contracts and have been ruined financially; but this is no reason for abrogating contracts. Corporations sometimes do likewise, but their contracts must be held inviolate. The right of the village, in this action, to compel the service rested on the contract, and only on the contract.

The judgment of the trial court is right, and is

AFFIRMED.

CLARENCE S. PETERSON ET AL., APPELLEES, V. LOUIS F. KUHN ET AL., APPELLANTS.

FILED MAY 15, 1923. No. 22375.

1. **Principal and Agent:** OSTENSIBLE AUTHORITY. "Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." *Thomson v. Shelton*, 49 Neb. 644.
2. **Bills and Notes:** NEGOTIABILITY. Under sections 5950-5954, Comp. St. 1922, a promissory note, secured by a real estate mortgage which provides that the mortgagor shall pay the taxes levied against the mortgage or debt secured thereby, is negotiable, notwithstanding the fact that the note and mortgage are parts of a single transaction.
3. **Evidence** examined, and *held* that the lower court was right in rendering judgment in favor of the administrator and against the maker of the note.

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

Charles L. Whitney and *Horth & Ryan*, for appellants.

Hainer, Craft, Edgerton & Fraizer and *J. H. Grosvenor, contra.*

Heard before MORRISSEY, C. J., ALDRICH, DAY and GOOD, JJ., BUTTON, District Judge.

BUTTON, District Judge.

This was an action to foreclose a mortgage for $800 against lot 12, block 17, South addition, Aurora, Nebraska. Louis F. Kuhn, on April 17, 1918, procured a loan

from W. C. Wentz Company and gave his note to the company therefor, secured by a mortgage on the real estate as above. The W. C. Wentz Company sold and assigned this note and mortgage to Clarence S. Peterson for $800 before maturity. Peterson took the note and mortgage and deposited them in the Fidelity State Bank of Aurora, Nebraska. When the interest fell due the bank notified Kuhn, but was reminded that the note and interest coupons were payable at the W. C. Wentz Company. The bank collected the interest at the office of said company. Before the note was due Kuhn sold the real estate to John Lulow. Lulow refused to assume the mortgage against the real estate, so Kuhn undertook to pay off the indebtedness, and did pay to the Wentz Company the amount thereof, but failed to obtain the note and procure the release of the mortgage. When the note fell due this action was instituted, and Lulow and Kuhn were made parties defendant. John Lulow died, and now Charley Lulow, as administrator of John Lulow's estate, has been substituted. The administrator asked that he be given judgment against Kuhn for the amount due in case the court found for appellee Peterson. The court found for appellee Peterson and determined the amount due and awarded foreclosure and gave the administrator judgment against Kuhn. Kuhn has appealed to this court and now seeks a reversal of the judgment and decree of the lower court.

Appellants now contend the W. C. Wentz Company was the agent of Peterson, and hence the payment to the company discharged the debt. And appellants also contend the note was nonnegotiable and that payment to the original mortgagee is payment to the holder. There is no evidence at all that the W. C. Wentz Company was authorized by Peterson to act for him. Appellants contend, however, that since the note and coupon interest notes recited on their faces that they were payable at the W. C. Wentz Company, and that the Fidelity State Bank,

agent for Peterson, collected the interest there, these facts gave the Wentz Company ostensible and apparent authority to collect the same, and payment to said company discharged the debt and satisfied the mortgage.

Ostensible authority, as used in the law of agency, pre-supposes the existence of the relation of principal and agent. This relation may exist by express words or agreement of the parties, or it may result from conduct of the parties such as will estop them from denying the relation. In the case at bar, Peterson's agent did exactly what the interest coupon notes required it to do, that is, presented the notes at the W. C. Wentz Company for payment. This provision was placed in the notes for the accommodation of the maker and Peterson had nothing to do with it. Manifestly it was the duty of the maker, when he attempted to pay the note, to demand and procure it at the time of payment. He cannot now escape from his own careless act, because Peterson accepted his interest at the hands of the company where Kuhn, as maker of the notes, said the holder of the notes should receive it. Peterson never had but the one transaction with the W. C. Wentz Company. This was the purchase of the note and mortgage. Peterson immediately took the note and mortgage to his bank and had no more to do with the Wentz Company nor any member thereof. Under such circumstances the evidence is entirely insufficient to show authority of the W. C. Wentz Company to act for Peterson for any purpose.

"Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." *Thomson v. Shelton*, 49 Neb. 644; *Rehmeyer v. Lysinger*, 109 Neb. 805; *Holt v. Schneider*, 57 Neb. 523; *Phœnix Ins. Co. v. Walter*, 51 Neb. 182. See, also, *Creighton v. Finlayson*, 46 Neb. 457; *Brown v. Eno*, 48 Neb. 538; *Gilbert v. Garber*, 62 Neb. 464; *Campbell v. O'Connor*, 55 Neb. 638.

Appellants further contend that the note was nonnegotiable, and hence Peterson had notice that payment could be made at the W. C. Wentz Company. The cases of *Garnett v. Meyers,* 65 Neb. 287, *Consterdine v. Moore,* 65 Neb. 296, *Bradbury v. Dillon,* 65 Neb. 300, and *Northern Counties Investment Trust v. Edgar,* 65 Neb. 301, 303, are cited in support of this contention.

The principle of negotiability is that the instrument must show on its face certainty as to the amount to be paid at maturity. Hence, a note and mortgage securing it, executed as part of a single transaction, when construed together, may contain provisions that will render the note nonnegotiable. The above decisions were rendered in 1902. The court, applying the above principle in the above cases, said that the language in the mortgage, "the said parties of the first part hereby agree to pay all the taxes and assessments levied upon * * * the holder of the mortgage for and on account of the same," produced this uncertainty and rendered the note nonnegotiable. The court then held that the maker, without notice of a transfer, could make payment to the payee named in the note and mortgage. The court said such agreement rendered the amount that the holder of the note could demand on the indebtedness itself uncertain, and the note nonnegotiable in the hands of one who took it with notice. In 1911 there was some legislation on the subject. This legislation was amended later and is now found as sections 5950-5954, Comp. St. 1922. Section 5952 reads in part as follows:

"When any mortgage contains a condition that the mortgagor shall pay the tax levied upon the mortgage or the debt secured thereby, the mortgage shall not be entered for separate assessment and taxation, but both interests shall be assessed and taxed to the mortgagor or owner of the real estate. An agreement of this character in the mortgage shall not destroy the negotiability of any note secured thereby."

Prior to this legislation, if the mortgagor failed to

live up to his contract, contained in the mortgage, to pay the taxes, the mortgagee had to pay them and add them to his mortgage, for the taxes ran against the mortgagee. This rendered uncertain the amount to be paid at maturity of the note, and the note and mortgage, being parts of a single transaction, were construed together, and the maker of the note, without notice of a transfer of the note and mortgage, could make payment to the original payee.

Since the above legislation, no uncertainty exists. Where the mortgagor agrees to pay the taxes, they are assessed against him and become a lien against his land, and the mortgagee's note and mortgage remain absolutely definite and certain as to the amount due at maturity. It might be noticed in this connection, also, that the negotiable instruments act, section 4616 Comp. St. 1922, provides that the negotiable character of an instrument is not affected by a provision which "waives the benefit of any law intended for the advantage or protection of the obligor." The reason upon which the above decisions are predicated does not exist in cases like the case at bar. Therefore, under sections 5950-5954, Comp. St. 1922, a note, secured by a real estate mortgage which provides that the mortgagor shall pay the taxes levied against the mortgage or debt secured thereby, is negotiable, notwithstanding the fact that the note and mortgage are parts of a single transaction.

All parties were before the court. The court had jurisdiction of the subject-matter. Having found for appellee Peterson, it was the duty of the court to render judgment against Kuhn and in favor of Lulow for the amount due under the decree, as Kuhn did not object to this procedure.

The decree and judgment of the lower court is right, and is

AFFIRMED.

ANNA WEIDMAN, APPELLEE, V. HERBERT BARNES, DEFENDANT: FRED DYSON, APPELLANT.

FILED MAY 15, 1923. No. 22376.

1. **Principal and Agent**: CONVERSION: MEASURE OF DAMAGES. Where a party enters into a contract to purchase a farm and exchange merchandise in part payment, and acts through an agent, and is cheated and defrauded by the agent, and, when the fraud is discovered, refuses to receive the land, and repudiates the contract and sues the agent for conversion of the merchandise, which had been delivered, and it is beyond the power of the agent to return the property, the measure of damages is the fair market value of the merchandise at the time and place of the fraudulent conversion.
2. **Trover**: MEASURE OF DAMAGES: FAILURE TO INSTRUCT. Where there is a conflict in the evidence as to the value of the converted property, it is reversible error to fail to instruct the jury as to the true measure of damages.

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

J. F. Boyd, for appellant.

Kelsey & Rice and *Jackson & Rice, contra.*

Heard before MORRISSEY, C. J., DAY, LETTON and DEAN, JJ., BUTTON, District Judge.

BUTTON, District Judge.

Appellee entered into a contract with Herbert Barnes for the purchase of a farm for $20,800, trading in thereon a stock of merchandise. Fred Dyson was agent for appellee. The price of the merchandise was inflated, of which fact appellee had knowledge. The merchandise was turned over to Barnes and appropriated by him. Appellee repudiated the contract and started action against Barnes and Dyson for the conversion of her goods. Appellee alleged that Dyson and Barnes entered into a conspiracy to cheat and defraud her out of her property and consummated the conspiracy. Appellee claimed the value and quality of the farm was misrepresented to her, and that she relied upon the representations as true. At the trial Barnes was discharged by the court, no appeal was taken, and he is

not now before this court. Appellee recovered judgment against Dyson for $4,973.60, a motion for a new trial was overruled, and Dyson appealed to this court.

The court instructed the jury that the measure of damages was the difference in the contract price, $20,800, and the reasonable market value of the land on October 30, 1920, but not exceeding the damage claimed, $6,000. This presents the only question before this court, and is: Was this instruction a correct application of the law under the pleadings and proof? We think not. Appellee did not accept the farm and sue for the difference in the contract price and the reasonable value of the land on October 30, 1920. She repudiated the contract and sued for the conversion of her goods. The measure of damage was the reasonable market value of the goods at the time and place of the conversion.

What appellee could have done for herself, she could do through an agent. If she had traded with Barnes herself, without the intervention of an agent, her damage would have been as above. She might have concluded in her own mind that she must have a certain price for her goods; but when she consented to a trade she took chances. She did likewise when she permitted her agent to trade for her. The court found for Barnes, and must have held there was no conspiracy between Barnes and Dyson. Therefore, the basis of appellee's recovery, under the petition, was the fraud of Dyson. What did Dyson defraud her out of? Manifestly her goods. She might have told him not to accept less than a certain price for her goods; but, when she permitted him to inflate the value of the goods for the purpose of trade and became a party to the trade herself, she placed herself in the same position as though she had traded with Barnes herself, and he had defrauded her. If Dyson defrauded her by false statement and deception, he is liable for what he took from her, and, since the goods are not capable of return, her damage is the value of the goods at the time and place of the conversion.

Where a party enters into a contract to exchange merchandise for land, and acts through an agent, and is cheated and defrauded by the agent, and, when the fraud is discovered, repudiates the contract and sues the agent for conversion, and it is beyond the power of the agent to return the property, the measure of damages is the fair market value of the merchandise at the time and place of the fraudulent conversion. *Baker v. Thomas,* 102 Neb. 401. And where there is a conflict of evidence on a material issue, it is error not to submit the question to the jury. *Larsen v. Savidge,* 103 Neb. 79; *Fox v. Scandinavian Mutual Aid Ass'n,* 103 Neb. 117.

The giving of the instruction, adopting a wrong measure of damage, where the evidence was conflicting as to the value of the converted property, was reversible error.

REVERSED AND REMANDED.

The following opinion on motion for leave to remit was filed February 2, 1924. *Motion allowed.*

Appeal: REMITTITUR. When a remittitur will obviate an error resulting from an erroneous charge on the measure of damages, such remittitur, in the absence of other errors, may be accepted and the judgment affirmed, when the amount to be remitted is determinable from the evidence.

PER CURIAM.

In our opinion in this case reported, *ante*, p. 377, the judgment of the lower court was reversed and the cause remanded for further proceedings upon the sole ground that the jury were improperly instructed as to the measure of damages. We held that, the action being one in rescission, the measure of plaintiff's damages was the reasonable value of the stock of goods which the plaintiff turned over to the defendant in the trade.

The testimony on behalf of the plaintiff tended to show that the value of the stock was from $5,000 to $6,000. The lowest value on the stock and fixtures placed by defendant Dyson was $1,750 on the stock, and $800 on the fixtures, making a total of $2,550. One of defendant's witnesses placed the value of the stock at $1,500, but considered himself incompetent to testify

as to the value of the fixtures. Taking this witness' value of the stock at $1,500, and defendant Dyson's value of the fixtures at $800, gives a total value of $2,300. This was the lowest possible valuation of the stock and fixtures. Upon the trial the plaintiff recovered a judgment for $4,973.60.

After our opinion was handed down, the plaintiff filed a motion indicating that, rather than to go to the expense of a new trial, she is willing to file a remittitur from the judgment so that the judgment will equal the value of the stock and fixtures as fixed by the defendant and his witnesses.

As the issue of fraud was determined by the jury in favor of the plaintiff under proper instructions, we can see no objection in allowing the plaintiff to accept the lowest possible verdict which the evidence would warrant, rather than to go to the expense of trying again all of the issues.

In *Mullins Lumber Co. v. Williamson & Brown Land & Lumber Co.*, 255 Fed. 645, it is held: "Where a jury by its verdict has settled all issues in favor of plaintiff, but because of an erroneous instruction may have awarded excessive damages, an appellate court may properly permit the judgment to stand on remission by plaintiff of all above the lowest amount the evidence would warrant."

If plaintiff, within twenty days, shall file a remittitur of $2,673.60, the judgment of the district court will be affirmed; otherwise reversed.

AFFIRMED ON CONDITION.

ABRAHAM KATSKEE, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED MAY 15, 1923. No. 22383.

1. **Negligence**: PROXIMATE CAUSE: PROOF. Where two or more possible sources exist which may have produced an injury to property, and a party alleges an injury and damage to his property growing out of the alleged negligence of another, and the evidence is prin-

cipally circumstantial, the party so complaining must prove, by a preponderance of all the evidence, that the negligence alleged was the proximate cause of the injury and damage, to the exclusion of all other present possible causes, or fail in his action.

2. **Evidence**: EXPERT OPINION: FOUNDATION. A foundation, qualifying a witness to testify that an injury to property was not caused from a particular source, is insufficient to qualify such witness to give an opinion, as an expert, as to the real cause.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

E. R. Leigh, for appellant.

Dana B. Van Dusen and *John F. Moriarty, contra.*

Heard before MORRISSEY, C. J., DAY, LETTON and DEAN, JJ., BUTTON, District Judge.

BUTTON, District Judge.

Appellant was the owner of a building in Albright's Annex in Omaha, Nebraska, and in the year 1917, and for several years prior, had conducted a general merchandise business therein. About 40 or 50 feet northeast of appellant's property was a natural watercourse, known as Stock-Yards creek. To the south of appellant's property, and some 40 or 50 feet from the rear of his building, was another creek. In 1916 the city of Omaha constructed a sewer which was intended to take care of the waters from the Stock-Yards creek, and the city removed a bridge over this creek, near appellants building, and filled in the creek. Appellant claimed this fill caused the waters in Stock-Yards creek to back up near his property, and in time there was a seepage through into his basement and his building and goods were damaged, and claimed the proximate cause was the negligence of the city in filling up this natural watercourse.

The evidence was very unsatisfactory and uncertain and entirely circumstantial as to the proximate cause of the injury. The testimony showed the presence of other standing water near the building and the presence of

the other creek, which always contained water, for which the city was in no way responsible. So far as the evidence was concerned, it was just as likely that the water in the basement came from one of these other sources, for which the city was not liable. The court directed a verdict for the defendant, and appellant has brought the case to this court.

It is now contended (1) that the evidence was sufficient to have taken the case to the jury, and that the court erred in directing a verdict; and (2) that the court erred in excluding the opinion of a witness who would have said the waters from the Stock-Yards creek caused the damage.

The overruling of the motion for a new trial is not assigned as error, and possibly this waives the other two alleged errors; however, we shall consider the other two grounds.

The burden was upon the one claiming damage for an injury, to have proved, by a preponderance of all the evidence, that the negligence alleged was the proximate cause. It was not sufficient to have proved a possible cause, nor even a probable cause, the preponderance of the evidence must have pointed to the cause alleged as the proximate one, to the exclusion of other present and equally possible sources of the injury complained of. *Union P. R. Co. v. Fickenscher*, 74 Neb. 497; *Blid v. Chicago & N. W. R. Co.*, 89 Neb. 689; *Ashbach v. Chicago, B. & Q. R. Co.*, 74 Ia. 248; *Neal v. Chicago, R. I. & P. R. Co.*, 129 Ia. 5; *Eisentrager v. Great Northern R. Co.*, 178 Ia. 713.

So far as expert testimony was concerned the foundation was wholly insufficient. The witness tendered was shown to be an expert on locating leaks in pipes and testified he found none in the water pipes in the basement. As to whether the water in the basement came from any other particular source, no foundation was laid to qualify the witness to state. No authorities are

cited in support of the alleged error, and we will not pursue the subject further.

The judgment of the trial court is right, and is

AFFIRMED.

BERTHA PREBLE, ADMINISTRATRIX, APPELLEE, V. UNION STOCK YARDS COMPANY, APPELLANT.

FILED MAY 15, 1923. NO. 22285.

1. **Master and Servant**: INJURY TO SERVANT: LAST CLEAR CHANCE. Where an engineer sees a brakeman on the side ladder of a car on a moving train in a switch-yard in a position that may become dangerous if the brakeman does not change his position, but the engineer knew that the brakeman was fully aware of the perilous situation he was approaching, and had ample time and a convenient way to avoid the danger by stepping to the end ladder or getting on top of the car, and the engineer believed, and was justified in believing, that the brakeman would so protect himself, it was not the duty of the engineer to keep the brakeman under observation, and stop the train before the point of danger was reached. In such a situation the doctrine of "the last clear chance" is not applicable.

2. ———: CARE REQUIRED. When there are two methods provided to accomplish the same act, one safe and the other unsafe, and both methods are known to the employee, he is bound to use the safe method.

3. ———: FEDERAL EMPLOYERS' LIABILITY ACT: CONSTRUCTION. The federal court interpretation of the federal employers' liability act must prevail over any state law or rule of interpretation of a state court.

4. ———: ———: ASSUMPTION OF RISK. In a case arising under the federal employers' liability act, the statute of Nebraska, section 8833, Comp. St. 1922, which abrogates the assumption of risk of an employee of a railroad company, where the railroad company is guilty of negligence, is not applicable, and the federal law as to assumption of risk is controlling on the state courts.

5. ———: ———: ———: BAR. "Assumption of risk is a bar to the action, in a case governed by the federal employers' liability act, and does not, like contributory negligence, operate merely in reduction of damages." *Pryor v. Williams*, 254 U. S. 43.

6. ———: ———: INJURY TO SERVANT: ASSUMPTION OF RISK. An experienced brakeman who had full knowledge of a dangerous

construction of side-tracks in a railroad company's switch-yard, and the hazard incident to service in such yards, and continued his employment without objection, assumed the risk incident to his employment in a case arising under the federal employers' liability act.

APPEAL from the district court for Douglas county: CARROLL O. STAUFFER, JUDGE. *Reversed.*

Brown, Baxter & Van Dusen and *R. R. Ryan*, for appellant.

Gray & Brumbaugh and *John M. Macfarland, contra.*

Heard before MORRISSEY, C. J., ROSE, LETTON, ALDRICH, DEAN and DAY, JJ., RAPER, District Judge.

RAPER, District Judge.

This is an action by an administratrix to recover damages for negligence in causing the death of her alleged husband, Howard Preble, and is based upon the federal employers' liability act.

The petition alleges that defendant is a common carrier engaged in interstate commerce, and that defendant was negligent in the following particulars: (1) That the engine used by defendant at time of the accident was not properly equipped with a headlight, as required by rule 131 of the interstate commerce commission; (2) that the defendant maintained and operated tracks and switches parallel with each other under a long shed, so close together that, when cars were run on said tracks opposite each other, it was a dangerous place for employees; (3) that the shed was dark and not properly lighted; and (4) that the engineer saw the deceased in a place of danger and negligently failed to stop before the two freight cars came opposite each other. The defendant denies all the alleged negligence, pleads contributory negligence and assumption of risk, and denies plaintiff's marriage with the deceased. The cause was submitted to the jury, which returned a verdict for plaintiff, and judgment was entered thereon.

There is no dispute in the material facts pertinent to

the condition of the tracks, and the lighting, and what took place at the time of the death of Howard Preble, who was employed by defendant as a switchman. Defendant's switch crew, consisting of the deceased, two other switchmen, the fireman, and engineer, went on duty at 4 p. m. of November 20, 1920. Their work was to take loaded cars from loading platforms, and replace them with empties, and were then engaged in interstate commerce. Defendant maintained a shed to cover the tracks between two loading docks. The sheds, about 16 car-lengths long, were lighted by 30 to 40 electric lights placed in the top. Under this shed between the two loading docks are 3 tracks running nearly parallel east and west, the north numbered 3, the center one numbered 4, and the other numbered 5. At a point 4 car-lengths from west end of shed from the south rail of track 3 to the north rail of track 4 is 5 feet and 9 inches, leaving a space between cars opposite each other on those tracks, as plaintiff computes, of about 9 inches. Between 6 and 7 o'clock deceased assisted in placing 4 cars on the west end of track 3. About 9 o'clock the crew had their engine and some cars east of the switch at east end of track 4. Deceased turned the switch to track 4, climbed to top of first car back of engine, and signaled engineer to go ahead, then deceased started to climb down the ladder on the side of the car. The deceased was about 200 feet from the stationary cars on track 3 when the engineer observed him at that time, and deceased being "in the clear," as the engineer expressed it, the engineer had no thought of danger, and then turned his face toward the west on the lookout for signals, and paid no further attention to deceased, as he supposed deceased would not remain on the side ladder until the cars on track 3 were reached. The engineer saw the car on track 3, before he was within 200 feet of it. The engine kept moving, and the engineer happened to look back when he had passed the first car on track 3, and saw deceased "rolling" between the cars, part of his body being above the roof of

the cars. The crushing between the cars, or "rolling," as the railroad men termed it, fatally injured deceased. Howard Preble was an experienced switchman, and had worked for defendant in these yards for 8 or 9 months, and must have been fully aware of the construction of the tracks and the danger he would encounter if he stayed on the side ladder of the car until it reached the standing cars on track 3. All the cars had a side ladder and end ladder, and it was the custom of switchmen, when they were on moving cars liable to pass moving or standing cars on an adjoining track, to use the end ladder instead of the side ladder.

The allegations of negligence 1 and 3 are not sustained by plaintiff's own testimony, and the verdict cannot be upheld on either of the alleged acts.

On the question of liability on the last clear chance theory, it will be noticed from the statement of the facts that the engineman, when 200 feet from the cars on track 3, saw the deceased on the side ladder of the car behind the engine, and supposed and had the right to assume that deceased would not remain in that dangerous place, and, after having received the signal from deceased to go ahead, the engineer turned toward the front of the train to look for signals, as was his duty. There was no further duty resting on the engineer to keep his face toward the deceased, and watch him. The deceased knew the danger of remaining on the side ladder, and knew where the cars had been left on track 3. In *Robbins v. Pennsylvania Co.*, 245 Fed. 435, the court gives this rule: "The doctrine of 'last clear chance' takes account of the acts and omissions of both the person injured and the defendant, and applies only where the defendant has either actual notice or is fairly chargeable with notice of the peril of the person injured, and negligently fails to avoid the injury." The evidence does not establish negligence of the engineer, hence recovery cannot be based thereon.

The proximity of the tracks created a very dangerous

place for the switchmen to work, and this ground of negligence is proved beyond question. The situation also discloses that deceased was fully aware of every element of danger connected with his work at the place, and never made complaint or objection thereto, and defendant contends that he voluntarily assumed the risks of the dangers necessarily inherent in his work there. It is the duty of the state courts to follow the interpretation of the federal courts as to the federal employers' liability act. *Bennett v. Atchison, T. & S. F. R. Co.*, 191 Ia. 1333. While our statute, section 8833, Comp. St. 1922, abrogates assumption of risk where the carrier is negligent, that statute cannot be applied in this case. *Pryor v. Williams*, 254 U. S. 43. That case also holds: "Assumption of risk is a bar to the action, in a case governed by the federal employers' liability act, and does not, like contributory negligence, operate merely in reduction of damages."

Under the federal employers liability act, if an employee knows of a defect and appreciates the risk that is attributable to it, then he assumes the risk, even though it arises from the master's breach of duty, if he continues in the employment without objection. 1 Roberts, Federal Liability of Carriers, secs. 558, 559.

The undisputed facts establish that deceased was an experienced switchman in full possession of his faculties, that he knew the dangerous proximity of the tracks, and that it was an unsafe place to be on the side ladder, and, under the circumstances, assumed the risk. Inasmuch as the cause must be reversed because of the matters above stated, it is unnecessary to advert to the question of the sufficiency of the evidence to prove a common-law marriage between plaintiff and deceased.

Cause reversed and remanded. REVERSED.

FIRST STATE BANK OF CRETE, APPELLEE, V. SPENCER A. YOHO, APPELLANT.

FILED MAY 26, 1923. No. 22364.

Appeal: SUFFICIENCY OF EVIDENCE. When on appeal the question

presented is the sufficiency of the evidence to sustain the ruling of the trial court on a motion to dissolve an attachment, and from an examination of the whole record it is apparent that a finding other than that made by the trial court could not be sustained, the evidence will be held sufficient.

APPEAL from the district court for Saline county: LEONARD W. COLBY, JUDGE. *Affirmed.*

Bartos & Bartos, for appellant.

Glenn N. Venrick and *Cosgrave & Campbell, contra.*

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

MORRISSEY, C. J.

This action is founded upon promissory notes aggregating $8,400. The notes were executed and delivered to plaintiff by defendant, who was engaged in the automobile and garage business. As security for the payment of the notes, defendant executed a chattel mortgage covering his stock of merchandise, equipment, etc., but the mortgage was withheld from record, and, under an agreement between the parties, defendant was authorized to continue his business and sell his stock; the proceeds from the sales, however, to be applied upon the notes. Forty days after the making of the notes, and before any of them had matured, plaintiff instituted proceedings in replevin to recover possession of the property covered by the chattel mortgage and still remaining in the possession of defendant, and instituted this proceeding by attachment to reach other property of defendant. The replevin proceedings are not before us, and we are dealing only with the proceedings had under the attachment.

Five separate grounds for the attachment were alleged, but the allegations that are material for this review are: That defendant was about to remove his property out of the jurisdiction of the court with intent to defraud his creditors; that he was about to convert his property into money for the purpose of placing it beyond the reach of his creditors; that he had property, money and rights in

action which he concealed; and that he had assigned, removed or disposed of or was about to dispose of his property or a part thereof with an intent to defraud his creditors.

Defendant filed a motion to dissolve the attachment; the grounds therefor being that the statements in the affidavits for attachment were untrue. The motion was overruled and judgment in favor of plaintiff was entered upon the notes. Defendant has appealed.

Although presented in several ways, there is but one question for consideration, namely, the sufficiency of the evidence to sustain the attachment. It is purely a question of fact. At the time of executing the notes defendant furnished plaintiff a property statement in which he alleged that the fair and reasonable value of his chattel property was $16,947.75, and that his unpaid bills did not exceed $600. Within the succeeding 40 days he sold the greater part of his stock of goods, office fixtures and garage equipment at wholesale prices, or less, until at the time plaintiff instituted proceedings the goods and equipment remaining, when put upon the market and sold, brought only $3,779.27.

It would needlessly incumber the reports to set out in detail a statement of defendant's transactions. The method of making the sales and the prices realized show conclusively that the sales were not made in the usual course of business. The sales of the office fixtures and shop equipment strongly indicate a determination on the part of defendant to sell not only the merchandise, but to close out the business. It is conceded that the proceeds from the sales were not applied upon the notes, and defendant undertakes to justify his conduct in this regard by saying that he had been advised by his brother-in-law to first pay his unsecured indebtedness. In addition to making the sales heretofore mentioned, defendant also executed on the very day the attachment was procured a note and mortgage in favor of his wife for $6,500 covering the only real estate he then owned. De-

fendant claims that the note and mortgage were executed after the attachment issued, but from all the circumstances we cannot escape the conclusion that they were executed in anticipation of the attachment proceedings. It may be worthy of mention also that improvements had recently been made upon this real estate with the money realized from the property on which plaintiff held a mortgage, and that when defendant submitted his property statement to plaintiff he made no mention of any indebtedness due to his wife.

When the whole record is considered, the conclusion is irresistible that the allegations of the affidavit in attachment are true. No finding other than that made by the trial judge could be sustained, and the judgment is

AFFIRMED.

MARGARET N. CHRISTOFFERSEN, APPELLEE, V. CHARLES WEIR, APPELLANT.

FILED MAY 26, 1923. No. 22389.

1. **Appeal:** CONFLICTING EVIDENCE. In a personal injury action where the evidence of physicians called by the respective parties is conflicting, in respect of injuries sustained, but there is sufficient competent evidence to support the verdict, it will not be disturbed on appeal.

2. ———: INSTRUCTIONS: PRESUMPTION. Where the court instructs on comparative negligence, it will be presumed that the jury took into account the contributory negligence of plaintiff, if any, and considered it in arriving at its verdict.

3. **New Trial:** NEWLY DISCOVERED EVIDENCE. Where an application for a new trial is made on account of alleged newly discovered evidence and the showing discloses that the evidence, if produced, would be cumulative in substance and effect, error cannot be predicated upon a denial of the application.

4. **Municipal Corporations:** USE OF STREETS. The right of a pedestrian to the lawful use of the crosswalks in a city or village is in all respects equal to that of a person driving a motor-propelled vehicle thereon. Comp. St. 1922, sec. 8392.

5. ———: ———: CARE REQUIRED. It is the duty of the driver of an automobile to exercise reasonable care in its operation, and where

pedestrians are numerous and traffic is congested, the degree of care required must be commensurate with the danger reasonably to be anticipated. Comp. St. 1922, sec. 8392.

6. ———: ———: WARNING BY AUTOMOBILISTS. Section 8395, Comp. St. 1922, contemplates, not only the installation of warning devices on motor-propelled vehicles, but that they shall as well be used opportunely by the drivers of such vehicles to apprise pedestrians and other travelers of the approach of an oncoming car.

7. **Appeal:** REMITTITUR. "Where plaintiff in a personal injury action recovers a verdict and the trial court directs a remittitur and the defendant appeals, this court will on request of plaintiff, in a proper case, set aside such remittitur either in whole or in part as the evidence may warrant." *Miller v. Central Taxi Co., ante* p. 306.

APPEAL from the district court for Douglas county. L. B. DAY, JUDGE. *Affirmed as modified.*

Kelso A. Morgan, for appellant.

Rosewater & Mecham, contra.

Heard before MORRISSEY, C. J., LETTON, DAY and DEAN, JJ., BUTTON, District Judge.

DEAN, J.

This suit was brought to recover damages for personal injuries sustained by reason of defendant's alleged negligence in driving his car against plaintiff while she was crossing Farnam street at Fourteenth street in Omaha. She recovered a verdict for $1,200. A motion for a new trial was overruled on condition that plaintiff file a remittitur for $350. Upon compliance with the court's requirement, judgment was rendered for $850, and defendant appealed.

Briefly plaintiff's account of the accident is that at about 6:30 or 7 o'clock in the evening of December 19, 1920, she left the north front door of the Paxton hotel pharmacy at the southwest corner of Fourteenth and Farnam streets. Fourteenth street runs north and south; Farnam east and west. From her evidence it appears that she went directly north on the crosswalk to take a south-bound Council Bluffs trolley

car at Fourteenth and Farnam streets; that when she reached a point about six feet north of the car tracks on Farnam street defendant's car, which was being driven close to the curb, turned west from Fourteenth street into Farnam street and knocked her down; that the left front wheel of defendant's car pinned both of her feet to the pavement and had to be backed off before she could get up, the wheel passing diagonally over her right foot a little above the instep; that after the accident she walked on crutches for three weeks, and the injuries subsequently caused her to limp and at all times caused "great pain and mental anguish and loss of sleep." She also testified that the accident permanently impaired her health and that thereafter she was compelled to have medical treatment almost continuously at an expense approximating $100. It appears from plaintiff's evidence and defendant's admission that he sounded no signal and gave no warning of the approach of his car.

Defendant's version in substance is that on the night of the accident, at about 7 o'clock, he turned his Reo touring car from Fourteenth street into Farnam street at a speed of less than five miles an hour; that he was accompanied by his wife and her sister, Miss Tobin, all three occupying the front seat; that the headlights were turned on and the car was without curtains and there was nothing to obstruct his view; that he did not see plaintiff until she was opposite his left front wheel and that he stopped within six inches; that he immediately stepped out of the car and, at his suggestion, she was taken in his car to a physician at the Paxton hotel, where, on arrival, he told the doctor that plaintiff lost her balance and that her foot slipped under the front wheel of his car, but that the car did not strike her. Upon examination the doctor bound up her foot with adhesive tape. He testified that he did not see plaintiff running as she approached his car. Ten days after the accident plaintiff called defendant up, according to his evidence, and told him that was the first

day she had been able to put her injured foot to the floor, and that he again told her she should have a doctor.

Defendant's wife testified: "The instant the car stopped he (defendant) jumped out, the instant that I screamed, she was going down at the scream. Just at that instant a couple people jumped up there and some helped to pick her, and Mr. Weir backed up a few inches." She also testified that Mr. Weir told the doctor in the Paxton hotel that the front wheel of his car was on plaintiff's foot. When the doctor bound plaintiff's foot she said he advised her "to stay off of it for a few days, it might be sore."

Mrs. Weir's sister testified that she did not see plaintiff until the car turned the corner, and then she made a leap and fell back, and when they arrived at the hotel Mr. Weir and another man took plaintiff by the arm and helped her up the steps.

Mr. Cosgrove, a bystander, testified that he heard a lady cry out, and that he and another man picked plaintiff up and helped to put her in defendant's car; that when he came up to her she was lying on her back in the street on the intersection of the sidewalk.

The only physician who testified on the part of plaintiff was the one who was first called to attend her about three weeks after the accident. He testified that he found she had been hurt with some kind of a crushing or pressing injury to the foot which resulted in crepitus; that her right ankle joint was much swollen and would bear weight with great difficulty and was very tender and painful on motion. He took an X-ray and found a fracture of one of the long bones of the ankle and of the foot, and sprained ligaments, and that the injury was permanent in that plaintiff would always limp; that the arch of her foot went down as soon as she commenced to bear weight on it; that she had formerly been treated for tuberculosis and that this tendency delays healing and tends to localize tuberculosis in an injured bone. He said that his treat-

ment consisted of rest, the use of crutches and adhesive plaster strips.

Three doctors were called on the part of defendant. The doctor who made the examination at the Paxton hotel testified that plaintiff could not put her foot down without pain, but that he found no fracture or deformity in any of the bones, and that he bound her foot with adhesive tape at the time. He further testified that to sprain the ankle or to fracture the small bones of the foot a "terrific force" is required. That the fracture of a bone of a tubercular person would heal more slowly than that of a person in normal health was conceded.

Another, who made an X-ray examination of the injured foot the day before the trial, testified that no fracture was disclosed, and that while there might be a minute fracture that sometimes heals without callus his X-rays gave no evidence of it; that the arch of her foot was in fairly average position; that he could not say she had a bad arch, and that he found nothing in the bones to cause lameness and that she had a good average foot. The doctor's conclusion was that there was nothing wrong with the bones, but he said that did not prove that there was nothing wrong with the foot.

The third physician called by defendant corroborated the other two in the main, but added that if plaintiff's foot or ankle was run over by an automobile it would be possible for the ligaments to become torn or lacerated in some degree, and that torn ligaments will sometimes occasion more pain and more swelling than a bone fracture, but that the X-ray does not disclose ligament injuries as it does bone injuries. He testified that on examination the day before the trial plaintiff complained of pain upon severe rotation of the arch.

Defendant complains of instruction No. 6, which follows: "Certain witnesses (physicians and surgeons) have been called who testified as expert witnesses. You are not bound to take the opinions of experts as binding upon you, but only to aid you in coming to a proper conclusion, their

testimony being received as that of persons who are learned by reason of extra investigation and study along lines not of general knowledge, and the conclusion of such persons may be of value. You may adopt, or not, their conclusions, according to your own best judgment, giving in each instance such weight as you think should be given under all the facts and circumstances of the case."

The argument in the brief is that the evidence of the doctor who testified on the part of plaintiff conflicts with the evidence of the doctors called by defendant, and that "the evidence given by all the doctors was not so much as experts, but rather as men skilled in their profession who had made an actual examination of the plaintiff and were telling the jury the result of their examination."

True, the physicians differed in respect of plaintiff's injuries, their permanent nature and the like. It is obvious that the jury could not accept both of the conflicting versions of medical evidence. They chose between the two. It is elementary that where there is competent evidence to support the verdict, as appears in the present case, it will not be disturbed on appeal. *Penhansky v. Drake Realty Construction Co.*, 109 Neb. 120. Reversible error does not appear in the instruction.

It appears that plaintiff was 26 when she was injured, and that she lived at home with her parents. She testified that, before the injury, she did all the housework because her mother was aged and feeble and unable to work. For her services she received her board, lodging and clothing and about $15 or $20 a month. Since the injury she has been unable to do any of the housework. Clearly the amount of damages allowed by the jury, in view of plaintiff's expenses for medical treatment, and in view of the record generally, is not excessive.

The court properly instructed the jury on the question of comparative negligence, so that if there was contributory negligence on the part of plaintiff, as counsel insist, the jury took it into account in computing the amount of the recovery.

Defendant complains because the court denied his application for a new trial on the ground of newly discovered evidence. The court did not err in its ruling. The showing submitted by defendant discloses that the evidence of the proposed witness would have been cumulative in substance and effect.

The right of a pedestrian to the lawful use of the crosswalks in a city or village is in all respects equal to that of a person driving a motor-propelled vehicle. The statute provides that, "within any city or village no motor vehicle shall be operated at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person." Comp. St. 1922, sec. 8392.

That an automobile driver is required, as a matter of law, to exercise reasonable precaution and care in its operation is firmly established. That defendant did not see plaintiff is no excuse for running her down with his car. From his own evidence and that of his wife it appears that the car lights were turned on and the side curtains were removed and there was nothing to obstruct the vision. Under such circumstances defendant should have seen plaintiff in time to stop his car before the collision. It was his duty to see her, and if he had exercised reasonable precaution he would have seen her. *Mares v. Chaloupka, ante,* p. 199. Defendant was driving on one of the main thoroughfares of Omaha at the time, where the traffic is dense, and at a point where unusual care is required in the management of an automobile. When he first saw plaintiff he testified that he stopped his car within six inches. But it was too late. The wheel was then on plaintiff's foot, as defendant himself informed one of the physicians. The injury was then inflicted and the damage was done beyond recall.

Defendant admits that he did not sound the horn or give any warning when he turned into Farnam street, which is one of the busiest thoroughfares in the city. On

this point defendant argues that there is no statutory requirement that any warning shall be given upon approaching or entering an intersection. Section 8395, Comp. St 1922, provides: "Every motor vehicle while in use on public highways shall be provided with good and sufficient brakes and also with suitable bell, horn or other signal." The statute is not meaningless. It was enacted for a purpose. Of course, it contemplates the installation of warning devices to be used to caution pedestrians and other travelers on the highway who may be in the path of an approaching car. Otherwise the provisions would be a mockery. But no warning was given, and a car, weighing almost 3,000 pounds, was negligently driven against and upon the person of plaintiff.

With respect to the remittitur. We are unable to find a substantial basis in the evidence which will support the trial court's requirement that a remittitur be filed by plaintiff in the sum of $350, as a condition precedent to the overruling of defendant's motion for a new trial. No need to repeat or to emphasize the evidence on this point; nor is there any need for extended argument. The record speaks for itself. Mention need only be made of the fallen arch and plaintiff's consequent halting walk, and the evidence which tends to prove that her injury is permanent, and also that which has to do with plaintiff's decreased earning power. This subject is briefly discussed in a very recent case. *Miller v. Central Taxi Co., ante,* p. 306.

On plaintiff's application, and for the reasons herein advanced, it is ordered that the required remittitur be vacated and that judgment be entered for plaintiff for $1,200 as of the date of the rendition of the judgment in the district court.

Other assignments of alleged error have been pointed out by counsel which we have considered, but, in view of our decision, we do not find it necessary to discuss.

As herein modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

EDWARD WALKER, APPELLANT, V. NICHOLAS MCCABE ET AL., APPELLEES.

FILED MAY 26, 1923. NO. 22393.

Trial: SPECIAL FINDINGS. "A special finding controls a general verdict, and when inconsistent with the general verdict it is the duty of the court to render judgment accordingly." *Norfolk Beet-Sugar Co. v. Preuner,* 55 Neb. 656.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

William E. Shuman, for appellant.

Halligan, Beatty & Halligan and *George N. Gibbs, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and DEAN, JJ., BEGLEY, District Judge.

DEAN, J.

Since this action was appealed to this court Dr. McCabe, one of the defendants, died. Subsequently the action was revived here in the name of Mrs. Mary McCabe, his widow, and she, as his executrix, was made a party defendant.

Plaintiff sued to recover $2,072 from defendants for removing flood-waters from the basement of the McCabe hotel at North Platte. The jury brought in the following general verdict:

"We, the jury in this case, being duly impaneled and sworn, do find and say that we find for the plaintiff and against both defendants jointly in the sum of $1,059.95, interest $49,44, $1,109.39, and against the defendant Claud Weingand, alone, in the additional sum of $53.75, interest, $4.76. $58.51, and we fix the amount of plaintiff's recovery against said defendants in said sum."

Special findings in the form of interrogatories were submitted to the jury on motion of plaintiff. The interrogatories and the answers thereto follow:

"1. What do you find to be the total reasonable value of the services performed by the plaintiff in pumping the water out of the basement of the hotel McCabe during the period extending from April 14, 1920, to May 28, 1920,

both dates inclusive? Answer, $1,113.70 without interest added.

"2. In how much, if anything, is the defendant, Nicholas McCabe, indebted to the plaintiff on account of the water being pumped out of said basement? Answer, $529.97, interest $24.72.

"3. How much, if anything, is the defendant, Claud Weingand, indebted to the plaintiff on account of the water being pumped out of said basement? Answer, $583.73, interest $29.48."

McCabe moved that judgment be entered upon the special findings and that the costs be taxed equally against defendants. The motion was sustained and pursuant thereto judgment was rendered against McCabe for $554.69, with interest, and against Weingand for $613.21, with interest, the costs being taxed equally against defendants. Plaintiff appealed.

The condition of the subsoil at North Platte, with respect to water rising to the surfact at times, is material here and is briefly explained in plaintiff's brief. He says:

"North Platte is situated in the valley between the North and South Platte rivers, which join a very few miles east of the city. This condition causes water to come up under the surface of the ground and enter into the basements. The situation is very annoying, and often sewage comes up into the basements also."

It appears that, when the lease was entered into, the peculiar condition of the soil, with respect to seepage, which prevails when the rainfall is excessive was contemplated by McCabe and Weingand, as shown by this excerpt from the lease, which was in full force and effect at the time of the controversy herein. The excerpt follows:

"It is further understood and agreed that the party of the second part (Weingand) is conversant with the water conditions in the ground upon which North Platte is situated, and that he assumes all risk of water in the cellar and basement of said hotel building and shall not

hold first party (McCabe) liable for any damage arising by reason of water in said basement. It is further agreed that upon the completion of said building, in accordance with the plans and specifications heretofore referred to, that the said second party shall make all repairs necessary to be done upon the inside of said hotel building and the said first party will do the repairing necessary to be done on the outside of said building, such as repairing the roof; that said first party shall have the water and sewer connections in good condition when said hotel building is completed and turned over to said second party, and said second party shall keep the same in good condition, and pay necessary expenses for repairs in so doing."

Dr. McCabe, during all of the time material to this inquiry, was the owner of the McCabe hotel building. Weingand was his tenant under a ten-year lease. The hotel has 68 rooms, and a basement wherein there is a steam heating plant, a hot water heater, and an electric motor to operate a passenger elevator. April 14, 1920, a heavy rainfall in the North Platte vicinity caused the water to rise in the hotel basement and extinguish the fires and otherwise discommode the tenant and his guests. Weingand was at Omaha serving on a federal jury at the time, and his wife took the matter up with Dr. McCabe. When the action was tried Mr. Weingand was in business at Los Angeles and the deposition of Mrs. Weingand was taken in that city.

On the direct examination Mrs. Weingand testified that on the morning of the flood she met Dr. McCabe in front of the hotel and told him "about the water and how the fire was, and I said I do not know what to do." To which the doctor replied, "We will have to get Walker (plaintiff) and pump it out," and that her recollection was that Walker began working the same day or the next.

Defendant McCabe testified in substance that he relied upon the conditions in the lease with respect to taking the water out of the basement, and that he had no conversation with plaintiff after he began work until some-

time early in May when plaintiff asked him for $200, and that he then told him that he did not owe him anything. The witness further testified that he reminded plaintiff that Weingand had paid him the year before for taking the water out of the basement and that the lease protected him (McCabe), and that plaintiff would have to collect the money from Weingand or quit work. On another occasion it appears from McCabe's evidence plaintiff again asked him to pay and that he told him that he had to protect himself. Shortly thereafter this suit was commenced. On the cross-examination the doctor denied that he said to Mrs. Weingand, "We will have to get Walker and pump it out," but that he said, "You will have to get Walker." He also testified that Weingand paid plaintiff for pumping the water out of the basement the previous year under the present lease. It further appears from a disinterested witness that plaintiff removed his pump from the hotel the morning of June 1, 1920.

Plaintiff himself testified that in the fore part of May, 1920, after he had pumped about a month, he called on Dr. McCabe, and when he asked him for money the doctor said to him in substance that Weingand paid him for pumping the water out last year and that he must pay for the work this year, and that the doctor further informed him that he was protected by a clause in his lease.

The court instructed the jury *inter alia*, instruction No. 9: "In this case, it is admitted by all parties that the defendant McCabe owned the hotel building and the defendant Weingand was operating the hotel, during the time the plaintiff was pumping the water from the basement. If under the evidence you find that the defendant McCabe asked the plaintiff to bring his equipment and pump the water from the basement; that the plaintiff pursuant to said request, without knowledge of the terms of the lease between defendants McCabe and Weingand, rendered the services requested, without any talk or agreement as to consideration therefor, then the law implies the

agreement on the defendant McCabe's part to pay the reasonable value of the services rendered. If you further find from the evidence that, after the plaintiff Walker began the work of pumping out the water from the hotel basement, plaintiff presented a bill to the defendant McCabe, and the defendant McCabe then and at that time told the plaintiff that he was not liable for the work being then done by plaintiff and that he would have to go to defendant Weingand for his compensation, then I charge you that the defendant McCabe is not liable for any work done or expense made thereafter by plaintiff in pumping water out of the basement of said hotel and can be held only up to the date the defendant McCabe refused to pay for his services."

In instruction No. 5 the court further instructed the jury: "If you find that plaintiff was employed by both the defendants McCabe and Weingand, then you will find and determine under the evidence what the services rendered by the plaintiff were reasonably worth. The amount so found, together with interest on the amount found due, at the rate of seven per cent. per annum from May 28, 1920, to this date, will be the amount of your verdict in plaintiff's favor."

The bill rendered by plaintiff for services shows that he began work April 14, 1920, and that he quit work May 28 following, so that it may fairly be said to appear that plaintiff performed about one-half of the work when he presented a bill to Dr. McCabe and the doctor refused payment.

Plaintiff's argument that judgment should have been rendered by the trial court on the general verdict instead of on the special findings, which are inconsistent therewith, is not persuasive. Under the evidence and the instructions it appears from the special findings that the jury must have concluded that each of the parties was liable for approximately one-half of the amount which the jury allowed for plaintiff's services. In any case it clearly appears that the special findings are inconsistent with the

general verdict and that they are supported by the evidence and respond to the instructions of the court.

The statute provides. "When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." Comp. St. 1922, sec. 8803.

In *Norfolk Beet-Sugar Co. v. Preuner*, 55 Neb. 656, we held: "A special finding controls a general verdict, and when inconsistent with the general verdict it is the duty of the court to render judgment accordingly."

We conclude that the trial court did not err in refusing to grant a new trial. The judgment is therefore

AFFIRMED.

JAMES C. FLYNN ET AL., APPELLEES, V. ROYAL NEIGHBORS OF AMERICA, APPELLANT.

FILED MAY 26, 1923. No. 22439.

Insurance: DELIVERY OF POLICY. On the facts stated in the opinion, *held* that there was a delivery of the benefit certificate to the insured in her lifetime and while she was in good health.

APPEAL from the district court for Dodge county: A. M. POST, JUDGE. *Affirmed.*

Benjamin D. Smith and *Nelson C. Pratt,* for appellant.

Joseph E. Daly, contra.

Heard before MORRISSEY, C. J., ALDRICH and DAY, JJ., COLBY and REDICK, District Judges.

ALDRICH, J.

This is an action at law brought by plaintiffs, James C. Flynn and Franklin J. Flynn, a minor, by James C. Flynn, his father and next friend, against the defendant, Royal Neighbors of America, a corporation, having its home office at Rock Island, Illinois, to recover the sum of $2,000 alleged to be due on a benefit certificate issued by the defendant company through Silver Leaf Camp, No. 390, located at Fremont, Nebraska. At the close of the testimony the trial court directed a verdict in favor

of plaintiffs. Judgment was rendered in the sum of $2,367, with interest at the rate of 7 per cent. per annum from September 13, 1921, until paid; and, in addition, the sum of $125 was allowed plaintiffs as attorney fees and taxed as a part of the costs. Motion for new trial was overruled, and defendant appeals.

Helen G. Flynn, (now deceased) had, in years gone by, held a benefit certificate issued by defendant through Camp No. 386, at O'Neill, Nebraska. On September, 21, 1918, she made application for reinstatement or new membership and benefits in the society through Silver Leaf Camp, No. 390, and for a benefit certificate in the sum of $2,000 payable as follows: $1,000 to James C. Flynn, her husband, and $1,000 to Franklin J. Flynn, her son. The camp officers at Fremont recommended the applicant for adoption; on September 27, 1918, she was examined by the camp physician and approved; on October 2, 1918, the application was approved by the supreme physician and recommendation made that a benefit certificate be issued. Helen G. Flynn took the secret and ceremonial work on October 4, 1918, and was initiated and adopted into the order by the officers of Silver Leaf Camp, No. 390. The benefit certificate, No. 487,228, dated at the city of Rock Island, Illinois, on October 31, 1918, was duly issued and forwarded to the recorder of Silver Leaf Camp, No. 390, but was never manually delivered to Helen G. Flynn, who died November 29, 1918, from the effects of an anesthetic administered in a hospital at Rochester, Minnesota, where she underwent an operation for goiter. Defendant's tender of the fees and charges paid by the applicant was refused by plaintiffs, who instituted this action claiming that there was a delivery in law of the benefit certificate to Helen G. Flynn in her lifetime, and that they were entitled to the benefits. Defendants claimed, in substance, as a defense, that (1) Helen G. Flynn never became a member of the society, and (2) the contract of indemnity for which application was made by Helen G. Flynn in favor of plain-

tiffs was never completed, that is, that there was no delivery of the certificate.

The record shows that Helen G. Flynn had gone through all the ceremonial processes and had paid all dues and fees necessary to become a member and receive the rights and benefits of the order. Hence, as a matter of fact, she was a member of the society and appellant's contentions to the contrary are without merit.

The next and most important question is: Was the delivery of the policy to a local officer of the lodge a delivery to the applicant? It has been so held by this court in the case of *Tracy v. Supreme Court of Honor*, 4 Neb. (Unof.) 189. In other words, it has been held in a case like the instant one that "A member of a fraternal society had fully complied with the rules and regulations thereof and that the delivery of his certificate by such order, to an officer of the subordinate lodge of which he is a member, was a delivery to him." Such is the rule of law laid down in Nebraska. We believe it is good law and sound practical sense. Notwithstanding that the by-laws in question provide that the policy shall not become effective until there is a manual delivery of it and a receipt for the certificate, we are of the view that the facts of this case are controlled by that decision. In other words, when the deceased insured had complied with all the rules and regulations to become a member, and the society, or supreme lodge, had recognized this to the extent of issuing the benefit certificate and mailing it to an officer of the subordinate lodge of which applicant was a member, we say, as a matter of law, that this was a delivery, and, having paid all dues and complied with all the regulations of the order, she was entitled to the benefits thereof. These being the facts, she was, as a matter of law, recognized as a member in good standing at the time she died and entitled to all the privileges of the society and the benefit certificate. If such were not the case, then of what benefit is a certificate, running all the risks of mistake, inaccuracy

and misstatement of fact? A certificate is the article which shows that the applicant was duly and properly initiated and obligated, and entitled to all the benefits and privileges of the society. In other words, it is an infallible statement of fact and the party issuing it would be estopped from denying or prohibiting a member from enjoying all the privileges connected therewith.

Section 211 of the society's by-laws reads in part as follows: "The liability of this society on any benefit certificate issued by it shall not begin until such certificate shall have been countersigned by the oracle and recorder of the local camp and actual manual possession be delivered to the member applying therefor, on payment to the local recorder of the assessment current at time of delivery of said benefit certificate, and while said member is in sound health, and, if a woman, not pregnant; and no officer or camp of this society is authorized or permitted to waive any of the laws of this society which relate to the substance of the contract of indemnity."

The application and the benefit certificate itself by express provision make any and all of the by-laws of the society a part of the insurance contract. Appellant contends the contract was never completed and argues that the above provision of the by-laws that "actual manual possession be delivered" must be literally fulfilled in order to establish plaintiffs' right of recovery on the contract as beneficiaries.

An analogous situation was handled in the case of *O'Neal v. Sovereign Camp, W. O. W.*, 130 Ky. 68. The case is supported by respectable authority and the opinion details a state of facts which is held to constitute a delivery in law of an insurance policy: "A certificate issued to insured on his application was received by the clerk of insured's local camp, when a mistake in the number of the camp was discovered. Insured was directed to appear for initiation and was regularly initiated, and paid all the dues and assessments, but the

clerk returned the certificate to the sovereign camp for correction, and, before a corrected certificate was returned and delivered to insured, he was killed. *Held,* that, when insured was initiated and had paid the dues, the clerk held the original certificate, which was a valid instrument notwithstanding the error, for him, and that such acts constituted a delivery of the original certificate to assured personally as required by the society's constitution in order to initiate defendant's liability."

This rule is directly applicable to the facts shown of record in the instant case. In view of the fact that Silver Leaf Camp, No. 390, received the benefit certificate for delivery during the lifetime of Helen G. Flynn, and while she was in good health, she was entitled to possession of the same, she having been ready, willing and able to receipt for the policy, and having been duly and regularly initiated into the society, and having paid all dues. As a matter of law the recorder of the subordinate camp held the certificate for her and the acts of the defendant society constituted a delivery in law to applicant of the insurance contract.

We think the trial court was correct in directing a verdict for plaintiffs, and in all respects the judgment is affirmed.

In the matter of attorney fees, it is our judgment that a fee of $100 in this court would be just and equitable and the same is hereby allowed.

AFFIRMED.

M. B. JENSEN & SON, APPELLEE AND CROSS-APPELLEE, V. JASPERITE COMPANY ET AL., APPELLANTS AND CROSS-APPELLEES: ITEN BISCUIT COMPANY, CROSS-APPELLANT: GEORGE W. PLATNER ET AL., INTERVENERS, APPELLEES AND CROSS-APPELLEES.

FILED MAY 26, 1923. No. 22382.

Evidence examined, and *held* to sustain the judgment of the district court as modified.

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

Carl E. Herring and *Arthur C. Pancoast,* for appellants.

Edward R. Burke, Mortgomery, Hall & Young, Alvin F. Johnson, Baldrige & Saxton and *Morsman, Maxwell & Haggart, contra.*

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ., BUTTON, District Judge.

DAY, J.

This action was brought by M. B. Jensen & Son against the Iten Biscuit Company, hereinafter called the Iten Company, and Carl B. Kraus, doing business under the name of the Jasperite Company, to foreclose a mechanic's lien upon certain real estate owned by the Iten Company. The plaintiff alleged in its petition that there was a balance of $5,481.89 due it, and prayed for a foreclosure of its lien for that amount. Plaintiff also prayed for a personal judgment for the same sum against the defendant Kraus, who was the contractor under whom plaintiff rendered the service and furnished materials as subcontractor. Kraus filed an answer to the plaintiff's claim, admitting that plaintiff was subcontractor under him, and alleged that plaintiff did not fully perform its contract; that the work done by it was so defective that he was obliged to again do the work which plaintiff had contracted to perform; that the cost to him amounted to more than the unpaid balance which plaintiff claimed; and prayed that an accounting be had between himself and plaintiff, that the lien of plaintiff be canceled and its cause of action dismissed. Kraus also filed a cross-petition against the Iten Company, claiming that there was due him upon his contract with the Iten Company the sum of $6,535.07, and prayed for an accounting and a judgment against the Iten Company. The Iten Company filed answers to the respective petitions, and also a cross-petition against Kraus, praying for damages

against him for failing to perform his contract, and for an accounting. George W. Platner and Sunderland Brothers, who had furnished materials to Kraus for a part of the work, and who had filed liens upon the Iten Company's property, intervened and prayed that their respective liens be foreclosed.

The trial court decreed a foreclosure of the lien of Jensen & Son against the Iten Company's property for $4,997.70, and also rendered a personal judgment in favor of Jensen & Son against Kraus for the same amount. The court also decreed a foreclosure against the Iten property of the liens of George W. Platner and Sunderland Brothers for $907.07 and $1,298.57, respectively, and rendered a personal judgment against Kraus in favor of Platner and Sunderland Brothers for the amounts of their respective claims. In the accounting between the Iten Company and Kraus, the court found that upon the payment by the Iten Company of the amounts found to be due to Jensen & Son, George W. Platner, and Sunderland Brothers, there would be a balance due from Kraus to the Iten Company of $1,966.84, and entered judgment accordingly. From this judgment Kraus appeals, and the Iten Company files a cross-appeal.

It thus appears that the issues presented by the respective pleadings call for an accounting between Jensen & Son, Kraus, and the Iten Company. A number of objections which are more or less technical will be brushed aside.

The record shows that the Iten Company is engaged in the production of food products upon a large scale in the city of Omaha. It was constructing an eight-story addition to its plant, and was desirous that the floors of the building should have a hard, smooth surface capable of standing wear. About this time the Iten Company came in contact with Kraus, who claimed that he had a new process of producing a hard, glossy, durable finish on cement floors, by troweling into the mixture a com-

position of dry cement and jasperite. Thereupon the Iten Company entered into a contract with Kraus to put a one-inch topping on the floors of the building for 12 cents a square foot, the finish to be 1 part cement to 1¼ parts clear Platte river sand, jasperite to be troweled into the surface, using not less than 50 pounds to 100 square feet. Kraus guaranteed the floor against wear, and agreed to replace any part showing signs of wear within a period of 18 months. The work was to be done in a satisfactory and workmanlike manner. Kraus in turn sublet the work to Jensen & Son for 9 cents a square foot, Kraus agreeing to furnish the jasperite, the work to be done in the best workmanlike manner to the satisfaction of the owner. The written contracts between the Iten Company and Kraus, and Kraus and Jensen & Son, were very incomplete, and were supplemented by oral agreements.

The Iten Company had made arrangements for the purchase of cement for the construction of the entire building a year before the contract with Kraus was made, and furnished the cement used at a figure below the then market price. Kraus also agreed with Jensen & Son to assist them in the purchase of material by procuring the same in conjunction with other materials in the building.

We first consider the claim of Jensen & Son. The trial court reduced the amount claimed by plaintiff a considerable sum, the largest item arising out of the fact that the plaintiff had charged 10 cents a square foot, whereas under its contract plaintiff was entitled to charge but 9 cents a square foot for the work.

Kraus urged that there should have been a further reduction in the plaintiff's claim, because of poor workmanship on the part of plaintiff which necessitated Kraus again doing part of the work at a great expense to himself.

It appears that the Iten Company complained of the floors and particularly those laid on the second and

third floors of the building. After a conference was held between the Iten Company, Kraus, and Jensen & Son, in which Jensen & Son disclaimed any responsibility for the condition of the floors, an arrangement was made between the Iten Company and Kraus by which Kraus for a consideration agreed to retop the second and third floors of the building, which he afterwards did.

The testimony upon this phase of the case shows that the plaintiff's workmen were experienced craftsmen in cement work; that the materials used were furnished by Kraus; that under the direction of Kraus the mixture of sand and cement was on the basis of one part cement to two parts sand; and that the dry coating of jasperite, which was furnished by Kraus, was put on and troweled in under the supervision and direction of Kraus. This jasperite finish was a new process which was promulgated by Kraus, and he directed the manner in which it should be laid. As the work progressed it became apparent that the use of the jasperite in the manner in which it was being used on the second and third floors was not producing a satisfactory floor, and thereafter the jasperite was run through a very fine screen, producing much better results on the other floors. It is claimed by Kraus that the faulty condition of the floors was the result of poor workmanship on the part of Jansen & Son. Upon this phase of the case, however, the testimony indicates that the imperfect condition of the floors could be attributed to so many causes for which the plaintiff was not in any wise responsible that we are hardly justified in holding that the condition of the floors arose out of faulty workmanship on the part of the plaintiff. We are of the view, therefore, that the trial court was right in refusing to reduce the plaintiff's claim on account of the fact that Kraus subsequently had to again do a part of the work at a great expense to himself.

We come now to a consideration of the testimony upon the issue between the Iten Company and Kraus. As

before stated, Kraus claimed that there was due him from the Iten Company a balance of $6,535.07. The Iten Company claimed that under his contract Kraus was obliged to finish the floors with a mixture of cement and sand in the proportion of 1 part cement to 1¼ part sand, but that in doing the work the mixture used was in the proportion of 1 part cement to 2 parts sand; that by doing the work in this manner Kraus did not use the amount of cement required by his contract; that he saved to himself in this manner 620½ barrels of cement, of the value of $3,226.60. The Iten Company also claims that after the entire job was finished, the floors proved so unsatisfactory that it was obliged to have the greater part of the floors refinished at a cost of $4,768.27, which it charges was a reasonable amount for the work done. The Iten Company prayed for an accounting. Kraus pleaded that the matters of offset claimed by the Iten Company had been settled.

Considering the evidence bearing upon the claim by the Iten Company for $4,768.27 for refinishing the floors, it appears that after the floors were completed by Jensen & Son, or practically so, the Iten Company made objections to the floors, particularly to the second and third floors, in that the jasperite used in the topping worked out and left small pits in the surface. An arrangement was made whereby Kraus agreed to refinish the second and third floors, for which the Iten Company agreed to pay the sum of 2½ cents a square foot. This contract was reduced to writing. While the written contract is silent on the question, the testimony tends to show that one of the inducements to the contract was the acceptance of the other floors by the Iten Company. This work of refinishing the second and third floors was done by Kraus, and proved satisfactory. Without discussing the evidence, we think it was fairly within the contemplation of the parties that, upon the performing of the extra work by Kraus, all the floors were to be accepted by the Iten Company. We think the trial court was

right in refusing any offset based upon this item of damage claimed by the Iten Company.

Considering now the claim of the Iten Company based upon the allegation that Kraus did not use the quantity of cement required by his contract, the testimony in behalf of the Iten Company shows that it would have required from 620 to 625 more barrels of cement to do the work in compliance with the contract than was actually used. The testimony in behalf of Kraus shows that it would have taken 555 more barrels of cement than was used. On this question the trial court found that there was a shortage of 585 barrels of cement, which the court found to be worth $2.24½ a barrel. As we view the evidence, there is no basis for finding the number of barrels to be 585. The evidence is undisputed that there were used in the job 925 barrels of cement, and that it was put in at the ratio of 1 part cement to 2 parts sand, instead of at the ratio of 1 part cement to 1¼ parts sand. Based upon tables of calculation used by engineers, we conclude that the correct amount of the shortage is 555 barrels.

The Iten Company also claims that the allowance by the court of $2.24½ per barrel was much below the market price of cement at that time. Upon this point the evidence tends to show that the Iten Company had arranged to purchase the cement for the entire building a year before the contract was made with Kraus, and were furnishing the cement for this work at $2.24½ a barrel. It seems reasonably clear that if the contractors had called for 555 more barrels of cement to finish the job, the Iten Company would have furnished the same at the same price of $2.24½. Upon the trial it was admitted by the parties that had Kraus fully performed his contracts, there would have been due him from the Iten Company $13,657.69, made up of items as follows:

Original contract.....	$12,096.84
For replacing 2d and 3d floors...	771.10

For use of hoisting engine.....	14.75
For empty sacks.....	775.00
Total.....	$13,657.69

It was also admitted that the Iten Company had paid in cash and credits upon this account the sum of $7,107.87. This would leave a balance due Kraus of $6,549.82. Against this amount the Iten Company are entitled to a credit for a shortage in the cement of 555 barrels at $2.24½ a barrel, totaling the sum of $1,245.97. Striking a balance between the amounts of the Iten Company and Kraus, there would be due and owing to Kraus $5,303.85. The trial court decreed that if the Iten Company should pay the lien of Jensen & Son of $4,997.70, and the lien of Platner for $907.07, and the lien of Sunderland Brothers for $1,298.57, in the aggregate amounting to $7,203.34, there would then be due from Kraus to the Iten Company the sum of $1,966.84. As above stated, this amount was arrived at by the trial court determining that the amount of shortage in the cement used was 585 barrels. Our examination of the evidence convinces us that the amount of shortage of cement was 555 barrels, which, on the basis of $2.24½ a barrel, would make the amount due from Kraus to the Iten Company $67.35 less than the amount found by the trial court.

It is the contention of Kraus that all matters of difference between himself and the Iten Company arising out of the claim that he had not performed his contract in accordance with its terms were fully settled by the parties by the contract of September 10, 1920, including the item now made for shortage of cement.

As before stated, after Jensen & Son had completed the work on all the floors except the eighth, the Iten Company refused to accept the work, and a conference was had between Iten Company, Kraus and Jensen & Son. The testimony shows that all the floors were examined; that the Iten Company complained that they were not satisfactory, particularly the second and third

floors. Finally it was agreed that, if Kraus would refinish the second and third floors, the work would be accepted. An agreement was thereupon entered into whereby Kraus was to retop the second and third floors, for which the Iten Company agreed to pay an additional sum of 2½ cents a square foot. This additional work was done by Kraus at a considerable expense. In fact the materials furnished by Platner and Sunderland Brothers were used by Kraus in refinishing the second and third floors, and topping the eighth floor. All of the conversation leading up to the agreement related to the condition of the surface of the floors, nothing was said about there being a shortage of cement used in the performance of the work, and there is nothing in the written contract to suggest that the question of shortage was in the minds of either of the parties at the time the agreement was made. We are of the opinion that the only matter settled related to the condition of the floors. It appears that one of the officers of the Iten Company knew at the time the settlement was made that the full amount of cement called for in the contract had not been used, but, as before stated, this item was not discussed or considered.

Considering the entire record, we are of the view that the trial court was right in holding that the settlement did not include any damages which the Iten Company sustained by reason of the fact that less cement was used in doing the work than was called for in the contract. The proposal of Kraus to do the work was made upon the understanding, clearly expressed, that there was to be used 1 part cement to 1¼ parts sand. This he failed to do. It is no answer to say that a better floor was produced by the use of a mixture containing 1 part cement to 2 parts sand. It seems only just that his contract price be reduced to the extent of the value of the cement he should have used and failed to put in.

From what has been said it follows that the judgment of the trial court should be modified to the extent of

reducing the item of $1,313.32, the value of the cement, to $1,245.97. As thus modified, the judgment of the trial court is affirmed. The costs in this court are to be paid by the appellant.

AFFIRMED AS MODIFIED.

GEORGE GESSELMAN, APPELLANT, V. R. WALTER PHILLIPS ET AL., APPELLEES.

FILED MAY 26, 1923. No. 22379.

1. **Vendor and Purchaser**: OPTION CONTRACT. One of the essential elements of an option contract for the purchase of land is that the party giving the option parts with the right, for a limited time, to sell his land to any one other than to the party to whom the option is given.
2. **Principal and Agent**. The law will not permit an agent to profit out of the subject of the agency, at the expense of his principal, beyond the agreed commission for his services.
3. **Brokers**: DUTIES: GOOD FAITH. Where a contract between a landowner and real estate broker provides that the latter shall receive a stipulated commission in the event of a sale, and also gives him an option to purchase the land, he cannot, while acting as the agent, exercise the option to purchase without making full disclosure to his principal of any opportunity he may have to sell the land to the principal's advantage; nor can the agent, after having contracted for the sale of the land to a third party at an advanced price, exercise the option to purchase the land to the detriment of his principal.

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

Harry L. Lehman, Lambe & Butler and *Walter D. James,* for appellant.

Cordeal & Colfer, contra.

HEARD before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

GOOD, J.

Plaintiff, George Gesselman, brought this action against R. Walter Phillips, James W. Mansfield and Charles W.

Burton, defendants, for an accounting for money alleged to have been received by them as his agents in a sale of land. Defendants prevailed, and plaintiff has appealed.

In September, 1919, plaintiff was the owner of 600 acres of land in Hitchcock county, Nebraska, that was incumbered by three mortgages. Plaintiff made application to defendants for a loan to take up the third mortgage, which was in process of foreclosure and which amounted to about $1,300. Their negotiations resulted in defendants agreeing to take up the mortgage and carry the same for plaintiff, and to secure them the plaintiff, on September 22, 1919, executed a warranty deed conveying to the defendants 600 acres of land. At the same time the parties signed a separate contract, in the preparation of which a printed form of an agreement for sale of real estate was used. Part of the printed form was filled in, indicating an agreement to sell the 600 acres of land to the defendants for a consideration of $15,000. The following provisions were inserted in writing:

"This is an exclusive option on this land and if sold otherwise party first part agrees to pay second parties one-thousand dollars, same as if sold by second parties. This is an option on this land for until March 1, 1920, and in case this is not sold by said date this is null and void as to both parties. If this land is sold within said time the first party agrees to pay second parties one-thousand dollars commission. Possession, if sold, to be given March 1, 1920. Deed to be given at this time. Title to be returned to first party upon payment of note & mortgage of about thirteen-hundred dollars with interest from this date at 10 per cent., taken up by second parties, if paid by March 1, 1920. Otherwise title to be absolute in second parties. In case of sale of land the $1,300 advanced and one-thousand dollars are to be paid by (to) second parties. In case of failure to pay $1,300 March 1, 1920, second parties are to assume $3,500 to Southwick Loan & Trust Co. only."

On the 11th day of October, 1919, the defendants sold

the land in question to one Weidner for $18,000. Defendants have accounted to plaintiff for the sum of $14,000 and no more. The plaintiff insists that defendants were acting as his agents in the sale of the land and that they should account for the full $18,000, less $1,000 for commission; in other words, that he is entitled to recover $3,000 more from the defendants. The defendants in their amended answer allege that the contract, above referred to, gave them an exclusive option to buy the land at any time prior to the 1st day of March, 1920, at the sum of $14,000, and that they exercised this option on the 4th day of October, 1919, on which date they claim to have paid to plaintiff the sum of $1,000, as part of the purchase price.

1. Somewhat depends on a proper construction of the above mentioned contract. Plaintiff contends that it is an exclusive agency contract, whereby defendants were given exclusive right to act as brokers in the sale of the land; and defendants insist that it is an exclusive option contract, which gave them the absolute right, at any time before March 1, 1920, to purchase the land for $14,000. In our opinion, neither contention is correct. The contract partakes of the nature of both an option and brokerage contract. It is clear that it could not have been an exclusive option contract, because, by its terms, it contemplates that a sale may be made to a third party either by defendants or others. This would be inconsistent with the idea of an exclusive option. One of the essential elements of an option contract for the purchase of land is that the party giving the option parts with the right, for a limited time, to sell his land to any one other than to the party to whom the option is given. *Pollock v. Brookover,* 60 W. Va. 75, 6 L. R. A. n. s. 403; 27 R. C. L. 334, sec. 31.

The contract also provides that, in the event of a sale of the premises before March 1, 1920, whether made by defendants or others, defendants shall have a commission of $1,000. This clearly contemplates that defendants are to

act as agents and receive a commission for their services, but also contemplates that it is not an exclusive agency.

2. The agency part of the contract has the effect of placing the defendants in a trust or fiduciary relationship to the plaintiff, which requires of them unswerving fidelity and absolute good faith in their dealings with their principal. The law will not permit an agent to profit out of the subject of the agency, at the expense of his principal, beyond the agreed commission for his services. *State v. State Journal Co.*, 77 Neb. 752; *Wells v. Cochran*, 84 Neb. 278.

3. While defendants were acting as agents, they were required to make full disclosure of any opportunities they may have had to sell the land that would be to the advantage of the plaintiff, before they could exercise their option to purchase the land. They could not, after having contracted for the sale of the land at an advanced price, exercise the option to purchase it themselves from the plaintiff to his detriment. It becomes important, therefore, to determine when, if ever, the defendants exercised their option to purchase the land from plaintiff. If they did exercise the option and did purchase the land prior to any sale to Weidner, or to knowledge that he would buy it at an advanced price, then they would be entitled to any profit made upon the sale of the land; and, upon the other hand, if they had contracted to sell to Weidner, or knew that he would purchase the land, at any sum more than $15,000, prior to the time they exercised their option, then they must account to the plaintiff for the full purchase price realized, less their brokerage commission.

The evidence respecting the exercise of the alleged option by defendants is in sharp conflict. They testify that they agreed with plaintiff on the 4th day of October to take the land at $14,000, and that plaintiff, to induce them to do so, agreed to and did give them 50 bushels of wheat. The defendants are corroborated in this by some other witnesses and by the circumstance that they produced a check, which was delivered to plaintiff, dated

October 4, for $1,000, and on which is written in the lower left-hand corner the words: "Part payment on ranch bought by Mansfield & Phillips over on Driftwood." Plaintiff admits the receipt of this check, but insists that it was not delivered to him until the 15th day of October, and in this he is corroborated by the testimony of his wife and daughter. Plaintiff's position is also corroborated by some other circumstances. For instance, it was shown by the testimony that he was in straitened circumstances for money at the time of these transactions. The evidence shows conclusively that the check was deposited by him in his bank on the 16th day of October. It is rather strange that one in such straitened circumstances as plaintiff was would carry the check for 11 or 12 days before cashing it. Again, the check in evidence does not bear any indication of having been worn, as it would naturally be if it had been carried for that time. But, to our mind, the most striking circumstance corroborating the position of the plaintiff is a statement rendered by defendants on the 23d day of March, 1920, when they were accounting to the plaintiff for the proceeds of the sale. In that statement they credit plaintiff with the sale price, $15,000, and charge him with a commission of $1,000, and the other items of payment, mortgages, etc., to the aggregate of $15,000. This statement made by them long after the transaction is inconsistent with the position they now take that they purchased the land outright for $14,000. If they purchased the land themselves, they would be entitled to no commission. Again, when they filed their original answer in this action, they alleged therein that they exercised their option to purchase the land on or about the 1st of November, 1919.

We are of the opinion, after careful consideration of all the evidence, that the defendants contracted to sell the land to Weidner for $18,000 prior to the time they exercised their alleged option. This being true, they were not entitled to anything except their commission, as agents, in the sum of $1,000. They have retained $4,000,

and should therefore account to the plaintiff for the sum of $3,000.

Plaintiff claims that defendants are also indebted to him for 50 bushels of wheat, which was turned over to them, to be planted upon the premises, but which they sold and converted to their own use. The evidence discloses that there was a load of wheat, amounting to 50 bushels, turned over to defendants, but there is no evidence in the record as to its quality or value. Because of his failure of proof in this respect, plaintiff cannot recover for the wheat.

The judgment is reversed and the cause remanded to the district court, with directions to enter judgment for plaintiff in the sum of $3,000 and interest accruing, at 7 per cent. per annum, from March 1, 1920, to the date of entering judgment.

REVERSED.

STATE BANK OF GERING, APPELLANT, V. MERTON C. GROVER ET AL., APPELLEES.

FILED MAY 26, 1923. No. 22412.

1. **Chattel Mortgages:** PROPERTY NOT IN ESSE. A chattel mortgage upon an unplanted crop of beets is ineffectual to create a lien, either legal or equitable, in favor of the mortgagee until the intervening of some new act, as where the mortgagee takes possession of the crop after it has been planted, and the filing of such chattel mortgage constitutes no notice of a claim of lien.

2. ———: MORTGAGE ON CROPS: PRIORITY. Where a lease provides that the lessee will execute a chattel mortgage on the crops to be raised on the demised premises to secure payment of the rent, and the lessee, after the planting of the crop, executes a mortgage for a debt due to a third person, who had no notice, either actual or constructive, of the provisions of the lease, such third party will acquire a lien on the crop superior to any right of lien in the lessor arising from the provisions of the lease.

3. ———: MORTGAGEE IN GOOD FAITH. A mortgagee of chattels in good faith is one who takes a chattel mortgage to secure a debt actually and justly owing to him, whether preexisting or not, without actual or constructive notice of prior equities against the mortgaged property. *State Bank v. Kelley Co.*, 49 Neb. 242.

APPEAL from the district court for Scotts Bluff county: RALPH W. HOBART, JUDGE. *Reversed, with directions.*

Curtis O. Lyda, for appellant.

L. L. Raymond, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

GOOD, J.

Plaintiff brought this action in the district court for Scotts Bluff county, to determine the priority of liens arising from the execution of two chattel mortgages on a crop of sugar beets, one of which mortgages was held by plaintiff, and the other given to the defendant Grover, and by him assigned to defendant bank. Defendants prevailed, and the plaintiff has appealed.

The facts are not in dispute and are principally covered by a stipulation of the parties. The record shows that on March 13, 1920, the defendant Grover leased to one Marlow a farm for one year. The written lease provided that Grover should receive as rental one-fourth of all the beets delivered at the beet dump and $350 in cash. The written lease contained the following clause: "The lessee is to give his note for this amount and to secure said note by a chattel mortgage on all of his crops." On the same day said Marlow executed and delivered to Grover his note for $350, and at the same time executed a chattel mortgage, to secure said note, which contained the following description: "All of my 1920 crops, which will consist of forty acres of sugar beets and whatever crops I may elect to put on the balance of the farm which belongs to said M. C. Grover, and which I have today leased from him. This mortgage is intended to cover all of my 1920 crops which will be grown on the above farm." Said chattel mortgage was filed for record in the office of the county clerk on March 15, 1920.

The record further shows that on the 31st of July, 1920, the plaintiff was, by purchase in the ordinary course of

business, the innocent holder of two promissory notes, previously executed by the said Marlow, and on which there was due the sum of $650; that on the last mentioned date said Marlow, in renewal of said two promissory notes, executed to plaintiff a new promissory note for $650, due November 10, 1920, and secured the same by a chattel mortgage on his three-fourths' interest in 40 acres of beets on the Merton C. Grover farm, being the same farm leased by Grover to Marlow. By agreement of all parties in interest, the beets were harvested and sold and the proceeds thereof distributed to the persons entitled thereto, except $400, which was paid into court, to be turned over to plaintiff or defendants, according to which one is found entitled thereto by priority of his mortgage.

At the time of the execution of the mortgage to Grover, the beets had not been planted and had no existence. Plaintiff contends that neither the provision in the lease nor the chattel mortgage created any lien in favor of the defendant Grover, and could not do so until the intervening of some new act previous to the execution of the mortgage to plaintiff, and that, no intervening act having occurred, plaintiff's mortgage should be decreed to be a prior lien upon the beets. On the other hand, the defendants contend that the mortgage to Grover was good as between the parties to the mortgage; that the mortgage created at least an equitable lien in favor of Grover, and that plaintiff is not an innocent purchaser or incumbrancer of the property and is not a purchaser thereof for value, because its mortgage was given to secure a pre-existing debt.

1. The rule is well established in this state that a chattel mortgage upon an unplanted crop, or upon property not *in esse*, is ineffectual to create a lien, either legal or equitable, in favor of the mortgagee until the intervening of some new act, as where the mortgagee has taken possession of the property after being planted. *Cole v. Kerr*, 19 Neb. 554; *Steele v. Ashenfelter*, 40 Neb. 770; *Battle Creek Valley Bank v. First Nat. Bank*, 62

Neb. 825; *Brown v. Neilson*, 61 Neb. 765. In the instant case it does not appear that Grover took possession of the beets under his chattel mortgage, or that any new intervening act occurred prior to the execution of the chattel mortgage to plaintiff, so that, at the time plaintiff took its chattel mortgage, defendant Grover had no lien upon the beets by reason of his chattel mortgage, and the filing of a void chattel mortgage is not constructive notice of any lien or claimed lien.

2. We are not unmindful that this court has held in *Weigand v. Hyde*, 109 Neb. 678, that—"Where a lease provides that the lessee shall on demand execute a chattel mortgage on the crops to secure the payment of the rent, but lessee fails to do so, and executes to a third person a first chattel mortgage on the same crops, the execution thereof constitutes a fraud on the part of the lessee, as between himself and the landlord, against which a court of equity may grant relief at the suit of the lessor. In such case, the mortgagee, if he had notice of the provisions of the lease, and of the landlord's rights thereunder, is not a mortgagee in good faith, and, in an action by the lessor for specific performance of the terms of the lease, the mortgagee's rights will be subordinated to those of the lessor."

Since, in the case under consideration, the lease from Grover to Marlow was not recorded and plaintiff had no actual knowledge of the provisions thereof, it follows that it was not charged with any notice of any right of Grover to a lien on the beets.

3. Defendants' contention that plaintiff's mortgage was given to secure a preexisting debt and that its lien is subordinate to the equitable right of Grover to a lien is not well founded. This court has held in *State Bank v. Kelley Co.*, 49 Neb. 242, that—"A mortgagee in good faith is one who takes a chattel mortgage to secure a debt actually and justly owing to him, whether preexisting or not, without actual or constructive notice of prior equities against the mortgaged property." And this holding was

approved in *Rogers v. Trumble,* 86 Neb. 316. It necessarily follows that plaintiff's lien, by reason of its chattel mortgage, was prior and superior to any right of the defendant Grover.

The judgment of the district court is therefore reversed and the cause remanded, with directions to enter judgment in favor of the plaintiff.

REVERSED.

JOHN J. LEDWITH, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED MAY 26, 1923. No. 22387.

1. **Municipal Corporations**: CONTRACTS: PAYMENT WITH BONDS. Where there is no provision in a city charter requiring the municipal authorities to sell bonds to the highest bidder after a proper and legal notice, said municipal authorities, when authorized to issue and sell bonds to pay for a public improvement, may, the contractor consenting, deliver the bonds at par in payment of the contract price, in lieu of raising money upon them by loan and then paying that money in discharge of the contract obligation.

2. ———: ———: INJUNCTION. A provision in a notice to contractors that a city reserves the option to make payment in warrants or city bonds is unenforceable, except with the consent of the contractor, and if such provision prevented competition to such an extent that it increased the cost of the work, the city should be enjoined from entering into the contract.

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

John J. Ledwith and *T. R. P. Stocker,* for appellant.

C. Petrus Peterson, contra.

Heard before MORRISSEY, C. J., ROSE, ALDRICH and GOOD, JJ., BEGLEY, District Judge.

BEGLEY, District Judge.

The city of Lincoln, having previously voted bonds to the extent of $500,000 for the extension and improvement of the city water and light plants, caused a notice to contractors to be published calling for sealed bids to be

received for the construction of a water and light plant at Thirtieth and A streets of an estimated cost of $150,000. The notice to contractors contained the following provision: "The city reserves the option to make payment in warrants or city of Lincoln bonds." Sealed bids were received under said notice, all within the engineer's estimated cost, the best or lowest bid being approximately $98,000. Plaintiff, a resident taxpayer, brought this action to restrain the sale of the bonds, "except as provided by statute to the highest bidder for cash after proper and legal notice as required by law," and to enjoin the letting of any contract for the construction of the A street power station pursuant to notice to contractors, for the reason "that said illegal notice restricts and limits the prospective bidders solely and only to those who can complete the work on their own financial ability and, when completed, be willing to take bonds and not cash." A demurrer was filed to said petition, which was sustained and the action dismissed. Plaintiff has appealed.

Appellant's first contention is that the city officials have no authority to pay the contractor in city bonds because the city charter requires the bonds issued shall be sold to the highest bidder, after giving 30 days' notice. We find no such provision in the charter relating to water and light bonds. The above provision, contained in section 36 of the charter relates only to refunding bonds issued without the consent of the voters, which has no application here. Section 1, art. VI, and section 2, art. VIII, of the city charter provide the only authority for the issuance of water and light bonds, and they contain no specific method for sale, and therefore, the statute not requiring the bonds to be sold in any particular manner, the city officials were vested with a discretion as to the method of sale or disposal, provided the bonds were not sold for less than par value, and the courts, in the absence of fraud or an abuse of the discretion vested in such officials, have no power to control their action. 28 Cyc. 1596. Under such circumstances an exchange of the

bonds in payment of the amounts to become due the contractor for material and construction would be a sale of the bonds within the meaning of the charter, and if the bonds were exchanged for their face value, this would be a sale at par value. Therefore, if the contract had been let, the city would have the right to pay the contractor with city bonds at par value, with the consent of the contractor, but the question here presented is: Can the city legally limit the bidding to contractors who are willing to take the bonds in payment of said work?

In 19 R. C. L. 1067, sec. 355, it is said: "The terms and conditions which a municipal corporation may lawfully include in its specifications for the construction of a public work are, however, subject to the following limitations: (1) When the statute requires competitive bidding the conditions must not be such as to prevent or restrict full and free competition. (2) The conditions must not be such as to increase the cost of the work for the benefit of a favored class, and thus result in the taxation of the people of the municipality for a private purpose. (3) When the work is to be paid for by special assessment the conditions must not be such as to add an element to the cost of the work which cannot lawfully be met by special assessment."

The option here claimed by the city seems to confine the bidding to persons able to accept the city's bonds or warrants in payment, and would necessarily limit those who bid to such as are able to construct the building on their own financial responsibility, and in this manner restrict competitive bidding. The bid which the contractor submits is regulated by the price he can receive for the bonds upon the market, and, unless he is a man of financial means, he must necessarily dispose of them quickly and at a discount, and to offset this must raise his bid, thus increasing the cost of the work for the benefit of a favored class who are financially responsible.

This question was decided in this state in the case of

State v. School District, 16 Neb. 182, where the court said: "When money is actually borrowed and received into the school district treasury, the contract for the erection of a schoolhouse, etc., may always be let at a reasonable cash price, after a fair competition among the contractors and builders of the vicinity; but when there is no money in the treasury, and the building is to be paid for in bonds, then the competition is confined to those persons of the neighborhood who combine the character of contractor and builder with that of capitalist or stock broker, and so in the latter case it is not only improbable, but well nigh impossible, that the same quality of building could be procured as economically as in the former."

In *Miller v. City of Des Moines,* 143 Ia. 409, 419, the court aptly said: "Government is instituted for the benefit of all the people and not for the benefit of any one class to the exclusion of others. City officials are charged with the collection and disbursement of vast sums of money to which all the people must contribute in proportion to their estate without regard to social position, political affiliation, religious belief or economic theories. Experience has shown that the interests of the taxpayers are best conserved by offering contracts for public work to the competition of all persons able and willing to perform it. When the opportunity to compete is fairly and openly offered, and contracts are fairly awarded, there is ordinarily no room for official or private graft at public expense, but just in proportion as competition is restricted, and the award is hedged about with express or implied conditions by which a favored person or a favored class is insured a preference over others of equal ability and capacity, public rights are imperiled and public interests are sacrificed. Such discrimination tends to monopoly, and involves a denial of the equality of right and of opportunity which lies at the foundation of republican institutions."

Appellees cite and rely upon the case of *Washington-Oregon Corporation v. City of Chehalis,* 76 Wash. 442.

In that case a statute referring to general fund bonds issued by any municipality provided that such bonds should be sold in such manner as the corporate authorities shall deem for the best interest of the city, and it was held that such provision was broad enough to permit the city to exchange its bonds in payment of amounts due a contractor under specifications providing that the contractor would be paid in bonds voted for that purpose, no question of fraud or restrictions on competitive bidding being involved. In this case the city charter only provides for the right to borrow money by the sale of the bonds at not less than par or face value. In addition, the petition herein contains the allegation, which is admitted by the demurrer, "That said notice, by being limited to contractors, restricts same from being sold to the highest bidder, and, further, said notice is a mere sham and pretext by means of which, by increased bids, the bonds may in fact be disposed of below par."

The petition of the plaintiff, therefore, stated a cause of action, and if it be proved on the trial that said provision prevented competition to such an extent that it increased the cost of the work, the contract should not be entered into.

The judgment of the district court in sustaining the demurrer is, therefore,

REVERSED.

Rose, J., dissents.

THEODORE HAPP, APPELLEE, V. PATRICK G. DUCEY: O. T. IRWIN ET AL., APPELLANTS.

FILED MAY 26, 1923. No. 22427.

1. **Bills and Notes**: BONA FIDE PURCHASER. Where the consideration for the purchase before maturity and without notice of a negotiable promissory note, by regular indorsement, was a sale of real estate, and the deed therefor had not been delivered, but was left with a bank for delivery to grantee upon payment of $500, the remainder of the purchase price, *held*, that the vendor was

entitled to protection as a *bona fide* purchaser, as against a claim of the maker of the note against the payee thereof.

2. **Statute of Frauds.** The fact that the agreement for sale of the real estate was not in writing is no defense, as defendants were not parties thereto, and the defense of the statute of frauds is personal to the parties.

APPEAL from the district court for Platte county: A. M. POST, JUDGE. *Affirmed.*

Vail & Flory, for appellants.

Albert & Wagner, contra.

Heard before MORRISSEY, C. J., DAY and ALDRICH, JJ., COLBY and REDICK, District Judges.

REDICK, District Judge.

Action upon a negotiable promissory note for $2,000, signed by Paul Rudolph, payable to O. J. Irwin, and by him indorsed before due to Patrick G. Ducey, and by Ducey indorsed before due to plaintiff. Defendants Rudolph and Irwin admit the note, but claim an offset against Ducey, alleging that, as a part of the transaction resulting in the giving of the note, Ducey agreed to pay the interest to March 1, 1920, on certain mortgages upon lands conveyed by Ducey to Rudolph, amounting to $1,200, which he failed to do.

Plaintiff acquired the note as part of the purchase price of a house and lot, and placed the deed conveying the property to Ducey with a bank, to be delivered upon Ducey paying the remainder of the purchase price, $500. Ducey was in possession of the property as tenant at the time of the purchase, had paid one month's rent, but after the purchase continued in possession under the contract, which was verbal.

Defendants claim the contract was void under the statute of frauds, but, not being parties to it, cannot raise the question. *Rickards v. Cunningham*, 10 Neb. 417; *Cresswell v. McCaig*, 11 Neb. 222.

The only other question is whether the evidence shows plaintiff to be a purchaser in good faith for value without

notice. The evidence does not warrant any inference of bad faith; but defendants claim that, as the sale of the lot has not been completed by delivery of the deed, plaintiff may refuse to deliver it except upon Ducey making good defendants' claim against him.

We think, however, Ducey may enforce delivery of the deed upon payment of the $500, and that plaintiff cannot be required to breach his contract in order to assist defendants in collecting their claim against Ducey.

The cases cited by defendants where the purchase price had not all been paid before notice are not applicable, for plaintiff had paid the full amount for the note by a valid and binding contract to convey the lot: the note was in part payment of the debt, and was credited thereon, and the case is within the principle that a purchaser without notice before maturity of a negotiable instrument, by crediting the amount thereof upon a preexisting debt, is a purchaser in good faith, as held in *Smith v. Thompson*, 67 Neb. 527, and *Martin v. Johnston*, 34 Neb. 797.

JUDGMENT AFFIRMED.

BESSIE CRAVER ET AL., APPELLANTS, V. THOMAS B. MCPHERSON, APPELLEE.

FILED JUNE 27, 1923. No. 22911.

Appeal: EXCLUSION OF EVIDENCE. When on the trial of a cause to a jury the court erroneously excludes competent evidence and then directs a verdict against the party making the offer because the issue to which the excluded evidence relates is not satisfactorily proved, the judgment will be reversed on appeal.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed.*

Morsman, Maxwell & Haggart, for appellants.

Baker & Ready and *Byron G. Burbank, contra.*

Heard before MORRISSEY, C. J., LETTON, DEAN and DAY, JJ., BUTTON, District Judge.

MORRISSEY, C. J.

This is the second appeal in this case, our first opinion being found in 106 Neb. 568. The action is based upon a promissory note given by defendant to Kate McGinness, together with a contemporaneous memorandum signed by the payee of the note. On the former appeal the only question presented was the sufficiency of the petition to state a cause of action. A demurrer had been filed to the petition and sustained by the trial court, but on review this court held the petition sufficient and remanded the cause for a new trial. Before the institution of the suit the payee had died, her estate was duly administered, and this suit is brought by the residuary legatees under her will. A copy of the note and memorandum are set out in the former opinion, but for convenience they will be set out here. They read as follows:

"$37,000. Omaha, Neb., November 27, 1908.

"One year after date, for value received I promise to pay to the order of Mrs. Kate McGinness, at the Union Stock Yards National Bank, South Omaha, Nebraska, thirty-seven thousand dollars, with interest at the rate of 6 per cent. per annum from date until paid.

"Thomas B. McPherson."

"Omaha, Nebraska, November 27, 1908.

"Whereas, Thos. B. McPherson has acted as agent for many years for my late husband, Daniel McGinness, and after his death for me, in the loaning of certain money for us and in our behalf;

"Whereas, he is now holding for me notes as hereinafter described;

"Whereas, he has executed his own note of even date herewith for thirty-seven thousand dollars ($37,000) payable to me, pledging as collateral the notes above referred to, to wit:

"Walker Manufacturing Co., $18,171.98 and int. due Nov. 14th, 1909.

"A. A. Spaugh, $9,386.16 and int. due Dec. 7th, 1909.

"Prime and Tower, $12,000 and int. due Jan. 26th, 1912.

"Whereas, the note for thirty-seven thousand dollars is really not his personal obligation and is only given to protect me from loss upon the notes he has taken for my account:

"Now, therefore, in consideration of the premises, I hereby agree to hold his note for thirty-seven thousand dollars, and not to transfer or dispose of it without his consent in writing.

"I further agree that the collateral notes referred to shall be held by him; and he is hereby empowered to collect, renew or extend them, and to substitute for them other collateral at his discretion.

"I also agree to exhaust my collateral, whatever it may be, before demanding payment from him of any part of this obligation, or attempting to collect any part of his personal note, unless there should be a loss in the collateral referred to, in which case he shall be liable for such deficiency.

"Provided, however, that he shall pay me, annually, interest at the rate of six per cent. upon the whole or such part of the principal as may be unpaid from time to time.

"Witness my hand day and date first above written.

"(Signed) Kate McGinness."

Defendant filed an amended answer which admitted that he signed the note, but denied the delivery to the payee. He admitted that the payee signed her name to the memorandum, but denied that he accepted the same or that it constituted any liability against him. He alleged that in 1896 Daniel McGinness, the husband of the payee of the note, placed in defendant's hands $37,000, with instructions to defendant to loan the same in his own name, but for the use and benefit of him, Daniel McGinness; that for many years thereafter and until the death of McGinness in 1907 defendant continued to loan the money for McGinness and took notes in the name of defendant as payee; that the interest received upon the loans was paid to Mc-

Ginness during his lifetime and that the defendant received no compensation for his services; that after the death of Daniel McGinness, the payee of the note in suit, his widow Kate McGinness, claimed ownership of the $37,000, and defendant at her request continued to loan the same as he had theretofore done for her husband, and that he received no compensation from her for his services; that in loaning the money defendant took the notes in his own name with the knowledge and approval of the owner of the money, and that defendant frequently made loans in excess of $37,000 and the excess over that amount was the money of defendant; that at no time prior to the death of Daniel McGinness had he ever claimed that defendant was indebted to him for any portion of the $37,000; that on November 27, 1908, defendant had loaned the $37,000 before mentioned, together with some of his own money, as follows:

Walker Manufacturing Company	$18,171.98
A. A. Spaugh	9,386.16
Prime and Tower	12,000.00
	$39,558.14

The answer in some detail recites that the money had theretofore been loaned to another party, and sets out excerpts from correspondence between defendant and Kate McGinness, and alleges that on November 27, 1908, he sent Kate McGinness the note now in suit together with a letter in which he said:

"I will send you my note to show in case of my death just what collateral is yours and when and as it is changed (I mean the collateral) your envelope in safe will always contain your stuff. Now my note means nothing more than a memorandum for you to hold. The real paper on which you must depend is the collateral and I will try my best, as I always have, to get good paper for you. Of course, I will advance you the interest if necessary so you can depend upon it the day

'tis due. I will send you for my protection a statement for you to sign and return."

The "statement" mentioned in defendant's letter was in the words and figures in the memorandum heretofore set out, except that it did not contain either of the last two paragraphs thereof. The record discloses that Mrs. McGinness did not sign or execute the memorandum which defendant mailed to her, but that she had the same rewritten with the two concluding paragraphs added thereto, and in due course of mail sent the same to defendant, who retained it. The answer alleged that on January 19, 1909, defendant held the note of one W. J. McLaughlin for $25,000 and the note of Prime and Tower for $12,000, and that on that date he wrote Mrs. McGinness and said:

"I enclose copy of note of W. J. McLaughlin, which I substitute for the Walker and Spaugh paper, I held for you. McLaughlin makes a property statement showing over $300,000 assets and no liabilities. This note with that of Prime and Tower covers the exact amount of your investment."

And it is alleged that on the 24th of the same month Mrs. McGinness wrote defendant acknowledging receipt of the McLaughlin note. It is next alleged that the correspondence heretofore mentioned and the $37,000 note in suit and the memorandum which defendant sent with the same were all parts of one transaction, which were rejected by Mrs. McGinness, and that defendant never received any consideration from any person for becoming liable on the note in suit nor did Mrs. McGinness suffer any loss or lose any rights against the makers of the notes by reason of any act of defendant, and that she knew at all times that the note in suit was intended to be a memorandum only and not a personal obligation of defendant; that the Prime and Tower note was paid to the administrator of the estate of the payee of the note in suit; and that the McLaughlin note was substituted for the other two notes with the consent of Mrs.

McGinness. The answer, which is so long it cannot be set out in detail, alleges also that the administrator of the estate of Kate McGinness undertook to collect the amount due on the McLaughlin note, and did realize $1,000 from the sale of some collateral given to secure the payment of the same, and that in his own name he secured judgment against McLaughlin.

In this connection it may be said that the judgment against McLaughlin is not collectible. As a further defense it is alleged that the statute of limitations has run against the note. In support of this allegation it is specifically alleged that on January 4, 1911, and at other times during the years of 1911 and 1912 the administrator of the estate of Kate McGinness, deceased, made demands upon defendant to pay the balance due upon the note in suit; that the demands were refused and defendant denied all liability upon the note; that the note became due November 27, 1909; that the last money paid on account of the original indebtedness was paid January 22, 1912, being the amount of the Prime and Tower note; that more than five years had elapsed since the demands by the administrator and more than five years had elapsed since the payment of the $12,000 and the bringing of the suit on February 2, 1918.

Plaintiffs filed a reply denying generally the affirmative allegations contained in the answer, but admitted that on January 19, 1909, defendant held for Kate McGinness the notes of the Walker Manufacturing Company, A. A. Spaugh, and Prime and Tower, and that on or about that date defendant substituted for the notes of Walker Manufacturing Company and A. A. Spaugh the note of McLaughlin for $25,000, which defendant then held and which was his personal property. The reply alleged also that the substitution was made under the authority conferred upon defendant by the memorandum signed by Kate McGinness which is heretofore set out; that the memorandum was then in possession of defendant and had been accepted by him, and that by reason of its

acceptance defendant was permitted to retain possession and control of the notes of the Walker Manufacturing Company, A. A. Spaugh, and Prime and Tower, and was permitted to substitute the note of McLaughlin for the notes of Walker Manufacturing Company and A. A. Spaugh, and that defendant is barred and estopped from asserting that he did not accept the memorandum.

Evidence in respect to the issues presented was submitted, and at its conclusion the court directed a verdict in favor of defendant and against the plaintiffs. The plaintiffs have appealed.

One hundred and twenty-four assignments of error are set out in the brief, but as most of these assignments relate to the ruling of the court on the admission or exclusion of evidence we do not deem it essential to a disposition of the case to take them up seriatim.

Many rulings on the evidence might have been erroneously prejudicial had the cause been submitted to the jury. But as the court, for reasons not based upon the objectionable evidence admitted or upon the whole record before the court, but for the reason stated by the court in its instructions to the jury, directed a verdict, we think this appeal may be disposed of by a consideration of the reason assigned by the court for its direction. The court stated:

"The agreement here entered into is that, at most, if the plaintiffs exhaust their remedy against McLaughlin, then the defendant would be liable; and the transcript of the record of the judgment that was obtained out in Fremont county, Wyoming, against McLaughlin, I cannot admit here as the transcript of the record of the suit on this case, for the reason that there is nothing reciting what it is on, excepting it claims that it is on a note. But the transcript indicates that the suit is by the representatives and heirs of the deceased, Kate McGinness; whereas this note runs to McPherson; and judgment for $37,000 on a $25,000 note, it seems, is too far-fetched to allow any dispute on that. If I submitted

it to you, I am satisfied you would take the same view of it."

In defendant's amended answer he specifically alleged that the administrator of the estate of Kate McGinness "undertook the collection and enforcement of the note of W. J. McLaughlin for $25,000 and proceeded * * * in his own behalf to secure judgment against him." And defendant's counsel in his opening statement to the jury stated that the administrator had recovered a judgment against McLaughlin on this note. Plaintiffs' offer of a duly authenticated transcript of an execution issued on the judgment, with the return of the sheriff thereon, was likewise excluded by the trial court. The correspondence in evidence shows to almost a moral certainty that the judgment, a transcript of which was offered, was based upon the McLaughlin note. These transcripts were offered for the purpose of showing that the preliminary steps required to be taken under the memorandum pleaded had been taken; that neither the note nor judgment had been paid and the contingent liability against defendant had accrued, and it was error for the court to exclude them. 22 C. J. 816, sec. 930.

The statute of limitations was in issue under the pleadings and proof, and it is contended by appellant that on this issue alone the judgment may be sustained. We do not so construe the evidence.

From a consideration of the entire record, the conclusion is irresistible that plaintiffs were entitled to have the transcript admitted in evidence and to have their cause submitted to the jury under proper instructions, and it was therefore error for the court to direct a verdict for defendant.

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

REVERSED.