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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

JANUARY AND SEPTEMBER TERMS, 1924.

VOLUME CXII

HENRY P. STODDART,
OFFICIAL REPORTER

CLAFLIN PRINTING COMPANY
UNIVERSITY PLACE, NEBRASKA
1925

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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] March 10, 1924, Associate Justice Aldrich died.
[2] Appointed April 15, 1924.

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During the period covered by these reports, in addition to the cases reported in this volume, there were 66 cases affirmed by the court without opinion.

TABLE OF CASES REPORTED.

Ackerman v. National American Fire Ins. Co. 272
Aksamit, Farmers State Bank v. 465
Alderman, Farmers & Merchants Bank v. 407
Allen v. Trester 515
Amack, Chicago, B. & Q. R. Co. v. 437
American Exchange Bank, State v. 834
American State Bank v. Keller 761
American State Bank, State v. 182
American State Bank, State v. 272
Anderson v. East Stocking Threshing Machine Co. 823
Anderson, Farmers State Bank v. 413
Aten v. Quantock 288
Atlas Refining Corporation, Smith v. 6
Atlas Refining Corporation, Stroman v. 187

Baker, v. Baker 738, 743
Baker, Miller v. 375
Baker v. State 654
Bankers Automobile Ins. Co., Huffman v. 277, 283
Barb, Tate v. 756
Becker, Carey v. 115
Berger, Panebianco v. 334
Bergmann, Wilson v. 145
Berkovitz v. Morton-Gregson Co. 154
Biggerstaff v. City of Broken Bow 4
Biltwell Tire & Battery Co. v. Book 647
Bishop v. Liston 559
Blue River Power Co. v. Hronik 500
Board of Equalization, Fisher v. 582
Bodie, Rogers v. 672
Book, Biltwell Tire & Battery Co. v. 647
Boyce v. Burleigh 509
Braun v. Quinn 485
Briegel v. Union P. R. Co. 398
Broken Bow, City of, Biggerstaff v. 4
Brown, Furnas County Farm Bureau v. 637
Brown, Karr v. 626
Brown v. Stroud & Co. 210
Brown County Bank, State v. 367
Brown County Bank, State v. 642
Bruce v. Ford 227
Bryan, State v. 692

Buckner, Lancaster Farmers State Bank v. 126
Buerstatte v. Swanson 30
Burleigh, Boyce v. 509
Burnham, Eliason v. 549
Bush v. State 384

Cahoon v. First Nat. Bank 462
Carey v. Becker 115
Carey v. Zabel 16
Carmony v. Carmony 651
Cavanaugh, Farmers State Bank v. 142
Century Oil Co. v. Department of Agriculture 73
Chadron, City of, Parsons v. 120
Chadron, City of, Randall v. 120
Chapin-Colglazier Construction Co. v. Hamilton County 269
Chermak v. Smolik 54
Chicago, B. & Q. R. Co. v. Amack 437
Chicago, B. & Q. R. Co., State v. 248
Chicago, & N. W. R. Co., State v. 176
Chicago, R. I. & P. R. Co. v. State 727
Chicago, St. P., M. & O. R. Co. v. City of South Sioux City 271
Church v. State 581
City of Broken Bow, Biggerstaff v. 4
City of Chadron, Parsons v. 120
City of Chadron, Randall v. 120
City of Omaha, Creighton Real Estate Co. v. 802, 810
City of Omaha, Metropolitan Utilities District v. 93
City of Omaha, State v. 694
City of South Sioux City, Chicago, St. P., M. & O. R. Co. v. 271
City of South Sioux City, Sioux City Bridge Co. v. 271
Claridge, Vavra v. 553
Colfax County, Costello v. 40
Cooper v. Kostick 816
Costello v. Colfax County 40
Crane Co. v. Douglas County 365
Crane Co., Horse Shoe Lake Drainage District v. 323
Creighton Real Estate Co. v. City of Omaha 802, 810
Culver v. Union P. R. Co. 441

Davis v. Davis 178
Davis, Krotter & Fitzgerald v. 545
Davis, Leypoldt & Pennington Co. v. 350
Department of Agriculture, Century Oil Co. v. 73
De Tar, King v. 535
Dodge County, Koyen v. 237
Dougherty v. White 675

Douglas County, Crane Co. v. 365
Dowler, Farmers State Bank v. 262
Drainage District, Merritt v. 210
Drainage District, Miller v. 206
Draper v. Eager 611
Dunnegan v. Jensen 266
Durland v. Elkhorn Life & Accident Ins. Co. 105

Eager, Draper v. 611
East Stocking Threshing Machine Co., Anderson v. 823
Edgar v. Skinner Packing Co. 752
Egbert v. State 129
Eliason v. Burnham 549
Elkhorn Life & Accident Ins. Co., Durland v. 105
Elliott v. Wille 78, 86
Employers Indemnity Corporation, Pred v. 161
Estate of Moore, Markel v. 743
Estate of Phifer, Phifer v. 327
Everett, Garrison v. 230

Farley & Loetscher Mfg. Co. v. Methodist Episcopal Church 140
Farmers Cooperative Grain Co. v. Startzer 19
Farmers & Merchants Bank v. Alderman 407
Farmers & Merchants Bank, State v. 840
Farmers Nat. Bank v. Ohman 491
Farmers State Bank v. Aksamit 465
Farmers State Bank v. Anderson 413
Farmers State Bank v. Cavanaugh 142
Farmers State Bank v. Dowler 262
Farmers State Bank, Koehler v. 590
Farmers State Bank v. Lydick 586
Farmers State Bank, Mansfield v. 583
Farmers State Bank, State v. 380
Farmers State Bank, State v. 474
Farmers State Bank, State v. 597
Farmers State Bank, State v. 788
Farrin v. State 608
Feather v. Feather 315
Feis v. United States Ins. Co. 777
Fender v. State 331
Finegold v. State 64
First Nat. Bank, Cahoon v. 462
First Nat. Bank, Thomas v. 847
Fisher v. Board of Equalization 582
Forburger Stone Co. v. Young 345
Ford, Bruce v. 227

Fraas, Funke v. 541
Francis v. Garlow 355
Fricke v. State 767
Funke v. Fraas 541
Furnas County Farm Bureau v. Brown 637

Garlow, Francis v. 355
Garrison v. Everett 230
Gearhart, Stutzman v. 827
Geise v. Yarter 44
Gibson v. Kelkenny 524
Gipson v. Metropolitan Life Ins. Co. 302
Goodwin v. Rosebud Cattle Co. 90
Gragg v. State 732
Graham, Von Loh v. 306
Grebe v. State 715
Grebe v. State 759

Hamilton County, Chapin-Colglazier Construction Co. v. 269
Harris v. McPherson 410
Hoppe v. State 593
Horse Shoe Lake Drainage District v. Crane Co. 323
Howard v. Spragins 641
Hronik, Blue River Power Co. v. 500
Hubler v. Modern Woodmen of America 1
Huffman v. Bankers Automobile Ins. Co. 277, 283

Iden v. State 454
In re Estate of Murphy 331

Jensen, Dunnegan v. 266
Johnson v. Kelley 60
Johnson v. State 530
Jones, Nittler-Rhump Co. v. 238
Jones v. State 710
Jorgensen v. Robinson Seed Co. 573
Judson, Tyrrell v. 393

Karr v. Brown 626
Kaufmann v. State 718
Keefover v. Vasey 424
Kelkenny, Gibson v. 524
Keller, American State Bank v. 761
Kelley, Johnson v. 60
Keys, Reid v. 242
Kilgore State Bank, State v. 856

King v. De Tar 535
Koehler v. Farmers State Bank 590
Kostick, Cooper v. 816
Koyen v. Dodge County 237
Krotter & Fitzgerald v. Davis 545
Kummer v. Kummer 220

Lancaster Farmers State Bank v. Buckner 126
Larson, Menking v. 479
Leyden, White v. 774
Leypoldt & Pennington Co. v. Davis 350
Liston, Bishop v. 559
Lydick, Farmers State Bank v. 586

McCaw v. Swallow 458
McCue v. State 9
McKillip, Madura v. 783
McMullen v. Nash Sales Co. 371
McPherson, Harris v. 410
Madura v. McKillip 783
Mansfield v. Farmers State Bank 583
Marcell v. Midland Title Guarantee & Abstract Co. 420
Mares v. State 619
Markel v. Estate of Moore 743
Markel, Moore v. 743
Menking v. Larson 479
Merritt v. Drainage District 210
Merritt Drug Stores, Wolcott v. 134
Methodist Episcopal Church, Farley & Loetscher Mfg. Co. v. 140
Metropolitan Life Ins. Co., Gipson v. 302
Metropolitan Utilities District v. City of Omaha 93
Meyers v. State 149
Midland Title Guarantee & Abstract Co., Marcell v. 420
Miller v. Baker 375
Miller v. Drainage District 206
Miller v. State 243
Millsap, State v. 722
Minatare Bank v. Wilson 216
Modern Woodmen of America, Hubler v. 1
Modern Woodmen of America, Smiley v. 10
Moore v. Markel 743
Moore v. Muller 551
Morgan, Nebraska National Guard v. 432
Morris, O'Shea v. 102
Morton-Gregson Co., Berkovitz v. 154
Muller, Moore v. 551

Murphy, In re Estate of 331

Nash Sales Co., McMullen v. 371
National American Fire Ins. Co., Ackerman v. 272
Nebraska National Guard v. Morgan 432
Nelson v. State 838
Nelson v. Woodhouse 359
Nittler-Rhump Co. v. Jones 238

Ohman, Farmers Nat. Bank v. 491
Olson v. Woodhouse 527
Omaha, City of, Creighton Real Estate Co. v. 802, 810
Omaha, City of, Metropolitan Utilities District v. 93
Omaha, City of, State v. 694
O'Shea v. Morris 102

Panebianco v. Berger 334
Parmele v. State 831
Parsons v. City of Chadron 120
Pearlman v. Snitzer 135
Perry, Stephenson v. 294
Phelps v. Williams 667, 671
Phifer v. Estate of Phifer 327
Phillips v. State 605
Potter v. Scotts Bluff County 318
Prairie Life Ins. Co., Sallander v. 629
Pred v. Employers Indemnity Corporation 161

Quantock, Aten v. 288
Quinn, Braun v. 485
Quinton v. State 684

Randall v. City of Chadron 120
Rasmussen, Warrick v. 299
Reagor, Trevett, Mattis & Baker Co. v. 470
Reid v. Keys 242
Riddick v. Riddick 813
Robinson v. Union Automobile Ins. Co. 32
Robinson Seed Co., Jorgensen v. 573
Rogers v. Bodie 672
Rogers v. Tangier Temple 166
Rosebud Cattle Co., Goodwin v. 90

Sallander v. Prairie Life Ins. Co. 629
Sawyer v. Sovereign Camp, W. O. W. 821

Schellpeper v. Sporn 192
Schlesselman v. Travelers Ins. Co. 332
Schminke v. Sinclair 3
School District D v. School District No. 80 867
School District No. 80, School District D v. 867
Scotts Bluff County, Potter v. 318
Security Mutual Life Ins. Co., Wood v. 66
Sherlock v. Sherlock 797
Sinclair, Schminke v. 3
Sioux City Bridge Co. v. City of South Sioux City 271
Skinner Packing Co., Edgar v. 752
Smiley v. Modern Woodmen of America 10
Smith v. Atlas Refining Corporation 6
Smolik, Chermak v. 54
Snitzer, Pearlman v. 135
Sommers v. State 311
South Fork State Bank., State v. 623
South Sioux City, City of, Chicago, St. P., M. & O. R. Co. v. 271
South Sioux City, City of, Sioux City Bridge Co. v. 271
Sovereign Camp, W. O. W., Sawyer v. 821
Sporn, Schellpeper v. 192
Spragins, Howard v. 641
Startzer, Farmers Cooperative Grain Co. v. 19
State v. American State Bank 272
State, Baker v. 654
State, Bush v. 384
State, Chicago, R. I. & P. R. Co. v. 727
State, Church v. 581
State, Egbert v. 129
State, Farrin v. 608
State, Fender v. 331
State, Finegold v. 64
State, Fricke v. 767
State, Gragg v. 732
State, Grebe v. 715
State, Grebe v. 759
State, Hoppe v. 593
State, Iden v. 454
State, Johnson v. 530
State, Jones v. 710
State, Kaufmann v. 718
State, McCue v. 9
State, Mares v. 619
State, Meyers v. 149
State, Miller v. 243
State, Nelson v. 838

State, Parmele v. 831
State, Phillips v. 605
State, Quinton v. 684
State, Sommers v. 311
State, Taylor v. 112
State, Taylor v. 259
State, Thompson v. 389
State, Welter v. 22
State, Wesley v. 360
State, ex rel. Davis, v. American State Bank 182
State, ex rel. Davis, v. Brown County Bank 367
State, ex rel. Davis, v. Brown County Bank 642
State, ex rel. Davis, v. Farmers & Merchants Bank 840
State, ex rel. Davis, v. Farmers State Bank 380
State, ex rel. Davis, v. Farmers State Bank 474
State, ex rel. Davis, v. Farmers State Bank 597
State, ex rel. Davis, v. Farmers State Bank 788
State, ex rel. Davis, v. Kilgore State Bank 856
State, ex rel. Davis, v. Wayne County Bank 792
State, ex rel. Metropolitan Utilities District, v. City of Omaha 694
State, ex rel. Reinhardt, v. Talich 723
State, ex rel. Sorensen, v. Chicago, B. & Q. R. Co. 248
State, ex rel. Spillman, v. American Exchange Bank 834
State, ex rel. Spillman, v. Chicago & N. W. R. Co. 176
State, ex rel. Spillman, v. South Fork State Bank 623
State, ex rel. Tunison, v. Millsap 722
State, ex rel. Village of Dakota City, v. Bryan 692
Stephenson v. Perry 294
Stocker v. Stocker 201
Stocker v. Stocker 565
Stroman v. Atlas Refining Corporation 187
Stroud & Co., Brown v. 210
Stutzman v. Gearhart 827
Swallow, McCaw v. 458
Swanson, Buerstatte v. 30
Swanson, Taylor v. 403

Talich, State v. 723
Tangier Temple, Rogers v. 166
Tate v. Barb 756
Taylor v. State 112
Taylor v. State 259
Taylor v. Swanson 403
Thomas v. First Nat. Bank 847
Thompson v. State 389
Thompson v. Wall 196

Tiernan v. Tiernan 707
Travelers Ins. Co, Schlesselman v. 332
Trester, Allen v. 515
Trevett, Mattis & Baker Co. v. Reagor 470
Tyrrell v. Judson 393

Union Automobile Ins. Co., Robinson v. 32
Union P. R. Co., Briegel v. 398
Union P. R. Co., Culver v. 441
Union P. R. Co., Varnum v. 340
United States Ins. Co., Feis v. 777

Varnum v. Union P. R. Co. 340
Vasey, Keefover v. 424
Vavra v. Claridge 553
Von Loh v. Graham 306

Wall, Thompson v. 196
Warrick v. Rasmussen 299
Wayne County Bank, State v. 792
Welter v. State 22
Wesley v. State 360
White, Dougherty v. 675
White v. Leyden 774
White v. White 850
Wille, Elliott v. 78, 86
Williams, Phelps v. 667, 671
Wilson v. Bergmann 145
Wilson, Minatare Bank v. 216
Wolcott v. Merritt Drug Stores 134
Wood v. Security Mutual Life Ins. Co. 66
Woodhouse, Nelson v. 359
Woodhouse, Olson v. 527

Yarter, Geise v. 44
Young, Forburger Stone Co. v. 345

Zabel, Carey v. 16

CASES CITED BY THE COURT

Aachen & Munich Fire Ins. Co. v. City of Omaha, 72 Neb. 518..... 100
Abbott v. Abbott, 18 Neb. 503..... 19
Ackerman v. Merle, 137 Cal. 157..... 396
Adams v. Cole, 1 Daly (N. Y.) 147..... 159
Adkins v. Hope Engineering & Supply Co., 81 W. Va. 449..... 519
Ætna Indemnity Co. v. Schroeder, 12 N. Dak. 110..... 646
Ætna Ins. Co. v. Indiana Nat. Life. Ins. Co., 191 Ind. 554..... 779
Ah How v. Furth, 13 Wash. 550..... 330
Albin v. Parmele, 70 Neb. 740..... 616
Alfree Mfg. Co. v. Grape, 59 Neb. 777..... 285
Allan v. Kennard, 81 Neb. 289..... 259
Allen v. Chicago Undertakers Ass'n, 232 Ill. 458..... 171
Allen v. Puritan Trust Co., 211 Mass. 409..... 845
Alter v. Bank of Stockham, 53 Neb. 223..... 646
Altman v. Eckermann, 132 S. W. (Tex. Civ. App.) 523..... 563
American Bonding Co., v. State Savings Bank, 47 Mont. 332..... 862
American Exchange Nat. Bank v. Fockler, 49 Neb. 713..... 631
American Ins. Co. v. Neiberger, 74 Mo. 167..... 37
American Nat. Bank v. Fidelity & Deposit Co., 129 Ga. 126..... 845
American Southern Nat. Bank v. Smith, 170 Ky. 512..... 604
Anderson v. Amidon, 114 Minn. 202..... 174
Anketel v. Converse, 17 Ohio St. 11..... 646
Armstrong v. Mayer, 60 Neb. 423..... 517
Ashford v. Iowa & Minnesota Lumber Co., 81 Neb. 561..... 140
Atkins v. Gladwish, 25 Neb. 390..... 564
Atkins v. Johnson, 43 Vt. 78..... 230
Atkinson v. Doherty & Co., 121 Mich. 372..... 171
Auld v. Walker, 107 Neb. 676..... 52, 297, 407, 670
Ayres v. McConahey, 65 Neb. 588..... 301
Ayres v. West, 86 Neb. 297..... 488

Bailey v. People, 190 Ill. 28..... 70
Baird v. Union Mutual Life Ins. Co., 103 Neb. 609, 104 Neb. 352 305
Baker v. Baker, 112 Neb. 738..... 743
Baker v. State, 112 Neb. 654..... 732, 735
Baker v. Thomas, 102 Neb. 401..... 285
Baldwin v. Burt, 43 Neb. 245..... 196
Bank of Benson v. Gordon, 101 Neb. 162..... 641
Bank of Commerce v. Hart, 37 Neb. 197..... 409
Bank of Commerce & Savings v. Randell, 107 Neb. 332..... 587
Bank of Hickory v. McPherson, 102 Miss. 852..... 845

Bank of Stockham v. Alter, 61 Neb. 359 647
Bank of United States v. Dunn, 6 Pet. (U. S.) 51 498
Bankers Life Ins. Co. v. Robbins, 53 Neb. 44 489
Barrett v. Selden-Breck Construction Co., 103 Neb. 850 321
Barry v. United States Mutual Accident Ass'n, 23 Fed. 712 782
Barry v. Wachosky, 57 Neb. 534 9
Bartley v. State, 55 Neb. 294 445
Barton v. McKay, 36 Neb. 632 413
Barton v. Patrick, 20 Neb. 654 757
Barton v. Shull, 62 Neb. 570 326
Bauer v. Deane, 33 Neb. 487 488
Bauer & Johnson Co. v. National Roofing Co., 107 Neb. 831 527
Baxter v. Earl of Portsmouth, 5 Barn. & Cr. (Eng.) *170 331
Beatrice v. Reid, 41 Neb. 214 122
Beebe v. Latimer, 59 Neb. 305 632
Bell v. City of David City, 94 Neb. 157 83
Benedict v. T. L. V. Land & Cattle Co., 66 Neb. 236 764
Berghoff v. State, 25 Neb. 213 773
Best v. Zutavern, 53 Neb. 604 683
Billings v. State, 109 Neb. 596 386
Bingaman v. Bingaman, 85 Neb. 248 787
Bird v. Smith, 101 Ky. 205 224
Birkett v. Postal Telegraph-Cable Co., 107 App. Div. (N. Y.) 115 159
Blair v. State, 72 Neb. 501 735
Bleecker v. Bond, 3 Wash. C. C. (U. S.) 529 809
Blevins v. State, 109 Neb. 183 595
Board of Directors of Alfalfa Irrigation District v. Collins, 46 Neb. 411 83
Bodwell v. Webster, 98 Neb. 664 321
Boehmer v. Wellensiek, 107 Neb. 478 750
Boesen v. Omaha Street R. Co., 79 Neb. 381 774
Bolln v. State, 51 Neb. 581 684
Bolton v. Oberne, Hosick & Co., 79 Ia. 278, 44 N. W. 547 472
Bonacum v. Harrington, 65 Neb. 831 175
Bonacum v. Murphy, 71 Neb. 463, 487 175
Boon v. Gooch, 95 Neb. 678 229
Bostwick v. Mahaffy, 48 Mich. 342 396
Bostwick v. Mutual Life Ins. Co., 116 Wis. 392 37
Boughn v. State, 44 Neb. 889 735
Bowman v. Wright, 65 Neb. 661 748
Boxa v. Boxa, 92 Neb. 78 317
Boyles v. Blankenhorn, 153 N. Y. Supp. 466 563
Bradley v. Slater, 58 Neb. 554 653
Briggs v. Brushaber, 43 Mich. 330 755
Briggs v. First Nat. Bank, 41 Neb. 17 650
Bright v. Ecker, 9 S. Dak. 192 396

Britton Milling Co. v. Williams, 44 S. Dak. 464 21
Brooks v. Flora, 111 Neb. 9 754
Brown v. Douglas County, 98 Neb. 299 367
Brown v. Hannibal & St. J. R. Co., 66 Mo. 588 447
Brown v. Harris County Medical Society, 194 S. W. (Tex. Civ. App.) 1179 174
Brown v. Stroud & Co., 112 Neb. 210 755
Browning v. State, 54 Neb. 203 737
Buckley v. Advance Rumely Thresher Co., 106 Neb. 214 754
Buffalo County v. Bowker, 111 Neb. 762 238
Buffalo County Bank v. Sharpe, 40 Neb. 123 846
Bull v. Mitchell, 47 Neb. 647, 654 159
Buonfiglio v. Neumann & Co., 93 N. J. Law, 174 519
Burke v. Monumental Division, No. 52, B. of L. E., 273 Fed. 707 173
Burlington & M. R. R. Co. v. Kearney County, 17 Neb. 511 632
Burlington & M. R. R. Co. v. York County, 7 Neb. 487 632
Burnett v. State, 86 Neb. 11 387
Bush v. State, 55 Neb. 195 687
Bush v. State, 62 Neb. 128 735

Cambrelleng v. Purton, 125 N. Y. 610 223
Camden Land Co. v. Lewis, 101 Me. 78 191
Campbell County v. City of Newport, 174 Ky. 712 96
Carson v. Greeley, 107 Neb. 609 278
Carstens v. McDonald, 38 Neb. 858 60
Central Nat. Bank v. Ericson, 92 Neb. 396 ..... 297, 403
Central State Bank v. Farmers State Bank., 101 Neb. 210 864
Central West Investment Co. v. Barker, 79 Neb. 47 688
Century Oil Co. v. Department of Agriculture, 110 Neb. 100 74
Century Oil Co. v. Department of Agriculture, 112 Neb. 73 379
Chadron Loan & Building Ass'n v. O'Linn, 1 Neb. (Unof.) 1 472
Chase v. Heaney, 70 Ill. 268 422
Cheney v. Dunlap, 27 Neb. 401 669
Chesapeake & O. R. Co. v. Kelly, 241 U. S. 485 453
Chezem v. State, 56 Neb. 496 9
Chicago, B. & Q. R. Co. v. Cram, 228 U. S. 70 547
Chicago, B. & Q. R. C. v. Hitchcock County, 60 Neb. 722 488
Chicago, B. & Q. R. Co. v. Sevcek, 72 Neb. 793, 799 403
Chicago, M. & St. P. R. Co. v. County of Lake, 287 Ill. 337 ..... 97, 703
Chicago & N. W. R. Co. v. City of Albion, 109 Neb. 739 6
Chicago, R. I. & P. R. Co. v. Bennett, 36 Okla. 358 322
Chicago, R. I. & P. R. Co. v. Burke, 82 Okla. 114 354
Chicago, R. I. & P. R. Co. v. McDowell, 66 Neb. 170 236
Chicago, R. I. & P. R. Co. v. State, 111 Neb. 362 728
Chicago, St. P., M. & O. R. Co. v. McManigal, 73 Neb. 580 233
Church of The Holy Trinity v. United States, 143 U. S. 457, 468 256

Churchill v. Stephens, 91 N. J. Law, 195 522
Citizens Bank v. Fredrickson, 83 Neb. 755 497
Citizens State Bank v. Worden, 95 Neb. 53 632
City Deposit Bank v. Green, 130 Ia. 384 219
City of Beatrice v. Leary, 45 Neb. 149 123
City of Chicago v. Knobel, 232 Ill. 112 97
City of Chicago v. Manhattan Cement Co., 178 Ill. 372 ..... 97, 703
City of Los Angeles v. Los Angeles Gas & Electric Co., 251 U. S. 32 96
City of Milwaukee v. Althoff, 156 Wis. 68 512
City of Omaha v. Jensen, 35 Neb. 68 126
Clark v. Gruber, 74 W. Va. 533 330
Clark v. State, 102 Neb. 728 737
Clayton v. Bank of East Chattanooga, 204 Ala. 64 219
Clough v. Adams, 71 Ia. 17 149
Cobbey v. Wright, 29 Neb. 274 488
Coffman v. Malone, 98 Neb. 819 ..... 241, 498, 757
Cole v. Duluth, S. S. & A. R. Co., 104 Wis. 460 403
Colorado Springs & I. R. Co. v. Fogelsong, 42 Colo. 341 447
Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co., 33 Okla. 535 863
Commercial Union Assurance Co. v. State, 113 Ind. 331 158
Commonwealth v. Interstate Consolidated Street R. Co., 187 Mass. 436 257
Connecticut Trust & Safe Deposit Co. v. Fletcher, 61 Neb. 166 294
Connors v. Semet-Solvay Co., 159 N. Y. Supp. 431 520
Consumers Coal Co. v. City of Lincoln, 109 Neb. 51 83
Cook v. Massey, 38 Idaho, 264 429
Cook v. Westchester Fire Ins. Co., 60 Neb. 127 37
Cook County Nat. Bank v. United States, 107 Neb. 445 865
Cooley v. Jansen, 54 Neb. 33 397
Corn Exchange Nat. Bank v. Jansen, 70 Neb. 579 ..... 195, 215
Cottle v. Cole & Cole, 20 Ia. 481 298
Covey v. Henry, 71 Neb. 118 359
Cram v. Chicago, B. & Q. R. Co., 85 Neb. 586 547
Creighton Real Estate Co. v. City of Omaha, 112 Neb. 802 810
Crutcher v. Order of Railway Conductors, 151 Mo. App. 622 171
Currier v. Teske, 98 Neb. 660 680

Daily v. Missouri P. R. Co., 103 Neb. 219 506
Dappen v. Weber, 106 Neb. 812 873
Darst v. Griffin, 31 Neb. 668 ..... 6, 44
Davenport v. Stone, 104 Mich. 521 410
Davis v. Industrial Commission, 297 Ill. 29 322
Davis v. State, 51 Neb. 301 689
Davis v. State, 54 Neb. 177 773

Davis v. Stearns, 85 Neb. 121 241
Davy v. Aevermann, 110 Neb. 62 592
Dean v. Raplee, 145 N. Y. 319 563
Dettman v. Pittenger, 89 Neb. 825 505
Deutschmann v. Third Avenue R. Co., 84 N. Y. Supp. 887 449
Devol v. Dye, 123 Ind. 321 396
Dixon v. Western Union Telegraph Co., 68 Fed. 630 164
Doane v. Dunham, 64 Neb. 135 ..... 180, 787
Dodds v. Wilson, 3 Brev. (S. Car.) 389 331
Dodge County v. Acom, 61 Neb. 376 44
Doe v. Cockell, 6 C. & P. (Eng.) *525 634
Dolvin v. American Harrow Co., 125 Ga. 699 37
Donnelly v. Sovereign Camp, W. O. W., 111 Neb. 499 822
Dorrington v. Myers, 11 Neb. 388 678
Dorsey v. Conrad, 49 Neb. 443 540
Dorsey v. McFarland, 7 Cal. 342 472
Douglas County v. Broadwell, 96 Neb. 682 653
Douglas County v. Vinsonhaler, 82 Neb. 810 690
Drexel v. Murphy, 59 Neb. 210 ..... 301, 416
Dunham v. Minard, 4 Paige (N. Y.) 441 223
Dunnegan v. Jensen, 112 Neb. 266 269
Dwelling House Ins. Co. v. Brewster, 43 Neb. 528 207
Dye v. Mann, 10 Mich. 291 472

Easton v. Snyder-Trimble Co., 94 Neb. 18 748
Edholm v. Edholm, 99 Neb. 331 852
Edmiston v. Hupp, 98 Neb. 84 149
Elliott v. Wille, 112 Neb. 78 86
Ellis v. State, 138 Wis. 513 185
Erwin's Lessee v. Dundas, 4 How. (U. S.) *58 681
Esterly Harvesting Machine Co. v. Frolkey, 34 Neb. 110 773
Esterly Harvesting Machine Co. v. Pringle, 41 Neb. 265 629
Everson v. Everson, 101 Neb. 705 654
Ex parte Wolf, 14 Neb. 24 726

Fager v. State, 22 Neb. 332 243
Fahey v. Updike Elevator Co., 102 Neb. 249 60
Farmers Cooperative Grain Co. v. Startzer, 112 Neb. 19 282
Farmers Investment Co. v. O'Brien, 109 Neb. 19 64
Farmers State Bank v. Cavanaugh, 112 Neb. 142 196
Farmers State Bank v. Dowler, 112 Neb. 262 648
Farmers State Bank v. Lydick, 112 Neb. 586 586
Farrens v. Farmers State Bank, 101 Neb. 285 864
Faulkner v. Simms, 68 Neb. 299 215
Fidelity & Deposit Co. v. Rankin, 33 Okla. 7 845
First Nat. Bank v. Blocker, 150 Minn. 337 54

First Nat. Bank v. Felt, 100 Ia. 680 498
First Nat. Bank v. Golder, 89 Neb. 377 496
Fischer v. Sklenar, 101 Neb. 553 182
Fitzgerald v. State, 11 Neb. 577 533
Fitzgerald v. Union Stock Yards Co., 89 Neb. 393 479
Flege v. State, 90 Neb. 390 133
Flege v. State, 93 Neb. 610 734
Fleming v. Burnham, 100 N. Y. 1 224
Floars v. Ætna Life Ins. Co., 11 L. R. A. n. s. 357 37
Fogg v. Ellis, 61 Neb. 829 488
Forbes v. City of Omaha, 79 Neb. 6 189
Forsha v. Nebraska Moline Plow Co., 89 Neb. 770 233
Fountain v. Bigham, 235 Pa. St. 35 264
Fourth Nat. Bank v. Bank Commissioner, 110 Kan. 380 185
Fowler v. State, 109 Neb. 400 738
Fraaman v. Fraaman, 64 Neb. 472 ..... 683, 868
Frahm v. Metcalf, 75 Neb. 241 ..... 757, 820
Francis v. Lincoln Traction Co., 106 Neb. 243 527
Franey v. Warner, 96 Wis. 222 755
Franklin v. Burnham, 40 Misc. (N. Y.) 566 176
Frazier v. State, 135 Ind. 38 26
Fremont, E. & M. V. R. Co. v. Mattheis, 39 Neb. 98 505
Friederich v. Klise, 95 Neb. 244 826
Fritts v. Palmer, 132 U. S. 282 604
Froelich v. Musicians Mutual Benefit Ass'n, 93 Mo. App. 383 171
Frost v. United States Fidelity & Guaranty Co., 109 Neb. 161 332

Gall v. Detroit Journal Co., 191 Mich. 405 322
Galligher v. Smiley, 28 Neb. 189 678
Gannon v. Phelan, 64 Neb. 220 865
Gardner v. East Rock Lodge, 96 Conn. 198 173
Gardner v. Kellogg, 23 Minn. 463 565
Gardes v. United States, 87 Fed. 172 690
Gauthier & Son v. Hines, 120 Me. 476 354
Gaweka v. State, 94 Neb. 53 713
Geise v. Yarter, 112 Neb. 44 755
Gentry v. Bearss, 82 Neb. 787 849
George v. State, 59 Neb. 163 689
Georgis v. State, 110 Neb. 352 22
German American State Bank v. Watson, 99 Kan. 686 497
Gerner v. Yates, 61 Neb. 100 583
Giles v. Giles, 30 Neb. 624 317
Gillespie v. City of Lincoln, 35 Neb. 34 700
Goetz Brewing Co. v. Waln, 92 Neb. 614 691
Goldenstein v. Goldenstein, 110 Neb. 788 694
Goldsberry v. State, 66 Neb. 312 696

Gooch v. Exeter, 70 N. H. 413 703
Goodall v. Swartzley, 108 Neb. 753 149
Grand Forks Nat. Bank v. Minneapolis & Northern Elevator Co., 6 Dak. 357 765
Grand Grove v. Garibaldi Grove, 130 Cal. 116 176
Grand Valley Water Users' Ass'n v. Zumbrunn, 272 Fed. 943 604
Grand View Building Ass'n v. Northern Assurance Co., 73 Neb. 149 37
Grant v. Humbert, 114 App. Div. (N. Y.) 462 849
Grave v. Pemberton, 3 Ind. App. 71 330
Gray v. Elbling, 35 Neb. 278 197
Great Western R. Co. v. Sutton, 4 L. R. 1869, Eng. & Irish App. Cas. 226 251
Greenway v. Orthwein Grain Co., 85 Fed. 536 497
Greusel v. Payne, 107 Neb. 84 378
Griffin v. Bankers Realty Investment Co., 105 Neb. 419 602
Griffith v. State, 94 Neb. 55 ..... 621, 738
Gulf, C. & S. F. R. Co. v. Hall, 34 Tex. Civ. App. 535 523

Hageman v. Powell, 76 Neb. 514 53
Haggin v. Haggin, 35 Neb. 375 742
Hall v. Catherine Creek Development Co., 78 Or. 585 105
Hall v. Supreme Lodge, K. of H., 24 Fed. 450 172
Hallenbeck v. Hahn, 2 Neb. 377 82
Haller v. City of Lansing, 195 Mich. 753 512
Halstead v. Central Savings Bank, 36 Cal. App. 500 395
Hamilton Nat. Bank v. Nye, 37 Ind. App. 464 407
Hamilton v. State, 46 Neb. 284 833
Hammond v. Hammond, 103 Neb. 860 317
Hammond v. Ocean Shore Development Co., 22 Cal. App. 167 752
Hanna v. Hanna, 104 Neb. 231 453
Hardwick v. Hardwick, 130 Ia. 230 569
Harte v. Castetter, 38 Neb. 571 723
Hartman v. Unexcelled Mfg. Co., 93 N. J. Law 418 519
Haslam v. Barge, 69 Neb. 644 326
Hauth v. Sambo, 100 Neb. 160 483
Hayden v. Hayden, 107 Neb. 806 448
Hazelet v. Holt County, 51 Neb. 716 690
Head Camp, W. O. W., v. Loeher, 17 Colo. App. 247 447
Hedbloom v. Pierson, 2 Neb. (Unof.) 799 472
Helena Consolidated Water Co. v. Steele, 20 Mont. 1 96
Helm v. Darby's Adm'r, 3 Dana (Ky.) *185 681
Henderson v. State, 85 Neb. 444 565
Hendrix v. Richards, 57 Neb. 794 849
Hennig v. State, 102 Neb. 271 ..... 26, 738
Henry v. New York, L. E. & W. R. Co., 10 N. Y. Supp. 508 447

Herpolsheimer v. Funke, 1 Neb. (Unof.) 304 32
Hespen v. Union P. R. Co., 82 Neb. 495 209
Hibberd v. Hughey, 110 Neb. 744 514
Hickey v. Brinkley, 88 Neb. 356 32
Hill v. Alexander, 2 Kan. App. 251 472
Hilton v. Bachman, 24 Neb. 490 874
Hinkley v. Sac Oil & Pipe Line Co., 132 Ia. 396 191
Hixon Map Co. v. Nebraska Post Co., 5 Neb. (Unof.) 388 60
Hobbs v. Hullman, 171 N. Y. Supp. 390 449
Hoctor-Johnston Co. v. Billings, 65 Neb. 214 750
Home Fire Ins. Co. v. Johansen, 59 Neb. 349 207
Homnyack v. Prudential Ins. Co. of America, 194 N. Y. 456 450
Hope v. Twarling, 111 Neb. 793 569
Hopper v. Elkhorn Drainage District, 108 Neb. 550 209
Horbach v. Tyrrell, 48 Neb. 514 472
Horkey v. Kendall, 53 Neb. 522 665
Hormel & Co. v. American Bonding Co., 112 Minn. 288 863
Horsfall v. Pacific Mutual Life Ins. Co., 32 Wash. 132 782
Hough v. Iderhoff, 69 Or. 568 563
Hough v. Stover, 46 Neb. 588 874
Houghton & Co. v. Todd, 58 Neb. 360 843
Hudgins v. Lanier Bros. & Co., 23 Grat. (Va.) 494 223
Huffman v. Bankers Automobile Ins. Co., 112 Neb. 277 283
Huffman v. Koppelkom, 8 Neb. 344 864
Hutchinson v. Western Bridge & Construction Co., 97 Neb. 439 453
Hyman, Moses & Co., v. Smith, 13 W. Va. 744 226

Iams v. Farmers State Bank, 101 Neb. 778 ..... 370, 475, 837
Independent Van & Storage Co. v. Iowa Mercantile Co., 184 Ia. 154 282
Indiana Union Traction Co. v. Thomas, 44 Ind. App. 468 447
Industrial Commission v. Shadowen, 68 Colo. 69 429
Ingoldsby v. State, 110 Neb. 495 738
In re Bollman, 73 Ind. App. 46 512
In re Boyer, 65 Ind. App. 408 429
In re Estate of Enyart, 100 Neb. 337 854
In re Estate of Grobe, 101 Neb. 786 749
In re Estate of Oldfield, 158 Ia. 98 330
In re Estate of Podhajsky, 137 Ia. 742 396
In re Estate of Van Alstine, 26 Utah, 193 571
In re Estate of Wilson, 83 Neb. 252 398
In re McVey, 50 Neb. 481 773
In re Matson, 123 Fed. 743 640
In re Sawyer, 124 U. S. 200 171
In re Strawbridge, 39 Ala. 367, 383 640
International & G. N. R. Co. v. Ryan, 82 Tex. 565 512

Interstate Casualty Co. v. Stewart, 208 Ala. 377 166
Interstate Commerce Commission v. Baltimore & O. R. Co., 145 U. S. 263, 278 255
Interstate Consolidated Street R. Co. v. Massachusetts, 207 U. S. 79 257
Inverness Chamber of Commerce v. Highland R. Co., 11 Railway & Canal Traffic Cas. (Eng.) 218 252
Iowa State & Savings Bank v. City Nat. Bank, 106 Neb. 397 603

Jackson v. Allen, 3 Stark. (Eng.) 74 634
Jackson v. Edwards, 7 Paige (N. Y.), 386, 412 225
Janes v. Howell, 37 Neb. 320 489
Jansen v. Williams, 36 Neb. 869 139
Johnson v. City of Omaha, 108 Neb. 481 527
Johnson v. David Cole Creamery Co., 109 Neb. 707 333
Johnson v. Herbst, 140 Minn. 147 750
Johnson v. State, 88 Neb. 328 533
Johnston v. Milwaukee & Wyoming Investment Co., 49 Neb. 68 629
Jones v. First Nat. Bank, 3 Neb. (Unof.) 73 409
Jones v. Guaranty & Indemnity Co., 101 U. S. 622 379
Jones v. Industrial Commission, 55 Utah, 489 429
Jones v. State, 28 Neb. 495 171
Jones v. United States, 179 Fed. 584 27
Jose v. Hewett, 50 Me. 248 229
Judson v. Creighton, 88 Neb. 37 397

Kane v. Bowden, 85 Neb. 347 43
Kaplan v. Gaskill, 108 Neb. 455 801
Kaufmann v. Drexel, 56 Neb. 229 489
Keeler v. Elson, 22 Neb. 310 410
Keifer v. Shambaugh, 99 Neb. 709 43
Keifer v. Stanley, 111 Neb. 822 43
Keller v. Davis, 69 Neb. 494 621
Kelley v. Goodwin, 95 Me. 538 766
Kelley v. Kelley, 8 Ind. App. 606 564
Kelly v. Beers, 194 N. Y. 49 395
Kendall v. Grey, 2 Hilt. (N. Y.) 300 449
Kenison v. State, 80 Neb. 688 133
Kerr v. State, 63 Neb. 115 360
Kessler v. Armstrong, 158 Fed. 744 864
Ketchell v. State, 36 Neb. 324 389
Kielbeck v. Chicago, B. & Q. R. Co., 70 Neb. 571 691
Kiler v. Wohletz, 79 Kan. 716 748
King v. Ketteridge, 1 L. R. K. B. Div. (Eng. 1915) 467 690
King v. Livingston Mfg. Co., 180 Ala. 118 282
King v. Viscoloid Co., 219 Mass. 420 521

King v. Waterman, 55 Neb. 324 60
Knappen v. Freeman, 47 Minn. 491 54
Knight v. Knight, 6 Ind. App. 268 330
Knuffke v. Bartholomew, 106 Neb. 763 321
Koehler v. Dodge, 31 Neb. 329 846
Koenigstein v. State, 103 Neb. 580 151
Koslowski v. Newman, 74 Neb. 704 396
Kotouc v. State, 104 Neb. 580 246
Kramer v. Bankers Surety Co., 90 Neb. 301 860
Kriss v. Union P. R. Co., 100 Neb. 801 67
Kron v. Robinson Seed Co., 111 Neb. 147 573
Krum v. Chamberlain, 57 Neb. 220 816
Kurpgeweit v. Kirby, 88 Neb. 72 564

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684 257
Lancaster County v. McDonald, 73 Neb. 453 821
Lang v. Omaha & C. B. Street R. Co., 96 Neb. 740 453
Langnecker v. Trustees of Grand Lodge, A. O. U. W., 111 Wis. 279 174
Lansing v. Commercial Union Assurance Co., 4 Neb. (Unof.) 140 37
Laughlin v Gardiner, 104 Neb. 237 64
Lawson v. Hewell, 118 Cal. 613 176
Lee v. State, 103 Neb. 87 622
Leedom v. State, 81 Neb. 585 247
Lenehan v. College of St. Francis Xavier, 30 Misc. Rep. (N. Y.) 378 224
Leo v. State, 63 Neb. 723 445
Lewis v. Brotherhood Accident Co., 194 Mass. 1 782
Lewis v. United States, 92 U. S. 618 866
Littlejohn v. Pearson, 23 Neb. 192 416
Livingston v. Omaha & C. B. Street R. Co., 104 Neb. 118 452
Lloyd v. Royal Union Mut. Life Ins. Co., 245 Fed. 162 571
Local Union v. Barrett, 19 R. I. 663 176
Los Angeles Gas & Electric Co. v. City of Los Angeles, 241 Fed. 912 96
Lowe v. Prospect Hill Cemetery Ass'n, 75 Neb. 85 823
Lower v. State, 109 Neb. 590 735
Lowther Oil & Gas Co. v. McGuire, 181 Ky. 681 540
Lucas v. State, 78 Neb. 454 133
Ludlum v. Rothschild, 41 Minn. 218 765
Lydick v. Gill, 68 Neb. 273 591

McAdams v. City of McCook, 71 Neb. 789, 76 Neb. 1, 7, 11 123
McAlister v. Lancaster County Bank, 15 Neb. 295 849

McCaffrey v. Little, 20 App. Cases, D. C. 116 223
McCarn v. London, 83 Neb. 201 757
McCormick v. Hopkins, 287 Ill. 66 185
McCoy v. Lane, 66 Neb. 847 849
McFadden v. Lynn, 49 Ill. App. 166 158
McKay v. State, 90 Neb. 63 734
McMillin v. Emery, 59 Utah, 553 663
McMullen v. Nash Sales Co., 112 Neb. 371 527
McNamara v. McNamara, 93 Neb. 190 813
McNees v. Thompson, 5 Bush (Ky.) 686 849
McNicol's Case, 215 Mass. 497 512
McTague v. Sea Isle City Bldg. Ass'n, 57 N. J. Law, 427 224
Mack v. Latta, 178 N. Y. 525 286
Maher v. State, 32 Neb. 354 726
Maier v. Romatzki, 95 Neb. 76 194
Maine v. Midland Investment Co., 132 Ia., 272 282
Malmstead v. Minneapolis Aerie, F. O. of E., 11 Minn. 119 174
Mangold v. Adrian Irrigation Co., 60 Wash. 286 191
Martin v. Hutton, 90 Neb. 34 238
Maryott & McHurron v. Gardner, 50 Neb. 320, 322 674
Masons Union Life Ins. Ass'n v. Brockman, 26 Ind. App. 182 447
Mattheis v. Fremont, E. & M. V. R. Co., 53 Neb. 681 506
Matthews v. Capshaw, 109 Tenn. 480 618
Mattox v. United States, 156 U. S. 237 153
Mehagan v. McManus, 35 Neb. 633 71
Melcher v. Melcher, 102 Neb. 790 ..... 569, 742
Melick v. Kelley, 53 Neb. 509 816
Merrill v. Suing, 66 Neb. 404 544
Metropolitan Utilities District v. City of Omaha, 112 Neb. 93 ..... 85, 698
Metzger v. Ætna Ins. Co., 227 N. Y. 411 37
Meyer v. Fishburn, 65 Neb. 626 ..... 149, 309
Meyers v. Menter, 63 Neb. 427 90
Miksch v. Tassler, 108 Neb. 208 ..... 215, 339
Miller v. Baker, 112 Neb. 375 539
Miller v. Drainage District, 112 Neb. 206 210
Miller v. Hurford, 11 Neb. 377 517
Miller v. Miller, 101 Neb. 405 683
Miller v. Ruzicka, 109 Neb. 152 223
Miller v. Ruzicka, 111 Neb. 815 750
Miller v. Wright, 109 N. Y. 194 224
Minatare Bank v. Wilson, 112 Neb. 216 406
Missouri P. R. Co. v. Fox, 56 Neb. 746 48
Mitchell v. St. Maxent's Lessee, 4 Wall. (U. S.) 237 681
Modern Woodmen Accident Ass'n v. Shryock, 54 Neb. 250 782

Modern Woodmen of America v. Berry, 100 Neb. 820 542
Mollyneaux v. Wittenberg, 39 Neb. 547 32
Moore v. Muller, 112 Neb. 551 548
Moore v. State, 53 Neb. 831 661
Moore v. United States, 150 U. S. 57 27
Moore v. Warrior Coal & Land Co., 178 Ala. 234 191
Morange v. Mix, 44 N. Y. 315 422
Morgan v. State, 51 Neb. 672 720
Morris v. Washington County, 72 Neb. 174 44
Morrison v. Scotts Bluff County, 104 Neb. 254 ..... 371, 527
Mosher v. Huwaldt, 86 Neb. 686 488
Mosiman v. Weber, 107 Neb. 737 876
Moss v. Cohen, 15 Misc. Rep. (N. Y.) 108 230
Mueller v. Engeln, 75 Ky. 441 764
Muffley v. City of St. Edward, 110 Neb. 572 120

Nalitzky v. Williams, 237 Fed. 802 497
Nason v. Nason, 79 Neb. 582 207
Nathan v. Nathan, 102 Neb. 59 317
National Bank v. Matthews, 98 U. S. 621 597
Neal v. Missouri P. R. Co., 98 Neb. 460 209
Neal v. Wilson, 213 Mass. 336 497
Nebraska Mutual Bond Ass'n v. Klee, 70 Neb. 383 264
Nebraska National Guard v. Morgan, 112 Neb. 432 801
Nebraska State Bank v. Walker, 111 Neb. 203 407
Nedela v. Mares Auto Co., 106 Neb. 883 436
Nelson v. Webster, 72 Neb. 332 860
Nelson v. Wirthele, 88 Neb. 595 43
Nelson & Co. v. Chicago & N. W. R. Co., 102 Neb. 439 354
Neneman v. Rickley, 110 Neb. 446 395
New England Mortgage Security Co. v. Great Western Elevator Co., 6 N. Dak. 407 416
New York Life Ins. Co. v. Mason, 272 Fed. 28 571
Nichols v. Hubbell, Inc., 92 Conn. 611 322
Nolan v. Garrison, 156 Mich. 397 848
Norfolk Beet-Sugar Co. v. Preuner, 55 Neb. 656 629
Norton v. Shelby County, 118 U. S. 425 655
Novack v. Montgomery Ward & Co., 158 Minn. 505 520
Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co., 98 Neb. 27 641

O'Brien v. South Omaha Live Stock Exchange, 101 Neb. 729 172
O'Donohue v Hendrix, 13 Neb. 255 632
O'Hara v. Hines, 108 Neb. 74 494
Omaha Fair & Exposition Ass'n v. Missouri P. R. Co., 42 Neb. 105 67

Omaha Fire Ins. Co. v. Hildebrand, 54 Neb. 306 779
Omaha & R. V. R. Co. v. Rickards, 38 Neb. 847 506
Orcutt v. McGinley, 96 Neb. 619 875
Osborn v. Gehr, 29 Neb. 661 489
O'Shea v. North American Hotel Co., 109 Neb. 317, 333 326
Ostenberg v. Kavka, 95 Neb. 314 297
Ostertag v. Galbraith, 23 Neb. 730 243

Palin v. State, 38 Neb. 862 28
Palmer v. Carpenter, 53 Neb. 394 669
Palmer v. Sawyer, 74 Neb. 108 678
Parkins v. Missouri P. R. Co., 76 Neb. 242 326
Patterson v. First Nat. Bank, 73 Neb. 384 838
Pennington v. Pacific Mutual Life Ins. Co., 85 Ia. 468 782
People v. County of Williamson, 286 Ill. 44 ..... 97, 703
People v. De France, 104 Mich. 563 449
People v. McWeeney, 259 Ill. 161 171
People v. Masonic Benevolent Ass'n, 98 Ill. 635 171
People v. Mead, 50 Mich. 228 26
People v. Moeller, 260 Ill. 375 27
People v. Schuyler, 43 Hun (N. Y.) 88 449
People v. Sharp, 163 Mich. 79 690
People v. Wakely, 62 Mich. 297 391
Perrin v. Royal, 42 Ind. 132 496
Peters v. Townsend, 93 Ark. 103 849
Peterson v. Locomotive Engineers Mutual Life & Accident Ins. Ass'n, 123 Minn. 505 782
Petrow & Giannou v. Shewan, 108 Neb. 466 ..... 321, 801
Phelps v. Williams, 112 Neb. 667 671
Phipps v. London & N. W. R. Co., 1892, 2 Q. B. (Eng.) 229 252
Pilger v. Torrence, 42 Neb. 903 489
Poe v. State, 95 Ark. 172 153
Pollock v. Horn, 13 Wash. 626 849
Pollock v. Smith, 49 Neb. 864 557
Popel v. State, 105 Neb. 348 737
Porter v. Chicago, & N. W. R. Co., 1 Neb. 14 577
Pounder v. Ashe, 44 Neb. 672 175
Powers v. Budy, 45 Neb. 208 175
Priboth v. Haveron, 41 Okla. 692 563
Pryor v. Hunter, 31 Neb. 678 60
Purviance v. Purviance, 14 Ind. App. 269 330
Purvis v. Local No. 500, 214 Pa. St. 348 70
Pyle v. Richards, 17 Neb. 180 43

Quinton v. State, 112 Neb. 684 ..... 718, 759, 768

Rakes v. Brown, 34 Neb. 304 680
Rakes v. People, 2 Neb. 157 533
Redell v. Moores, 63 Neb. 219 706
Rehmeyer v. Lysinger, 109 Neb. 805 159
Rhines v. Skinner Packing Co., 108 Neb. 105 756
Ritzwoller v. Lurie, 225 N. Y. 464 285
Roberts v. Cox, 91 Neb. 553 820
Robertson v. Lea., 1 Stew. (Ala.) 141 687
Rocha v. Payne, 108 Neb. 246 548
Roe v. Howard County, 75 Neb. 448 43
Rohrer v. Hastings Brewing Co., 83 Neb. 111 694
Rooney v. City of South Sioux City, 111 Neb. 1 271
Root v. London Guarantee & Accident Co., 922 App. Div. (N. Y.) 578 782
Rosenberg v. Chicago, B. & Q. R. Co., 77 Neb. 663 403
Rothwell v. Knox County, 62 Neb. 50 367
Roush v. Heffelbower, 225 Mich. 664 429

Sailors Union v. Hammond Lumber Co., 156 Fed. 450 70
Sallander v. Prairie Life Ins. Co., 110 Neb. 332 632
Sanders v. Nightengale, 109 Neb. 667 19
Sanderson v. Everson, 93 Neb. 606 395
Sands v. Potter, 165 Ill. 397 330
Saunders v. Mitchell, 61 Miss. 321 849
Sawyer v. Sovereign Camp, W. O. W., 105 Neb. 395 822
Schlesselman v. Travelers Ins. Co., 111 Neb. 65 332
Schneider v. Plum, 86 Neb. 129 5
Schrandt v. Young, 62 Neb. 254 299
Schuster v. North American Hotel Co., 106 Neb. 672, 679 212
Schuster v. North American Hotel Co., 106 Neb. 679 ..... 189, 484
Scott v. O'Brien, 129 Ky. 1 571
Seaton v. State, 106 Neb. 833 720
Seaver v. Hall, 50 Neb. 878 223
Security Abstract of Title Co. v. Longacre, 56 Neb. 469 423
Security Savings Bank v. Rhodes, 107 Neb. 223 497
Seifried v. Commonwealth, 101 Pa. St. 200 714
Sexton v. Sexton, 129 Ia. 487 570
Seybold v. Grand Forks Nat. Bank, 5 N. Dak. 460 396
Seymour v. Standard Live Stock Commission Co., 110 Neb. 185 ..... 301, 415
Shade v. Ash Grove Lime & Portland Cement Co., 92 Kan. 146 520
Shafer v. Beatrice State Bank, 99 Neb. 317 215
Shawnee State Bank v. Vansyckle, 109 Neb. 86 52
Sheibley v. Dixon County, 61 Neb. 409 690

Sheppard v. Graves, 14 How. (U. S.) *505 687
Shonsey v. Clayton, 107 Neb. 695 750
Sims v. McLure, 8 Rich. Eq. (S. Car.) 286 331
Simmons v. Baker, 109 Neb. 853 149
Simmons v. State, 111 Neb. 644 686
Simmons v. United States, 142 U. S. 148 689
Skagit State Bank v. Moody, 86 Wash. 286 497
Skala v. Michael, 109 Neb. 305 763
Slater v. Skirving, 51 Neb. 108 875
Slobodisky v. Phœnix Ins. Co., 52 Neb. 395 37
Smiley v. Modern Woodmen of America, 112 Neb. 10 3
Smith v. Crawford County State Bank, 99 Ia. 282 416
Smith v. First Nat. Bank, 45 Neb. 444 602
Smith v. Neufeld, 61 Neb. 699 821
Smith v. Roehrig, 90 Neb. 262 ..... 551, 573
Smith v. Spaulding, 40 Neb. 339 650
Smoot v. Kansas City, 194 Mo. 513 447
Socha v. Cudahy Packing Co., 105 Neb. 691 512
Soldate v. McNamara, 94 Conn. 589 750
Solt v. Anderson, 71 Neb. 826 472
Sorensen v. Sorensen, 56 Neb. 729 448
South Carolina v. United States, 199 U. S. 437 96
Spaulding v. State, 61 Neb. 289 686
Spence v. Miner, 90 Neb. 108 849
Spieler v. Lincoln Traction Co., 103 Neb. 339 453
Spiritual and Philosophical Temple v. Vincent, 127 Wis. 93 176
Springer v. Byram, 137 Ind. 15 447
State v. Adams County, 15 Neb. 568 83
State v. Allen, 46 Conn. 531 690
State v. American Exchange Bank, 112 Neb. 834 ..... 788, 797
State v. American State Bank, 108 Neb. 92, 98 845
State v. American State Bank, 108 Neb. 98 409
State v. American State Bank, 108 Neb. 111 844
State v. American State Bank, 108 Neb. 129 844
State v. American State Bank, 112 Neb. 182 ..... 274, 371, 647
State v. American State Bank, 112 Neb. 272 647
State v. Atchison & N. R. Co., 24 Neb. 143 110
State v. Augustine, 113 Mo. 21 726
State v. Banking House of A. Castetter, 110 Neb. 564 ..... 185, 274, 370, 837
State v. Bowen, 54 Neb. 211 517
State v. Brandt, 41 Ia. 593 662
State v. Chapman, 69 N. J. Law, 464 70
State v. Chicago, B. & Q. R. Co., 71 Neb. 593 258
State v. Chicago, M. & St. P. R. Co., 118 Minn. 380 257

State v. Cones, 15 Neb. 444 723
State v. Cornell, 53 Neb. 556 82
State v. Culver, 5 Neb. (Unof.) 238 833
State v. Diskin, 34 La. Ann. 919 690
State v. Donahue, 91 Neb. 311 717
State v. Farmers State Bank, 111 Neb. 117 ..... 370, 380, 474, 864
State v. Farmers State Bank, 112 Neb. 380 ..... 371, 647, 864
State v. Farmers State Bank, 112 Neb. 474 796
State v. Farmers State Bank, 112 Neb. 788 793
State v. Franke, 159 Mo. 535 27
State v. Gaston, 96 Ia. 505 29
State v. Georgia Medical Society, 38 Ga. 608 171
State v. Gonzales, 26 Tex. 197 736
State v. Grills, 35 R. I. 70 837
State v. Hansford, 76 Kan. 678 690
State v. Hazelet, 41 Neb. 257 690
State v. King, 23 Neb. 540 243
State v. Leflang, 108 Neb. 138 ..... 215, 339
State v. Leroy, 61 Wash, 405 28
State v. Love, 89 Neb. 149 ..... 100, 700
State v. Matthews, 44 Kan. 596 391
State v. Meyers, 56 Ohio St. 340 661
State v. Miller, 104 Neb. 838 83
State v. Monroe, 142 Minn. 394 28
State v. Moran, 24 Neb. 103 688
State v. Nickerson, 99 Neb. 517 270
State v. Norris, 27 Wash. 453 28
State v. Peoples State Bank, 111 Neb. 136 864
State v. Popejoy, 165 Ind. 177 726
State v. Roberston, 65 Neb. 41 735
State v. Robinson, 35 S. Car. 340 28
State v. St. Louis, S. W. R. Co., 197 S. W. (Tex. Civ. App.) 1006 257
State v. Schaffer, 70 Ia. 371 28
State v. Sheldon, 79 Neb. 455 694
State v. Shove, 96 Wis. 1 185
State v. South Fork State Bank, 112 Neb. 623 ..... 788, 834
State v. Standard Oil Co., 100 Neb. 826 76
State v. Stewart, 59 Vt. 273 70
State v. Tibbets, 52 Neb. 228 317
State v. Union P. R. Co., 87 Neb. 29 258
State v. Valwell, 66 Vt. 558 27
State v. Vaughan, 23 Nev. 103 689
State v. Wallack, 193 Ia. 941 28
State v. Washington, 89 N. Car. 535 689

State v. Wheeler, 33 Neb. 563 100
State v. Wiseman, 68 N. Car. 203 689
State Bank v. Grover, 110 Neb. 421 765
State, ex rel. Bykle, v. District Court, 140 Minn. 398 429
Steele's Lessee v. Spencer, 1 Pet. (U. S.) *552 535
Stewart v. Wyoming Cattle Ranche Co., 128 U. S. 383 139
Stocker v. Stocker, 112 Neb. 201 566
Stocker v. Stocker, 112 Neb. 565 552
Story v. Sramek, 108 Neb. 440 629
Story v. Story, 1 Ind. App. 284 330
Stotts v. Fairfield, 163 Ia. 726 282
Stroman v. Atlas Refining Corporation, 112 Neb. 187 ..... 484, 755
Stull Bros. v. Powell, 70 Neb. 152 7
Sturgis v. Sturgis, 51 Or. 10 848
Suiter v. Park Nat. Bank, 35 Neb. 372 ..... 144, 197
Sullenbarger v. Ahrens, 168 Ia. 288 330
Sunderland & Saunders v. Hibbard, 97 Neb. 21 229
Sutter v. State, 105 Neb. 144 688
Sutton v. New Jersey, 244 U. S. 258 257
Sweat v. Hines, 107 Neb. 1 453
Sylcord v. Horn, 179 Ia. 936 429

Tait v. Reid, 91 Neb. 235 632
Tankersley v. Lincoln Traction Co , 101 Neb. 578 483
Tanner v. Lee, 121 Ga. 524 418
Tarnow v. Carmichael, 82 Neb. 1 631
Taylor v. Goelet, 208 N. Y. 253 224
Teal v. Bilby, 123 U. S. 572 748
Tewksbury v. City of Lincoln, 84 Neb. 571 126
Thomas v. Hinkley, 19 Neb. 324 865
Thompson v. Phenix Ins. Co., 136 U. S. 287 37
Thompson v. St. Nicholas Nat. Bank, 146 U. S. 240 603
Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231 219
Thompson v. Stetson, 15 Neb. 112 632
Tiernan v. Tiernan, 107 Neb. 563 708
Tindall v. Peterson, 71 Neb. 160 181
Totten v. Totten, 172 Mich. 565 565
Torrey v. Toledo Portland Cement Co., 158 Mich. 348 191
Traver v. Merrick County, 14 Neb. 327 83
Tyler v. Hoover, 92 Neb. 221 72
Tyrrell v. Kelley, 104 Neb. 555 397

Uhlig v. Barnum, 43 Neb. 584 423
Union Central Life Ins. Co. v. Schidler, 130 Ind. 214 755
Union Nat. Bank v. Winsor, 101 Minn. 470 219

Union P. R. Co. v. Thomas, 152 Fed. 365 451
United States v. Chicago & N. W. R. Co., 127 Fed. 785 257
United States v. Oregon R. & N. Co., 159 Fed. 975 255
United States v. State of Oklahoma, 261 U. S. 253 837
United States Fidelity & Guaranty Co. v. Bramwell, 295 Fed. 331 866
United States Fidelity & Guaranty Co. v. People's Bank, 127 Tenn. 720 845
United States Wind Engine & Pump Co. v. Drexel, 53 Neb. 771 865
Universal Service Co. v. American Ins. Co., 213 Mich. 523 166
Urlau v. Ruhe, 63 Neb. 883 680

Valencia v. Milliken, 31 Cal. App. 533 564
Van Etten v. Howell, 40 Neb. 850 498
Van Etten v. Test, 49 Neb. 725 688
Vavra v. Claridge, 112 Neb. 553 647
Vian v. Hilberg, 111 Neb. 232 219
Vincent v. Taylor Bros., 180 App. Div. (N. Y.) 818 428
Vogt v. Binder, 76 Neb. 361 680
Vollmer v. State, 24 Neb. 838 133
Von Dorn v. Mengedoht, 41 Neb. 525 326
Votaw v. Votaw, 90 Neb. 699 815

Walker v. McCabe, 110 Neb. 398 629
Walker v. Stevens, 52 Neb. 653 488
Warner's Estate, 207 Pa. St. 580 855
Watson v. Taylor, 35 Okla. 768 563
Webster v. Stewart, 210 Mich. 13 522
Weigand v. Hyde, 109 Neb. 678 763
Welsh v. State, 60 Neb. 101 565
Welton v. Dickson, 38 Neb. 767 82
Wesley v. Wood, 72 Misc. Rep. (N. Y.) 258 849
Western Home Ins. Co. v. Richardson, 40 Neb. 1 209
Western Mfg. Co. v. Rogers, 54 Neb. 456 498
Western Union Telegraph Co. v. Call Publishing Co., 44 Neb. 326 258
Westinghouse Co. v. Tilden, 56 Neb. 129 326
Whelan v. Adams, 44 Okla. 696 472
White v. Loades, 178 App. Div. (N. Y.) 236 428
White v. White, 140 Wis. 538 569
Whitehead v. Rhea, 168 S. W. (Tex. Civ. App.) 460 330
Wilkins v. Wilkins, 84 Neb. 206 317
Willis v. Davis, 233 S. W. (Tex. Civ. App.) 1035 174
Wilmerding v. Postal Telegraph-Cable Co., 118 App. Div. (N. Y.) 685 159

Wilson v. Burney, 8 Neb. 39 860
Wilson v. Griess, 64 Neb. 792 472
Wimple v. Patterson, 117 S. W. (Tex. Civ. App.) 1034 285
Wolf v. Trinkle, 103 Ind. 355 564
Wood v. State, 46 Neb. 58 565
Wylie v. Charlton, 43 Neb. 840 53
Wyrick v. Wyrick, 88 Neb. 9 854

Yeiser v. United States Board & Paper Co., 107 Fed. 340 191
Yost v. Grand Trunk R. Co., 163 Mich. 564 522
Young v. Rohrbough, 86 Neb. 279 233

Zitnik v. Union P. R. Co., 91 Neb. 679 586

STATUTES AND CONSTITUTIONAL PROVISIONS CITED AND CONSTRUED

NEBRASKA

CONSTITUTION

Art. I, sec. 11 720
Art. I, sec. 21 82
Art. III, sec. 11 518
Art. III, sec. 14 78
Art. III, sec. 18 250
Art. VIII, secs. 6, 7 78
Art. VIII, sec. 7 ..... 93, 695
Art. IX, sec. 7 96
Art. X, sec. 7 248
Art. XIV, sec. 1 251

SESSION LAWS

1877

P. 215 690

1889

Ch. 68 504

1893

Ch. 40 504

1895

Ch. 39 701
Ch. 69 500

1903

Ch. 125 215

1905

Ch. 161 206

1907

Ch. 57 690
Ch. 90, sec. 14 252
Ch. 93 254

1913

Ch. 143 ..... 696, 805
Ch. 143, sec. 15 94
Ch. 198, sec. 11 518
Ch. 198, sec. 15 517

1917

Ch. 85, sec. 4 515

1919

Chs. 33, 187 94
Ch. 33, sec. 16 694
Ch. 190, sec. 4 279
Ch. 217 78
Ch. 243 868

1921

Ch. 111 95

1923

Ch. 1, sec. 2 637
Ch. 41 733
Ch. 160 248
Ch. 169 78
Ch. 190, sec. 1 601

COMPILED STATUTES

1899

Ch. 89, art. I 44

1903

Ch. 43 106

1922

Sec. 462 600
Sec. 634 752
Sec. 1261 222
Sec. 1263 223
Secs. 1344, 1375 49
Secs. 1489, 1490, 1492, 1493 741
Sec. 1491 742
Sec. 1533 853
Secs. 1665-1702 40
Secs. 2381, 9722 685
Sec. 2397 690
Sec. 2453 757
Secs. 2455, 10150 360
Sec. 2456 ..... 137, 817
Sec. 2819 ..... 60, 470
Secs. 2832, 8973, 8981 679
Sec. 2837 140
Sec. 3029, subd. 1 439
Sec. 3029, subd. 2 ..... 427, 437
Secs. 3029, 3037, 3038, 3039 800
Sec. 3034 519
Sec. 3038, subd. 1 434
Secs. 3038, subds. 1, 3, 3300, 3302, 3305, 3322, 3340, 3370 435
Secs. 3038, subd. 2, 5140 515
Sec. 3044, subds. 1, 3 332

Secs. 3085, 9551 562
Sec. 3238 ..... 311, 718
Secs. 3252, 3273 596
Sec. 3274 595
Sec. 3377 504
Sec. 3760 ..... 93, 703, 811
Sec. 3761 694
Sec. 3771 95
Sec. 3994 110
Sec. 4161 122
Sec. 4286 4
Sec. 4384 120
Secs. 4612-4809 587
Sec. 4663 298
Secs. 4663, 4666, 4667, 4669 589
Sec. 4665 219
Sec. 4670 ..... 297, 407
Sec. 4916 ..... 666, 732
Sec. 4917 684
Secs. 5039, 5064, 5065, 5070 660
Sec. 5140 522
Secs. 5440, 5509 254
Sec. 5509 252
Secs. 5839-5841, 5874 693
Sec. 5901 731
Sec. 5972, subd. 4 366
Secs. 5972, 10186 365
Secs. 6268, 6275 725
Sec. 6332 724
Sec. 6477 727
Secs. 7147-7154 78
Sec. 7669 113
Secs. 7745-7765 280
Sec. 7748 279
Secs. 7757, 7772 32
Sec. 7811 303
Sec. 7903 823
Secs. 7983, 8005 600
Secs. 7984, 7994, 8001, 8002, 8008, 8010, 8012, 8013, 8018, 8025, 8034 601
Secs. 8003, 8004 383
Sec. 8008 ..... 475, 789, 794
Sec. 8024 ..... 370, 834
Secs. 8024-8028 599
Sec. 8033 ..... 380, 474, 858

Sec. 8100 767
Sec. 8452 500
Sec. 8453 504
Sec. 8512 178
Sec. 8570 8
Sec. 8577 573
Secs. 8612, 8901 632
Secs. 8633, 8879, 8884 665
Secs. 8668, 8670, 9160 654
Sec. 8802 ..... 324, 371
Sec. 8834 524
Sec. 8835 447
Secs. 8835, 8838 565
Sec. 8836 ..... 52, 201
Sec. 8840 441
Sec. 8849 451
Secs. 8901, 8904 630
Sec. 9136 674
Sec. 9150 ..... 215, 535, 755
Secs. 9150, 8012 375
Secs. 9189, 9190 66
Secs. 9152, 9603, 10248 733
Secs. 9302, 9603 620
Secs. 9477, 9722 710
Secs. 9612, 9931 581
Secs. 9616, 10087 619
Sec. 9634 655
Sec. 9722 715
Secs. 9722, 10186 691
Sec. 9812 229
Sec. 9892 390
Secs. 9931, 10104 735
Sec. 10117 737
Sec. 10154 26
Secs. 10154, 10248 738

REVISED STATUTES
1913

Sec. 1606 653
Sec. 3429 503
Sec. 3656 515
Sec. 3974 504
Secs. 4244, 4257 94
Secs. 5319-5513 587
Secs. 9129 738

UNITED STATES
REVISED STATUTES
1875

Secs. 3466, 3468 865

STATUTES AT LARGE

Vol. 24, ch. 104, sec. 1, pp. 379, 387 253
Vol. 25, ch. 382, sec. 9, p. 862 253
Vol. 41, ch. 227, sec. 1, p. 759 435

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1924.

LAURA A. HUBLER ET AL., APPELLEE, V. MODERN WOODMEN OF AMERICA: DAVID M. FAGER, APPELLANT.

FILED APRIL 10, 1924. No. 22688.

Insurance: CHANGE OF BENEFICIARIES. Under the facts outlined in the opinion, *held* that there was no legal or equitable change of beneficiaries named in the benefit certificate in controversy issued by a fraternal beneficiary association.

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

Cain & Johnson, for appellant.

Henry M. Kidder and *S. S. Sidner, contra.*

Heard before LETTON, DEAN and DAY, JJ., and REDICK, District Judge.

PER CURIAM.

This is an action to recover $2,000 on a fraternal benefit or life insurance certificate issued May 4, 1917, by the Modern Woodmen of America, a fraternal beneficiary association, insurer, to David M. Hubler, insured. Laura A. Hubler, wife of insured, was named in the benefit certificate as beneficiary to the extent of $1,000, and the children of insured, John H. Hubler, Elmer W. Hubler, Maud D. Henderson, Sadie M. Wintersteen, Emma E. Henderson and Pearl A. Raush, as beneficiaries in equal shares to the extent of $1,000 in all. When the benefit certificate was in force, insured died February 5, 1920. Plaintiffs are the beneficiaries named and defendants are the insurer and David M. Fager, a rival claimant to the insurance. In an answer to the petition, the insurer pleaded that it refused to pay

the insurance to plaintiffs because Fager claims to be the sole beneficiary under a change alleged to have been made in his favor by insured January 28, 1920; that insurer refused to recognize Fager as beneficiary for the reason that insured failed to comply with the by-laws and regulations relating to the manner of making such a change and was not mentally competent to make it; that insurer be permitted to pay the insurance into court for distribution. This course was taken and insurer was discharged from further liability. Fager filed a cross-petition pleading a change which made him beneficiary and demanded the insurance. Upon a trial before the district court without a jury, the issues were decided in favor of plaintiffs and the cross-petition was dismissed. Fager has appealed.

The question presented by the appeal is the effect, if any, to be given to the attempt to substitute Fager as beneficiary for the wife and children of the insured.

January 28, 1920, insured, using a blank form on the back of the benefit certificate, signed and acknowledged before a notary a purported change, expressing a wish to surrender the original benefit certificate and to have a new one issued in favor of Fager. So indorsed, the benefit certificate was received by the head clerk of insurer at Rock Island, Illinois, January 30, 1920. The purported change did not comply fully with the by-laws and regulations of insurer. There was a failure to pay a fee essential to such a change and the relationship of Fager to insured was not stated. Beneficiaries are limited to particular classes and there was nothing to show that Fager belonged to one of them. A new benefit certificate was never issued. Failure to comply with regulations in these respects made the purported change inoperative within the meaning of the insurance contract and the by-laws. Insured did not do all in his power to make the change. Insurer, acting within its power and questioning the mental capacity of insured, refused to recognize Fager as beneficiary and to issue a new benefit certificate in his favor. In this state of affairs insured died February 5, 1920. On the record presented it is clear that there was no

legal substitution of Fager for the wife and children of insured. It seems equally clear that there was no equitable change. The original beneficiaries were within a class of persons entitled to receive benefits. They were natural objects of insured's affections, care and bounty. For their benefit the assessments had been paid without any effort to substitute Fager, during a period when insured was sound mentally. The purported change occurred at a time when the mental capacity of insured was at least questionable. It may fairly be inferred from the evidence that it resulted from caprice or anger. There is no substantial ground for decreeing an equitable change, such as took place in *Smiley v. Modern Woodmen of America*, p. 10, *post*. In this view of the facts and the law there is no error in the record.

AFFIRMED.

Note—See Mutual Benefit Insurance, 29 Cyc. p. 130.

D. WILLIAM SCHMINKE, PLAINTIFF, V. DORA SINCLAIR ET AL., APPELLEES: JOSEPHINE W. BRANDT ET AL., APPELLANTS.

FILED APRIL 10, 1924. No. 22752.

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

Pitzer & Tyler and *A. L. Timblin*, for appellants.

Paul Jessen and *L. F. Jackson*, *contra*.

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

PER CURIAM.

This is an action between heirs-at-law and devisees of Paul Schminke, deceased, for an accounting and for distribution of part of the estate of decedent, and involves the amount due to one of the heirs and devisees of decedent and the amount due from her because of certain advancements made to her by the widow and executrix, pursuant to certain provisions of the will of Paul Schminke, deceased.

No new question of law is presented, and from an examination of the record we are convinced that the trial court made a correct disposition of all the issues and rendered a judgment according to the legal and equitable rights of the respective parties, except in the following particulars:

There was an error made in computing the amount of interest due from appellant Josephine W. Brandt, she being charged with $17.84, as interest, more than was due, and also an item of $112, which was due to Josephine W. Brandt from the estate of her mother, and which was incorrectly applied upon her indebtedness to the estate of Paul Schminke, deceased. Appellant is entitled to these two corrections.

In all other respects, the judgment of the district court is affirmed, and the cause is remanded, with directions to modify the judgment in accordance with this opinion.

AFFIRMED AS MODIFIED.

COMMODORE C. BIGGERSTAFF, APPELLEE, V. CITY OF BROKEN BOW ET AL., APPELLANTS.

FILED APRIL 10, 1924. No. 22672.

Municipal Corporations: SPECIAL ASSESSMENTS: INJUNCTION. The collection of "special assessments for improvements" made under the provisions of section 4286, Comp. St. 1922, will not be enjoined for lack of jurisdiction in the board making the levy because of mere technical irregularities in the manner of making the same. The board will be held to have acquired jurisdiction to make the assessment when it has substantially complied with the statute.

APPEAL from the district court for Custer county: BRUNO O. HOSTETTLER, JUDGE. *Affirmed in part, and reversed in part.*

N. T. Gadd, for appellants.

Beal & Wilson, contra.

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

MORRISSEY, C. J.

This action was brought in the district court for Custer county by plaintiff to restrain the collection of a special assessment made against a parcel of ground in the city of Broken Bow, which is owned by plaintiff. The court found that the assessment was void and restrained its collection.

Broken Bow is a city of the second class, having less than 5,000 population, and the statute relating to special assessments which controls the points presented here, is section 4286, Comp. St. 1922. This statute, among other things, provides: "Such assessment shall be made by the council or board of trustees at a special meeting, by a resolution fixing the valuation of such lot assessed, taking into account the benefits derived or injuries sustained in consequence of such contemplated improvements, and the amount charged against the same, which, with the vote thereon by yeas and nays, shall be spread at length upon the minutes." The council of defendant city adopted a resolution which does not strictly conform to the provisions of the statute quoted, in that no valuation of the property was made, nor is any mention made of any "injuries sustained." Did the failure to fix a valuation upon plaintiff's lot and to make special mention of injuries, if any, constitute a jurisdictional defect in the proceedings, or are they irregularities merely?

The council found the value of the improvement. To be an improvement it must necessarily be in excess of the injury, if any injury there be, but the record fails to show anything in connection with this improvement which could possibly be regarded as an injury.

We are cited to the case of *Schneider v. Plum*, 86 Neb. 129, where the collection of a special tax was enjoined because of the failure of the village board to comply with the statute. However, in that case the failure was of a different character from that shown by this record. There, there was no finding of benefits, but there was an arbitrary as-

sessment against plaintiff's property of the cost of the improvement. In the instant case there is a finding of the value of the benefits, and that plaintiff's property is benefited in the amount levied thereon. As pointed out in that case, the proper inquiry is not as to the cost of the improvement, but as to the benefits accruing to the property against which the assessment is to be made, and the city council has pursued the proper steps in this respect. Where the board has acquired jurisdiction by substantial compliance with the statute, mere irregularities in the proceedings will not render the assessment void. *Darst v. Griffin*, 31 Neb. 668.

As indicated by the opinion in *Schneider v. Plum, supra*, it is not required that the council's record shall be faultless, especially against a collateral attack such as this. The board will be held to have acquired jurisdiction when it has substantially complied with the statute. *Chicago & N. W. R. Co. v. City of Albion*, 109 Neb. 739.

From what has been said it follows that the court was in error in entering the decree restraining the collection of the tax. There was another branch of the case in which the court found in favor of the city. The defeated party has not taken a cross-appeal and this question is, therefore, not before us for review.

The judgment of the trial court is reversed in so far as it restrains the collection of the tax, and in all other respects it is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

Note—See Municipal Corporations, 28 Cyc. p. 1185.

LEVI S. SMITH, APPELLEE, V. ATLAS REFINING CORPORATION ET AL., APPELLANTS.

FILED APRIL 10, 1924. No. 22704.

1. **Pleading:** JURISDICTIONAL DEFECT. Where a jurisdictional defect does not appear upon the record but must be proved, it is proper to plead the lack of jurisdiction in the answer, and by so pleading the defense of lack of jurisdiction is preserved.

2. **Process:** SUMMONS TO ANOTHER COUNTY. "To authorize summons to another county in a merely personal action for money, there must be an actual right to join the resident and nonresident defendants." *Stull Bros. v. Powell*, 70 Neb. 152.

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

H. A. Reese, T. S. Allen and *Stiner & Boslaugh*, for appellants.

Bruckman & Paulson, contra.

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

MORRISSEY, C. J.

This case comes here on appeal from the district court for Adams county. Plaintiff alleges that he was induced to make a loan of $1,000 to the Atlas Refining Corporation upon the representations of one Elmer E. Bevard, the treasurer of the corporation, and John G. Cole, whom he alleges was an agent for defendant corporation, and charges a conspiracy between Alvin H. Armstrong, Samuel Chamberlain and Elmer E. Bevard, the officers and directors of defendant corporation, and John G. Cole, alleged agent of defendant corporation, to cheat and defraud plaintiff. Defendant Cole answered denying that he was in any way connected with the Atlas Refining Corporation, and entered a general denial. The other defendants in their answer object to the jurisdiction of the court and deny that Cole was at any time the agent or representative of the Atlas Refining Corporation. The jury found for plaintiff and against each defendant for the full amount of the note which was given as evidence of the loan, and interest thereon.

It appears that plaintiff and defendant Cole came to Lincoln at the request of Bevard, and that each arranged to loan $1,000 to the corporation under an agreement that they should receive the corporation's notes for that amount and in addition should receive a bonus of $500 in stock in

the corporation for every $1,000 loaned, as soon as a permit could be secured to issue stock within this state. The permit was never obtained, the stock was never delivered, nor was the note paid.

At the close of plaintiff's evidence in chief, each defendant moved for a directed verdict and each motion was overruled.

The record nowhere discloses that Cole was in fact the agent of defendant corporation or that he represented it in any capacity or that he had conspired with other defendants to cheat or defraud plaintiff or that he had said anything other than what one friend might say to another in an ordinary conversation. Thus, at the time the motion for a directed verdict was made on behalf of defendant Cole, the record shows that he was not a proper party to the action, and it was error not to sustain the motion and dismiss the action as against him.

The action was brought against Cole in Adams county, and thus it was sought to acquire jurisdiction over defendants, Atlas Refining Corporation and Armstrong, Bevard and Chamberlain under section 8570, Comp. St. 1922, which provides that, where an action is rightly brought in one county, summons may be issued to any other county against other defendants.

In the answer of defendants, other than Cole, the jurisdiction of the court is pleaded as a defense and preserved in the motion for new trial. Where a jurisdictional defect does not appear upon the record but must be proved, it is proper to plead the lack of jurisdiction in the answer, and by so pleading the defense of lack of jurisdiction is preserved. *Stull Bros. v. Powell*, 70 Neb. 152.

The right of plaintiff to maintain an action against the nonresident defendants in the district court for Adams county was dependent upon plaintiff's right to recover from the resident defendant Cole, for, as said in *Stull Bros. v. Powell, supra:* "To authorize summons to another county in a merely personal action for money, there must be an actual right to join the resident and nonresident defendants."

Since no liability on the part of Cole was proved, the court had no jurisdiction to render judgment against the other defendants. *Barry v. Wachosky*, 57 Neb. 534.

The judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

Note—See Pleading, 31 Cyc. p. 166; Process, 32 Cyc. p. 427.

EARL MCCUE ET AL. V. STATE OF NEBRASKA.

FILED APRIL 10, 1924. No. 23831.

1. **Criminal Law: PROOF.** "To sustain a conviction for a crime, the *corpus delicti* must be proved beyond a reasonable doubt." *Chezem v. State*, 56 Neb. 496.
2. **Evidence** examined, and *held* insufficient to sustain the verdict.

ERROR to the district court for Clay county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed and dismissed.*

Epperson, Massie & Epperson, for plaintiffs in error.

O. S. Spillman, Attorney General, and *Harry Silverman, contra.*

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

MORRISSEY, C. J.

Defendants Earl McCue and Vernon Jacobs were convicted of chicken stealing in the district court for Clay county and sentenced to one year in the state reformatory. From this conviction, they prosecute error to this court. Numerous assignments of error are made; however, we think a consideration of one is sufficient. Does the evidence sustain the verdict?

The principal witness for the state, one James, an alleged accomplice of defendants, testified that on the night of March 28, 1923, he and the two defendants, at the suggestion of the defendant Jacobs, drove from the village of Edgar to the farm of defendant Jacobs' father, where they

stole ten or twelve chickens which were later sold to a produce dealer in the village of Ong by the witness and defendant McCue and the proceeds of the sale divided between the witness and the defendants. The produce dealer testified that he bought chickens from two boys on March 29, 1923, and identified James as one of them, and partially identified McCue. A resident of Ong who knew McCue testified to having seen McCue and James in Ong on the morning of March 29th with two large sacks, and that they went in the direction of the poultry buyer's place of business.

On behalf of defendants, Nels Jacobs and wife, father and mother of defendant Jacobs, from whom the chickens were alleged to have been stolen, denied that any chickens were stolen from them at the time charged in the information. They stated the number of chickens they owned immediately before and immediately after the date of the alleged larceny and said that had any chickens been stolen they would have had knowledge of the loss.

"To sustain a conviction for a crime, the *corpus delicti* must be proved beyond a reasonable doubt." *Chezem v. State*, 56 Neb. 496.

Under the record presented, the evidence is insufficient to sustain the verdict, and the judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

Note— See Crimial Law, 16 C. J. p. 773, sec. 1581—Larceny, 25 Cyc. p. 119.

EMMETTE OTIS SMILEY ET AL., APPELLEES, V. MODERN WOODMEN OF AMERICA: LINNIE L. SMILEY, INTERVENER, APPELLANT.

FILED APRIL 10, 1924. No. 22677.

Insurance: BENEFICIARIES: SUBSTITUTION. In a controversy between two minor sons of insured and his second wife, his widow, to recover fraternal insurance paid into court by insurer, the facts outlined in the opinion *held* to establish an equitable sub-

stitution making the sons beneficiaries instead of the first wife who, by a decree of divorce, had been disqualified as a beneficiary, there having been a partial failure on the part of the insured to comply with fraternal regulations in attempting to make the change.

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

J. C. McReynolds, for appellant.

G. E. Hager, contra.

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

ROSE, J.

This is an action to recover $2,000 on a fraternal benefit or life insurance certificate issued by the Modern Woodmen of America, a fraternal beneficiary association, insurer, to William Elmer Smiley, insured. Ora O. Smiley, then the wife of insured, was named in the benefit certificate as beneficiary. She and insured had two minor sons, Emmette Otis Smiley and Dale D. Smiley, plaintiffs. A partial chronology of events follows: June 2, 1909, the benefit certificate was delivered to insured; January 24, 1919, insured procured a decree of divorce which became final six months later; June 5, 1919, insured, by means of a partially printed and partially written indorsement on the back of the benefit certificate, evinced a purpose to change the beneficiary by substituting for his former wife their two minor sons, plaintiffs; October 2, 1919, insured remarried, the name of his second wife being Linnie L. Smiley; August 28, 1920, insured died.

This action was instituted by P. D. Kelly as guardian of the two minors to recover for them the insurance due on the benefit certificate. Linnie L. Smiley, the second wife, intervened, pleaded that the first wife, after the decree of divorce became final, was not within the class of persons to whom the insurance could be paid and that plaintiffs had never been made beneficiaries. Intervener claimed the in-

surance as the widow of insured and as the beneficiary under the benefit certificate and the by-laws applicable thereto. Insurer admitted its liability for the full amount of the benefit certificate, asked permission to pay the insurance money into court, and prayed for an order directing payment of the fund to the person or persons entitled to it. Insurer paid into court $2,000 and was discharged from further liability on its benefit certificate. Upon a trial of the issues between plaintiffs and intervener, the district court directed a verdict in favor of plaintiffs, and from a judgment thereon intervener has appealed.

A by-law applicable to the benefit certificate forbids payment of the insurance to the first wife and she makes no claim thereto, the divorce having disqualified her as beneficiary. Another by-law directs payment to the widow, the second wife, intervener, unless the minor sons were substituted for the original beneficiary. The rival claimants to the insurance fund in court, therefore, are plaintiffs and intervener, the insurer taking no part in the controversy. The decision depends on the effect, if any, to be given to the attempt by insurer to change the beneficiary. By means of a blank form on the back of the benefit certificate insured verified and acknowledged the following instrument:

"Change of Amount or Beneficiary.

"I, William Elmer Smiley the neighbor to whom this benefit certificate was issued, do hereby surrender and request the cancelation of this benefit certificate, and order that a new one shall be issued, to be in full force and effect from and after the date of issuance thereof by the head clerk and upon the conditions and subject to all of the provisions contained in my original application for membership and the by-laws of this society, in the amount of two thousand dollars, and the same be made payable to Emmette Otis Smiley and Dale D. Smiley who are related to me as sons.

"William Elmer Smiley."

This instrument was executed after the divorce had been

granted and before the decree therefor had become final. It is contended by intervener that the contemplated change never became effective because insured never complied with regulations containing the following provisions: For the purposes of such a change the benefit certificate shall be returned to the head camp through the local camp and a new one issued, designating the new beneficiaries. Insured, upon surrendering his old benefit certificate, shall pay to his camp clerk a fee of 50 cents to be divided equally between the local and the head camps. A section of the by-laws relating to the changing of beneficiaries provides further:

"No change in the designation of beneficiary or beneficiaries shall be effective until the old certificate shall have been delivered to the head clerk and a new certificate issued, during the lifetime of the member, and until such time the old certificate shall remain in force. * * * No change in the designation of the beneficiaries shall be of binding force unless made in compliance with this section."

The benefit certificate was not returned or formally surrendered. The fee was never paid. The insurer did not issue a new benefit certificate. In these respects there was a failure on the part of insured to comply with the by-laws relating to the method of changing beneficiaries.

As between the widow who was the second wife and the two sons of insured by the first wife, did insured make the change effective?

The general rule is that by-laws relating to the manner of changing beneficiaries must be observed, but there are exceptions resting on reason, justice and equity. Whether the present case falls within an exception is the question presented. A fraternal insurer which has performed its contractual obligations in good faith should not be exposed to a double liability through the failure of insured to comply with regulations applicable to a change in beneficiaries. The liability of the insurer and the rights of the beneficiary are fixed at the time of insured's death. Prior to that event, however, the beneficiary named in the benefit

certificate has no vested interest in the insurance and insured may substitute another. Payment of premiums by the person named in a benefit certificate does not create a right to the insurance nor prevent a change in beneficiaries. While a fraternal insurer, to protect its contractual rights and to prevent a double liability, may insist on compliance with its by-laws, it cannot arbitrarily disregard known changes which are valid as between rival claimants to the insurance and which fall within a recognized exception to the general rule requiring full compliance with regulations. These are principles of fraternal insurance.

In the present case the insurer is not exposed to the danger of a double liability. All interested parties are before the court. Prior to payment of the insurance to any one, the insurer had notice that there were rival claimants to the fund. It did not undertake to decide between them, or to prejudice the claim of either, but admitted liability to some one for the face of the benefit certificate, paid the fund into court and was released from further liability. Under such circumstances can a court of equity, as between the rival claimants, inquire into and determine the merits of the different claims? Though the action was commenced as one at law to recover the amount alleged to be due plaintiffs on an insurance contract, the insurer is not now a suitor. The rival claimants to the fund in court are plaintiffs and intervener. Each side pleaded facts in the nature of equitable considerations and offered proofs of the same character. The evidence was heard by a jury, but at the close of the testimony both sides requested a peremptory instruction, which, under the procedure in this jurisdiction, left the decision of both law and fact to the trial court. In reviewing the decision in this state of the record, it is not necessary to make any distinction between law and equity.

The evidence on behalf of intervener tends to prove that insured had expressed to her a prenuptial wish to transfer to her a part of his life insurance. She became his wife and continuously performed her duties as such, caring

for him during his last illness. In the meantime, to keep the insurance in force, she paid some of the insurer's assessments. Unless the original beneficiary was changed she is entitled to the fund, under the by-laws, as the widow, since the first wife, after the divorce became final, was disqualified as a beneficiary. The evidence, however, does not show that insured expressed a prenuptial wish to transfer this identical insurance to intervener, but does show that he did transfer to her other insurance. As already stated, mere payments of premiums by a third person creates in the latter no right to the insurance. Intervener never had possession or control of the benefit certificate. In comparison, what are the rights and equities of plaintiffs, the two minor sons of insured by his first wife? Insured signed and verified by affidavit on the back of the benefit certificate the instrument, already quoted, evincing his purpose to make plaintiffs beneficiaries. He delivered the insurance contract to their mother to be safely kept by her for their benefit. He told his camp clerk he had made the change and evidently believed he had done so. Under the law and the terms of his contract with the insurer he had a right to make the change. The new beneficiaries were within the class of persons entitled to receive the benefits. They were natural objects of his affections, care and bounty. He partially complied with the by-laws applicable to such a change. His intention to make it is clear. The attempted transfer of the insurance from the first wife to the two sons of insured was not a temporary or whimsical act, but was a deliberate, permanent effort to substitute beneficiaries. The change, as between the rival claimants, took effect during his lifetime when intervener had no vested interest in the insurance. Upon acquiring knowledge of the facts before paying the insurance to intervener, the insurer protected itself from a double liability. Of course, payment in good faith, without notice of a rival claim, to the person substituted by the by-laws for the original beneficiary would have prevented a recovery by plaintiffs in an action between them and the in-

surer, but that is not the case presented. There is nothing to prevent a court of equity from doing justice between the rival claimants and declaring that done which should have been done. In equity, as between the rival claimants, a valid substitution took place long before the death of insured. The judgment in favor of plaintiffs rests on established facts, equity and justice, and does no wrong to the insurer.

AFFIRMED.

Morrissey, C. J., dissents.

Note—See Mutual Benefit Insurance Companies, 29 Cyc. p. 130.

JOHN CAREY ET AL., APPELLANTS, V. HERMAN ZABEL ET AL., APPELLEES.

FILED APRIL 10, 1924. No. 23661.

Pleading. A contract incorporated into a pleading as part of a cause of action or defense controls allegations which it contradicts.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed.*

Burr, Brown & Dibble and *Stewart, Perry & Stewart,* for appellants.

Holmes, Chambers & Mann, Hartigan & Fouts, T. S. Allen and *H. J. Requartte, contra.*

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

ROSE, J.

This is an action on a promissory note for $8,000, dated August 28, 1920, due March 1, 1921. Herman Zabel was maker and the States Realty Investment Company payee. Plaintiffs are John Carey and Herbert G. Dyar, who pleaded in their petition that they were purchasers of the note in good faith in the regular course of business for a valuable consideration before maturity, that the payee

indorsed the note and delivered it to them, that they are the owners and holders of it, and that it is unpaid. Plaintiffs alleged further that they presented the note to the indorser and demanded payment at maturity, which was refused. The maker of the note, the indorser thereof, and Edward G. Maggi, receiver of the indorser, are defendants.

Defendant Zabel filed an answer in which he admitted the execution and delivery of the note, alleged there was no consideration for it, and charged plaintiffs with knowledge of this and other defenses at the time of the indorsement pleaded by them in their petition. By general denial of facts not admitted, he put in issue the indorsement of the note to plaintiffs and their ownership of it. The reply amounted to a general denial. After evidence had been adduced by both sides, the trial court directed a verdict in favor of defendants and dismissed the action. Plaintiffs have appealed.

Did the trial court err in directing a verdict in favor of defendants? There is evidence tending to prove that payee indorsed the note to plaintiffs, delivered it to them, and that they are the owners of it. It follows that the peremptory instruction cannot be justified on the ground that the note was not transferred to plaintiffs or that they do not own it—issues raised by the general denial in the answer of Zabel.

Does the answer state facts constituting a defense to the note itself? This is the principal question presented by plaintiffs. It is alleged in substance by Zabel that the note was given pursuant to a written contract in which the States Realty Investment Company, payee, agreed to sell Zabel a tract of land which it did not own, but which belonged to plaintiffs; that in the sale of the land payee was the agent of plaintiffs; that Zabel was entitled to a deed upon execution and delivery of the note, but did not receive it; that he never received any consideration for the note, and that plaintiffs hold it with notice of the defenses and of payee's breach of contract; that plaintiffs and payee

refuse to comply with the terms of the sale, and that plaintiffs, while holding the land with knowledge of the facts, are attempting to collect the note. The contract of sale is attached to Zabel's answer and is made a part of it.

The sufficiency of the allegations outlined is challenged on the ground that they are contradicted by the terms of the contract pleaded by Zabel and made a part of his answer. In this connection plaintiffs invoke the rule that allegations of a pleading are controlled by contradictory provisions of a contract incorporated into it.

The contract shows on its face that payee sold and that Zabel bought a tract of land in Perkins county upon these terms: Consideration, $28,800, payable as follows: Cash, receipt acknowledged, $7,500; assignment of corporate stock to vendor, $2,500; credit for indebtedness, $2,800; payable March 1, 1921, $8,000; assumption of mortgage on land purchased, $8,000. The contract discloses that there were considerations for the note in the form of mutual promises, payments and credits; that vendor, the States Realty Investment Company, acted for itself without any intimation that it was agent for plaintiffs; that Zabel was not entitled to a deed upon the execution and delivery of the note dated August 28, 1920, and maturing March 1, 1921, but upon final settlement; that Zabel was entitled to possession immediately after the removal of the present crops, the contract of sale bearing date August 28, 1920. While it is alleged in the answer that the vendor in the contract of sale and the payee in the note did not own the land, there is nothing to show that it did not have a prior, valid, enforceable contract to purchase the land from plaintiffs, which would have been performed, had Zabel complied with the terms of his subsequent purchase. Zabel does not allege that there was fraud or mistake inhering in his contract of purchase; or that he did not take possession of the land after the removal of the crops; or that he offered performance on his part; or that he rescinded his purchase; or that he did not have a remedy by specific performance or by an action for damages. The contract

of sale pleaded by Zabel, therefore, contradicts other parts of his answer to such an extent that nothing is left which can be construed into a defense to the note. As presented for review, the answer falls within the rule that a contract incorporated into a pleading as part of a cause of action or defense controls allegations which it contradicts.

Since Zabel did not plead any defense to the note itself, there was no answer or competent evidence to sustain a judgment in favor of defendants. The peremptory instruction, therefore, was erroneous. The judgment is reversed and the cause remanded for further proceedings, with permission to Zabel, if so advised, to amend his answer.

REVERSED.

Note—See Pleading, 31 Cyc. p. 563.

FARMERS COOPERATIVE GRAIN COMPANY, APPELLANT, V. S. J. STARTZER, APPELLEE.

FILED APRIL 10, 1924. No. 22632.

1. **Fraud:** QUESTION FOR JURY. In an action for damages for fraud and deceit, it is for the jury to determine whether facts and circumstances are established which show that the injured party was justified in relying on the representations which induced the contract. *Sanders v. Nightengale*, 109 Neb. 667.

2. ———: ACTIONABLE FRAUD. "The representation of a fact in the future, and not a mere promise which has been acted upon and turns out to be false, will entitle the injured party to the same remedies as fraudulent misrepresentatitons of an existing fact." *Abbott v. Abbott*, 18 Neb. 503.

3. **Evidence** examined, and *held* that the trial court did not err in overruling plaintiff's application for a new trial.

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

E. S. Nickerson and *A. S. Ritchie*, for appellant.

William R. Patrick, contra.

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

DEAN, J.

The plaintiff corporation was engaged in buying and selling grain at Springfield, Nebraska, in 1918. During the course of a campaign which was commenced to increase its capital stock, defendant subscribed for five shares of stock at $100 a share for which he gave his promissory note for $500. In an action brought to enforce payment defendant recovered a verdict and judgment from which plaintiff appealed.

The evidence shows that sometime in May, 1918, plaintiff employed two stock salesmen to plan and conduct a drive at Springfield for the sale of corporate stock in the elevator enterprize. They were brought from Minneapolis by plaintiff for that purpose. One of the salesmen, accompanied by two of the stockholders, called on defendant and sold the stock to him and obtained the note on which this action is based. There is competent evidence which tends to prove that the agent, as an inducement to defendant, stated and represented that within a year a new $40,000 elevator would be built to take the place of the old one which was dilapidated and out of date; that the new structure would be equipped with grain drying, cleaning, grading and other modern devices to facilitate the handling of grain and to so prepare it for market that defendant, and other subscribing patrons, would be paid two or three cents a bushel above local market prices for grain at the new elevator; that the stock would "carry itself" and that defendant would never be called upon to pay the note except from dividends on his stock which would be derived from increased earnings when the new and improved elevator was installed; that he relied upon the material representations and statements so made, and in reliance thereon he made his subscription and gave his note. The elevator was never built. He testified that the representations and statements so made were false, fraudulent and untrue, and contends that they were purposely made to cheat and defraud him and without

an intention of performance on plaintiff's part. There is evidence tending to prove that all of the material representations and statements made by the selling agent to defendant to induce the sale and to obtain the note in suit were made to him in the presence and hearing of not less than two stockholders of the original corporation.

There is some conflict in the evidence in respect of material facts, but the jury, as the triers of questions of fact, and of the credibility of witnesses as well, resolved the issues in favor of defendant. In *Sanders v. Nightengale*, 109 Neb. 667, we held in effect that, in an action for damages for fraud and deceit, it is for the jury to determine whether facts and circumstances are established which show that the injured party was justified in relying on the representations which induced the contract. It is elementary that deceit, to ground a recovery, must ordinarily relate to existing facts. But we think the present case comes within the exception to the rule, as announced in *Abbott v. Abbott*, 18 Neb. 503, where we held: "The representation of a fact in the future, and not a mere promise which has been acted upon and turns out to be false, will entitle the injured party to the same remedies as fraudulent misrepresentations of an existing fact."

In a comparatively recent case it was held that, in an action on a note given for the purchase price of corporate stock which was defended on the ground of misrepresentation by the seller that a stockholder could sell grain to the plaintiff corporation for more than could be obtained elsewhere, and receive a greater price for feed sold to plaintiff than could be obtained elsewhere, and could pay the note out of dividends, the question whether the seller made such representations, and as to whether the buyer was induced thereby to sign the note, was for the jury. *Britton Milling Co. v. Williams*, 44 S. Dak. 464.

Other assignments of alleged error have been urged by plaintiff which we have considered but do not find it necessary to discuss and do not decide. Reversible error does

not appear. We think the court did not err in overruling plaintiff's application for a new trial.

The judgment of the district court is

AFFIRMED.

Note—See Appeal and Error, 4 C. J. p. 857, sec. 2836; Fraud, 27 C. J. p. 76, sec. 216; 26 C. J. p. 1087, sec. 25.

WILLIAM WELTER V. STATE OF NEBRASKA.

FILED APRIL 10, 1924. No. 23305.

1. **Criminal Law:** WEIGHT OF EVIDENCE: QUESTION FOR JURY. Where a witness for the state in a criminal prosecution has been impeached, it is for the jury to determine the probative value of his evidence.

2. ———: PROOF: QUESTION FOR JURY. Two stores, in close proximity, were burglarized in the same village during the same night. Defendant was informed against and convicted of having committed one of the burglaries. Part of the goods, stolen from the burglarized stores, were found in his possession the following day and some a few days thereafter. *Held*, that it was for the jury to determine whether proof of the burglary for which defendant was not indicted, tended to prove the commission of the burglary for which he was indicted.

3. ———: EVIDENCE OF ANOTHER CRIME: ADMISSIBILITY. The general rule is the evidence of the participation by an accused person in the commission of a crime, other than that for which he is placed on trial, cannot ordinarily be admitted in evidence against him. But the rule has its exceptions which are as well established as the rule itself, and may be applied in a given case, not to establish the other crime but as confirmatory of the evidence tending to show the commission by defendant of the crime for which he is being tried.

4. ———: 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." *Georgis v. State*, 110 Neb. 352.

5. ———: WEIGHT OF EVIDENCE: QUESTION FOR JURY. Defendant introduced evidence tending to prove an alibi which, if believed by the jury, would have entitled him to an acquittal of

the crime with which he was charged. *Held*, that the probative value of such evidence is for the jury.

6. ———: REVIEW. As a reviewing court, we cannot, for obvious reasons, consider matter here which has not been first submitted in the trial court.

ERROR to the district court for Johnson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Jay C. Moore and *Andrew P. Moran*, for plaintiff in error.

O. S. Spillman, Attorney General, and *Harry Silverman, contra.*

Heard before LETTON, ROSE, GOOD and DEAN, JJ., and ELDRED, District Judge.

DEAN, J.

William Welter, plaintiff in error, hereinafter designated defendant, and Jacey Banker, were jointly informed against in the district court for Johnson county and there charged with having burglariously entered the general merchandise store of Frank Eversole, in the village of Elk Creek, in the nighttime of October 12, 1922, and of having stolen therefrom certain men's and women's wearing apparel and a quantity of tobacco and cigars, the property of Eversole, in excess of the value of $100. The defendants were tried separately. The defendant herein was convicted of larceny and the value of the property alleged to have been stolen was fixed by the jury at $100. Welter was sentenced to the state reformatory for a term of not less than three years nor more than six years. He prosecutes error to this court to have the record reviewed.

On the same night that the goods were stolen from the Eversole store a quantity of goods, of the value of more than $100, was stolen from the hardware store of Beethe Brothers, in the same town, consisting of rifles, shotguns, a large quantity of shells, some silverware, automobile casings, or tires, and the like. The stores fronted on the

same street and were only about two doors apart. Apparently the front doors of both buildings were pried open by the same pinch-bar and in substantially the same manner.

Subsequently nearly all the goods taken from the Eversole store were found secreted at different places on a farm in Otoe county on which a man named Roy Babcock lived. Some were found in a smokehouse and other farm buildings, some were found buried in tin cans on the premises, and some were found in a tool-chest on a porch of the farmhouse. But a bundle of gloves was found in a cupboard in the Welter home which Eversole identified by the cost marks which he had made and attached to the goods while they were in his store. As tending further to establish defendant's participation in the Eversole burglary, four witnesses testified, on the part of the state, that they saw and talked with Welter after the gloves were found in his house, and that he stated to each witness that the gloves were his and that he bought them at Smith's store in the village of Paul. But Welter testified that he never saw the gloves on his place and did not know they were there. Mr. Eversole, or one of his clerks, testified that defendant came to the store October 11, and asked to be shown a leather jacket, some shirts and other articles, but left without making a purchase. It appears that the same class of goods which were shown to Welter, on his request, were afterwards recovered among the stolen goods found on the Babcock place. One or more witnesses testified that they saw Welter and Jacey Banker and a man named George Kriefels driving into Elk Creek in a car the morning of October 11, and that Welter and Kriefels together entered the Eversole and the Beethe stores, but that Jacey Banker remained in the car. It was also shown that a somewhat unusual car track was found on the streets of Elk Creek the day after the theft which was the same as a track made by a tire on a rear wheel of Welter's car.

Roy Babcock, at whose place the goods were found, was a witness on the part of the state. His material testimony in substance is that, the day after the goods were stolen,

the defendant and Jacey Banker passed his place in a car about four or five o'clock in the afternoon; that Welter called out and asked him if he found the things that he left on his place; that he replied that he had not; that Welter then told him he would find plenty of tobacco and cigars and to help himself; that he subsequently found cigars, tobacco and some other things in his granary. He testified that he did not tell the sheriff about finding the tobacco and cigars until after the other goods were found on his place by the officers, because defendant and Banker threatened to shoot any person who informed against them. Three or four qualified character witnesses called by the defendant testified that Babcock's reputation for truth and veracity in his home vicinity was bad. But his testimony, in its material features, was corroborated, in part at least, by unimpeached witnesses. From the record it appears that Babcock had not been complained against at the time this case was tried.

It may be added that Babcock also testified that when defendant and Jacey Banker passed his place, on the day following the burglary, as above noted, they had several guns and perhaps some ammunition in the car. Subsequently the guns were identified as having been taken from the Beethe store.

Babcock also testified that he again saw defendant and Kriefels October 22, the Sunday following the burglary, and that they had six or seven guns in the car, and that one, which he picked up, was a new one. He testified that the occupants of the car said they were on their way to Omaha and were in a hurry to reach their destination. Kriefels corroborated Babcock's evidence in that he testified that, on the Sunday in question, he and defendant went to Babcock's house, and when they left they drove a short distance and stopped and defendant got out and went into a field and returned with a sack or package which he threw into the car.

Defendant argues that the court erred in permitting evidence to be introduced which had to do with the larceny

of the Beethe goods. But there was no direct evidence of the value of the Beethe goods. It is elementary that a verdict of guilty would not be sustained in a larceny case without such evidence. Comp. St. 1922, sec. 10154; *Hennig v. State,* 102 Neb. 271.

It is evident that both offenses are apparently parts of the same transaction and tend to connect defendant with the offense with which he is charged. In many jurisdictions where the same question was involved, it has been held proper to permit the state to introduce evidence of another burglary or theft, where both offenses were substantially one transaction, and this on the ground that whatever tended to show participation in one was evidence of participation in all. It has been held generally that the proof, in such case, is not given to show a different and distinct felony, but because it tends to prove the felony under investigation and its tendency to that end is for the jury.

People v. Mead, 50 Mich. 228, is in point. In that case the defendant was convicted of breaking into a farmhouse, in the open country, and committing a larceny therein. There was evidence, to which defendant objected, going to show that several houses in the neighborhood were broken into the same night. Among other things the court said, speaking by Judge Cooley:

"The prosecution concede that, if it had no tendency to connect the respondent with the particular offense for which he was on trial, it should not have been received; but their theory of the case was that the several burglaries were all substantially one transaction, and whatever tended to show participation in one was evidence of participation in all. We agree in this view. The proof was not given to show a different and distinct felony, but as tending to prove the very felony then under investigation; and its tendency to that end was for the jury." To substantially the same effect is *Frazier v. State,* 135 Ind. 38.

"On the trial of a defendant for conspiracy to defraud the United States of public lands, evidence that he had

previously been engaged in the illegal acquisition of public lands elsewhere by a different method was admissible as bearing upon the questions of intent, purpose, and design." *Jones v. United States*, 179 Fed. 584.

"Evidence which shows that a gun found hidden between the laths and rafters of defendant's house two or three days after his arrest was, shortly before a burglary was committed, stolen from the house of a neighbor only a quarter of a mile from the burglarized house, at which neighbor's defendant had been working, is competent as showing the guilty intent of defendant." *State v. Franke*, 159 Mo. 535.

"The test of the admissibility of evidence in a criminal case is the connection of the facts proved with the crime charged, and whatever testimony tends directly to show the defendant guilty of the crime charged is competent, even though it tends to show him guilty of another offense." *People v. Moeller*, 260 Ill. 375.

"The respondent was indicted for burglary. The evidence of the state tended to show that the respondent and two others went with respondent's team and stole certain sugar from the dwelling of one Damon; that one of the three remained with the team while the other two entered the house and took the sugar. Held, that the state might show that before going to Damon's and while on their way there the three stole sugar at another place." *State v. Valwell*, 66 Vt. 558.

Moore v. United States, 150 U. S. 57, is a case where the defendant was convicted of the murder of a man named Palmer. Circumstantial evidence was admitted, over objection, which tended to prove that Moore was implicated in another homicide wherein Palmer, after investigation, became possessed of certain facts which tended to prove Moore's guilt. This was known to Moore, thus furnishing a motive for the slaying. The court held that the evidence was competent, and that "the effect of circumstantial facts depends upon their connection with each other, and considerable latitude is allowed on the question of motive."

The general rule is that evidence of the participation by an accused person in the commission of a crime, other than that for which he is placed on trial, cannot ordinarily be admitted in evidence against him. But the rule has its exceptions. In a recent well-considered case the exceptions are discussed. The court observed: "It is a well-established rule of evidence in criminal prosecutions, and excludes, for illustration, evidence tending to prove various forgeries on the trial of an indictment charging grand larceny, and evidence of different larcenies on the trial of an indictment charging murder, or evidence of any other crime which is distinct and independent in class and character from that on trial. But like other rules of both law and evidence it is not without well-defined exceptions under which evidence of other crimes is admissible. In fact the exceptions are as well established as the rule itself. * * * In such case the evidence is admissible, not to establish the other crime, but as confirmatory of the evidence tending to show the commission by defendant of the one on trial." *State v. Monroe,* 142 Minn. 394.

The exception, though not directly involved, is recognized in *Palin v. State,* 38 Neb. 862, and authorities are there cited in support of the application of the exception to the rule in a criminal prosecution. See, also, *State v. Schaffer,* 70 Ia. 371; *State v. Wallack,* 193 Ia. 941; *State v. Robinson,* 35 S. Car. 340; *State v. Leroy,* 61 Wash. 405; *State v. Norris,* 27 Wash. 453.

It is argued that the court erred in that the jury were not instructed in specific terms in regard to the purpose for which the evidence of the Beethe burglary and theft was admitted. But defendant did not request such instruction, and he should not now be heard to complain in view of the instructions given in respect of the weight and credibility of the evidence and in respect of the fact that the jury must be satisfied beyond a reasonable doubt that at the time and place charged in the information the defendant was guilty of the theft of the goods named in the information. In a recent case we held that error could

not be predicated upon the failure to charge the jury on a given point without a request therefor, unless it is upon a question where a statute or positive rule of law required the giving of such instruction. *Georgis v. State,* 110 Neb. 352; *State v. Gaston,* 96 Ia. 505. The evidence, *inter alia,* shows that the Eversole and Beethe burglaries, as contended by the state, were so closely connected in point of time and place as to be a part of the same transaction. And particularly is this apparent in view of the fact that goods from both stores were found in defendant's possession shortly after the burglaries. The conclusion is that the court did not err in admitting evidence of the theft of the Beethe goods.

Defendant interposed evidence tending to prove an alibi which, if believed by the jury, would have entitled him to an acquittal, but we do not find it necessary to discuss this feature of the case other than to observe that the jury evidently did not accept the version of defendant's witnesses on this point.

It may here be noted that defendant has attached to the record, a second showing which tends to establish an alibi. This showing was made since the case was tried before. But as a reviewing court, we cannot, for obvious reasons, consider matter here which has not been first submitted in the trial court.

Reversible error has not been shown. The judgment of the district court is

AFFIRMED.

Note—See Criminal Law, 16 C. J. secs. 1132, 1134, 2281, 2290, 2293, 2498; 17 C. J. sec. 3328—Larceny, 25 Cyc. p. 127.

CHRIS BUERSTATTE, APPELLEE, V. CHARLES A. SWANSON, APPELLANT.

FILED APRIL 10, 1924. No. 22720.

Contracts: TRADE AGREEMENT. Where, for a consideration, a party agrees not to engage in the furniture and undertaking business in competition with anotl.er for a period of five years within the area of a city, *held,* that such agreement is reasonable and may be enforced.

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

Good & Good and *J. M. Galloway,* for appellant.

Slama & Donato, contra.

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

DAY, J.

The plaintiff, Chris Buerstatte, obtained a decree in the district court for Saunders county against the defendant, Charles A. Swanson, enjoining the latter from engaging in the undertaking business in the city of Wahoo, Nebraska, for a period of five years from May 25, 1920. The plaintiff's action was based upon an agreement between the plaintiff and the defendant, by the terms of which the defendant agreed for considerations named to refrain from engaging in the furniture or undertaking business in the city of Wahoo for a period of five years. From this decree the defendant appeals.

The record shows that on and prior to May 25, 1920, the defendant owned and conducted a furniture and undertaking business in the city of Wahoo. On that date the parties entered into a written contract, by the terms of which the plaintiff agreed to buy and the defendant agreed to sell the stock of furniture, fixtures, and undertaking supplies, including an automobile hearse. By the terms of the contract the purchase price was to be determined by an appraisement in the manner provided therein. The total value

fixed by the appraisers was $17,769.69. In this appraisement the value of the hearse was fixed at $1,000. The plaintiff took over the business, assumed full charge of all the property enumerated in the contract except the hearse, and paid to the defendant $16,769.69. The dispute between the parties is whether the contract as entered into was subsequently modified in so far as it included the hearse. It was the theory of the defendant that the plaintiff had breached the contract by refusing to take the hearse, and for that reason the defendant claimed the right to again enter into the undertaking business at Wahoo, and was proceeding to do so, when the present action was commenced. The plaintiff's theory was that, after the contract was made, by mutual agreement between the parties the hearse was eliminated from the items of property which the plaintiff agreed to purchase. The trial court did not pass upon the question whether the contract was so modified, but held that the plaintiff had substantially complied with the contract of sale, and was therefore entitled to the protection of a court of equity. The court also held that the defendant had an adequate remedy at law.

The case is before us for a trial *de novo*. The plaintiff testified that about June 21, 1921, the defendant complained that the value of the hearse, as fixed by the appraisers, was too low; that it was worth at least $1,500, and that the appraisement should have been for that sum; that thereupon it was agreed between the parties that the defendant should keep the hearse, and that the plaintiff was to pay him rent therefor for such times as he used it. This is denied by the defendant. The only evidence bearing upon this phase of the case was that given by the parties, and letters passing between them and checks given by the plaintiff in payment of rent for the use of the hearse. Upon a trial *de novo* we are quite satisfied that the testimony fully sustains the plaintiff's theory, and that the contract, by mutual consent, was so modified as to eliminate the hearse therefrom.

The contract provided, as one of the inducements thereof, that the defendant would "not engage in the furniture or

undertaking business in the city of Wahoo, Saunders county, Nebraska, either directly or indirectly, for a period of five years from the date of this agreement." The rule is established in this state that an agreement by one of the parties to refrain from engaging in a competitive business for a reasonable time and within a limited area, not larger than reasonably necessary for the protection of the other party, is valid and enforceable. *Mollyneaux v. Wittenberg*, 39 Neb. 547; *Herpolsheimer v. Funke*, 1 Neb. (Unof.) 304; *Hickey v. Brinkley*, 88 Neb. 356.

Extensive arguments have been made by both sides in support of and against the theory adopted by the trial court that there had been a substantial compliance with the contract by the plaintiff, but in the view which we have taken of the evidence it seems unnecessary to discuss that phase of the case.

In view of the evidence, it seems clear that the plaintiff has fully performed the contract, and is entitled to the relief prayed.

The decree of the trial court was right, and it is, therefore,

AFFIRMED.

Note—See Contracts, 13 C. J. p. 472, sec. 417.

JASPER W. ROBINSON, APPELLEE, V. UNION AUTOMOBILE INSURANCE COMPANY, APPELLANT.

FILED APRIL 10, 1924. No. 22682.

1. Insurance: AGENCY. Under sections 7757, 7772, Comp. St. 1922, one who solicits an application for insurance of any kind, or who, with authority, receives or receipts for any money on account of or for any contract of insurance made by him, although the policy may not be signed by him, shall be deemed, to all intents and purposes, the agent of the insurance company.

2. ———: POLICY: REFORMATION. It is a general rule that, if, by inadvertence, accident, or mutual mistake, the terms of the contract are not fully set forth in the policy of insurance, it

may be reformed so as to express the real agreement of the parties.

3. ———: ———: ———. When a soliciting agent of an insurance company and the insured mutually agree upon the terms and conditions of the insurance contract, and the policy, later issued by the company, omits one of the essential elements of the contract, which is not discovered by the insured until after a loss occurs, he may then have the policy reformed so as to express the real agreement of the parties, and his failure to promptly examine the policy when received and discover the departure therein from the real agreement will not defeat his right to have reformation of the policy.

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

Doyle & Halligan, J. S. Garnett and *George N. Foster,* for appellant.

Sullivan, Squires & Johnson, contra.

Heard before Morrissey, C. J., ROSE, DAY and GOOD, JJ., and REDICK, District Judge.

GOOD, J.

This is an action to reform an automobile insurance policy, so as to make it cover loss caused by collision, and to recover under the policy as reformed. Defendant admits the issuance of the policy, but denies that it covers, or was intended to cover, loss by collision. The trial resulted in a judgment for plaintiff, reforming the policy and awarding him judgment for the amount of his loss. Defendant appeals.

Was plaintiff entitled to a reformation of the policy? The correct answer to this question determines this appeal. There is little, if any, conflict in the evidence that is material to the issues raised.

The defendant is, as its name implies, an insurance company which insures the owners of automobiles against loss by fire, theft, lightning, tornado, liability, property damage, collision, etc. Its home office is in the city of Lincoln, Ne-

braska. One Brown was its local soliciting agent at Broken Bow, where plaintiff resided. Brown was furnished literature and rate cards and authorized to solicit insurance, take applications and forward to the company, where, if approved, a policy was issued and sent to the agent and by him delivered to the insured. The agent also collected the premium. Brown called upon the plaintiff and solicited him to take out a policy covering his automobile in defendant company. The character of policies and coverage, together with rates therefor, were discussed between plaintiff and Brown. Plaintiff indicated that he desired a full or total coverage policy that would protect him against loss by fire, theft, tornado, liability and collision. Brown consulted his rate card and informed plaintiff that such a policy would cost, for a three-year term, $100. The plaintiff assented and drew his check for $100, payable to Brown, and Brown then filled out an application which plaintiff signed. This application was forwarded to the company, and within a few days a policy was sent to the agent and by him delivered to plaintiff. It is conceded that the policy, as issued, does not cover loss occasioned by collision. Plaintiff did not read nor examine the policy until after the loss occurred. He then made claim to the company for the loss, and the company declined to pay because the policy did not cover collision insurance. Plaintiff was not aware of this until so informed by the company, and was not convinced that the policy, as written, did not cover loss by collision until he had submitted it to his attorneys. Thereupon, this action was brought to reform the policy as above stated.

The written application was introduced in evidence. The following is the form of the application:

"Automobile Application and Contract.

"Union Automobile Insurance Company.

"Paid-up Capital, $100,000. (Stock Company) Paid in Surplus, $25,000.

"Fire, theft, tornado, earthquake, liability, property damage and accidental death.

"Premium, $100.

"Fire, theft, tornado, earthquake, etc., only.
"Premium, $.....
"Liability, property damage and accidental death only.
"Premium, $.....
"Term 36 months."

Then follows a schedule of declarations which is not material to the present consideration. It will be observed that the application does not, in terms, mention collision insurance. The president of the insurance company testified that it was the custom, when collision insurance was to be included, for the agent to write a letter, informing the company of such fact, or to make a notation upon the application that collision insurance was desired. The form of policy issued does not, as stated, cover collision insurance, and the president of the company testified that, when collision insurance was to be included, a rider was placed upon the policy especially covering loss from this cause. The president produced a rate card, which he testified was in force at the time, and which showed the rate on plaintiff's automobile, for three years, for general coverage, except collision insurance, to be $125, and that the additional rate, for the same time, for collision insurance was $65. He testified that this rate card was furnished to all of the agents for their guidance. However, it will be observed that the policy was issued for a premium of $100, which does not conform to the rate, as disclosed by the rate card, when collision insurance is not included. Brown, the agent who solicited the insurance, was called as a witness and testified that he was furnished a rate card for 1919, which had been destroyed when the new rate card for 1920 was issued; that the 1920 rates were considerably higher than the 1919 rates. He produced the 1920 rate card, and that disclosed that the rate upon plaintiff's car, for a three-year period, for complete coverage, including collision insurance, was $112.50. The witness Brown further testified that the rate on the card, furnished him in 1919, for complete coverage, including collision insurance, was $100. There can be no question whatever that both plaintiff and the agent Brown

understood that plaintiff was contracting for a policy which would insure against loss by collision.

Defendant advances several propositions of law, which, it argues, if properly applied, will defeat plaintiff's right to a reformation of the contract of insurance. Its first proposition is that, in the absence of fraud or mistake, all previous verbal understandings are merged in the written contract, and it is conclusively presumed to contain the entire engagements of the parties with all the conditions of their fulfilment.

We are in accord with the principle stated, but fail to see the application of it to the situation in hand. Under sections 7757, 7772, Comp. St. 1922, Brown, in taking the application, was the agent of the company. It could act only through an agent. The agent was furnished a rate card and authorized to solicit insurance. He had ostensible authority to state and quote to a prospective applicant the rate for any kind of policy he was authorized to solicit. He did quote to and agree with the plaintiff upon the rate. In so doing he was the company. He was also acting for the company in taking plaintiff's application. Both plaintiff and the agent Brown stated positively that the plaintiff desired, ordered and paid for a policy that would protect him from loss by collision. It was the intention of both parties to have the application include this feature. If the application was not specific enough to cover it, it is obvious that there was a mutual mistake of the parties.

It is next contended that, where a party accepts a contract of insurance and makes no effort to examine or read the policy until a loss occurs, he is bound by the terms of the policy as written. Several authorities are cited as sustaining this principle, and, as applied to the situations in the cited cases, the principle may be accepted as sound. The cases cited, however, in the main are actions on contracts as written and where one or the other of the parties seeks to avoid the legal effect of some clause in the contract of which he had no personal knowledge. They are not actions for reformation of the contract. In such an action,

where one party seeks the aid of a court of equity to require the contract to conform to the actual intent and agreement of the parties, a different rule is applicable. It is a general principle, sustained by abundant authority, that if, by inadvertence, accident, or mutual mistake, the terms of the contract are not fully set forth in the policy, it may be reformed so as to express the real agreement. *Cook v. Westchester Fire Ins. Co.*, 60 Neb. 127; *Grand View Building Ass'n v. Northern Assurance Co.*, 73 Neb. 149; *Lansing v. Commercial Union Assurance Co.*, 4 Neb. (Unof.) 140; *Slobodisky v. Phœnix Ins. Co.*, 52 Neb. 395; *Dolvin v. American Harrow Co.*, 125 Ga. 699, 28 L. R. A. n. s. 785, and subnote "h" thereto on page 831; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; 14 R. C. L. 902, sec. 80.

While the authorities are not unanimous, we think the better rule—the one in consonance with reason and supported by the most of the courts—is that a policy may be reformed where it does not conform to the agreement of the parties, though the mistake, so far as the company is concerned, was that of a mere soliciting agent, with no power to issue a policy. 14 R. C. L. 902, sec. 80, and note to *Floars v. Ætna Life Ins. Co.*, 11 L. R. A. n. s. 357. The provisions of the statutes cited above are alone sufficient to compel the adoption of the rule announced.

Defendant further contends that, where the insured receives a policy of insurance, ostensibly in response to his written application therefor, and the policy does not conform to the agreement of the parties, the insured is bound, as a matter of law, to examine the policy within a reasonable time after its receipt, to discover obvious departures therein from the one which he supposed he had received, or he will be held as having accepted the policy as complying with his application. In support of this proposition, defendant cites *American Ins. Co. v. Neiberger*, 74 Mo. 167; *Metzger v. Ætna Ins. Co.*, 227 N. Y. 411; *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 67 L. R. A. 705.

In the first of the cases cited, the action was to recover on a premium note. The policy for which it was given did

not conform to the agreement between the insurance company's agent and the insured. The latter became aware of this fact as soon as the policy was received and did not reject the policy until several months later. It was held that he should have promptly rejected the policy on discovering that it did not comply with the agreement, and that his failure so to do rendered him liable on the note, on the ground that, by his delay, he was held to have accepted the policy as written. In the instant case, the insured did not discover that the policy did not comply with the agreement until after the loss occurred.

In *Metzger v. Ætna Ins. Co., supra,* the action was to reform a policy of fire insurance which, while issued for a term of one year, was to cover a builder's risk, and, by a rider attached to the policy, limited the liability to the time while the building was in process of erection and completion, and provided that all liability on the policy should cease when the building became occupied, in whole or in part. It was there held: "While in equity a recission of a contract may be adjudged on the ground of a unilateral mistake in its contents, in order that a reformation may be adjudged, there must be mutual mistake or inadvertence or the excusable mistake of one party and fraud of the other. There must have been a meeting of the minds of the contracting parties concerning the agreement, or agreements, which the court is asked to declare existent." It was held that the mistake was not mutual. In the instant case the evidence disclosed that the minds of the two parties met, but the policy did not conform to their mutual intent, and hence the mistake was mutual.

In *Bostwick v. Mutual Life Ins. Co., supra,* the action was by the insured to recover premiums paid upon a policy that differed, in terms, from the one which the insured had ordered. In that case, the insured desired a ten-payment policy, and the agent for the company wrote the application for a policy that would require insured to make annual payments during his life. When the policy was received, there was a letter, the first words of which di-

rected the insured's attention to the nature of the policy, and that it was different from the one which he desired. He complained to the agent, and considerable correspondence ensued, but he did not seek a cancelation of the policy until the lapse of several months. It was held that he was not entitled to recover. An examination of the case leads the writer to the view that there are many expressions contained in the opinion that were unnecessary for a determination of the questions. While the principle, as contended for by defendant, is announced in that case, it seems that it was wholly unnecessary for the determination of the case, as it might have turned solely upon the question of the laches of the insured in not promptly rejecting the policy upon discovery that it was not of the character that he had ordered.

In the instant case, we are asked to hold that plaintiff is not entitled to a reformation of the policy because he failed to examine it and promptly discover that it did not contain the provision for which he stipulated. To so hold would permit the insurance company to take advantage of its own wrong or of a mutual mistake. In this case, there was no laches on the part of the plaintiff, unless it was in his failure to examine and read his policy and ascertain therefrom that it did not cover collision insurance. The policy is long and contains many conditions and limitations, and we seriously doubt if one, other than a lawyer or one versed in insurance, would know, from a casual reading of the policy, that it did not cover collision insurance. But, in any view of the case, there was a mutual mistake, and the plaintiff sought the reformation of the contract, to conform to the agreement of the parties, as soon as the mistake was discovered. The defendant has not been injured unless it has carried the insurance for a less premium than its regular rates, which, by the way, is not entirely clear. That the policy as issued did not conform to the agreement of the parties is due either to the mutual mistake, caused by defendant's agent, or to the fraud on the part of the company in not issuing the proper kind of

policy. In either event, we think the plaintiff was entitled to have the policy reformed.

It follows that the judgment of the district court should be and is

AFFIRMED.

Note—See Insurance, 32 C. J. p. 1058, sec. 133; p. 1140, sec. 247; p. 1142, sec. 249—Reformation of Instruments, 34 Cyc. pp. 925, 949.

JOHN H. COSTELLO ET AL., APPELLANTS, V. COLFAX COUNTY ET AL., APPELLEES.

FILED APRIL 10, 1924. No. 23798.

Drains: DIVERSION OF WATERS: INJUNCTION. Where the construction of a drainage ditch, pursuant to the provisions of article I, ch. 17 (sections 1665-1702) Comp. St. 1922, would divert the waters from one flowing stream into another, which would cause the waters of the latter stream to overflow its banks and flood the lands of lower riparian owners, injunction will lie, at the instance of such owners, to prevent the construction of the ditch until a time has been fixed for hearing their claims for damages and due notice of such hearing has been given them, to the end that they may have the opportunity of having their claims for damages duly presented and determined.

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

Cain & Johnson, for appellants.

George W. Wertz and *B. F. Farrell, contra.*

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

GOOD, J.

This is an action to enjoin the construction of a drainage ditch, in Colfax county, Nebraska, which would divert the waters of Dry creek into Maple creek, on the ground that the increased flow of water in Maple creek would cause it to overflow and flood plaintiffs' lands to their damage, with-

out provision having been made for compensating them. Plaintiffs' lands are in the valley of, and below the point where the diverted waters would enter, Maple creek. Defendants are the county of Colfax, the county clerk and county commissioners of said county, and the petitioners for the drainage ditch. They intend to construct the ditch pursuant to the provisions of article I, ch. 17, Comp. St. 1922, and had taken preliminary steps for its construction when this action was begun. Defendants admit that they intend to construct the drainage ditch and have not given plaintiffs any notice of a hearing on claims for damages; that no provision has been made for compensating plaintiffs for any damages they may sustain, and that defendants do not intend to make any provision for compensation, and claim that if plaintiffs suffer any damage it is *damnum absque injuria* and is not compensable. The trial court found for defendants and entered a decree accordingly. Plaintiffs appeal.

The following pertinent facts are shown without substantial dispute: Dry creek flows into Maple creek in Colfax county, Nebraska, and for several miles above their confluence the two streams run nearly parallel. The intervening valley varies from a half mile to a mile and a half in width. Most of the land in this valley is lower than the banks of either stream. In times of freshet and high water, Dry creek overflows its banks at various places, but particularly at and above the point where the proposed drainage ditch is to tap that stream. The greater part of this overflow water never returns to the creek from which it emerges, but spreads over the valley and runs over the lands of the petitioners into another drainage ditch and ravine, and thence into Maple creek at the place where the proposed drainage ditch would enter that stream. The length of the proposed drainage ditch is approximately five miles. On at least four or five occasions within the past 40 years, both creeks have simultaneously overflowed their banks and inundated the valley to such an extent as to entirely destroy or greatly damage the crops growing on the

lands of both plaintiffs and such of the defendants as are petitioners for the ditch.

It is shown that Maple creek, just below the point where the drainage ditch would enter it, is frequently taxed to its full capacity; that on an average of four or five times a year the stream at that point runs bank-full, and that a small increase in the volume of its waters would cause it to overflow its banks. The volume of water in Dry creek is equal to about one-third to one-half the volume of water in Maple creek, and it clearly appears that the drainage ditch, if constructed, would so increase the flow of water in Maple creek as to cause it to overflow its banks, and that plaintiffs' lands would be flooded several times in the course of a year, while, under present conditions, they are not flooded oftener than on an average of once in eight or ten years.

The trial court decided the case apparently upon the theory that the defendants had complied with the statutory provisions relative to the construction of such a drainage ditch; that the statute did not require notice to any persons except those whose lands would be benefited by the improvement, and that, the county board having pursued the course prescribed by the letter of the statute, injunction would not lie. The court also seems to have adopted the view that, since the overflow waters of Dry creek never return to it, they become surface waters, and that the contemplated drainage ditch would carry only surface waters; that the defendants had a right to collect these waters and accelerate their flow into Maple creek where they were wont to flow, and that the lower riparian owners along Maple creek could not complain of such acts.

We think the district court erred in assuming that the proposed drainage ditch would carry only surface waters. It will be conceded that the overflow waters of Dry creek which spread over the valley and never re-enter that stream become surface waters. However, the evidence shows that the bottom of the drainage ditch where it would tap Dry creek is only 12 inches higher than the bottom of that stream. Dry creek at that point is 8 feet deep, and the

waters of that creek running more than 12 inches deep will flow, in part at least, into the drainage ditch. It is also evident that, because of the decreased flow of water in Dry creek below the point to be tapped by the ditch, it would fill up and in a short time practically all the waters of Dry creek would be forced into and carried by the drainage ditch, and thereby all the waters of that creek would be diverted into Maple creek. If the proposed ditch would not divert the waters that naturally flow within the banks of Dry creek but would carry only surface waters and discharge them into Maple creek at a point where they would naturally flow, then plaintiffs could not justly complain. As lower riparian owners, their lands must bear the burden of surface waters that come upon them in their natural course, even though the flow thereof has been greatly accelerated by artificial means.

The law does not require the plaintiffs to bear the burden of water diverted from the natural flow of one stream and discharged into another stream, thereby causing the latter to overflow its banks and flood their lands. *Pyle v. Richards,* 17 Neb. 180; *Kane v. Bowden,* 85 Neb. 347; *Nelson v. Wirthele,* 88 Neb. 595; *Keifer v. Shambaugh,* 99 Neb. 709; *Keifer v. Stanley,* 111 Neb. 822; *Roe v. Howard County,* 75 Neb. 448. In the latter case it is held: "Where water, be it surface water, the result of rain or snow, or the water of springs, flows in a well-defined course, be it ditch or swale or draw in its primitive condition, and seeks its discharge in a neighboring stream, its flow cannot be arrested or interfered with by a landowner to the injury of the neighboring proprietors, and what a private proprietor may not do neither can the public authorities, except in the exercise of the right of eminent domain."

Under this authority the defendants could not lawfully construct a drainage ditch and divert the waters that naturally flow within the banks of Dry creek and discharge them into Maple creek and thereby cause the latter to overflow its banks and flood the plaintiffs' lands to their injury, except in the exercise of the right of eminent domain. De-

fendants are not entitled to construct the ditch and thereby take and damage the lands of the plaintiffs, without compensation having first been made or provided for.

This court has held that in establishing a drainage ditch pursuant to the provisions of article I, ch. 89, Comp. St. 1899, which now appears as article I, ch. 17, Comp. St. 1922, among the jurisdictional steps required to be observed is "that notice, as provided by statute, to persons on whose lands the cost is to be apportioned, and the owners whose lands are to be taken or damaged, shall be given." *Dodge County v. Acom*, 61 Neb. 376; *Darst v. Griffin*, 31 Neb. 668; *Morris v. Washington County*, 72 Neb. 174.

It follows that the judgment of the district court should be and is reversed, and the defendants are enjoined from proceeding with the construction of the proposed drainage ditch until a time is fixed for the hearing of plaintiffs' claims for damages, and they are given due notice of such hearing, so that their claims may be heard and determined.

REVERSED.

Note—See Drains, 19 C. J. p. 683, sec. 153.

HENRY GEISE, APPELLEE, V. ARTHUR T. YARTER ET AL., CROSS-APPELLANTS: BILLS & CLINE ET AL., APPELLANTS.

FILED APRIL 10, 1924. No. 22728.

1. **Witnesses: EVIDENCE: COMPETENCY.** In an action against the representative of a deceased person and the surviving partner of the firm, the evidence of a witness, having a direct legal interest in the result, as to transactions and conversations with deceased, is competent unless the interest of the representative in that action is adverse to the interest of the witness.

2. **Contracts: RESCISSION: NOTICE OF ELECTION.** An action in equity to rescind a contract for the alleged fraud of defendants may be maintained without the prior service of notice of an election to rescind.

3. **Evidence examined, and findings of the district court approved and adopted.**

4. Contracts: RESCISSION: POWER OF COURT. In an action in equity to rescind a contract for the purchase of stock of a corporation, the consideration for which was a note of a third party secured by mortgage, and which had been sold by the fraudulent vendor to a purchaser with knowledge of the fraud, and, in turn, sold by said purchaser to an innocent party, *held*, that, upon decreeing rescission, the court had jurisdiction to render a money judgment in favor of plaintiff and against all defendants guilty of the fraud whereby plaintiff had been deprived of his property.

5. ———: ———: BURDEN OF PROOF. In such case, evidence tending to prove the fraud having been received, the burden was upon the purchaser from the fraudulent vendor to prove that he purchased in good faith and without notice.

APPEAL from the district court for Lincoln county: BAYARD H. PAINE, JUDGE. *Affirmed in part, and reversed in part.*

C. C. Flansburg, for appellants.

Doyle & Halligan, for cross-appellants.

Halligan, Beatty & Halligan, contra.

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

REDICK, District Judge.

This is an action brought by Henry Geise, plaintiff, against Arthur T. Yarter, Perry Anthony, Sarvis Lumber Company, a corporation, and Bills and Cline, a copartnership. Charles J. Bills, one of the partners, died pending suit, and by stipulation of the parties the action was revived as to Charles J. Bills against Florence L. Bills, executrix of his estate. The action is in equity for the rescission of a contract between plaintiff and Perry Anthony, whereby Anthony sold to the plaintiff 75 shares of stock in the Sarvis Lumber Company at $200 a share, upon the ground that the plaintiff had been induced to make the purchase by false representations. The allegations of the petition are sub-

stantially as follows: That on or about the 9th day of April, 1920, the defendants Yarter and Anthony were the agents of the lumber company for the sale of its stock, and represented to the plaintiff that the par value of the stock was $200 a share, that its actual market value was $200 a share, that the corporation had paid large dividends upon its common stock and would do so in the future; that Yarter held $3,000 of the stock and had recently been paid 18 per cent. dividends; that one Dieringer owned a similar amount and had been paid 18 per cent. dividends, and was going to sell his farm and buy more of the stock; that the company was financially sound. It was further alleged that Yarter, who was the more active in making these representations, was an old friend and neighbor of the plaintiff; that he believed and relied upon said statements and purchased 75 shares for $15,000, by assigning to Anthony a mortgage of the value of $20,298, principal and interest, receiving the surplus over the $15,000 from Yarter and Anthony; that the stock was delivered to plaintiff April 22, 1920, and then for the first time he discovered that the shares were of the par value of only $100, and he commenced an investigation resulting in the discovery that all of the representations above set forth were false, and immediately rescinded the sale and tendered the stock to the defendants, demanding his mortgage in return, which was refused. It was further alleged that the defendants Bills and Cline had purchased, or were about to purchase, the said mortgage from Anthony, and that said Bills and Cline had full knowledge of the fraud practiced on the plaintiff and are not holders for value in the usual course of business; that unless restrained they will sell said note and mortgage to innocent parties; and that the defendants are insolvent. The prayer is for a rescission of the contract, for an injunction restraining the negotiation of the note and mortgage, and, in case it had been negotiated, for a judgment against the defendants for $15,000 and interest. The action was begun May 7, 1920, and a restraining order was issued and served.

Bills and Cline answered that they purchased the note and mortgage in question April 20, 1920, in the usual course of business, for full consideration, without notice of any defects or defenses and acting in good faith, the said Charles J. Bills, since deceased, conducting the negotiations; that prior to the service of the restraining order they had sold the same to an eastern client and had paid all of the purchase price of said note and mortgage to defendant Anthony for his use and benefit or under his direction, except the sum of $5,293.49 which was still in defendant's hands, and which it offered to pay into court for the benefit of the party entitled thereto. It was further alleged that all the capital assets, including the note and mortgage in question, of Bills and Cline were the individual property of Charles J. Bills.

The answer of Perry Anthony admitted the sale of the stock, but alleged it was his own property and that he was not acting as agent of the lumber company, denies the making of the alleged representations, alleges that Bills and Cline were fully informed at the time of the purchase of the manner in which defendant became the owner of the note and mortgage, and that he had only received the sum of $3,500 for the same, and prayed judgment against Bills and Cline for $18,248.

The lumber company answered denying all the allegations of the petition, and alleged that the stock in question was the property of Anthony and that defendant had no interest in it. Yarter answered and denied making the representations alleged, and that upon the occasion of the sale of said stock he did not represent Anthony in any other capacity than as a chauffeur. He further alleged that at the request of Anthony he furnished the sum of $3,300 to make up the difference between the purchase price of the stock and the note and mortgage, which had never been repaid, and prayed judgment against plaintiff for that amount in case the contract was rescinded. Florence L. Bills, executrix, answered, admitting the copartnership of Bills and Cline, alleging that all the funds of the partner-

ship were the personal property of Bills, Cline's interest being only in the profits; that the money in the hands of Bills and Cline belonged to her as executrix, admitted the purchase by Bills and Cline, which she alleged was made in good faith and for full value in the due course of business, and denied all other allegations in the petition for want of knowledge or information.

The trial resulted in a decree finding generally for the plaintiff and against all defendants, rendering judgment against them in the sum of $16,685, upon which the sum of $5,232.70 was to be credited when paid into court as ordered. The decree specifically found that Bills and Cline purchased the note and mortgage with knowledge of the fraud, not in the regular course of business, and that they were not innocent purchasers. The court declined to determine the rights of the defendants as between themselves and the judgment was without prejudice thereto. Bills and Cline, a copartnership and Florence L. Bills, executrix, appeal, and Yarter, Anthony and the lumber company file cross-appeals.

The first assignment of error by appellees is that the judgment against the executrix has no foundation in the pleadings, the point being that after she had been substituted for Charles J. Bills, deceased, and the action revived in her name, no amended or supplemental petition was filed charging her as executrix; but it was held in *Missouri P. R. Co. v. Fox*, 56 Neb. 746, that such pleadings, though proper, were unnecessary, as the facts already appeared upon the record. Furthermore, she filed an answer to the plaintiff's petition, thereby treating it as tendering an issue to her, and she cannot now complain of a failure to make a formal amendment. The second assignment is that no cause of action is stated against Bills and Cline except as to the amount tendered into court, but this assignment is not argued, and is not well taken at all events for the reason that, if Bills and Cline were not purchasers in good faith, they could not escape liability by transferring the

note and mortgage to an innocent holder, but are liable for its value. 13 C. J. 611; sec. 653; 35 Cyc. 158.

It is further contended that an order barring claims in the estate of Charles J. Bills applies to the claim in question, as the same was not presented to the county court, but there is no merit in this proposition because the statute barring claims expressly provides that it shall not "be construed to affect actions pending against the deceased at the time of his death." Comp. St. 1922, sec. 1344. And section 1375 provides for the certification of the judgment in such actions to the county court for allowance.

We do not think that it is or can be seriously contended that the plaintiff was not defrauded of his mortgage by reliance upon misrepresentations of fact as set out in the petition. The evidence of plaintiff is clear and convincing that the representations were made by defendant Yarter. It is shown that Anthony and Yarter drove in an automobile to plaintiff's residence, and that Anthony took Yarter along because he was a good friend and neighbor of plaintiff, and sent him into the house, Anthony remaining outside in the automobile; and the principal representations were made by Yarter while in the house, and Anthony is bound thereby. Yarter was not called as a witness, so the testimony of plaintiff and his wife as to the statements of Yarter are practically undisputed, and the finding of the district court upon this subject is amply sustained and will not be disturbed.

The contention most seriously urged by the appellants involves the sufficiency of the evidence to establish bad faith upon the part of Bills and Cline, and it will be necessary to consider somewhat in detail the evidence upon this question. The name of the corporation was originally Sarvis Timber Company, and was later changed to Sarvis Lumber Company, and will be herein referred to as the lumber company. It appears that the original capital stock of the Sarvis Lumber Company was $200,000, which was issued in varying amounts to Charles J. Bills and Willard Kimball, without consideration. The capital stock of the

company was then increased and provision made for the issuance of $500,000 of preferred stock, $243,000 of which was sold by Perry Anthony and his brother, acting as agents of the lumber company, at par or above, and for their services they received $50,000 of the common stock; the defendant Perry Anthony afterwards becoming the sole owner thereof. Anthony subsequently secured $10,000 more of the common stock as commission from Kimball for selling $20,000 worth at par, and the 75 shares sold to the plaintiff were a part of Anthony's personal stock, which he sold on his own account, and not as agent of the lumber company. The company issued bonds in the sum of $125,000 and placed them in the hands of Bills for sale, and they were sold, and Bills received as commission $20,000 cash and a bonus of $125,000 of common stock (a part of the $200,000 above mentioned). Bills then sold his stock to Kimball at par for $162,500, for which he gave his note, and under a contract whereby Kimball agreed to apply in payment of said sum all the income of the lumber company from the sale of lumber and lath until said amount was fully paid. By this transaction the usual process was reversed; instead of the company receiving pay for its stock, it issued the same without consideration and then paid for it out of its own assets. Bills, Cline, McCormick (an employee of Bills) and Kimball were officers and directors and in control of the company, Kimball being president, and the contract above referred to providing that such control should continue until $112,500 had been paid upon said note, in the meantime Bills retaining the stock as security, with the right to vote the same, $85,000 of the proceeds of the sale of the preferred stock was applied toward the payment of Kimball's indebtedness to Bills, and a total of about $125,000 has been paid thereon. The facts just stated are sufficient to charge Bills with full knowledge of the position and value of the common stock of the lumber company.

At the time of the purchase by Bills and Cline from An-

thony of the mortgage in question, there was due thereon for principal and interest the sum of $20,398.87. Anthony was paid thereon the sum of $2,000 at the time, and later on, after an investigation of the security, $1,500, or a total of $3,500. $5,232.70 remains in the hands of Bills and Cline to the credit of Anthony, and $9,544.59 was retained by Bills and Cline for the purpose of taking up $5,572.50 of past-due coupons on the lumber company's bonds, $1,137.09 accrued interest thereon, and $2,835, the amount of coupons coming due June 15, 1920. Payment of these coupons had been guaranteed by Bills and Cline through an agreement to repurchase them if not paid when due, and they were in their hands for collection. They also charged Anthony a discount on the purchase of the mortgage of $2,000. It will thus be noted that the entire consideration actually paid by Bills and Cline to Anthony for his $20,000 mortgage was the $3,500 cash and $5,232.70 credit, or a total of $8,732.70, the balance being made up of the discount $2,000, amount retained for coupons $9,544, and some small items for expenses for abstract and investigation of the property. While at this time Anthony was a director of the lumber company, he had only a comparatively small interest therein, and was in no way personally liable for the payment of the coupons above referred to. He submitted to a discount from the actual value of his mortgage of $2,000 and a further sum of over $9,500 for the purpose of paying or reimbursing Bills and Cline for the payment of those coupons, and beyond this had paid $2,828.21 from his own funds, and become liable to Yarter for $2,469.79 (the excess of the value of the mortgage over the purchase price of the stock). The defendants offer no satisfactory explanation of this transaction, their only suggestion being that the discount and application of the proceeds to the payment of the coupons were the only considerations under which they would purchase the mortgage. The evidence is to the effect that the security of the mortgage was ample for the payment of the

debt, and no good reason is shown or suggested why Anthony should submit to the terms imposed, other than that Bills and Cline had full knowledge of all the circumstances surrounding the purchase of the mortgage and were acting in concert with Anthony in the application of the proceeds thereof. As the result of the transaction, Bills and Cline obtained a mortgage of the value of over $20,000 for about $8,700. The facts above stated would seem of themselves sufficient to make it very difficult of belief that the purchase of the mortgage by Bills and Cline was in due course, for value, in good faith, and without notice of the fraud by which Anthony had obtained title to it. In addition to this, however, Anthony, called as a witness for the plaintiff, testified that he told Bills and Cline that he had sold 75 shares of his stock at $200 a share and had taken the mortgage in payment therefor, that he had sold other mortgages taken for lumber company stock to Bills and Cline, and that he had never received the coupons referred to, although he had demanded them. The evidence of Anthony as to what he told Bills and Cline was contradicted by that of Cline and McCormick. Evidence having been received tending to prove that the note and mortgage had been procured by fraud, the burden was cast upon defendants Bills and Cline to prove that they were purchasers for value, in good faith, and without notice of any defect in the title of Anthony. *Auld v. Walker,* 107 Neb. 676, *Shawnee State Bank v. Vansyckle,* 109 Neb. 86. This they have failed to do.

It is strenuously contended by appellants that this evidence of Anthony of a conversation with Bills, since deceased, was incompetent under the statute as against his representatives, the executrix, and the surviving member of the firm, Cline. The statute referred to is section 8836, Comp. St. 1922, reading as follows:

"No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be per-

mitted to testify to any transaction or conversation had between the deceased person and the witness."

This section was construed by this court in *Hageman v. Powell,* 76 Neb. 514, where it was held, quoting from *Wylie v. Charlton,* 43 Neb. 840: "Having in view the common law as to competency, and the mischief which this statute sought to prevent, it should be construed as if it read that no person having a direct legal interest in the result of an action shall be permitted to testify, when the party interested adversely to the witness' interest is the representative of a deceased person." The question, then, is whether or not Anthony had any legal interest in the controversy between plaintiff and Bills adverse to Bills or his representative. As stated thus it seems perfectly clear that any interest which Anthony had was in the success of Bills, and not adverse to him, because, if the plaintiff in this action were defeated, Anthony would be entitled to receive at least the sum to his credit, to wit, $5,232, and perhaps the value of the coupons deducted from the proceeds of the mortgage. In an action by Anthony against the executrix and Cline to recover these amounts, it is probable Anthony's evidence would be incompetent, but that is a different question. The same observations dispose of the objection on account of Cline, the surviving partner, being a representative within the meaning of the statute. As a witness in the case of plaintiff *versus* the representatives of Bills and Cline, Anthony had no interest adverse to such representatives.

The further contention is made that the evidence of Anthony was incompetent as an attempt to vary the terms of the written contract entered into by Anthony and Bills and Cline at the time of the purchase of the mortgage, but there is no merit in this. The evidence had no such tendency as ascribed to it, but was offered and received only upon the question of knowledge and good faith of Bills and Cline in making the purchase.

It is objected that no notice of rescission was given before suit, but this was not necessary. When a party seeks

to rescind a contract by his own act, he must give the other party notice; but when he seeks the aid of a court for that purpose, the bringing of the action is sufficient disaffirmance for the purpose of the action. *Knappen v. Freeman*, 47 Minn. 491; *First Nat. Bank v. Blocker*, 150 Minn. 337.

Complaint is made that the decree is for damages which are recoverable in a law action; but the court of equity having obtained jurisdiction of the action for rescission, and having found for plaintiff, had the power to grant relief in the form of a money decree, it appearing that the note and mortgage had passed into the hands of an innocent party and could not be ordered delivered up as prayed. The petition contained a prayer for general relief.

The cross-appellants complain of the refusal of the court to dispose of their several contentions as between themselves, but we think the discretion of the court in this regard was properly exercised.

Upon a careful and thorough consideration of the entire record, we are convinced that the findings and judgment of the district court are correct, with this exception: There is no evidence to sustain a finding that in the sale of the stock in question Anthony was the agent of the Sarvis Lumber Company; on the contrary, it is beyond dispute that he was acting for himself alone. It follows that the judgment against the Sarvis Lumber Company must be reversed and the action dismissed; in all other respects it is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

Note—See Witnesses, 40 Cyc. p. 2281—Cancelation of Instruments, 9 C. J. p. 1207, sec. 91; p. 1262, sec. 210; p. 1251, sec. 188; Corporations, 14 C. J. p. 713, sec. 1093.

ANTON CHERMAK, APPELLEE, V. FRANK SMOLIK, APPELLANT.

FILED APRIL 30, 1924. No. 22761.

1. **Principal and Agent:** CONTRACT OF AGENT: RATIFICATION. **Even though a written contract to sell real estate was entered**

into by an agent without written authority from the owner of the land, the contract may be ratified, where the owner, with knowledge of all the facts, receives the part of the consideration paid in cash, and enters into a valid written contract to convey the land to the agent upon the same terms and maturing at the same time as the original contract so that the purchaser may acquire the title under the original contract with the agent.

2. **Vendor and Purchaser:** TENDER. Where the vendee in an executory contract for the sale of real estate renounces or abandons the contract before maturity, the vendor is relieved from the necessity of tendering performance at maturity.

APPEAL from the district court for Butler county: EDWARD E. GOOD, JUDGE. *Reversed.*

Hastings & Coufal and *Thomas, Vail & Stoner*, for appellant.

Matt Miller and *Roper & Fuller, contra.*

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

LETTON, J.

This action is to recover the sum of $2,500, which the petition alleges was made as an initial payment by plaintiff to defendant upon an executory contract, dated May 16, 1918, by which defendant agreed to sell to plaintiff 160 acres of land for the purchase price of $40,800, payable $2,500 in cash, and $38,300 on or before March 1, 1919, at which time possession was to be given. Time was an essential element of the contract, and there was a provision that, if either of the parties failed to perform any of the stipulations of the contract, the failing party should pay $2,500 as damages for nonfulfillment. It is alleged that defendant failed to comply with the terms of the agreement by furnishing a warranty deed or an abstract of title, and has never at any time complied with or offered to comply with any of the conditions of the contract; that at the time of entering into the contract he was unable to comply with any of its terms, nor has he been able to do so at any time since. Plaintiff alleges that he was at all times ready, wil-

ling and able to perform his part of the agreement according to its terms. He prays for a return of the $2,500 advance payment, with interest, and for $9,400 damages for nonfulfillment of the contract. The defense in substance is abandonment of the contract by plaintiff on account of inability to raise the money with which to make the necessary payment on March 1, 1919, and repudiation by him of the whole contract. At the close of the testimony the court directed the jury to return a verdict in favor of defendant upon the cause of action for damages for breach of the contract, and in favor of plaintiff upon the cause of action to recover the $2,500 paid upon the purchase price, with interest. Judgment was rendered on this verdict, and defendant appeals.

Most of the facts are undisputed. Plaintiff produced the written contract (exhibit A) set forth in his petition and testified that he paid $2,500 at the time of its execution; that the defendant failed to furnish a warranty deed or an abstract to the premises, and never offered to perform the contract; that plaintiff was ready and willing to carry out the agreement according to its terms; that he had arranged to borrow part of the money from a bank at Brainard; that he had sold 80 acres of this land to one Whitzell, under an executory contract, for $245 an acre, and that Whitzell was ready and willing to carry out this contract in accordance with its terms.

The evidence on the part of the defendant is to the effect that, prior to entering into this contract, defendant, a real estate agent or broker, had sold a farm belonging to plaintiff to one Hotovy for $40,000, to be paid in cash on March 1, 1919, plaintiff paying defendant $300 commission on the sale; that after this contract was made plaintiff desired to purchase the land described in the contract (exhibit A), which belonged at the time to one Frank Toman, who had listed the same with defendant for sale; that plaintiff inquired of defendant whether he was authorized to sell the Toman land, and at what price; that defendant informed him that he had the same listed at the price of $40,800; that

the plaintiff and defendant then went to the Farmers State Bank, of Brainard, where Mr. Hayek, the banker, wrote the contract; that plaintiff then paid defendant $2,500, the cash payment required by the contract, which money he borrowed from the bank. During the negotiations plaintiff requested that the payment of $10,000 of the amount due on March 1, 1919, be deferred for some time. Defendant informed him that he would see Mr. Toman, the owner of the land, and try to arrange this for him. A few days afterwards defendant saw Mr. and Mrs. Toman, and informed them of the plaintiff's desire to have the payment of $10,000 deferred to be secured by a mortgage upon the land. Mr. and Mrs. Toman agreed to this and they, with defendant, went to the bank at Brainard and procured Mr. Hayek to draw up a contract (defendant's exhibit 2) embodying this modification. At the same time defendant paid Toman $1,700 of the $2,500 paid by plaintiff, retaining $800 as the commission which had previously been agreed upon by him and Toman. This contract provides for the sale of the Toman land to Smolik for $40,000, reciting that $1,700 was paid in cash, $10,000 to be secured by mortgage drawing 5½ per cent. interest, and $28,300 to be paid on March 1, 1919.

It will be seen that the only change in the terms of payment from those in exhibit A was the extension of the time to pay $10,000 of the purchase price, when it is considered that credit was given in this contract for the $2,500 already paid under the other. Afterwards it developed that the mother of plaintiff, who had a life interest in the farm which he had sold to Hotovy, was dissatisfied with the sale and refused to make a conveyance of her interest. Plaintiff was therefore unable to carry out the terms of the sale to Hotovy. He therefore induced Hotovy to surrender the contract, and it was canceled by mutual consent. This deprived him of the means to obtain the $40,000 with which he had expected to make the payment due March 1 on the purchase of the Toman land. Frank Toman died on September 3, 1918, the land was devised to his widow, and an

administrator was appointed with the will annexed. Previous to his death Toman had contracted to purchase 240 acres of land, relying upon receipt of the money from plaintiff with which to make the payment due March 1, 1919. After the death of Toman, his widow and the administrator of the estate, became anxious to know whether plaintiff intended, and was able, to carry out the contract of purchase of the Toman land. The testimony of Sobota, the administrator, and of the defendant Smolik is to the effect that in two conversations which were had with the plaintiff in Brainard, in the late fall of 1918, it was stated to him that those interested in the Toman land wished to know whether he would, or intended to, complete the purchase, so that they could begin proceedings in court authorizing the administrator to make a deed to him in accordance with the contract, and that in these conversations the plaintiff stated that he could not raise the money and he could not hold both places. The plaintiff did not take the stand in rebuttal of the testimony of Sobota and Smolik as to his repudiation of the contract. Two witnesses testified that Smolik had approached them endeavoring to suborn them to commit perjury by testifying that they heard Chermak say he was unable to carry out the contract for the land, but defendant denied this, and it was admitted that one of these witnesses, at least, was on bad terms with him. From the time of these conversations until the beginning of the suit there seems to have been nothing further done by either party with reference to the contract.

The evidence further develops that the contract of plaintiff to sell 80 acres of the Toman land to Whitzell had previously been canceled by mutual consent, that by this contract Whitzell was to have a clear title by January 1, 1919, and that since Chermak could not carry out the contract by that time Whitzell desired to have it canceled, and this was done.

While the original contract for the sale of the Toman land was entered into by Smolik, apparently as the owner,

and the second contract was between Toman and Smolik, the real facts were known to all parties that Chermak was buying the land from the Tomans, and that defendant Smolik was merely an intermediary. The successors in interest of Toman made no attempt to enforce the contract as against Smolik.

Plaintiff's theory is that the contract between him and Smolik is void because Smolik had no written authority to enter into it, nor to receive the $2,500 paid upon it; that since Smolik entered into the contract in his own name he was bound to tender an abstract and a deed to plaintiff on March 1, 1919, and that not tendering nor being able to tender the abstract or deed at that time he had no right to retain the $2,500, and plaintiff is entitled to recover it with interest. Plaintiff argues that since all oral conversations were merged in the written contract, and Toman's name did not appear in it, Smolik must be treated as the real contracting party. Smolik did not have the title to the Toman land at the time he made the contract, nor had he legal authority at that time to execute such a contract, but the subsequent acceptance by Toman with full knowledge of that part of the purchase price paid by plaintiff to defendant, and the written contract subsequently entered into between Toman and Smolik whereby Toman agreed to convey the land to Smolik in accordance with the terms of the contract of Smolik with plaintiff, constituted a ratification by Toman of the act of Smolik and vested Smolik with entire power to execute a written contract of sale to the plaintiff. On March 1, 1919, Smolik could have demanded performance of the contract from Toman, if he had lived, for the same estate which he had agreed to transfer to plaintiff by the original contract, and the benefit of the contract would have inured in equity to plaintiff.

Was defendant bound to tender an abstract and deed under the circumstances? A party to an executory contract, who states to the other party, before the time for performance, that it is impossible for him to fulfil its terms, and causes the other party to believe he has abandoned it, can-

not afterwards recover back earnest money on the ground that the other party failed to tender performance at the specified time. Even though a party who has renounced a contract changes his mind and desires to carry it out, if he fails to withdraw his renunciation before the time comes for performance it will excuse the default of the other party. *Pryor v. Hunter,* 31 Neb. 678; *Carstens v. McDonald,* 38 Neb. 858; *King v. Waterman,* 55 Neb. 324; *Fahey v. Updike Elevator Co.,* 102 Neb. 249; *Hixson Map Co. v. Nebraska Post Co.,* 5 Neb. (Unof.) 388; 3 Williston, Contracts, secs. 1306, 1313-1319. If the contract was renounced and abandoned by plaintiff, defendant was not required to offer or tender performance at maturity, but had the right, at his option, to treat the contract as annulled. We think the learned trial judge properly directed a verdict for defendant on the cause of action for damages, but that he erred in directing the verdict for plaintiff.

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

REVERSED.

Note—See Agency, 2 C. J. p. 502, sec. 122—Vendor and Purchaser, 39 Cyc. p. 1542.

HANS JOHNSON, APPELLANT, V. JOHN L. KELLEY, APPELLEE.

FILED APRIL 30, 1924. No. 22789.

1. **Homestead:** CONVEYANCE: VALIDITY. Where a written contract provides for the exchange of a tract of land, part of which is a family homestead, for a stock of goods, and the contract, which is invalid as to the homestead because not signed and acknowledged by husband and wife, is carried out by the parties, by delivery of the stock of goods to one and delivery of possession of the land to the other, and a deed to the land properly executed and acknowledged by husband and wife is tendered, the grantee, who is in possession of the land, is not entitled to have the contract set aside as being void because in violation of section 2819, Comp. St. 1922, the statutory provision being for the protection of the homestead interest, and not intended to be

used as a weapon by third parties with which to abrogate executed contracts otherwise valid.

2. **Deeds:** SETTING ASIDE. In this action to set aside a conveyance of land, one of the grounds alleged is false and fraudulent representations. *Held*, that the evidence does not preponderate in favor of the plaintiff, and that the district court was justified in refusing to set aside the contract.

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

R. H. Mathew and *E. L. Vogeltanz*, for appellant.

Davis & Davis, contra.

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

LETTON, J.

Plaintiff in this action sought to set aside a certain contract made with defendant. In substance the petition alleges, that on April 28, 1921, the defendant, then being the owner of 240 acres of land in Loup county, induced plaintiff to exchange a stock of hardware and implements at Arcadia, belonging to plaintiff, for the land which defendant agreed to convey to plaintiff, to be occupied and used for agricultural and grazing purposes, defendant representing to plaintiff that the land was "not sandy enough to blow;" that the representation that the land was not sandy enough to blow was false and untrue, and the land was not suitable for agricultural and grazing purposes, but was underlaid with gravel and sand; that the land is unproductive and quickly dries out in hot weather, of which fact plaintiff was ignorant, but which defendent well knew; that plaintiff delivered possession of the stock of implements to defendant on May 10, 1921, moved upon the land on May 20, 1921, and has been in possession until the present time; that 160 acres of the land was the family homestead of the defendant; that the contract was not executed nor acknowledged by defendant or his wife, and was therefore void;

that no deed to the land has been delivered to plaintiff, nor placed in escrow; that defendant has sold goods from the store for which he refuses to account; that about October 1, 1921, after learning the facts, plaintiff offered to give possession of the land to defendant and to pay a reasonable rent for the same; that the land is not of the value represented, and that defendant is insolvent and is about to dispose of the stock of goods. The prayer is for an injunction to restrain the sale of any of the stock of goods, for an accounting, for a declaration that the contract is void, or if found to be enforceable that it be rescinded. The defense is a denial of fraud, and it is alleged that an abstract of title was delivered to the plaintiff, which was approved, and a good and sufficient deed was tendered to plaintiff, which is now on deposit subject to plaintiff's order. A default of payment by plaintiff of a balance due defendant is also alleged. There is a prayer for affirmative relief, requiring plaintiff to pay the balance due upon the contract.

The court found that the evidence did not sustain the allegations of fraud; that defendant had released any claim to the homestead by making conveyances to the plaintiff, and had abandoned the same; that the defendant is entitled to a judgment against the plaintiff for $300, and that the deeds tendered and offered in evidence be held by the clerk of the court subject to the order of the plaintiff. Plaintiff has appealed.

The evidence shows that the contract was not executed nor acknowledged by both husband and wife. It was therefore, as matters then stood, legally insufficient to convey the homestead. Both parties treated it as valid. Plaintiff delivered the stock of goods to defendant on May 10, 1921, and defendant surrendered possession of the entire tract of land on May 20; plaintiff retaining possession at the time of the trial. This action was brought in October, 1921. Defendant delivered to plaintiff an abstract of title to the land for examination and approval, and there is testimony that at that time it was agreed between the parties that

the deed, which was tendered, should be left at the Arcadia State Bank to be delivered to plaintiff upon the payment of $650 which was then found to be due from him on the contract. Plaintiff farmed the land during the crop year of 1921.

With respect to the allegations of fraud, upon which the action was based, plaintiff himself testified as follows: "All the conversation I had with Mr. Kelley was in regard to the assertion—he made the assertion that it did not blow and I took his word for that." This testimony is denied by defendant and others who heard the conversation, and there is proof that at the time plaintiff inspected the land he asked defendant about the subsoil, and defendant told him there was a spade by the windmill and he could examine it for himself. On cross-examination plaintiff testified: "Q. What did he say? A. About all the representations he made was that the land would not blow. * * * Q. That was about all you relied on—that he said about it—that it would not blow? A. Yes. Q. How long had you lived in Nebraska at that time? A. Lived in Nebraska since 1881. Q. He told you that Nebraska soil would not blow? A. Yes." Plaintiff had been a farmer in Sherman county for more than 10 years. He testifies that he discovered the nature of the soil in May, and discovered in June and July that the soil would blow, but he made no objection until October or November. There is testimony that defendant said the land was worth $80 an acre, and some testimony that it is worth not much more than half that amount. But the petition does not charge over-valuation as an element of fraud; and, even if it had, the mere setting of a price or value by a seller upon that which he seeks to sell has never been considered to be more than "dealers' talk," and does not furnish ground for an action for deceit. Before the contract was made plaintiff had driven about and walked over the land and had examined some of the buildings. There is also testimony that in July or August, 1921, plaintiff said that he liked the land and

that it was as good a farm as there was upon the Calamus river.

The determination of this case rests upon questions of fact, since the carrying out of the contract by the actual exchange of properties, the acceptance and approval of the abstract, the tender of the deed, and the fact that the deed remains subject to plaintiff's order, remove the transaction from the operation of the statute requiring a contract or conveyance of a homestead to be signed and acknowledged by both husband and wife. *Laughlin v. Gardiner*, 104 Neb. 237; *Farmers Investment Co. v. O'Brien*, 109 Neb. 19.

Complaint is made that the deed tendered was made "subject to railroad right of way." There is no evidence that any railroad has a right of way over the land. No complaint on this score was made when the deed was tendered and no issue is made in the pleadings on this matter. Another warranty deed fully in accordance with the terms of the contract and containing no reservations was tendered to plaintiff at the trial and refused, and, under the final order of the court, is in the hands of the clerk for delivery to plaintiff, and is subject to his order. Plaintiff therefore cannot complain upon this score.

A review of the evidence requires us to reach the same conclusion upon the facts as that arrived at by the district court.

AFFIRMED.

Note—See Homesteads, 29 C. J. p. 889, sec. 265; Deeds 18 C. J. p. 447, sec. 554.

NATHAN FINEGOLD V. STATE OF NEBRASKA.

FILED APRIL 30, 1924. No. 23895.

Contempt: PROOF. In absence of a formal complaint of any kind, a mere finding by the court that a party to a civil action is "guilty of contempt of court in connection with perjury committed during the trial" thereof will not sustain a sentence of imprisonment

for contempt, the facts connecting him with the perjury or constituting the contempt not being stated.

ERROR to the district court for Douglas county: CARROLL O. STAUFFER, JUDGE. *Reversed.*

Richard S. Horton, for plaintiff in error.

O. S. Spillman, Attorney General, and *Harry Silverman, contra.*

Heard before MORRISSEY, C. J., ROSE, DAY and GOOD, JJ., BLACKLEDGE and REDICK, District Judges.

ROSE, J.

In the district court for Douglas county, Nathan Finegold was found guilty of contempt of court and for that offense was sentenced to serve a term of eight months in the county jail. As plaintiff in error he has presented his sentence for review.

The conviction cannot be approved. There was no formal complaint accusing Finegold of a violation of the criminal law or of contempt. He was brought into court by a capias. The judgment recites that he was brought before the bar "to answer for contempt of court in connection with perjury committed during the trial of this cause"—a civil action in which he was the plaintiff; that he was found guilty of "contempt of court in connection with perjury committed during the trial of this cause"—the civil case mentioned; that he was "arraigned for sentence" and informed of the finding of guilty. He was not arraigned under any criminal charge. He was first found guilty and afterward "arraigned for sentence." Neither the capias nor the findings of the court recite that Finegold himself committed perjury in the civil action. The record goes no further than to state the conclusion that he was "guilty of contempt of court in connection with perjury committed during the trial" of the civil case. What that "connection" was or what specific act was contemptuous is nowhere stated.

To sustain the conviction the attorney general invokes the statutory power of a court to inflict punishment for a "wilful attempt to obstruct the proceedings, or hinder the due administration of justice," in pending litigation, or to punish summarily contempts committed in the presence of the court. Comp. St. 1922, secs. 9189, 9190. The record does not show an exercise of judicial power under these provisions. There is no charge or finding that Finegold wilfully attempted to obstruct the civil proceedings or to hinder the due administration of justice. "Contempt of court in connection with perjury committed during the trial" of the civil case is the only attempt anywhere in the record to state or define any unlawful or contemptuous act. The judgment itself shows that the conviction was not based on what the presiding judge observed in the presence of the court. It recites that evidence was adduced and considered in determining the question of guilt. The record, therefore, is fatally defective and the action taken will not support the sentence imposed. If Finegold was not subject to summary punishment, a written complaint and an opportunity to make a defense were necessary to a conviction for contempt. If he was guilty of contempt in the presence of the court, his conviction should state the conduct constituting the contempt. In neither respect is there a compliance with the law. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Contempt, 13 C. J. p. 63, sec. 87 (1925 Ann.).

EDWARD A. WOOD, APPELLANT, V. SECURITY MUTUAL LIFE INSURANCE COMPANY, APPELLEE.

FILED APRIL 30, 1924. No. 22685.

1. **Landlord and Tenant: LEASE: CONSTRUCTION.** A tenant occupied a barber shop in a room in his landlord's building free of charge. During his occupancy the building was reconstructed. In the lease he expressly agreed to hold the landlord harmless

"from all liability for damage" to his "person or property" while the reconstruction of the building was in progress. By reason of the reconstruction work plaintiff's business, as a barber, was greatly impaired. *Held*, that the word "property," as used in the lease, included damage to plaintiff's business, and that, pursuant to the release clause therein, he was barred from recovery of damage.

2. **Property**: DEFINITION. A calling, business, or profession, chosen and followed, is property, and the term "property," as ordinarily employed, includes every interest any one may have in anything that is the subject of ownership, together with the right to freely possess, use, enjoy and dispose of it.

3. **Damages**: "DAMAGE" DEFINED. The term "damage," as ordinarily employed, is the indemnity recoverable by a person who has sustained an injury, either in his person, property, or relative rights, through the act or default of another.

4. **Contracts**: CONSTRUCTION. Where a contract is plain and unambiguous, its meaning should be determined without reference to extrinsic facts.

5. **Appeal**: ARGUMENT OF COUNSEL: FAILURE TO OBJECT. "The general rule is that counsel cannot remain quiet and seemingly acquiesce in remarks of opposing counsel in his argument to the jury, and after verdict obtain a reversal because of matters not objected to at the time." *Kriss v. Union P. R. Co.*, 100 Neb. 801.

6. **New Trial**: COMMUNICATIONS WITH JURORS. "While all communications during a trial between jurors and persons connected with the case are to be avoided, still a verdict should not be set aside because a witness has been seen in conversation with a juror, where it is made to appear that there was no communication with reference to the case." *Omaha Fair & Exposition Ass'n v. Missouri P. R. Co.*, 42 Neb. 105.

7. **Trial**: COMMUNICATIONS WITH JURORS. Counsel, parties, witnesses and all persons connected with a case on trial, or having interest therein, should carefully avoid all private communication with jurors.

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

Wilmer B. Comstock, for appellant.

Field, Ricketts & Ricketts, contra.

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

DEAN, J.

On and before June 1, 1915, plaintiff conducted a barber shop in a room in the south end of the basement of defendant's building, then known as the Burr block, at the southeast corner of O and Twelfth streets in Lincoln, under a written lease which was to terminate about 2½ years thereafter. About June 1st defendant began to remodel and reconstruct its building, and plaintiff, finding it necessary to procure another location, was permitted by defendant to move into and occupy a room free of charge in the north end of its building, fronting on Twelfth street, to be used as a barber shop, while the reconstruction was in progress.

Plaintiff contends that, while the rebuilding was going on, the room was thereby rendered almost useless as a barber shop for a period of about 1½ years, by being filled with smoke, dust, dirt, lime, mortar and other debris. Alleging damage in the sum of $10,000 this action was begun. From an adverse verdict, and judgment thereon, plaintiff appealed.

In his brief plaintiff says that he specially relies for reversal upon alleged misconduct of counsel and the jury, and error in the instruction of the court in respect of the written agreement, or release, which is in evidence. The agreement, which is dated July 23, 1915, so far as material here, is in the following language:

"In consideration that the Security Mutual Life Insurance Company will furnish to the undersigned without charge office accommodations in the Security Mutual Life Building, Lincoln, Nebraska, pending the remodeling and reconstruction of such building, the undersigned hereby agrees to hold said insurance company harmless from all liability for damage to the person or property of the undersigned or their employees pending such reconstruction. And the undersigned further agrees to rent from said insurance company rooms No. —— south end basement in

said reconstructed building, as shown by the plans thereof, at a rental of $60 per month, said tenancy in said reconstructed building to commence when said rooms are ready for occupancy."

Plaintiff, however, contends that he did not sign the contract, or release, which is in evidence, and avers that his name, which is inscribed thereon, is a forgery, and that this is "the vital point in the lawsuit." On this controverted point much evidence was introduced by the parties, but the jury evidently rejected plaintiff's version and accepted that of defendant. So that, in view of the fact that there is sufficient competent evidence to support a finding that the agreement was signed by plaintiff, we conclude that this question is foreclosed as against him.

In respect of the foregoing release, plaintiff contends that the alleged erroneous construction, of which he complains, is that the jury were instructed that, if it found from a preponderance of the evidence that plaintiff executed the instrument, it then became its duty to return a verdict for defendant. His argument is that the only damage which could have been reasonably contemplated thereunder was damage to visible, tangible property "which plaintiff had in his shop" and which was capable of physical custody. He insists that the contract had no reference to plaintiff's trade or business and did not therefore work a release of liability for damage thereto.

We do not think plaintiff's argument is tenable. He cites decisions to support his contention which do not seem to be in point and which, in view of the weight of authority, are not applicable to the facts before us.

It is to be noted that, by the language of the instrument in question, plaintiff agreed to hold defendant harmless "from all liability for damage to the person or property" of plaintiff. The inquiry then should be directed to what is meant, under the law, by this expression as used by the parties in their agreement.

"Property," in a broad sense, is defined as any valuable right or interest considered primarily as a source or ele-

ment of wealth, and includes in modern legal systems practically all valuable rights. Webster's New International Dictionary. In New Jersey it was held that "a calling, business or profession, chosen and followed, is property." *State v. Chapman*, 69 N. J. Law, 464. It has also been held that the owner of a vessel has a property right, not only in the vessel itself, but in its use and the business in which it is employed. *Sailors Union v. Hammond Lumber Co.*, 156 Fed. 450. At page 454, in the case last cited, the court said: "The appellee's property is not only its vessels, but the business of carrying freight and passengers, without which the vessels would lose their value. The right to operate vessels, and to conduct business, is as much property as are the vessels themselves." In Pennsylvania the court declared that the labor and skill of the workman, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, investments of commerce, are all, in equal sense, property. *Purvis v. Local No. 500*, 214 Pa. St. 348, 12 L. R. A. N. S. 642, citing *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710. In the *Purvis* case the court held, in direct terms, that a person's business is property within the meaning of the law. In Illinois it has been held: "The term 'property' includes every interest any one may have in any and everything that is the subject of ownership by man, together with the right to freely possess, use, enjoy and dispose of the same." *Bailey v. The People*, 190 Ill. 28. In the *Bailey* case it was also held that the right to entertain lodgers in a lodging house is a property right.

The word "damage" has been defined as "loss, injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter's person or property." Black's Law Dictionary. "The indemnity recoverable by a person who has sustained an injury, either in his person, property, or relative rights, through the act or default of another." Bouvier's Law Dictionary.

The contract, or release, is plain and unambiguous and its meaning can be determined without reference to extrinsic facts. The conclusion is that, when fairly construed in all

its parts, the contract contemplates a release of defendant from liability arising out of the damage of which complaint is made.

Plaintiff, however, attempted to discredit the verdict by the affidavits of several members of the jury, and in his brief he argues that it is apparent therefrom that the jurors were influenced to render a verdict against plaintiff because counsel in his argument stated that all the tenants in the building signed a like contract, and that unless plaintiff had signed the contract he could not have remained in the building. This argument, it is alleged, was based on proffered evidence which the court consistently rejected. He complains that the argument, so made, constituted such misconduct as to require the verdict to be vacated.

But we think reversible error cannot be predicated upon the objection so urged, in view of the fact that the jury were instructed to disregard all statements of counsel unsupported by the evidence. And on this point the jury were also cautioned that they should not be influenced by questions propounded and ruled out, nor by offers of testimony which were rejected, nor by any evidence which was stricken out. *Mehagan v. McManus,* 35 Neb. 633. And incidentally it may be added that defendant in its brief charges, and it is not denied, that plaintiff made no objection, at the time of the argument, to the language so used by counsel, nor was any ruling of the court requested thereon at the time. In respect of this assignment of alleged error we adhere to the following rule: "The general rule is that counsel cannot remain quiet and seemingly acquiesce in remarks of opposing counsel in his argument to the jury, and after verdict obtain a reversal because of matters not objected to at the time." *Kriss v. Union P. R. Co.,* 100 Neb. 801.

Plaintiff filed an affidavit wherein it was alleged that one of defendant's counsel was observed in conversation with a juror in the corridor of the courthouse while the case was in progress. A counter-affidavit of this juror was filed, and he therein stated that he had only a speaking acquain-

tance with the attorney; that he did converse with him in the corridor, but that the conversation was solely about the Penitentiary-Insane Asylum paving case, which involved the paving abutting his father's farm and which also abutted land owned by the attorney's family. Whether it was during the trial of the present case he did not recall. It is also charged that a juror was seen shaking hands with the president of the defendant company. In *Omaha Fair & Exposition Ass'n v. Missouri P. R. Co.*, 42 Neb. 105, in an opinion by Judge Irvine, we held: "While all communications during a trial between jurors and persons connected with the case are to be avoided, still a verdict should not be set aside because a witness has been seen in conversation with a juror, where it is made to appear that there was no communication with reference to the case." We think the showing set out in the record brings the facts within the rule announced in the case last cited, and that reversible error cannot be predicated on this assignment of alleged error. However, we think it cannot be too strongly urged that counsel, parties, witnesses and all persons connected with a case on trial, or having any interest therein, should carefully avoid all private communications with jurors.

Plaintiff contends that the court erred in denying his motion for a new trial, not only because of the giving of the instruction complained of, but also because the verdict "was not an unbiased, dispassionate expression of the jury," as shown by the affidavits of some of the jurors. To support the argument he cites *Tyler v. Hoover*, 92 Neb. 221, wherein we held that if a verdict is so clearly wrong as to cause the reviewing court to believe that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, it will be set aside. We do not think the cited case is applicable to the facts. An examination of the record convinces us that the verdict is sufficiently supported by competent evidence and that from any viewpoint it is clearly right. The record fairly discloses that the verdict is based on the proved facts.

Other assignnments of alleged error have been presented which we have examined but do not find it necessary to decide. Reversible error has not been shown. The judgment is

AFFIRMED.

Note—See Landlord and Tenant, 24 Cyc. p. 1055; Property, 32 Cyc. pp. 647, 677; New Trial, 29 Cyc. p. 797; Trial, 38 Cyc. p. 1825—Damages, 17 C. J. p. 710, sec. 1; Contracts, 13 C. J. p. 520, sec. 481; Appeal and Error, 3 C. J. p. 862, sec. 763.

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

FILED APRIL 30, 1924. No. 23601.

1. **Inspection:** EXCESSIVE FEES. Where state officers collect inspection fees from dealers in gasoline and kindred petroleum products in excess of the fees authorized by law, which, under a court order, were paid into court to await the result of the suit and subsequently to be paid to the parties legally entitled thereto, the fact that such dealers have sold the inspected products at a sufficiently increased price to cover the excess inspection fees will not justify the turning over of such excess fees to the state upon the theory that they belong to the consumer.

2. ———: ———: INJUNCTION. The legislature, in the exercise of the police power, enacted a law which provided a fee for the inspection of gasoline and kindred petroleum products, which law was valid when enacted, but, because of the greatly increased consumption of gasoline, subsequent to the passage of the act, the fees so collected greatly exceeded the cost of inspection, so that the act became, in its operation, and in effect, a revenue measure and, as such, became unenforceable. It does not follow, however, that the act is invalid, *in toto*, but it is invalid only as a revenue measure and its enforcement may therefore be enjoined only to the extent that the fees to be collected under the act are in excess of the reasonable cost of inspection.

3. ———: ———. The record examined, and *held* that the plaintiff oil companies are entitled, under the present act, to a return only of so much of the oil inspection fees paid into court as are in excess of the reasonable cost of inspection.

4. ———: ———. The maxim, "He who seeks equity must do equity," applies to the facts in the present case. Out of the money paid into court as inspection fees, the court should ascertain the reasonable cost of inspection of the various petroleum products inspected for the respective plaintiffs, and direct that such sum be turned over to the state, and the excess, or remainder, should be returned to the several plaintiffs as their respective interests may appear.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Reversed, with directions.*

O. S. Spillman, Attorney General, W. C. Dorsey and *George W. Ayres,* for appellants.

Kennedy, Holland, De Lacy & McLaughlin, Baldrige & Saxton, William H. Herdman, Clinton Brome and *Crossman & Munger, contra.*

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

DEAN, J.

This is the second appearance of this case in this court on appeal from the district court. In the former opinion we held that the act was unconstitutional and the cause was remanded for further proceedings. For the facts see *Century Oil Co. v. Department of Agriculture,* 110 Neb. 100.

The trial court entered a judgment in favor of plaintiffs and interveners, all of whom are hereinafter referred to as plaintiffs. An order was also entered that the moneys, approximating $62,000, which had theretofore been paid into court, pending the litigation, should be repaid to the respective plaintiffs in the several amounts paid by them into court. From the judgment so rendered defendants have appealed.

When the cause was remanded a decree was entered in the district court enjoining the enforcement of the legislative act providing for the collection of a fee of 6 cents a

barrel for the inspection of gasoline. At the commencement of the action in the district court, a temporary injunction was granted and, pursuant to an agreement between the parties, an order was entered in that court requiring the plaintiffs to pay to the defendants the fees for inspection, as provided by the statute, and requiring defendants to keep such fees in a fund separate and apart and to hold them subject to the further order of the court. The district court also ordered that all fees collected, from the time that the temporary injunction was granted until the new legislative act which provided a fee of 3 cents a barrel for inspection became effective, should be returned to plaintiffs.

Defendants insist that the fees, paid by plaintiffs for the inspection of gasoline, were not, in fact, paid out of funds belonging to them, but that such fees were added to the price of the gasoline, and that the excess fees so collected belonged, in fact, to the customers of the plaintiffs who purchased gasoline, and that the state was entitled to retain such fees until claimed by the parties entitled thereto. The state also urges that, in any event, plaintiffs should be required to pay the reasonable expense of inspection, and that in no event are they entitled to a return of the fees collected, except such as are in excess of the reasonable cost of inspection.

So far as the first contention is concerned, we think it is not well founded. When the several oil companies sold gasoline and received the compensation therefor from their customers, this money belonged to the respective plaintiffs. It may be and probably is true that they increased the price of the product sold by them so as to receive a profit over and above the inspection fees paid, but this does not change the situation, nor convert the money that they have received from the sale of gasoline into a fund belonging to the customers. Plaintiffs paid the inspection fees with funds to which they had legal title.

With respect to the second contention, we are inclined to the view that there is merit in it. The legislative act, providing a fee of 6 cents a barrel for the inspection of

gasoline, was a valid law when enacted and did not contravene any of the constitutional provisions or the constitutional rights of plaintiffs. By reason, however, of a greatly increased consumption of gasoline, subsequent to the passage of the act, and the large quantities inspected, the fee provided by the statute yielded a sum largely in excess of the reasonable expense of inspection.

In the former opinion in this case, hereinbefore referred to, which was controlled by *State v. Standard Oil Co.*, 100 Neb. 826, it was held that the legislative act, providing a fee of 6 cents a barrel for the inspection of gasoline, violated the constitutional provision relating to taxation, because the statutory fee created a fund in excess of the reasonable expense of inspection, and it thereby became, in effect, a revenue measure to which no reference was made in the title to the act.

After a further consideration of our former opinions, above cited, the majority of the court is of the opinion that the statute is not void *in toto*. It was valid when enacted and was valid so long as the inspection fees provided by the statute did not exceed the reasonable cost of inspection of gasoline. But when the fees exacted amounted to a sum greatly in excess of the reasonable expense of inspection, it became in effect a revenue measure, and, as such, was invalid. In other words, the statute, so far as it provides for the reasonable expense of inspection, is valid, and is invalid only in so far as it seeks to impose a fee in excess of such reasonable expense of inspection. So that, instead of enjoining the collection of any fees, the injunction should have been limited to the excess cost over the reasonable expense of inspection.

It is well known that, in every state in the Union, state inspection of gasoline, kerosene and other like petroleum products, from every viewpoint, is a matter of prime importance to all persons, for the reason that such products, when they fall below the recognized standard grade required by law, are highly explosive and are therefore an exceedingly dangerous commodity. Nor can it be said

that such inspection is of no importance to the dealer in such products, because, without state supervision and state permission, he could not, under the law, bring such products into the state for sale.

This being a suit in equity, it follows that this court has complete jurisdiction over every feature of the subject here involved. A familiar maxim is this, "Equity imputes an intention to fulfil an obligation;" another is, "He who seeks equity must do equity." We think the facts before us bring the case within the meaning of both.

In view then of the expense attendant upon the exercise of a governmental function so important, in all its aspects, as the state inspection of petroleum products under discussion and of the very well-known commercial and trade value of such inspection to the dealer, it seems to us that there is an obligation resting upon plaintiffs, under the present law, to pay the reasonable cost of inspection. And on the part of defendants there rests an obligation to refrain from collecting a revenue under the statute, in its present form, because the title to the act is not broad enough to authorize revenue to be so raised, as pointed out in the former opinion in the present case.

It follows from the views expressed herein that the plaintiffs are not entitled to a return of all the fees collected during the time the temporary injunction was in force, but only to a return of that part of the fees which exceed the reasonable expense of inspection. So that, out of the money paid into court as inspection fees, the court should ascertain the reasonable cost of inspection of the various petroleum products inspected for the respective plaintiffs, and direct that such sum be turned over to the state, and the excess, or remainder, should be returned to the several plaintiffs as their respective interests may appear.

The judgment of the district court is reversed and the cause remanded, with instructions to modify the injunction certain the amount of fees collected that are in excess of in accordance with the views herein expressed, and to as-

the reasonable expense of inspection, and to return to the plaintiffs such excess.

REVERSED.

ROSE, J., dissents.

Note—See Inspection, 32 C. J. p. 934, sec. 10; p. 936, sec. 11; p. 937, sec. 12 (1925 Ann.).

IRA ELLIOTT, APPELLANT, V. FRED WILLE ET AL., APPELLEES.

FILED APRIL 30, 1924. No. 23850.

1. **Eminent Domain**: ELECTRICITY: PUBLIC USE. Chapter 217, Laws 1919, being sections 7147 to 7154, inclusive, Comp. St. 1922, as amended by chapter 169, Laws 1923, providing for the creation and incorporation of districts for the distribution within the district of light, heat and power by means of electric current to be paid for by taxation, are not in contravention of the implied constitutional inhibition that private property may not be taken for a private purpose without the consent of the owner.

2. ———: ———: ———. The distribution of light, heat and power as contemplated in sections 7147-7154, Comp. St. 1922, as amended by chapter 169, Laws 1923, is for a public use as distinguished from a private purpose.

3. **Statutes**: VALIDITY: TITLE. Chapter 217, Laws 1919, does not contravene section 14, art. III of the Constitution, as recorded in Comp. St. 1922, which declares that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." Such clause in the Constitution does not require that the title to an act shall be a complete abstract of the bill; its purpose is to prevent surreptitious legislation.

4. ———: ———. Sections 7147-7154 Comp. St. 1922, as amended by chapter 169, Laws 1923, are not in conflict with sections 6 and 7, art VIII, of the Constitution, as such constitutional provisions are recorded in Comp. St. 1922.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Lambert, Shotwell & Shotwell. for appellant.

Courtright, Sidner, Lee & Gunderson, contra.

Abbott, Rohn, Robins & Dunlap, amici curiæ.

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

DAY, J.

The plaintiff, on behalf of himself and others similarly situated, brought this action against the Columbus Farmers' Light District, a corporation, and Fred Wille *et al.*, directors of said corporation, to enjoin the defendants and each of them from exercising certain powers authorized by provisions of the statute hereinafter referred to. The defendants filed a demurrer to the petition, which was sustained. Plaintiff elected to stand on his petition; whereupon the trial court dismissed the action. From this judgment the plaintiff appeals.

The question presented by this appeal involves the constitutionality of the statutes in question. The plaintiff in his petition alleged in substance that he is an elector, taxpayer, and freeholder in Platte county, and the owner of property within the defendant district; that the defendants, pretending to act under provisions of the statute, are about to, and will unless enjoined, issue bonds of the district to be paid for by taxation upon the property in said district. The petition further recites that in August, 1923, certain freeholders of Platte county, sufficient in number to comply with the statute, filed a petition with the county board under the provisions of chapter 217, Laws 1919, being sections 7147-7154, Comp. St. 1922, including an amendment to section 7153 as embraced in chapter 169, Laws 1923. The petition filed with the county board prayed that the question of the formation of a district for the distribution of light, heat and power by electric current be submitted to the electors of the proposed district, the boundaries of which were fully described in the petition. The petitioners estimated the cost of the distribution system at $15,000, and proposed the method of raising the necessary funds by the issuance of bonds and making a small additional charge

for services above the actual cost thereof, to take care of repairs, depreciation and upkeep. They also asked that three directors be elected to manage the business of the district. Plaintiff's petition further alleges that, pursuant to the petition of the freeholders, the county board duly called a special election, which resulted in favor of the formation of the district, and the election of the three directors, defendants in this action; that the result of said election was duly published as required by law; that thereafter the electors of said district met and adopted certain by-laws for the management of the affairs of the district, and named the district the "Columbus Farmers' Light District." The plaintiff's petition further alleges that the defendant corporation and the individual defendant directors for and on behalf of the corporation are about to issue bonds of the district in the sum of $15,000 for the purpose of constructing an electric distributing system throughout the district, and are claiming and assuming to have power to make contracts for and on behalf of the district, and are threatening to incur large obligations to be met by the district by the imposition of taxes upon the property therein to pay such bonds, obligations and expenses in connection with the construction of the system and its operation. The plaintiff further avers that the laws above referred to, particularly as they relate to the issuance of bonds and the imposition of taxes upon the property in the district to pay for such bonds and other expenses, are unconstitutional and void.

Without attempting to give the substance of the statutes above referred to, it may be said in a general way that provision is made for the formation of distribution districts by a majority vote of the electors residing within the proposed district when a petition has been filed by a certain number of the electors requesting that the question of the formation of a district be submitted to the electors. The electors also select directors who are authorized by law to manage the affairs of the district. When so formed the district has power of eminent domain, to make contracts,

to sue and be sued, and such other powers as are granted under the general incorporation laws of the state. The district through its board of directors, when authorized by the electors, has power to issue bonds and to determine the amount of money necessary to be raised to conduct the business affairs of the corporation. The amount of bonds which may be issued is limited to 6 per cent. of the last assessed valuation of property in the district. Bonds so issued may not draw a greater rate of interest than 6 per cent., nor run for a period longer than 25 years. The board of directors may not issue bonds in the first instance in a greater amount than the estimated cost of the distribution system, as set forth in the petition to establish the district. Should the district in the first instance not set out the method of raising the necessary funds by the issuance of bonds, or should the board of directors determine that it is necessary to increase the amount of bonds in excess of the amount set out in the petition for the organization of the district, or should it be necessary to make any additional issue of bonds therefor, the same shall be done only after being submitted to the electors, and be authorized by at least a majority vote thereof. The board is given power to employ such persons as may be necessary for the operation of the system, and to propose a schedule of charges for service with the district, and upon approval by the state railway commission, said schedule shall be the legal schedule for such district. The law also provides for registering of the bonds with the auditor of public accounts and with the county clerk before the same may be sold. Provision is also made requiring any person, firm, or corporation engaged in the production of electric current for commercial purposes, passing through or adjacent to any distribution district, to furnish electric current to the district at rates substantially the same as those under which it furnishes electric current to other customers, provided that the plant of such person, firm, or corporation is of sufficient capacity to furnish said current to said district without prejudice to the service in the territory already covered.

It is contended by the plaintiff, and also in a brief filed *amici curiæ,* that the laws above referred to, and particularly the parts thereof which authorize the issuance of bonds of the district, and the imposition of taxes upon property therein to pay for such bonds, and the expenses of operation of the distribution system, are unconstitutional and void.

It is argued that the legislative acts under which the defendants are proceeding contravene several provisions of our Constitution. The main argument is based upon the theory that the distribution of light, heat and power, as contemplated by the act, is for a private purpose, and hence in contravention of the implied constitutional inhibition that private property may not be taken for a private purpose without the owner's consent. Of course, if it be true that the distribution system contemplated by the act is for a private purpose, to be paid for by taxation upon the property within the district, such legislation would be in contravention of our Constitution. Section 21, art. I of our Constitution declares: "The property of no person shall be taken or damaged for public use without just compensation therefor." This provision has been held by implication to prohibit the taking of private property for private use of any character, without the owner's consent. That taxation of property for a private purpose is the taking of property cannot be gainsaid. *Welton v. Dickson,* 38 Neb. 767; *State v. Cornell,* 53 Neb. 556.

On the other hand, it is familiar law that the legislature may authorize taxation of property for a public purpose. *State v. Cornell,* 53 Neb. 556. In passing upon the question whether the object of raising money by taxation is for a public purpose, the rule is established in this state that, if the question is doubtful, the court will not set its judgment against that of the lawmakers.

For the purpose of showing the wide variety and forms of legislation in which taxation has been held valid on the ground that it was for a public use, we cite a few of the cases from this court. In *Hallenbeck v. Hahn,* 2 Neb. 377,

bonds of a county in aid of the construction of a railroad were held valid, and not in conflict with the Bill of Rights that "The property of no person shall be taken or damaged for public use without just compensation therefor." In *Traver v. Merrick County,* 14 Neb. 327, it was held: "A water grist-mill erected for public use, the rates of toll to be determined by the county commissioners, and being subject to regulation by the legislature, is a work of internal improvement within the meaning of the act of 1869, and bonds voted to aid its construction are valid." In *State v. Adams County,* 15 Neb. 568, it was held that bonds in aid of a grist-mill operated by steam were invalid as being for a private purpose. The distinction is set out in the opinion. In *Board of Directors of Alfalfa Irrigation District v. Collins,* 46 Neb. 411, an act authorizing the district to issue bonds and to pay the same by taxation was held to be for a public purpose. In *State v. Cornell,* 53 Neb. 556, an act authorizing counties to issue bonds to provide for the levy of taxes to pay the same to enable the county to participate in interstate expositions was held to be for a public purpose. In *Bell v. City of David City,* 94 Neb. 157, it was held that the city had authority to erect and operate a municipal electric light system. In *State v. Miller,* 104 Neb. 838, legislation making provision for farm bureaus as governmental agencies of an educational nature to disseminate among farmers scientific knowledge for the improvement of agriculture was held to be a "public purpose" within the taxing power of the state. In *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51, the principle is announced that "The maintenance of a municipal fuel yard for the purpose of selling fuel to the inhabitants of the city is a 'public purpose,' for which money raised by taxation may be used."

In the light of these decisions, it would seem that the distribution of light, heat and power by electrical current among the inhabitants of the district was for a public purpose. The use of the electric current is open to all the inhabitants of the district, and its rates subject to regulation.

The mere fact that some of the inhabitants may not desire to use it does not militate against its public character. We hold, therefore, that the distribution of electric current for light, heat and power, under the provisions of the statute, was for a public purpose, and that money in payment therefor could be raised by taxation.

Having determined that the system of distribution was for a public purpose, it follows that the legislation does not violate the section of the Bill of Rights that private property shall not be taken for a private use; nor does it violate the provisions of the state or federal Constitutions that one may not be deprived of his property without due process of law.

It is next urged by the plaintiff that the act in question contravenes section 14, art. III of the Constitution, as it appears in Comp. St. 1922, which declares: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." The title to the act in question, chapter 217, Laws 1919, is as follows: "An act providing for the creation and incorporation of districts for the distribution of light, heat and power, defining the powers and government of such districts and the regulation of rates and methods of distribution therein." It is argued that the provisions of the act authorizing the raising of money by taxation, the issuance of bonds, and the right of eminent domain, are beyond the scope of the title to the act. We do not agree with this contention. The clause in the Constitution now being considered does not require that the title to an act shall be a complete abstract of the bill. Its purpose is to prevent surreptitious legislation. The phrase in the title, "defining the powers and governnment of such districts," in our opinion is broad enough to authorize the provisions of the act.

It is next urged by the plaintiff that the legislation in question contravenes sections 6 and 7, art. VIII of our Constitution, as recorded in Comp. St. 1922. Plaintiff's position in regard to the applicability of section 6 to the present situation is not argued, and we are unable to discover

anything in that section which the act under consideration contravenes. Section 7, art. VIII, among other things, declares: "The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes." A discussion of the meaning of the phrase "corporate purposes," as used in this section of the Constitution, as distinguished from municipal or governmental purposes, may be found in *Metropolitan Utilities District v. City of Omaha*, p. 93, *post*.

By the act in question the legislature has not attempted to impose a tax upon the municipal corporation, or the inhabitants or property thereof. Neither has it created a situation, which, independent of the action of a majority of the electors, imposes any obligation on the district to be paid for by taxation. The legislature has provided a method by which the electors may organize a distribution district, with corporate powers, but has left the question of the issuance of bonds within certain limitations, and the imposition of taxes, within the hands of a majority of the electors of the district. It cannot be doubted that the legislature has power to authorize the creation of special districts comprising a part of the county for the purpose of promoting some object for the benefit of the public. Examples of this character are found in our school districts, road districts, paving districts, irrigation and drainage districts, and perhaps others. We find nothing in the legislation in question which contravenes section 7, art. VIII of the Constitution.

From a consideration of the record, we are of the view that the action of the trial court in sustaining the demurrer, and dismissing the cause of action, was right. The judgment is, therefore,

AFFIRMED.

Note—See Electricity, 20 C. J. p. 305, sec. 2 (1925 Ann.); Eminent Domain, 20 C. J. p. 584, sec. 68—Municipal Corporations, 28 Cyc. p. 1660; Statutes, 36 Cyc. pp. 1017, 1026, 1028.

The following opinion on motion for rehearing was filed October 20, 1924. *Former judgment of affirmance vacated, and judgment of district court reversed, with directions.*

1. **Constitutional Law:** EMINENT DOMAIN. A legislative act, which authorizes private individuals to create and fix the boundaries of a district for public improvement, to be paid for by taxes levied on the property within the district, without any provision for determination by a competent tribunal whether the creation of the district and the construction of the improvement will promote public health, convenience or welfare, and without any provision for determination whether the owner's property has been arbitrarily or unjustly included in the district, or whether his property will receive any benefit from the proposed improvement, is invalid because it authorizes the taking of private property for a public use without just compensation and deprives the owner of his property without due process of law.
2. ———: POWER OF LEGISLATURE. The legislature may not delegate to private individuals either legislative or judicial functions.
3. ———: EMINENT DOMAIN. Sections 7147-7154, Comp. St. 1922, as amended by chapter 169, Laws 1923, authorize the taking of private property for a public use without just compensation and authorize the taking of private property without due process of law, and are violative of both the state and federal Constitution.

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

PER CURIAM.

This case has been heretofore submitted to this court and an opinion rendered. *Elliott v. Wille, ante,* p. 78. Upon consideration of a motion for rehearing a reargument has been allowed.

This action involves the validity of sections 7147-1754, Comp. St. 1922, and of the amendment to section 7153 contained in chapter 169, Laws 1923. A statement of the issues and an outline of the legislative provisions involved in this action may be found in the former opinion and will not be here repeated.

In the former opinion we held: "The distribution of light,

heat, and power as contemplated in sections 7147-7154, Comp. St. 1922, as amended by chapter 169, Laws 1923, is for a public use as distinguished from a private purpose." We still entertain the view that the distribution of light, heat and power in rural communities by the use of electricity by a district, properly created for the purpose in such a manner as to safeguard the rights of owners of property within the district, is or may be for a public use and purpose, but, in determining whether any particular legislation which authorizes the creation of such a district is valid, it is proper to examine and ascertain what may be done or accomplished under and pursuant to such statutory provisions. If the statutes, when fairly construed, authorize and sanction the taking of private property without just conpensation, or deprive persons of their property without due process of law, then such legislation must be held invalid.

Under the legislative acts in question, when a petition praying for the formation of a district for the purpose of distributing light, heat or power by the use of electric current, and for the election of three directors of such proposed district, setting forth the boundaries of the proposed district, the estimated cost of the distribution system and the method proposed for raising necessary funds, whether by bonds or special tax, and signed by not less than 10 per cent. of the freeholders of the proposed district, is filed with the county board, it then becomes the duty of such board to order a special election within the proposed district. At this election all who are electors under the general election laws and reside in the proposed district may vote, and, if a majority of the votes cast at such special election is in favor of the proposed district, it then becomes a district. The district may then, through its officers, proceed to construct a distribution system and to levy taxes or issue bonds to defray the cost of the system.

At first blush it might seem that the plan of organizing such districts is fair and equitable and that injustice to no one could be apprehended. Upon a closer scrutiny and

a careful consideration of the various provisions of the statutes, it becomes apparent that the petitioners in the first instance fix the boundaries of the proposed district. To be sure, the district is not created until the plan is approved by majority vote of the electors of the district, but as the petitioners fix the boundaries in the petition they can so arrange the boundaries as to exclude from the district a small plat of land on which any elector might reside. In this manner, any elector who would not vote with the petitioners for the creation of the district could be excluded, and, by a like means, the boundary lines might be run so as to include within the district practically all of the land of any owner who was opposed to the creation of the district. The major portion of his land might be included; that particular part on which he resided could be excluded. He could be denied a voice in the creation of the district or the management of its affairs, while his property could be taxed to pay the cost of constructing and maintaining the distribution system. It is entirely within the range of possibilities that two or three designing persons could thus organize a distribution district so that they would be the only persons having a voice in creating the district or the management of its affairs and who would be the only ones who would receive any benefits from the construction of such a system. At the same time they could include the major portion of the lands of 50 or more other farmers so that such lands would necessarily bear the greater part of the burden of the taxation to pay the cost of construction and maintenance of the distribution system.

The statutes in question make no provision for a tribunal to determine whether any lands have been unjustly included in or excluded from the district, or whether the organization of a particular distribution district will be for the public convenience or welfare, save and except the action of the petitioners and their self-selected electorate. The situation is not unlike that which would exist if a party to an action could select the jury to whom his cause was to be tried. If disposed to be unfair, he might select

only such persons for jurors as would view his contention with favor, and under such circumstances he would be reasonably sure of a favorable verdict. It is intolerable to think that such a situation should exist under sanction of law.

In enacting the legislation under consideration we have no doubt the legislature was actuated by proper motives, but it has failed to make any provision to safeguard the rights of property owners whose property may receive no benefit from the public improvement contemplated and yet be taxed to construct and maintain it, or whose property has been wrongfully included in the district.

It is argued on behalf of defendants that non-resident owners of land within the district have no more right to complain than would nonresident owners of land in a city or village, when those municipalities undertake to construct light or water plants or sewer systems. The argument is fallacious in this, that the boundaries of a city or village are not fixed and determined by private individuals, and, moreover, provisions are made for the exclusion of lands that are wrongfully included within a city or village. The fixing of boundaries of a political subdivision of a state into counties or districts for public purposes is a legislative function. The legislature may authorize the organization of districts for public purposes by other governmental bodies, and the proceeding may be proposed or initiated by private individuals. Where the latter course is pursued, there must be some provision for determining whether the particular district is for the public health, convenience or welfare, and a means by which an aggrieved property owner, whose property is injuriously affected, may have his rights judicially determined. The legislature may not delegate to private individuals either legislative or judicial functions. Where a legislative act permits the organization of districts, for the construction of a public improvement, by private individuals, to be paid for by a tax on all the property in the district, and no provision is made for a hearing by any tribunal as to the right of

property owners who may be injuriously affected or wrongfully included within the district, it may result in the taking of private property for a public purpose without just compensation, and in the taking of private property without due process of law.

Sections 7147-7154, Comp. St. 1922, and section 7153, as amended by chapter 169, Laws 1923, authorize and permit the taking of private property for a public purpose without just compensation and the taking of private property without due process of law. The statutes violate both the state and federal Constitution and are therefore invalid.

It follows that the affirmance in *Elliott v. Wille, ante,* p. 78, should be and hereby is vacated. The demurrer to the petition should have been overruled and the injunction issued as prayed by plaintiff. The judgment of the district court is reversed, with directions to overrule the demurrer to the petition and to issue the injunction as prayed by plaintiff.

REVERSED, WITH DIRECTIONS.

Note—See Constitutional Law, 12 C. J. p. 2160, sec. 1061; p. 842, sec. 327; p. 808, sec. 241; Eminent Domain, 20 C. J. p. 645, sec. 124—Municipal Corporations, 28 Cyc. p. 1149.

ARTHUR O. GOODWIN, APPELLEE, V. ROSEBUD CATTLE COMPANY, APPELLANT.

FILED APRIL 30, 1924. No. 22750.

1. **Animals: TRESPASS: PLEADING.** "A petition which states that the defendant, with his cattle, broke and entered upon plaintiff's premises, and injured and destroyed property thereon, charges a wilful trespass, and is good against a general demurrer." *Meyers v. Menter*, 63 Neb. 427.

2. **Appeal: FINDINGS.** The finding of the trial court in a law action is entitled to the same force and effect as the verdict of a jury. This court will not interfere with the finding of the trial court in a law action based upon conflicting evidence, unless clearly wrong.

3. **———: DEFENSE.** A defendant will not be heard in the su-

preme court to urge a defense which was neither pleaded nor proved in the trial court.

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

James C. Quigley and *Allen G. Fisher*, for appellant.

Oliver M. Walcott and *J. J. Harrington, contra.*

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

GOOD, J.

This is an action to recover damages for trespass by live stock. Plaintiff in his petition alleged that in November and December, 1919, the defendant permitted a large herd of its cattle to trespass upon his land and to eat and destroy 1,400 bushels of corn and 60 tons of hay of the value of $2,850. The defendant filed an answer, in which it alleged that it is an unincorporated association, organized for the carrying on of business in Nebraska, and that one Clifford Jackson was foreman in charge of its ranch on November 19, 1919. It further alleged that on said date plaintiff took up, under a claim of right under the herd law, 16 head of defendant's steers, and that, pursuant to the demand made by plaintiff, the defendant offered to pay the damages incurred until that time by the 16 head of defendant's steers, and offered in settlement of such damages the sum of $500, and defendant offered to confess judgment in favor of the plaintiff for that sum. The answer further denied that any of defendant's cattle were on the plaintiff's premises after November 19, 1919, and denied all the other allegations of the petition. A jury was waived and trial had to the court, which resulted in a judgment for plaintiff in the sum of $2,104.34. Defendant appeals.

There are no specific assignments of error. Defendant urges three propositions: (1) The petition does not state a cause of action. (2) The judgment is not sustained by the evidence. (3) Plaintiff's cause of action is satisfied

by having seized 16 head of cattle while trespassing upon his premises.

As to the sufficiency of the petition, it appears from the allegations thereof that "defendant caused and permitted its cattle to come on and trespass upon the lands of the plaintiff." It also shows that there were 70 acres of corn grown on said premises during the year 1919, from which it appears that at least a part of the land was cultivated. In the case of *Meyers v. Menter*, 63 Neb. 427, it was held: "A petition which states that the defendant, with his cattle, broke and entered upon plaintiff's premises, and injured and destroyed property thereon, charges a wilful trespass, and is good against a general demurrer." The facts alleged in the petition in this case bring the case within the rule announced. The petition is not vulnerable to the attack which is now made upon it in this court.

The evidence as to the value of the hay and corn eaten and destroyed by defendant's cattle is in conflict. The finding of the trial court is entitled to the same force and effect as the verdict of a jury. This court will not interfere with the finding of the trial court in a law action based upon conflicting evidence, unless clearly wrong. We have carefully examined the entire record, and the evidence is ample to sustain a finding for even a larger amount than was awarded the plaintiff.

As to the third point, there is no averment in the answer that plaintiff's cause of action was satisfied or extinguished by the seizing of 16 head of defendant's cattle. While the evidence shows that plaintiff did seize 16 head of defendant's cattle while trespassing upon his land, the evidence does not disclose what became of the cattle. For aught that appears, the cattle may have been returned to the defendant. A defendant will not be heard in the supreme court to urge a defense which was neither pleaded nor proved in the trial court.

No error of the trial court has been pointed out. The judgment seems to be just and is

AFFIRMED.

Note—See Animals, 3 C. J. p. 145, sec. 460; Appeal and Error, 3 C. J. sec. 589; 4 C. J. sec. 2855.

METROPOLITAN UTILITIES DISTRICT, APPELLEE, v. CITY OF OMAHA, APPELLANT.

FILED APRIL 30, 1924. No. 23252.

1. **Municipal Corporations:** TAXATION. A legislative act which creates a liability that can be discharged only from funds raised from taxation imposes a "tax," within the meaning of that part of section 7, art. VIII of the Constitution, which provides "The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes."

2. ———: GOVERNMENTAL FUNCTIONS. The construction, operation or maintenance of water and gas plants by municipal corporations is not an exercise of governmental functions, but is rather in the nature of a private enterprise for the convenience, advantage or benefit of the municipality, its inhabitants and property owners.

3. ———: "CORPORATE PURPOSES." The phrase, "for corporate purposes," as used in section 7, art. VIII of the Constitution, is limited to those municipal activities designed, in the main, for the principal or exclusive convenience or benefit of the municipality, its inhabitants or property owners.

4. ———: CONSTITUTIONAL LAW. That part of section 3760, Comp. St. 1922, which imposes upon municipal corporations the burden of paying the cost of lowering gas and water mains and resetting hydrants, is in contravention of section 7, art. VIII of the Constitution.

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

W. C. Lambert, for appellant.

John L. Webster, contra.

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

GOOD, J.

In this action Metropolitan Utilities District, plaintiff, seeks to recover from the city of Omaha, defendant, the cost of lowering gas and water mains and water hydrants in the city of Omaha. Defendant demurred to the petition on the ground that the statute, requiring the city to pay such cost, was in violation of section 7, art. VIII of the state Constitution. The demurrer was overruled and, defendant refusing to plead over, judgment was rendered for plaintiff. Defendant appeals.

In 1913 (Laws 1913, ch. 143) the legislature created the "Metropolitan Water District of the City of Omaha," and gave to it the "sole management and control of all waterworks property, * * * and all the powers that are now or may be granted to cities and villages by the general statutes of this state for the construction or extension of waterworks." Rev. St. 1913, sec. 4244. Section 15 of the act provided that said Metropolitan Water District "shall also lower water mains and reset hydrants at their original locations whenever necessary: Provided, that the cost thereof shall be paid by the respective municipalities whenever such pipe lowering and resetting of hydrants is made necessary because of a change in established street grades or curb lines." Rev. St. 1913, sec. 4257. At that time the Metropolitan Water District of Omaha included within its boundaries other cities and villages. The following clause, "cost thereof shall be paid by the respective municipalities," in the statute above quoted, evidently had reference to the cities and villages in the district.

In 1919 (Laws 1919, ch. 33) said section 15 was amended to read as follows: "Said district shall also lower water mains and reset hydrants at their original locations whenever necessary: Provided, that the cost thereof shall be paid by the respective municipalities. Said district shall also afford free of charge water required for public use by each of said municipalities." Comp. St. 1922, sec. 3760. The legislature in 1919, by a new act (Laws 1919, ch. 187), provided: "Whenever any metropolitan city included within a

metropolitan water district shall acquire or take possession of a gas plant or electric plant supplying gas or electricity, as the case may be, said gas plant or electric plant shall be immediately taken over by said metropolitan water district, and operated by the board of directors of said metropolitan water district." Comp. St. 1922, sec. 3771. In 1921 (Laws 1921, ch. 111) the legislature changed the name of Metropolitan Water District to Metropolitan Utilities District, and further provided that said Metropolitan Utilities District should in all things and in all respects become the successor of the Metropolitan Water District and be possessed of and exercise all the powers and authority conferred upon the Metropolitan Water District as fully and effectually as though the corporate name had not been changed, and by said act it further provided that the powers of said district should extend to and apply to gas plants and other public utilities as fully and effectually as if said gas plant had been specifically named in the statute laws of the state creating or relating to metropolitan water districts. In 1912 the city of Omaha took over a waterworks system, and in 1920 it acquired, by condemnation proceedings, a gas plant, and since said dates the city has owned a waterworks system and a gas plant, which are controlled, managed and operated by the plaintiff. Plaintiff determines the rates to consumers for water and gas and collects all revenues from the sale of water, gas and its by-products.

From the allegations of the petition which are admitted, it appears that it became necessary that certain gas mains and water mains be lowered and hydrants reset, and, pursuant to the statutory provisions, the plaintiff performed this work, and now seeks to recover the cost thereof from the city. It is the defendant's contention that the statute requiring the city to pay such cost violates that part of section 7, art VIII of the Constitution, which is as follows: "The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes." If the defendant is required to pay the claim of plaintiff, it must do so from funds derived from

taxation. The creation of a liability that can only be discharged by funds raised from taxation constitutes the imposition of a tax, within the meaning of the constitutional provision above quoted. *Helena Consolidated Water Co. v. Steele*, 20 Mont. 1; *Campbell County v. City of Newport*, 174 Ky. 712.

It is conceded by both plaintiff and defendant that the construction, operation or maintenance of water and gas plants by a municipal corporation is not a governmental function, but is in the nature of a private enterprise. The municipality is not required to construct, own or operate such public utilities. It may contract with private corporations or individuals to furnish such service, or it may, if it so elects, own and operate such utilities for the benefit and convenience of its inhabitants and property owners. Whatever a municipality does in the matter of engaging in the furnishing and delivery of water and gas to its inhabitants is in its proprietary or quasi-private capacity. Whatever it does under the police power is in its governmental capacity. *South Carolina v. United States*, 199 U. S. 437; *Los Angeles Gas & Electric Co. v. City of Los Angeles*, 241 Fed. 912, affirmed by the United States supreme court in *City of Los Angeles v. Los Angeles Gas & Electric Co.*, 251 U. S. 32.

Plaintiff contends that the phrase, "for corporate purposes," as used in section 7, art. VIII, Const. (formerly section 7, art. IX, Const.), relates to municipal government, and that the inhibition is the imposition of taxes for the purpose of carrying out its governmental power, functions and duties, as distinguished from the obligations and duties arising from the exercise of its power to operate private or business enterprises, such as waterworks systems, gas plants, and the like; that it necessarily follows that there rests upon the city the obligation to pay for the maintenance of the plant, the cost of lowering gas and water mains and changing location of hydrants, when made necessary, and that such expenditure is not the imposition of a tax, within the meaning of the constitutional provision. It

calls attention to the fact that the provision under consideration is identical with a provision of the Illinois Constitution, from which it was taken, and contends that the construction placed upon this provision by the court of last resort of that state should be followed by the courts of Nebraska. In support of its contention, the plaintiff cites the following cases from the Illinois supreme court: *City of Chicago v. Manhattan Cement Co.*, 178 Ill. 372; *People v. County of Williamson*, 286 Ill. 44; *City of Chicago v. Knobel*, 232 Ill. 112; *Chicago, M. & St. P. R. Co. v. Lake County*, 287 Ill. 337.

In *City of Chicago v. Manhattan Cement Co., supra*, the action was to recover for the destruction of property by a mob and was brought under the mob law, which declares municipalities liable for destruction by mobs of property within its boundaries. It was held that such legislation did not contravene the constitutional provision. The ruling was put upon the ground that the legislation was an exercise of the police power of the state. In the course of the opinion, the following quotation from Cooley on Taxation was cited with approval (p. 384): "Another similar case is, where a municipal corporation is compelled, by means of taxation, to make compensation for losses sustained within its limits at the hands of mobs and rioters. It has been thought from very early times that that political division of the county which failed to exert its authority for the effectual suppression of disorder, by means whereof innocent parties suffer from lawlessness and violence within its boundaries, might justly be required to make good the losses, and that its diligence in maintaining the empire of the laws would be quickened by the requirement. Such legislation is, in effect, only a part of the state police system, under which the municipal divisions are severally looked to for the preservation of the public peace within their respective limits. And, speaking generally, it may be affirmed that in any case in which compulsory taxation is found necessary in order to compel a municipal corporation or political division of the state to perform properly and justly any of its

duties as an agency in the state government, * * * the state has ample power to direct and levy such compulsory taxation. * * * The legislature has undoubted power to compel the municipal bodies to perform their functions as local governments, under their charters, and to recognize, meet and discharge the duties and obligations properly resting upon them as such, * * * and for this purpose it may require them to exercise the power of taxation whenever and wherever it may be deemed necessary or expedient." In the course of the opinion it was further said (p. 385): "Keeping in mind that the passage of this and similar laws is for the better government of the state—is a mere police regulation—sections 9 and 10 of the Constitution in no way limit the power of the general assembly to enact them."

In *People v. County of Williamson, supra,* the action involved the validity of an act of the general assembly, making counties liable for their *pro rata* share of the cost of constructing a bridge over a stream constituting the boundary line between two counties. It was held that such act did not contravene the constitutional provision, and that the general assembly may compel a municipal corporation to perform any duty which relates to the general welfare and security of the state, although the performance of the duty will result in taxation or create a debt to be paid by taxation. It was said (p. 49): "Roads and bridges are not merely for local use but for the use and accommodation of all citizens of the state, and it is within the power of the general assembly to provide that counties shall build roads and bridges and that a county shall pay its proportionate share of the cost of a bridge across a stream on the boundary line between it and another county."

The case of *City of Chicago v. Knobel, supra,* involved the constitutionality of a legislative act which made a county bear part of the expense for juries for municipal courts of the city. In the course of the opinion it was said (p. 117): "The state is interested in the enforcement of laws in all parts of its territory. The necessity for such enforcement

in incorporated towns, and especially in large cities, for the good of the state, is certainly as vital as in the unincorporated territory. * * * The results arising from the enforcement of the laws within our large cities are so closely interwoven with the well-being of the city, county and state governments that it would be somewhat difficult on a question of this kind, based upon the proportionate amount which should fairly be paid by each, to hold a division of expenses between the city, county and state unconstitutional." Evidently the decision was grounded upon the proposition that the tax imposition was for a governmental purpose, as distinguished from a local, corporate or private purpose.

The case of *Chicago, M. & St. P. R. Co. v. Lake County, supra,* involved the validity of a legislative act requiring municipalities to pay the cost of an alteration of dangerous railroad crossings by the construction of subways. In that case it was held that under the constitutional provision the legislature could not create a debt against a municipal corporation for merely local purposes, requiring taxation, without the consent of the taxpayers affected; that requiring the construction of subways was an exercise of the police power of the state, and that the debt created against the municipality was for the protection of the general public and not for local corporate purposes. It was also held: "While sections 9 and 10 of article IX of the Constitution prohibit the state from creating a debt against a municipal corporation for local corporate purposes necessitating the levy and collection of a tax, they do not prohibit the state from imposing a liability where the public safety and welfare require it and the municipality fails and neglects to act."

It seems clear that none of the cases cited is authority for the position taken by the plaintiff. They seem to tend very strongly to support a contrary view, and to interpret the constitutional provision as being a limitation upon the legislative authority to impose taxes for local corporate or private purposes, and not to inhibit the imposition of a tax

for enforcing a governmental purpose or one for the general good and benefit of the public at large, as distinguished from the benefit of the local corporation or its inhabitants.

This court has, on several occasions, had under consideration the constitutional provision above quoted. In *State v. Wheeler*, 33 Neb. 563, it was held that an act of the legislature, requiring lre insurance companies to pay a certain proportion of their gross premium receipts for the support of city fire departments, was a violation of the constitutional provision; and in *Aachen & Munich Fire Ins. Co. v. City of Omaha*, 72 Neb. 518, the court had under consideration the validity of an act of the legislature imposing upon fire insurance companies a tax of 2 per cent. of their gross premiums, but not limited to the support of fire departments, and it was held in conflict with the Constitution, and was based upon the holding in *State v. Wheeler, supra.* In neither of these cases, however, was any consideration given to the meaning of the phrase, "for corporate purposes."

In *State v. Love,* 89 Neb. 149, a legislative act, providing for the pensioning of superannuated firemen in cities of the metropolitan class, was held not obnoxious to the constitutional provision now under consideration. Judge Root, in writing the opinion, after reviewing the prior decisions of this court on the subject, reached the conclusion that a city, in maintaining a fire department, exercises governmental, rather than private or corporate, power, and further said (p. 153): "While the city of Lincoln has the right, and in its charter is given specific authority, to assemble appliances for the extinguishment of fires, to employ firemen, and to levy and collect taxes to pay the expense of the fire department, and while that purpose is a public one, it is not a corporate purpose within the prohibition in section 7, art. IX (now art. VIII) of the Constitution."

McQuillin in his work on Municipal Corporations, at section 2379, commenting upon the scope and effect of similar constitutional provisions, used this language: "This provision that the legislature shall have no power to impose taxes on municipal corporations or their inhabitants for 'munic-

ipal purposes' refers to the ordinary purposes for which taxes are levied by municipalities, namely, for constructing sewers, improving streets, erecting and operating water and light plants, and various different matters or enterprises which are for the sole benefit or enjoyment of the municipality and its inhabitants."

When a legislative act is attacked on constitutional grounds, courts will hesitate to declare it invalid unless it clearly contravenes some specific constitutional command; but this court also recognizes the Constitution as the supreme law, binding alike on it and the legislative branch of the government, and when a legislative act clearly violates a specific constitutional declaration the court has no recourse, but to declare the act invalid.

In this case, we are of the opinion that the phrase, "for corporate purposes," as used in the constitutional provision above quoted, does not include purposes and activities designed, in the main, to aid or assist the state in carrying out its governmenta' activities, functions and policies, but is limited to those municipal activities designed, in the main, for the principal or exclusive benefit of the municipality, or of its citizens and inhabitants. The legislative act, seeking to impose upon metropolitan cities the burden of paying the cost of lowering gas and water mains and resetting of hydrants, violates section 7, art. VIII of the Constitution, and is therefore invalid.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a judgment dismissing the plaintiff's cause of action.

REVERSED.

Note—See Gas, 28 C. J. p. 547, sec. 2; Municipal Corporations, 28 Cyc. pp. 269, 1660.

FLORENCE H. O'SHEA, APPELLEE, V. MALINDA K. MORRIS ET AL., APPELLANTS.

FILED APRIL 30, 1924. No. 22767.

Vendor and Purchaser: RESCISSION: FAILURE TO DISCLOSE FACTS. As between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or to mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; but where such facts are known by the vendor and he knows them to be not within reach of the reasonably diligent attention, observation and judgment of the purchaser, and they are such as would readily mislead the purchaser as to the true conditions of the property, the vendor is bound to disclose such facts.

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

T. F. A. Williams and *Homer L. Kyle*, for appellants.

Doyle & Halligan and *Dort, Cain & Witte, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and GOOD, JJ., and BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

This action is by the plaintiff against the defendants, who are wife and husband, for the rescission of a contract for the purchase by plaintiff of lots 3 and 4, in block 1, Chase and Beardsley's Park Hill addition to Lincoln, Nebraska, also known as 2325 South Twenty-fourth street. The controversy arises in respect to the north boundary of lot 3 as it relates to a driveway and garage located partly on said lot and partly on the adjoining lot 2. The trial court found that the house is constructed with grade door, coal bins, and laundry so as to be occupied with the driveway on the north side of the house; that the driveway is necessary for the proper occupancy of the property; that said driveway and garage are not entirely upon lot 3, the north line thereof being in the center of said driveway and garage, which

extend over onto lot 2 approximately four feet. The defendants were not owners of any of lot 2 to the north, which is vacant, and there is no visible or marked boundary line between the lots; that defendants knew they did not have title to the ground in lot 2 upon which the north half of the driveway and garage stood, and knew that said driveway and garage were not all located on lot 3, yet they failed to advise plaintiff of that fact; that the plaintiff believed, and was reasonably led and induced to believe, by the character and location of the grounds and improvements, that defendants were the owners of all of said property, including the land upon which the driveway and garage were located, and purchased said property upon the understanding that all of said improvements were located on lots 3 and 4; that defendants, under the circumstances, were in duty bound to advise plaintiff that said driveway and garage were not entirely on their property, yet they concealed such fact and knowingly permitted the plaintiff to believe that all of said house, driveway and garage were upon lots 3 and 4, and that the deed executed by defendants conveyed a fee simple title to the driveway and garage and all the ground upon which the same were located, which was a fraud and deceit as against plaintiff. The court further found that plaintiff promptly upon discovery claimed a rescission, tendered a reconveyance, and demanded return of the purchase money paid.

Plaintiff contracted for the premises at the price of $8,800, paying in cash $7,250, assuming a mortgage of $1,300, and retaining for the purpose of paying the expenses for curing a defect in the title the sum of $250. Prior to the trial plaintiff had paid said $1,300 mortgage. The trial court found the plaintiff entitled to a rescission of the contract and recovery of said $8,550, with interest thereon from the date on which judgment was entered, April 11, 1922, and made the judgment a first lien on the premises, conditioned, however, that if the defendants should within 60 days present to the plaintiff a fee simple title to the ground upon which the driveway and garage

were located, which title should be approved by the court, rescission should not be allowed.

It would serve no useful purpose to discuss the evidence in detail or the propositions of law involved. We are satisfied, after a careful reading and consideration of all the evidence, that the trial court reached the right conclusion thereon, and we adopt the same. We are further of the opinion that the governing principle of law is well settled, and is to the effect that as between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or to mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; but where such facts are known by the vendor and he knows them to be not within reach of the reasonably diligent attention, observation and judgment of the purchaser, and they are such as would readily mislead the purchaser as to the true condition of the property, the vendor is bound to disclose such facts; and his failure to do so constitutes such fraud as will authorize rescission of the contract by the purchaser. 27 R. C. L. 366, sec. 611.

The appellants urge that rescission is a harsh remedy, and that especially in view of the proportion which the alleged injury bears to the whole value of the property, as evidenced by the testimony concerning the difference in value of the property as it actually was and as it would have been had it included the adjacent four-foot strip upon which the driveway and garage were located, rescission should not be granted. While not acceding to this view in its entirety, we are impressed with the fact that the trial judge before whom the case was first tried in the district court (it having been twice tried in that court) was of that opinion, and that the record discloses that some such adjustment was not entirely unacceptable to the plaintiff. We think substantial justice may be promoted by so modifying the decree that the defendants shall have another option whereby total rescission may be avoided. It is a fair conclusion from the evidence bearing upon that point that the

difference in value of the property as it actually was and as it was represented to be is the sum of $1,000; and the decree will be so modified that the defendants may within 60 days from the filing of mandate pay into court for the use and benefit of the plaintiff that sum, together with interest at 7 per cent. from the date of filing such mandate; or may deposit in court for the plaintiff a conveyance giving good and marketable title to the ground upon which the driveway and garage are located. This should also be more specifically designated to include the whole strip adjacent to the north boundary of lot 3, and extending the entire length thereof east and west, and of sufficient width to include the driveway and garage as located. In either event, the defendants should be taxed with the costs in both courts, and in case of failure to fulfil such conditions that the judgment of the district court shall otherwise stand as rendered, except that, plaintiff retaining possession and use of the property, interest is not recoverable except upon the final deficiency, if any shall exist. *Hall v. Catherine Creek Development Co.*, 78 Or. 585, L. R. A. 1916C, 996.

The parties have filed in this court a motion and affidavits relating to certain transactions claimed to have taken place respecting the property in controversy after the perfecting of this appeal, but the same are not considered in making our determination of the appeal.

The cause is remanded to the district court for entry of judgment in accordance herewith:

AFFIRMED AS MODIFIED.

Note—See Vendor and Purchaser, 39 Cyc. p. 866.

CHARLES A. DURLAND, APPELLANT, v. ELKHORN LIFE & ACCIDENT INSURANCE COMPANY ET AL., APPELLEES.

FILED APRIL 30, 1924. No. 22746.

Insurance: CONTRACTS: VALIDITY. A statute required that a mutual insurance company procure 250 applications for insurance before it was authorized to commence business. The applications

were secured upon promises by the incorporators, followed later by charter member certificates issued by the company after commencing business, in substance, that 5 per cent. of the gross annual premiums written each year should constitute a special dividend fund to be divided each year equally between the charter members so long as their policies remained in force. *Held* that, in the absence of express or necessarily implied authority in the charter or statute under which the company was organized, such contracts and certificates were *ultra vires.*

APPEAL from the district court for Madison county: WILLIAM V. ALLEN, JUDGE. *Reversed, with directions.*

Mapes, McFarland & Mapes, for appellant.

Charles H. Kelsey, contra.

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

REDICK, District Judge.

Action in equity to enjoin the defendant insurance company from distributing certain funds among charter members under contracts or certificates to be referred to later. A number of holders of said certificates are joined as defendants, and the question for decision is whether or not the contracts were valid obligations of the company within their powers to assume. The case is submitted on the pleadings and a stipulation of facts.

In September, 1904, five citizens of Norfolk, Nebraska, executed articles of incorporation of the Elkhorn Life and Accident Insurance Company, which were duly filed and approved by the secretary of state September 30, 1904. The plan of operations was the mutual benefit natural or stipulated premium plan. The company was organized under chapter 43, Comp. St. 1903, which provided that no such company should be organized or transact any business of insurance until it had received at least 250 applications for insurance. In compliance with this requirement, the organizers of the company solicited and procured 250 applications, and thereupon commenced business under its arti-

cles. No record of any kind was kept of the methods by which these applications were secured, but some blank forms were found among the early records of the company as follows:

"Charter Membership Certificate
(250 Required by State Law).

"This contract, entered into this———day of——— 190—, by and between the Elkhorn Life and Accident Insurance Company of Norfolk, Nebraska, party of the first part, and———of———, Nebraska, party of the second part, witnesseth:

"II. That in consideration of the payment of five ($5.00) dollars, receipt of which is hereby acknowledged, being the fee for said charter membership and the further payment of the sum of———(less membership fee), being the———premium on $——— of insurance, as per the agreements and terms of the policy, said premium to be paid upon delivery of policy,——— is hereby accepted as a charter member of the Elkhorn Life and Accident Insurance Company."

"III. The Elkhorn Life and Accident Insurance Company hereby agrees and guarantees to set aside from the expense element (5) five per cent. of the gross annual premiums written each year as a dividend fund, and that so long as the said———shall continue the payments of premiums as per terms of said policy that he shall be entitled to such share of said dividends as shall be obtained by dividing such dividend fund equitably among the charter members remaining in force, dividends to be computed on the first day of January each year.

"Elkhorn Life and Accident Insurance Company, ———, Secretary.

"Signed by———, Charter Member."

Certificates of this character appear to have been issued to the 250 original applicants, although there appears to be no record or mention thereof until May 20, 1905, after the company had regularly commenced business, when new certificates were issued in the following form:

"This certifies that————of————county of———— state of————as holder of policy No.————for $———— on the————plan, is a charter member of the Elkhorn Life and Accident Insurance Company of Norfolk, Nebraska.

"The Elkhorn Life and Accident Insurance Company hereby agrees to set aside from the expense fund five per cent. of the gross annual premium written each year, on which the payment is made to the company, as a special dividend fund for the exclusive benefit of the charter members, who are limited to the holders of the first two hundred and fifty policies issued and paid for. On the first day of January of each year this fund will be divided equally among the charter members retaining their membership with the company, and will be applied to reduce the premium so long as premiums are to be paid, and will be paid in cash annually thereafter on the anniversary of the date of the policy. Upon the termination of said policy this contract shall cease and no further benefits will be derived therefrom.

"In witness whereof, the said The Elkhorn Life and Accident Insurance Company of Norfolk, Nebraska, has caused this certificate to be signed by its president and secretary and caused the corporate seal to be hereto affixed, this ———day of———, A. D.———.

———, President.
"(Seal) ———, Secretary."

These second certificates were to be in lieu of the others, but only a small number of the latter were returned to the company. No record exists regarding authorization or issuance of these second certificates, except the stubs in the book from which they were taken. Policies of insurance in regular form were issued to the 250 original subscribers; they contained no reference to these certificates.

The following sections of the constitution or articles of incorporation of the defendant company are the only ones material to our present inquiry:

"Article 4. Members: The persons insured, who may be designated policy holders, are the members of the asso-

ciation. The policy issued to a member, his application for insurance, the warranties and provisions therein contained, the articles of incorporation and by-laws and amendments thereto shall, together, constitute the contract of insurance, shall contain all the conditions, requirements and provisions and define all the privileges and benefits and shall be the sole evidence of the intention of the association as insurer and the member as insured. Each member present at any annual meeting of the association for the election of directors shall be entitled to one vote, and he may delegate his authority to vote by written proxy given to a member of the association, such proxy to be registered by the secretary at least ten days before the meeting for which it is originally given and to remain good until written revocation is filed with the secretary. One hundred members present in person or proxy shall constitute a quorum."

"Article 6. The Plan in General: The object for which this company is formed is to insure the lives of individuals, to furnish benefits to the widows, heirs, orphans or legatees of deceased members, and of paying accident indemnity, upon the mutual benefit natural or stipulated premium plan."

In 1906 the attention of the insurance department of the state was called to the existence of these "charter membership contracts," and the department insisted that they be canceled or modified, and considerable correspondence took place between the company and the department, but nothing further was ever done in that regard until April 24, 1909, when a resolution was passed attempting to limit the number of years that payments should be made under those contracts; and February 25, 1911, the board of directors ordered a dividend of $3 to be paid upon each of said certificates and the remainder of the so-called "dividend funds" to be applied upon the expenses of certain litigation. No dividends have been paid upon said certificates since 1917, when they ceased upon advice of the company's counsel. The funds of the company have never been separated into "Reserve," "General," and "Surplus," except each year the

reserve necessary to mature existing policies is "set up;" then any amount of net assets above such reserve goes into the surplus fund. The premium rate has been changed a number of times, but has always been fixed at an amount which, with interest according to the expectancy tables, will amount during the life of the policyholder to the face of his policy, and a further sum to cover the expenses of operation, which, however, did not include any amount necessary to take care of the extra payments to charter members and no special provision has ever been made therefor, such payments having been included in the general term "dividend." The notices of assessments of premiums due under the policies issued by the company contained no statement that any part of the money was to be used in payments under these contracts, and such payments as have been made were taken from the general surplus fund of the company. The by-laws of the company provided for a general fund made up of all amounts collected from premiums in excess of the reserve, out of which fund all expenses were to be paid; also a surplus fund consisting of surplus interest earnings on the reserve, from which fund "such dividends as the board of directors shall set aside from year to year shall be added to the amount of settlement as provided by the terms of the policy contract."

Section 3994, Comp. St. 1903, provides that the notice of assessment must state the purpose for which it is to be used, and any surplus shall be set aside and used only for such purpose as the by-laws and notices specify.

The principle is well established that the powers of a corporation are defined by and limited to those provided for and granted by its charter and the statute under which it is organized, and it possesses no powers other than those expressly stated and such as are necessarily implied therefrom. *State v. Atchison & N. R. Co.*, 24 Neb. 143. They include, unquestionably, the power to do all acts and make all contracts necessary to the proper and orderly conduct of the business of the corporation. The present contracts are in a sense preorganization contracts; they originated

with the promoters, the organizers, of the company in an effort to comply with the statute requiring 250 applications, and so far as the records show were never authorized by the official action of the board of directors, and they were not referred to, nor their provisions included, in the policies issued to the charter members. It is quite evident that the above quoted sections of the articles of the company confer no authority for the issuance of any policy of insurance promising to the assured any benefits other than those provided for in all other policies, and we think it must be conceded that in a mutual company, where the members are not divided into classes except as to age, the company would have no authority, for the same premium, to issue policies promising special benefits to different members of the same class. Certainly the articles of incorporation above quoted contain no express authority for the contracts in question. Article 4 provides: "The policy issued to a member, his application for insurance, the warranties and provisions therein contained, the articles of incorporation and by-laws and amendments thereto shall, together, constitute the contract of insurance, shall contain all the conditions, requirements and provisions and define all the privileges and benefits and shall be the sole evidence of the intention of the association as insurer and the member as insured." And article 6 provides for the payment of benefits only upon the death of the assured or indemnity for accident. There is no provision anywhere for the payment of dividends, and while the power to declare dividends from surplus is implied, such dividends must be distributed ratably among all the members. We think that, if the provisions of the certificate or contract in question regarding special dividends had been incorporated in the policies issued to the first 250 members, the same could not have been enforced against the company, and the fact that they are contained in a separate contract adds nothing to their validity.

The insurance company is willing to perform the contracts in question; but, owing to their questionable validity,

requests the judgment of the court upon their authority to do so. Counsel for the company have filed an able and persuasive brief in support of the validity of the contracts from the standpoint of the necessities of the case regarding the procurement of 250 applications for insurance prior to the commencement of business, and presents many arguments supporting the propriety and necessity of offering special inducements for securing the requisite number of applications. We recognize the force of these arguments and are not disposed to criticise the course taken by the incorporators in an endeavor to comply with the statute as being either corrupt or contrary to public policy. If the charter of the company had provided expressly, or by necessary implication, for the issuance of policies or certificates of the character in question, we would seriously hesitate before condemning them as invalid, though we do not decide the point; but in the absence of any such authority, and considering the provisions of articles 4 and 6 above quoted, declaring the mutual character of the company and the plan of operation, and declaring that the policy, articles of incorporation, by-laws and amendments thereto shall contain all the requirements and provisions and define all the privileges and benefits thereunder accruing to the members, we are of the opinion that no authority existed in the corporation to issue the certificates or contracts in question, and that the judgment of the district court holding to the contrary is erroneous and must be reversed.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a decree for the plaintiff as prayed.

REVERSED.

Note—See insurance, 32 C. J. p. 1030, sec 84 (1925 Ann.).

HARRY A. TAYLOR V. STATE OF NEBBRASKA.

FILED MAY 8, 1924. No. 23803.

Infants: EMPLOYMENT. The statute providing that no child under 14 years of age shall be employed or permitted to work in a

theatre does not forbid the proprietor of a theatre from allowing children, casually, under the direction and control of their teacher or parents, to go upon the stage voluntarily, without compensation, to entertain the public by giving a four-minute exhibition in the arts of dancing, acting, or singing. Comp. St. 1922, sec. 7669.

ERROR to the district court for Douglas county: L. B. DAY, JUDGE. *Reversed and dismissed.*

Eugene N. Blazer, for plaintiff in error.

O. S. Spillman, Attorney General, and *Lee Basye, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and GOOD, JJ., and BLACKLEDGE, District Judge.

PER CURIAM.

In the juvenile division of the district court for Douglas county, Harry A. Taylor, the proprietor of two motion picture and vaudeville theatres in Omaha, was accused of violating the statute which declares:

"No child under fourteen years of age shall be employed, permitted or suffered to work in, or in connection with any theatre, concert hall, or place of amusement, or in any mercantile institution, store, office, hotel, laundry, manufacturing establishment, bowling alley, passenger or freight elevator, factory or work shop, or as a messenger or driver therefor within this state." Comp. St. 1922, sec. 7669.

Defendant pleaded not guilty and upon a trial in the juvenile court he was convicted and sentenced to pay a fine of $5 under another statutory provision authorizing the imposition of a penalty for a violation of the law. To reverse the judgment of the district court, defendant has prosecuted a proceeding in error, bringing up the evidence relied upon by the state to sustain the conviction.

Did defendant violate the statute? The answer depends on what he did, as shown by the evidence, and on the meaning of the language used by the legislature. Defendant

operates two motion picture and vaudeville theatres in Omaha, both being a considerable distance from the business center of the city. The evidence relied upon by the state to prove guilt is in substance as follows: Occasionally defendant, in entertaining people who pay admission fees and occupy seats in the theatres, permits girls of good character, between the ages of 10 and 14 years, to appear on the stage to dance, act or sing. Such performances are casual. Each performance lasts from two to four minutes only, and the appearance on the stage occurs but once or twice during an evening, the performer leaving the theatre before 9 o'clock. The girls are pupils of an instructor in dancing, acting, or singing, and their performances are in a sense lessons in those arts. While absent from home and in and about the theatre, the girls are in the care of their teacher or some other proper person. A girl receives no compensation. Her appearance and experience before the public are voluntary and the environment is not improper. In these respects there is no dispute in the evidence.

Is the permitting of such performances by the proprietor of the theatres, under the circumstances disclosed by the proofs, a violation of law? It is the unanimous opinion of the court that the legislature did not use language forbidding what defendant did when he permitted the girls to appear on the stage under the circumstances shown in this prosecution. "Be employed" and "to work," as those terms are used in the statute, when the entire act and the purposes of the legislation are considered, imply a contract of employment for compensation and work for hire pursuant to such a contract. This is the sense in which such legislation is generally understood. The girls in performing their little tasks in public were not under the control of defendant as master or employer. They were directed by their own teacher in studying and exhibiting their art, or by some other proper person, and were thus protected from the evil influences against which the statute is directed. In this sense, there is no evidence that defendant

violated the law. The judgment is therefore reversed and the prosecution dismissed.

REVERSED AND DISMISSED.

Note—See Infants, 31 C. J. p. 995, sec. 16.

JOHN L. CAREY ET AL., APPELLANTS, V. SAMUEL BECKER ET AL., APPELLEES.

FILED MAY 8, 1924. No. 22779.

1. **Appeal:** DIRECTION OF VERDICT. Where there is a substantial conflict in the evidence upon a question which is material to the issues, it is error to direct the jury to return a verdict for either party.
2. **Contracts:** NOVATION. One party to a contract may not substitute a third person in his stead without the consent of the other contracting party.

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

J. J. Harrington, for appellants.

J. A. Donohoe, contra.

Heard before MORRISSEY, C. J., LETTON and ROSE, JJ., REDICK and BLACKLEDGE, District Judges.

LETTON, J.

This action is brought to recover the sum of $2,000, which it is alleged is the proceeds of a check and promissory note which were deposited in the defendant bank in escrow to be paid to defendant Becker on the signing of a contract of sale of land by the owner of the land. It is alleged that the contract was never signed by the owner. and that defendants wrongfully converted the money to their own use. Defendants plead that the contract was signed and deposited as agreed upon by the parties, that the payment was

authorized, and that the owner of the land is ready and willing to perform the contract. From a judgment upon a directed verdict for defendants, plaintiffs appeal.

The evidence on behalf of plaintiffs is to the effect that, induced by one Mrs. Norton, who resided in Iowa, but who was interested in a ranch in Holt county, and also dealt in real estate, the plaintiffs, who resided at Anita, Iowa, came to Holt county. They met defendant Becker, who told them that he was the agent for the owner of a tract of 160 acres of land, that he thought he could sell it for $62 an acre, but would have to communicate with the owner, Mrs. King, who lived at O'Neill, in order to know whether she would accept that price, before he was authorized to sell it. Plaintiffs agreed to buy. A contract was executed describing "Samuel Becker, agent," as the vendor, and the plaintiffs as vendees. This contract was deposited by mutual consent in escrow in the First National Bank of Atkinson, with instructions that, if the contract were signed by Mrs. King, a check for $1,500, which was also deposited, and a note for $500 dated June 14, 1920, payable 90 days after date, were to be delivered to Becker for the owner. The plaintiffs were to be informed by telegraph when the contract was signed. If Mrs. King did not sign the contract, the money and papers were to be returned to plaintiffs. On the 16th day of June they received the following telegram: "Terms and price of land in contract accepted by owner. Samuel Becker." On the 18th day of June they received the following: "Mrs. Clyde King signed and deposited with this bank. First National Bank." After this telegram was received, believing that Mrs. King had signed the contract, plaintiffs instructed their banker at Anita to pay the check. The note was paid on September 20, and the defendant bank paid the proceeds of the check and note to Becker. Afterwards, desiring an extension of time for the payment of $2.500, falling due March 1, 1921, plaintiffs called upon Mr. O'Donnell, a banker in O'Neill, and he made arrangements with Mrs. King that the contract was to be extended one year on the payment of $500. An extension contract and

draft were afterwards sent to O'Donnell and returned by him, since she had sold the land to another party. On the same day the contract of sale was entered into between Becker and plaintiffs. Becker, with one Dr. Waynick (who had written the contract for the parties), called upon Mr. King, who was acting as Mrs. King's agent, in O'Neill. Waynick entered into a contract to purchase the land from Mrs. King for the sum of $9,600 ($60 an acre) paying $1,000 cash in hand, the contract also providing that $3,200 should be paid on March 1, 1921, that the balance of $5,400 be secured by a mortgage on the premises, payable seven years from March 1, 1921, at 6 per cent., and that a warranty deed and abstract to be furnished on or before January 1, 1921, were to be placed in escrow with the First National Bank of O'Neill, where the provisions of the contract were to be fulfilled. By subsequent agreement the papers were placed in escrow in the First National Bank of Atkinson.

The evidence for defendants is, in substance, that King had previously told Becker that this land was for sale and if he could find a buyer to let him know. He, Becker, told plaintiffs that he could not sell without the consent of the owner to the price named, but that at that time he could not remember her name; that the name of Mrs. King was not mentioned; that the agreement made was that the money was to be returned to plaintiffs provided he could not get the land for them, and that this was the instruction given the bank when the check and other papers were deposited. He did not have the money to handle the property, so he procured Dr. Waynick to finance the transaction, he buying the land for $320 less than plaintiffs had agreed to pay. Becker did not inform the Kings that he had made a contract to sell the land for $62 an acre. They paid him $200 commission for selling the land to Waynick. He paid Mrs. Norton $50 for putting him in touch with the plaintiffs. Dr. Waynick testifies that when he and Becker drove to O'Neill they went to the courthouse to ascertain the name of the owner of the land. He bought the land at $60 an acre. The contract be-

tween Mrs. King and Dr. Waynick, with a deed from Mrs. King with a blank for the name of the grantee to be written in, was placed with the contract between plaintiffs and Becker in the First National Bank of Atkinson. Waynick testifies that he was getting the land for Becker so that he would be able to deliver it on his contract with plaintiffs, and that he was ready and willing to carry out the contract and to make a separate deed to plaintiffs if they desired. Mr Swingley, who was at that time the cashier of the bank at Atkinson, testifies that the money and note deposited in the bank were to be delivered to Becker when there was satisfactory evidence in his hands of a contract on the land conveying title to Lightfoot and Carey. If Becker could not perform the contract, it was to be null and void, and the note and check returned. Swingley was to let plaintiffs know if such a contract was executed. The next thing that occurred was; a contract and deed from Mrs. King to Dr. Waynick were sent by the First National Bank of O'Neill to him to be held with the Becker contract, and he has had them in his possession ever since. He had received no instructions as to filling in the name of the grantee in the blank deed. He sent plaintiffs a telegram as follows: "Mrs. Clyde King contract signed and deposited with this bank. First Nat'l Bank." This was sent in reply to a telegram received. He turned the proceeds of the check and of the $500 note over to Dr. Waynick. He received no compensation for this.

Under the pleadings, the amendments requested by defendant not having been permitted, the other evidence does not bear upon the vital question and will not be set forth.

There is a substantial conflict in the evidence as to the agreement of plaintiffs with Becker and the bank under which the check, promissory note and contract with Becker, agent, were deposited in the bank. The plaintiffs testified the money was not to be turned over to Becker until Mrs. King had signed the contract. Becker and Swingley testified that her name was not mentioned, but that the check and note were to be delivered as soon as a contract for the sale

of the land, signed by the owner, was deposited in the bank. No contract was ever entered into between Mrs. King, the owner of the land at that time, or with Dr. Waynick, and plaintiffs. It is very evident that the plaintiffs would not have consented to the delivery of the check and note as a payment upon a contract which did not bind the owner of the land to convey to them if its terms were complied with by them. If the jury believed the evidence on behalf of plaintiffs as to the agreement with which the check and note were deposited, then the bank acted in violation of this agreement, and would be liable for the proceeds of the check and note at the time it unlawfully delivered the same to Becker or to Waynick. Defendants denied that this was the agreement. There was a conflict in the evidence on this very material point which should have been submitted to the jury. If the delivery of these proceeds was unauthorized by plaintiffs, the subsequent verbal offer to comply with the contract by Waynick, with whom the plaintiffs had no relations and were not in privity, could not alter the status or legal rights of the parties. Waynick is under no contract obligation with plaintiffs and they could not enforce any right as against him. Again, the law does not permit one party to a contract to substitute a third person in his stead without the consent of the other contracting party. Plaintiffs never had a contract with Mrs. King. They never agreed with her or with any one to make the payments required by the terms of the contract between Mrs. King and Dr. Waynick, or to execute a mortgage to her as required therein. Waynick has never been vested with absolute title so that he could fulfil the contract. Nor has Becker ever had the power or ability to carry it out.

We are of the opinion that the district court erred in directing a verdict in behalf of the defendants. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Novation, 29 Cyc. p. 1132.

WILLIAM LE ROY RANDALL, APPELLEE, V. CITY OF CHADRON, APPELLANT.

WILEY W. PARSONS, APPELLEE, V. CITY OF CHADRON, APPELLANT.

FILED MAY 8, 1924. No. 23104.

1. **Municipal Corporations:** OBSTRUCTION OF DRAINS: LIABILITY. Where a city has constructed in its streets a system of gutters or drains to carry off surface water, it is charged with the duty of ordinary care to maintain them in a proper manner; and where one of its agents negligently and carelessly obstructs a gutter or drain in such a manner as to dam the flow and raise the water in the street to such a height that it overflows the curb and runs into the basement of plaintiffs' store, injuring a part of a stock of goods, the city itself will be liable for such injury.

2. ———: ———: ———. In such case, the city cannot relieve itself from liability by pleading and proof that the carelessness of a subcontractor of one with whom the city had made a contract to curb, gutter and pave the street caused the obstruction.

3. ———: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* not to establish that the rain which caused the damage was so excessive and unusual as to constitute "an act of God."

4. **Judgment:** RES JUDICATA. The fact that a former action by the plaintiffs against the paving contractor to recover damages for the same injury was dismissed with prejudice does not render that decision *res judicata* as against the city, since the city was not a party to the suit, and the negligent act which resulted in the injury to the property of plaintiffs was not the act of the paving contractor but of an independent subcontractor who was not a party to the action. The fact that plaintiffs sued an innocent party was no defense to an action against the city.

5. **Municipal Corporations:** DAMAGES: NOTICE. "The words, 'arising from defective streets,' in section 4384, Comp. St. 1922, have reference only to claims for damages to the person or property of travelers upon the street using the same in the ordinary way, and have no reference to a claim for damages to abutting property based upon negligence or tort of the city giving rise to a cause of action at common law; as to which claim no notice need be served before suit." *Muffley v. City of St. Edward*, 110 Neb. 572.

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

J. B. Townsend, E. D. Crites, F. A. Crites and *George T. H. Babcock,* for appellant.

Allen G. Fisher and *Samuel L. O'Brien, contra.*

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

LETTON, J.

This is an appeal from a consolidated action brought against the city of Chadron, a paving contractor, and a subcontractor, to recover damages occasioned by the flooding, by water overflowing from gutters in the street, of the basements of stores owned and operated by the respective plaintiffs. No service was had upon the other defendants, and the action proceeded to a judgment against the city, from which it has appealed.

The evidence is substantially to the effect that in 1920 the city entered into a contract with the Ford Paving Company to curb, gutter and pave certain streets in the city and lay storm sewers therein; that, preparatory to paving, a subcontractor of the paving company, the Hahn Construction Company, which was doing the curbing and guttering, had entered upon the work on Main street in said city. The plaintiffs charge, and the evidence tends to prove, that, through the negligence of this subcontractor, the gutters on Main street became obstructed by piles of dirt and sand at the intersection of Second street, in such a manner that the water from a heavy rainfall, which otherwise would have flowed down the gutters and passed away from the neighborhood of plaintiffs' stores without injury to their property, was obstructed and dammed back in such a manner that it overflowed the curb and ran into the basement of their respective stores, causing the damage complained of to goods therein.

Plaintiffs rely upon the proposition that it was the duty

of the city to keep the gutters unobstructed so that water flowing in them would be carried away from their premises; that this is a primary duty of the city from which it cannot be absolved even if the act was caused by the negligence of the independent contractor with whom it had contracted that the work should be done in a proper and legitimate manner. On the other hand, defendant contends that the evidence does not sustain the allegations of the petition; that the city is not liable for the negligent acts of its independent contractors; that the defense of independent contractor is *res judicata* against the plaintiffs, the evidence showing that it had been decided in a former action, brought by these plaintiffs against the Ford Paving Company for the same injuries, that said contractor was not liable for the damages, and the actions having been dismissed with prejudice, this constituted a former adjudication as to the liability of the city for the alleged damages sued for here, and that the city could not be held liable when the defendant Ford Paving Company is not liable; that no notice of the injury complained of was given as provided by section 4161, Comp. St. 1922; that the city in grading and improving its streets is not liable for injuries resulting from an incidental interruption or change in the flow of surface water. And it is charged the injury resulted from the negligence of plaintiffs in improperly filling ditches leading to the basements. No reply was filed, but the case was apparently tried on the theory that affirmative allegations of the answer were denied.

A number of these propositions have already been settled by this court. With respect to the defense that the injury resulted from the negligence of an independent contractor and therefore the city was not liable, it was held in *City of Beatrice v. Reid*, 41 Neb. 214:

"That a municipal corporation, by contracting with another to construct an improvement for it, does not and cannot thereby abdicate its control over the streets or public grounds of such corporation, nor thereby exonerate itself from liability for an injury resulting from the negligence

of such contractor in the manner of the performance of his contract."

Is the city liable for negligence in the maintenance of, or in the obstruction of, the gutters and drains provided by it for the removal of surface waters? In *City of Beatrice v. Leary,* 45 Neb. 149, the ground of negligence alleged and made the basis of the action was that the city, in grading and paving Court street, filled a ditch in the street through which surface water, flowing in a natural depression or drainage channel, found its way to the river, and failed to provide any other outlet for the water, so that the water was thrown upon and damaged plaintiffs' property. The city denied negligence, pleaded that the grading and paving were done at the request of the abutting property owners, of which plaintiff was one, and that the damages were the result of an unprecedented rain storm. The evidence showed that the overflow was brought about by the act of the city in filling the ditch and in failing to provide sufficient outlets to the water elsewhere. This court held that, when the city filled up the ditch in the street, it was charged with the duty of constructing other sufficient ditches or outlets to carry the water to the river. The gist of the holding is that the city, having constructed or provided a method of conducting surface water through its streets by means of a ditch or gutter, when it dammed or obstructed this outlet and failed to provide another method to discharge the waters, was guilty of actionable negligence.

In *McAdams v. City of McCook,* 71 Neb. 789, on rehearing, 76 Neb. 1, 7, 11, the facts alleged were that certain merchandise in the basement of plaintiff's storeroom was damaged by reason of the negligent omission of the city to maintain in proper condition a system of drainage ditches and culverts which it had constructed for the purpose of conducting surface water through the city; that the natural flow of surface water had been diverted through this system; that, through the negligence of the city, the embankments which confined the waters to the drainage ditches

had been worn down and reduced to a level, and in consequence thereof the water in the ditch during a heavy rainstorm was diverted and precipitated in a southeasterly direction against the plaintiff's building, thereby causing the injury complained of. There was no allegation that there was any carelessness or negligence in the original construction of the drainage system. The city denied negligence, and alleged that the injury was caused by a storm of such an unusual and unprecedented character as to constitute it "an act of God." The court said that, while the city was under no obligations to construct a system of drainage, yet it did not follow that this absolved it from liability for injury occasioned to private property by its failure to keep the ditches in proper condition.

"When a city makes provision by sewers or drains for carrying off the surface water, it may not discontinue or abandon the same when it leaves the lot owner in a worse condition than he would have been if the city had never constructed such drains. *City of Atchison v. Challiss,* 9 Kan. 603. It is also urged by the city that the injury complained of by the plaintiff was occasioned by surface water, which is a common enemy, and that for injuries arising from this source no one is liable. This contention, however, so far as it applies to cases of this character, is qualified by the principle that the city, like a private individual, must so use its own as not to injure another. *City of Kearney v. Themanson,* 48 Neb. 74."

These principles were not departed from in the final opinion, which held that it was incumbent upon the defendant to establish the defense that the storm was of such a character as to constitute it an act of God, and the judgment against the city was affirmed.

These decisions have settled the questions as to the liability of a city for negligence in failing to keep or maintain its surface-water drainage system in its streets in proper and reasonable condition, and as to whether it can relieve itself from this liability by proof that the negligence was that of an independent contractor employed by it.

As to the defense of *res judicata,* separate actions were brought by the plaintiffs against the Ford Paving Company, which was the sole defendant in the actions. The evidence showed that that company had not been guilty of any negligent act which resulted in the injury to the plaintiffs' property, but that the obstructions in the gutter were created by the negligent acts of the Hahn Construction Company, an independent subcontractor, which was not a party to the action. For this reason, the court dismissed the suit. The city was not a party to either of these actions, and the fact that the plaintiffs mistakenly sued an innocent party could not affect their right to recover against the city.

There was a conflict of evidence as to the fact of excessive and unusual rainfall. There was sufficient evidence to sustain the finding of the trial court against the city on this issue.

As to the defense that the surface water entered the basement in consequence of the negligence and want of care of the plaintiffs in installing a water-pipe connecting to the city's water-main in the street, in the course of which a ditch was opened and negligently refilled in such a manner as to be insufficient to exclude from the basement rain and surface water running in the street, the evidence was conflicting, but the finding of the trial court is not found to be erroneous.

Does the failure of the plaintiffs to give the notice required by section 4384, Comp. St. 1922, constitute a defense to this action? The city of Chadron is a city of the second class, and consequently section 4384, and not section 4161, which is cited by counsel for the city, applies. This question has already been settled in a recent case. In *Muffley v. Village of St. Edward,* 110 Neb. 572, it is held:

"The words, 'arising from defective streets,' in section 4384, Comp. St. 1922, have reference only to claims for damages to the person or property of travelers upon the street using the same in the ordinary way, and have no reference to a claim for damages to abutting property based upon negligence or tort of the city giving rise to a cause of

action at common law; as to which claim no notice need be served before suit."

It has also been held that where the injury is the result of an act of direct malfeasance on the part of an agent of the city, the city is bound to take notice of it, and further notice is unnecessary. *Tewksbury v. City of Lincoln,* 84 Neb. 571; *City of Omaha v. Jensen,* 35 Neb. 68.

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

AFFIRMED.

Note—See Judgments, 23 Cyc. p. 1280; Municipal Corporations, 28 Cyc. pp. 1316, 1450 (1925 Ann.).

LANCASTER FARMERS STATE BANK ET AL., APPELLEES, V. GEORGE R. BUCKNER, APPELLANT.

FILED MAY 8, 1924. No. 22715.

1. Guaranty: CONSTRUCTION. The term "till maturity," when used in a contract guaranteeing a promissory note, means "at maturity," where that is the import of the context under circumstances showing that any other interpretation would make the guaranty inoperative.
2. ———: DEFENSES: PROOF. In an action on a contract guaranteeing payment of a promissory note at maturity, the defenses that plaintiffs did not exercise diligence in collecting from the original debtor the amount due from him and that timely notice of the latter's default was not given to guarantor, *held* not proved.

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

John J. Ledwith and *T. R. P. Stocker,* for appellant.

Fred C. Foster, O. K. Perrin and *S. M. Kier, contra.*

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

ROSE, J.

This is an action to recover from the guarantor of a

promissory note the amount due thereon from the maker to the holder. The note was executed August 29, 1918, by Bartley McHugh, as maker, and contained a promise to pay the Farmers State Bank of Waverly $2,700 March 1, 1919. After the note was executed, but before it matured, the Lancaster County Bank acquired by purchase and consolidation the assets and banking business of the Farmers State Bank. The note was included in the transfer. The successor in the banking business and the holder of the note is a corporation called the "Lancaster Farmers State Bank," one of the plaintiffs. The only other plaintiff is Anton Sagl. He was formerly the managing officer of the Lancaster County Bank and represented it in the negotiations for the consolidation. Defendant is the guarantor, George R. Buckner, who, acting for himself and his banking associates, sold to the Lancaster County Bank the capital stock and the assets of the Farmers State Bank. In this transfer the note described, with others, was guaranteed by Buckner. The original debtor, McHugh, absconded without paying the note, and this is an action against Buckner as guarantor.

For the purposes of review the defenses pleaded may be outlined as follows: The execution, delivery and plaintiffs' ownership of the note were not denied, but the guaranty was a limited one which did not extend beyond the maturity of the note. Under the terms of the contract between the consolidating banks, plaintiffs were to collect the note from McHugh, the maker, when due March 1, 1919. The means for doing so consisted in plaintiffs' possession of a contract for the sale of a farm owned by McHugh and the right to take from the proceeds, which were to pass through plaintiffs' hands, the amount due on the note. McHugh had been the owner of the farm and in his contract to sell it he had agreed August 24, 1918, to deed it to Dennis W. Keleher and wife for $28,800. The purchasers paid $5,000 in cash and agreed to pay the remainder upon settlement in plaintiffs' bank March 1, 1919. McHugh agreed to pay the 2,700-dollar note out of the proceeds of his farm, but

plaintiffs did not exercise diligence and failed to exact payment in that manner, negligently relinquished the lien on the contract for the sale of the land and permitted McHugh to abscond with the remainder of the proceeds without paying the note guaranteed by defendant. Failure of plaintiffs to give notice of McHugh's default upon maturity of the note was also pleaded as a defense. This is a mere summary of the answer.

The district court made general findings in favor of plaintiffs and entered a judgment against defendant as guarantor for $3,521.06. Defendant has appealed.

The first question presented is the meaning of the term "till maturity" as those words are used in the guaranty. Defendant contends that the maturity of the note March 1, 1919, was the end of the period covered by his guaranty, and he treats it as a limited one. His position seems to be untenable when the contract as a whole is considered in connection with the surrounding circumstances and the understanding of the parties before any controversy arose. The guaranty was an integral part of the contract between the consolidating banks. For the purposes of consolidation the assets of the Farmers State Bank, including the note in controversy, were transferred to the Lancaster County Bank. Buckner, acting for himself and his banking associates, made the transfer, "Guaranteeing all notes * * * till maturity now on books." Considering the context and the purposes of the parties, "till" was used in the sense of "at." Payment of the notes at maturity was what Buckner guaranteed. No other interpretation is permissible. The transactions involved a large amount of money. In a business affair of such magnitude the parties contemplated an operative guaranty. That provision of the contract would be nugatory, if the guaranty did not extend beyond March 1, 1919, the date on which the note in suit matured. McHugh, the maker of the note, did not intend to pay his debt before maturity. According to the allegations of the answer he was to make payment at maturity March 1, 1919, out of the proceeds of

his farm, when his unpaid purchase money became available. There being no means or obligation to pay the note before maturity, a guaranty limited to that specific date would be inoperative. The proper inference from the evidence is that the parties understood that payment at maturity was guaranteed. Defendant, after maturity, paid without question other notes guaranteed by the same instrument. The district court, therefore, properly found that the guaranty was not limited in time to the date on which the note matured.

The evidence seems to be insufficient to prove the release of guarantor on the grounds that plaintiffs, for want of diligence, failed to collect the debt and negligently failed to give timely notice of the default. Defendant's bank lent to McHugh the money for which the note was given. The proofs tend to show that defendant, in transferring the note to plaintiffs, represented McHugh to be a man of integrity; that plaintiffs consequently trusted him as such, believing the proceeds of his farm would pass through their hands; that McHugh went to another bank to transfer the title to his farm; that he procured the remainder of the purchase price in currency without the knowledge of plaintiffs and absconded, leaving the note guaranteed by defendant unpaid. On the issue that timely notice of the default was not given there seems to be a failure of proof, under the circumstances.

No error has been found and the judgment is

AFFIRMED.

Note—See Guaranty, 28 C. J. p. 957, sec. 106; p. 1031, sec. 202.

CHARLES L. EGBERT V. STATE OF NEBRASKA.

FILED MAY 8, 1924. No. 23561.

Homicide: INSTRUCTIONS: MALICE: PRESUMPTION. Where an eyewitness called by the state, in a prosecution for murder in the second degree, explains the circumstances surrounding the homi-

cide and testifies to facts tending to show that it was the result of an accident occurring without malice, it is error to instruct the jury that malice may be presumed from the homicidal act and the use of a deadly weapon.

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

Stiner & Boslaugh and *Charles E. Bruckman*, for plaintiff in error.

O. S. Spillman, Attorney General, and *Lloyd Dort, contra.*

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

ROSE, J.

In a prosecution by the state in the district court for Adams county, Charles L. Egbert, defendant, was convicted of murder in the second degree, and for that felony was sentenced to serve a term of 15 years in the penitentiary. Charles R. Gordon, the son-in-law of defendant, was the victim of the homicide. As plaintiff in error, defendant presents for review the record of his conviction.

Defendant was a practicing physician residing at Hastings. His family consisted of himself, his wife, one daughter, and Charles R. Gordon, the daughter's husband, and Mary Mitchell, a sister of defendant's wife. The home of defendant had been the home of the others. Prior to the homicide Mary Mitchell was taken to a hospital in Hastings for a surgical operation which defendant performed. She had not returned at the time of Gordon's death. Defendant was absent from home February 13, 1923, and when he returned his daughter and her husband were missing, but he found them elsewhere in Hastings the next day and visited them almost daily during their absence. The wife of defendant was taken to a sanitarium in Hastings for treatment February 17, 1923, where she remained for a considerable time. While defendant was alone in his house February 21, 1923, his daughter and her husband entered

unannounced in the forenoon. Gordon was shot and killed a few minutes later. Defendant was charged with murder in the first degree. He pleaded not guilty, and upon a trial the jury rendered a verdict of murder in the second degree.

The accusation was that defendant unlawfully, purposely, feloniously and of his deliberate and premeditated malice shot and killed Gordon—murder in the first degree. Under the law of Nebraska malice is an element of murder in the first degree and also in the second degree, the latter excluding deliberation and premeditation. The theory of the defense under the plea of not guilty was that the discharging of the revolver was accidental, without malice and without any intention to harm Gordon, the explanation of defendant at the trial being: While making professional calls at night it was his custom to carry a revolver for his own protection. Late during the night just preceding the homicide defendant came home and was the only one in his house. He threw his revolver on a table and retired. He arose during the forenoon and went to the basement in his bath-robe. While there his daughter, using a key which she had taken with her when she left, unlocked the front door and entered. Upon returning to the first floor defendant found and greeted her. He picked up his revolver intending to put it away. Gordon, who had accompanied his wife, but who had been standing inside the front door unobserved by defendant, rushed at him and grabbed him and his revolver. A struggle ensued during which the revolver was accidentally discharged twice, fatally injuring Gordon. This in substance is the explanation of defendant, and his testimony tends to prove that the homicide occurred without malice, in the manner indicated, but in this outline, given as it is for the mere purpose of indicating the nature of the defense, no opinion on the merits of the plea of not guilty is expressed or even intimated. With the record of the trial presenting this defense, supported as it was by competent evidence, the trial court instructed the jury as follows:

"In a case of homicide the law presumes malice from the unlawful use of a deadly weapon upon the fatal part or with fatal result, and when the fact of unlawful shooting or killing causing death is proved, and no evidence tends to show express malice on the one hand, or any justification, mitigation or excuse on the other, the law implies malice, and the offense is then murder in the second degree.

"You are instructed that in law a loaded gun is a deadly weapon, and if you believe from the evidence beyond a reasonable doubt that the defendant herein wantonly, cruelly and without justification or excuse, shot and caused the death of Charles R. Gordon, or that he unlawfully caused the death of Charles R. Gordon with a deadly weapon, then the law presumes that such shooting was done maliciously, unless you believe from the evidence that it was done without malice."

Objections to this instruction were properly preserved. It is the subject of one of the principal assignments of error. Under the criminal law of this state the instruction was erroneous when applied to the circumstances disclosed by the evidence. The burden was on the state to prove the guilt of defendant beyond a reasonable doubt, including the essential element of malice. There were only two living eye-witnesses to the homicide—defendant and his daughter. Defendant testified to circumstances surrounding the shooting. He was a competent witness in his own behalf. His explanation, if believed by the jury, tended to disprove malice. There was evidence that the shooting occurred without malice. The daughter was called by the state and testified to the surrounding circumstances, implying that defendant was not prompted by malice. It was for the jury to determine from all circumstances properly disclosed whether the element of malice was proved. The instruction permitted the jury to base a finding of malice on a presumption when they had before them evidence of surrounding circumstances tending to show that defendant was not actuated by malice. To permit the jury to infer malice from the use of a deadly weapon under the circumstances

was to deprive defendant of the benefit of evidence implying that the homicide was accidental. It has been announced time and again that this is not the law applicable to a case like the present one. It was held in *Vollmer v. State,* 24 Neb. 838:

"On a trial for murder in the second degree, malice can be implied only in cases where the killing alone is shown. Where, in such a trial, the evidence showed all the circumstances connected with the killing by the testimony of the eye-witness, it was held to be error for the court to instruct the jury that, where the fact of killing was established, without any excuse or explanatory circumstances, malice was presumed and the crime would be murder in the second degree."

In discussing this rule it was said in a later case:

"The presumption as to the motive of the homicide which the law derives from the mere act of killing arises from the necessity of the case. It is a presumption of fact. If the fact of the killing is proved, and none of the circumstances surrounding the act are shown, the existence of a motive and purpose to kill unlawfully is presumed, until the contrary appears; but, if the circumstances of killing are shown, then no presumption obtains. The motives actuating the defendant are to be derived by the jury from the circumstances surrounding his act." *Lucas v. State,* 78 Neb. 454.

Later opinions are to the same effect: *Kennison v. State,* 80 Neb. 688; *Flege v. State,* 90 Neb. 390.

Since the presumption of malice falls when eye-witnesses testify to the circumstances surrounding the homicide, the instruction under consideration cannot be justified by assuming that the facts were not all told. The error affected a fundamental right of defendant. He was deprived of the benefit of both law and evidence which protect other defendants similarly jeopardized. To hold in the reviewing court that defendant was not prejudiced would be to decide in a proceeding in error an issue of fact within the exclusive province of the jury. The conviction cannot be per-

mitted to stand. On account of the erroneous instruction, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Homicide, 30 C. J. p. 346, sec. 599.

MARY WOLCOTT, APPELLANT, V. MERRITT DRUG STORES ET AL., APPELLEES.

FILED MAY 8, 1924. No. 22628.

Pleading: MISJOINDER. Where a petition jointly charges several defendants with wrongful and unlawful acts, a demurrer to the petition should be sustained on the ground of a misjoinder of causes of action unless concert of action among the several defendants is pleaded.

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

Francis A. Mulfinger, Robert J. Webb and *Lawrence W. Rice,* for appellant.

Isidor Ziegler and *James E. Rait, contra.*

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

DEAN, J.

Austin and Mary Wolcott are husband and wife. They reside at Omaha, where Mr. Wolcott is engaged in the tailoring business. Mrs. Wolcott, plaintiff herein, sued to recover damages from the Merritt Drug Stores, a corporation, and Adolph Merritt, Jesse Merritt and Joseph Merritt, and Dr. F. A. Edwards, a licensed, practising physician and surgeon, on the alleged ground that defendants wrongfully and unlawfully sold to her husband certain deleterious drugs, namely, "drugs commonly known as morphine and opium or coca leaves, their salts, derivatives and preparations thereof," sometimes with and sometimes without pre-

scriptions therefor; and at times without labeling the boxes so as to reveal the nature of their contents and the amounts therein contained. Plaintiff alleges generally that her husband, by reason of defendant's unlawful sale and delivery to him of the drugs in question, thereby formed the "drug habit."

Each defendant demurred separately and in each demurrer it is charged, *inter alia,* that there is a misjoinder of causes of action. The demurrers were sustained. Plaintiff refused to plead further and the action was thereupon dismissed as to all defendants. On the theory that the court erred in its ruling, plaintiff has brought the record here for review.

The judgment of the trial court must be sustained. Counsel had the right to ask for and to obtain leave to file separate petitions against each of the defendants, but failed to avail themselves of the opportunity which was theirs under the law and the rules of practice. There is nothing pleaded which charges concert of action among the defendants. And it is clear that, unless such concert of action is shown, one defendant cannot be held for the unlawful act of another. The rule is that, where a petition jointly charges several defendants with the commission of an unlawful act, a demurrer to the petition should be sustained on the ground of an improper joinder of causes of action unless concert of action among the several defendants is pleaded.

The judgment is

AFFIRMED.

Note—See Pleading, 31 Cyc. p. 104.

ISRAEL PEARLMAN, APPELLEE, V. JOHN N. SNITZER, APPELLANT.

FILED MAY 8, 1924. No. 22678.

1. Trial: MOTIONS FOR DIRECTION OF VERDICT. When the evidence of the parties in a law action has been submitted to the jury and each party moves for a directed verdict, this constitutes a sub-

mission of the case both as to fact and law to the trial court for decision.

2. **Principal and Agent:** DUTY OF AGENT. The law imposes upon an agent the duty of disclosing to his principal every material fact known to him which is the subject of the agency.
3. **Brokers:** COMMISSIONS. Where an agent for the sale of real estate to another withholds from his principal material facts pertaining to the sale of the property, such conduct renders the contract voidable and the agent cannot recover any commission.
4. **Interest:** MONEY WRONGFULLY WITHHELD. Where an agent wrongfully withholds money belonging to his principal, such agent is chargeable with interest at the rate of 7 per cent. per annum for the time the money was so withheld.

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

Charles W. Haller, for appellant.

Will H. Thompson & Son, contra.

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

DEAN, J.

It appears that plaintiff died since this action was appealed to this court. Therefore, on application of plaintiff's estate, it is ordered that the action be and it hereby is revived in the name of William Pearlman, administrator.

On and before November 4, 1914, plaintiff's decedent owned a house and lot in Omaha which he was desirous of selling. The plea is that defendant, while acting as agent under a verbal authority to procure a buyer, fraudulently induced Mr. Pearlman to sign an agency contract for the sale of the property, and that, when it was sold, he withheld $500 of the purchase price as his commission notwithstanding the fraud.

This action was brought to recover the money so withheld. When the evidence was submitted both parties moved for a directed verdict. This submitted

the case both as to fact and law to the trial judge for decision. The court, pursuant to the foregoing motions, discharged the jury and rendered judgment for plaintiff, from which defendant has appealed. A cross-appeal was filed by plaintiff from the court's disallowance of 7 per cent. interest from the date when defendant obtained the money in question until the date of the judgment.

The parties rely on section 2456, Comp. St. 1922, which provides:

"Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent."

This statute was enacted in 1897 to meet the pressing need of real estate owners for protection against such persons as might pretend to have a verbal contract for the sale of the lands of such owners and who would not hesitate to attempt to uphold such contract by the presentation of false testimony. In brief the object of the act is to protect a real estate owner from the fictitious claim of a person who, without the owner's authority, might claim to be entitled to a commission as a selling agent. It is obvious that this meritorious act cannot be invoked for the enforcement of a contract if it is shown that fraud inheres therein.

The written contract in suit is dated November 4, 1914, and, by its terms, plaintiff gave to defendant an exclusive agency to sell the property within five days for $8,500 net to plaintiff, defendant to receive, as his commission for the sale, all that was realized over that sum. Immediately following plaintiff's signature, the contract concludes with these words: "I accept the above agency and agree to use my best efforts to obtain a purchaser under the same. John N. Snitzer, Agent."

Just before defendant signed the contract he told plaintiff,

in answer to a direct inquiry, that he had not yet obtained a customer. But the answer did not reflect the fact. He had already obtained a customer, who had agreed to purchase the property for $9,000. Subsequently, upon consummation of the sale at that price, and within the specified five days, the purchaser paid to plaintiff's agent, defendant herein, as a part of the purchase price, the $500 which is in controversy here.

Defendant contends that he withheld the money from plaintiff on the alleged ground that he is entitled thereto as his commission pursuant to the terms of the contract. He seeks to justify his conduct on the theory that he was not plaintiff's agent until the written contract was signed by the parties, and that he was not therefore bound to disclose to his principal the $9,000 offer which he had already obtained for his property.

The contention cannot be upheld under any theory known to the law of real estate agency as it exists in Nebraska. In passing it may be noted incidentally, and only so, that the regular agency commission on a sale of real estate for $9,000, as disclosed by the record, is 5 per cent. on the first $5,000 and 2½ per cent. on the remainder. So that it plainly appears that plaintiff's commission would amount to $350 if the transaction was lawful and regular in all other respects. It is therefore apparent that on the face of the record defendant's gain would approximate $150 over the regular commission if he should be permitted to retain the $500 which he withheld. But this is only incidental to the main inquiry.

That defendant was plaintiff's agent, under a verbal contract, to procure a purchaser for the property plainly appears. The relationship between the parties, even before the written contract was executed, clearly constituted an agency. That is to say, defendant obtained plaintiff's confidence and was entrusted with his business. He was authorized to act for him and in his place. It follows that he owed to his principal the utmost good faith in all that he did. It is elementary that the law imposes upon an agent

the duty of disclosing to his principal every material fact in the transaction which is the subject of the agency. But defendant did not fulfil this fundamental requirement. Before his principal signed the contract defendant withheld from him the material fact, upon inquiry, that he had already obtained a purchaser and also all knowledge of the price which the purchaser agreed to pay. In view of the relationship between the parties this showed bad faith. And so the transaction, on defendant's part, was fraudulent from its inception.

True, under section 2456, Comp. St. 1922, defendant could not have collected a commission from plaintiff unless he first obtained from him a contract in writing which described the property and fixed the compensation. But defendant's concealment of one or more material facts, which he was in good faith bound to disclose, with or without inquiry, tainted the transaction with fraud. Hence, under the familiar rule that fraud vitiates the validity of every contract into which it enters, it follows that the contract in suit is unenforceable. The vitally controlling point is that defendant, as plaintiff's agent, failed to disclose to his principal all material facts, which in law and in good conscience he was bound to disclose.

Of course defendant would have been clearly within his rights if he had merely withheld knowledge of the identity of the proposed purchaser. But that is not the case before us and this feature need not be further noticed.

In an opinion by Commissioner Ryan this salutary rule was announced: "A commission cannot be collected by the agent for his services as such if he has wilfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency." *Jansen v. Williams*, 36 Neb. 869.

In *Stewart v. Wyoming Cattle Ranche Co.*, 128 U. S. 383, the supreme court of the United States said: "Although silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation, yet concealment or suppression by either party to a contract of sale, with

intent to deceive, of a material fact which he is in good faith bound to disclose, is evidence of, and equivalent to, a false representation." In the body of the opinion, at page 388, the court said that the concealment or suppression of a material fact "is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party."

The judgment, as it now stands, draws interest from the date when it was rendered in the district court at 7 per cent. per annum. But the court refused to allow interest to plaintiff from the date when defendant withheld the money, which unlawfully came into his possession, until the date of the judgment. We think this was error. The money was from the first unlawfully withheld. Plaintiff is therefore entitled to interest at the rate of 7 per cent. per annum from the date when defendant received it, in addition to the interest allowed by the court. It is therefore ordered that the interest so omitted, be added to the judgment. Section 2837, Comp. St. 1922.

Except as to the above mentioned disallowance of interest, the judgment is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

Note—See Agency, 2 C. J. p. 714, sec. 369; Brokers, 9 C. J. p. 567, sec. 67; Interest, 33 C. J. p. 202, sec. 58; Trial, 38 Cyc. p. 1583.

FARLEY & LOETSCHER MANUFACTURING COMPANY, APPELLANT, V. METHODIST EPISCOPAL CHURCH ET AL., APPELLEES.

FILED MAY 8, 1924. No. 22747.

Mechanics' Liens: SUBCONTRACTORS. "A subcontractor who furnishes materials for a building, and whose contract is with the contractor alone, cannot acquire a lien under the statute for material that was neither used in the construction of said building, nor delivered on the premises for such use." *Ashford v. Iowa & Minnesota Lumber Co.*, 81 Neb. 561.

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

Kennedy, Holland, De Lacy & McLaughlin, for appellant.

A. R. Davis, contra.

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

DAY, J.

The plaintiff brought this action against the Methodist Episcopal Church of Allen, Nebraska, and others, to foreclose a mechanic's lien upon the church property. From a decree in favor of the defendants, the plaintiff appeals.

It appears that on September 10, 1917, the board of trustees of the church society entered into a contract with R. G. Roberts, a contractor and builder, to furnish the materials and do the work in the construction of a church building for a sum named in the contract; said building to be constructed in accordance with plans and specifications adopted by the board of trustees. On the same day the plaintiff entered into a contract with Roberts to furnish the mill-work in the construction of the church building, for the sum of $1,529. Pursuant to this contract the plaintiff shipped certain items of material to Roberts on September 26, 1917, February 13, 1918, February 27, 1918, March 23, 1918, and October 9, 1918. The last shipment contained two window frames, a box of glass and a few window stops. The lien upon which the action is founded was filed November 14, 1918, so that the shipment of October 9, 1918, becomes a controlling factor in the case. This last shipment was sent by express, consigned to Roberts, and arrived at Allen on October 11. Roberts refused to accept the consignment, and later the material was sent to Omaha by direction of the plaintiff. The record further shows that no contractual relations existed between the plaintiff and the church society or its board of trustees.

Our mechanics' lien law gives to a subcontractor the right

to a lien in cases falling within its terms, but requires such subcontractor to file his claim for a lien within 60 days from the furnishing of the last item of material, or the performing of the last labor. From the foregoing statement it is clear that, unless October 9, 1918, can be considered as the last date of furnishing material, the plaintiff's lien was not filed within the time prescribed by our statute.

The items of this last shipment were never delivered to Roberts, or to the church or its board of trustees. They were never delivered on the church premises, and in fact were never out of the possession of the express company. Under these facts the case falls clearly within the rule announced in *Ashford v. Iowa & Minnesota Lumber Co.*, 81 Neb. 561, wherein it was held: "A subcontractor who furnishes materials for a building, and whose contract is with the contractor alone, cannot acquire a lien under the statute for material that was neither used in the construction of said building, nor delivered on the premises for such use."

The record shows that Roberts had complied with the terms of his contract, and a full settlement was made with him by the board of trustees on August 22, 1918, without any knowledge that the plaintiff had not been paid.

From what has been said, it follows that the shipment of October 9, 1918, cannot be considered as a basis for the plaintiff's lien. The judgment of the district court was right, and it is

AFFIRMED.

Note—See Mechanics' Liens, 27 Cyc. p. 46.

FARMERS STATE BANK OF CROOKSTON, APPELLANT, V. MARGARET CAVANAUGH, APPELLEE.

FILED MAY 8, 1924. No. 22749.

1. Trial: RIGHT TO OPEN AND CLOSE. Where a defendant in his answer admits the plaintiff's cause of action, but sets up new matter as a defense, which defense would fail without proof thereof, the defendant is entitled to open and close the case.

2. Evidence examined, and *held* sufficient to support the verdict and judgment of the trial court.

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

James C. Quigley, Louis K. Travis and *Allen G. Fisher,* for appellant.

James J. Harrington and *John M. Tucker, contra.*

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

DAY, J.

Action by plaintiff against defendants to recover a balance claimed to be due upon a promissory note alleged to have been executed by defendants Margaret Cavanaugh and Albert Nollett. The record presents only the issue between the plaintiff and the defendant Margaret Cavanaugh, who will be referred to hereinafter as defendant. The answer of the defendant admitted that she signed the note in question, but pleaded that her signature thereto was obtained by fraud and deceit practiced upon her by the plaintiff, the details of which were fully set forth in the answer. The trial resulted in a verdict and judgment in favor of the defendant. Plaintiff appeals.

It is first urged by the plaintiff that the evidence is not sufficient to support the judgment. The record shows that Albert Nollett was the son-in-law of the defendant; that he had become indebted to the plaintiff bank in an amount more than the bank was authorized to loan to any one individual. The plaintiff was desirous of having the indebtedness reduced.

It is the claim of the plaintiff that the note in question was given by the defendant to reduce the amount of Nollett's indebtedness to the bank, and that eight shares of stock in the bank held by defendant were assigned to the bank as security for the defendant's note.

It was the defendant's theory, supported by evidence, that she assigned the shares of stock as security for the indebtedness of her son-in-law; that when she signed the papers at the bank she did not have her glasses, and was unable to read; that she did not know and was not told that among the papers she signed was the promissory note in question; and that she was told that the paper she signed was merely an assignment of the shares of stock.

A great deal of testimony was taken by both sides, tending to support their respective theories, and many circumstances were referred to which tended to corroborate each theory. It would serve no useful purpose to enter into a discussion of the evidence. Suffice it to say that there was a clear dispute between the parties which presented a question for the jury's determination.

It is next urged by plaintiff that the court erred in granting to the defendant the right to open and close the case. It is well settled that where the defendant in his answer admits the plaintiff's cause of action, but sets up new matter as a defense, which defense would fail without proof thereof, the defendant is entitled to open and close. *Suiter v. Park Nat. Bank*, 35 Neb. 372. Upon the trial the defendant moved to be permitted to have the opening and closing, both in evidence and argument, "for the reason that the defendant, Margaret Cavanaugh, admits the execution and delivery of the note involved in this case." A fair interpretation of the defendant's answer, especially in view of the interpretation placed thereon by the defendant, indicates that it was in the nature of a confession and avoidance. We think the court did not err in permitting the defendant to open and close the case.

The plaintiff also urged that certain remarks made by defendant's counsel in his argument to the jury were prejudicial. The remarks in question referred to familiar passages of scripture, and apparently were made in response to the argument of the plaintiff. It does not appear that any exception was taken to the argument at the time it was made, the objection first appearing in the affidavits

in support of the motion for new trial. In our opinion, under the circumstances, these remarks of counsel were not prejudicial.

The plaintiff also complains of the giving of instruction No. 4. We have examined the instruction, and conclude that it fairly submits the issue to the jury.

Upon an examination of the entire record, we find no prejudicial error in the trial. The judgment of the district court is, therefore,

AFFIRMED.

Note—See Trial, 38 Cyc. p. 1300.

JAMES S. WILSON, APPELLANT, V. EDWARD F. BERGMANN, APPELLEE.

FILED MAY 8, 1924. No. 23415.

1. **Specific Performance.** Specific performance is not generally a legal right, but is directed to the sound legal discretion of the court, and it will not be granted where its enforcement would be inequitable.
2. ———: DENIAL. Evidence examined, and *held* that the decree denying specific performance was properly rendered.

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

William G. Rutledge and *W. W. Wilson,* for appellant.

Kelligar & Ferneau, R. F. Neal, and *E. F. Armstrong, contra.*

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

DAY, J.

The plaintiff, James S. Wilson, vendor, brought this action against Edward F. Bergmann, vendee, for specific performance of a contract for the sale of 80 acres of land. The trial court denied specific performance, but required the defendant to pay to the plaintiff $890, being the amount

expended by the plaintiff in placing himself in position to perform the contract. Plaintiff appeals.

The record shows that on August 31, 1921, the parties to this action signed the written contract upon which this suit is founded, wherein the plaintiff agreed to sell and the defendant agreed to purchase the land specifically described in the contract. By the terms of the contract the defendant agreed to pay $22,000 for the land, payable as follows: $1,000 upon the execution of the contract; $11,000 on March 1, 1922; and to assume a mortgage then upon the land for $10,000. The contract provided that a deed was to be executed forthwith and delivered in escrow to a certain bank where settlement was to be made on March 1, 1922, at which time the deed was to be delivered and possession given to the defendant. The third day following the signing of the contract the defendant notified the plaintiff that he could not perform the contract, and that he rescinded the same. Defendant also stopped payment of the check he had given to plaintiff as the initial payment on the contract. Thereafter the plaintiff completed the abstract, paid the taxes on the land, paid the interest on the $10,000 mortgage up to March 1, 1922, and on that date went to the bank prepared to perform the conditions of the contract on his part. Defendant failed to appear. The following day the plaintiff commenced this action.

By way of defense the defendant pleaded his lack of business experience; his mental incapacity to understand and appreciate the full purport of the contract; that plaintiff and his agent misrepresented the value of the land; that they unduly influenced him to enter into the contract; that under all the circumstances the contract is unfair, inequitable, and unjust; and that performance thereof would cause him to lose all his property, including a quarter section of land given to him by his father.

The trial court found that the defendant voluntarily and understandingly entered into the contract; that there was no fraud or misrepresentations practiced by the plaintiff or his agent in procuring the contract; and that the land

was worth not to exceed $250 an acre at the time the contract was signed; and that the performance of the contract at the price agreed upon, $275 an acre, would be so great a burden and hardship upon the defendant that a decree of specific performance would be inequitable. The court also found that the plaintiff had paid $450 to the tenant upon the land to obtain his consent to surrender his lease upon the premises, and the further sum of $440 to his agent for making the sale.

Upon these findings the decree of the court denied specific performance, and required the defendant to pay to the plaintiff $890, with interest. It is quite evident that the intention of the trial court was to place the parties *in statu quo,* as nearly as could be done.

The record shows that the defendant was a young man, under 23 years of age, with but little education, and with very limited business experience. Notwithstanding the wish of his father to the contrary, he quit school at the age of 15, at which time he had reached the seventh grade. He could read with difficulty; he could not compute interest; his perceptions were dull. After leaving school he worked on a farm for a neighbor until he reached his majority, his father claiming his wages during that period. On becoming of age his father gave him a quarter section of land which adjoined the 80 acres now in controversy. This action on the part of the father was prompted by a desire to treat all his children alike, as he had given the same amount of land to his other children. His father testified that "he was awful easy;" that the "things he bought, he paid two prices for;" and that he was trustful of others. It also appears that the defendant was contemplating marriage, and as his land had no house upon it, he readily entered into negotiations for the purchase of the 80 acres in question, as there was a small house thereon.

It further appears that, a few days prior to the date of the signing of the contract now in issue, the agent of the plaintiff had procured from the defendant a contract to purchase this same land upon the same terms. At that time

defendant gave his check for $1,000 as part of the purchase price. This check was drawn upon a bank other than the one upon which the check in the present action was drawn, and in which bank defendant had insufficient funds to pay the check. The next day the defendant went to the agent and informed him that he could not go on with the contract; that his father was opposed to it; and that he could not pay it. The agent told him that it would be all right so far as he was concerned, but that it would be necessary to see the plaintiff. Thereupon the agent took the defendant to the plaintiff, who declined to release the defendant from the contract. After some conversation the parties went to an attorney's office, had a formal contract drawn up and signed, and a new check was given. The first contract and the first check were then destroyed. At the time of signing the check the defendant stated that he did not have the money. After signing the second contract and check, the defendant went immediately to the home of his banker, it being after business hours, and told him what he had done. At that time he was very excited and nervous, and was crying, and stated that "they had talked him into it."

Upon the question of the value of the land the plaintiff's agent admits that he told the defendant that it was worth $275 an acre. The weight of the testimony on behalf of the plaintiff was to the effect that the land was worth $250 an acre. The defendant's testimony indicated that it was worth $150 an acre. The trial court found that it was not worth more than $250 an acre.

Upon an examination of the record *de novo,* we are quite convinced that on account of the mental weakness of the defendant, his lack of business experience, his want of knowledge of the value of the land, he was unduly influenced to enter into the contract, and that he did not exercise a deliberate judgment concerning his own interests. It is quite apparent that he did not want to make the contract, but in the presence of the plaintiff and his agent he seemed to readily acquiesce in their suggestions.

While, generally speaking, a court of equity cannot un-

dertake to inquire into and measure the difference in the business sagacity of men in their dealings, yet it is obvious that mental weakness, although not sufficient to show an absolute disqualification, is a very important circumstance in determining whether a contract has been obtained through fraud, imposition, or undue influence, and when the contract is of such a nature as to justify the conclusion that a party has been imposed upon by cunning, artifice, or undue influence, a court of equity will not hesitate to set the contract aside. *Clough v. Adams,* 71 Ia. 17; Story, Equity Jurisprudence (4th ed.) sec. 337; *Meyer v. Fishburn,* 65 Neb. 626. It is also established that specific performance will be denied upon less proof than is required to set aside a contract. In *Edmiston v. Hupp,* 98 Neb. 84, it was held: "Specific performance is not generally a legal right, but is directed to the sound discretion of the court, and it will not be granted where its enforcement would be unjust." The same principle is announced in *Goodall v. Swartsley,* 108 Neb. 753; *Simmons v. Baker,* 109 Neb. 853. The circumstances presented by the record are such as to fully warrant a court of equity in denying specific performance of the contract.

The judgment of the district court is

AFFIRMED.

Note—See Specific Performance, 36 Cyc. pp. 548, 550, 784 (1925 Ann.).

RAY MEYERS V. STATE OF NEBRASKA.

FILED MAY 8, 1924. No. 23783.

1. **Criminal Law:** EVIDENCE: ADMISSIBILITY. Where a witness in a criminal case has been previously examined in open court, with the opportunity for cross-examination, and such witness cannot be procured for examination upon a second trial of the same case, the evidence so given upon the former trial may be used on the second trial.

2. ———: ABSENT WITNESS: SHOWING. In such case, it must

affirmatively appear that the personal attendance of the witness at the trial cannot be had.

3. ———: ———: ———: DISCRETION OF COURT. Whether a sufficient showing has been made that the personal attendance of a witness who had testified upon a former trial could not be procured rests in the sound discretion of the trial court, and his ruling thereon will not be interfered with upon appeal, unless an abuse of such discretion affirmatively appears.

4. ———: ———: OATH: PRESUMPTION. Proof that an absent witness was a witness upon a former trial, and gave testimony therein, justifies the inference that such witness was duly sworn as such.

5. **Witnesses:** IMPEACHMENT. Before a witness, not a party to the suit, can be impeached by proof that he has made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he has ever made such statements.

6. **Evidence** examined, and *held* sufficient to sustain the verdict and judgment of the trial court.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

R. C. James and *John C. Mullen,* for plaintiff in error.

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

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

DAY, J.

Ray Meyers, the defendant, was convicted in the district court for Richardson county, upon a charge of unlawfully selling intoxicating liquor to one A. C. Nolan. It being his second offense, he was sentenced to 90 days in the county jail. To reverse this judgment, he has brought the record of his conviction to this court for review.

The complaint was originally filed before a justice of the peace. A trial was had on April 14, 1923, wherein the defendant was found guilty, and sentenced to 90 days in the

county jail. From the judgment in the justice court, defendant appealed to the district court.

It appears that upon the trial before the justice of the peace, the principal witnesses as to the sale of intoxicating liquors by the defendant were A. C. Nolan and L. R. Friend. Nolan testified to the actual purchase of the intoxicating liquors from the defendant. Friend testified to circumstances strongly corroborating Nolan. Among other things, Friend testified that when Nolan entered the defendant's house he had no liquor in his possession; that when he came out he had the bottles of liquor in his possession, which a moment later were seized by the officers, when Nolan and Friend were arrested in front of defendant's house. When the case was reached for trial in the district court, Nolan and Friend could not be found and their whereabouts were unknown. Under these circumstances, upon proof being offered that Nolan and Friend could not be found, the trial court permitted Charles Fellers, a police officer, A. R. Young, sheriff of Richardson county, A. S. Smith, deputy sheriff, and John D. Spragins, the justice of the peace before whom the defendant was tried, all of whom were present at the trial, to testify concerning the testimony given by Nolan and Friend before the justice of the peace.

It is urged by the defendant that the court erred in permitting the above named witnesses to testify on behalf of the state. The rule is well settled in this state that where a witness in a criminal case has been previously examined in open court, with the opportunity for cross-examination, and such witness cannot be procured for examination upon a second trial of the same case, the evidence so given upon the former trial may be used on the second trial. In considering a case involving this principle, in *Koenigstein v. State,* 103 Neb. 580, the court used this language: "When a witness has been previously examined in open court with the opportunity for cross-examination, which has been fully availed of, and the witness cannot be procured for examination at the second trial, the evidence so given upon a

former trial for the same offense may be used on the second trial." This statement of the law was entirely correct in view of the facts in the case then under consideration. The phrase, "which has been fully availed of," in the above quotation was not intended to be a necessary element to be established before evidence otherwise competent could be introduced. The admissibility of evidence of this character does not turn upon the point whether the party cross-examined the witness. An oportunity for cross-examination is all that the law requires. The cross-examination may be waived by the party. The record here is silent as to whether the defendant upon the first trial was represented by counsel, or whether he examined the witnesses Nolan and Friend upon that occasion. The defendant was present, however, and testified in his own behalf. In the absence of a showing that he was denied an opportunity to cross-examine the witnesses, it will be presumed that he had such opportunity.

The defendant makes the further objection that the record does not sufficiently show that the personal attendance of Nolan and Friend at the trial could not be had. The record shows, however, that Friend had left the state; that he wrote a letter from Powhattan, Kansas, stating that he would return when wanted; that shortly before the case was reached for trial the officers communicated with his relatives at Powhattan, and ascertained that he had left there, and that his address was unknown. Other efforts to locate Friend were unavailing. The record shows that Nolan left in the nighttime, a few days prior to the sitting of the court; that the circumstances surrounding his flight indicated that he did not intend to return; that he was traced as far as Omaha; that telegraph and telephone messages to places where he might reasonably be expected to go failed to reveal his whereabouts. We think this showing was sufficient to warrant the court in permitting the witnesses to testify. Whether a sufficient showing was made to permit the use of secondary evidence was a matter largely within the discretion of the trial court, and its rul-

ing will not be interfered with upon an appeal, unless an abuse of discretion is affirmatively shown. *Koenigstein v. State,* 103 Neb. 580.

It is next urged that the court erred in permitting the evidence of the several witnesses, above named, to go to the jury, because it was not shown that Nolan and Friend were sworn before testifying in the justice court. It may well be doubted whether the objections urged at the time the evidence was offered were broad enough to challenge the attention of the trial court to the question now raised. While it is true that no witnesses testified that Nolan and Friend were sworn before giving their testimony in the justice court, we are of the view that the record is sufficient to justify the inference that they were duly sworn. The witnesses called in the district court on this phase of the case testified that they "heard the testimony" given by Nolan and Friend before the justice; that Nolan and Friend "testified" as related by the witnesses. The terms "testimony" and "testified" refer to statements made under oath in a legal proceeding. In *Poe v. State,* 95 Ark. 172, it was held: "Proof that an absent witness was a witness at the examining trial and gave testimony therein justifies the inference that such witness was duly sworn as such." No one testified that the witnesses Nolan and Friend were not sworn before testifying in the justice court.

The defendant further contends that the court erred in excluding the testimony of John Jones. The defendant offered to prove by this witness that after the trial in justice court Nolan told Jones that he did not buy the liquor from the defendant. The ruling of the court in excluding this testimony was based upon the theory that no proper foundation had been laid to impeach Nolan's testimony. The rule is stated in *Mattox v. United States,* 156 U. S. 237, as follows: "Before a witness can be impeached by proof that he has made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he has ever made such statements." No effort was

made to lay a foundation for the introduction of Jones's testimony. Under this rule, the action of the trial court was clearly right. A valuable discussion involving this rule may be found in *Mattox v. United States,* 156 U. S. 237.

Other objections are urged by the defendant relating to the introduction of other evidence, and the instructions of the court, which we have considered. We deem it unnecessary to prolong this opinion with a discussion of these objections. In our opinion the rulings of the court in this regard were not prejudicial to the defendant's rights. The question of the sufficiency of the evidence was wholly for the consideration of the jury.

Upon the entire record, we find no reversible error, and the judgment is, therefore,

AFFIRMED.

Note—See Criminal Law, 16 C. J. p. 757, sec. 1557; 17 C. J. p. 240, sec. 3581—Witnesses, 40 Cyc. p. 2719.

SAM BERKOVITZ, APPELLANT, V. MORTON-GREGSON COMPANY ET AL., APPELLEES.

FILED MAY 8, 1924. No. 22730.

1. **Principal and Agent: LIABILITY OF PRINCIPAL: ESTOPPEL.** Where one, who is acting as a salesman and collecting agent for his principal, and, without the knowledge or consent of the latter, fraudulently alters and raises footings or totals on the statements of account sent him for collection, and presents such altered statements to and collects from the debtor more than is due his principal, and, without the knowledge, consent or authority of his principal, uses the excess so collected to settle claims for shortage or spoilage of other customers of his principal, in the absence of a showing that the claims so settled were just charges against the principal, the latter cannot be said to have received and retained the benefits of the fraudulent conduct of his agent, and to be thereby estopped from denying liability to the principal's debtor for the fraudulent conduct of the agent.

2. ———: ———. M.-G. Co., engaged in the packing industry at Nebraska City, Nebraska, employed K. as its salesman and col-

lector for the city of Omaha. K. obtained orders for merchandise from B. and mailed them to his principal. The latter filled and shipped the orders to B., and at the same time mailed to him the invoice for each order filled, showing the amount due for such order. The account was payable weekly, and at the end of each week M.-G. Co. prepared and mailed to K. a correct statement of B.'s account for the week. K. fraudulently altered the footings or totals of the statements to show larger amounts than were actually due, which he presented to and collected from B. In an action by B. against M.-G. Co. to recover the amount of the excess collections so made, *held*, that K., in presenting the altered statements of account, was acting in the line of his employment and within the apparent scope of his authority, and that M.-G. Co. is liable to B. for his loss occasioned by the fraud of K.

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

Harry Fischer, W. H. Hatteroth and *J. Gerald Mac Veigh,* for appellant.

Montgomery, Hall & Young, Gaines, Van Orsdel & Gaines and *H. M. Johnsen, contra.*

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

GOOD, J.

Sam Berkovitz, the plaintiff, brought this action against Morton-Gregson Company, B. F. Kleeberger and the State Bank of Omaha, to recover payments made in excess of amounts due on accounts of Morton-Gregson Company against plaintiff for merchandise. Trial was had to the court without a jury, resulting in a judgment for plaintiff as against Kleeberger, and in favor of defendants, Morton-Gregson Company and State Bank of Omaha. Plaintiff appeals. The case presented in this court involves only the liability of Morton-Gregson Company to plaintiff.

At the time of the transactions, out of which this controversy arises, plaintiff operated a retail meat-market in Omaha, Nebraska, and Morton-Gregson Company was engaged in the meat-packing industry at Nebraska City, Ne-

braska. The packing company employed Kleeberger as its salesman and collector for the Omaha territory. In the course of his employment as salesman, Kleeberger called upon the plaintiff and took several orders each week for merchandise which were forwarded to his principal at Nebraska City. These orders were filled and shipped to plaintiff, and an invoice for each order filled was mailed to plaintiff. The accounts for the merchandise thus sold were payable weekly. At the end of each week, Morton-Gregson Company prepared and sent to Kleeberger a statement of plaintiff's account. On the following Monday morning Kleeberger would call upon the plaintiff and collect the amount due. The amounts so collected were deposited in the Omaha National Bank to the credit of Morton-Gregson Company. This company had provided Kleeberger with a rubber stamp, as follows: "Pay to Omaha National Bank, Omaha, Neb., or order. Morton-Gregson Co., Nebraska City, Neb. 208," which he was required to stamp upon the back of the checks that were payable to Morton-Gregson Company. Plaintiff paid the accounts as presented by checks drawn on his account in the First National Bank and made payable to Morton-Gregson Company.

In January, 1918, Kleeberger began the practice of altering the statements of accounts against the plaintiff by changing the footings or totals of the accounts, so as to show a much larger amount than was actually due. Plaintiff did not check up these statements, but accepted them as correct and drew his checks therefor. When Kleeberger began this practice, he did not deposit these checks to the credit of the Morton-Gregson Company in the Omaha National Bank, but indorsed on them the name of Morton-Gregson Company, per B. F. Kleeberger, and deposited them in his private account in the State Bank of Omaha. He would then draw a check upon his own account, payable to Morton-Gregson Company, for the amount actually due the company and deposit this check in the Omaha National Bank to the credit of Morton-Gregson Company. This practice continued for more than two years before it was dis-

covered. The amounts so paid by plaintiff to Kleeberger in excess of the amounts due Morton-Gregson Company amounted in the aggregate to nearly $3,000.

Kleeberger was called as a witness in behalf of defendants and admitted his fraudulent conduct, and that he had raised the footings of the statements without any authority from his principal. On cross-examination he claimed that he did not personally profit by his perfidy; that he used the excess collections received from plaintiff in adjusting claims of other customers of Morton-Gregson Company for shortage, spoilage, etc. Such claims, however, were not submitted to his principal for adjustment, and Morton-Gregson Company had no knowledge either of the excess collections at the time they were made, or that Kleeberger was adjusting claims of customers for alleged shortage, spoilage, etc.; nor had the company authorized him to make such adjustments.

Plaintiff contends that Morton-Gregson Company is liable to him for the excess collections upon two grounds: (1) That the acts of Kleeberger in presenting the altered and raised statements of account and in making the excess collections were within the apparent scope of his employment; and (2) that the company is estopped to deny liability, since the excess collections were used in discharging claims of other customers against it.

So far as the latter claim is concerned, we think it wholly devoid of merit. Kleeberger was not authorized to adjust any claims for shortage, spoilage, or any other kind of claim, against his principal. Whether these claims were just or unjust is not shown, and whether or not they would have been allowed, if they had been presented to Morton-Gregson Company, is a matter of mere speculation. Under the evidence, it does not appear that any valid or just claims against Morton-Gregson Company were paid and discharged by Kleeberger out of the excess collections. So far as appears, Morton-Gregson Company has not profited in any manner by the fraudulent acts of its agent. It has

not accepted any benefits on account thereof. No facts appear that would create an estoppel.

Whether the acts of Kleeberger in altering and raising the statements of account and collecting excessive amounts, which he appropriated to his own use, can be said to be within the ostensible or apparent scope of his authority is a more serious question. While the statements of account were correctly made out at the home office and sent to Kleeberger for collection, the latter, when he presented the altered and raised statements of account to plaintiff, was certainly acting for and on behalf of his principal, and was within the line of his employment. So far as plaintiff was concerned, Kleeberger, to all appearances, stood as the agent and representative of Morton-Gregson Company, and was acting within the apparent scope of his authority. Morton-Gregson Company was without question a reputable business concern, and plaintiff, we think, was justified in the belief that its agent was reliable and trustworthy, and was warranted in the belief that the trusted agent of the Morton-Gregson Company was presenting accurate and true statements of his account. That he relied on the statements as being accurate and true was beyond question. We think he was justified in so acting. The fraud was perpetrated by Kleeberger while acting within the apparent scope of his authority.

In *McFadden v. Lynn,* 49 Ill. App. 166, it is held: "A principal holding out an agent as having authority to represent him, and thereby asserting or impliedly admitting that the agent is worthy of trust and confidence, is bound by all his acts within the apparent scope of the employment. Hence, the principal may be held for the fraudulent acts of the agent."

In *Commercial Union Assurance Co. v. State,* 113 Ind. 331, it is held: "An insurance company must bear a loss sustained by the misconduct or disobedience of its agent, acting within the scope of his authority, rather than the assured, who has dealt fairly with him as such, without notice."

This court has held in *Bull v. Mitchell,* 47 Neb. 647, 654; "Where one of two innocent persons must suffer through the misfeasance of the agent of one, that one must suffer who has placed the agent in a position to perpetrate the fraud complained of." The rule above laid down is reaffirmed in *Rehmeyer v. Lysinger,* 109 Neb. 805.

In *Adams v. Cole,* 1 Daly (N. Y.) 147, it is said: "A general agent or clerk employed to make sales of goods and require payment therefor, who obtains payment of false bills by fraud or deceit, held, as acting within the scope of his employment, and his principal is liable for the amount thus obtained, especially where there is some evidence, however slight, that the agent paid the sum collected to his employer."

Birkett v. Postal Telegraph-Cable Co., 107 App. Div. (N. Y.) 115, is a case quite similar to the one under consideration. In that case plaintiff was accustomed to send telegrams through the Postal Telegraph Company and at the end of each month to pay the agent of the company the amount due, as shown by the statements presented by the agent. The agent padded the statements and in the course of four years collected a large sum in excess of the true amount. The agent remitted the true amount to the company, as did Kleeberger in the case under consideration. The plaintiff in the *Birkett* case had a list of the tariffs and charges of the company and might have, from an examination thereof, ascertained the amount which should have been paid, but he relied upon the accuracy of the statements as presented. The court held in that case that the agent was acting within the scope of his agency in receiving the money for the benefit of defendant, and that the defendant company was liable for the fraud perpetrated by its agent.

The case of *Wilmerding v. Postal Telegraph-Cable Co.,* 118 App. Div. (N. Y.) 685, was a similar case. In that case the plaintiff, when desiring to send a telegram, called one of defendant's messengers, who came and took the message and delivered it for transmission according to the

general practice, and the next day the messenger would present a statement on a slip of paper to the cashier of the plaintiff, who would pay the amount and take the receipted slip. Defendant's messenger forged slips and presented them to the cashier of plaintiff who paid them. In that case the court, in the course of the opinion, said (p. 687): "The question is, is the defendant responsible to the plaintiffs for the dishonesty of its messengers? It is conceded that so far as the genuine slips are concerned, made out by the defendant's agent, Morrell, in charge of its office and given by him to the messengers, they were thereby constituted the agents of the defendant for the purpose of collecting from the plaintiffs the amounts due for services rendered as appeared upon the face of such slips. * * * But the defendant claims that these messengers were not in any sense the general agents of defendant; that their employment was limited to the presentation of the genuine slips as given to them by the general agent, Morrell, and the collection of the sums called for thereby, and that when they forged slips and upon such forged slips collected and appropriated the sums apparently called for they acted independently and outside of their respective agencies, and that, therefore, the defendant is not liable for such fraudulent conduct. It seems to me that this contention is not sound; that the liability of the principal does not depend upon the general agency of the agent but upon the question whether the acts done were within the apparent scope of the authority of the agent, and that when it had clothed these messengers with the power to present slips and receive payment therefor, it is responsible for the wrongful acts of such agents committed in that kind of work. The fictitious slips were intermingled with the genuine. They were both presented by the same boys to the same assistant cashier in the same ordinary way in which the dealings between the parties had been conducted for a very considerable period of time. The plaintiffs had the right to assume that the agents of the defendant, admittedly employed by it and clothed with the power to collect

money on the presentation of slips, were honest and that the slips presented by them were genuine. * * * An employer who has put it within the power of his employee to defraud a third person by intermingling fraudulent and genuine bills and collecting money therefrom should be held responsible to an innocent third party for the dishonesty of his employee."

From a consideration of these authorities, we are constrained to hold that Kleeberger was acting within the *apparent scope* of his authority, and that his principal must be held responsible for his fraudulent conduct in raising and collecting excessive amounts from the plaintiff.

The defendant suggests that the State Bank of Omaha was not justified in cashing the checks when presented by Kleeberger, but we think that is not a matter that affects the right of plaintiff to recover in this case. If the bank was not justified in cashing the checks when presented by Kleeberger, Morton-Gregson Company may have a right of action against the bank for its negligence in cashing the checks. We are not called upon to decide that question in this case.

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

REVERSED.

Note—See Agency, 2 C. J. p. 495, sec. 115, p. 627, sec. 264.

BORIS PRED, APPELLEE, V. EMPLOYERS INDEMNITY CORPORATION, APPELLANT.

FILED MAY 8, 1924. No. 22754.

1. **Insurance:** LIABILITY: LOSS BY COLLISION. Where a policy of insurance insures the owner against loss or damage to his automobile by collision, and limits the use of the car to "any driver, pleasure or business. No commercial delivery," the insurer is liable for a loss by collision occurring when the car is being operated by one not authorized by the owner, if not at the time being used in commercial delivery.

2. ———: ———: ———. When an automobile, while being driven along the highway, is driven against an embankment alongside of and adjacent to the highway with such force as to cause it to be overturned and wrecked, the injury resulting to the car is caused by a collision, within the meaning of the terms of an insurance policy, which insures against loss or damage by "collision with another object, either moving or stationary." An embankment adjacent to the highway is an object, within the meaning of the clause quoted.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

Dressler, Neely & Morehouse, for appellant.

Monsky, Katleman & Grodinsky, contra.

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

GOOD, J.

In an action on a policy for collision insurance, plaintiff recovered a judgment for damages to his automobile, occasioned by coming in contact with an embankment at the side of a highway on which the car was being operated. Defendant appeals.

Two questions are presented for determination, both of which are dependent upon the interpretation to be placed upon the terms of the policy. Defendant denies liability on these grounds: (1) Because the collision occurred while the automobile was being operated by one who had no authority to operate it. (2) The fact that the automobile left the highway and ran into an embankment adjacent thereto did not constitute a collision, within the meaning of the terms of the policy.

Without the consent or knowledge of the plaintiff, an employee in a public garage where the automobile was stored took the car for his personal use and pleasure, and, while driving at a speed of from 30 to 40 miles an hour on the highway, came to a right-angle turn, which he was unable to negotiate and drove the car off of the highway

into a ditch or gully and against the embankment on the further side thereof. When the car struck this embankment, it turned over and was wrecked and rendered almost valueless.

The policy contains the following provision: "In consideration of * * * $129, of the statements forming a part of the policy to which this certificate is attached, and of the additional statements herein contained and subject to the terms, exclusions, conditions and agreements of the policy, * * * does hereby agree to indemnify the assured * * * against actual loss or damage to any of the automobiles herein described, including its operating equipment while attached thereto, if sustained within the period covered by this certificate, and if caused solely by accidental collision with another object, either moving or stationary; subject further to the following:" Then follow provisions excluding liability for loss or damage by fire, or while the automobile is being driven in any race or speed contest, or while being operated by any person contrary to law as to age, or by any person under the age of 16 years; also excluding loss or damage while rented to others or used to carry passengers for a consideration, or while used for towing purposes, or while used for any other purpose than that specified in the schedule. Then follows descriptive matter of the insured car, and, under the following heading, "Only purpose for which automobiles are to be used," appears the following: "Any driver, pleasure or business. No commercial delivery."

Defendant argues that, because insurance contracts are personal in their nature and character, the policy should be construed to cover the loss by collision only while being operated by the owner or by some person by him authorized; that the insurance company, in taking applications for insurance, may investigate the proposed risk, and, if it finds the car owner a careful, prudent man in the operation of the car and in the selection of persons authorized to operate it, that it may elect to accept the risk, and, on the other hand, if it finds from investigation that he is a careless driver, or is not careful and prudent in the selection

of persons authorized to drive the car, that it may decline to write the insurance.

We readily grant that the contract of insurance is personal, but we fail to see how that has any application to the situation in hand. If some other person than the one insured were seeking to recover, as, for instance, one to whom the insured had transferred the car and attempted to transfer the insurance without the consent of the company, then of course the plea that the contract was personal would be applicable; but the question presented here is whether the terms of the policy exclude liability of the company if a collision occurs while the car is being operated by an unauthorized driver. That question must be determined from the terms of the policy itself. The language therein used is "any driver." There is no limitation or restriction.

Dixon v. Western Union Telegraph Co., 68 Fed. 630, is cited and relied upon as justifying the interpretation that the words "any driver" mean any authorized driver. In that case an employee, under a statutory provision, sought to recover damages for personal injury resulting from his own acts. The statute provided that the employer "shall be liable in damages for personal injury suffered by any employee while in its service, * * * where such injury resulted from the act or omission of any person." And it was held that the statute did not impose liability upon the employer for any act or omission of the person injured. While in that case it was held that the language was sufficiently broad, in itself, to embrace every person, the court interpreted the statute as intending to deprive the employer of the defense of negligence of a coemployee or fellow servant, and, with this thought in view, it held that the statute did not authorize a recovery where the injury resulted from the act or omission of the person injured.

It is a familiar rule that, if there be any ambiguity in a provision of an insurance policy, it shall be most favorably construed in favor of the insured, and not of the insurer,

because the latter is the one that formulates and prepares the contract of insurance and dictates its terms.

We think the provision in the policy is plain and unambiguous. By its terms it insures against loss if a collision occurs while the car is being operated by any driver. To interpret the contract to mean that it does not insure against loss while the automobile is being operated by an unauthorized driver would be to read into it a provision which the parties to the contract had the power and the right to insert therein, but failed to do so. We are powerless to make a new contract for the parties, or to insert therein a provision which they did not assent to. The court can only enforce the contract actually made by the parties to it.

Defendant's argument assumes that it is liable for loss occasioned by collision only while the car is being operated, but this is not the condition stipulated for by the parties. A collision might occur while the insured car was standing still and not being operated by any person. If some other person operating a vehicle should carelessly or recklessly run into or against the insured car while it was standing still and not being operated by any one, we have no doubt that the insurer would be liable for the resulting damage.

It is earnestly urged that there was no collision, within the meaning of the terms of the policy, and that the overturning of the car was the cause of the injury to it. The evidence shows that the car first ran against the embankment at the roadside, and that the impact or collision with the embankment caused the car to overturn and be wrecked. Cases are cited which hold that injuries to cars did not result from a collision where the car fell over an embankment along the highway, and where a car skidded in loose gravel, overturned and was injured. Whatever may be said of those cases, they are not applicable to the situation in hand. It was the collision with the embankment which caused the overturning of the car and the consequent injury to it. The embankment was an object, within the meaning of that term as used in the policy. Numerous cases, quite similar to the one under consideration, have been before the courts,

and they generally accord with the conclusion here reached. These cases may be found collated in a note to *Interstate Casualty Co. v. Stewart* (208 Ala. 377) 26 A. L. R. 427, 429, and in a note to *Universal Service Co. v. American Ins. Co.* (213 Mich. 523) 14 A. L. R. 183, 188.

We find no error in the record, and the judgment is accordingly

AFFIRMED.

Note—See Motor Vehicles, 28 Cyc. p. 50 (1924 and 1925 Ann.).

FRED C. ROGERS ET AL., APPELLANTS, V. TANGIER TEMPLE, A. A. O. N. M. S., ET AL., APPELLEES.

FILED MAY 8, 1924. No. 23539.

1. Associations: ENFORCEMENT OF RULES: PROVINCE OF COURTS. A court of equity will not inquire into the regularity or validity of disciplinary proceedings by a voluntary unincorporated association, not organized for profit, against one of its members, when no civil or property right of such member will be affected.

2. ———: RIGHT OF MEMBERSHIP. The right of membership and those rights incident to it in such organizations do not flow from the common law, but from the organization agreement, and the power of the association over them is absolute, except where a civil or property right of the member is invaded.

3. ———: ———. A member has no such severable right in the funds of such an association, accruing from initiation fees, dues and assessments, as will authorize a court of equity to interfere to prevent his wrongful suspension or expulsion from the association; his remedy, if any, is at law.

4. ———: RIGHTS OF MEMBERS: PROVINCE OF COURTS. Where under the agreement of association the member is entitled to receive pecuniary benefits under certain circumstances, equity will prevent deprivation thereof except by proceedings conducted in accordance with the rules of the society, and for that purpose will inquire into such proceedings only to determine whether or not the association is acting within its jurisdiction.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

William H. Herdman and *Lawrence Fredericksen,* for appellants.

Byron G. Burbank, contra.

Heard before LETTON, ROSE, DEAN, DAY and GOOD, JJ., BLACKLEDGE and REDICK, District Judges.

REDICK, District Judge.

Action in equity to enjoin Tangier Temple from excluding plaintiffs from membership and participation in the affairs of the Temple, under an order of suspension issued by the Imperial Council claimed to be void for want of jurisdiction.

The Ancient Arabic Order of the Nobles of the Mystic Shrine is a voluntary, unincorporated association, a secret society. It is organized under the lodge system, having a supreme lodge, called the "Imperial Council," as the supreme governing body, and subordinate lodges, called "Temples," which receive their charters from the Imperial Council and are subject in every respect to the by-laws, laws and edicts of the Imperial Council, which has plenary power to suspend and erase the charter of any Temple. The Temples have power to adopt by-laws not inconsistent with the constitution and laws of the Imperial Council. Members of the order are elected by the Temple, which elects representatives to the Imperial Council. The purposes of the order are stated to be "the inculcation of charity, benevolence, tolerance and unselfish friendship." The order pays no benefits of any kind to its members, who have no severable interest in the property of the order, amounting in value to about $50,000, accumulated from entrance fees, annual dues, etc. The principal executive officer of the order and of the Imperial Council is the Imperial Potentate who is vested with power to suspend any temple or any officer of the Imperial Council or Temple until the next session of the Council, during the recess of which he has general supervision of the order and is empowered to "do all such other acts and perform all such other duties, not inconsistent with

this constitution, as, in his judgment, the interests of the order require."

Prior to November 10, 1921, complaint was made by about 75 members (called Nobles) of Tangier Temple to the Imperial Potentate concerning the conduct of some of the Nobles of the Temple, with a request that Imperial Potentate investigate; and on that date notice was sent by registered mail to the plaintiffs to attend a meeting of the Temple on November 13, 1921, to give testimony relative to certain charges filed with the Imperial Potentate, which notice was duly received by all, except Rogers, who was out of the city. On the day fixed, the Imperial Potentate attended said meeting and conducted an informal investigation of the matters complained of, calling each of the plaintiffs, except Rogers, separately before him and examining them, and examining in all about fifty Nobles. No charges were filed against the plaintiffs, and no witnesses were produced in their presence, so that the proceedings did not take the form of a trial in any sense, but were an *ex parte* investigation for the information of the Imperial Potentate. These proceedings resulted in the filing of a report by the Imperial Potentate, which was presented December 8, 1921, at the annual meeting of Tangier Temple. The report contained ten findings and an order of suspension of all of the plaintiffs until the next meeting of the Imperial Council at San Francisco in June, 1922. The report found the parties guilty of infractions of the rules of the order in two particulars: First, in the formation of a club composed of Nobles, called the Monitors Club, which was held to be illegal and in violation of section 6, article II of the code of the Imperial Council; and the second, that printed ballots had been circulated in and about Tangier Temple at the place of election by one Charles F. Hause, and various other Nobles, members of the Monitors Club, in violation of section 1, article IV of the code. It was further found that plaintiff Rogers had used vile and indecent language in referring to Illustrious Potentate Black of Tangier Temple. On these findings the order of sus-

pension was made by the Imperial Potentate, a copy of which findings and order was served upon each of the plaintiffs December 12, 1921. A complete report of these proceedings, including the evidence taken before the Imperial Potentate, was presented to the Imperial Council at its meeting in San Francisco in June, 1922, and under the rules was referred to the committee on grievances and appeals. The plaintiff Rogers appeared before the committee and was heard in his defense. The other plaintiffs made no appearance. The committee reported approving and sustaining the action of the Imperial Potentate in suspending nine members of Tangier Temple until the session of the Imperial Council, and recommended that certain Nobles be restored to full membership in Tangier Temple; that Nobles McHugh, Cole, and Hause be suspended from Tangier Temple until July 1, 1923; that Nobles Zimmerman, Bernstein, and Dobbs be suspended until July 1, 1924; and that Noble Rogers be suspended indefinitely. The report of the committee was adopted by the Imperial Council. It will be noted that the period of suspension has expired as to all plaintiffs except Zimmerman, Bernstein, Dobbs, and Rogers, who are the only plaintiffs now having an interest in the controversy. Upon trial in the district court, there was a finding and decree for the defendants, and plaintiffs appeal.

The plaintiffs present the questions for review in the following language:

"First: Is it within the power of a voluntary unincorporated fraternal association, which collects fees and dues from its members, and from the proceeds thereof has accumulated and possesses (other than ordinary lodge paraphernalia) a large amount of property and money, to suspend or expel a member thereof without (a) charges being preferred against him, (b) notice thereof to the accused, (c) opportunity afforded him to defend against same, and (d) trial; the laws of the association containing no provision so to do, but to the contrary, clearly and expressly providing otherwise; and

"Second: If such power does not exist and such sus-

pension or expulsion is void, what relief will a court of equity of this state grant to a member so suspended or expelled?"

The position of defendants is that in the absence of a civil or property right to be protected, or the infraction of a constitutional provision or state law or the public policy of the state, a court of equity will not interfere with the internal affairs of a voluntary, unincorporated organization, or inquire whether disciplinary measures taken within the order have been carried out in accordance with its rules. They further contend that the Imperial Potentate and Imperial Council acted within their powers. And it is further suggested that, inasmuch as the proceedings and orders complained of were taken and made under the authority of the Imperial Council, and not by Tangier Temple, the action should have been against the Imperial Council or its officers and members, who are not made parties.

With reference to this last point it must be conceded that it presents some serious obstacles to the granting of the relief prayed by the plaintiffs. The Temple is the creature of the Imperial Council, holding its charter at the will thereof, and its bounden obedience to a decree of this court would place it in opposition to the order of the Imperial Council, which, not being a party to this litigation, might subject the Temple to its disciplinary action. However, we have concluded to pass the point without deciding it, in view of the importance of the other questions presented to the very large membership of the order.

Regarding the second contention of defendants above noted, we do not consider a discussion thereof necessary, in view of our conclusion upon the first point, which, together with the contentions of the plaintiffs, present the single question whether the case made by the plaintiffs presents a situation within the jurisdiction of a court of equity.

It has long been established as a general principle of equity jurisprudence that jurisdiction will not be taken of controversies between individuals except to protect some civil or property right, the civil right referred to being one

which is guaranteed by Constitution, statute, or the law of the land; and the principle has many times been applied to controversies between voluntary, unincorporated associations and their members, and relief has been denied almost without exception, where the only question involved is one of discipline of its members by the society.

In *Froelich v. Musicians Mutual Benefit Ass'n,* 93 Mo. App. 383, it was said: "So long as the association remains a voluntary one the courts have no jurisdiction over it and the courts will not interpose between it and a member except for the sole purpose of protecting an interest the member may have in the property of the association."

In *State v. Georgia Medical Society,* 38 Ga. 608: "While it remained a voluntary society, the courts had no jurisdiction over it, if it violated no law of the state, and its members had no property in its membership which the law could protect."

And in *In re Sawyer,* 124 U. S. 200: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property."

See, also, *People v. Masonic Benevolent Ass'n,* 98 Ill. 635; *People v. McWeeney,* 259 Ill. 161; *Atkinson v. Doherty & Co.,* 121 Mich. 372. In *Allen v. Chicago Undertakers Ass'n,* 232 Ill. 458, it was held that equity will not enjoin the expulsion of a member from a corporation organized not for profit, and that his remedy is at law. And in *Crutcher v. Order of Railway Conductors,* 151 Mo. App. 622, it was held that, even in a case where a member was entitled to the benefit of an insurance policy and had been wrongfully expelled, equity would not interfere, and that he had a complete remedy at law upon the policy, because, if the action of the association was void, his legal rights were not affected.

Counsel for appellants has cited a number of cases which are supposed to announce a different doctrine than the one above stated, or to establish exceptions to the general rule. A few of these cases will be examined. *Jones v. State,* 28 Neb. 495, was a criminal prosecution in which the defend-

ant was charged with disturbing a religious meeting, and his guilt or innocence depended upon the solution of the question whether or not he was a member of the religious body. The church claimed that he had been expelled by resolution of the congregation, and the court held that it was necessary for the state to show an expulsion in accordance with the rules of the society, or, if there were no such rules, that "a charge must be made against him, and notice given to him to make his defense, and opportunity presented to make the same," and that, inasmuch as no such proceedings were taken, the attempted expulsion was void. It will be observed at once that the inquiry into the validity of the expulsion was necessary to protect the civil right of the defendant to his liberty or to his property in case a fine were imposed. Moreover, the question arose collaterally, and not between the member and the society. *Hall v. Supreme Lodge, K. of H.*, 24 Fed. 450, was an action at law on a benefit certificate for $2,000, and the court found the alleged suspension void, and that the heirs were entitled to recover—another case where it was necessary to inquire into the proceedings to protect a property right. From the opinion in *O'Brien v. South Omaha Live Stock Exchange*, 101 Neb. 729, appellants quote the following:

"While the disciplinary proceedings in a voluntary association are quasi-judicial in character, courts do not ordinarily interfere except to discover whether such proceedings have been conducted in good faith and in pursuance to rules and by-laws that are not obnoxious to public policy nor to the law of the land."

But in that case, which was an action at law to recover the value of the certificate of membership, the proceedings of the exchange were found to be regular, and a reversal of the judgment for the plaintiff was based upon the proposition that the plaintiff had no property right in the certificate. There was one concurring and one dissenting opinion, the latter being concurred in by the chief justice; the dissent being upon the ground that, assuming the validity of the expulsion, the certificate was a species of proper-

ty, the value of which could be recovered by the plaintiff upon his membership being severed. This case is no authority for the proposition that a court of equity would take jurisdiction in the absence of a property right to be protected.

The cases now to be examined appear to furnish the largest measure of support to appellants' contention. *Gardner v. East Rock Lodge,* 96 Conn. 198, was where the by-laws of the order fixed the penalties for offenses committed by members as reprimand, suspension for a definite term, expulsion, and a fine not exceeding $5, and the lodge ordered the suspension of three of the members until they paid to the lodge the sum of $144 the amount of costs and expenses of the lodge in a proceeding against such members, and it was held that the judgment of the lodge was void, and that the judgment of the lower court dismissing the appeal on the ground that plaintiffs had failed to appeal to the highest tribunals of the lodge was erroneous, for the reason that no duty to appeal from a void judgment existed. The action was to enjoin the defendant from denying plaintiff the privileges of a member of the society, compelling his restoration to membership, and for $1,000 damages. At page 206 it is said:

"In the present case, which is not a case where the charges involve property rights, but relates to discipline and damages as the incidental result of the unlawful infliction of discipline, the mass of decisions directly involving property rights are of little weight."

But it appears that among the privileges of membership of which plaintiff was deprived by the suspension was the "receipt of sick benefits, and the like." While the case makes for the appellant in its announcement of general principles and its result in remanding the case for further proceeding, still it does appear that by the act of suspension the plaintiff was deprived of sick benefits to which he was entitled as a member, and this surely was a property right within the jurisdiction of a court of equity to protect. *Burke v. Monumental Division, No. 52, B. of L. E.,* 273 Fed. 707,

was another case in which an expulsion without notice of the charge was held void, but in which an injunction was held proper because the membership carried with it the right to certain pecuniary benefits which would be lost by the expulsion, and upon the ground that the remedy at law to recover such benefits was inadequate. That case further held that mandamus to restore his membership would have been proper in the case of an incorporated association, but that, defendant being unincorporated, equity would grant the relief. In *Langnecker v. Trustees of Grand Lodge, A. O. U. W.*, 111 Wis. 279, the effect of the expulsion was to deprive the member of insurance. *Malmsted v. Minneapolis Aerie, F. O. of E.*, 111 Minn. 119, was an action at law to recover damages for wrongful expulsion. *Anderson v. Amidon*, 114 Minn. 202, was an action at law by a commercial club to recover delinquent dues. These cases do not aid the plaintiffs.

Plaintiffs, however, cite two cases from Texas which support their contention. In *Willis v. Davis*, 233 S. W. (Tex. Civ. App.) 1035, it is held:

"Where a member of a voluntary association has been convicted of an offense and expelled in violation of the rules and by-laws of the association, and where no by-laws or other laws of the association make any adequate allowance for relief by appeal from such conviction and expulsion, such member may resort to equity for relief."

And at page 1037, Lane, J., uses the following language: "It is well settled that the courts will not interfere with the decisions of any kind of voluntary association in disciplining, suspending or expelling its members where no property rights are involved, except to ascertain whether or not the proceeding was pursuant to the rules and laws of such an association, whether or not it was in good faith, and whether or not there was in it anything in violation of the law of the land. *Brown v. Harris County Medical Society*, 194 S. W. (Tex. Civ. App.) 1179, and authorities there cited."

The case contains no discussion of the question, nor other

citation of authorities. The opinion in the *Brown* case was written by the same Justice Lane, in which he says (p. 1181):

"We have found no authority for holding that, where a member of a voluntary association has been convicted of an offense and expelled in violation of the rules and by-laws of the association, and where the by-laws and other laws of the association do not allow adequate relief by appeal from such conviction and expulsion, such member may not resort to a court of equity for relief. We think the uniform holding of all courts is to the contrary. In 26 Cyc. 345, the rule of law is thus stated: 'As a rule the writ will not be granted until the relator has exhausted the means of relief and remedies by objection, defense, appeal, * * * afforded him by the by-laws and rules of the corporation, unless such remedies are inapplicable or unreasonable and inadequate, or would prove vain and useless.' "

The citation from Cyc. is found under the topic "Mandamus," and of the 13 cases cited in support of the proposition we have examined 11 and found one only in which a voluntary, unincorporated association was involved; the other 9 being cases where the writ was directed to corporations, and in a majority of them a direct property interest was involved. While the statement of the law in Cyc. as applied to the remedy of mandamus is fully supported by the authorities cited, we fail to perceive their application to either the *Willis* or the *Brown* cases, and, therefore, we do not feel that we should follow them.

The general proposition that equity interferes with this class of cases only to protect civil or property rights finds support in a number of cases in this jurisdiction, but it would extend this opinion to too great length to enter into a discussion of them. For the information of the student we refer to *Pounder v. Ashe,* 44 Neb. 672; *Bonacum v. Murphy,* 71 Neb. 463, 487; *Bonacum v. Harrington,* 65 Neb. 831; *Powers v. Budy,* 45 Neb. 208.

It is finally contended that the case at bar involves the property right of the plaintiffs in the funds and property

of the temple, and two cases are cited: *Grand Grove v. Garibaldi Grove,* 130 Cal. 116, and *Spiritual and Philosophical Temple v. Vincent,* 127 Wis. 93. In the first case the supreme body had attempted to forfeit the charter of the temple, and brought an action at law to recover funds belonging to the temple in the hands of its treasurer. There was no question but that the fund belonged to the temple, and the court having found the forfeiture of the charter invalid under the rules of the order sustained a demurrer to the petition. In the second case the contest was between two factions of the society as to the custody of the common fund. Neither of these cases involved any individual claim by a member of the organization to the fund or any part thereof, but concerned only the ownership of the fund as a whole, the dispute being as to which organization had title. The cases do not support plaintiffs' contention, and, on the other hand, it seems to be well established that, in organizations of the kind under consideration, members have no severable interest or right of property in the common fund. *Franklin v. Burnham,* 40 Misc. (N. Y.) 566; *Lawson v. Hewell,* 118 Cal. 613; *Local Union v. Barrett,* 19 R. I. 663.

We find no error in the record, and the judgment of the district court is

AFFIRMED.

Note—See Associations, 5 C. J. p. 1364, sec. 101; p. 1352, sec. 63; p. 1357, sec. 78.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, RELATOR, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, RESPONDENT.

FILED MAY 14, 1924. No. 24133.

Original proceeding in mandamus to compel respondent to operate trains. *Writ allowed, and motion to vacate overruled.*

O. S. Spillman, Attorney General, and *Hugh La Master,* for relator.

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

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

PER CURIAM.

On May 8, 1924, the respondent notified the Nebraska state railway commission that on Sunday, May 11, it would cease daily train service between certain points in this state, and cease Sunday train service between other points within the state. This is an application for a peremptory writ of mandamus to compel respondent to run these trains because permission to discontinue the same had not been granted by the state railway commission. Permission to discontinue was necessary under a general order of the commission made April 8, 1908, which had been in force since April 20, 1908, of which the respondent had been duly notified and which had been complied with heretofore by respondent. The application was heard *ex parte* upon Saturday, May 10, and the peremptory writ allowed. On Monday, May 12, a motion was made to vacate the order for the reason that the writ was issued without notice; that it was improvidently issued, the facts stated in the application being untrue; that the order of April 8, 1908, is null and void and was made without jurisdiction, and is in violation of the Fourteenth amendment to the Constitution of the United States, and is an undue burden upon interstate commerce. Evidence was submitted and considered. The court being of the opinion that the only question before it was with respect to the jurisdiction of the state railway commission to make the order of April 8, 1908, and being of the opinion that the railway commission possessed jurisdiction to make such order under the Constitution and statutes of the state, and that respondent must obtain the permission of the railway commission in order to discontinue the ser-

vice, the order was modified, and the motion to vacate the peremptory order overruled.

MOTION OVERRULED.

Note—See Railroads, 33 Cyc. p. 657.

MARY DAVIS, APPELLANT, V. JOHN SAMUEL DAVIS, APPELLEE.

FILED MAY 26, 1924. No. 22719.

1. **Trusts:** RESULTING TRUSTS: PROOF. The theory of a resulting trust is based upon the intention which the law imputes to the parties, and to establish such a trust the proof must be clear and convincing.
2. **Evidence** examined, and *held* insufficient to establish a resulting trust in favor of plaintiff in the 80-acre tract of ground described in plaintiff's petition.
3. **Limitation of Actions:** RENTS. The statute of limitations (Comp. St. 1922, sec. 8512) may run in favor of one in possession of lands so as to bar a claim for rents and profits beyond the period fixed by the statute.
4. **Evidence:** SUFFICIENCY. The evidence supports the findings of the trial court as to the rental value of the property in controversy and the amount to be credited to defendant for the use of improvements placed thereon, and such findings are approved.
5. **Homestead.** A homestead may be composed of contiguous parts of different governmental subdivisions, notwithstanding the existence of a public highway over a section line dividing the tracts.
6. ———: POWERS OF PROBATE COURT. The widow's right of homestead, if any, in lands of which her husband died seised vests immediately upon his death, and a probate court is without jurisdiction to enter any order affecting her interest therein other than the mere finding and determination of her status as such widow.

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

Lambert & Hawxby and *O. P. Coshow,* for appellant.

Kelligar, Ferneau & Gagnon, contra.

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

MORRISSEY, C. J.

This is an action in equity to establish equitable ownership in plaintiff of 80 acres of land in Richardson county, and to decree plaintiff entitled to a one-third interest during her life in all other real estate of which her husband died seised and now held by defendant, and for an accounting by defendant, her son, of the rents and profits of the real estate involved since the death of her husband in 1895.

In 1870 or 1871 plaintiff and her husband, John W. Davis, came to the state of Nebraska and purchased 80 acres of land in Richardson county with money belonging to plaintiff. Later more land was acquired. Title to the land was taken in the name of John W. Davis and was so held by him during his lifetime. The married life of plaintiff and her husband appears to have been an unhappy one, and culminated in plaintiff leaving her home and living apart from her husband until shortly before his death, when she returned to him and nursed him through his last sickness. During the period of separation the husband deposited money to plaintiff's credit in a local bank in the amount of $1,500, which sum was apparently drawn out and used by plaintiff, and according to defendant's witnesses was accepted in the nature of a settlement of their respective accounts.

By will John W. Davis bequeathed and devised to his wife, "just such portion of my personal and real estate as she may be entitled to by law and no more." Provision was also made in the will for the payment of all debts and funeral expenses and the erection of a monument on his grave. A small bequest was made to his daughter and the balance of the estate was bequeathed and devised to his son, defendant in this action. On probate of the will one-third of the personal property and a life estate in one-third of all the real estate owned by John W. Davis at the time of his death was set over to the widow. Defendant was de-

creed to be the owner of the real estate, subject only to the life estate of the widow, and he has ever since paid the taxes assessed against the property and has paid plaintiff annually one-third of the rental value of the property, less one-third of the taxes.

The trial court found that plaintiff should not recover the fee title to the 80 acres first purchased, but that she was entitled to a homestead right in this land as well as in another 80 acres adjoining it but lying in another section, notwithstanding a public road ran along the section line between the two tracts. And the court allowed plaintiff the reasonable rental value of the 160 acres for the years 1916, 1917, 1918, 1919, 1920, and 1921, but disallowed claims for prior years because barred by the statute of limitations. Plaintiff was also awarded a one-third dower interest in all other land owned by John W. Davis at the time of his death. Defendant was allowed a small sum for the use of improvements he had placed upon the land.

Plaintiff appeals from that part of the decree denying her ownership in fee of the original 80 acres and from the allowance to defendant of compensation for the use of the improvements placed thereon. Defendant has taken a cross-appeal from that part of the decree which gives plaintiff a homestead right in the entire 160 acres, and from the granting of a dower interest in the balance of the land, and from the amount of the rent to be paid, claiming that the allowance is excessive.

Appellant's first assignment of error is that the ownership of the original 80-acre tract was not correctly decided. She urges that a resulting trust in her favor has been sufficiently shown. "Parol evidence to establish a resulting trust must be clear, unequivocal and convincing." *Doane v. Dunham*, 64 Neb. 135. The theory of a resulting trust is based upon the intention which the law imputes to the parties, and proof of this intention must be full and satisfactory. In the instant case there is no evidence that plaintiff ever claimed to own the land. It is true that John W. Davis in his lifetime frequently acknowledged that his wife con-

tributed all or part of the money used in establishing their home, but plaintiff does not show that this may not have been a loan or gift, whether repaid or not. The evidence is not sufficient to raise a trust, while it is ample to support the finding of the trial court.

Plaintiff urges that her recovery for rents and profits should not be limited to four years next preceding the bringing of the action. Without passing on the question of whether or not such limitation should be made in case of a trust, suffice it to say that this case presents merely a personal action against one wrongfully in possession and the statute of limitations, section 8512, Comp. St. 1922, applies.

Plaintiff complains that the amount allowed her for rent was inadequate, but the court based its finding upon the testimony of competent witnesses as to the rental value of the land, and that finding will not be disturbed.

There is no merit in plaintiff's contention that defendant should not have been granted an allowance for repairs and improvements, since it appears from the testimony of reliable witnesses that the improvements added increased the rental value of the land.

On behalf of the cross-appellant it is urged that the court erred in granting plaintiff a homestead right in the full 160 acres. The original 80 acres were purchased in 1871, and another 80-acre tract was added in 1875, and both were used and operated as one farm. The two tracts are separated by a public highway, but are nevertheless contiguous, since the fee to public highways remains in the landowner, the public having but an easement. Nor is it required that a homestead be included in one governmental subdivision, for as said in *Tindall v. Peterson*, 71 Neb. 160: "A homestead may be composed of contiguous parts of different governmental subdivisions."

The cross-appellant further urges that the court erred in allowing plaintiff homestead rights in any of the property, and relies upon the proposition that any such rights were barred by the probate proceedings had in 1896 by which she was given a life interest in one-third of all the property.

The district court ruled in effect, and rightly we believe, that the probate proceedings did not defeat such of plaintiff's rights as were not barred by the statute of limitations. The widow's right of homestead, if any, in lands of which her husband died seised vests immediately upon his death, and a probate court is without jurisdiction to enter any order affecting her interest therein other than the mere finding and determination of her status as such widow. *Fischer v. Sklenar*, 101 Neb. 553.

The record is free from error; the evidence amply supports the judgment of the trial court, and it is

AFFIRMED.

Note—See Homesteads, 29 C. J. p. 832, sec. 114; p. 1030, sec. 529—Limitation of Actions, 25 Cyc. p. 1107 (1925 Ann.)—Trusts, 39 Cyc. pp. 105, 160, 166.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, APPELLEE, V. AMERICAN STATE BANK ET AL., APPELLEES: BANKERS AUTOMOBILE INSURANCE COMPANY, APPELLANT.

FILED MAY 26, 1924. No. 22762.

Banks and Banking: GUARANTY FUND: DEPOSIT. Where a bank in good faith receives negotiable paper from a customer and, in place of paying the money over the counter at the time the notes are negotiated, issues to him a certificate of deposit payable at a future date, no fraud or collusion being shown, the legal effect is the same as if the money itself had actually been placed upon deposit, and, as respects the bank guaranty fund, the deposit evidenced by the certificate so issued stands upon the same footing as any other deposit.

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

Burkett, Wilson, Brown & Wilson, and *Sterling F. Mutz,* for appellant.

Claude S. Wilson, Albert S. Johnston and *F. B. Sidles, contra.*

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

LETTON, J.

The American State Bank of Lincoln is now insolvent and is in the hands of a receiver. A claim, based upon a certificate of deposit for the sum of $13,000 issued by the bank and payable to the Bankers Automobile Insurance Company of Lincoln, was filed with the receiver for allowance. He refused to allow or pay the same. In the meantime the insurance company became insolvent and was taken in charge by the department of trade and commerce of this state, under special agent Whitney. A hearing was had in the district court, where the receiver filed objections to the allowance of the claim. The court found that the certificate was a just and proper claim against the bank, but "is not a valid claim to be paid out of the state guaranty fund, since it does not represent any actual deposit of money or its equivalent." The insurance company has appealed.

There is practically no conflict in the testimony. The certificate of deposit upon which the claim is based was issued by the bank and delivered to George W. Woods, cashier of the Lincoln State Bank, of Lincoln, on June 18, 1921. It was given as part payment upon the amount due upon two certificates of deposit, maturing on that date, which had been issued to the insurance company on April 18, 1921. The Lincoln State Bank held these certificates as collateral security to a loan to the insurance company. When the bank accepted these certificates as collateral they were assured by Mr. Whitney, the agent of the department of trade and commerce, in charge of the insurance company, and by Mr. Hart, the head of that department, and who was also the head of the banking department of the state, that there was no defense against them and they would be paid at maturity. When they were then presented for payment, the cashier and managing officer of the bank and Mr. Hart requested Woods to accept part payment in money and take a renewal certificate for a part of the amount due on the

certificates. There being no dispute or question as to the validity of the obligations, Woods accepted the present certificate as a renewal of one and was paid the balance of the amount due, including interest. The certificate was placed with the other collateral in the Lincoln State Bank. The insurance company afterwards paid its note, and the certificate was delivered to that company.

It was stipulated that suits have been brought by the bank and by the receiver upon some of the notes taken by the bank in exchange for the original certificates of deposit, and that the makers are defending upon the ground that these notes were obtained by fraud and that the bank is not a holder in due course.

Maixner, who was then the president of the insurance company, testified that he conducted the transaction with Mr. Dwiggins, the president of the bank, whereby the original certificates were issued; that at that time he was the owner of the promissory notes for which the certificates of deposit were issued, and the insurance company had no interest in them. The real facts seem to be that Maixner had made a contract with the insurance company at the time of its organization whereby he was to float the stock of the corporation and receive the 10 per cent. promotion fee allowed by the insurance department of the state; that the agreement was that he should underwrite $250,000 of the common and preferred stock of the insurance company and was to place in the treasury of the company $100,000 in securities. To comply with this contract Maixner, who was or had been president of the State Bank of Ceresco, had apparently procured to be issued to himself without consideration a certificate of deposit of that bank for $25,000. This he had delivered with other securities to the insurance company, and it was in order to take up this spurious certificate that he negotiated the notes and took in exchange the original certificates of deposit. He procured these to be issued in the name of the insurance company and then delivered them to it to take up the Ceresco bank certificate. He testified that as an officer of the in-

surance company he had repeatedly taken notes belonging to the insurance company to the bank and received in exchange therefor certificates of deposit payable to the insurance company, the maturity of which was invariably fixed at a later time than the maturity of the notes, and that the understanding was that if the notes were not paid at maturity they would either be paid or other notes substituted therefor, and that this was the understanding as to the notes indorsed and delivered by him at the time the original certificates were issued. Both Maixner and Dwiggins testified that there was no agreement that the certificates of deposit should not be cashed until the notes had been paid. The evidence is that all notes negotiated in the prior transactions of this nature had been paid to the bank. Dwiggins testified that the certificates were issued in the regular course of business, but the maturity was made far enough in advance so that he would be sure the notes would be collected.

Maixner was not a stockholder or officer in the American State Bank. The insurance company has received cash or its equivalent for all of the stock issued to Maixner under the underwriting contract, except for this $13,000.

One of the principal contentions of the state in this case is that, since no money was actually deposited at the time of the issuance of the original certificates, no deposit was made for which the guaranty fund is liable; that it is only liable to depositors, and that the insurance company is not a depositor. In the case of *State v. Banking House of A. Castetter,* 110 Neb. 564, decided since the briefs in this case were filed, it is said: "We think the presence of the actual money is not a prerequisite to a deposit. If I discount a note at a bank and the proceeds thereof are placed to my credit, no actual money passes, but it could not be claimed that such proceeds were not a deposit." The opinion states the reasons for the rule and is supported by the following cases: *Fourth Nat. Bank v. Bank Commissioner,* 110 Kan. 380; *Ellis v. State,* 138 Wis. 513; *McCormick v. Hopkins,* 287 Ill. 66; *State v. Shove,* 96 Wis. 1. A pertinent fact is

that the bank could and would have paid the entire amount due at the time the original certificates were presented for payment but for the fact that the head of the banking department requested, in order to accommodate the debtor bank, that the $13,000 certificate be renewed and the time extended for its payment. There is no proof that the notes for which the original certificates were given could not at that time have been sold, or negotiated to some other bank. The fact that, after the general financial situation had become acute, payment of them, or some of them, was afterwards resisted might tend to prove that Dwiggins did not exercise good judgment in taking them, but since like transactions had often been had before without loss to the bank the natural tendency would be to accommodate the customer. The most careful bankers sometimes err in extending credit or in discounting notes. The transaction must be considered as it appeared to the parties at that time, and not as subsequent events may have changed the situation. That which would be good judgment under normal circumstances may prove to have been unwise in the light of extraordinary or unusual subsequent events, such as periods of unlooked-for financial depression. To sum up, where a bank in good faith receives negotiable paper from a customer and, in place of paying the money over the counter at the time the notes are negotiated, issues to him a certificate of deposit payable at a future date, no fraud or collusion being shown, the legal effect is the same as if the money itself had actually been placed upon deposit, and, as respects the bank guaranty fund, the deposit evidenced by the certificate so issued stands upon the same footing as any other deposit.

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

REVERSED.

Note—See Banks and Banking, 7 C. J. p. 485, sec. 15 (1925 Ann.).

BURR STROMAN, APPELLEE, V. ATLAS REFINING CORPORATION ET AL., APPELLANTS.

FILED MAY 26, 1924. No. 22783.

1. **Action:** ACTIONS FOR DECEIT: ASSIGNABILITY. A cause of action based upon deceit and misrepresentation survives in this state, and is therefore assignable.
2. **Evidence:** FRAUD: ESTOPPEL. In an order for the purchase of stock, a written provision that "No conditions or agreements either verbal or written, or other than those printed herein, shall be binding upon the corporation. This contract is signed with full knowledge of the plans of organization of the corporation" —does not estop the purchaser from establishing that false and fraudulent representations were made in order to induce such purchase.
3. **Corporations:** SALE OF STOCK: FRAUD. Where the directors of a corporation were also the promoters thereof, and were active in its organization and promotion, were fully informed as to its assets and property, and either made false and fraudulent representations themselves or were cognizant of false representations made by their agents, they, as well as the corporation, are chargeable with fraud.
4. ———: PROMOTERS: FRAUD. Promoters stand in a fiduciary relation to subscribers for stock and to those whom it is expected will purchase stock from the corporation. It is their duty to act in good faith with such intending purchasers, and they may not, either by themselves or by agents, fraudulently misrepresent the actual facts as to assets and property of the corporation.
5. **Appeal:** REVIEW. It is the duty of counsel to point out specifically alleged errors, and unless the briefs indicate at what page of the bill of exceptions these may be found the court will not search for nor consider them.

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

Fawcett & Mockett and *T. S. Allen,* for appellants.

Hastings & Coufal and *John S. Bishop, contra.*

Heard before MORRISSEY, C. J., LETTON and DAY, JJ., BLACKLEDGE and REDICK, District Judges.

LETTON, J.

The plaintiff, for himself and as trustee for 41 others

whose respective claims had been assigned to him, brought this action to recover damages alleged to have been sustained by reason of false and fraudulent representations made to each of them to induce the purchase of shares of stock in the Atlas Refining Corporation, defendant. The other defendants were joined as directors and promoters, and as actively engaged in the conduct of the affairs of the corporation.

It is alleged that the stock was issued to each of the office-holding defendants without consideration; that each of them, in order to induce the purchase of stock, made a large number of false and fraudulent representations set forth in the petition; that, relying on these false representations, plaintiff and his assignors purchased the stock at the rate of $100 a share; and that the stock was, and is, worthless. Defendants, though answering separately, set up substantially the same defenses. They are: That the petition does note state sufficient facts to constitute an action; that there is a misjoinder of parties and causes of action; that the contracts contained a clause, "No conditions or agreements either verbal or written, or other than those printed herein, shall be binding upon the corporation. This contract is signed with full knowledge of the plans of organization of the corporation"—and plaintiffs are therefore estopped to claim fraud; that there was not authority in the sellers of stock to make any contract with reference to the same other than that printed. The answers also contained a general denial. Judgment was rendered in favor of plaintiff for only a part of the damages claimed, the court having instructed the jury that there was no proof of false and fraudulent representations as to a number of plaintiff's assignors.

The errors assigned are in substance as follows: (1) That several actions in tort cannot be joined and suit brought in the name of an assignee, and therefore that there is a misjoinder of parties. The general rule is that, if a cause of action in tort survives, it may be assigned. A cause of action such as this survives in this state, and is therefore

assignable. *Forbes v. City of Omaha,* 79 Neb. 6; 5 C. J. 888, sec. 54, 889 sec. 55.

(2) . That the verdict is contrary to the evidence, and that there was no evidence as to the value of the stock. It is impracticable within the proper limits of this opinion to relate all the facts in evidence with reference to the promotion, and as to the affairs of the corporation and the method in which the sale of stock was carried on. But it is clear that most of the tangible assets of the company about which the representations were made possessed no actual value unless and until paid for. There is evidence that the title to property of considerable value, which was represented to be in the corporation, was in fact in the names of other persons, and the corporation had nothing but a mere contract or option to buy the same, which it had never exercised and could not exercise if it would. In fact the estimates and representations made by the salesmen were largely based upon hope and faith and were tinted with the roseate hues of imagination. The evidence establishes actionable fraudulent misrepresentations.

It is said that, where the contract provides that the company will not be bound by statements of an agent, but only by the written provisions of the contract, a corporation or its officers are not bound by representations outside of those contained in the written order, and that the written agreement heretofore set forth was sufficient to release the corporation from liability for any promises or representations outside of those contained in the writing. But the written limitation is not against representations, but merely against "conditions or agreements," and knowledge of the "plans of organization" does not include knowledge of all its assets. There is no contention in this case that the agents made any "conditions or agreements" inconsistent with the written order. Even if this clause be given the fullest force, it cannot apply to the facts in this case, nor limit the liability of the corporation for false and fraudulent representations made by its agents. As pointed out in *Schuster v. North American Hotel Co.,* 106 Neb. 679, in order to ac-

complish a sale, the stock-selling agent must perforce make some representations in respect to that which he is selling, and as to these he may bind his principals even though there is a provision in the contract (not found in the present case) that "No conditions, agreements or representations, other than those printed above, shall bind the said company."

(3) That the court erred in holding that a director of a corporation is liable for such false representations where the director did not know of, approve or ratify the action of the agent. The evidence establishes that the defendants served, other than the corporation itself, were active in the promotion and organization of the corporation and knew of the manner in which its stock was being sold. Defendant Bevard actively participated in the sale of stock. Defendant Armstrong, among other things, prepared for circulation a flamboyant letter with respect to the assets of the corporation used by agents in the sale of stock. It is shown that a number of purchasers relied largely upon the Armstrong letter, knowing that Mr. Armstrong was the president of the Armstrong Clothing Company, a reputable corporation doing business in Lincoln. Defendant Thompson knew the state bureau of securities had refused permission to the company to sell stock in this state on account of the unsatisfactory condition of its property, and although he knew the agent selling stock had no permit, he made no effort to stop the sale, to correct or stop the misrepresentations, or to return any of the funds received for such illegal sales. He knew that if the actual facts had been fully stated to intending purchasers no man of ordinary common sense would buy.

(4) It is asserted that it was essential, in order to find the officers of the corporation liable, that they must have entered into a conspiracy to sell this stock, and that, since the court instructed the jury that there was no proof of conspiracy, the verdict cannot stand. The purpose of the stock-selling campaign was to procure money for the benefit of defendants. Each of these defendants assisted either ac-

tively or tacitly in accomplishing this purpose. They were promoters as well as directors, and, under the law, are held to the exercise of good faith. Promoters stand in a fiduciary relation to subscribers for stock and to those whom it is expected will purchase stock from the corporation. It was the duty of each of these promoters to see that the stock-selling agencies acting for them were acting in good faith and were not fraudulently misrepresenting the property and assets of the corporation; and it was further their duty to see that the money procured by the sale of stock was in good faith devoted to the purposes for which the corporation was organized. *Torrey v. Toledo Portland Cement Co.*, 158 Mich. 348; *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Ia. 396; *Yeiser v. United States Board & Paper Co.*, 107 Fed. 340; *Camden Land Co. v. Lewis*, 101 Me. 78; *Mangold v. Adrian Irrigation Co.*, 60 Wash. 286; *Moore v. Warrior Coal & Land Co.*, 178 Ala. 234; 14 C. J. p. 253, secs. 285, 286, p. 267, sec. 309, and notes.

It is next assigned that the court erred in refusing to give instructions Nos. 1, 2, 3, 4, and 10, requested by defendants, and that the verdict is contrary to instruction No. 9, given by the court. There is no argument made to support this assignment, except with respect to instruction No. 10. The court upon its own motion instructed the jury in substance that the officers of a corporation are not originally personally bound by the contracts of the corporation or by its frauds, but they may be bound if they have knowledge of the fact that fraud is being practiced, and if they assent to the same and approve it; and, further, that they should not find against the officers of the corporation, naming them, "unless you find by a preponderance of the evidence that they actually knew and approved and ratified the actions of the agents of the corporation in selling its stock, and that said action was fraudulent and acted as an inducement for its purchase." Instruction No. 10, requested by defendants, is in conflict with this and was properly refused. The rights of the defendants were fully protected.

Several cross-assignments of error have been made in behalf of the plaintiffs, but the brief to sustain the cross-appeal does not comply with the rules of court with respect to particularity in pointing out the pages of the bill of exceptions where the alleged errors may be found, and the court will not search through the 600-page record to look for them.

The judgment of the district court is

AFFIRMED.

Note—See Appeal and Error, 3 C. J. p. 1409, sec. 1586; Assignments, 5 C. J. p. 891, sec. 56; Corporations, 14 A C. J. p. 185, sec. 1962; 14 C. J. p. 253, sec. 285; p. 254, sec. 286; Evidence, 22 C. J. p. 1218, sec. 1623.

LAURENCE SCHELLPEPER, APPELLEE, V. WILLIAM F. SPORN ET AL., APPELLANTS.

FILED MAY 26, 1924. No. 22723.

1. **Pleading**: DEFENSES: CONSISTENCY. Defenses to a civil action are not inconsistent unless the proving of one defense will necessarily disprove another.
2. ———: ———: ———. Nondelivery of a promissory note and lack of consideration are not necessarily inconsistent with the defense that the note is void as an incident of unlawful transactions in which the maker and the payee were intentional participants.
3. Appeal: ELECTION. An error in requiring an election between counts of an answer may not be prejudicial, if all defenses pleaded are available at the trial under the defense upon which defendant elects to stand.
4. Bills and Notes: VALIDITY. Courts refuse to enforce payment of a promissory note in the hands of the payee, where it is the consideration for, or an incident of, unlawful transactions in which he and the makers intentionally participated.
5. Appeal: DIRECTION OF VERDICT. It is prejudicial error to direct a verdict for plaintiff, where testimony on controverted issues, if believed by the jury, will sustain a judgment in favor of defendant.

APPEAL from the district court for Stanton county: WILLIAM V. ALLEN, JUDGE. *Reversed.*

Hugh J. Boyle and *George A. Eberly,* for appellants.

D. C. Chase and *William P. Cowan, contra.*

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

ROSE, J.

This is an action to recover the amount due on a promissory note. Laurence Schellpeper, payee, is plaintiff. William F. Sporn and William Baier, makers, are defendants. The note is dated January 27, 1919, and contains a promise by defendants to pay plaintiff, one month after date, $1,000, with interest at the rate of 5 per cent. per annum. In the petition a partial payment of $150 January 27, 1919, is pleaded. Judgment for the remainder, $853.54, is demanded.

Defendants in their answer admitted they signed the note, but alleged: (1) It was never delivered. (2) There was no consideration for it. (3) By means of a check defendants procured from plaintiff January 27, 1919, $1,000 under an oral contract to act as his agents to procure for him in Sioux City, Iowa, 10 cases of whiskey to be transported to plaintiff in Stanton county, Nebraska, for the purpose of resale by him. The purchase price of the 10 cases and the compensation of defendants as agents for plaintiff amounted to $1,000. Defendants bought the whiskey and paid for it in transit. The transportation, however, was interrupted and the whiskey was temporarily secreted, but was subsequently stolen from the place of storage without any fault on the part of defendants. In consequence of the theft the 10 cases purchased were never delivered to the plaintiff, but he did receive intoxicating liquors worth $150 February 22, 1919. Defendants signed the note and entrusted it to plaintiff for the sole purpose of evidencing their receipt of the $1,000 in the event of their death before purchasing and paying for the whiskey. Plaintiff held the note for no other purpose and it never became a binding contract to pay $1,000 or any other sum.

The facts alleged in this count of the answer amount to a plea that plaintiff and defendants mutually participated in transactions to buy, transport, possess and resell intoxicating liquors in violation of law, and that plaintiff furnished defendants as his agents the $1,000 and took their note as an incident of the lawless enterprise, the note itself being void as against public policy.

Except for the admission that defendants signed the note, the reply to the answer was a general denial.

The jury, pursuant to a peremptory instruction, rendered a verdict in favor of plaintiff for $976.21. From a judgment thereon defendants have appealed.

One of the assignments of error directs attention to a ruling that required defendants to elect between the third count of their answer, invalidity of the note on the ground of public policy, and the first and second counts, nondelivery and lack of consideration. There was an involuntary election by defendants to stand upon the third count of their answer—illegality of the note. Defenses to a civil action are not inconsistent unless the proving of one defense will necessarily disprove another. Nondelivery of a promissory note and lack of consideration are not necessarily inconsistent with the defense that the note is void as an incident of unlawful transactions in which the maker and the payee were intentional participants. *Maier v. Romatzki*, 95 Neb. 76. While the ruling that required an election between defenses seems on the face of the pleadings in the present case to be erroneous, it does not necessarily follow that the judgment should be reversed on that ground, since defendants interposed at the trial the defenses relating to consideration and delivery and adduced their proofs on those issues under the defense that the note was void as an incident of the criminal acts of plaintiff and defendants.

A more serious question is presented by the assignment that the district court erred in directing a verdict in favor of plaintiff. Courts refuse to enforce payment of a promissory note in the hands of the payee, where it is the consideration for, or an incident of, unlawful transactions in

which he and the makers intentionally participated.

"The validity of a contract assailed for illegality is not determined by its formal incidents but by the nature of the transaction and the intent of the parties." *Corn Exchange Nat. Bank v. Jansen,* 70 Neb. 579.

On the witness-stand defendants in the present case brazenly testified to the details of the unlawful acts pleaded by them in their answer. Their testimony connected plaintiff with those crimes. If defendants are worthy of belief, there is evidence tending to prove that plaintiff, for the purpose of procuring whiskey in violation of law for illegal resale, made defendants the instruments of his lawlessness, furnished them $1,000 to carry out his evil purpose, and took their note to get the money back, if their dangerous mission should result in their being killed before making their precarious investment. Judicial scrutiny goes beyond mere legal forms to facts indicating intention and purpose. From the testimony of defendants, if believed, it may be inferred that the furnishing of the $1,000 and the receiving of the note were incidents or inherent parts of the unlawful transactions pleaded as a defense. The testimony of defendants in admitting their own crimes is uncontradicted. Plaintiff, instead of taking the witness-stand and contradicting the testimony connecting him with the lawlessness to which defendants testified, moved for a directed verdict in his favor. The peremptory instruction was clearly erroneous. Whether defendants were worthy of belief, the inferences to be drawn from their testimony, if believed, and the weight of the oral proofs, when considered with the note signed by defendants and put into the hands of plaintiff, were questions for the jury. For the error in directing a verdict in favor of plaintiff, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Appeal and Error, 4 C. J. p. 943, sec. 2918; p. 1022, sec. 3008; Bills and Notes, 8 C. J. p. 241, sec. 380.

CHARLES N. THOMPSON ET AL., APPELLEES, V. JOHN WALL, APPELLANT.

FILED MAY 26, 1924. No. 22774.

1. **Bills and Notes:** PLEA OF NIL DEBET. "The plea *nil debet* under our system puts in issue no fact and cannot be regarded as a defense." *Baldwin v. Burt*, 43 Neb. 245.
2. **Trial:** RIGHT TO OPEN AND CLOSE. "Where a defendant in his answer admits the plaintiff's cause of action, but sets up new matter as a defense, which defense would fail without proof thereof, the defendant is entitled to open and close the case." *Farmers State Bank v. Cavanaugh, ante*, p. 142.
3. ———: ———: HARMLESS ERROR. Under the facts disclosed by the record, the denial to the defendant of the right to open and close the case, although erroneous, *held* not to be prejudicial.
4. **Evidence** examined, and *held* sufficient to support the verdict and judgment of the trial court.

APPEAL from the district court for Valley county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Bert M. Hardenbrook and *O. A. Abbott*, for appellant.

Davis & Davis and *Lanigan & Lanigan, contra.*

Heard before MORRISSEY, C. J., ROSE, DAY and GOOD, JJ., BLACKLEDGE and REDICK, District Judges.

DAY, J.

The plaintiffs, who are the heirs at law of Asler C. Thompson, deceased, brought this action against the defendant, John Wall, to recover a balance alleged to be due upon a promissory note executed by the defendant to Asler C. Thompson. The trial resulted in a verdict and judgment for the plaintiffs for $6,586. Defendant appeals.

It appears that on June 20, 1918, the defendant executed and delivered to Thompson his promissory note for $6,757.97, due two years after date, and bearing interest at the rate of 6 per cent. from date, and 10 per cent, after maturity; that thereafter Thompson died, and the plaintiffs by virtue of their relationship became the owners and hold-

ers of the note. The plaintiffs alleged that, after deducting certain payments which were indorsed upon the note, there was due and owing thereon $7,304.53, for which they prayed judgment. The amended answer of the defendant admitted the execution and delivery of the note sued on, but denied "that there is now due and owing to the lawful owners and holders of said note the sum of $7,304.53, or any other sum whatever." The amended answer also pleaded matters of counterclaim and set-off, further reference to which will be made.

It is first urged by the defendant that the court erred in denying to him the right to open and close the case. At the very outset of the bill of exceptions, it appears that defendant's counsel asked the court for leave to open and close the case, stating: "The burden of proof is upon us to prove our defense." This application was denied.

At the time the amended answer and counterclaim was filed, it contained these words: "Denies that the plaintiffs are the lawful owners and holders of said note." Thereafter an amendment was made to the petition, and thereupon the clause in the answer above quoted was stricken out. The amendments to the petition, as well as the elimination of the clause in the answer, appear to have been made by consent of the parties. In this state of the pleadings, the answer was in the nature of a confession and avoidance. The allegation in the answer denying "that there is now due and owing to the lawful owners and holders of said note the sum of $7,304.53, or any other sum whatever," did not put in issue any fact. In *Baldwin v. Burt,* 43 Neb. 245, it was held: "The plea *nil debet* under our system puts in issue no fact and cannot be regarded as a defense." *Gray v. Elbling,* 35 Neb. 278.

The rule is well settled that, where the defendant in his answer admits the plaintiff's cause of action, but sets up new matter as a defense, which defense would fail without proof, the defendant is entitled to open and close the case. *Suiter v. Park Nat. Bank,* 35 Neb. 372; *Farmers State Bank v. Cavanaugh, ante,* p. 142. In the light of this rule, we

think the burden of proof was upon the defendant, and the right to open and close the case should have been accorded to him.

The real controversy in the case arises upon the counterclaim and set-off pleaded by the defendant. In substance it alleged that for some years prior to January, 1917, the defendant had been the president of the Commercial State Bank of Arcadia; that the bank had a capital stock of $10,000, divided into shares of $100 each; that the defendant owned 79 shares of the stock; that, although defendant was president of the bank, he was not engaged as the active manager thereof; that on January 9, 1917, Asler C. Thompson purchased of the defendant 70 shares of the stock in the bank, paying therefor $16,800 in cash; that as a part of the transaction defendant was to remain as president of the bank, and devote his entire time to the active management thereof under the direction of Thompson; that Thompson and one Sunderland were to be vice-presidents of the bank; that Thompson was to pay defendant the reasonable value of his services so long as they should mutually agree; that thereupon the defendant entered upon the duties as active manager of the affairs of the bank, and so continued to act until January 14, 1919, at which time, at the request of Thompson, he resigned as president, and ceased to perform services as active manager of the bank; that the services performed by him during the period were reasonably worth the sum of $250 a month, aggregating $6,000; that no part of the same had been paid, and that the amount due to him for such services should be credited upon any amount found due upon the note.

The answer further alleged in substance that on January 20, 1918, the state bank examiner required the bank to charge off certain notes held and owned by the bank, amounting in the aggregate, with interest, to $6,757.97; that, through an arrangement between Thompson and the defendant, Thompson paid into the bank in lieu of the notes charged off $6,757.97 in cash; that thereupon the

defendant executed to Thompson the note sued upon, and the notes so charged off, by agreement, became the property of the defendant; that these notes were then left with Thompson and the bank for collection, and when collected the proceeds thereof were to be credited on the note given by defendant; that the defendant had no knowledge of the amounts collected on said notes except the amounts set out in the petition; that the bank now holds them as the property of the Thompson estate, and refuses to surrender the same; that Thompson's representatives have collected and converted to their own use on said notes $1,339.39, in addition to the amounts credited on the defendant's note as shown by the petition. Defendant prays that the additional sum of $1,339.39 should be credited upon the note.

An amended reply was filed in which the plaintiffs deny that the defendant ever rendered any services to Asler C. Thompson, personally, in acting as president of the Commercial State Bank; deny that the services rendered by the defendant were of the reasonable value of $250 a month, or any other sum. Plaintiffs allege that the state bank examiner required the bank to charge off notes amounting to the sum of $21,725.83; that under an agreement between the parties the defendant agreed to take up certain of the notes, amounting with interest to the sum of $6,757.97, and that said Thompson advanced to the defendant, to enable him to take up said notes, said amount, and took his note therefor, which note forms the basis of this action; that the notes taken up by the defendant were delivered to him; that neither said Thompson nor the plaintiffs have ever had custody or control of said notes at any time; that all of the indorsements made upon the note were made at the specific instance and request of the defendant. Plaintiffs deny that any of the notes turned over to the defendant were collected by them, or by Thompson.

It appears from the plaintiffs' testimony that the defendant's note was turned over by Thompson to Sunderland, vice-president of the bank; that the collateral notes were in the possession of the bank; and that defendant as presi-

dent of the bank collected from several of the makers of said notes certain sums which were credited on his note by Sunderland.

With respect to the claim of the defendant that there had been collected upon the collateral notes $1,339.39, in addition to the credits indorsed on defendant's note, the evidence fails to establish this claim. No attempt was made to show there had been payments upon any of these notes which were not credited upon defendant's note. All of the collateral notes, except two, were produced upon the trial. One of these two notes was for $119.40, and the other for $681.25. The testimony showed that they had become lost, or at least could not be located at the time of the trial. The loss of the notes falls far short of proof that they had been collected, especially in view of the testimony on behalf of the plaintiffs that they had not been collected. If the notes were lost, suit could be maintained as an action on a lost instrument. There was a complete failure to establish this part of the defense, and it might well have been withdrawn from the jury. The defendant cannot complain that this was not done.

With respect to the defendant's claim for services rendered as president and manager of the bank under a contract with Thompson that he would pay for such services, it appears that this question was submitted to the jury under proper instructions. A comparison of the amount due upon the note at the time of the trial with the verdict shows that the jury allowed the defendant upon his claim something over $1,760. In the light of the testimony, it is clear that the jury found that Thompson had agreed to pay the defendant for services rendered as president and manager of the bank, and that the jury allowed him a part at least of the amount claimed. The mere fact that the jury failed to allow the full amount claimed by the defendant does not in our view warrant a reversal of the judgment, notwithstanding the erroneous ruling of the court in denying to the defendant the right to open and close the case, as it appears to be an error without prejudice.

It is next urged by the defendant that the court erred in sustaining the objections of the plaintiff to certain questions propounded to the defendant while on the witness-stand. The questions related to a conversation between the defendant and Thompson, and apparently were for the purpose of establishing that Thompson had agreed to pay the defendant for his services as president and manager of the bank. It is not claimed in the answer that Thompson had agreed to pay any specific amount for the services. The objections to the questions were based upon the theory that the defendant was an incompetent witness, under the provisions of section 8836, Comp. St. 1922. We need not pass upon the question thus raised: First, because the jury found for the defendant on the issue of the employment of the defendant by Thompson, and hence no prejudice resulted to defendant; and, second, because no offer was made showing what fact the defendant sought to establish by the witness.

Defendant also claims that the court erred in giving certain instructions. We have examined the instructions, and in our view they fairly submitted to the jury the issues presented by the pleadings.

We find no prejudicial error in the trial, and the judgment is, therefore,

AFFIRMED.

Note—See Bills and Notes, 8 C. J. p. 910, sec. 1195—Trial, 38 Cyc. pp. 1304, 1310.

THOMAS R. P. STOCKER, APPELLANT, V. GUSSIE E. STOCKER, APPELLEE.

FILED MAY 26, 1924. No. 22757.

1. **Divorce:** DECREE. The form of decree in a divorce action, set out in the opinion, *held* to be one for separate maintenance, and not to grant a divorce from bed and board.
2. ———: ———. A husband sued his wife for a divorce. She filed a cross-petition, asking for a separate maintenance, which was awarded to her by the court. The evidence was insufficient

to warrant granting a divorce to plaintiff, but was sufficient to sustain a decree for absolute divorce in favor of the wife. *Held*, that the husband had no right to insist that the decree to his wife should be for an absolute divorce instead of one for separate maintenance.

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

C. C. Flansburg and *T. R. P. Stocker*, for appellant.

Kelligar & Ferneau and *McCarty & Hager, contra.*

Heard before MORRISSEY, C. J., ROSE, DAY and GOOD, JJ., BLACKLEDGE and REDICK, District Judges.

GOOD, J.

Plaintiff brought this action against his wife to obtain, on ground of extreme cruelty, a divorce and the custody of the minor child of the parties. Defendant filed an answer and cross-petition, in which she charged plaintiff with extreme cruelty, and asked for a decree of separate maintenance, and also for the custody of the minor child. The trial resulted in a decree denying plaintiff any relief, and awarding defendant the custody of the child, requiring plaintiff to pay the sum of $250 to meet the immediate needs and necessities of the defendant and the minor child, and requiring the plaintiff to pay to the defendant the further sum of $50 a month for the support and maintenance of defendant and the minor child. Plaintiff has appealed.

The parties to this action were married at Auburn, Nebraska, in June, 1916, and immediately took up their residence with plaintiff's parents in the city of Lincoln, where they continued to reside until July, 1921, when defendant, with the minor child, then nearly four years of age, returned to the home of her parents at Auburn. Both of the parties to this action were young people of more than average intelligence, and each came from families that were well-to-do financially. Plaintiff was a young lawyer and had but small income when they were married. It was largely because his income was small and he was without

property that they arranged to live with his parents. Within a short time friction developed between defendant and plaintiff's parents. At first plaintiff gave aid and comfort to his wife and seemed to stand by her in their difficulties, but later he espoused the cause of his parents.

The record shows that the young wife was allowed but little, if anything, to say in the management of the household affairs. She was either denied the privilege of having her relatives and friends visit her, or made so uncomfortable when they did come that they ceased to visit her. Plaintiff's parents were aged, and the mother particularly seemed to be of a violent temper and frequently lost her poise and called the defendant vile and indecent names, accused her of theft, and on more than one occasion assaulted her, and life was made so unbearable that defendant was practically driven from the home. She often requested the plaintiff to secure a separate home where she would not be subjected to these indignities. This he failed to do, upon financial grounds as well as upon the ground that his parents were aged and needed his care and attention.

Without reviewing the evidence in detail, suffice it to say that we have read the entire record, and we have reached the same conclusion as did the trial court, that the wife was fully justified in departing from the home that her husband had provided for her and in returning to her parents. The evidence fails to show that she was guilty of any extreme cruelty toward the plaintiff or guilty of any conduct that would justify him in seeking a divorce. Plaintiff in his brief does not seriously contest this part of the decree, but insists that the decree, in effect, grants a divorce from bed and board; that it is impossible for the parties to again live together as husband and wife; that it is contrary to public policy that a limited divorce should be granted to these people, who are comparatively young in years, and that this court should modify the decree by awarding to the defendant an absolute divorce.

We think this contention is based upon an unsound prem-

ise. The decree is not for a divorce from bed and board, but simply awards defendant a separate maintenance of $50 a month, plus $250 for the immediate needs and necessities of the defendant and the minor child. It is true that in the findings made by the court there appears the following:

"The court finds that said plaintiff has shown no cause for divorce from defendant and that said divorce should not be granted. As a conclusion of law the court finds that said defendant was justified in leaving the said home of plaintiff and in remaining away therefrom and is justified in continuing to remain away from said home and to refuse to live in the home where plaintiff's parents live and reside and is justified in refusing to return to said plaintiff and refusing to resume marital relations with him until said plaintiff establishes and furnishes a home for said defendant separate and apart from that of plaintiff's parents, and that it is the duty of said plaintiff to establish and furnish and maintain a home for plaintiff, defendant, and said minor child separate and apart from the home, residence, and place of abode of plaintiff's father and mother, each and both of them."

Then follows the judgment in the following form: "Wherefore it is considered and decreed that said plaintiff be and he hereby is denied a divorce, and plaintiff's petition dismissed; that the custody of said minor child * * * be and hereby is awarded to said defendant; * * * that said plaintiff, within ten days from the entry of this decree, pay to said defendant the sum of two-hundred and fifty dollars to meet the immediate wants and necessities of said defendant and said minor child, and that said plaintiff pay to said defendant on the first day of February, 1922, the sum of fifty dollars, and thereafter on the first of each and every month pay to said defendant the said sum of fifty dollars, all for the support and maintenance of said defendant and said minor child, and that said plaintiff pay the costs of this action."

Nowhere in the decree is there anything which prohib-

its the plaintiff and defendant from living together as husband and wife, nor denying the plaintiff the rights of a husband The decree is one for separate maintenance only, and recognizes the situation that defendant should not be required to live in a home with plaintiff's parents. While there is ample evidence in the record that would justify the defendant in asking for and obtaining a decree of divorce, plaintiff has not the right to insist that, because of his wrongful conduct, the defendant should be required to submit to the severance of the marital relation. He cannot predicate any right to a divorce upon his own misconduct; nor will this court impose upon the defendant the necessity of submitting to the severance of the marital relation when she does not ask for such relief.

The plaintiff complains that the amount awarded to the defendant is excessive and that he is not able to comply with the award. The evidence discloses that he possesses property of his own of the value of about $2,000, and, while his income from his practice is not large, yet during the time that he maintains and persists in maintaining his home with his parents he is not required to pay anything for board or lodging, and is required only to furnish his own clothing, incidental expenses, and look after his office expense. We feel that the allowance is not at all exorbitant or unjust, but in any event, if it should develop in the future that plaintiff is financially unable to comply with the order made, the matter is subject to revision upon application to the district court.

We are of the opinion that the judgment of the district court is righteous and just and that no reason appears for interfering therewith. It follows that it should be, and is

AFFIRMED.

Note—See Divorce, 19 C. J., sc. 400.

FENTON W. MILLER ET AL., APPELLEES, V. DRAINAGE DISTRICT, APPELLANT.

FILED MAY 26, 1924. No. 22799.

1. **Drains:** DRAINAGE DISTRICTS: LIABILITY. A drainage district organized under chapter 161, Laws 1905, as originally enacted, or under the act as amended, is liable for damages caused by its negligence in the construction or maintenance of its works.
2. ———: ———: ———. A purchaser of lands situate within a drainage district is entitled to all the rights that his vendor would have had as to damage, subsequent to the purchase, to lands or crops caused by negligence in the construction or maintenance of such ditch.
3. **Pleading:** ADMISSION. In an action for damages where defendant in his answer avers that, if plaintiff was damaged as stated in the petition, such damage was caused by occurrences over which defendant had no control, *held* that such averment is an admission that plaintiff was damaged, even though the defendant also interposed a general denial.
4. **Evidence:** VALUE. The owner of personal property is qualified by reason of the ownership relation to give his estimate of the value of such property.
5. **Trial:** VERDICT. Plaintiff sought to recover on five separate counts. The jury found for him on three, finding the respective amount due on each. In a separate paragraph it totaled the three. This was not error.
6. ———: OBJECTIONS. An objection to a question asked at the trial should be sufficiently explicit to indicate the specific reason for its interposition.

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

Dort, Cain & Witte and *Dan J. Riley,* for appellant.

James E. Leyda, contra.

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

THOMPSON, J.

This action was brought by plaintiffs in the district court for Richardson county to recover from defendant for damage to plaintiff's crops by flooding, caused by defendant's alleged negligence. Defendant drainage district is

a corporation organized under the laws of Nebraska under chapter 161, Laws 1905, and amendatory acts. Plaintiffs are owners of certain lands in Richardson county, which were leased to one Ed Merritt and which are included in the drainage district in question. Plaintiffs prevailed, and defendant has appealed.

An amended petition was filed which contains five causes of action, but as the same negligence is alleged in all they may be considered together. Plaintiffs allege generally that the drainage ditch extends through plaintiffs' lands. The improvement was constructed partly by digging a new ditch and partly by using the natural channel of what is known as Muddy creek. The negligence alleged is that the defendant district failed to widen and clear the natural channel of Muddy creek so used as a part of the improvement; and that it was negligent in constructing the new ditch narrower and shallower at some points than others; and that the district negligently allowed drifts and debris to accumulate and remain in the old channel of Muddy creek, thus retarding the escape of the flood waters and causing them to run over and upon plaintiffs' lands doing damage to the crops thereon.

The answer in paragraph 4 avers as follows: The defendant states that if any crops upon said lands have been injured and damaged at any time, such injuries and resulting damage have not been caused by defendant's carelessness and negligence as alleged in plaintiff's petition, but that such injury and damage, if any, have been caused by the topography of the land and conditions arising from excessive and unusual floods over which defendant had no control and which could not have been reasonably foreseen or guarded against by it. This answer amounts to an admission that the plaintiffs were damaged. *Dwelling House Ins. Co. v. Brewster*, 43 Neb. 528; *Home Fire Ins. Co. v. Johansen*, 59 Neb. 349; *Nason v. Nason*, 79 Neb. 582.

The answer further avers that none of the drainage improvements constructed by the defendant district, of which complaint is made, impede, hinder or injuriously

affect the natural drainage of the lands described; paragraph 9 denies the negligence alleged, and paragraph 10 is a general denial. The verdict follows:

"We the jury duly impaneled and sworn in the above entitled case do find and say: We find for plaintiffs on the first cause of action and assess the amount of their recovery thereon at the sum of $600. We find for plaintiffs on the fourth cause of action and assess their recovery thereon at the sum of $250. We find for plaintiffs on the fifth cause of action and assess their recovery thereon at the sum of $100. We find for plaintiffs on the first, fourth and fifth causes of action in the total sum of $950. We find for defendants on the second and third causes of action.

"Charles Wittwer, Foreman."

Thus the jury found for plaintiffs as to the matured crops, and for the defendant as to the unmatured.

Defendant attacks that part of the verdict which added the three findings in favor of the plaintiffs. We find this was not error. The jury having found specifically and separately as to each cause of action, they thereby had fully complied with their duties. The part of the verdict complained of was surplusage and was properly so treated by the trial court.

Defendant contends that the verdict is against the weight of the evidence. Its contention cannot be sustained. The record discloses sufficient evidence to sustain the complaint as to negligent construction and maintenance. Trees and stumps were allowed to remain and debris to accumulate in the old channel of Muddy creek, as alleged, which actually served to retard, dam up, and cause the waters to overflow plaintiffs' lands, and thus destroyed the crops of plaintiffs, as charged, so as to justify the verdict of the jury.

Defendant also complains of the evidence as to the value of the crops damaged. The trial court permitted witness Miller, one of the plaintiffs and owner of the undivided one-half of the crop destroyed, and witness Merritt, the tenant, who was the owner of the other half destroyed, to

testify as to the probable yield of the crop and the market value at the time of the flood. Both of these witnesses were competent to testify as to the value of their own property. "In an action for damages on account of an injury to chattels, the owner of such chattels is qualified by reason of that relationship to give his estimate of their value." *Hespen v. Union P. R. Co.*, 82 Neb. 495. See *Neal v. Missouri P. R. Co.*, 98 Neb. 460; *Western Home Ins. Co. v. Richardson*, 40 Neb. 1. The crop was matured, part being in the shock. It was proved that by the terms of the lease the tenant was to deliver plaintiff's share of the crop to market as part of his rental contract. Thus the market value at the time of the flooding was a proper guide for the jury in computing plaintiff's damage.

It is further contended by defendant that, plaintiffs having purchased the land after the ditch was constructed, they thereby assumed the risk of flood damages from all natural causes. We held in *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550: "A party who sells and conveys to a drainage district corporation a right of way through his lands, and in such conveyance releases such corporation from all claims for damages by reason of the occupancy and use of the land conveyed, may nevertheless recover damages caused by the carelessness and negligence of the district in the construction and maintenance of its improvements." Certainly these plaintiffs cannot be said to be in any more disadvantageous position than their vendor.

It will be noticed that defendant uses the words "natural causes." The plaintiffs are not seeking damages which arose from natural causes, but from the careless and negligent construction and maintenance of the ditch.

It is also contended by defendant that it was not liable for damages for either faulty construction or lack of maintenance. The aforesaid cited case held: "A drainage district corporation organized under the laws of this state, although a local corporation clothed with powers of a public nature, is liable for damages caused by its negligence in the construction or maintenance of its works."

Other assignments of alleged error have been presented, which we have examined, but, in view of our conclusion, we do not find it necessary to discuss.

The judgment is AFFIRMED.

Note—See Drains, 19 C. J. p. 710, sec. 202; Evidence, 22 C. J. p. 581, sec. 683—Pleading, 31 Cyc. p. 206; Trial, 38 Cyc. pp. 1378, 1890.

ED MERRITT, APPELLEE, V. DRAINAGE DISTRICT, APPELLANT.

FILED MAY 26, 1924. No. 23097.

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

Dan J. Riley and *Dort, Cain & Witte,* for appellant.

James E. Leyda, contra.

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

THOMPSON, J.

This case was submitted at the same time that the case of *Miller v. Drainage District, ante,* p. 206, was argued and submitted. It appears from the record that the facts and questions of law involved are the same as in the before-mentioned case, and it follows that the decision in that case controls in this case.

The judgment is

AFFIRMED.

AMOS BROWN, APPELLEE, V. STROUD & COMPANY, APPELLANT.

FILED MAY 26, 1924. No. 22721.

Corporations: SALE OF STOCK: AGREEMENT FOR REFUND. Where the fiscal agent of a corporation procures to be executed a stock subscription contract and, as part of the same transaction, executes in the name of the company a written agreement to refund under certain conditions the amount paid for the stock, the cor-

poration, if it with notice of such agreement accepts and retains the consideration, is bound thereby, notwithstanding the subscription contract had printed therein a provisicn that no conditions or agreements other than those printed therein shall be binding upon the company.

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

William Baird & Sons, for appellant.

Nye, Worlock & Nye and *N. P. McDonald, contra.*

Heard before MORRISSEY, C. J., LETTON and DAY, JJ., BLACKLEDGE and REDICK, District Judges.

BLACKLEDGE, District Judge.

In this an appeal from the district court for Buffalo county, the plaintiff seeks to recover from the defendant the amount of a note of $5,000 previously given and paid for the purchase of certain of the capital stock in the defendant company. In the original transaction the plaintiff acted in person and the defendant was represented by one J. W. Rachman. The documents executed at the time consisted of one which was apparently in two parts marked by a line of perforation, the upper part being designated "Subscription for capital stock," and the lower part, "Receipt for subscription of the capital stock." They both contained a notation printed thereon that all checks, drafts, money orders or other payments must be made payable to and be received by Stroud & Company, and the subscription part also contained this clause: "No conditions or agreements either verbal or written other than those printed herein shall be binding upon the company." At the time of the transaction the agent, in order to induce the plaintiff to make the subscription and give his note, further made and wrote upon the reverse side of the receipt for subscription the following:

"If the securities of Stroud & Co. do not have a selling price of a minimum of $150 per share by the time of note

for $5,000 due 18 mo. from date the company will take back stock on demand of holder Mr. A. Brown.

"(Signed) Stroud & Co., J. W. Rachman."

In closing the transaction the plaintiff's note was given and was discounted at the local bank and a certificate of deposit obtained therefor maturing in 18 months, the same time as the note. Plaintiff paid the note, and shortly after the maturity thereof, upon the basis of the contract above quoted, made demand for the refund of the purchase price of the capital stock. The defendant failing to comply therewith, the present suit resulted. Judgment was given in the district court in plaintiff's favor.

In this appeal it is of the assignments of error by the appellant that the contract is lacking in mutuality, and too vague and uncertain to support a decree; also that, by plaintiff's delay of three months from the maturity date in demanding redemption of the stock, he waived his right thereto. We do not consider these propositions of sufficiently serious import to warrant a reversal, especially as it is disclosed by the evidence that the parties understood the terms of the contract, and there was no attempt at the trial to show that, under any possible construction, the requirements of the contract as to the value of securities had been met, nor that any change in or injury to the defendant's situation had resulted from the delay.

A more serious question is raised upon the assignment that the contract to repurchase or redeem the stock was not that of the defendant, was made without authority or ratification, that defendant is protected against the same by the clause of the subscription contract hereinbefore quoted and, hence, that the evidence is not sufficient to sustain the decree of the trial court.

In this, the appellant relies strongly upon the case of *Schuster v. North American Hotel Co.*, 106 Neb. 672, 679, wherein this court held that, where a contract contains the provision that no conditions, agreements or representations other than those printed in the instrument shall bind the company, the agents of the company who sell the

corporate stock and procure the execution of the subscription contract clearly act outside the limits of their ostensible authority when they make an oral promise, as an additional stipulation and obligation of the company, that the company will, upon request, accept a return of the stock and repay the consideration, with interest. That case, we do not doubt, correctly states the law as applied to the facts in it. But, as we understand the record in the present case, the principles expressed in the *Schuster* case would have to be considerably broadened in scope before they could be made to govern in the instant case. In the opinion by Justice Flansburg on rehearing it is said:

"It is quite generally held that a provision in a contract, to the effect that the agent cannot bind the company by any representations, statements or agreements, will not relieve the principal from responsibility for the fraudulent representations, as to the subject-matter of the contract, made by the agent, since such representations are within the scope of the agent's actual or ostensible authority. It is a self-evident fact that, in order that an agent sell corporate stock for a company, he must make representations to the buyer as to the character of the business of the company, the amount of its earnings, its financial condition and assets, and many other representations of fact which materially affect the value or desirability of the stock. * * * Where he makes false representations concerning the subject-matter of the contract, as distinguished at least from the agreements and promises which are to be undertaken, the company is responsible."

It is also to be noted that the court had then under consideration no express written contract purporting on its face to be that of the company, but an oral promise of the agent that he would procure the contract of the company, which fact itself was notice of the lack of authority of the agent to make the contract sought to be relied upon. We are cited to no case wherein it was considered that such a provision would be sufficient to avoid responsibility on the part of the company in instances where it had notice of

the agreement made by the agent and accepted and retained the proceeds of his transaction. In this case the trial court expressly finds that the defendant had full knowledge of the contract made in its name by Rachman at the time of the sale of the stock and fully ratified said contract.

The case then turns upon the construction to be put upon the evidence and the findings of the trial court. We have carefully considered all the evidence as contained in the record. It discloses that the person making the contract on behalf of the defendant was its fiscal agent. He was a son of the then president of the company. His testimony as given is not contradicted in the record except as to the single fact of the giving of notice of this contract to Mr. Jones, the treasurer and a director of defendant company. He received the plaintiff's note in the transaction, payable to the defendant, and discounted it at a local bank, thereby incurring a liability of the defendant as indorser. He obtained the proceeds of the note in the form of a time certificate of deposit, also payable to defendant company, which he turned over to the treasurer and director, receiving his commission at the time and deducting the discount to the bank therefrom, and at the same time, as he says, informed the treasurer and director of the outstanding contract, which is the basis of this suit. As stated, it is only upon this point as to the information given concerning the outstanding contract that this witness is contradicted. He later, before the maturity of the contract, became a director and stockholder in defendant company himself and so continued for several months. He states that he made the contract on the basis of an informal meeting and conversation with the officers of the company which included the president, secretary, treasurer, and himself. It is not clearly disclosed how many officers and directors there were, but the only other mentioned is the vice-president.

Upon the part of the defendant the treasurer is the only one who explicitly denies information concerning this contract. The secretary testified as a witness and his answers are not explicit. He was asked upon being shown this con-

tract: "I will ask you if you received or saw any copy of that anywhere near the time when, around July, 1919, or were advised by any one of the contents thereof, or that such an instrument had been executed?" To which he answered: "No, sir; I did not." Again he was asked: "Did the board of directors ever at any meeting pass any resolution authorizing the making of a contract such as the plaintiff claims was made on the reverse side of plaintiff's exhibit 1?" To which he answered: "No, sir." These questions and the answers constitute the sum of the secretary's testimony in reference to knowledge of the contract and as to what the records did or did not disclose. The president of the company, whom the articles of incorporation provide shall sign or countersign all certificates, contracts and other instruments of the company, was not produced or interrogated as a witness, and no showing was made that he was not available. These witnesses testify in person and, upon the whole state of the record, we think it was such a case as was particularly within the better opportunity for the trial court for observation and determination.

We are not, however, in accord with the proposition urged by the appellee to the effect that this court will not disturb the findings and decree of the lower court unless the same are clearly wrong and not supported by competent evidence, in support of which a large number of cases are cited. Subsequent to the determination of all the cases so cited there was enacted chapter 125, Laws 1903, now appearing as section 9150, Comp. St. 1922, to the effect that in appeals of this character it is the duty of this court to retry the issues of fact upon the evidence preserved in the bill of exceptions, and upon trial *de novo* to reach an independent conclusion. The construction placed upon this statute is illustrated by the following cases: *Faulkner v. Simms*, 68 Neb. 299; *Corn Exchange Nat. Bank v. Jansen*, 70 Neb. 579; *Shafer v. Beatrice State Bank*, 99 Neb. 317; *State v. Leflang*, 108 Neb. 138; *Miksch v. Tassler*, 108 Neb. 208.

We believe that in this state of the record—"The findings of the trial judge, who made a thorough and painstaking original investigation, although no longer conclusive, are entitled to respectful consideration, if not to considerable evidential weight, in this court." *Corn Exchange Nat. Bank v. Jansen*, 70 Neb. 579. We think that this rule is applicable to the case at bar, and under it we cannot conscientiously say that there was any error in the findings of the trial court. The judgment is therefore

AFFIRMED.

Note—See Corporations, 14 C. J. p. 580, sec. 860.

MINATARE BANK OF MINATARE, NEBRASKA, APPELLANT, V. M. G. WILSON, APPELLEE.

FILED MAY 26, 1924. No. 22795.

1. **Bills and Notes:** HOLDER IN DUE COURSE. A purchaser of a negotiable promissory note does not become a holder in due course thereof until he has paid, or become bound to pay, the consideration.
2. ———: PAYMENT. In such case, the giving by a purchasing bank of credit on its books, or the issuance of a nonnegotiable certificate of deposit, for the amount of the consideration does not constitute payment.
3. ———: NEGOTIABILITY: WAIVER. A bank having issued a nonnegotiable time certificate of deposit does not, as to any defense that may thereafter arise, waive the nonnegotiable character of the certificate by merely informing a prospective purchaser that it is satisfactory for such purchaser to buy the certificate.

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

Mothersead & York and *Floyd E. Wright*, for appellant.

Morrow & Morrow, contra.

Heard before MORRISSEY, C. J., ROSE and DAY, JJ., BLACKLEDGE and REDICK, District Judges.

BLACKLEDGE, District Judge.

This action was instituted by the appellant bank to recover of the defendant upon two certain promissory notes dated, respectively, October 3 and October 24, 1917, and maturing six months after date. The notes were originally delivered to agents of the Globe Life Insurance Company of Salina, Kansas, who had been engaged in selling capital stock of said insurance company in the vicinity of Minatare, and were given in purchase of shares of such stock. The defense alleged is fraud in the inception and procurement of the notes, and plaintiff claims as a holder in due course without notice of such fraud.

Upon the submission of the case in this court it was conceded that fraud in the procurement of the notes existed and was shown. The primary question, therefore, and in our judgment the one determinative of the case, is whether the plaintiff is entitled to protection as a holder of the notes in due course. The notes were negotiated and delivered to plaintiff within a few days after their execution. The mode of payment adopted was by issuance of certificates of deposit by the bank in favor of the insurance company maturing six months after date and at a lower rate of interest than that carried by the notes. The certificates for these notes were dated October 4 and November 17, respectively, and each carries upon its face the statement that it is not negotiable.

The evidence discloses without substantial dispute that the plaintiff bank learned of the fraud in the procurement of the notes and of the insolvent condition of the insurance company as early as February or March, 1918, which was prior to the maturity of either the notes or certificates. The appellee relies upon the proposition that, appellant not having paid for the notes except by issuance of these nonnegotiable certificates of deposit, and having had notice of the fraud before paying, or becoming bound to pay, the consideration, is not entitled to be considered a holder in due course. The appellant contends that it waived the nonnegotiability of such certificates and became bound for their

payment prior to receiving notice of the fraud, basing its contention upon the fact that the certificates within ten days or two weeks from their issuance were purchased, one by a bank in Lincoln and one by a bank in Omaha, and that at or before such purchases the purchasing bank made inquiry of plaintiff whether it would be satisfactory for them to make the purchase of these certificates, to which the Minatare Bank replied that it would. The evidence discloses that the negotiations respecting the purchase of these certificates were entirely by correspondence. The correspondence with the Omaha bank is not produced in evidence, but the only inference permissible from the evidence is that it was substantially the same as that with the Lincoln bank. The correspondence with the Lincoln bank consists of three letters, two of which are produced in evidence. The first is an inquiry concerning the certificates, to which the Minatare Bank replied under date of October 5:

"We are in receipt of your letter of the 3d inst., concerning our certificates of deposit issued in favor of the Globe Life Insurance Co. of Salina, Kansas. These certificates are printed as being not negotiable. It will be satisfactory to us if you purchase these certificates."

October 8 the Lincoln bank replied, giving a list of certain certificates as purchased on that date, wherein is included the one of October 4, and adding: "We presume, of course, that it is satisfactory for you to have us purchase these certificates. * * * As you appreciate, we are asking this on account of the nonnegotiable feature of the certificates."

This, except a reference in the oral testimony of the cashier of the Minatare Bank to the substance of the correspondence, completes the showing made as to the negotiations for these certificates, and no correspondence is shown having reference to the later certificate of November 17. This evidence wholly fails to show any act sufficient to change or waive the nonnegotiable character of the instruments in question, and in our judgment does not tend to

show that it was the intention of the parties so to do. It is, at most, an expression that so far as the issuing bank was then advised there was no objection on its part to the purchase of the outstanding certificates. The transaction falls short of such an agreement as would preclude the issuing bank from asserting any defense which should thereafter become known to it respecting the certificates, and does not indicate an intention to bar the subsequent assertion of such a right.

We regard it as a well-settled proposition that, where a bank purchases a note and payment is not made therefor except by the giving of credit on the bank's books, or the issuance, as in this case, of a nonnegotiable certificate of deposit maturing at a later date, the purchasing bank does not become entitled to protection as a *bona fide* holder so long as no part of the deposit is drawn out or the certificate has not been paid or become an absolute outstanding liability of the bank. As long as the amount to be paid remained in such condition, the bank, if it received notice of the fraud, was still in position to return the notes and cancel the credit. *Thompson v. Sioux Falls Nat. Bank,* 150 U. S. 231; *Union Nat. Bank v. Winsor,* 101 Minn. 470, 118 Am. St. Rep. 641, 11 Ann. Cas. 204; *City Deposit Bank v. Green,* 130 Ia. 384; *Clayton v. Bank of East Chattanooga,* 204 Ala. 64.

It is familiar law that one holding a note as collateral security is to be considered a holder in due course, but only to the amount of the principal debt for which the collateral is pledged. *Vian v. Hilberg,* 111 Neb. 232. Our statute provides: "Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him." Comp. St. 1922, sec. 4665. Considering now the evidence as to the payment of these certificates as related to the time of maturity of the notes, it will be observed that the certificate issued October 4 was not paid

until April 5 following, which is the date of the paid stamp of the Minatare Bank thereon, although the date of the indorsing stamp of the Lincoln bank is April 8. Either date, however, is subsequent to the maturity of the note; and upon the second note which matured April 24 payment of the certificate was not made until May 18; so that in neither instance was payment made within the rule of the cases cited until after the maturity of the notes purchased, and the plaintiff bank could not then become a holder in due course so as to preclude the assertion against it of the defense of fraud.

These considerations render unnecessary the discussion of other features of the case. The judgment of the district court was right, and it is

AFFIRMED.

Note—See Bills and Notes, 8 C. J. p. 480, sec. 698; p. 482, sec. 700; p. 391, sec. 577; p. 487, sec. 702.

OTTO KUMMER ET AL., APPELLEES, V. FRED KUMMER ET AL., APPELLEES: JOHN C. BYRNES, APPELLANT.

FILED MAY 26, 1924. No. 22717.

1. **Judicial Sales:** DEFECT IN TITLE. A defect of title which will warrant the release of a purchaser at a judicial sale must be of a substantial character; and where it is one which may be and is removed within a reasonable time, a court of equity may require the purchaser to comply with his bid if the ends of justice will thereby be accomplished.
2. ———: BY-BIDDING. A charge of "puffing" or "by-bidding" at a judicial sale is not sustained when it appears that all bids were made in good faith with the intention and ability to purchase the property if the bids were successful.
3. ———: RELIEF FROM BID. A court of equity will relieve a purchaser at a judicial sale from his bid when it appears that, owing to delay in confirmation, the situation of the parties or property has so changed as to make it inequitable to compel performance. *Held*, no such change appears in this case.

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

Albert & Wagner, for appellant.

Mills, Beebe & Mills and *King, Bittner & Campbell, contra.*

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

REDICK, District Judge.

Appeal from an order confirming a judicial sale. At a judicial sale under the decree of the district court for Polk county, on July 7, 1920, appellant John C. Byrnes became the purchaser of about 300 acres of land at $265 an acre, he being the highest and best bidder. Two of the heirs interested in the estate, through their representative, bid $250 an acre; a third party whose good faith and financial ability is conceded bid $250.50 an acre; and still another good faith and financially able person bid $262.50 an acre. The decree and placards advertising the sale stated that the purchaser would be furnished an abstract "showing good and merchantable title," and the decree provided that the sale should be for not less than half cash, balance on five years time secured by mortgage, 15 per cent. to be paid on date of sale, the remainder when the report of sale is examined and confirmed by the court. The purchaser paid the 15 per cent. required, possession to be given March, 1921; but the purchaser was permitted to take possession for the fall plowing in 1920, and has remained in possession by tenant ever since, under a stipulation entered into between the parties in March, 1921, that the rent should be paid to a third party without prejudice to the rights of either party in this proceeding. There was considerable delay in the preparation and delivery of the abstract on account of an erroneous patent which had to be corrected at Washington, which having been done, the abstract was delivered to the purchaser March 5, 1921. No objection on account of delay in furnishing the abstract was made by the purchaser, but on March 11 the attorney for the purchaser notified him that the abstract was insufficient be-

cause it appeared that the title to 160 acres of the land came through a will of one Sarah Johnson, which appeared to have been probated in the state of Indiana, but probate thereof had never been had in this state, and on March 14 the purchaser, by his attorneys, filed an application in the district court to be relieved of their purchase on the ground that said abstract did not show a marketable title, and for the reason just stated, and that the executor had employed by-bidders or puffers without the knowledge of the purchaser, whereby the price at which said land was sold was largely increased. Immediately upon receiving notice of the defect in the title, the executor procured a certified copy of the probate of the will from Indiana and filed it in the county court of Polk county, and the same was duly probated and allowed about May 15, 1921, by which proceedings it is conceded the title was perfected. Nothing was done toward procuring a confirmation of the sale until June 27, 1921, when the purchaser filed an amended application to be relieved from his bid, urging the two grounds above specified, and a further one that between the time of the sale and the time when the title was perfected the value of the lands had depreciated to the extent of $50 an acre, which allegation as to the extent of the depreciation was put in issue by an answer, and alleging that it would be inequitable under these circumstances to require the purchaser to complete his purchase. The matter was submitted to the district court on July 7, 1921, and on October 4 the court overruled the application and confirmed the sale, and the purchaser appeals.

Three questions are presented for decision: (1) Was the failure to procure the probate in this state of the foreign will such a defect in the title as to justify the purchaser in refusing to complete the purchase? (2) Was the sale fairly conducted relative to the objection of by-bidding and puffing? (3) Was the purchaser entitled to be relieved by reason of the depreciation in the value of the land? Of these in their order:

1. Section 1261, Comp. St. 1922, provides that no will

shall be effectual to pass the title to real estate unless the same shall have been duly proved and allowed in the county court. And section 1263 provides for the probate of wills which have been duly probated in a foreign state and presented to the county court, as follows:

"Where more than two years have elapsed since the death of the person whose will is offered for probate, the court shall fix a time for hearing upon said petition not more than 30 days subsequent to the filing thereof, and may in its discretion either dispense with or order notice of the time and place of said hearing," etc.

Other sections provide for the recording of the judgment of probate. The proceeding seems to be purely formal, and it appears that Sarah Johnson died and her will was probated in Indiana over 40 years ago. The defect in the title which will relieve the purchaser must be substantial; and a mere possibility of the existence of adverse claims is not sufficient. *McCaffrey v. Little,* 20 App. Cases, D. C. 116; *Hudgins v. Lanier Bros. & Co.,* 23 Grat. (Va.) 494; *Dunham v. Minard,* 4 Paige (N. Y.) 441; *Cambrelleng v. Purton,* 125 N. Y. 610. The precise question then, in our judgment, is whether or not, this being a judicial sale, the court would have been justified in postponing the confirmation of sale for a reasonable time to enable the executor to perfect the title of record. The discussion in the printed briefs proceeds upon the theory that the rules governing specific performance of contracts are strictly applicable, and counsel for appellant insists that he has the same right to resist the confirmation as he would have to rescind a contract for the purchase of land. It must be noted, however, that a private contract generally provides for a time within which title is to pass, and frequently time is expressly made the essence of such contract; and where time is not the essence of the contract, the contract is to be performed within a reasonable time, and it has been held that specific performance may be ordered if good title is furnished at the time of the decree. *Miller v. Ruzicka,* 109 Neb. 152; *Seaver v. Hall,* 50 Neb. 878. In the present case

no time was fixed for performance, but in such case the law implies a reasonable time. Now, we may dismiss from our consideration the time elapsing from the date of the sale to the furnishing of the abstract, because the purchaser made no objection thereto, but in fact, on several occasions, stated that there was no hurry about the abstract, and in fact made no complaint of delay until May 24, 1921 (in a letter to the executor), nor upon the record until June 27. We think under these circumstances that the purchaser is not entitled to be relieved of his bid merely upon the ground of delay in procuring the title, and that whether or not it would have been proper for the court to grant the time in advance, the title having been perfected within a reasonable time after defect was discovered (about 70 days), and the purchaser not insisting upon a ruling on his application during that period, he is not entitled now to object to the delay since the first presentation of the abstract. Where time is not of the essence of the contract, it may be performed within a reasonable time, before the lapse of which neither party may rescind without notice, from the giving of which computation will start. *McTague v. Sea Isle City Bldg. Ass'n*, 57 N. J. Law, 427; *Taylor v. Goelet*, 208 N. Y. 253. So, also, in *Bird v. Smith*, 101 Ky. 205, it was held that the sale should not be set aside because of the existence of adverse claims, but that the parties holding them should be brought in and their claims determined. In *Miller v. Wright*, 109 N. Y. 194, where title could be perfected by certain conveyances, the case was remanded that opportunity might be had for their procurement. In *Cambrelleng v. Purton*, 125 N. Y. 610, it was held that in the exercise of sound discretion the purchaser may be compelled to complete the purchase where no reasonable doubt exists as to the title. On the other hand, where reasonable doubt does exist the purchaser should be relieved. *Fleming v. Burnham*, 100 N. Y. 1; *Lenehan v. College of St. Francis Xavier*, 30 Misc. Rep. 378. We need not further pursue this inquiry; we are of the opinion that, so far as the defect in title is concerned, the district court properly exercised its

discretion in overruling the objection.

2. The evidence establishes beyond a question that the bidding on behalf of the two heirs interested in the estate was in good faith for the purpose of preventing a sacrifice and with the ability and intention of completing the purchase if their bid had been accepted. There is no merit in the second objection.

3. It appears from the evidence that, between the date of sale and the perfection of the title, the value of farm lands generally had depreciated, but there is no evidence that they had depreciated to the extent of $50 an acre, or any other amount. This depreciation had no relation to the defect in the title, and it is not claimed that the purchaser had any opportunity in the meantime to have sold the land at a profit. The delay in furnishing the abstract and perfecting the title was not attributable in any way to the purchaser, though, as already stated, he made no objection on that account until May, 1921, and he now claims that the situation of the parties has been so changed that it would be inequitable and unjust to require him to complete his purchase. The question thus presented is not free from doubt. The appellee answers that, if the value of the land had increased, the executor would not be heard on objections to the confirmation for that reason. The contrary, however, has been held in *Jackson v. Edwards,* 7 Paige (N. Y.) 386, 412, where the purchaser was responsible for the delay and the court was satisfied that injustice would result to the estate if the sale were ratified, the court saying: "As this court will not give a purchaser at a master's sale the benefit of his purchase, where he has neglected to comply with the terms of sale within a reasonable time, if a resale of the property is deemed more beneficial to the parties interested in the proceeds of the sale; so neither will it compel him to take the title, where by the fault of the parties thus interested, and without any captious objections to the title on his part, the completion of the sale has been delayed so long that he cannot have the benefit of his purchase, substantially, as if the sale had been completed

and the title given at the time contemplated by the terms of sale. In this case there was a valid objection to the title which was not removed until a long time after the sale; and no attempt was made to remove it until the property had depreciated in value, so that the purchasers must now be great losers if they are compelled to take the property at the prices for which it was sold." To the same effect, *Hyman, Moses & Co. v. Smith*, 13 W. Va. 744.

We have no doubt of the correctness of the rule that, both in actions for specific performance and for confirmation of judicial sales, a court of equity is vested with a sound discretion as to whether or not the purchaser may be required to accept title, and that where by reason of delay the situation has substantially changed the purchaser may properly be relieved; but the burden is upon him to bring before the court the evidence of facts showing the equity claimed. In the present case the only evidence in the record is to the effect that the land in question was worth the amount for which it was sold at the time, and that there has been a "good deal of depreciation in value since," and that there was quite a change in the financial situation from that time on. There is no evidence as to how the land in question was affected by these facts, or the extent, if any, to which the value of that particular land had been depreciated. We are asked upon the mere showing of delay and that there has been a good deal of depreciation in the value, without further facts, to apply the equitable doctrine above referred to and relieve the purchaser. It is suggested that the court will take judicial notice of the "crash in land values," which perhaps is correct as a matter of general history, but we are not prepared to say that we may apply that knowledge to a specific piece of land without some evidence of the extent of the loss in value upon which the discretion of the court may be intelligently exercised. In cases of this kind the extent of the loss in value is an important consideration in determining the equities of the parties. The evidence of the purchaser in the record indicates that his principal reliance was upon the defect

in the title and the supposed "puffing" at the sale, for in a letter to the executor dated May 24, 1921, he made no mention of depreciation in value, nor until June 27 following. The evidence also indicates another factor entering into his unwillingness to complete the purchase, in the fact that another party who was to furnish the money necessary to finance the transaction had refused to go on with it. Under the circumstances shown, we do not think the case is one which calls for the application of the equitable principles above referred to, and we think the discretion of the district court was properly exercised in overruling the purchaser's application and confirming the sale. The purchaser, however, should not be charged with interest, except from the date of confirmation.

AFFIRMED.

MORRISSEY, C. J., and DEAN, J., dissent.

Note—See Judicial Sales, 35 C. J. p. 91, sec. 143; p. 39, sec. 52; p. 93, sec. 146.

WILLIAM BRUCE, APPELLANT, V. ROY FORD, APPELLEE.

FILED MAY 26, 1924. No. 22781.

1. **Gaming.** A contract whereby plaintiff agreed to carry on certain deals in wheat upon the Chicago Board of Trade for the benefit of defendant, actual delivery of the grain not being contemplated, is a gambling contract, is illegal, and no cause of action arises thereon in favor of plaintiff for moneys advanced to pay losses resulting from such dealings.
2. **Evidence** examined, and *held* sufficient to sustain the verdict.

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

W. D. Oldham and *S. A. Dravo,* for appellant.

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

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

REDICK, District Judge.

The petition in this case declares upon a contract for the loan of money by the plaintiff to the defendant at the defendant's request. The answer of the defendant contains a general denial, and alleges the invalidity of the contract, asserting that the transaction referred to in the plaintiff's petition as a loan was in fact a gambling transaction involving trades in wheat upon the Chicago Board of Trade, in which the delivery of the wheat was not contemplated by either party, but that settlement was to be made, whether a profit or loss, upon the difference between the price at which the wheat was bought and that at which it was sold. The issues were submitted to a jury and resulted in a verdict and judgment for the defendant, and plaintiff appeals.

Waiving some informality in the assignments, the question presented by the appellant is whether or not the verdict is sustained by sufficient evidence, and, if not, that the court erred in submitting to the jury the question of the illegality of the contract.

Without setting out the evidence, the transaction between the parties as thereby disclosed was in substance the following: The plaintiff and defendant had both been dealing to some extent upon the Chicago Board of Trade through the commission firm of N. B. Updike & Company, which maintained a branch office at Holdrege, Nebraska. In January, 1917, the parties met at said office, and defendant desiring to purchase 10,000 bushels of wheat on the Board for May delivery, and plaintiff being in a position to place said trade for defendant through the Updike company without the deposit of cash margins to protect the same, it was agreed that plaintiff should place said trade for defendant, which he did, in his own name, on January 9, and on the 10th another trade for 5,000 bushels. Evidence for plaintiff was to the effect that defendant agreed to protect plaintiff from any loss resulting from said transaction, and, a loss having occurred, plaintiff seeks to recover in this action. The validity of the contract in this class of cases generally depends upon the intention of the parties with reference to the delivery of the grain. If actual delivery of the grain

was contemplated, the fact that such delivery was to take place in the future would not render the contract invalid; but, if the intention of the parties was merely to speculate upon the rise and fall of the market and make settlement on the contract for the difference in price, the transaction would be a mere gamble prohibited by the statute. Comp. St. 1922, sec. 9812.

A careful perusal of the testimony contained in the bill of exceptions convinces us that the preponderance is in favor of defendant's contention, but at any rate it was a question for the jury and their finding thereon should not be disturbed. The court did not err in submitting the question. The case seems to be controlled by *Boon v. Gooch*, 95 Neb. 678, and *Sunderland & Saunders v. Hibbard*, 97 Neb. 21. Plaintiff seeks to distinguish these cases by the fact that in each of these cases the plaintiff seeking to recover was the broker engaged in buying and selling upon the Board of Trade on commission, while in the case at bar the plaintiff was not connected with the Updike company, but was a mere trader or speculator the same as the defendant, and was therefore not connected with the illegal transaction. We can conceive of a case where the plaintiff made a loan of money to defendant in order that the defendant might use it in gambling upon the market and the loan not be tainted with illegality; but where, as in this case, the plaintiff conducted the illegal transaction for the defendant, the parties were *in pari delicto* and carrying on a transaction prohibited by law. The transaction does not differ from one in which I ask my friend to place a bet for me on a horse race, and which, being done, results in a loss of the money advanced by my friend. In such case all will agree that I am morally bound to reimburse my friend, but it seems equally certain that he would have no standing in a court of law to recover his loss. Contracts to indemnify another in contemplation of an act to be performed by him impliedly or by positive enactment forbidden by law are universally held to be illegal and the courts will leave the parties where they have placed themselves. *Jose v. Hewett*,

50 Me. 248; *Moss v. Cohen*, 15 Misc. Rep. (N. Y.) 108; *Atkins v. Johnson*, 43 Vt. 78.

The record is without error, and the judgment of the district court is AFFIRMED.

Note—See Gaming, 27 C. J. p. 1055, sec. 271; p. 1080, sec. 317; p. 1103, sec. 358.

MINNIE M. GARRISON, APPELLEE, V. HARRY H. EVERETT ET AL., DEFENDANTS: SULPHO-SALINE BATH COMPANY, APPELLANT.

FILED MAY 26, 1924. No. 22787.

1. **Master and Servant:** VERDICT FOR EMPLOYEE AND AGAINST EMPLOYER. A verdict in favor of an employee and against the master will not be set aside as inconsistent, where there is evidence of negligence of other employees, not made defendants, sufficient to sustain the verdict.
2. **Damages:** INJURY: QUESTION FOR JURY. Where it is shown that plaintiff, nearly a year after injury, is still suffering in mind and body as a result of defendant's negligence, and other circumstances are in evidence warranting an inference that such conditions will continue for an indefinite period, it is not error to submit to the jury the questions of the continuance and permanence of the injuries, notwithstanding the fact that experts testify that they are unable to say whether or not the conditions are permanent.
3. **Appeal:** INSTRUCTIONS: HARMLESS ERROR. An instruction that the jury in assessing damages may consider "the future pain and deprivation of health" which plaintiff will undergo, "if any such they find," while not approved, is the substantial equivalent of an instruction that future injuries must be shown "with reasonable certainty," and, if error, was without prejudice, especially where the jury are required to allow only such damages as will compensate plaintiff for injuries actually sustained.
4. ———: ———: FAILURE TO REQUEST. Where a petition contains a general allegation of negligence and of a specific negligent act, and evidence of other negligent acts sufficient to sustain the verdict is received without objection, a judgment for plaintiff will not be reversed for failure of the court to instruct upon the

law applicable to such other acts, where no such instruction is requested.

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

Reavis & Beghtol and *J. L. McPheely*, for appellant.

W. B. Comstock and *Tyrrell & Westover, contra.*

Heard before MORRISSEY, C. J., LETTON and GOOD, JJ., BLACKLEDGE and REDICK, District Judges.

REDICK, District Judge.

This action is brought by Minnie M. Garrison, the plaintiff, against the Sulpho-Saline Bath Company, a corporation, and Dr. Harry H. Everett, the operating surgeon, to recover damages occasioned by the negligence of the doctor in failing to secure a drainage tube by fastening one end of it to the dressing so as to prevent its slipping into the wound; and negligence in failing to discover and remove the drainage tube before allowing the wound to heal. The result was that the drainage tube, about eleven inches long, composed of rubber, slipped into the wound and remained there and was not discovered by the surgeon and nurses at the time the stitches were taken out, and the wound was closed and healed over with the tube remaining inside. The case was submitted to the jury, who found in favor of Dr. Everett and against the corporation in the sum of $6,500, and from the judgment rendered thereon the defendant appeals.

Four points are made by the defendant as grounds for reversal: (1) That the evidence does not sustain the verdict; (2) that the verdict is inconsistent upon the theory that the liability of the corporation depended entirely and exclusively upon the negligence of the operating surgeon; (3) that the district court, having excluded the Carlisle table of expectancy, erred in instructing the jury that they might consider whether the injuries of the plaintiff were temporary or permanent; (4) that the only injuries resulting were those attributable merely to a proper

performance of the operation, namely, adhesions of the intestines and other portions of the abdominal region.

Upon the first point the argument of appellant is: "That the inconvenience suffered by plaintiff was not due to leaving the tube in her body, in any degree, but was due entirely to the formations of adhesions which did not come, and could not come, from the tube, but which came as a natural result of her infected appendix. There is no evidence whatever that any of the trouble experienced by plaintiff resulted or could have resulted from the presence of this tube in the abdominal wall." We do not think the facts upon which this argument is based are the proper inferences from the testimony. The operation was for a pus appendix; that is, one which was inflamed to such an extent that pus was formed in considerable quantities. In such cases all the experts called agree that artificial drainage is necessary to carry off the pus and thus prevent infection. There is evidence that the purpose of inserting the tube was to secure proper drainage; that, where the tube disappeared entirely into the pelvic cavity and the wound healed over, all drainage would be stopped; that such treatment was improper; that plaintiff's appendix was badly inflamed; that inflammation produces serum, and serum produces fibrin, and that adhesions are the result of fibrin; that some adhesions are generally present in operations on a pus appendix; that where there is improper drainage there would be more adhesions; that irritation caused by the presence of the rubber tube in the body might cause adhesions. Defendant's contention that the adhesions in this case were solely the result of the operation and prior condition of the appendix cannot be sustained; at least it was a question for the jury. It further appears from the evidence for plaintiff that plaintiff's health prior to the operation was good, but that since then and up to the time of trial, January, 1922, she had lost weight, from 158 to 132 pounds, became weaker and more nervous, was sick, could not eat anything without vomiting, is on a milk diet, is in bed half the time, and suffers pain, complains of soreness through the stomach, and at times has swelling around the wound. An

X-ray examination in January, 1922, established the existence of adhesions "down in the right lower quadrant, or right lower abdomen, involving the terminal ileum, cæcum, and the ascending colon." The physicians who examined plaintiff attribute her present condition of health to these adhesions.

We think the evidence above summarized made a question for the jury and affords sufficient ground for the inference that with proper drainage a normal recovery would have resulted, but that the failure to provide proper drainage after the operation and permitting the wound to heal without removing the tube were the proximate cause of plaintiff's condition of ill health.

As to the second point, there is no doubt but that upon the trial of the case plaintiff's principal reliance was upon the negligence of Dr. Everett, and with one exception (in the statement of the allegations of the petition) the instructions of the court have to do entirely with the negligence of Dr. Everett. If the only negligence charged was that of Dr. Everett, the inconsistency of the verdict is beyond dispute. Where the liability of the principal depends entirely upon the negligence of the named agent or employee, a verdict in favor of the employee and against the principal cannot be sustained. *Chicago, St. P., M. & O. R. Co. v. McManigal,* 73 Neb. 580; *Young v. Rohrbough,* 86 Neb. 279; *Forsha v. Nebraska Moline Plow Co.,* 89 Neb. 770.

It appears, however, that the allegations of the petition are sufficiently broad to let in evidence of negligence of other servants of the defendant corporation. After alleging negligence of the operating surgeon in failing to properly fasten the tube, paragraph 7 of the petition is as follows: "That the plaintiff remained at the said hospital and was treated by defendants continuously during said period of time in such an unskilful, careless, and negligent manner that the plaintiff was, and still is, caused to suffer great pain and anguish, * * * and the nurses, and physicians, and attendants employed by the said defendants were so incompetent, unskilful, and negligent that they failed to discover the cause of her sickness, pain, and suffering" so

that other physicians had to be employed. It appears from the evidence that a daily record is kept of the condition of the patient, and that when a drainage tube is inserted in the wound that fact is reported to the nurse in charge, whose duty it is to enter the fact upon the chart or report; that Dr. Everett instructed the nurse to record the fact of the insertion of the tube, but the nurse failed to make the record, with the result that, when Dr. Olney, the surgical assistant of Dr. Everett, an employee of defendant corporation and the physician in charge of the case after the operation, dressed the wound the following day and subsequently, he received no information from the chart or otherwise that a tube had been inserted, and did not discover its presence, but dressed the wound, and about eight days later removed the stitches, allowing the wound to heal. This evidence of negligence on the part of the nurse employed by defendant was sufficient to sustain a finding against the defendant corporation. If the chart had shown the insertion of the tube, Dr. Olney, who testifies that he worked from the chart, would in all probability have noticed its absence and taken proper steps to recover it and place it in proper position to perform its function.

Up to this point it would seem that the second proposition of the defendant is not well taken; but we must consider another factor. In the statement of the allegations of the petition, the court in its first instructions said: "She further avers that following said operation she was negligently and unskilfully treated and cared for by the defendants. And she says that by reason of the foregoing she incurred damages in the sum of $50,000, for which, with interest, she prays judgment." No other or further reference to this allegation is contained in the instructions; but, as before stated, the law of the case given by the court had sole reference to the alleged negligence of Dr. Everett. We are thus confronted with this situation: The petition contains the necessary allegations of negligence, the evidence is sufficient to support the verdict thereon, the court recites the allegations of the petition of the negligence of other servants as one of the grounds for recovery, but fails

to instruct the jury upon the law applicable to that particular phase of the case. In this situation, we are in considerable doubt whether the verdict should be sustained, but our conclusion is that it may be from the following considerations: While the evidence to support allegations as to the negligence of servants other than Dr. Everett appears to have been brought out upon the cross-examination of defendant's witnesses, it was received without objection (except where secondary evidence was called for). Neither party requested any instruction upon the law as applicable to this allegation. The evidence is practically undisputed that plaintiff suffered great pain and inconvenience and loss of ability to perform her ordinary duties as a housewife, and a clear case of liability is made against the defendant corporation. We are of the opinion that the error of the court, if any, in failing to instruct the jury as to the law applicable to this particular ground of recovery was without prejudice to the defendant, and that nothing would be gained by the reversal of the case upon this ground except to give the defendant another chance to escape a clear liability. On the whole, the case appears to have been presented fairly to the jury, and justice does not require another trial merely because the verdict may appear to be inconsistent as to one of the defendants.

Upon the third objection, it occurs to us that the Carlisle table is not the only evidence upon which a jury may base a finding of damages for a permanent injury. That question may be, and frequently is, submitted to the judgment of the jury without the table. The evidence upon the permanency of the injuries was indefinite, and perhaps the final effect of it is that the doctors were unable to say how long the adhesions would continue; but this uncertainty itself was proper to be considered by the jury with the other facts, and the verdict is not based upon any arithmetical calculation, as, for instance, where the loss of wages and ability to earn money during the expectancy of the plaintiff is involved; and, therefore, it appears to us that, while the evidence of the table might properly have been received in evidence, its exclusion did not withdraw

from the jury the question of the temporary or permanent character of the adhesions, but that the question was properly presented to them for the exercise of their judgment based upon all the evidence in the case. Dr. Olney testified for defendant that plaintiff made an uneventful recovery from the operation, a little more rapid than the average, sat up the 9th day and was discharged the 12th. It seems quite proper to conclude from the evidence that her subsequent decline in health was due to the presence of the tube in her body for 60 days, the stopping of the drainage from the wound, and the consequent accumulation of pus or serum which was not released until the tube was removed. Her continued ill health up to the time of trial, over ten months after the operation, in connection with these other matters, furnished a reasonable ground upon which the jury might base a finding as to the probable continuance of the conditions. The court did not err in submitting to the jury the question of the temporary or permanent character of plaintiff's injuries.

A further objection to the instruction on the measure of damages is that it does not limit her recovery to the damages which might reasonably be expected to result from the permanency of her injury. By the instruction the jury were told that, "in arriving at the amount of her recovery," they should consider "the future pain and deprivation of health that she will undergo, if any such you find, and give her such a sum as will compensate her for her injuries actually sustained."

The rule in this state is as stated in *Chicago, R. I. & P. R. Co. v. McDowell*, 66 Neb. 170, cited by defendant, that "compensation can be recovered for only such future damages as are shown with reasonable certainty," and the instruction complained of would have been more accurate if it had stated that such damages must appear from the evidence with reasonable certainty; but we think, the jury being required to find from the evidence that plaintiff would undergo such damages, together with the further caution that they should compensate her only for damages actually sustained, the elements of speculation and con-

jecture were eliminated and the instruction substantially correct. A requirement that she will suffer damages in the future is, as a matter of mere statement, a little more rigid than one that such fact appear with reasonable certainty.

As to the fourth point, the evidence is conflicting as to whether or not the presence of the rubber tube, which appears to have lodged between the abdominal wall and the exterior covering of the body, would tend to cause the formation of pus or inflammation causing adhesions. The undisputed evidence is that the case was one of a pus appendix, requiring artificial drainage, and the slipping of the tube inside and healing of the wound prevented proper drainage, so that two months after the operation, when the presence of the tube was discovered and the same was extracted, a quantity of serum was expelled from the wound, and it is fairly deducible from the evidence that such a condition would cause inflammation inducing the occurrence of adhesions. This was a question for the jury.

AFFIRMED.

Note—See Appeal and Error, 3 C. J. p. 854, sec. 756; 4 C. J. p. 1032, sec. 3014; Damages, 17 C. J. p. 1075, sec. 381 —Master and Servant, 26 Cyc. p. 1579.

WILLIAM KOYEN, APPELLANT, V. DODGE COUNTY, APPELLEE.

FILED JUNE 24, 1924. No. 23921.

APPEAL from the district court for Dodge county: JAMES T. BEGLEY, LOUIS LIGHTNER and FREDERICK W. BUTTON, JUDGES. *Affirmed.*

Abbott, Rohn & Dunlap, for appellant.

Courtright, Sidner, Lee & Gunderson, contra.

Heard before MORRISSEY, C. J., DAY, GOOD and THOMPSON, JJ., and BLACKLEDGE, District Judge.

PER CURIAM.

This cause comes here as a "case stated" under Rule 14 (94 Neb. XIII). According to the federal census for the

year 1920, Dodge county in that year had a population of less than 25,000. Subsequently it was claimed by certain interested parties that the actual population of the county was in excess of 25,000. The salaries of county officials for that county are determined upon the basis of population. The board of supervisors adopted the following resolution:

"Whereas, claims have been made that the population of Dodge county is under 25,000; and

"Whereas, the law bases the salaries of officers upon the population and the county board deems it its duty to determine the population of this county for the basis of salaries and other governmental purposes:

"It is resolved that a hearing be had before this board on the matter of the population of this county at its session on the 12th day of December, 1922, when all persons interested may appear before the board and present such evidence on the matter at issue as they may have."

Thereafter a hearing was had, evidence taken, and the board found that the population of the county exceeded in number 27,000. On appeal to the district court, the action of the county board was upheld, and this appeal has been prosecuted from that judgment. Since this appeal was lodged in this court we have adopted the opinion in *Buffalo County v. Bowker*, 111 Neb. 762, which deals with substantially the same questions here presented, and, on the authority of that opinion, the judgment of the district court is AFFIRMED.

NITTLER-RHUMP, INC., APPELLEE, V. THOMAS JONES, APPELLANT.

FILED JUNE 24, 1924. No. 22744.

1. **Action:** MONEY HAD AND RECEIVED. "An action for money had and received will lie to recover money secured from the plaintiff, without consideration, in reliance upon fraudulent representations made by the defendant." *Martin v. Hutton*, 90 Neb. 34.
2. **Evidence:** VALUE OF MATERIALS: ADMISSION OF EVIDENCE. When the question for determination by the jury is the cost of a building, and it is shown that second-hand material entered into its construction, and the party furnishing this material failed to make any showing as to its value, or its cost, he can-

not complain because the court permitted the other party to offer testimony as to its value and allowed the jury to consider this evidence as to value in determining the cost of the building.

3. ———: LEASE: EVIDENCE OF FRAUD. The existence of a written lease does not ordinarily prevent a party apparently bound thereby from proving that he was induced to execute the same by the deceit of the other party to the lease.

4. Trial: DIRECTION OF VERDICT. When at the close of the plaintiff's case in chief he has submitted sufficient competent evidence to support a finding in his favor, it is not error to deny a motion by defendant to direct a verdict in his favor.

5. ———: ———. When at the close of all the evidence there is a substantial conflict in the evidence, it is proper for the court to deny a motion for a directed verdict and to submit the disputed questions of fact for the determination of the jury.

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

McGilton & Smith, for appellant.

Weaver & Giller, contra.

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

MORRISSEY, C. J.

This is an action commenced in the district court for Douglas county by the Nittler-Rhump Company against Thomas Jones to recover the sum of $7,016 and interest claimed by plaintiff to be due him as an overpayment of rent on a building leased by plaintiff from defendant under a preliminary agreement dated October 20, 1917, and a lease dated November 1, 1917.

It appears without dispute that Albert E. Bihler, Inc., which is the name under which plaintiff corporation did business at the time the lease was made, on October 20, 1917, entered into an agreement with defendant whereby Albert E. Bihler, Inc., agreed to lease a building at 1114 Dodge street in the city of Omaha from defendant for a period of five years, with the privilege of renewal for another five-year period, at an annual rental of a sum equal to 8 per cent. of the actual cost of the building, which

amount was to be determined before the Bihler company took possession of the building. Later, on November 27, 1917, a lease was entered into as of the date November 1, 1917, for a period of five years at an annual rental of $6,880.

Plaintiff contends that, notwithstanding the terms of the agreement of October 20, 1917, whereby the rental was to be 8 per cent. of the actual cost of the building, defendant fraudulently represented, at the time the lease was made, that the building cost $76,000, which, together with an item of $10,000, the agreed value of the lot, constituted the basis upon which the annual rental of $6,880 was charged. There is an allegation in the petition that plaintiff believed and relied upon the representations of defendant as to the cost of the building, and that these representations induced the corporation to sign the lease, but that in fact the building cost much less than $76,000. Plaintiff prays judgment in the amount of these overpayments for the four years during which it paid this rental on the building.

Defendant in his answer denied all the allegations of fraud in plaintiff's petition, and alleged that the building leased cost, together with the value of the lot, $86,000. The jury found for plaintiff in a sum equal to the difference between the rental paid and the amount which would have justly accrued to defendant under the lease on a valuation of the property at $60,000, in lieu of the $86,000 which plaintiff had been induced to believe was the cost of the property when it executed the lease.

Appellant urges that the court erred in failing to instruct the jury that defendant claimed that the lease dated November 1, 1917, expressed the full and complete agreement between the parties, and cites us to numerous authorities on the question of prior agreements being merged into a written agreement. However, this is not an action on the written instrument, but rather an action to recover the money which defendant fraudulently secured from plaintiff. This assignment is not well taken. *Martin v. Hutton,* 90 Neb. 34.

It is next urged that it was error for the court to admit

testimony as to the value of certain material used in the construction of the building, when the contract was based on the cost price, and not upon the value either of the materials used or of the finished building. The evidence complained of related to the value of second-hand material which defendant had used in the construction of the building and for which defendant had made no showing either as to the value or as to the cost. In the absence of such showing, defendant cannot complain because the court permitted testimony as to the value of the material, which, under the circumstances, was the best available evidence of its cost.

Appellant also assigns as error the admission in evidence of the preliminary agreement dated October 20, 1917, and the admission of oral testimony of conversations had at the time of making the lease and prior thereto. These objections are untenable. It is true that, were the action one on a written agreement, such evidence might be inadmissible as tending to vary its terms; but, the present action being in deceit for money had and received, the evidence is proper, since it establishes the basis upon which the parties dealt with each other and proves the fraud imputed to defendant. 10 R. C. L. 1058, sec. 252. See, also, *Davis v. Sterns*, 85 Neb. 121, and *Coffman v. Malone*, 98 Neb. 819.

At the close of plaintiff's case in chief, defendant made a motion for a directed verdict and made a similar motion at the close of the case. Each motion was overruled and these rulings are assigned as error. As the record stood at this time, plaintiff had adduced sufficient evidence to prove the allegations of his petition, and, therefore, it would have been improper to have sustained defendant's motion for a directed verdict. At the close of all the testimony there was a substantial conflict in the evidence on the issues presented by the pleadings, and the court properly overruled defendant's motion and submitted the cause to the jury to determine the controverted questions of fact.

Other objections made to the rulings of the trial court have been considered, but are not found to be of such character as to require specific discussion.

The record is found free from error, and the judgment is

AFFIRMED.

Note—See Money Received, 27 Cyc. p. 866—Evidence, 22 C. J. p. 177, sec. 119; p. 1217, sec. 1623—Trial, 38 Cyc. pp. 1539, 1578.

JOHN F. REID ET AL., APPELLEES, V. HATTIE L. KEYS ET AL., APPELLANTS.

FILED JUNE 24, 1924. No. 22784.

Holidays: JUDICIAL SALES. When a day designated by statute as a legal holiday falls on Sunday, the succeeding day is not a legal holiday, except only as to commercial paper, and a judicial sale of lands made on such a day will not be set aside as in derogation of any statute relating to legal holidays.

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

M. O. Cunningham and *Elmer E. Ross,* for appellants.

John C. Martin, contra.

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

MORRISSEY, C. J.

This case is here on appeal from the district court for Merrick county.

In October, 1920, appellees filed their petition for foreclosure of two mortgages held by them. Upon trial, a decree was entered in favor of appellees, and appellants took a stay of execution. On January 10, 1922, an order of sale was issued and the sheriff of Merrick county caused notice of sale to be published, as required by statute, in a legal newspaper. On February 13, 1922, the premises were sold to appellees. Two days later appellants filed objections to the confirmation of the sale, alleging that the sale was void in that it had been held on a legal holiday, and made other objections which are abandoned here. The objec-

tions were overruled and the sale confirmed. Defendants appeal from the order confirming the sale.

The holiday in this case was February 12, known as "Lincoln's Birthday," which in the year 1922 fell on Sunday. It is appellants' contention that the Monday following a Sunday which is a legal holiday is also a legal holiday. The contrary of this contention has long been the established rule in this state, except in matters falling within some special provision of the statute. *Ostertag v. Galbraith*, 23 Neb. 730; *State v. King*, 23 Neb. 540.

The judgment of the lower court is

AFFIRMED.

Note—See Holidays, 29 C. J. p. 761, sec. 2.

ROBERT H. MILLER V. STATE OF NEBRASKA.

FILED JUNE 24, 1924. NO. 23797.

1. Rape: CORROBORATIVE EVIDENCE. "In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." *Fager v. State*, 22 Neb. 332.
2. ———: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held*, sufficient to support the verdict as to the commission of the act charged.
3. ———: CHASTITY: SUFFICIENCY OF EVIDENCE. In this, a prosecution for rape upon a female over 16 years of age and under 18 years of age, the question of her previous chastity was put in issue by defendant. The evidence on this issue has been examined, and is *held* to support the finding of the jury.
4. ———: ———: INSTRUCTIONS. When, in a prosecution for rape upon a female over 16 years of age and under 18 years of age, defendant challenges the previous chastity of prosecutrix, it is not error for the court to instruct the jury that—"As to the question of the previous chastity of Ruby Shelton, it is not necessary that her testimony that she was not previously unchaste be corroborated; it is sufficient, as to this point, if you are satisfied by the evidence, beyond a reasonable doubt, that she was not unchaste previous to the time of the alleged act of

sexual intercourse complained of in the information."

5. ———: INSTRUCTION AS TO TIME. Instruction mentioned in the opinion as No. 7, *held*, under the facts in this case, free from error.

ERROR to the district court for Franklin county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

George W. Prather, J. T. Reed, A. W. Relihan and *T. D. Relihan,* for plaintiff in error.

O. S. Spillman, Attorney General, and *Lloyd Dort, contra.*

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

MORRISSEY, C. J.

Defendant was convicted in the district court for Franklin county of the crime of rape upon Ruby Shelton, a female child over the age of 16 years and under the age of 18 years. He prosecutes error to this court, alleging that the evidence is insufficient to sustain the conviction, and making other assignments which will be considered in their order. At the time the crime is alleged to have been committed, defendant was in charge of the telephone system in the village of Bloomington. He was 37 years of age and with his wife and family resided in the building wherein was installed the telephone exchange. There was direct access to that part of the building used by defendant and his family for residential purposes from that part of the building used in the telephone business. The crime is alleged to have been committed "on or about June 25, 1922." At the time charged and for about a month immediately preceding, prosecutrix was employed by defendant as a telephone operator. Prosecutrix was a member of a large family, and her mother was a widow who resided in the immediate neighborhood of the telephone exchange and by daily labor supported herself and her family. The members of prosecutrix' family and of defendant's family had been on intimate terms for many years. According to the story told by prosecutrix, on Sunday morning, June 25, 1922, de-

fendant's wife and children left their home in an automobile owned and driven by a friend of defendant and his family, and subsequent to the departure of defendant's wife and children defendant entered the operating room where prosecutrix was at work at the switchboard, and, after making some indecent remarks to prosecutrix, seized her by the hands and took her into a bedroom immediately adjacent to the operating room and there had sexual intercourse with her. Within a normal period of gestation, prosecutrix gave birth to a child. She testified that she never had sexual intercourse with any person other than defendant. Defendant directly contradicted the story of prosecutrix in so far as it incriminated him, and testified that he went with his wife and family to a picnic which was held that day a short distance from the village, and in this way endeavored to prove an alibi. In his behalf there was also introduced evidence, which, if true, would show that prosecutrix was unchaste at the time the crime is alleged to have been committed. This evidence will be considered in another division of this opinion. Prosecutrix' story of the presence of defendant at the time and place alleged is corroborated by her sister who assisted prosecutrix in the management of the telephone exchange upon the day mentioned. Defendant's story as to his departure for, and presence at the picnic is also corroborated; thus on this very material question there is a direct conflict in the testimony which was resolved by the jury against defendant. Prosecutrix remained in the employ of defendant for several months following the incident related, and she testified that there were subsequent acts of intercourse between her and defendant, the dates not being fixed. She failed to inform her mother or any other person of what she alleges occurred that Sunday morning, and her pregnancy was not known for several months. Prosecutrix testified however, that, following the alleged assault, she informed her mother that she did not desire to continue in the employ of defendant, but she failed to give any reason for her desire to cease the employment, and her mother, being in ignorance of the assault, required her to remain

in defendant's employ.

Defendant testified that some time subsequent to the opening of the fall term of school, he heard gossip to the effect that prosecutrix was pregnant; that he talked the matter over with his wife, suggesting that somebody ought to look after prosecutrix, and that he went to prosecutrix and spoke to her on the subject, and that she told him the story was not true; that subsequent to this a young man of the village, whom the witness named, spoke to him about the girl's condition, and said that the girl was going to hold defendant responsible for it, but that the matter could be adjusted for $500; that defendant resented the imputation and stated that he would give nothing; that soon thereafter he again saw the prosecutrix, and that in a fit of anger and excitement he accused her of being in a conspiracy against him. The girl testified, in substance, that in November she had a conversation with defendant about her condition, and he offered to send her away, saying that "it would cost $500, and I told him that I did not want to leave. * * * I told him that I did not want to go, and did not want to leave my folks and did not want to take an operation."

The rule is well established in this state that—

"In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." *Fager v. State*, 22 Neb. 332.

And in *Kotouc v. State*, 104 Neb. 580, it is said:

"In a prosecution for rape, the corroboration of prosecutrix may consist of circumstantial evidence."

Having in mind the relation of the parties and the circumstances surrounding them and the whole story as it went to the jury, we are convinced that the evidence is ample to support the verdict returned as to the commission of the act charged.

On the question of the previous chastity of the girl, she testified that she never had sexual intercourse with any person other than defendant. Defendant, for the purpose of raising a question in the minds of the jury as to her previous chastity, called a number of witnesses who testified to conduct on the part of prosecutrix which, if true, would completely overthrow her claim to chastity. These witnesses were directly and positively contradicted by prosecutrix and other witnesses who had knowledge of the incidents related. At most, the testimony offered by defendant presented a question of fact for the jury. It was their province to determine the veracity of these witnesses, and they found, as appears to us entirely proper, that prosecutrix was not previously unchaste.

Criticism is made of a clause in instruction No. 6, which told the jury:

"As to the question of the previous chastity of Ruby Shelton, it is not necessary that her testimony that she was not previously unchaste be corroborated; it is sufficient, as to this point, if you are satisfied by the evidence, beyond a reasonable doubt, that she was not unchaste previous to the time of the alleged act of sexual intercourse complained of in the information."

This was proper. *Leedom v. State,* 81 Neb. 585.

The final assignment is directed against instruction No. 7, which permitted the jury to find defendant guilty, if they found that the crime charged was committed "on or about said 25th day of June, 1922." The criticism is directed to the phrase "on or about." It is said in the brief that the prosecution should have been required to prove that the act was committed on June 25, because the testimony of prosecutrix fixed that definite date as the day of its commission, and defendant's defense of an alibi was restricted likewise to that particular day. The assignment is without substantial merit. The information alleged that the act was committed "on or about June 25," and the instruction merely followed the language of the information. Furthermore, the testimony as a whole went to the proof of that date and none other, and the jury could not have

been misled. The instruction was proper.

The record is free from error, and the judgment is

AFFIRMED.

Note—See Rape, 33 Cyc. pp. 1482, 1486, 1496, 1497—Criminal Law, 16 C. J. p. 969, sec. 2364.

STATE, EX REL. CHRISTIAN A. SORENSEN ET AL., APPELLEES, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLANTS.

FILED JUNE 24, 1924. No. 23847.

1. **Carriers**: DISCRIMINATION. At common law a common carrier of goods or passengers was under no obligation to treat all persons equally, but might grant one individual an unreasonably low rate or even carry for him without making any charge whatever.
2. ———: ———. Section 7, art. X of the Constitution of Nebraska, provides: "The legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph and railroad companies in this state." Not all discriminations are prohibited by this section.
3. ———: ———. The provisions of section 7, art. X of the Constitution, are designed to take away from the common carriers named therein the power of arbitrary selection of persons as the objects of their favor or disfavor.
4. ———: ———: POWER OF LEGISLATURE. It is competent for the legislature within reasonable limits to determine what are proper preferences or discriminations which may lawfully be made by common carriers, and, unless it is manifest that its action in this respect is a clear violation of the Constitution, the courts may not interfere.
5. ———: ———: CONSTRUCTION OF STATUTE. A statute which allows the granting of special favors or preferences to any class of people by common carriers is to be strictly construed.
6. ———: FREE PASS LAW: CONSTITUTIONALITY. Chapter 160, Laws 1923, which adds to the classes exempted from the restrictive provisions of the "free pass law" ministers of religion, inmates of charitable institutions and charitable workers, is not void as being in violation of section 7, art. X of the Constitution.
7. ———: ———: ———. Chapter 160, Laws 1923, operates alike on all persons in the same class within the state, is not a local or special law, and is not unconstitutional for that reason.

8. **Constitutional Law:** CONSTRUCTION. In construing the quoted section of the Constitution, the court will consider its history; the development of the evil sought to be restrained by its provisions; that since the enactment of the "free pass law" the language of the section has been construed as to its meaning and scope, and acted upon, by the legislature and by the courts, and that a constitutional convention held since such construction made no change therein.

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

Byron Clark, Jesse L. Root, Reavis & Beghtol, J. W. Weingarten, C. W. Krohl, N. H. Loomis, J. A. C. Kennedy, Wymer Dressler, E. P. Holmes, Robert D. Neely, Yale C. Holland, Guy C. Chambers, C. A. Magaw and *Thomas W. Bockes,* for appellants.

C. A. Sorensen and *F. L. Bollen, contra.*

R. M. Switzler, amicus curiæ.

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

LETTON, J.

This action was brought by the plaintiff on behalf of himself and all other persons similarly situated. It is alleged that the attorney general of the state had been requested to prosecute the same but had refused, but that he makes no objection to the action being brought in the name of the state on the relation of the plaintiff. The purpose of the suit is to enjoin and prohibit the defendant railroad companies from giving free passes or reduced transportation to ministers of the gospel and persons engaged in eleemosynary and charitable work, and to have the court declare chapter 160, Laws 1923, unconstitutional and void. Separate demurrers to the petition were overruled by the district court. Defendants elected to stand upon their demurrers, and, refusing to proceed further, the court found the allegations of the petition to be true, and decree was rendered declaring that the law in question was unconsti-

tutional and void, and restraining the issuance of free passes or reduced transportation to the classes of persons named in the act. Defendants have appealed.

The petition alleges that, unless restrained by the court, the defendant railroad companies will establish, promulgate and charge passenger fares on their lines within the state by dividing all who have occasion to travel as passengers into two classes; those who are not ministers of the gospel, nor engaged in charitable or eleemosynary work, constituting the first class, who are required to pay fare; and those who are ministers of the gospel or engaged in charitable or eleemosynary work and required to pay only a half or reduced fare, constitute the second class; that there is no reasonable basis for this classification; that persons within the second class occupy the same space in passenger coaches as all other persons; that persons within this class do not travel in groups or more extensively than others; that the expense to the railroad corporation of transporting both classes is equal; that such persons have rendered no greater service to the railroads than others, and that such class is no more entitled to receive free or reduced transportation than other classes of people, such as farmers, school-teachers, newspaper editors and writers, common laborers, or lawyers; that the proposed action will decrease the net earnings of the defendants and bring about an increase in the passenger rates to persons not within the favored class; that the amended law is not so framed as to extend to and embrace equally all persons in like situation and circumstances, and is capricious and arbitrary, since it makes the accepting of free passes and reduced transportation an innocent and harmless act by ministers of the gospel or persons engaged in charitable and eleemosynary work, but a crime punishable by fine and imprisonment when accepted by all other persons; that chapter 160, Laws 1923, is unconstitutional and void because: (a) It contravenes section 7, art. X of the Constitution. (b) It contravenes section 18, art. III of the Constitution, providing that the legislature shall not pass local or special laws

"granting to any corporation, association or individual any special or exclusive privileges, immunity or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted." (c) It contravenes that part of section 1, art. XIV of the Constitution of the United States, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws."

Defendants each demurred on the grounds: (1) That the petition did not state facts sufficient to constitute a cause of action; (2) that there is defect of parties plaintiff; and (3) that plaintiff has not legal capacity to maintain the action. We prefer to deal with the case upon its merits rather than upon the other grounds of demurrer.

The question is whether the amendatory statute violates the provisions of the Constitution. At common law a common carrier of goods was under no obligation to treat all customers equally. Its obligation was to accept and carry all goods delivered to it for carriage on being paid a reasonable compensation, unless it had some reasonable excuse for not doing so, and if the carrier refused to accept such goods an action might be brought against it for so refusing. If the shipper paid under protest a sum which was unreasonable, he might recover back the surplus in an action for money had and received, as having been extorted from him. There was nothing in the common law to prevent a carrier from giving individuals an unreasonably low rate or even carrying without charge. *Great Western R. Co. v. Sutton,* 4 L. R. 1869, Eng. & Irish App. Cas. 226. In a short time after railroads came into being they practically monopolized all methods of land transportation, and it was found necessary to establish rules and regulations for the protection of the public. Undue preferences were prohibited by statute, and common carriers became bound to charge all persons for whom they carried goods under like circumstances equally. The courts of England, in passing

upon questions arising under the railway and canal acts, are careful to point out that all preferences were not forbidden by law, but only "*undue preferences,*" and have upheld, under certain circumstances, rates and charges which result in preferences being given. In *Inverness Chamber of Commerce v. Highland R. Co.*, 11 Railway & Canal Traffic Cas. (Eng.) 218, Lord Darling said: "It seems to me that, there being to some extent a preference of one trader over another, the whole question comes to be whether that preference is undue, and that is a question purely of fact. There is, in my opinion, a strong presumption that when a preference of that kind is offered and given to all and sundry upon purely business considerations, without any element of caprice or arbitrary choice about it, the preference is not undue." In *Phipps v. London & N. W. R. Co.*, 1892, 2 Q. B. (Eng.) 229, the burden of proof is held to be on the railroad company to show that the lower charge does not amount to "an undue preference."

Abuses arose in the United States similar to those that occurred in England, though perhaps greater in degree. The interstate commerce act of 1887, and the several railway commission acts in the states, were the result of the desire to put an end to such conditions. The interstate commerce act provides that all charges made for service by the railroad "shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful," and, also, provides that if any carrier subject to the act shall charge, demand, collect or receive a greater or less compensation for any service rendered, or to be rendered, in the transportation of persons or property than it charges, collects, demands or receives from any other person or persons for doing a like or contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is therein prohibited and declared to be unlawful. Section 14, ch. 90, Laws 1907, railway commission act, now section 5509, Comp.

St. 1922, is almost an exact copy of this section, which is section 1, ch. 104, 24 U. S. St. at Large, p. 379. The act recognized as proper and just certain preferences and discriminations which had been customary. Section 22 of the interstate commerce act also provides: "That nothing in this act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: Provided, that no pending litigation shall in any way be affected by this act." By amendments made by the Act of March 1889, section 9, ch. 382, 25 U. S. St. at Large, p. 862, the prohibition was also removed as to granting preferences to "the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, * * * to municipal governments for the transportation of indigent persons, or to inmates of the national homes or state homes for disabled volunteer soldiers and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes."

Having thus traced to some extent the history of the law prohibiting unjust discrimination by carriers, we come to the precise question involved in this case. Section 7, art. X of the Constitution of Nebraska provides: "The legisla-

ture shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph and railroad companies in this state, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises." In 1907 the legislature enacted chapter 93, Laws 1907, commonly known as the "free pass law." Comp. St. 1922, sec. 5440. This act made the issuance of any free ticket, free pass, or free transportation in any form for the transportation of any passenger or passengers unlawful, except to persons within certain classes which are in the act designated and limited. At the same session, by the railway commission act, it was made unlawful for any person not included within such classes to accept or use any such free transportation. The bill (S. F. 2) for the free pass act was substantially copied from the provisions of the interstate commerce act and contained provisions allowing preference to ministers of religion and charitable workers, but these were eliminated in passing through the legislature.

In 1923 the legislature, by chapter 160, amended this law by restoring the omitted provisions exempting "ministers of religion, traveling secretaries of Railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work," from the prohibitions of the statute. It is the validity and constitutionality of this amendment, and also the validity of an amendment, for the same purpose, made by the same act, to section 14 of the railway commission act (Comp. St. 1922, sec. 5509) that is attacked by this proceeding. The objections made to this amendment could with equal propriety and reason be made to several provisions of the original act.

It will be noted that the provisions of the Nebraska Constitution are directed against "*unjust* discrimination." The question as to the proper construction of the provisions of the interstate commerce act prohibiting discrimination or preferences came before the United States supreme court

for decision. In the case of *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 278, it was held, as it had been by the English courts, that it is not all discriminations or preferences which fall within the inhibition of the statutes, but only such as are undue or unreasonable, and it was said: "The object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, state or municipal governments; destitute and homeless persons transported free of charge by charitable societies; indigent persons transported at the expense of the municipal governments; inmates of soldiers' homes, etc., and ministers of religion—in favor of whom a reduction of rates had been made for many years before the passage of the act."

In *United States v. Oregon R. & N. Co.*, 159 Fed. 975, a number of specific acts of discrimination are shown to have been sustained by the courts as not being unlawful or "unjust."

The whole matter is one of degree, and, unless a discrimination permitted by the legislature plainly violates the Constitution, the courts will not declare the act void. Again, we see no reason why if a railroad company desires to foster, encourage and contribute to a charitable enterprise, or to one designed for the public weal and welfare, it may not do so. Maitland, in "Collected Essays," says: "If the law allows men to form permanently organized groups, those groups will be, for common opinion, right-and-duty bearing units; and if the lawgiver will not openly treat them as

such he will misrepresent, or, as the French say, he will 'denature' the facts: in other words, he will make a mess and call it law." We see no reason why a railroad corporation may not, to a reasonable extent, donate funds or services to aid in good works.

In a large majority of the states of the Union statutes permitting the issuance of free passes to ministers of religion are in effect. The Constitution of this state recites that religion, morality and knowledge are essential to good government. As a general rule the legislatures of the several states have recognized that religious and charitable organizations are potent factors for good, and valuable instrumentalities for the public welfare. In fact, were it not for organizations of this nature, the moral and domestic virtues might largely escape inculcation in this age of haste and hurry and relaxation of parental discipline. The exemption from taxation of the property of religious and charitable institutions by constitutions or by statutes is another manifestation of this spirit of philanthropy.

In *Church of The Holy Trinity v. United States*, 143 U. S. 457, 468, the supreme court held that the contract labor law did not apply to a contract between a nonresident alien and a religious society whereby he engages to remove to the United States and serve the society as its rector. In the opinion by Justice Brewer it is said: "If we examine the constitutions of the various states we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four states contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well-being of the community. * * * If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth." After pointing out numerous instances, he concludes: "These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation." We conclude that

there exists sufficient ground for a classification by the legislature placing ministers of the gospel and charitable workers in a different class from ordinary passengers.

Adverting now to another contention of appellee: There is a clear distinction between statutes such as this and statutes imposing a duty or obligation upon a common carrier to carry certain designated classes at reduced rates or requiring such classes to be carried gratuitously. *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, cited and quoted by appellee, was a case involving the validity of a law of the state of Michigan which required the sale at reduced rates of 1,000-mile tickets. The railroad complained of the law as depriving it of the equal protection of the laws, and as taking its property without due process of law. In the opinion, language is used which, taken apart from its context, and without considering the exact question involved, may be considered to condemn the granting of free passes or of reduced rates under any circumstances; but, when the question actually before the court is considered and compared with other decisions of the same court, we are of the opinion that such is not the proper conclusion to be drawn. See, also, *Interstate Consolidated Street R. Co. v. Massachusetts*, 207 U. S. 79; *Sutton v. New Jersey*, 244 U. S. 258; *United States v. Chicago & N. W. R. Co.*, 127 Fed. 785; *State v. Chicago, M. & St. P. R. Co.*, 118 Minn. 380; *Commonwealth v. Interstate Consolidated Street R. Co.*, 187 Mass. 436; *United States v. Oregon R. & N. Co.*, 159 Fed. 975. These are all later cases than *Lake Shore & M. S. R. Co. v. Smith, supra*. We believe those cases are better considered than other cases cited by appellees. In *State v. St. Louis, S. W. R. Co.*, 197 S. W. (Tex. Civ. App.) 1006, a similar statute was attacked, but was held valid so far as it permitted the issuance of free passes to eight different classes of people, among which are indigent poor, when applied for by any religious or charitable organization, and Confederate veterans admitted to Confederate homes. It is difficult to see just why the court of appeals drew the line between these classes and some of the other classes, and yet the extremes are quite far apart.

The complaint that the issuance of free passes to ministers or charitable workers will bring about an increase in passenger rates to persons not within the favored class, we think is not borne out by the facts. We can take judicial notice of that which is common knowledge. Compared with the population of the state of Nebraska, or with the number of passengers traveling upon the railroads, the number embraced within the favored classes is exceedingly small. We are of the opinion that if the railroad companies sought to increase rates of fare on the ground that the added cost of transporting ministers or charitable workers make this necessary, they would find but cold comfort from the railway commission or from the legislature.

It may properly here be said that the granting of special favors or preferences to any class of people by common carriers is to be closely scrutinized and should not be unduly extended. The public suffered from such abuses many years before regulatory acts were passed. In any case where the provisions of the Constitution designed to prevent the granting of special privileges, favors or preferences are clearly violated by the legislature, it is the imperative duty of courts to declare such enactments void. As a matter of public policy, in the judgment of the writer, but few classes of persons should be accorded special privileges upon the railroads of the country, and these classes should be in the main connected with the operation of the roads, or with the protection of the public. I am inclined to think that the courts have gone far in upholding legislation permitting some classes to ride free, and that the privilege granted by some of the statutes might well be curtailed by legislation. This is not said as expressing the views of other members of the court.

There is nothing in the amendatory statute attacked which in any wise violates the principles announced in *State v. Chicago, B. & Q. R. Co.*, 71 Neb. 593; *State v. Union P. R. Co.*, 87 Neb. 29; *Western Union Telegraph Co. v. Call Publishing Co.*, 44 Neb. 326.

We are also of the opinion that the law in question is not a local or special law. It is a general act applying to all

persons within the classes designated and is not invalid upon this ground. *Allan v. Kennard*, 81 Neb. 289.

It is an important fact that since the free pass law has been upon the statute book, although the classification made therein as to some of the classes of persons who are exempted from the prohibition in the act seems closer to the line than that in question here, another constitutional convention has been held. The members of this convention, fresh from the people, made no change in this constitutional provision. Successive legislatures also have met and also have made no further restrictions. These facts indicate that the people themselves, through their duly elected representatives, both in the constitutional convention and in the legislature, are satisfied with, and have acquiesced in, the construction given by the legislature and by the courts to the effect that discriminations of this nature are not unjust.

The judgment of the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

Note—See Carriers, 10 C. J., secs. 775, 1079, 1083, 1091, 1149—Statutes, 36 Cyc. p. 992—Constitutional Law, 12 C. J., secs. 63, 65.

DWIGHT TAYLOR V. STATE OF NEBRASKA.

FILED JUNE 24, 1924. No. 23981.

1. **Contempt:** FINDINGS. Findings of fact by the trial judge in a proceeding for contempt of court have the same force and effect as the verdict of a jury, and where there is a conflict in the evidence, if there is sufficient evidence to sustain the verdict, it will not be disturbed.
2. ———: DUTY OF COURTS. It is the duty of courts to zealously guard against and punish any interference or any attempt to interfere with the testimony of witnesses by means of bribery, intimidation, inducements. or solicitations of any kind, in order to induce them to change or modify their testimony, or to suppress the facts.
3. ———: ATTEMPT TO SUPPRESS EVIDENCE. While waiting in the hall of the courthouse, where she had been subpœned as a witness to testify in a criminal case, the accused approached a

girl of about 14 years of age, endeavored to induce her to suppress a part of the facts in the case in which she was a witness, and promised her a new dress if she would not tell all she knew. *Held*, that this was an interference with the proper administration of justice and constituted contempt of court.

ERROR to the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

McKenzie, Cox & Harris, for plaintiff in error.

O. S. Spillman, Attorney General, and *Harry Silverman, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and THOMPSON, JJ., and BLACKLEDGE, District Judge.

LETTON, J.

Plaintiff in error was convicted of contempt of court and seeks to set aside his conviction. The substance of the charge against him is that on or about the 8th day of February, 1924, a criminal action was pending in the district court for Douglas county, wherein James Griffin and others were charged with the crime of murder; that on that date two girls, witnesses for the state of Nebraska, naming them, were waiting in the hall of the courtroom to testify in the case; that the accused, knowing these facts, wrongfully and for the purpose and intent to hinder the due administration of justice in that case, did solicit these witnesses not to give testimony against the defendant which they knew to be true, and in consideration for their not giving such testimony he promised to buy each of them a new dress. A plea of not guilty was interposed. The charge was tried to the court, who found the defendant guilty and sentenced him to be imprisoned in the county jail for 30 days.

The only error charged is that the evidence is insufficient to sustain the finding of the court that Taylor was guilty of the charge set out in the information.

There is a direct conflict in the testimony. Dolores Newton, who is a schoolgirl about 14 years of age, testified that

on February 7, 1924, which was Thursday, she was waiting in the hall of the courthouse in Douglas county. She had been subpœned as a witness in the criminal case mentioned. She had been attending as a witness from Monday until that day. On Thursday the accused, whom she knew, said to her in the hall that he would buy her a new dress if she did not testify all she knew, and also said: "You would hate to convict an innocent man, wouldn't you? It would haunt you the rest of your days." And that this was said before she was called into the courtroom to give her testimony. She also testified that Evelyn Clark, another schoolgirl, about 15 years of age, and one Mrs. Finn, were in the hall of the courthouse at the time, and that during the conversation Mrs. Finn and Evelyn Clark came over to where she and Taylor were standing. Evelyn Clark testified she heard the remark with reference to the conviction of an innocent man, and that she thought this remark by Taylor was meant for her as well as for Miss Newton. Both girls, Taylor and Mrs. Finn agreed that one of the girls said she had $12 coming from her witness fees, and that would buy her a new dress, and that Taylor said: "Put three more dollars with it and you could get a good dress." Mrs. Finn testified that the conversation with Taylor was after he had testified; that she was present during the whole time, and that while she was there nothing was said with respect to the conviction of an innocent man, or that he would give the girls, or either of them, a new dress.

In the trial of a case for contempt of court, the findings of fact by the trial judge have the same force and effect as the verdict of a jury. Where there is a conflict in the evidence, the rule, that if there is sufficient evidence to sustain the verdict it will not be set aside, applies. If the testimony of the two girls is believed, there is ample evidence to sustain the conviction. If the evidence of Taylor and Mrs. Finn is believed, the accused is not guilty. Under these circumstances, the finding of the trial court may not be set aside on the ground that it is not sustained by the evidence. All the witnesses were before the trial judge. Some facts were developed on cross-examination which may have

influenced the mind of the judge as to their respective credibility. He could observe their demeanor and have the invaluable aid, in determining whether the testimony was true or false, of observing their manner of testifying and their general appearance upon the witness stand. The inducement offered the witness may seem trifling to mature minds, but the promise of a new dress to a girl of the age of Dolores Newton may have had a great attraction for her and might have well induced her to suppress part of the truth.

The offense charged is a heinous one and merits the severest condemnation. Thus to interfere with the administration of justice is clearly a contempt of court. Such offenses should not be passed over lightly nor regarded as of little moment. It is impossible for a jury to reach the right conclusion upon the trial of a case unless the testimony comes to them unpolluted or uninfluenced. It is difficult enough to obtain a knowledge of the real facts, even when the witnesses are telling the truth, since so much depends upon the point of view, upon the ability to observe and retain, and on the mental aptness of the respective witnesses. Courts should zealously guard against and punish any interference with, or any attempt to interfere with, the testimony of witnesses by means of bribery, intimidation, inducements or solicitations of any kind in order to influence them to change or modify their testimony, or to suppress the facts.

The judgment of the district court is

AFFIRMED.

Note—See Contempt, 13 C. J. p. 104, sec. 168; p. 38, secs. 48, 50.

FARMERS STATE BANK OF OVERTON, APPELLEE, V. ERNEST DOWLER ET AL., APPELLANTS.

FILED JUNE 24, 1924. No. 22849.

1. **Contracts:** DURESS. The general rule of law that a person who signs a contract for the benefit of another is not ordinarily un-

der duress is subject to exceptions growing out of intimate ties of blood or marriage, and the exceptions may include a son-in-law.

2. ———: ———. Threats of imprisonment designedly made by an interested party for an unlawful purpose may be sufficient to prove duress, where it is also shown that the effect is to prevent the other party, upon whom the threats operate, from exercising his free will while signing contractual obligations.

3. ———: ———: ADMISSIBILITY OF EVIDENCE. Proof of threats wrongfully made to intimate relatives of a person upon whom duress is intended to operate, if communicated to him pursuant to the design of the wrongdoer, may be admitted in evidence on the issue of duress.

4. ———: ———. Any wrongful influence designedly exerted by an interested party and producing a condition of mind that deprives the other party of the exercise of his free will may amount to duress and invalidate a contract signed while the influence prevails.

5. **Bills and Notes:** DIRECTION OF VERDICT. In an action on a promissory note signed by defendant, it is error to direct a verdict against him where he pleads duress and adduces sufficient evidence on that issue to support a judgment in his favor.

APPEAL from the district court for Dawson county: J. LEONARD TEWELL, JUDGE. *Reversed.*

Hainer, Craft, Edgerton & Fraizer and *T. M. Hewitt,* for appellants.

Cook & Cook, contra.

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

ROSE, J.

This is an action on two promissory notes payable on demand, each for $2,000, bearing interest at the rate of 10 per cent. per annum. The Farmers State Bank of Overton, payee, is plaintiff. Ernest Dowler and Swan Johnson, makers, are defendants. They signed the notes, but duress was pleaded as one of the defenses. Upon a trial of the issues the district court directed a verdict in favor of plaintiff, and from a judgment thereon defendants have appealed.

One of the assignments of error is that the district court erred in directing a verdict in favor of plaintiff. Should the issue of duress have been submitted to the jury? A verdict against both defendants was directed, and this ruling was of course erroneous, if the evidence was sufficient to sustain a judgment in favor of either. When defendant Johnson was not indebted to plaintiff, he signed the notes as surety for defendant Dowler, his son-in-law. Was the suretyship the result of duress? Johnson himself was not subjected to threats and was not seized by fear for his own safety or liberty. The general rule is that a person who signs a contract for the benefit of another is not ordinarily under duress, but there are exceptions growing out of intimate relationships. Threats which affect the mind of a person accused of crime may exert an influence on others with whom he is intimately connected by ties of blood or marriage. An exception to the general rule mentioned may include a son-in-law. Threats of imprisonment designedly made by an interested party for an unlawful purpose may be sufficient to prove duress, where it is also shown that the effect is to prevent the other party, upon whom the threats operate, from exercising his free will while signing contractual obligations. *Nebraska Mutual Bond Ass'n v. Klee*, 70 Neb. 383; 9 R. C. L. 726, sec. 16; *Fountain v. Bigham*, 235 Pa. St. 35. Threats may have a similar effect, if designedly communicated through intimate relatives to the person upon whom they are intended to operate. Evidence of that nature is admissible, and its probative effect, if any, as proof of duress is a question for the jury. *Fountain v. Bigham*, 235 Pa. St. 35, citing *Nebraska Mutual Bond Ass'n v. Klee*, 70 Neb. 383. Did defendants make a *prima facie* defense for the consideration of the jury? The notes in suit were the last of three renewals, the respective dates being December 7, 1920, February 5, 1921, and August 1, 1921. The original notes were dated July 10, 1920. From the testimony adduced by defendants, if believed, the following inferences might properly have been drawn by the jury: In the first instance Johnson did not owe the debts evidenced by the notes which he signed. He lived on a

farm and was there accosted by the president of plaintiff's bank, who threatened to send Dowler, Johnson's son-in-law, to the penitentiary for moving mortgaged chattels from Dawson county to Buffalo county, if Johnson did not sign the notes, intimating there would be no prosecution, if he did so. He was not thus coerced, but yielded later after his wife and daughter, the mother-in-law and the wife of Dowler, went, weeping, to him and pleaded with him to sign the notes. This conduct on the part of the wife and daughter had been prompted by similar threats made by the same person with the intention of having them communicated to Johnson. This is not a statement of facts, but a mere outline of inferences from the testimony on duress as a defense. The credibility of the witnesses and the inferences from their testimony were questions for the jury. The evidence was clearly sufficient to sustain a finding by them that Johnson was under duress when he signed the notes in the first instance.

It is argued, however, that the peremptory instruction was proper because the renewal notes were voluntarily given. It is insisted that the acts of Johnson in signing them amounted to a ratification of the original transaction. This view cannot be adopted without disregarding evidence of a different import. There is testimony to the effect that the renewals did not amount to a payment or a discharge of the original indebtedness, but were new evidence thereof. From the testimony of Johnson, if believed, the jury might have inferred that the duress which controlled him when he first surrendered his own will to that of plaintiff extended to all the renewals; that in each instance he still thought his son-in-law would be prosecuted criminally if he failed to sign the renewals; that except for the fear inspired by the threats of plaintiff, and the pleading of his wife and daughter, he would not have signed any of the notes; that these influences were wrongfully exerted by plaintiff. It was not for the court to say as a matter of law that the testimony was untrue or that no such inferences could be drawn. The questions should have been submitted to the jury. Any wrongful influence de-

signedly exerted by an interested party and producing a condition of mind that deprives the other party of the exercise of his free will may amount to duress and invalidate a contract signed while the influence prevails. *Fountain v. Bigham,* 235 Pa. St. 35, citing *Nebraska Mutual Bond Ass'n v. Klee,* 70 Neb. 383. It follows that the district court erred in directing a verdict against defendant Johnson. For this error, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Contracts, 13 C. J. p. 404, sec. 325; p. 400, sec. 315; p. 769, sec. 964, p. 402, sec. 319; p. 783, sec. 993; Bills and Notes, 8 C. J. p. 1060, sec. 1371.

JOHN J. DUNNEGAN ET AL., APPELLANTS, V. J. H. JENSEN, COUNTY TREASURER, APPELLEE.

FILED JUNE 24, 1924. No. 22889.

1. **Taxation:** EXEMPTIONS. Where a contractor agrees to install in and for a city a sewer system at a fixed price for the completed improvement, and obligates himself to provide at his own expense the necessary labor and materials therefor, the mere inspection and approval of unlaid sewer pipe, subsequently placed by the contractor above the ground in the streets but not yet a part of the completed sewer system, do not make such unlaid sewer pipe city property which is exempt from taxation.
2. ———: UNLAID SEWER PIPE. Unlaid sewer pipe above ground in a city on the first day of April is subject to taxation as property of a contractor who purchased it and placed it there in performing a contract to provide at his own expense the necessary labor and materials and to install in and for the city a completed municipal sewer system at a fixed price for the entire improvement.

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

C. P. Anderbery, for appellants.

John L. McPheely, contra.

Heard before MORRISSEY, C. J., ROSE, GOOD and THOMPSON, JJ.

ROSE, J.

This is a suit for an injunction to prevent the county treasurer of Kearney county, defendant, from collecting taxes alleged to have been illegally assessed. May 30, 1921, the assessor listed as property owned by plaintiffs in Minden April 1, 1921, the following: Ditch-digging machine, $4,500; ditch-filling machine, $750; sewer pipe on hand in the city of Minden, $20,000; total, $25,250. On these valuations the taxes levied were $809.28. Plaintiffs were partners and resided at Shenandoah, Iowa. They pleaded in their petition that their digging and filling machines had been assessed for the year 1921 in Iowa and were not, therefore, subject to taxation in Nebraska, and that the sewer pipe listed by the assessor was exempt property of the city of Minden. Defendant by answer put in issue the facts upon which plaintiffs relied for an injunction and defended the assessment as a valid exercise of the taxing power. Upon a trial of the case the district court found that plaintiffs' digging and filling machines were not properly listed in Nebraska, because they had been assessed in Iowa for the same period; that plaintiffs owned in Minden, April 1, 1921, subject to taxation, unlaid sewer pipe of the value of $7,600, and that they are liable for taxes thereon to the extent of $243.58. The levy in excess of hat amount was enjoined as invalid. Plaintiffs have appealed, claiming they are not liable to Kearney county for taxes in any amount.

There does not seem to be any error in the judgment of the district court. It is conclusively shown that the ditching and filling machinery was assessed in Iowa for 1921. Consequently it should not have been listed in Nebraska for that year. The question for determination is plaintiffs' ownership of unlaid sewer pipe in Minden April 1, 1921. Plaintiffs had entered into a contract August 24, 1920, to install in and for the city of Minden a sanitary sewer system at a fixed price for the completed improvement. While plaintiffs were performing the contract there was on hand April 1, 1921, in the streets of Minden, unlaid sewer pipe of the value of $7,600. At that time whose property was it? It was then above the ground. It had not become a

part of the completed sewer system which plaintiffs had agreed to install. It had been shipped to them and was in the streets to which they had access for the purpose of performing their contract. The city did not order or purchase the materials used. The obligation to pay for them had been assumed by plaintiffs. The city could not legally have taken the unlaid sewer pipe for other municipal purposes or have maintained replevin for it. On the other hand, plaintiffs, without violating the terms of their contract, could have removed it at will. The city had agreed to pay plaintiffs a fixed sum for the completed sewer system, but had not obligated itself to pay for any materials used therein. It is argued, however, that the city exercised the right of inspection and accepted the sewer pipe before it was unloaded from the railroad cars on which it had been shipped to Minden, and that thereafter it was owned by the city. The point does not seem to be well taken. In the contract the provisions relating to the inspection and approval of materials do not affect the question of title. It is apparent from the contract as a whole that inspection and approval of unlaid sewer pipe were conditions accepted by both parties for their mutual convenience. Plaintiffs and the city, for obvious reasons, would naturally seek to avoid inspection of sewer pipe after it had been laid in the ditches. It seems clear that the unlaid sewer pipe above ground in the streets of Minden April 1, 1921, belonged to plaintiffs.

Under the constitutional and statutory provisions relating to taxation, nonexempt property should be listed by the owners. The sewer pipe in controversy was not exempt. It was the duty of the assessor to see that it was listed. While he listed machinery not subject to taxation in Nebraska, plaintiffs, nevertheless, owned in Minden sewer pipe which they should have listed. Legally they were tax-debtors to the extent of $243.58. They sought and obtained affirmative relief in equity. As a condition of granting the injunction to prevent the collection of the illegal taxes, it was within the discretion of the court of equity to require plaintiffs to pay what they as tax-debtors

justly owed Kearney county. The decree of the district court conforms to these views, and consequently is

AFFIRMED.

Note—See Taxation, 37 Cyc. p. 872 (1925 Ann.); p. 999 (1925 Ann.).

CHAPIN-COLGLAZIER CONSTRUCTION COMPANY, APPELLEE, V. HAMILTON COUNTY, APPELLANT.

FILED JUNE 24, 1924. No. 23075.

Taxation. Loose paving materials in the streets of a city on the first day of April *held* assessable as property of the paving contractor. *Dunnegan v. Jensen, ante*, p. 266, followed.

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

John J. Reinhardt, for appellant.

Hainer, Craft, Edgerton & Fraizer, contra.

Heard before MORRISSEY, C. J., ROSE, GOOD and THOMPSON, JJ.

ROSE, J.

This is a controversy over the taxability of loose paving materials in the city of Aurora April 1, 1921. As property of plaintiff the materials were listed by the county assessor as follows: Brick, 1,500,000, $45,000; cement, 8 cars, $6,400; asphalt, 2 cars, $360; sand, 10 cars, $500; total, $52,260. Plaintiff, a construction company, had entered into a contract January 21, 1920, to provide at its own expense the necessary labor and materials and to grade, curb and pave the streets in a paving district in the city of Aurora. This contract had been partially performed April 1, 1921, but the loose materials listed by the assessor, though then in the streets ready for utilization in the work of paving as it progressed, had not yet become a part of the completed improvement. Plaintiff objected to the assessment of the loose materials listed, insisting they were property of the city and therefore exempt from taxation. In July, 1921, the county board of equalization overruled

the objections and assessed the paving materials in controversy as the property of plaintiff, the paving contractor. The latter appealed to the district court, where the assessment against plaintiff was stricken from the tax rolls. From that judgment, defendant, the county of Hamilton, has appealed.

The controlling question for determination is the ownership of the loose paving materials in the streets of the paving district April 1, 1921. Under a fair interpretation of the contract, plaintiff obligated itself to grade, curb and pave at its own expense the streets in the paving district according to definite plans and specifications and to accept in payment fixed prices based on the completed pavement. It was the duty of plaintiff to furnish the materials. They were necessarily in the possession and under the control of the contractor during the progress of the work. For the mutual convenience of the parties, loose paving materials were inspected and approved by the city before becoming parts of the completed whole. While carloads of bricks used for paving had been consigned to the city of Aurora in care of plaintiff, they were owned by the latter until the title thereto changed upon completion of the pavement. There is nothing in the contract or evidence to show that the loose materials in the streets were owned by the city of Aurora April 1, 1921. They were not exempt and were assessable as the property of plaintiff. Assuming that the loose materials in the streets April 1, 1921, were parts of the pavement in July, 1921, when the county board made the assessment, the changing of ownership in the meantime would not relieve plaintiff from liability as a tax-debtor. The taxability of personal property in the taxing district is determined by the ownership on the first day of April. In reaching this conclusion *State v. Nickerson*, 99 Neb. 517, has not been overlooked. The decision is controlled by *Dunnegan v. Jensen, ante*, p. 266. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Taxation, 37 Cyc. p. 999 (1925 Ann.).

SIOUX CITY BRIDGE COMPANY, APPELLANT, V. CITY OF SOUTH SIOUX CITY ET AL., APPELLEES.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLANT, V. CITY OF SOUTH SIOUX CITY ET AL., APPELLEES.

FILED JUNE 24, 1924. No. 23532.

Municipal Corporations: VOID ASSESSMENTS: INJUNCTION. The collection of void assessments levied by a city on property specially benefited by the paving of streets may be prevented by injunction. *Rooney v. City of South Sioux City*, 111 Neb. 1, followed.

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

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

George W. Leamer and *Sidney T. Frum, contra.*

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

ROSE, J.

These suits were brought to prevent officers of South Sioux City and the county treasurer of Dakota county from collecting paving assessments levied by South Sioux City against property of plaintiffs therein. Injunctions were sought on the ground that the assessments were void, because the city in attempting to authorize the paving and in levying assessments for special benefits proceeded under what is called "Ordinance No. 122," which never went into effect. Defendants resisted the applications for injunctions on the ground that ordinance No. 122 was valid and that the proceedings thereunder were regular. The trial court upheld the city ordinance and dismissed the suits. Plaintiffs appealed.

The decision is controlled by *Rooney v. City of South Sioux City*, 111 Neb. 1. Though it was therein held, for reasons stated in the former opinion, that the assessments

were void because ordinance No. 122 never went into effect, it is nevertheless argued that an ordinance was unnecessary and that the affirmative action taken was authority for what was done by the city. The fallacy in this argument is the failure to recognize the proposition that the ordinance, according to its own terms, was to become effective only upon the approval of the mayor, an unperformed official act, and that this infirmity inheres in the proceedings of the council. It is therefore unnecessary to decide whether a valid ordinance is required, and that question is not determined.

It is argued further that the proceedings authorizing the paving and the assessments therefor are valid under ordinance No. 121, if ordinance No. 122 fails. The answer to this proposition is that the council proceeded with the improvement and defended these suits under ordinance No. 122. Ordinance No. 121, therefore, is not properly in issue. On the record presented the injunctions were erroneously denied. It follows that the judgment is reversed and the cause remanded for further proceedings, but with leave to defendants, if so advised, to amend their answers.

REVERSED.

Note—See Municipal Corporations, 28 Cyc. p. 1185.

STATE OF NEBRASKA V. AMERICAN STATE BANK OF AURORA. A. F. ACKERMAN, RECEIVER, APPELLANT, V. NATIONAL AMERICAN FIRE INSURANCE COMPANY, CLAIMANT, INTERVENER, APPELLEE.

FILED JUNE 24, 1924. No. 23710.

1. **Banks and Banking**: DEPOSIT. Actual money is not necessarily a prerequisite of a "deposit" within the meaning of the bank guaranty law.
2. ———: RESERVE FUND. Liberty bonds of the United States may be received and held by a state bank at their face value for the purpose of creating or maintaining the reserve fund required by law.
3. ———: DEPOSIT: LIBERTY BONDS. In absence of wrong-doing on the part of a depositor, liberty bonds of the United States

may be received as a deposit at par by a state bank in exchange for time certificates of deposit in an equal amount.

4. ———: AGENCY. There may be exceptions to the general rule that a banker who receives a deposit while absent from his place of business is, for the purpose of delivery, the agent of the person from whom he receives it

5. ———: ———. A banker in exclusive control of his bank may, under exceptional circumstances, be considered its agent from the time he exchanges, while absent, its time certificates for a deposit of liberty bonds of the United States, where the depositor acts in good faith.

6. ———: GUARANTY FUND: ALLOWANCE OF CLAIM. Depositor's claim against an insolvent bank *held* payable out of the bank guaranty fund under the facts stated in the opinion.

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

Charles E. Matson and *C. M. Skiles*, for appellant.

Isidor Zeigler and *Hainer, Craft, Edgerton & Fraizer, contra.*

Butler & James, amici curiæ.

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

ROSE, J.

This is a controversy between A. F. Ackerman, receiver of the American State Bank of Aurora, an insolvent corporation, and the National American Fire Insurance Company, claimant, as a depositor. An officer of the state took charge of the bank in an insolvent condition March 17, 1920, and Ackerman went into possession as receiver May 14, 1920. In a proceeding to wind up the affairs of the bank, claimant pleaded a deposit of $15,000, evidenced by three time certificates dated December 16, 1919, each for $5,000, all bearing interest at the rate of 4 per cent. per annum and maturing respectively in four, eight and twelve months. The regular blank forms of the American State Bank were used in drawing the certificates. They were signed for the bank by Charles W. Wentz, vice-president,

and claimant was named as depositor. The relief sought herein was the allowance of the claim as a deposit payable out of the bank guaranty fund. The receiver resisted the claim on the ground that the certificates did not represent such a deposit. Upon a trial of the issues raised by the pleadings, the district court allowed the claim to the extent of $13,704.68, with interest, and made it payable out of the bank guaranty fund. The receiver has appealed.

Did the certificates represent a deposit within the meaning of the bank guaranty law? Charles W. Wentz, vice-president and managing officer of the American State Bank of Aurora, went into the office of claimant at Omaha December 16, 1919, and applied on behalf of that bank for a deposit of $15,000. When told, as he was, that claimant could not make a deposit of $15,000, he said liberty bonds of the United States could be accepted on the basis of cash. Claimant then agreed to make such a deposit and turned over to Wentz liberty bonds amounting on their face to $15,000, receiving from him the three certificates of deposit in controversy, aggregating $15,000. Instead of depositing the bonds in the American State Bank of Aurora on the basis of cash, Wentz immediately transferred them to the United States Trust Company of Omaha for $13,704.68, which he deposited in the United States National Bank of Omaha to the credit of the Wentz Company, a corporation dealing in real estate, farm loans, mortgages and insurance, and transacting business at Aurora under his exclusive control in the rooms occupied by the American State Bank.

It is first argued that claimant left no money in the American State Bank as a deposit subject to check or as a basis for a time certificate. It has recently been held that "the presence of the actual money is not a prerequisite to a deposit." *State v. Banking House of A. Castetter*, 110 Neb. 564; *State v. American State Bank, ante*, p. 182. Liberty bonds are interest-bearing securities of a high order. Fraud or dishonesty on the part of claimant, because it exchanged liberty bonds at par for the certificates of deposit, is not a proper inference from the evidence. It seems

equally clear that the conduct of Wentz in converting the liberty bonds into cash at a discount was not imputable to claimant. Rascality often casts suspicion on the innocent, but the truth, not suspicion, is the goal of judicial inquiry into the facts, and on this phase of the litigation the evidence shows that claimant had no part in any of the wrongs committed by Wentz. This view of the evidence extends also to a contention that the transaction was the result of a conspiracy to exact an illegal rate of interest on the certificates of deposit and to defraud the American State Bank.

Other propositions ably presented by counsel for the receiver may be summarized as follows: In accepting the liberty bonds for deposit, Wentz was the agent of claimant. He did not act for or in the interests of his bank and any loss resulting from his failure to deposit the liberty bonds therein falls on his principal, the claimant. Banks do not contemplate the receiving of deposits outside their places of business and do not become liable as bankers before the deposits are delivered. In this connection it is insisted that neither the deposit nor its equivalent was received at the American State Bank to its credit, and that therefore it is not liable to claimant as a depositor. The law thus invoked by the receiver is sound in principle and should not be relaxed, but there are exceptions to the general rule. If a cashier should leave his bank during an unreasonable run, procure from other banks, on certificates of deposit issued by him while absent, funds which stop the run, save his bank, protect unpaid depositors and prevent a public disaster, would he be the agent of a bank whose currency under such circumstances was lost in transit? In the situation assumed the initial transactions, though identical in character, would result in the protection of a depositor in one instance and in a loss in another. It would be a strange rule indeed that would sanction such a doctrine. To prevent anomalies like that, exceptions to general rules are recognized.

Whether the present controversy falls within an exception is the question to be determined. Wentz had exclusive control of the Wentz Company. As vice-president of

the bank he managed its business. No other person connected with it assumed to interpose any objections to his will. Both corporations were chartered by the state, and their office, counter, vault and safe were used in common. The business of the two corporations was more or less intermingled. Wentz used both concerns for his own purposes. When he left the bank he took with him the knowledge and mind that controlled it. In a sense he was both institutions wherever he went. The danger of one was the danger of the other. When both were in a precarious condition, Wentz, as he had done before, went to claimants' office in Omaha and there exchanged time certificates of his bank for a deposit. The better view of this transaction is that he was the agent of the bank, acting in its interests. In contemplation of law the liberty bonds received by him and the proceeds thereof belonged to his bank. The district court found, and the evidence fairly shows, that the deposit of $13,704.68 to the credit of the Wentz Company in the United States National Bank of Omaha eventually went into the American State Bank in the form of liberty bonds returned for correction, of credit in other banks, or of deposits reducing overdrafts of the Wentz Company. This method of transacting business and the control of Wentz were not disturbed by the exercise of any function on the part of other executive officers or directors of the American State Bank. Having in those relations no useful existence for the purpose of conducting a legitimate banking business, why should they be permitted to assume official connections with the bank for the sole purpose of asserting lack of knowledge and of defeating the claim of an honest depositor who had no part in the iniquity of Wentz? The general rule invoked by the receiver grew out of the necessities of legitimate banking. In the ordinary course of business a bank, as contended by the receiver, contemplates the receipt of deposits at its place of business where its funds are controlled and protected by officers and agents who perform their duties, but the claim in controversy falls within an exception and cannot be adjudicated under the general rule without defeating justice. In various forms, as

already explained, proceeds of these bonds to the extent of $13,704.68 ultimately went into the bank. In allowing the claim for that amount and in making it payable out of the bank guaranty fund the district court did not err. While the receiver resisted the claim in good faith on grounds that seemed to him to be substantial, the better view of the facts and the law is the one taken by the district court.

AFFIRMED.

GOOD, J., dissents.

Note—See Banks and Banking, 7 C. J. p. 485, sec. 15 (1925 Ann.); p. 486, sec. 16; p. 648, sec. 338 (1925 Ann.); p. 637, sec. 318.

OSCAR HUFFMAN, APPELLEE, V. BANKERS AUTOMOBILE INSURANCE COMPANY ET AL., APPELLANTS.

FILED JUNE 24, 1924. No. 22803.

1. **Contracts:** RESCISSION. The rule is that one who seeks to rescind a contract on the ground of fraud must, within a reasonable time, offer to return the property or the consideration which he received. But there are exceptions to the rule.

2. ———: ———: DELAY. Delay will not ordinarily defeat rescission of a contract obtained by fraud if the circumstances are not such as to render rescission inequitable and if the rights of creditors or stockholders, who have become such on the faith of the defrauded party's subscription, have not intervened.

3. **Election of Remedies:** AMENDED PETITION: REFUSAL TO STRIKE. Plaintiff began an action against the defendant corporation, and its agents, to recover damages for false and fraudulent representations made by defendants whereby he was induced to buy 50 shares of its corporate stock at a grossly excessive valuation. At a considerable time thereafter he filed an amended petition against the same parties, wherein he tendered to defendants the stock, and also certain alleged dividends, which were sent to him by the corporation. Between the time of filing the original petition and the amended petition, the rights of others had not intervened, nor was the status of the parties changed in any material respect. *Held*, that the court did not err in refusing to strike the amended petition from the files on the alleged ground that plaintiff's original petition constituted an irrevocable elec-

tion of remedy, and that he was therefore estopped from maintaining an action on his amended petition. Substantially the same principle is involved in *Carson v. Greeley*, 107 Neb. 609.

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

Cosgrave, Campbell & Ankeny, H. A. Reese and *Sterling F. Mutz*, for appellants.

J. M. Priest, contra.

Hall, Cline & Williams, amici curiæ.

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

DEAN, J.

This action is based on a rescission of a sale contract involving 50 shares of stock in the Bankers Automobile Insurance Company, for which plaintiff paid $100 a share. He tendered the stock to defendants, and also tendered certain alleged dividends in the sum of $210, which he received from the company, and seeks to recover the purchase price paid for the stock. It is alleged that the stock, at all times material to the issues herein, was of greatly less value than plaintiff paid for it. The argument is that the sale to plaintiff was induced by defendants' false and fraudulent representations, in respect of value, which plaintiff believed to be true, and upon which he relied and acted.

Plaintiff made the Bankers Automobile Insurance Company, hereinafter called the insurance company, and Charles Maixner, who was president of the insurance company, Oliver Sacks and Fred Noah, who were its agents and representatives, and A. H. Armstrong, F. P. Dwiggins and H. W. Kenyon, parties defendant. The action was dismissed as to Armstrong, and service of summons was not had upon Dwiggins or Kenyon. A default judgment was rendered against Maixner. The jury returned a verdict for plaintiff and against the insurance company, and Oliver Sacks and Fred Noah, for principal and interest, in the

sum of $5,897.78. A joint judgment was thereupon rendered on the verdict against the insurance company, and Oliver Sacks and Fred Noah. Except Maixner, all defendants appealed who were served with summons.

The action was originally begun against the same defendants to recover $5,000 damages on account of the alleged fraud. Two petitions are in the record. The original petition was filed within a reasonable time after plaintiff made the discovery of the facts of which he complains. In his subsequent amended petition he alleged substantially the same facts which he pleaded in the original petition, and he therein pleaded a rescission of the contract, and tendered to "defendants and each of them in open court the said 50 shares of stock," and also $210, which was sent to him by the company in two or more payments as alleged dividends. Plaintiff also pleaded that it was impossible for him to make an earlier tender to the defendants, because, when he first discovered the fraud, the agents from whom he purchased the stock were out of the state and could not be found. It was also disclosed that at the time the president of the insurance company was in the penitentiary. Hence, for these reasons he made his tender in his amended petition. And the proofs, in these respects, tend to support the allegations.

All defendants contend, in pleading and in briefs, that plaintiff is estopped from maintaining an action on his amended petition. The argument is that, by delay and by filing his original petition for damages, without first having rescinded his contract, he affirmed the contract and thereby elected his remedy and is bound thereby. But there are exceptions to the rule which will be hereinafter noticed.

October 5, 1921, the insurance company filed its answer, and therein pointed out the conceded fact that the department of trade and commerce, hereinafter called the Department, acting under an order of the district court for Lancaster county, January 14, 1921, took possession of the property and effects of the defendant insurance company, of every nature and description, under section 4, ch. 190, Laws 1919, being section 7748, Comp. St. 1922. The court

in its order, pursuant to the power conferred upon it by the laws relating to insurance companies (Comp. St. 1922, title V, art. III, secs. 7745-7765), ordered the Department to retain in its possession all the property of the insurance company, its records and effects, and to conduct its business and to do all things imposed upon it by the order until the further order of the court. As a part of the proceedings, preliminary to the making of the order in question, the district court found the insurance company's affairs "to be in such condition that its further transaction of business would be hazardous to its policy-holders, its creditors, its stockholders, and to the public." And, among other recitals in the record, it is disclosed that various violations of the law by the defendant company had been established.

After the appeal was filed in this court, and shortly before the case was submitted on oral argument, plaintiff, by an agreement with the Department, effected a settlement with the insurance company, with the court's approval, and dismissed his action in this court against the insurance company only, with prejudice. Of course, no further appearance was thereafter made here by the insurance company.

Sacks and Noah complain because the insurance company was dismissed without their knowledge, and because they received no consideration therefor and at no time approved or acquiesced therein, and that the joint judgment against them and the insurance company now stands against them alone. There is no ground for this complaint. It is obvious that their liability on the judgment would be decreased in such amount as plaintiff received upon settlement with the insurance company, and that the judgment can only be enforced against them as to the unpaid remainder. They further complain that in the settlement the defendant insurance company, or its successor, has accepted from plaintiff, and now holds as its own, all the shares and certificates of stock involved in this action.

However, Sacks and Noah contend, in substance, that they cannot properly be a party to this action because it has to do with the rescission of the sale of corporate stock

in which they have no proprietary interest. But by the settlement between plaintiff and the insurance company, and its acceptance of the stock and its withdrawal from the case, this embarrassment has been removed. And it may be noted that, in their joint answer, Sacks and Noah allege that the stock which plaintiff purchased "belonged to the defendant Charles Maixner," and in their brief they say that defendant "Noah testified that he was selling the stock of defendant Charles Maixner." Be that as it may, the question in regard to the value of the stock, from whomsoever purchased, and Maixner is a party defendant, was a question for the jury. And it is conceded in their brief that "an action in damages for fraud might properly be directed against the agent alone or against the agent and principal jointly, for the liability is joint and several." And they contend that Maixner was their principal.

In view of the argument, it is obvious that the defense of Sacks and Noah is not tenable. Besides, there is evidence to support a finding that Sacks and Noah knew the stock was of small value, as compared with the price for which they sold it. But in any event they should have known it. In view of all the facts, it is unthinkable that they should now escape liability on the specious plea that plaintiff was negligent in that he did not make inquiry in respect of the value of the stock, or on the plea of their own ignorance of values, which was within their power to discover and upon which it was their bounden duty to be informed. Neither Sacks nor Noah have been prejudiced by any of the facts disclosed by the record.

"Contributory negligence is not a defense to an action for deceit. If the false statement is made by one who may be fairly assumed to know what he is talking about, it may be accepted as true, without question and without inquiry, although the means of correct information are easily within reach. * * * It would, indeed, be singular to hold a swindling deceiver exempt from liability because he has swindled only foolishly credulous and trusting persons, and more singular still to hold that such a swindler may successfully plead the incredibility of his falsehood and the

folly of his victim's belief." *King v. Livingston Mfg. Co.*, 180 Ala. 118.

It is contended that Maixner, and either Sacks or Noah, or perhaps all three together, called on plaintiff at his farm home, about 25 miles distant from defendant's Lincoln office, and here made the false and fraudulent representations, perhaps in the first instance, which in part induced him to make the purchase, and that Sacks and Noah followed up and at other times saw and repeatedly urged plaintiff to invest, and always with the assurance that the stock would certainly increase greatly in value and that he could not lose on the investment. It clearly appears from the record that the representations so made to plaintiff were such as to convince the jury that they were not mere expressions of opinion, but were false and fraudulent representations of fact. *Farmers Cooperative Grain Co. v. Startzer, ante*, p. 19.

The general rule is that one who seeks to rescind a contract on the ground of fraud must, within a reasonable time, offer to return the property or consideration which he received. But we think the present case comes within recognized exceptions to the rule, as shown by well-established authority, which in effect holds that where the injured party has done no wrong, and where neither the defendant, nor any other person, has been shown to have been prejudiced in any lawful right by the delay complained of, the remedy by rescission may be invoked. *Independent Van & Storage Co. v. Iowa Mercantile Co.*, 184 Ia. 154; *Stotts v. Fairfield*, 163 Ia. 726. It has been held that an offer "to restore the *status quo* is sufficient." *Maine v. Midland Investment Co.*, 132 Ia. 272.

"Whether a subscriber's delay in rescinding his subscription for fraud was unreasonable, so as to constitute laches, depends upon the circumstances, as well as upon the extent of the delay. Even a long delay will not be fatal if satisfactorily explained, and if the circumstances are not such as to render rescission inequitable, or where the rights of creditors or stockholders, who may have become such on the faith of the defrauded party's subscription, have not

intervened." 2 Fletcher, Corporations, 1408, sec. 634.

Substantially the same principle is involved in *Carson v. Greeley*, 107 Neb. 609, wherein we held: "When a suit is begun for the rescission of a contract on the ground of fraud, the plaintiff may dismiss her action without prejudice, and begin an action at law to recover damages for the perpetration of the fraud under facts which are not inconsistent with the facts in the former action, and no estoppel is worked thereby, where the plaintiff has acquired no benefit in the former action and no detriment has been caused to the defendant in such action."

Defendants complain of the giving of certain instructions, and also of the refusal of the court to give certain tendered instructions. An examination of the record does not disclose reversible error in this respect. Evidently the jury's belief in plaintiff's veracity controlled the issue of fact. Error which would affect the result has not been shown.

The judgment is

AFFIRMED.

Note—See Contracts, 13 C. J. p. 621, sec. 680; Corporations, 14 C. J. p. 596, sec. 868. Election of Remedies, 20 C. J. p. 13, sec. 10.

The following opinion on motion for rehearing was filed December 4, 1924. *Former opinion set aside, and judgment of district court reversed as to certain defendants.*

1. **Corporations: RESCISSION: PARTIES.** Ordinarily, in an action against a corporation to rescind a contract for the purchase of its capital stock and to recover the purchase price paid therefor, on the ground of fraudulent representations of the agent in inducing the purchase of such stock, such agent is not a necessary or proper party defendant.

2. **Former Opinion Vacated.** Former opinion, *ante*, p. 277, set aside, and the judgment of the trial court, in so far as it affects defendants Noah and Sacks, is reversed and the cause of action against them dismissed.

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

DAY, J.

This case was before this court on a former occasion, the opinion being reported, *ante*, p. 277. The material facts are set out in our former opinion and need not be restated.

Upon a reargument, ordered by the court, the defendants Noah and Sacks specially urge that the trial court erred in not dismissing them from the case. It is argued by these defendants that, in the form of action presented by the amended petition upon which the action was tried, they were not proper parties defendant. There is some conflict in the testimony as to whether Noah and Sacks were the agents of the Bankers Automobile Insurance Company, or Charles Maixner, in selling the stock of the automobile insurance company to the plaintiff. That fact, however, is not material as we now view the case. As originally instituted, the action was one in damages for fraud, alleged to have been practiced by the automobile insurance company, Charles Maixner, and Noah and Sacks, in inducing the plaintiff to purchase a number of shares of stock in the automobile insurance company. The original action clearly shows that Noah and Sacks were merely agents, and that the alleged fraudulent acts were committed by them in inducing the plaintiff to purchase the stock. As originally brought, it is clear that the principal, as well as the agents who participated in the fraudulent acts, would be liable in damages, and therefore the agents were proper parties to be made defendants.

It appears, however, that after the action had been pending about nine months, and just prior to the trial, the plaintiff filed an amended petition in which he changed the form of his action from an action in damages to one for rescission. In the amended petition he set out the alleged fraudulent acts committed by Noah and Sacks, which induced him to purchase the stock, asked for a rescission of the contract, and prayed that the purchase price of the stock be paid back to him. The same parties were named as de-

fendants as in the original action. The principal question presented by the record, as it now stands, is whether in an action for rescission the agents who by fraud procured the contract are proper parties defendant. The weight of authority sustains the rule that, in an action against a corporation for a rescission of a contract of purchase of its stock on the ground of fraudulent representations of its agent inducing the purchase, the agent is not a necessary or proper party defendant. The reason of the rule is apparent. In such case the purchaser tenders back to the principal the thing he has received and demands a return of the consideration given. The contract relations are between the principals, and not the agent. The liability of the agent for his wrong-doing to a purchaser is by force of other principles of law than those which measure and fix the rights of parties to a contract. It is true that the agents kept a part of the money paid by the plaintiff for the stock, but this was by virtue of a contract with their principal by which they were to receive a certain commission on all sales of stock made by them. From a legal standpoint their principal received all of the consideration paid by the purchaser. For cases supporting the view we have expressed, see *Ritzwoller v. Lurie,* 225 N. Y. 464; *Wimple v. Patterson,* 117 S. W. (Tex. Civ. App.) 1034. This court has approved the distinction between an action for rescission for fraud and one in tort for damages for the fraud. The two causes of action cannot be joined, as they are repugnant, one affirms and the other disaffirms the contract. *Alfree Mfg. Co. v. Grape,* 59 Neb. 777; *Baker v. Thomas,* 102 Neb. 401.

On the argument an attempt was made to show that the action was one in the nature of a conspiracy among all the defendants to defraud the plaintiff. This contention is not sustained by the amended petition. There is no charge that the wrong-doing was collusively done, or that it was the result of concerted action on the part of the defendants. The instructions given by the trial court clearly indicate that it regarded the action as one for rescission of the contract.

Upon a consideration of the record, we think the court

erred in not dismissing the action as to defendants Noah and Sacks.

Our former opinion in this action is set aside, and the judgment of the trial court, in so far as it affects defendants Noah and Sacks, is reversed and the cause of action as against them is dismissed.

JUDGMENT ACCORDINGLY.

Note—See Corporations, 14 C. J. p. 614, sec. 888.

DEAN, J., dissenting.

In the majority opinion it is said: "The weight of authority sustains the rule that, in an action against a corporation for a rescission of a contract of purchase of its stock on the ground of fraudulent representations of its agent inducing the purchase, the agent is not a necessary or proper party defendant."

I respectfully submit that the present case comes within well recognized exceptions to this rule.

In the brief of *amici curiæ,* counsel very fairly say:

"It is conceded that perhaps authority exists for joining principal and agents in such an action in equity at least in some jurisdictions, and notably in New York. This rule was announced and followed by Chief Justice Parker in *Mack v. Latta,* 178 N. Y. 525, 67 L. R. A. 126." Counsel then incorporate this excerpt from the *Latta* case, which, in principal, is in point.

"These decisions seem to us so well grounded in reason as to justify a court of equity, invoked to cancel a subscription for stock on the ground of fraud, and enjoin further calls for payment, and the prosecution of actions thereon, in bringing in the officers and agents of the corporation who were personally guilty of making the misrepresentations constituting the fraud, so that plaintiff may have complete relief in one action against both the corporation and the persons guilty of the fraud." *Mack v. Latta,* 178 N. Y. 525, 67 L. R. A. 126, and cases there cited.

In the present case plaintiff testified that Maixner, the

president of the company, and Noah and Sacks, all called on him at his farm home near Bennett, to induce him to purchase stock and that Maixner, at one time, as an inducement, told plaintiff the value of the stock was $100 a share, and that "it was a wonderful investment, the best I had ever made or ever could make."

Evidently the case was tried on the theory that the agents and the president of the company conspired together and, by concerted action, induced plaintiff to purchase. If so all defendants were properly joined as parties.

That evidence was introduced, which was not supported by the pleadings, was not assigned as error by defendants in their motion for a new trial. Hence the court did not err in overruling the motion.

That plaintiff believed, relied, and acted on the fraudulent representations of defendants sufficiently appears. The evidence was submitted to, passed on, and evidently accepted by the jury as the truth, and a verdict was thereupon rendered in favor of the defrauded plaintiff, and, with its verdict, and judgment thereon we should be content and not permit defendants to escape restitution of the fruits of the fraudulent practices of which complaint is made.

The stock argument in defense of fraudulent sellers of corporate stock of doubtful, or no value, is that a prospective, but timid or suspicious buyer, before purchasing, should make general inquiry about values and also call at the company's office and talk the subject over with its officers and representatives and examine the corporate books and, if suspicion still persists, he should go to the state house and look up the records which are required by law to be there recorded and, if he fails to do these things, and his purchase turns out to be valueless, his protest for relief in court should go unheeded. Nothing of the sort.

Corporate stock may be purchased from those offering it for sale the same as any other commercial commodity and, if the buyer is defrauded by the misrepresentation and deceit of the seller his remedy is no different from that of the defrauded buyer of any other article of merchandise which is offered for sale in the ordinary marts of trade.

True, the stock argument plan may be at times salutary, and it may perhaps be exercised by the prudent as a precautionary measure. But all buyers are not prudent. Anyhow it is not a preliminary obligation which must of necessity first be exercised, by the defrauded corporate stock buyer, before he may obtain relief in court from the wiles of a designing and unprincipled seller.

The ultra-niceties of technical rules of practice are not ordinarily invoked to open up a door of escape to relieve the wrongdoer of well merited punishment. At most, in the present confused and almost incomprehensible state of the record, the case should have been remanded for trial instead of being dismissed.

For the reasons stated herein and in view of the *Latta* case and the authorities there cited, I respectfully dissent from the conclusion of the majority.

LORENA ATEN, APPELLEE, V. SIMEON J. QUANTOCK ET AL., APPELLANTS.

FILED JUNE 24, 1924. No. 22780.

1. **Appeal:** DIRECTION OF VERDICT. If the evidence is insufficient to sustain a verdict against a party to a civil action, it is error to refuse a request for a peremptory instruction in his favor.
2. ———: REVERSAL AS TO ONE DEFENDANT. Upon appeal, a judgment against two defendants charged with the same tort may be reversed as to one and affirmed as to the other, where the evidence justifies such action.
3. **Assault and Battery:** AFFIRMANCE. In an action to recover damages for an assault and battery, where plaintiff was the aggressor in the first instance, a verdict in his favor may be sustained, if the evidence shows that defendant used more force than was reasonably necessary in repelling the attack and in protecting himself, the use of excessive force being an issue raised by the pleadings.
4. ———: QUESTION FOR JURY. Where there is a conflict of evidence as to whether defendant in an action to recover damages for an assault and battery used more force than was reasonably necessary in repelling an attack upon him by plaintiff in the first instance, the question is one for the jury, if the evidence will sustain a verdict in favor of plaintiff on that issue.

5. **Appeal:** NONPREJUDICIAL INSTRUCTIONS. Error in giving or in refusing instructions is not a ground for reversing a judgment, if appellant was not prejudiced by the erroneous ruling.
6. **Trial:** MISCONDUCT OF COUNSEL. While counsel abuses the privileges of advocacy at the peril of his client, such abuse may not require a new trial, if the district court by proper instructions to the jury prevents the adverse party form being prejudiced by such misconduct.
7. **New Trial:** MISCONDUCT OF JURORS. Charges of misconduct on the part of jurors *held* not substantiated by affidavits on motion for a new trial.
8. **Harmless error** in admitting incompetent testimony is not a ground for setting aside a verdict.

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

Claude S. Wilson, George A. Adams and *Albert S. Johnston,* for appellants.

Bruce Fullerton and *T. R. P. Stocker, contra.*

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

DAY, J.

Lorena Aten, plaintiff, brought this action to recover from Simeon J. Quantock and Pearl Quantock, his wife, defendants, $35,000 as damages on account of personal injuries resulting from an assault and battery alleged to have been instigated by Pearl Quantock and committed by Simeon J. Quantock. A conspiracy by defendants to commit the wrongful acts charged is also pleaded in the petition. In addition to a denial of the conspiracy pleaded and of any wrongful act on the part of Pearl Quantock, the answer amounts to a plea that Simeon J. Quantock was assaulted by plaintiff, and that in repelling the attack he used no more force than was necessary for his own protection. The reply to the answer was a general denial. Upon a trial of the issues, the jury returned a verdict against both defendants for $1,900, and from a judgment thereon

in favor of plaintiff they have appealed.

One of the assignments is error committed by the district court in failing to direct a verdict in favor of defendant Pearl Quantock. As to her the judgment is erroneous. There is no evidence that she conspired with her husband to assault or otherwise injure plaintiff, or that she instigated or committed any wrongful act. Between her husband and plaintiff, however, there existed an old quarrel. Plaintiff had kept dog kennels on a five-acre tract of land in the outskirts of College View. "Defendant," as Simeon J. Quantock will be called for convenience, had been mayor of College View. During his administration there was passed an ordinance limiting the number of dogs which any one could keep or harbor in the municipality. In the making of this regulation plaintiff seems to have assumed that her property rights had been illegally invaded and that defendant had been prompted by malice toward her. She refused to comply with the ordinance and was arrested for violating it. After giving bond for her appearance in the police court, she went into a bank in College View, with which defendant and his wife were connected, and according to defendant's testimony alternately applied to defendant terms of mock endearment and epithets too vile for decent utterance. At this stage of the controversy the wife of defendant directed him to put plaintiff out of the bank. This proved to be unnecessary, because plaintiff, without the use of force, left upon a request to do so. While she was in front of the bank building defendant came down the steps. He and plaintiff met between the bank and the curb. A fight ensued, in which defendant either struck or pushed plaintiff and she fell backward. Among her injuries was a broken femur. As a result she was confined to a hospital for several weeks. The wife of defendant did nothing to incur liability for plaintiff's injuries. She was not out on the street when the altercation took place, nor did she abet her husband in engaging in the affray. There is nothing in the evidence from which a wrongful act resulting in injury to plaintiff can reasonably be imputed to the wife of defendant. It was error, therefore, to permit

the jury to return a verdict against her. There should have been a peremptory instruction in her favor. Upon appeal a verdict against two defendants charged with the same tort may be reversed as to one and affirmed as to the other, if the evidence justifies such action.

There is also an assignment of error to the effect that the district court erred in failing to direct a verdict in favor of defendant Simeon J. Quantock. The point does not seem to be well taken. In the petition he was charged with a wrongful assault resulting in the injuries of which plaintiff complains. In his answer he pleaded that she "rushed upon him and assaulted him with her hands, her fists and her hat;" that he "warded off her blows as best he could;" that in "the melee or combat" he pushed her back from him, "using no more force than was necessary to protect himself;" that she fell to the ground, and in that way received such injury, if any, as she did receive, all without his fault, and "all in the reasonable and proper defense of his person," and "without the use of any more force than was necessary for his protection" and to ward off her blows. The allegation that defendant used no more force than was necessary is denied by the reply. That question, therefore, was an issuable fact, considering plaintiff the aggressor and disregarding scandal, quarrels and epithets in which the record abounds. As to the amount of force used by defendant there is a conflict of evidence. If the jury believed the testimony of plaintiff, it may be inferred therefrom that defendant used more force than was reasonably necessary in repelling the attack alleged to have been made by plaintiff. The testimony connected both with prior scandal and both resorted to proof of collateral facts. The credibility of the witnesses and the inferences from their testimony were questions for the jury. The evidence of plaintiff seems to sustain the finding of the jury that defendant used more force than was reasonably necessary for his own protection. Resulting damages, as found by the jury, were proved. There was therefore no error in the refusal of the district court to direct a verdict in favor of defendant.

A reversal is asked on the ground that the plaintiff shammed inability to walk, and permitted her counsel to carry her into and out of the courtroom at each session of the court during the trial. There is nothing in the record tending to show that plaintiff's counsel or any one else carried the plaintiff into the courtroom. This alleged error was not presented to the trial court, and hence cannot be considered by this court.

Rulings in giving and in refusing instructions are challenged as erroneous, but they do not seem to be prejudicial to defendant. Under defendant's answer in connection with the petition and reply, he was liable for any damages shown to have resulted from the use of excessive force in repelling the attack upon him by plaintiff, and the jury were properly instructed on that point. They found against him on sufficient evidence, and the instructions as a whole do not contain reversible error.

Counsel for plaintiff in his closing argument to the jury made a disparaging remark concerning the nature of the evidence in support of the defense, and this also is assigned as error. The remark went a little beyond the bounds of courteous advocacy, but the presiding judge, upon being requested by defendant to remind the jury to disregard it, said: "The jury will be governed by their own inference as to what the evidence is and not take the construction of counsel."

Afterwards the jury were formally instructed orally and in writing: "You should disregard all statements of counsel on either side, unless the same are supported by the evidence."

In view of these admonitions to the jury, which evidently prevented prejudice to defendant, we think the judgment should not be reversed for misconduct of counsel in his closing argument to the jury.

Complaint is made on the ground that one of the jurors stated upon his *voir dire* examination that he knew nothing about the case, but told the other jurors while deliberating upon their verdict that he knew all about the case prior to the trial. There was an attempt to show mis-

conduct of this particular juror by means of affidavits filed after the rendering of the verdict. What the juror said upon his *voir dire* examination was not preserved in the bill of exceptions. The statements in the affidavits were principally hearsay and were insufficient to impeach the verdict. They do not show that this juror's knowledge was at variance with the evidence, that he was biased, or that he misled or influenced other jurors. Though the verdict was unanimous, it could have been rendered by ten jurors. The trial judge heard the *voir dire* examination, considered the affidavits, and upheld the verdict. Under these circumstances we think the record does not show that he abused his discretion or erred in refusing to grant a new trial on account of the misconduct of any juror or jurors.

It is contended that the trial court erred in overruling objections to questions in answer to which the wife of defendant testified on cross-examination that her husband conveyed their homestead to her after this action was instituted. This subject was not gone into on direct examination. While the cross-examination was improper, and while the testimony relating to the transfer should have been excluded, we do not think the error was prejudicial to defendant. His wife had an interest in the homestead without the title to it, and this was implied by other evidence. It was shown that defendant had other property which he did not transfer. In addition, both parties disregarded rules of evidence in resorting to collateral facts which threw no light on any issue to be determined. If each error in receiving inadmissible testimony constituted ground for a reversal, few verdicts would be permitted to stand. This error does not call for a new trial.

No prejudicial error has been found in the proceedings and judgment against defendant. The judgment against Pearl Quantock is reversed and the action as to her is dismissed, she to recover her costs in both courts from plaintiff. The judgment against Simeon J. Quantock is affirmed, he to pay plaintiff the costs which are taxable in her favor in both courts as against him.

AFFIRMED IN PART, AND REVERSED IN PART.

LETTON, J. Being of opinion that prejudicial eror was committed in the reception of evidence over objections, I dissent.

Note—See Appeal and Error, 4 C. J. p. 969, sec. 2952; p. 1022, sec. 3008; p. 1029, sec. 3013; p. 1048, sec. 3031; p. 1182, sec. 3218; Assault and Battery, 5 C. J. p. 636, sec. 32; p. 688, sec. 135—New Trial, 29 Cyc. p. 981; Trial, 38 Cyc. p. 1503.

ELMER B. STEPHENSON, TRUSTEE, APPELLANT, V. GLENN PERRY ET AL., APPELLEES.

FILED JUNE 24, 1924. No. 22782.

1. **Bills and Notes:** HOLDER FOR VALUE. "Where a negotiable promissory note is indorsed and transferred before due, as collateral security for a loan of money then made, the pledgee without notice is a holder for value." *Connecticut Trust & Safe Deposit Co. v. Fletcher*, 61 Neb. 166.

2. ———: FRAUD: BURDEN OF PROOF. Where fraud in the inception of a note is pleaded as a defense, and proof has been offered sufficient to make out a *prima facie* case, in an action by an indorsee against the maker the burden is on the plaintiff to show he is a *bona fide* holder.

3. ———: ———: ———. Where an action is brought upon a promissory note by an agent for the benefit of other parties, and where in said action the defendant has offered proof sufficient to make out a *prima facie* case of fraud in the inception of the note, the burden is on the plaintiff to show that all of the parties for whose benefit the action is brought had no knowledge of the fraud.

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

Fred C. Foster, O. K. Perrin and *S. M. Kier*, for appellant.

William A. Robertson and *Tyrrell & Westover, contra.*

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

DAY, J.

This action was brought in the name of Elmer B. Stephenson, trustee, upon a promissory note against Glenn Perry, maker of the note, and the Standard Securities Corporation, payee and indorser, defendants. The last named defendent made no appearance, and judgment was rendered against it for the full amount due upon the note. Upon the issues joined between the plaintiff and Perry, who will be hereinafter referred to as defendant, there was a verdict and judgment for the defendant. Plaintiff appeals.

The petition, in the main, is in the usual form in actions of this character. The plaintiff alleged that he brought the action as trustee of an express trust on behalf of 14 persons, whose names are attached to an exhibit which is made a part of the petition. The defendant pleaded fraud in the inception of the note; failure of consideration; and also that the plaintiff was not a holder in good faith in the usual course of business.

At this point it may not be amiss to set out some of the salient facts pertaining to this transaction. It appears that the Standard Securities Corporation was engaged, among other things, in selling stock in corporations. The Patriot Motors Company was an industrial corporation, operating an extensive plant at Havelock near the city of Lincoln. The president of the Standard Securities Corporation was vice-president of the Patriot Motors Company. The former corporation was selling stock of the latter corporation as its agent. On June 4, 1920, the Standard Securities Corporation sold to the defendant ten shares of stock in the Patriot Motors Company, and in payment therefor took the defendant's note for $1,000 due in six months after date, and drawing interest at 7 per cent. from date until paid. This note forms the basis of the present action. A short while thereafter the note was indorsed by the Standard Securities Corporation and turned over to the Patriot Motors Company. The president of the latter company testified that the note was given for stock in the Patriot Motors Company. The shares of stock were never delivered to the defendant. Some suggestion is made in the testimony

that the shares of stock were being held as security for the note. There is ample testimony in the record to sustain the claim of the defendant that the note was obtained by fraud. It is also clear that the Patriot Motors Company was chargeable with knowledge of the fraud in the procuring of the note. The record shows that it had been the custom of the Patriot Motors Company to discount its commercial paper at the banks in Lincoln for the purpose of securing ready money to conduct its business. For some time prior to August 1, 1920, the Patriot Motors Company had been unable to secure discounts at the banks, and it became very much in need of ready money to carry on its operations. Its business affairs became the subject of considerable comment. The Chamber of Commerce of Lincoln had considered the subject with a view of working out some scheme to financially assist the company. Finally the fourteen business men for whose benefit this action is brought agreed to loan to the Patriot Motors Company $38,000 on condition that the company would give satisfactory collateral security. This sum was contributed in unequal amounts, the lowest amount contributed by any one person being $1,000 and the highest $10,000. For the purpose of convenience the fourteen men selected the plaintiff to look after the details of the loan and the securities. The plaintiff examined the plant, and to some extent went over the affairs of the company. On August 3, 1920, the Patriot Motors Company turned over to the plaintiff as collateral security for the money to be advanced certain securities aggregating in face value $50,444.80. Among the notes turned over to the plaintiff was the note in question. Shortly thereafter the plaintiff paid to the Patriot Motors Company sums of money aggregating $39,398.40. There is nothing in the record to show that the Patriot Motors Company executed any note to the plaintiff evidencing this indebtedness. The record shows that the plaintiff received from the business men $38,000. No explanation is made how he came to advance a larger sum than he had received. The evidence refers to the plaintiff as "trustee." Whether he was a "trustee" within the usual meaning of that term

we think may well be doubted. From the evidence it may well be inferred that he was merely an agent for the parties in looking after the details of the business.

The important question presented by the record is whether the plaintiff was a *bona fide* holder of the note for value in the usual course of business. The note was indorsed by the Patriot Motors Company; upon its face it was a negotiable instrument; and at the time it was turned over to the plaintiff it was not due. The rule is settled that "Where a negotiable promissory note is indorsed and transferred before due, as collateral security for a loan of money then made, the pledgee without notice is a holder for value." *Connecticut Trust & Safe Deposit Co. v. Fletcher*, 61 Neb. 166.

Upon the trial the defendant introduced testimony tending to prove that there was fraud in the inception of the note. It was incumbent upon the plaintiff, therefore, in making out his case to show that he was a *bona fide* holder. The rule is well settled that where fraud in the inception of a note is pleaded as a defense, and proof has been offered sufficient to make out a *prima facie* case, in an action by an indorsee against the maker the burden is on the plaintiff to show that he is a *bona fide* holder. *Central Nat. Bank v. Ericson*, 92 Neb. 396; *Ostenberg v. Kavka*, 95 Neb. 314; *Auld v. Walker*, 107 Neb. 676.

Our statute provides, as follows: "Every holder is deemed *prima facie* to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course." Comp. St. 1922, sec. 4670. The statute also provides: "A holder in due course is a holder who has taken the instrument under the following conditions: First. That it is complete and regular on its face. Second. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact. Third. That he took it in good faith and for value. Fourth. That at the time it was negotiated to him he had no notice of any in-

firmity in the instrument or defect in the title of the person negotiating it." Comp. St. 1922, sec. 4663.

Did the plaintiff's proof show that at the time he took the note he had no notice of infirmities existing against it? The plaintiff testified that he had no knowledge of the circumstances of the making of the note or the consideration therefor. He also called one of the fourteen men, who testified that he had no knowledge of any infirmities against the note. It is clear from the plaintiff's petition that he was demanding a single judgment for the amount of the note in favor of himself as trustee, but for the benefit of all the persons for whom he assumes to act, either as trustee or agent. To do this it was incumbent upon him to show that all of the persons for whom he assumed to act were without notice of fraud in the inception of the note. This, he did not do. Authorities are not wanting to support the rule that the party holding the legal title to a note or instrument may sue on it, though he be an agent or trustee and liable to account to others for the proceeds of the recovery, but in such case any defenses which exist against the party beneficially interested may be interposed. *Cottle v. Cole & Cole,* 20 Ia. 481. It would seem to logically follow that where fraud in the inception of the note was pleaded, under the practice in this state in an action brought by an agent for the benefit of another, it should be shown that the party beneficially interested did not know of the infirmities against the note.

The plaintiff complains of the giving of instruction No. 4 by the court. In substance this instruction told the jury that the burden of proof was on the plaintiff to satisfy them that he received the note in question without notice or knowledge of any fraud upon the defendant in the procuring of the note, and that the same is true of at least one of the parties whom he represented. The plaintiff now argues that this instruction imposed upon him a greater burden than the law requires. Under the plaintiff's theory of the case as disclosed by his petition, and the facts proved, we are of the view that the instruction was too restrictive, and that it should have required the plaintiff to show that

all of the parties for whose benefit the action was brought had no notice of the fraud in the inception of the note. The plaintiff cannot complain of this error. Under the record a peremptory instruction should have been given for the defendant because the plaintiff had failed to show that all of the parties interested had no notice of fraud in the inception of the note.

Complaint is made as to the giving of other instructions, but, fairly construed, we think there was no error in giving them.

In this discussion we have omitted any reference as to whether the facts as shown by the record were sufficient to submit to the jury the question of plaintiff's knowledge of fraud in the inception of the note.

From an examination of the entire record, we find no prejudicial error, and the judgment is, therefore,

AFFIRMED.

Note—See Bills and Notes, 8 C. J. p. 487, sec. 702; p. 984, sec. 1292.

STEPHEN K. WARRICK, APPELLANT, V. NELSON H. RASMUSSEN, APPELLEE.

FILED JUNE 24, 1924. No. 22796.

1. **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 the sale is accordingly made, the mortgagee thereby waives his lien.
2. ———: ESTOPPEL. Where a mortgagee, with knowledge of the facts, accepts a part of the proceeds of a sale of the mortgaged property made by the mortgagor, such mortgagee is thereby estopped as against a purchaser to assert that the sale was invalid.
3. **Replevin:** DAMAGES. "Interest is the ordinary measure of damages of the defendant in replevin; but where the use of the property has a value which exceeds the interest, he may recover such value, and his right so to do does not depend upon return of the property." *Schrandt v. Young*, 62 Neb. 254.
4. **Evidence** examined, and *held* sufficient to support the verdict and judgment of the trial court.

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

Mothersead & York and *Floyd E. Wright*, for appellant.

P. J. Barron, Robert G. Simmons, J. M. Fitzgerald and *Morrow & Morrow, contra.*

Heard before MORRISSEY, C. J., ROSE and DAY, JJ., BLACKLEDGE and REDICK, District Judges.

DAY, J.

Action in replevin by Stephen K. Warrick against Nelson H. Rasmussen to recover possession of a Cole 8 automobile. Plaintiff claims the right of possession by virtue of a chattel mortgage upon the property executed by P. C. Gaines. The trial resulted in a verdict and judgment in favor of the defendant. Plaintiff appeals.

It appears that Gaines was a retail dealer, engaged in selling automobiles to the public generally. On December 21, 1920, Gaines executed a chattel mortgage to the plaintiff to secure a note of $5,000. The mortgage covered a number of automobiles, among them the Cole 8 in question. The mortgage was duly filed for record on December 23, 1920. With the knowledge and consent of the mortgagee the car in question, with others, was displayed by the mortgagor for sale to the public in a salesroom at the place of business of the mortgagor. On March 3, 1921, while the lien of the plaintiff's chattel mortgage was in full force and effect, Gaines sold the car in question to the defendant, the consideration being $100 in cash, a diamond ring, a Dodge Sedan car, and three notes of $300 each, signed by the defendant. At the time of the purchase, the defendant, who was a practicing physician, had no actual knowledge of the existence of the plaintiff's mortgage. The trial court construed the answer to plead as a defense that the plaintiff had released the mortgage lien by giving permission to the mortgagor to sell the property, and also that the sale had been ratified by the plaintiff by the acceptance of a part of the proceeds of the sale, with full knowledge of

the facts. The jury were instructed upon this theory.

Gaines testified that the plaintiff knew of the proposed sale of the car to Rasmussen a week before the sale was made, and knew of the conditions of the sale, and that plaintiff gave his consent that the sale be made. This testimony is corroborated by Mrs. Gaines, who testified that she was present at the time her husband and the plaintiff discussed the proposed sale, and that plaintiff consented thereto. Plaintiff denies that he consented to the sale. He admits, however, that Gaines had talked with him about a prospective sale to Rasmussen. With respect to the conversation with Gaines the plaintiff testified: "He came in and told me that Dr. Rasmussen was a prospect for a Cole car. I asked him how the Doctor wanted to pay for it, and he said he didn't know. I said you find out what he wants to pay for it, and then come back to me, and I will tell you whether you can sell it or not." He further testified that Gaines never reported to him the terms on which Rasmussen was to buy. The plaintiff testified that Gaines was instructed not to sell a car without first taking it up with plaintiff. A number of circumstances, which need not be set out, seem to corroborate the theory that plaintiff consented to the sale. This issue was for the jury to determine.

The testimony also tends to prove that after the sale was made, and with full knowledge of the facts, the plaintiff accepted a part of the proceeds thereof. If he did so, such act would constitute a ratification of the sale. Under the evidence this question was also for the jury to determine.

The rule of law is settled that where a mortgagee of chattels authorizes the mortgagor to sell the property described in the mortgage, and the sale is accordingly made, the mortgagee has thereby waived his lien. *Drexel v. Murphy*, 59 Neb. 210; *Seymour v. Standard Live Stock Commission Co.*, 110 Neb. 185.

It is equally well settled that, where a mortgagee accepts part of the proceeds of the sale of the mortgaged property, with knowledge of the transaction, he is estopped as against a purchaser to assert that the sale is invalid. *Ayres v. McConahey*, 65 Neb. 588.

The jury found that, at the commencement of the action, the right of property in the automobile, and the right of possession thereof, was in the defendant, and that if a return of the property could not be had the value thereof should be fixed at $2,400 and that the defendant was damaged by the detention of the property in the sum of $528. Upon the motion for a new trial the court ordered a remittitur of $128 from the amount of damages awarded for the detention of the car, and thereupon judgment was rendered in accordance with the verdict as modified by the remittitur.

The plaintiff complains that the court erred in permitting evidence to be offered by the defendant tending to prove the value of the use of the car. Plaintiff urged that interest upon the value of the car is the measure of damages for its detention. The interest rule does not apply to all situations. The rule for the measure of damages for the detention of property, applicable to the facts in this case, is stated in *Schrandt v. Young*, 62 Neb. 254, as follows: "Interest is the ordinary measure of damages of the defendant in replevin; but where the use of the property has a value which exceeds the interest, he may recover such value, and his right so to do does not depend upon return of the property."

The plaintiff also complains of certain instructions to the jury. We think the instructions were responsive to the issues tendered by the pleadings, and that the verdict of the jury is sustained by the evidence.

The judgment of the district court is

AFFIRMED.

Note—See Chattel Mortgages, 11 C. J. p. 624, sec. 339; p. 262, sec. 340—Replevin, 34 Cyc. pp. 1509, 1561, 1563.

MAMIE GIPSON, APPELLEE, V. METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT.

FILED JUNE 24, 1924. No. 22800.

Insurance: ATTORNEY'S FEES. Where an insurance company offered to pay to the beneficiary the amount due upon the contract upon

the furnishing of proofs of loss as required by the contract, and where after proofs of loss were furnished the insurer with due diligence in the usual course of business was proceeding to pay the amount due, and where within a few days after mailing proofs of loss an action was commenced upon the contract, and where before answer day the insurer tendered the amount due, which was refused unless an attorney's fee of $100 was added, and where the insurer offered to confess judgment for the amount due, which was accepted, an attorney's fee is not properly taxable as costs under section 7811, Comp. St. 1922.

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

Reavis & Beghtol, for appellant.

R. J. Greene, contra.

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

DAY, J.

This is an appeal by the defendant from the allowance of an attorney's fee of $100 as part of the costs in an action upon two insurance policies. The petition was filed February 18, 1922, and set out three separate causes of action based upon three insurance policies, issued by the defendant company upon the life of John S. Gipson. The petition was in the usual form, and alleged that there was due the plaintiff upon the first policy $362.80, upon the second policy $503.72, and upon the third policy $1,015.08. On March 17, 1922, the defendant filed an answer admitting the execution and delivery of the three policies. It denied that there was due upon the first policy the amount claimed thereon by the plaintiff, and alleged there was due the sum of $289.08, and no more. The defendant also denied that there was due upon the second policy $503.72, as claimed by plaintiff, and alleged that John S. Gipson had borrowed $100 on the policy, and that after deducting the amount borrowed, with interest, there was due upon the second policy $393.79. As to the third policy, the defendant pleaded that the insured had failed to pay the premium

when due, and as provided in the policy it became forfeited, and there was nothing due to the plaintiff thereon. On the same day that the defendant filed its answer, it also filed an offer to confess judgment upon the first and second policies for the amount it admitted to be due, to-wit: On the first policy $289.08, and on the second policy $393.79. On March 18 the offer was accepted by the plaintiff, and judgment was rendered upon the two causes of action for $682.87, which was subsequently paid. Thereupon the plaintiff moved for an allowance of an attorney's fee as a part of the costs. Upon a hearing the court allowed an attorney's fee of $100.

It appears that John S. Gipson died January 24, 1922, and his funeral was held January 27, 1922. On January 31, 1922, the attorney for the plaintiff wrote to the defendant at its New York office, notifying it of the death of Gipson. On February 2, 1922, the defendant's local agent, who had learned of the death of Gipson the day before, called on the plaintiff and told her that the amount due on the policies would be paid as soon as proofs of loss were made, and tendered his assistance in making up the claim for loss. He asked her to bring the policies to his office the following day, and informed her that he would make up the proofs in proper form, and that the money would be sent in a few days. This she agreed to do. On the following day the plaintiff telephoned the agent that she could not bring the policies; that she had given them to her attorney, and that he refused to give them up. She asked the agent to confer with her attorney. The agent called upon the attorney and offered to assist in making up the proofs, and informed him that the amount due would be paid within a few days after the proofs were received. The attorney seems to have regarded the proffered assistance as a reflection upon his capacity to look after his client's interests, and told the agent to "keep out," that he was handling the business direct with the home office. On February 8, 1922, the plaintiff mailed sworn proofs of loss to the home office. On March 6, 1922, the agent notified the plaintiff that drafts covering the amount due upon the two policies were

ready for delivery and would be turned over in exchange for the policies. Plaintiff's attorney refused to accept the amount unless an attorney's fee of $100 was also paid. The plaintiff's claim for an allowance of an attorney's fee is based upon section 7811, Comp. St. 1922, which, in so far as applicable to the present case, provides in substance that, in all cases where the beneficiary brings an action at law to recover upon any life insurance policy, the court upon rendering judgment against the company shall allow the plaintiff a reasonable sum as an attorney's fee, in addition to the amount of recovery, to be taxed as part of the costs. The purpose of the statute was to allow an attorney's fee to a successful plaintiff, in the class of cases covered by the statute, where resort to law was reasonably necessary to secure his rights.

Under the facts in this case, there appears to have been no reasonable necessity of bringing an action upon the two policies to recover the amount due thereon. The defendant conceded its liability immediately upon being notified of the death of the insured, and was ready at all times to pay the amount due upon the policies upon receipt of proofs of loss as provided by the contract. After proofs of loss were furnished, the defendant with reasonable dispatch was proceeding in the usual course of business to pay the amount due. The proofs of loss were mailed from Lincoln, Nebraska, to New York, and within ten days after the proofs were mailed this action was begun. Before answer day the defendant tendered to plaintiff the amount due upon the policies, which was refused unless an attorney's fee of $100 was also paid. Subsequently, as heretofore stated, the amount offered was accepted.

We think the facts in this case bring it within the rule announced in *Baird v. Union Mutual Life Ins. Co.*, 103 Neb. 609. Upon a rehearing in the *Baird* case, reported in 104 Neb. 352, the rule announced was not changed, but it was held the facts did not bring it within the rule.

When the facts were fully disclosed there was no *bona fide* dispute between the parties. The defendant was act-

ing in good faith and appeared to be anxious to pay its obligation under the contract.

Under the facts disclosed by the record, we are of the view that no allowance of an attorney's fee should have been made.

The judgment is reversed and the cause remanded, with directions to enter judgment in accordance with this opinion.

REVERSED.

Note—See Life Insurance, 25 Cyc. p. 956.

ARTHUR VON LOH, INCOMPETENT, BY HENRY VON LOH ACTING GUARDIAN, APPELLEE, v. CHARLES M. GRAHAM, APPELLANT.

FILED JUNE 24, 1924. No. 22807.

Contracts: INCOMPETENCY. Evidence examined, and *held* sufficient to sustain the verdict and judgment of the trial court.

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

S. A. Dravo, Stewart, Perry & Stewart, Robert Van Pelt, W. D. Oldham and *E. T. Grunden,* for appellant.

Roy B. Ford and *O. E. Bozarth, contra.*

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

DAY, J.

Arthur Von Loh, incompetent, by his guardian brought this action against Charles M. Graham to recover a balance of $1,696.13 alleged to be due upon an adjustment of mutual accounts. The defendant filed an answer and cross-petition in which he set out various dealings between himself and the plaintiff, and alleged that upon a balancing of their mutual accounts there was due him from the plaintiff $978.50, for which amount he prayed judgment. The case was tried to a jury, resulting in a verdict and judgment

for the plaintiff for $1,517.02. Defendant appeals.

It is contended by the defendant that the evidence is not sufficient to support the verdict. The plaintiff's action is predicated upon the theory that, at the time of the business transactions between himself and the defendant, the plaintiff was incompetent and incapable of understanding and appreciating the purport of their dealings; that the defendant took advantage of the plaintiff's mental condition, and induced him to accept from defendant on or about March 1, 1920, the sum of $2,100, which the plaintiff understood to be in the nature of a loan, and which in this accounting the plaintiff concedes should be charged against him. The plaintiff alleges that thereafter on divers dates mentioned in the petition the defendant, who is a grain dealer, induced the plaintiff to deliver to defendant large quantities of grain, and to pay to defendant sums of money, in all aggregating the sum of $3,796.13; that after deducting the $2,100 which plaintiff received there is due the plaintiff the sum of $1,696.13.

The answer and cross-petition of the defendant alleged that he knew nothing of the plaintiff's alleged incompetency; that in dealing with him he appeared to be normal, and capable of understanding the business transactions; that on March 1, 1920, the defendant purchased of the plaintiff 210 acres of growing wheat at the agreed price of $10 an acre, and in payment therefor gave the plaintiff a check for $2,100; that the plaintiff executed a bill of sale for said growing wheat, in which he agreed at his expense to harvest, thresh and deliver the same to the defendant; that thereafter on May 21, 1920, the defendant sold to the plaintiff 65 acres of said growing wheat, and also a one-half interest in the remaining 145 acres for $2,861.50, and took the plaintiff's note for said amount in payment therefor; that to secure the payment of this note the plaintiff executed a mortgage on all of his wheat and on 150 acres of corn.

The defendant also alleges that on March 11, 1921, the plaintiff and defendant had a mutual settlement of their accounts, at which time it was agreed between the parties

that the plaintiff was owing to the defendant $1,906.74, which was settled by a note of that date given by the plaintiff to the defendant. The defendant also alleges that he paid on July 27, 1921, for threshing the wheat $258; that after allowing all payments made by the defendant upon the transaction the defendant claims there is due him $978.50.

The reply of the plaintiff denied the allegations of the answer and cross-petition. During the trial the parties entered into a stipulation as to the value of certain grain delivered by the plaintiff to the defendant, and also stipulated as to the amount of cash which the plaintiff had paid upon his indebtedness. It was admitted that in October or November, 1920, plaintiff delivered to the defendant 1,030 bushels of wheat of the value of $1,442. Thereafter the defendant received cash, or its equivalent, as follows: December 18, 1920, $247.50; March 8, 1921, $273.34; March 22, 1921, $280; May 21, 1921, $190; July 20, 1921, $12.41; August 4, 1921, $1,417.50. It is also stipulated that the defendant paid for the benefit of the plaintiff for threshing, August 8, 1921, $264.79.

The principal controversy arises over the 1,030 bushels of wheat of the value of $1,442. It was the theory of the defendant that this wheat was a delivery to him of his share of the wheat, and that this item should not be considered in the matter of the adjustment of their respective accounts.

Eliminating the question of interest, the defendant's account, from his theory, would be stated as follows: Due from the plaintiff on note, $2,861.50; due for money advanced for threshing, $264.79, a total of $3,126.29; paid by plaintiff on the account, as per the stipulation, $2,420.75, leaving a balance due of $705.54.

The plaintiff's theory was that the 1,030 bushels of wheat, comprising the item of $1,442, was the plaintiff's wheat, and that the amount should be credited upon the plaintiff's indebtedness to the defendant, which indebtedness plaintiff claims was $2,100 and the amount of $264.79 which defendant had advanced for threshing, making a total of $2,364.79. The plaintiff claims that he is entitled to

a credit against this amount of indebtedness of the items stipulated to have been paid as above shown, amounting to $2,420.75, and in addition thereto the item of $1,442 for the 1,030 bushels of wheat delivered in 1920, making a total of $3,862.75. Excluding matters of interest, the account would stand, plaintiff owes the defendant $2,364.79; defendant owes plaintiff $3,862.75, leaving a balance due plaintiff of $1,497.96.

The testimony tends to show that the plaintiff was a man of weak understanding and very illiterate. He had reached the third grade in school, could read but very little, and was unable to compute figures. In detailing the transaction of March 1, 1920, involving the sale of the 210 acres of growing wheat, plaintiff stated that he understood that he was borrowing money on the wheat. While he admitted that his name was signed to the bill of sale, he stated that he had no understanding that he was selling his wheat. Practically the same testimony was given with respect to the execution of the $2,861.50 note, and the settlement which resulted, as the plaintiff claims, in the giving of the $1,906.74 note. The evidence shows that plaintiff was very improvident in conducting his business affairs. It is shown that he received a few thousand dollars from his father's estate, and within three years had accumulated debts contracted to 28 different persons and aggregating more than $24,000. Whether the plaintiff was incompetent to transact business was under all of the circumstances a question for the jury to determine. The testimony clearly shows that he was weak-minded, and one who could be readily induced to enter into improvident contracts. He did not exercise a deliberate judgment in his dealings with the defendant. The case falls within the rule in *Meyer v. Fishburn*, 65 Neb. 626.

The plaintiff's contention was that, if the first transaction is regarded as a loan of money merely, the resale of a one-half interest in the wheat on May 21, 1920, by defendant was void, for the reason that, defendant not being the owner of the wheat, had nothing to sell; and also that the plaintiff did not understandingly enter into this con-

tract. There is some complication in the statement of the issues to be determined by the jury, but as a whole we think the jury could well have understood the issues presented to them by the court. It is quite clear from the verdict which was returned that the jury considered that the transaction of March 1, 1920, was a loan, and not a sale as contended by the defendant. Some criticism is made of the introduction of evidence as to the incompetency of the plaintiff to transact ordinary business, without the witness first having disclosed the facts upon which such conclusion was reached. In view of the fact, however, that the case was tried upon the theory of the plaintiff's weak-mindedness, and that he was overreached in his business dealings with the defendant, we are of the opinion that there was no prejudicial error in admitting the testimony.

The defendant also contends that the court erred in overruling his demurrer to the petition. The record shows that on September 14, 1921, the defendant filed a demurrer upon the grounds: First, that plaintiff has no legal capacity to maintain this action; second, because the petition on its face shows that it is not filed in the name of the real party in interest, or any one legally competent to appear; and, third, because the petition fails to state a cause of action against the defendant.

On October 3, 1921, the demurrer was overruled, and the defendant given 15 days to answer. On October 24, 1921, on motion of the plaintiff, leave was given to amend the petition by alleging that Henry Von Loh is the regularly appointed, qualified and acting guardian of Arthur Von Loh, incompetent, and that the action be prosecuted in the name of said Arthur Von Loh, incompetent, by his said guardian, which amendment was made instanter. On the same day the defendant was given leave to answer to the amended petition; and on the same day the defendant filed an answer and cross-petition. The answer and cross-petition charged, among other things, that the plaintiff has no legal capacity to maintain this cause of action. As originally filed, the petition was subject to the criticism made in the demurrer, and in the answer. We think, however,

that the amended petition states a cause of action, and also that it was brought in the name of the proper party.

From a consideration of the entire record, we are of the opinion that no prejudicial error is shown.

The judgment of the district court is, therefore,

AFFIRMED.

Note—See Contracts, 13 C. J. p. 778, sec. 978.

GEORGE SOMMERS ET AL. V. STATE OF NEBRASKA.

FILED JUNE 24, 1924. No. 23795.

1. **Intoxicating Liquors:** CONSTRUCTION OF STATUTE. Section 3238, Comp. St. 1922, making it unlawful for any person to manufacture or sell intoxicating liquors, except for certain purposes and by persons specially authorized, does not prohibit the *bona fide* manufacture and sale of vinegar, even though alcohol may be developed in the process of manufacturing the vinegar.
2. ———: "MASH." The word "mash," as used in the prohibitory statute, includes any mixtures of grain, either whole, cracked or crushed, or malt, mixed with water or other liquid so as to produce fermentation.
3. ———: ———. A mixture of 10 gallons of water and sugar with one pound of yeast is not mash, within the meaning of the prohibitory statute.
4. **Evidence** examined, and *held* insufficient to sustain the verdict.

ERROR to the district court for Fillmore county: RALPH D. BROWN, JUDGE. *Reversed.*

Waring & Waring, for plaintiffs in error.

O. S. Spillman, Attorney General, and *Lee Basye, contra.*

Heard before MORRISSEY, C. J., DAY, GOOD and THOMPSON, JJ., and REDICK, District Judge.

GOOD, J.

Plaintiffs in error (hereinafter referred to as defendants), who are husband and wife, were prosecuted on an information, consisting of three counts, charging viola-

tions of the liquor law. Before the case was submitted to the jury, the prosecution was dismissed as to the first count. The second count charged both defendants with the unlawful manufacture of intoxicating liquors; the third count charged both defendants with the unlawful possession of mash and intoxicating liquors. The trial resulted in finding defendant Ruby Sommers guilty on the second count, and defendant George Sommers guilty on the third count. George Sommers was acquitted on the second count and Ruby Sommers was acquitted on the third count. Defendants prosecute error to review the record of their conviction.

Defendants urge the insufficiency of the evidence to sustain a verdict of guilty as to either defendant. It appears that the sheriff and his deputy, armed with a search warrant, went to the home of defendants on their farm in Fillmore county, where they found defendant Mrs. Sommers, to whom the search warrant was read. She readily assented to a search of the premises. The officers made a thorough search, including every part of the home and the outbuildings. In a room adjacent to the kitchen was found a keg, containing 10 gallons of water and sugar mixed with one pound of yeast, and over the top of which was spread a white cloth. On being asked what it contained, Mrs. Sommers replied that she was making vinegar and that the contents would be vinegar when the process was completed. She further told the officers that the contents consisted of water, sugar and yeast, to which she would later add sorghum molasses and mother of vinegar. The contents was then in a state of fermentation. On request of the sheriff, Mrs. Sommers furnished a bottle so that the officers might take a sample of the liquid, which was later submitted to a physician for examination. He testified that he distilled some of the liquid and that it contained 3½ per cent. by volume of alcohol. No other intoxicating liquor of any kind, or any still, apparatus or equipment for the manufacture of intoxicating liquor was found. On the following day the officers returned to the home of defend-

ants and arrested them. At that time the keg had been removed from the room and the contents emptied. The defendants were both put upon trial in the county court on a complaint charging unlawful possession of intoxicating liquor and were found not guilty. Then followed the present prosecution, which is based upon the manufacture and possession of the same intoxicating liquor, for possession of which defendants were tried in the county court.

Mrs. Sommers testified that she was making vinegar and following a recipe furnished by her mother, and was corroborated by the testimony of her mother, to the effect that she had furnished the recipe to her daughter, and further that the mother had used the recipe for making vinegar for her own use for a great many years. The evidence shows that defendants had never manufactured, sold or possessed any intoxicating liquor. It further appears that a day or two prior to the day on which the search was made by the officers Mrs. Sommers had stated to a visitor at her home that she was going to make vinegar, and she told a caller at her house that morning that she was making vinegar and showed her the keg in which the ingredients had been placed to ferment. No bottles, jugs or other containers for intoxicating liquor were found, and, for aught that appears in the evidence, defendants were honest, upright, respectable citizens, of integrity, without any just reason to suspect them of wrong-doing or misconduct. They had lived in the county for ten years and on the same farm for a period of six years. A recognized process of making vinegar is that employed by Mrs. Sommers, and apparently is one in common use.

Our liquor statute recognizes that it is lawful for a citizen to manufacture vinegar. Section 3238, Comp. St. 1922, after declaring that it shall be unlawful to manufacture, sell or keep for sale intoxicating liquors, further provides: "And nothing herein contained shall be construed to prevent the *bona fide* manufacture and sale of vinegar." The placing of this provision in the statute clearly recognizes that alcohol may be developed in the process of manufac-

turing vinegar. It is well known that if sweet cider is permitted to stand, exposed to the air, it will develop alcohol and become hard cider, which is an intoxicating liquor, but if allowed to stand a sufficient time acetic acid develops and it becomes vinegar. And so, where sugar or molasses and water and yeast are mixed together, fermentation will develop alcohol, but by the addition of mother of vinegar acetic acid is developed and the mixture will become vinegar. Evidently it was not the intention of the legislature to make it unlawful to manufacture vinegar, even though in the process alcohol is developed. The question arises whether or not there is a good-faith purpose and intention to make vinegar. If such is the intention and the purpose, then the law has not been violated. In the present case, it was disclosed that the defendant, Mrs. Sommers, had arranged with her mother, who lived in the vicinity, to obtain mother of vinegar for the purpose of completing the process which she had started. This evidence is not disputed. Nowhere in the record is there an incriminating circumstance that is pointed out, unless it is the fact that after the premises were searched the defendants emptied the contents of the keg. This could not have availed them anything, however, because Mrs. Sommers had voluntarily furnished the officers with a sample of the liquid, which had been taken by them, and it may well be that the defendants, after finding themselves under suspicion of manufacturing liquor, concluded to empty the contents on the ground and buy their vinegar, rather than be subjected to suspicion of violating the law.

In view of the circumstances disclosed by the record, we are of the opinion that the evidence is wholly insufficient to warrant a verdict of guilty.

Complaint is made of the eleventh instruction, which defines the word "mash," as used in our prohibitory law, as "Any mixture of ingredients in water or other liquid so as to soften and in such a manner as to evidence that fermentation has been produced, or is intended to be produced as a stage in the process of manufacturing intoxicating liquor." The word "mash" has different significan-

ces, depending on the connection in which it is used. It is sometimes applied to a mixture of bran and water or turnips and bran, used for feeding live stock, but when used with reference to the manufacture of intoxicating liquors, as in brewing and distilling, it has a different meaning. Century Dictionary defines it as a "mixture of ground grain, malted or otherwise prepared, and water." Webster's New International Dictionary defines it as "crushed malt, or meal of rye, wheat, corn, etc., steeped and stirred in hot water to form wort." The Encyclopædic Dictionary defines it as "crushed or ground grain, malt, or a mixture of the two, steeped in hot water so as to obtain an infusion consisting of the saccharine portions." It is clear that not every mixture of ingredients with water which will produce fermentation is mash.

We are inclined to the view that, as used in our statute, the word "mash" would include any mixture of grain, either whole, cracked or crushed, or malt, mixed with water or other liquid so as to produce fermentation. We think the definition as given in the instruction is entirely too broad. The mixture of ingredients in possession of defendants, consisting of water, sugar and yeast, was not mash, within the meaning of our prohibitory law. The instruction practically told the jury that the mixture was mash. This was prejudicial error.

Because of the errors pointed out, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Intoxicating Liquors, 33 C. J. p. 577, sec. 194; p. 578, sec. 195; p. 757, sec. 502; p. 761, sec. 505.

STELLA R. FEATHER, APPELLANT, V. ORIN T. FEATHER, APPELLEE.

FILED JUNE 24, 1924. No. 23835.

1. **Divorce:** CUSTODY OF CHILDREN. In divorce actions, in making disposition of the custody of a child of tender years, the policy

of the law is to look to the welfare and best interests of the child.

2. ———: ———. Evidence examined, and *held* that the welfare and best interests of the minor child require that its custody should be committed to its mother.

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

Claude S. Wilson and *Albert S. Johnston,* for appellant.

T. S. Allen and *H. J. Requartte, contra.*

Heard before LETTON, DEAN, DAY, GOOD and THOMPSON, JJ.

GOOD, J.

Action by a wife for divorce, alimony and custody of the minor child of the parties, grounded upon the husband's alleged extreme cruelty. The trial resulted in a decree, awarding the plaintiff a divorce without alimony and awarding the custody of the two-year-old daughter of the parties to the defendant husband. Plaintiff has appealed and seeks a modification of the decree so as to give her the custody of the child and an allowance for its support and for attorney's fees. The trial court, after finding that the defendant was guilty of extreme cruelty, found that he was a suitable person to have the custody and control of the two-year-old daughter of the parties.

The evidence discloses that defendant at the time of the trial was living upon a rented farm in a very comfortable home, and had a competent and suitable person in charge thereof, so that the little daughter might be properly cared for in his home. No finding was made with reference to the fitness of the mother to have the care and custody of the child. An examination of the record discloses that the mother is a fit and proper person to have the custody of the child; that at the time of the trial she was living with her parents in a comfortable home, and that the home of her parents is a very desirable and proper place in which to bring up the child. The evidence further shows that the mother gave to the child genuine, loving affection and

excellent maternal care. The home in which the mother would keep the infant child is equally as good as that in which the defendant would keep it.

In divorce actions, in making disposition of the custody of a child of tender years, the policy of the law, as declared by the courts, is to look to the welfare and best interests of the child. *Hammond v. Hammond,* 103 Neb. 860; *Nathan v. Nathan,* 102 Neb. 59; *Boxa v. Boxa,* 92 Neb. 78; *Wilkins v. Wilkins,* 84 Neb. 206; *Giles v. Giles,* 30 Neb. 624.

While the defendant doubtless has a tender regard for his daughter, the nature of his work is such that he could not give to the child his personal care and attention during the greater part of the day, because his duties would necessarily keep him in the field and away from the presence of the child. We think it is generally conceded that the best interests and welfare of a child of tender years will be best subserved by placing it in the custody of its natural mother, if she is a fit and proper person. It is seldom, if ever, that any other person can be found who will bestow upon a child in arms such tender and loving care, and who will have its welfare so much at heart, as its mother. The record does not disclose anything that would justify denying to this mother the care and custody of her infant daughter. The welfare and best interests of the child demand that its custody be committed to the mother.

The decree of the district court is hereby modified so as to award the custody of the minor child to the plaintiff, but defendant will be permitted to visit the child at all reasonable times and to have the child visit him at reasonable intervals.

The record shows that defendant has but little property and at the present time a meager income. Under the facts disclosed, we find that a reasonable allowance for the support of the child is $20 a month, and it is ordered that defendant pay into the district court monthly the sum of $20 for the support of the minor child, and the sum of $100 as attorney's fee in this court, to be taxed as part of the costs. Leave is given to either of the parties to apply to the district court for a modification of the orders herein

made, with respect to the custody of the child and allowance for its support, upon a showing of changed conditions.

The judgment of the district court, as modified, is affirmed.

AFFIRMED AS MODIFIED.

Note—See Divorce, 19 C. J. p. 343, sec. 795; p. 351, sec. 811.

ARCHIE G. POTTER, APPELLEE, V. SCOTTS BLUFF COUNTY, APPELLANT.

FILED JUNE 24, 1924. No. 23923.

Master and Servant: WORKMEN'S COMPENSATION LAW: INDEPENDENT CONTRACTOR. One who contracts with a county to furnish tools, appliances and labor, to load, haul and evenly spread 1,500 cubic yards of gravel from designated pits upon a designated highway, for the sum of 49 cents a cubic yard; who may perform the work himself or hire others to do it; who may employ as many men or teams or motor trucks to do the work as he pleases; who has the right to hire and discharge men, fix their wages and hours of labor, and is liable for their compensation; and who has the power to direct when and where the men shall work, is, within the meaning of the workmen's compensation law, an independent contractor.

APPEAL from the district court for Scotts Bluff county: P. J. BARRON, JUDGE. *Reversed and dismissed.*

William H. Heiss, Jr., for appellant.

Glebe & Elliott, contra.

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

GOOD, J.

Defendant appeals from an allowance, made under the workmen's compensation law, to plaintiff for injuries received by him while engaged in a road-graveling job for defendant.

Defendant argues that plaintiff at the time he received

the injuries was not an employee of the county, but was either an independent contractor or an employee of such contractor.

The pertinent facts, as shown by the record, are substantially as follows: Defendant county desired to gravel two and one-half miles of highway east of the village of Minatare, and within the county, and caused a notice to be published that it would, at a fixed date, receive bids for hauling 1,500 yards of gravel, to be evenly spread over two and one-half miles of highway, which was accurately described in the notice. The notice, among other things, contained the following: "The work will consist of loading, hauling, dumping and spreading the gravel according to instructions of county highway commissioner. All work will be paid for by the cubic yard of gravel in place; * * * contractors to furnish all tools and labor to complete the work." The gravel was to be obtained from designated pits and paid for by the county. Pursuant to the notice, I. N. Wallace and S. J. Medlin filed a written bid, offering to do the work for 49 cents a cubic yard, which bid was accepted by the county. No formal contract was entered into. It is evidenced only by the notice, bid, and record-acceptance thereof.

It appears that prior to the making of the contract plaintiff had some conversation with Wallace and Medlin, in which he told them that if they got the job he would take his teams and help them. For some undisclosed reason Medlin seems to have dropped out and taken no part in the work, and plaintiff became associated with Wallace in the job. Plaintiff testified that he was hired by Wallace, and further testified: "He was supposed to pay me 75 cents a day for my teams and board them, and if he made anything he was to pay me a certain amount of wages—probably $20 a week." He further testified that he was to receive a share of the profits, but did not definitely state the proportion that he was to receive. From the whole of plaintiff's testimony, it fairly appears that Potter and Wallace were in partnership in the undertaking. Some time after the work was underway, the county made a partial payment by check

or warrant, which was drawn payable to Potter and Wallace, and was received and indorsed by plaintiff and deposited in a bank to the credit of Potter and Wallace. This fund was drawn out by checks for the payment of feed and provisions for the teams and men. After plaintiff was injured, additional partial payments for the work were made by checks or warrants drawn in like manner and cashed by Wallace. It also appears that in the prosecution of the work five teams of horses were used, four of which belonged to plaintiff and one to Wallace, and that four other men, who were each to receive $1.50 a day and their board, were employed by Wallace or by plaintiff and Wallace together. The teams, wagons, tools and appliances were all furnished by plaintiff and Wallace, except one dump wagon, a pick and a shovel. Whether this wagon, pick and shovel were the property of the county or of the state, which was also interested in the project, is not made clear. The part of the work performed by plaintiff was principally helping to load the gravel and assisting, with an extra team, in getting the loads out of the pits. While loading gravel he was injured by an overhanging ledge of frozen earth falling upon him. The four hired men did the hauling, dumping and spreading. What particular part of the work was performed by Wallace is not disclosed. Plaintiff testified that he talked to the highway commissioner but once, when he came to the pit and said the gravel was too fine, and directed that the gravel be taken from another nearby pit. It appears that the teamsters were directed in their work by plaintiff and Wallace, except that the highway commissioner may have directed where the gravel should be dumped. Plaintiff contends, since the county reserved in the contract the right to instruct how and where the work should be done, that it was an employer, and that he was an employee, and not an independent contractor.

Whether one is an employee or an independent contractor must be determined from the circumstances of each particular case. It is sometimes quite difficult to distinguish whether the relation is one of employee or that of an independent contractor. This particular question has received

the consideration of this court on several occasions. In *Barrett v. Selden-Breck Construction Co.*, 103 Neb. 850, it was held: "The right to supervise, control, and direct the work is one of the tests for determining whether a person is an independent contractor or an employee, but it is not the sole and only test." In the course of the opinion it was said (p. 855): "There is no one criterion known to the law, but several elements may enter into the determination. A test is whether the contract requires the work to be done by the particular person contracting, or whether his personal services are not required, and any person whom he may employ may, under the agreement, do the job."

In *Bodwell v. Webster*, 98 Neb. 664, it was held: "An 'independent contractor' is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer, except as to the result of the work.

"While the existence or the absence of the right of the employer to control the work is a usual test to determine whether the workman is a servant or an independent contractor, the right of the employer to discharge him, the absence of an independent occupation, and the mode of compensating him and his subordinates, may be factors indicating the true relation."

In *Knuffke v. Bartholomew*, 106 Neb. 763, it was held: "On the issue as to whether a workman is an employee as distinguished from independent contractor, his relation to his employer should be determined from all of the facts, rather than from any particular feature of the employment service."

In *Petrow & Giannou v. Shewan*, 108 Neb. 466, it was held: "An independent contractor is generally distinguished from an employee as being a workman who contracts to do a particular piece of work, according to his own method, and is not subject to the control of his employer, except as to the results of the work.

"A plumber who undertakes to install a floor drain and sink for a confectionery storekeeper, and agrees to procure and furnish the necessary materials, and has no specific

agreement for compensation other than the understanding that he is to receive pay for the materials furnished and the usual plumber's charges, and when no hours of employment are agreed upon, and there appears to be no right to control the manner or method of his doing the work, is an independent contractor, and not an employee, within the meaning of the term 'employee,' as used in the workmen's compensation law.

"The act of the employer in giving such directions as may be found necessary to secure compliance with the contract, according to the plan adopted by him and agreed upon between the parties, is not necessarily inconsistent with the existence of the status of his workman as an independent contractor."

The subject is also fully treated in the following cases and the elaborate notes attached thereto: *Davis v. Industrial Commission* (297 Ill. 29) 15 A. L. R. 732; *Nichols v. Hubbell, Inc.* (92 Conn. 611) 19 A. L. R. 221; *Gall v. Detroit Journal Co.* (191 Mich. 405) 19 A. L. R. 1164; and *Chicago, R. I. & P. R. Co. v. Bennett* (36 Okla. 358) 20 A. L. R. 678.

In the instant case it will be observed that the contract did not require the work to be performed by the contractors, but they might employ others to perform the work. No particular time was stipulated within which the work should be performed. The contractors or their employees could work to suit their own convenience; keep their own time; determine during what hours they should perform the work; determine what days they should or should not work; determine whether the gravel should be hauled by teams or motor trucks; determine the size of the loads and have control over all of the details of performing the labor. They were at liberty to hire as many men as they saw fit. They might have completed the work within a week or might have taken 60 to 90 days in which to do it. They were at liberty to determine the wages they would pay to the hired men, the price they would pay for teams, and were to furnish their own tools and equipment. On the other hand, while the contract specified that the work

should be done subject to the instruction of the county highway commissioner, it is apparent that his only concern, or the county's concern, was in seeing that the proper kind and amount of gravel was evenly distributed over the highway. The county had no control over the men; could not hire or discharge them; could not determine the number who should be employed; could not determine how many teams should be operated; could not determine the hours of labor, the size of loads, or any of the other details. Under the circumstances, we are clearly of the opinion that plaintiff was not an employee of the county, but was an independent contractor.

We have not overlooked the argument of plaintiff that, where a question of fact is determined by the trial court, in a case under the workmen's compensation law, its finding is equivalent to the verdict of a jury. Under the circumstances disclosed by the record, in our opinion, no other finding than that the plaintiff was an independent contractor can be sustained. Where the evidence clearly shows, beyond question, that the claimant under the workmen's compensation law is, in fact an independent contractor, and not an employee, a contrary finding by the trial court cannot be upheld.

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

REVERSED AND DISMISSED..

Note—See Workmen's Compensation Act. p. 50, sec. 42.

HORSE SHOE LAKE DRAINAGE DISTRICT, APPELLEE, V. FRED M. CRANE COMPANY ET AL., APPELLANTS.

FILED JUNE 24, 1924. No. 22802.

1. **Damages:** BREACH OF CONTRACT. Where a contractor breaches a construction contract after partial performance, the measure of the contractee's damages is the necessary and reasonable cost of completing the work, in excess of the original contract price.
2. ———: ———: INTEREST. When a party recovers a sum of money as damages in a suit for breach of a construction con-

tract, he is entitled to interest on the sum recovered from the date of the breach.

3. Trial: VERDICT. Where plaintiff seeks to recover from defendant, and defendant has interposed a counterclaim or set-off, and the jury finds for each party, in such case the verdict must show affirmatively the amount of the respective findings. Comp. St. 1922, sec. 8802.

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

W. J. Courtright, and *T. B. Murray*, for appellants.

Kennedy, Holland, De Lacy & McLaughlin and *E. M. Clennon, contra.*

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

THOMPSON, J.

Plaintiff is a drainage district corporation doing business in Cherry county. Defendant Fred M. Crane Company is a Nebraska corporation, and defendant surety bonding company is a Vermont corporation with authority to do business in Nebraska. August 18, 1916, plaintiff, being desirous of having a drainage ditch constructed in the plaintiff district, about 20 miles or more in length, entered into a written contract with the defendant Crane Company, wherein defendant agreed to excavate and construct for plaintiff a drainage ditch, and to furnish the material and labor therefor, and "to make a completed job of the work" at the rate of 17½ cents per cubic yard for the first 150,000 yards and 14 cents per cubic yard for any additional yards. In pursuance thereof the defendant Crane Company procured the defendant American Fidelity Company to join it in the execution and delivery of a bond to plaintiff in the sum of $13,000, conditioned on the faithful fulfillment of the contract by the former. Plaintiff prosecutes this action to recover $27,202.52, with interest thereon from January 1, 1918, from the Crane Company, defendant, and the $13,000 from the American Fidelity Company, defendant,

with interest from the same date, on its bond, with costs of suit.

Plaintiff alleges, in substance, that on December 7, 1917, the Crane Company breached the contract, quit work, and abandoned the enterprise without cause and against the wishes and without consent of plaintiff; that at the time the work was less than half completed; that owing to the breach plaintiff was damaged in the sum for which it prayed judgment. The reason given to plaintiff by defendant Crane Company for its breach of the contract was that plaintiff had let a new contract to J. L. Mullen for the completion of the work.

The defendant answered, admitting the incorporation of the parties to the action; entering into the contract with plaintiff; giving of the bond; work done under the contract; and it charged plaintiff as being the one at fault for the breach; denied all allegations of petition not admitted; further filed a cross-petition demanding judgment for $8,847.75 as a balance due it from plaintiff for work done before the breach and not paid for, with interest at 7 per cent. per annum from December 1, 1917, the date it alleged the payment was due, and costs. Plaintiff's reply to the answer and cross-petition is a denial.

The case was tried to a jury, which returned a verdict as follows: "We, the jury duly impaneled and sworn in the above entitled cause, do find for the said plaintiff, and do fix the amount of its recovery from the defendant, the Fred M. Crane Company, at the sum of $26,969.04; and do fix the liability of the defendant, American Fidelity Company, as surety for the Crane Company, at the sum of $16,690.40." Judgment was rendered on the verdict, and defendants appealed.

The court instructed the jury, in substance, that the measure of plaintiff's damages, if they found that the contract was breached by the defendant, was the difference between the amount that the plaintiff had contracted to pay the defendant for the completion of the work then uncompleted and a fair reasonable cost which the plaintiff would have to pay for the completion of the work, as in the

contract provided, at the date of the breach. The instruction correctly stated the law applicable to the facts. *Von Dorn v. Mengedoht*, 41 Neb. 525; *Parkins v. Missouri, P. R. Co.*, 76 Neb. 242; 2 Sedgwick, Damages (9th ed.) secs. 618, 647c; 9 C. J. p. 812, sec. 151, p. 814, sec. 153; 4 Elliott, Contracts, sec. 3722.

Defendants contend that it was error to allow the jury to compute interest on the sum recovered from the date of the breach, for the reason that plaintiff paid nothing for the completion of the work until a year or more after such breach. Defendants' contention cannot be sustained. The cause of action arose at the time the contract was breached, and plaintiff's right to damages then accrued. It is entitled to interest on the amount of its damages for the time such amount is withheld. *Parkins v. Missouri P. R. Co.*, 76 Neb. 242; *O'Shea v. North American Hotel Co.*, 109 Neb. 317, 333, and cases cited.

We have carefully examined all other alleged errors presented and find that reversible error has not been shown except the one complained of by defendant Crane Company as to the $4,422.06, that being a part of the damages claimed in its cross-petition. Of the $8,847.75 for which defendant Crane Company demanded judgment by way of a counterclaim, the record shows that plaintiff conceded $4,422.06 of this amount was due from it to the defendant as stated in its cross-petition, for work done under the contract, before the breach, and was not paid. The verdict of the jury in no manner responded to the issue raised by the cross-petition either as to the entire $8,847.75 or the $4,422.06. The verdict should respond to each issue raised in the pleadings and to the instructions of the court. *Westinghouse Company v. Tilden*, 56 Neb. 129; *Haslam v. Barge*, 69 Neb. 644; *Barton v. Shull*, 62 Neb. 570.

In this case the jury should have first found as to the plaintiff's cause of action, assessing the amount of its recovery against the defendants as it did. Then it should have found the amount due from the plaintiffs to the defendants on the defendants' cross-petition, and deducted that amount from the finding in favor of plaintiff, and returned a verdict

for the plaintiff for the remainder. This should all have appeared in the verdict returned. Section 8802, Comp. St. 1922, follows: "When, by the verdict, either party is entitled to recover money of the adverse party, the jury in their verdict must assess the amount of recovery." But, instead, it showed the finding for the plaintiff and no more. It is thus evident from the record that the $4,422.06 with interest at 7 per cent. from December 1, 1917, to date of verdict, to wit, for four years and twenty-one days, which interest would amount to $1,256.23, which, plus the principal, would be, $5,678.29, should have been by the jury found for defendant Crane Company and deducted from the $26,969.04, leaving a balance due plaintiff of $21,290.75.

It is clear to us that the judgment must be in the main affirmed. It must, however, be reduced by the amount which the evidence proves should have been found due and owing to the Crane Company on its cross-petition. This amount we have found to be the sum of $5,678.29. If the plaintiff files a remittitur in this sum within twenty days the judgment will be affirmed; if not, it will stand reversed.

AFFIRMED ON CONDITION.

Note—See Damages, 17 C. J. p. 852, sec. 169; p. 815, sec. 137—Trial, 38 Cyc. p. 1889.

MARY R. PHIFER, APPELLEE, V. ESTATE OF WILLIAM PHIFER, APPELLANT.

FILED JUNE 24, 1924. No. 22850.

1. **Limitation of Actions:** CONTRACT FOR SERVICES. A daughter agreed to render services for her parents, in consideration of $10 a week to be paid by her father. No time was named for the termination of the contract, nor for payment. The contract was terminated by the death of the parents, many years later, at which time the daughter had received no part of the agreed wage. *Held*, this being a continuing contract, the statute of limitations did not commence to run until its termination.
2. **Insane Persons:** TERMINATION OF CONTRACTS. Where a father has entered into a valid contract with his daughter, providing for his care and the supervision of his household by her, a sub-

sequent appointment of a guardian for him does not impair or terminate the contract.

3. **Executors and Administrators:** JUDGMENT FOR SERVICES. Evidence examined, discussed in the opinion, and *held* that the judgment is amply supported thereby.

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

W. F. Moran, for appellant.

D. W. Livingston and *E. F. Warren, contra.*

Heard before MORRISSEY, C. J., DAY, GOOD and THOMPSON, JJ., and BLACKLEDGE, District Judge.

THOMPSON, J.

Plaintiff, an adult daughter, filed a claim in the county court of Otoe county against her father's estate, defendant herein, for $4,000, being $10 a week from November, 1910, to March 24, 1919, which she alleges is due her on an unwritten contract between them entered into before the services were rendered, she agreeing, in consideration of his promise to pay, to do the housework and to nurse and care for her aged parents, which she did up and until their death. The administrator objected to allowance of her claim, for the reason that the estate did not owe the debt; that whatever services she rendered she rendered as a member of the family; that the greater part of the claim is barred by the statute of limitations. These allegations were followed by a general denial. Case tried to county court, finding and judgment for plaintiff. Administrator appealed, tried in district court, on same pleadings, to jury, verdict and judgment for amount claimed. Administrator appeals.

The defendant for reversal relies on the following: That the verdict is not supported by the evidence; that a guardian was appointed for the father on the 20th day of May, 1913, and by reason thereof the contract terminated; that the claim is barred by the statute of limitations.

Taking these questions in their order, we find from the

evidence that prior to the date of the alleged contract the daughter had made a homestead entry on 160 acres of government land in Custer county and had lived thereon for several years; that her father and mother and an aunt lived in Otoe county; that her parents were each 77 years of age; that the aunt died, and plaintiff, who was then about 45 years of age, returned to her parents' home to attend the funeral; that the father was the owner of property of about the value of $12,000; that both parents were in feeble health, or at least were in need of some one to assist them, especially with the household duties, and that there was no other child situated so as to be able to render such care, and this daughter being unmarried, and either had or was about to prove up on her homestead, the father offered to pay the daughter, if she would return to his home and take care of them, $10 a week; that the daughter accepted the proposition, went to her homestead, and remained there until in November, 1910, when she returned to the home of her father, and took charge of her parents and cared for them and their household from that time until the father died March 24, 1919, the mother having passed on April, 1917. The first demand for payment was the filing of this claim. The evidence further shows a guardian was appointed as contended by the defendant, who entered upon the discharge of his duties and looked after the rentals, paying the taxes and paying over to the daughter a monthly allowance ordered by the court to be used by her in paying for the food, clothing, etc., for the father and mother. The guardian did not take charge of the person of the ward. The father and mother were left in the care of the daughter at his home after the guardian was appointed, the same as before. A brother, who was present at the time the contract was made, remained as a part of the father's family until the father died, and he testified in plaintiff's behalf at the trial. Plaintiff had two other brothers, neither of whom, so far as the evidence shows, objected to what was done, nor do they now object to the payment. The daughter's services were part of the parents' necessaries, and were so recognized by the father; also by the county

court, wherein it ordered the money set aside by the guardian to be paid over to the daughter, to be expended by her as in her judgment the needs of the parents demanded for fuel, food and clothing. This daughter was the burden bearer, the parents the recipients of her care and toil. As those interested construed this family agreement, in fact, in law, as well as in equity, it should remain and be enforced. Thus, it will be seen that all interested parties, all who had to do with the contract, and with the properties since the agreement was made, have interpreted it to be a contract providing for continuous service, without any fixed time of payment, or termination. As we view the law applicable to the proved facts, each of the contentions relied upon by the defendant for reversal must be, and is hereby, found against him. The verdict is sustained by the great preponderence of the evidence.

The contract is one without any definite time of payment, as well as without any definite time of termination, hence it is a continuing contract and the statute of limitations did not commence to run until on the father's death, to wit, March 24, 1919. Hence, the claim that no part thereof was barred by the statute of limitations. *Ah How v. Furth*, 13 Wash. 550; *Purviance v. Purviance*, 14 Ind. App. 269; *Whitehead v. Rhea*, 168 S. W. (Tex. Civ. App.) 460; *Clark v. Gruber*, 74 W. Va. 533; *In re Estate of Oldfield*, 158 Ia. 98; *Sullenbarger v. Ahrens*, 168 Ia. 288; *Story v. Story*, 1 Ind. App. 284; *Grave v. Pemberton*, 3 Ind. App. 71; *Knight v. Knight*, 6 Ind. App. 268.

The appointment of the guardian did not terminate the contract. "Where the relation of master and servant exists by reason of a mutual contract of hiring and service, the contract is not terminated by subsequent insanity of the master, as the relation in such case is more than the bare relation of principal and agent." *Sands v. Potter*, 165 Ill. 397. In this Illinois case the master was found to be insane, taken to the asylum, and his wife appointed conservator, after the service contract was made. In the instant case the father's ability to make the contract is not and never was questioned. The law as announced in the *Sands*

case is approved. Other cases supporting the position here taken are: *Sims v. McLure,* 8 *Rich. Eq.* (S. Car.) 286, 70 Am. Dec. 196; *Baxter v. Earl of Portsmouth,* 5 Barn. & Cr. (Eng.) *170; *Dodds v. Wilson,* 3 Brev. (S. Car.) 389.

Other assignments of alleged error have been presented, which we have examined, but in view of our decision we do not find it necessary to discuss.

The judgment of the district court is right, and is in all things

AFFIRMED.

Note—See Limitations of Actions, 25 Cyc. p. 1104—Insane Persons, 32 C. J. p. 731, sec. 502; Executors and Administrators, 24 C. J. p. 867, sec. 2184.

IN RE ESTATE OF THOMAS MURPHY.
S. W. FENDER, ADMINISTRATOR, APPELLANT, V. STATE OF NEBRASKA, CLAIMANT, APPELLEE.

FILED JUNE 24, 1924. No. 23289.

APPEAL from the district court for Keith county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

George H. Merten, for appellant.

O. S. Spillman, Attorney General, and *Lloyd Dort, contra.*

Heard before MORRISSEY, C. J., LETTON, DAY and THOMPSON, JJ., and BLACKLEDGE, District Judge.

THOMPSON, J.

No bill of exceptions has been filed in the case, nor has the evidence been preserved and presented to us. The only question presented is whether the pleadings sustain the judgment. The case was tried in the district court, by consent, upon the claim presented in the county court and the objections filed in that court. The claim was sufficient to sustain the judgment.

AFFIRMED.

CLAUS SCHLESSELMAN, APPELLEE, V. TRAVELERS INSURANCE COMPANY, APPELLANT.

FILED JUNE 24, 1924. No. 23913.

1. **Master and Servant:** EMPLOYERS' LIABILITY ACT: COMPENSATION. In a case arising under the employers' liability act, where the trial court has found the employee to be permanently partially injured in both of his legs, to the extent of 50 per cent. of his ability to do ordinary labor, such employee should receive 50 per cent. of 66 2-3 per cent. of the weekly wage received at the time of the injury, for a period of 300 weeks, and 50 per cent. of 45 per cent. of such wage, each week thereafter, for the remainder of his natural life, in accordance with subdivision 3, sec. 3044, Comp. St. 1922, and subdivision 1 of the same section. Such amount, however, shall not in either case be more than $15 a week nor less than $6.
2. **Construction Followed.** The interpretation of subdivision 3, sec. 3044, Comp. St. 1922, in conjunction with subdivision 1 of the same section, as announced in *Frost v. United States Fidelity & Guaranty Co.*, 109 Neb. 161, is followed and approved.

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

Hall, Cline & Williams, for appellant.

Charles S. Roe, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, DAY, GOOD and THOMPSON, JJ., and REDICK, District Judge.

THOMPSON, J.

We considered this case October 20, 1923, and remanded the same with special instruction, reported in 111 Neb. 65, to which we refer for statement of facts. For consideration of the questions here presented, it is sufficient to say that the injuries complained of are alleged to have been caused by scalding water, burning different parts of the plaintiff's body, especially the legs. On December 27, 1923, on the evidence previously introduced and additional evidence then received, the court found: "That the damaged condition of the cuticle and tissues of substantial areas of

the plaintiff's left shoulder, arm, and leg, and practically all the right leg from below the ankle to the region of the knee, collectively impedes circulation of the blood, causing numbness in both feet, fatigue, and weakness of body generally, rendering plaintiff unable to perform ordinary labor.

"That from June 6, 1923, by reason of said accident, plaintiff was permanently partially disabled to the extent of one-half of his ability to do ordinary labor, and that he is entitled to recover for 32 weeks from said date compensation at the rate of $7.50 a week, aggregating $240; that the defendant, in addition to all prior amounts due, has paid plaintiff from the 6th day of June, 1923, the sum of $405, which is $165 more than is now due, and has thereby paid in full until the 29th day of May, 1924.

"That plaintiff is entitled to recover from and after said last-named date, to be paid weekly, the sum of $7.50 a week during the remainder of his life, and to recover his costs other than $14.40 taxed by the supreme court."

In addition to the presumption in favor of the finding of the trier of fact, the evidence amply sustains the judgment of the trial court, that the plaintiff has suffered a 50 per cent. permanent partial disability to his legs. In accordance with subdivision 3, sec. 3044, Comp. St. 1922, as construed in *Frost v. United States Fidelity & Guaranty Co.*, 109 Neb. 161, and *Johnson v. David Cole Creamery Co.*, 109 Neb. 707, plaintiff was entitled to recover such proportion of the compensation allowed for total disability under subdivision 1 of this section as the extent of his loss would bear to the total loss of such members. At the time of injury plaintiff's wage was $27 a week. Thus it will be seen that he should have been awarded 50 per cent. of 66 2-3 per cent. of $27, or $9 a week, for a period of 300 weeks, and 50 per cent. of 45 per cent. of $27, or $6.07½ a week, thereafter, for the remainder of his life.

Since plaintiff has not filed a cross-appeal, and the case cannot be tried here *de novo*, he must be content with the $7.50 a week, awarded by the trial court, for a period of 300 weeks from the date of the injury, and the sum of $6.07½ a week thereafter, during the remainder of his

natural life. The Travelers Insurance Company should be credited with any and all amounts heretofore paid to Schlesselman.

It is therefore ordered that the judgment of the district court be modified to the extent of awarding plaintiff $6.07½ a week for the remainder of his life, from and after the expiration of the 300 weeks, in lieu of $7.50, and for that purpose the case is modified, and remanded, with directions.

MODIFIED, AND REMANDED, WITH DIRECTIONS.

Note—See Workmen's Compensation Act, p. 96, sec. 87.

TOM PANEBIANCO, APPELLANT, V. ARMAND BERGER, APPELLEE.

FILED JUNE 24, 1924. No. 22556.

1. **Brokers:** DUAL AGENCY: RESCISSION. Where a real estate agent, with their full knowledge and assent, acted for both parties in a contract for an exchange of real estate, the fact of such dual agency furnishes no legal ground for rescission of the contract.
2. **Evidence** examined and found to fully sustain the decree of the lower court.

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

Montgomery, Hall & Young, for appellant.

Brown, Baxter, Van Dusen & Ryan, contra.

Heard before LETTON, ROSE, DEAN, DAY and GOOD, JJ., BLACKLEDGE and REDICK, District Judges.

REDICK, District Judge.

The action is one for the rescission of an executed exchange of improved real property in the city of Omaha for 400 acres of land in Holt county, Nebraska. The plaintiff was the owner of the Omaha property, which was put into the exchange at the agreed price of $12,000, subject to a mortgage of $4,000, and the defendant was the owner of

the land, which was put in at the agreed price of $16,000 and was clear of incumbrance, the difference between the equity of the plaintiff and the value of the land, $8,000, to be secured by a mortgage upon the land. Before the exchange of deeds, in consideration of an increase in the rate of interest, the amount of the mortgage was reduced to $7,600. The contract was entered into in November 1918, and each party seems to have taken possession of the property received in the trade soon after the exchange of deeds. The plaintiff alleges that he was induced to enter into the contract through the fraudulent representations of the defendant and a real estate dealer, of the city of Lincoln, with whom plaintiff had listed his property for sale or exchange; that by a secret arrangement, without the knowledge or assent of plaintiff, defendant engaged said agent to act as defendant's agent in making the exchange, and that plaintiff did not discover the fraud and the falsity of the representations made until the year 1920 when this suit was brought. The trial court found generally in favor of the defendant, and plaintiff has appealed.

We have made a careful and painstaking examination of the evidence as contained in the bill of exceptions, and find that at the time of the contract plaintiff's property was worth somewhat less than the value fixed in the contract, but that his equity was worth not less than $5,000, while the property of defendant had little, if any, value above the amount of the mortgage thereon executed by the plaintiff, and that the trade was a very disadvantageous one for the plaintiff.

The facts leading up to the contract are substantially as follows: The plaintiff, an Italian, was a shoemaker or a cobbler by trade, and had lived in Omaha about 15 years. One D. M. Douthett, a real estate agent of the city of Lincoln, Nebraska, having been introduced to plaintiff by a common friend, in the spring of 1918 plaintiff listed his property with Douthett for sale or exchange. On November 4, 1918, Douthett wrote the plaintiff a letter in the following terms:

"Dear Tom: I have just found a piece of land in a good section of country that I believe can get you a good deal on for your property. This is 400 acres in the eastern part of Holt county, about 75 miles northwest of Grand Island, which brings it in about the same section of country, that is, the same kind of a country, as up around Overton and Elmcreek. This land was bought by a Frenchman 10 or 12 years ago, and he went to France, lost his wife, and came back and wrote me to sell this land for him. His price is $40 an acre and the price is all right. The thought struck me that if I could only trade your property in Omaha for this, it would make you a fine deal, so I wrote him and told him about it, giving him a good description of it, just as it was, and also spoke of it to him in the highest terms. I have a letter from him today that he will consider it and I am now writing him asking him when he can meet me in Omaha and look at your property. I think I can have him down there Sunday or Monday. Land in this vicinity has been selling mighty well all summer and I have some myself not very far away from it. Let me hear from you in regard to this. Don't believe we'll 'ever get a better chance for your property. Very truly,

"D. M. Douthett."

Plaintiff replied as follows:

"Your letter of Nov. 4 received and was very glad to hear from you. I have the greatest confidence in your judgment, and if you say this is a good deal, I have no doubt you know what you are talking about. I will be pleased to have you bring your man here as you say Sunday or Monday. That will be satisfactory to me. If you come Sunday and the shop is closed come to the house, 715 No. 33 about 1½ blocks south on same side of street. Since the first of the month, one store is empty, on account of tenant having gone to war. But this ought to make no difference under the circumstances."

November 7 Douthett wrote the plaintiff arranging a meeting for the following Sunday in Omaha, and suggesting that they would go out and look at plaintiff's property

and go that evening to see the land, to which plaintiff replied: "I just received your letter and I would be glad to meet you at Merchants Hotel at 1:20 p. m. Sunday, and with your friend, we go see the property together." He then stated he could not go out to see the land at that time on account of sickness in his family. The parties met as arranged and went out and inspected plaintiff's property, and after some discussion the terms of the contract as finally carried out were agreed upon, the contract reduced to writing and signed by the defendant, but was not signed by plaintiff until two weeks later after plaintiff had been out with Douthett to inspect the land, the contract containing a provision that it was "made subject to the inspection of first party's land by second party." There is considerable conflict in the testimony as to what was said at the meeting in Omaha with reference to the value, character and quality of defendant's land, but the allegations of misrepresentations alleged to have been made by the defendant personally do not appear to be supported by a preponderance of the evidence, and plaintiff's cause of action must fail unless plaintiff has established that he did not know that the agent was acting for both parties.

There is no serious dispute as to the law applicable to the facts in this case, and it is stated as follows in 31 Cyc. 1572:

"An agent may with their full knowledge and consent represent both parties to a contract, and his contracts under these circumstances bind each within the scope of his authority. But where an agent without the full knowledge and consent of his principal represents the adverse party in a transaction, his contracts relating thereto are voidable at the option of the principal."

In the course of the transaction the agent served in a dual capacity for both parties and collected a commission from each. The defendant knew that the agent assumed to act for both, but the plaintiff denies having had such knowledge, and the case turns upon the determination of this question of fact.

The plaintiff testifies that he had no knowledge or information that Douthett was acting as the agent for the defendant until about a year after the trade had been consummated, when Douthett informed plaintiff that he had received a commission from the defendant in the deal. On the other hand, the defendant testified that at the meeting in Omaha, which was the only one ever had between the parties, he told the plaintiff that Douthett was his agent, and he is corroborated by the testimony of the agent. It appears from the evidence that the plaintiff had not had any experience in the purchase and sale of farm lands and was not acquainted with their character and value, and that he relied implicitly upon the statements and judgment of his agent. The evidence, however, does not warrant the inference that plaintiff was an ignorant man or entirely unacquainted with business transactions. He had purchased the Omaha property and improved it with a brick building from which he was receiving rents in the neighborhood of $75 a month, and his manner of answering questions, so far as the record shows, indicates that he was a man of at least ordinary intelligence; so that, while he was engaged in a lowly occupation and was a foreigner by birth, it cannot be claimed from the evidence, and the case is not presented upon the theory, that he was imposed upon and defrauded because of his ignorance and general lack of capacity in business transactions. But, while it is alleged that plaintiff was ignorant on the subject of the character of farm lands, as already noted, it is also alleged and the case is presented upon the proposition that plaintiff's agent, secretly and without plaintiff's knowledge or assent, acted as agent for the sale of defendant's land. The district court, while its finding was generally for the defendant, must necessarily have found against the plaintiff on this issue; and, while the plaintiff is entitled to a trial *de novo* in this court on this appeal and we are required to reach an independent conclusion upon the facts without reference to the conclusion reached by the district court, we have held that where the determination of a fact rests

upon conflicting testimony, requiring the court to determine which witness has testified falsely, we have a right to and should consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. *State v. Leflang,* 108 Neb. 138; *Miksch v. Tassler,* 108 Neb. 208.

In the present case the letter of the agent to plaintiff initiating the transaction complained of, and quoted above, contained the following expression: "This land was bought by a Frenchman 10 or 12 years ago, and he went to France, lost his wife, and came back and wrote me to sell this land for him." And plaintiff in his reply said: "I will be pleased to have you bring your man here as you say Sunday or Monday." Further than this, while plaintiff denied that he knew that the agent was handling Berger's land for him, he admitted that the agent told him that Berger wrote about the land and asked him to sell the land for him; and then in answer to the next question testified that he did not say anything about it, but then admitted that he knew that Douthett had a letter from Berger telling him that the land was for sale. We think from a consideration of this evidence we would not be justified in holding that the finding of the lower court was clearly wrong, but must rather conclude that it is sustained by a preponderance of the evidence. If it be true, as claimed by the plaintiff, that he did not learn that defendant paid the agent a commission on the exchange until a year later, though Douthett testifies that he informed him of that fact, this fact alone would not establish plaintiff's ignorance of Douthett's agency for Berger, for payment of a commission was an ordinary consequence of the employment of Douthett by defendant to sell the land, of which fact we find plaintiff was informed. Plaintiff paid a commission to the agent based only upon the value of his equity in the lots.

We think that, disregarding the conflicting testimony of the witnesses, plaintiff was charged with knowledge that his agent was also acting as agent for the sale of defendant's

land by the letter of November 4, 1918, and that he was not justified in relying upon the statements of the agent and cannot charge defendant with responsibility therefor, especially in view of the fact that he inspected the land and had every opportunity to learn the facts before signing the contract. If, as he says, he knew nothing about lands or their value, made no real inspection, and would have made the trade without inspection relying upon the agent, this does not excuse him under the circumstances.

Upon more mature consideration, we conclude that our former opinion should be vacated and withdrawn, and the judgment of the district court affirmed.

AFFIRMED.

Note—See Brokers, 9 C. J. p. 540, sec. 40; p. 678, sec. 161.

RAY J. VARNUM, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS.

FILED JUNE 24, 1924. No. 22785.

Evidence examined, and *held* insufficient to sustain the verdict.

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

C. A. Magaw, Thomas W. Bockes and *Douglas F. Smith,* for appellants.

Abbott, Rohn, Robins & Dunlap, contra.

Heard before MORRISSEY, C. J., LETTON and DAY, JJ., BLACKLEDGE and REDICK, District Judges.

REDICK, District Judge.

This is an action by plaintiff, Varnum, against the Union Pacific Railroad Company to recover damages to plaintiff and his automobile in the sum of $25,000 claimed to have been sustained by reason of negligence of the defendant resulting in a collision between an automobile driven by plaintiff and a train of defendant at a country crossing. Defendant's engineer in charge of the train is joined as defendant. The trial to a jury resulted in a verdict in favor

of the engineer, but against the railroad company in the sum of $1,250. The grounds of negligence charged are the failure of the engineer to give any warning of the approach of the train to the crossing by sounding a whistle or ringing a bell, and the existence upon the right of way of willows and weeds which obstructed the view of plaintiff as he approached the crossing, so that he was unable to see the train until he was so close to the rails that he could not stop in time to avoid the collision. The separate answers of the defendants consisted of denials of allegations of negligence in the petition, and pleas of contributory negligence on the part of the plaintiff. The defendant appeals, assigning a number of errors, only one of which we deem it necessary to consider, namely, that the verdict is not supported by sufficient evidence and the district court erred in overruling defendant's motion for a directed verdict.

The verdict of the jury in favor of the engineer is a finding against the plaintiff as to all charges of negligence relating to the management of the train, and, therefore, we are concerned only with the charge that the right of way was permitted to be covered with weeds and trees to such an extent as to obscure the view of plaintiff on the highway of the approaching train; and the existence of trees may be eliminated because the testimony of all the witnesses shows that there were no trees within 40 feet of the railroad track, or any other obstructions within that distance, except weeds. It is shown without dispute that the situation regarding permanent factors at and near the crossing was as follows: The Lincoln Highway, a paved road, and the double track of the defendant run parallel with each other in a northwesterly direction about 150 to 160 feet apart. A county road running north and south crosses the highway and the railroad, the east line of the road making an angle at the railroad track of about 65 degrees. On the east side of the road between the highway and the railroad was a cornfield extending to the right of way fence 50 feet north of the tracks and parallel with

them. Ten feet south of the fence is a line of telegraph poles and a few scattering scrub willows. The surface of the road within that 50 feet is about 2 feet lower than the roadbed of the railway, and about a foot lower than the general surface of the right of way between the railroad and the fence. A slight incline begins about 8 or 10 feet north of the crossing where the road approaches it. As plaintiff approached the crossing from the north, his view of the railroad track upon which the train with which he collided was approaching from the east was at the angle above stated of about 65 degrees, with the ever widening prospect which such an angle gives; that is, the crossing was not at right angles with the railroad, and plaintiff approaching from the north had the advantage of the divergence of the line of the railroad from a right angle.

Plaintiff testifies that he was driving a Ford touring car, and that he turned from the Lincoln Highway to the left on the county road, going south on the east side of the road in low gear at about six or seven miles an hour (at which rate he could stop in five or six feet), looking and listening for approaching trains in both directions, and before entering upon the crossing brought his car nearly to a stop, but did not discover the train until he was just about four feet from the north rail, when the train was right upon him. The front end of the automobile struck about the center of the engine and was thrown about 40 feet into a ditch at the side of the track. The plaintiff claims that no whistle was sounded and no bell rung, and that he was unable to see the train on account of the cornfield, the willows, the telegraph poles, and high weeds on the right of way. We may dismiss all of these claims from consideration except the weeds, because the other so-called obstructions were at least 40 feet from the railroad track, and plaintiff traveling in the road, barring the weeds, when he reached a point 40 feet north of the track, could have seen the track or the roadbed for a distance of about half a mile, and a train upon the track a much greater distance.

It will thus be seen that the sole question for determina-

tion is whether the evidence regarding the weeds growing upon the right of way is sufficient to sustain the verdict. The accident was in broad daylight, and plaintiff was perfectly familiar with the crossing, having been over it many times for two months before, and in fact had crossed it earlier on the day of the accident. The plaintiff testified that the weeds were four to five feet high and extended to within six feet of the north rail. One witness that he called said they were two to four feet high, and another one fixed their height at three to four feet, the highest weeds four feet. Witnesss Phillips for the plaintiff fixed the height of the weeds at six to eight feet. All of these estimates, except that of the plaintiff, were made while the witnesses were sitting in automobiles or standing in the road, while the plaintiff went over into the weeds a day or two later and fixed their height at four or five feet, the higher figure representing scattered weeds throughout the space. This evidence, viewed in the light most favorable to the plaintiff, will not sustain a finding that the weeds in question exceeded four to five feet in height. The estimate of the witness Phillips must be rejected as entirely unreliable, in view of the evidence of the plaintiff and his other witnesses. He testified, however, that at a point 12 feet north of the crossing he could and did see a train approaching from the east 100 feet away, and it is not certain whether he was talking of weeds along the road or in the right of way. It is further shown that, while sitting in his automobile on the road, plaintiff's point of vision was five feet above the ground, and that the height of the railway engine was 17 feet above the rails; it is thus evident that the weeds growing in the right of way, conceding the right of way to be a foot higher than the surface of the road, were but one foot higher than plaintiff's head while sitting in his automobile, and this distance being modified by the fact that there were some 15 or 20 feet between plaintiff's position in the road and the east line of the county road, at which point the weeds on the right of way began, while the object which plaintiff was looking

for, the locomotive coming from the east, was on railroad tracks 2 feet above the surface of the ground covered with weeds, and extended 17 feet above the rails. Assuming the situation to have been as claimed by plaintiff, the physical facts would seem to us to conclusively demonstrate the incorrectness of plaintiff's claim that the approaching train was obscured by and could not be seen on account of the weeds on the right of way. Furthermore, the train was traveling 35 miles an hour, and plaintiff at 6 or 7. It follows, therefore, that when plaintiff was 50 feet from the crossing the train was 250 feet from it, and, if the same rate of speed was maintained, when plaintiff was 12 feet from the crossing the engine was 60 feet away and in plain sight past the corner of the weeds, if they had obstructed plaintiff's view prior to his arrival at that point. Phillips testified the train could be seen 100 feet from that point, and if plaintiff had looked, as he says he did 10 or 12 feet from the north rail, he could have seen the train in time to have stopped. A few days after the accident several kodak pictures were taken by plaintiff or some one with him in the vicinity of the crossing, evidently for the purpose of showing the situation regarding the weeds on the right of way. Some of these pictures were taken at the crossing, but the jury were not given the benefit of the information disclosed by those pictures, they not being introduced in evidence, nor their absence accounted for. Two pictures taken at or near the intersection of the Lincoln Highway with the county road were introduced, and a careful study of them leads to the conclusion that they were so taken at a point 150 to 175 feet north of the crossing for the purpose of emphasizing the height of the corn north of the right of way as obscuring the approach of trains, which fact is conceded, but they are of little, if any, value upon the question of the weeds which we are discussing. It is perfectly evident that, if it was desired to show the condition of the right of way as to weeds, the camera should have been placed at some point on the county road at the corner of the right of way fence, or between that point and

the railroad track, thereby placing the lens in about the position of the eyes of a traveler upon the road and demonstrating clearly and accurately what could be seen and what obstacles existed to prevent the traveler from observing the approach of trains. It seems that such pictures were taken, but, as above noted, were not produced for the inspection of the jury, furnishing a strong inference that they would show no such obstructions as the plaintiff is claiming.

We are not unmindful of the rule that a reviewing court is not permitted to weigh the evidence, that being the exclusive province of the jury, but where the statements of the witnesses are opposed to natural laws and conclusive inferences arising from the undisputed physical facts, there is no question of weight of evidence, and the latter must prevail.

We conclude that the verdict is not sustained by sufficient evidence, and that defendant's motion for a direction should have been sustained; judgment reversed, and cause remanded for further proceedings.

REVERSED.

Note—See Railroads, 33 Cyc. p. 1087.

FORBURGER STONE COMPANY, APPELLANT, V. FRED J. YOUNG, JR., ET AL., APPELLEES.

FILED JUNE 24, 1924. No. 22819.

1. **Evidence:** OPINION AS TO ULTIMATE FACT. Where, in an action to recover the contract price for cut stone delivered to the contractor, a counterclaim is filed for damages suffered by delays in furnishing the stone, it is error to permit defendant and other witnesses to state their opinion or conclusion as to the total period of such delay, that being one of the final facts to be found by the jury from the evidence.

2. **Damages:** PLEADING. Such damages as naturally flow from a breach of contract are presumed to have been within the contemplation of the parties and need not be specially pleaded.

3. **Sales:** IMMATERIAL EVIDENCE. Where it is not shown by competent evidence that the contractor was put to any extra expense

on account of delay in furnishing the stone by reason of an increase in the wage scale, evidence of such increase is immaterial.

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

Claude S. Wilson and *Albert S. Johnston,* for appellant.

Tyrrell & Westover, Reavis & Beghtol, Carl E. Sanden and *W. B. Comstock, contra.*

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

REDICK, District Judge.

This is an action brought on a written contract to recover a balance of the contract price for cut stone furnished by plaintiff to defendant, Fred J. Young, Jr., contractor, for the erection of a school building in the city of Lincoln. The United States Fidelity & Guaranty Company, surety on the contractor's bond, was joined as defendant, and filed a general denial. By the terms of the contract the stone was to be delivered so as "to keep up with the progress of the building." The contract price was $9,200, of which $8,000 has been paid, and the plaintiff asks judgment for the remainder, $1,200, and $24.50 for extras furnished. The contract was executed September 24, 1919. The defendant answered and admitted the execution of the contract and set up a number of defenses, as follows: (1) That before entering into the contract with the school district he procured a proposal for the cut stone work from the plaintiff at $8,200 on July 28, 1919; that thereupon, on the basis of plaintiff's proposal, he filed his bid with the school district July 31, and on August 4 posted a certified check for $3,500 as required, and on August 5 his bid was accepted and he became bound to enter into a contract with the district to erect the school building; that on August 6 he received notice from plaintiff that an error in addition had been made in their proposal in the sum of $1,000, and that the same would have to be withdrawn or increased to

$9,200, wherefore defendant alleged plaintiff was estopped from claiming more than $8,200. Defendant further alleged that he was compelled to enter into the contract sued upon as he could not get the stone elsewhere. (2) That the plaintiff failed to deliver the stone at the time required by the contract, whereby defendant had been damaged in the sum of $3,000. Plaintiff filed a reply putting in issue the allegations of the answer and counterclaim.

Upon the trial defendant's first defense was eliminated by the court, and the case was submitted to the jury upon the question of the delay in furnishing the stone and the amount of damages suffered by the defendant in consequence thereof. The jury found for the plaintiff in the sum of $1,336, and for the defendant on his counterclaim $1,200, and returned a verdict for the plaintiff for the difference, $136. Motion of plaintiff for a new trial was overruled, judgment upon the verdict, and plaintiff appeals. No cross-appeal was taken by defendant, so that the questions discussed in the briefs having reference to the first defense set up in the answer are not before us for consideration.

The errors assigned by plaintiff and upon which he relies for reversal are: (1) In the reception by the court of incompetent evidence over the objection of plaintiff; (2) the allowance of proof of special damages where none were alleged; (3) error in instruction No. 11 given by the court. Of these in their order:

1. Defendant was called as a witness and was asked this question: "How long was this contract delayed by his failure to furnish stone?" And he answered: "Five months." Plaintiff objected to the question as calling for a conclusion of the witness, immaterial, incompetent and irrelevant. Defendant's brother was asked the question: "How long a time did those men work at this increase in wages that could have been saved had this stone work been furnished on time?" Answer: "Well, they worked about eight or nine months, I should judge." The plaintiff objected to the question as incompetent, irrelevant and immaterial, no foundation laid, not the best evidence. The ob-

jections were overruled in each instance and exception taken. It seems perfectly clear that the objections should have been sustained. They call for the conclusions of the witnesses upon one of the final facts to be found by the jury, the extent of the delay, if any, caused by the failure of plaintiff to deliver the stone in accordance with the contract. The answers to these questions furnish the only basis in the evidence upon which the jury could determine the amount of defendant's damages. The burden was upon the defendant to establish his damages, and it was incumbent upon him to present to the jury evidence of facts from which they could determine whether or not there had been delay caused by failure to furnish the stone, and the extent of such delay. It was not a question for the reception of expert or opinion evidence.

2. The allegation of damage in the answer was merely general, to the effect that plaintiff agreed to furnish all the stone by March 1, 1920, when in fact it was not furnished until the 1st day of November, 1920, to the damage of defendant in the sum of $3,000. The plaintiff contends that under such general allegation no evidence of damages such as offered by the defendant could be received; that they are special damages and must have been pleaded. There is no question but that special damages must be pleaded in order to make evidence thereof admissible, but, in the absence of a motion to make the pleading more specific, a general allegation of damages is sufficient to let in evidence of all such damages as would naturally flow from or would be presumed to be within the contemplation of the parties as the result of a breach of the contract. Defendant sought to recover as damages the wages paid his foreman during the period of delay, interest upon the amount he had invested in the contract, and loss of defendant's time. Such losses naturally accrue as the direct result of the breach of the contract and are presumed to have been within the contemplation of the parties and need not be specially pleaded, but the extent of such loss, if any, depends upon the period of time the work was delayed by

plaintiff's failure to deliver the stone in accordance with the terms of the contract, and, as we have above intimated, there was no competent evidence before the jury from which they could determine this essential fact, and so there is no sufficient evidence upon which to base a verdict as to these losses.

Defendant further claimed damage by reason of the increased cost of labor during the period of delay, and evidence was received over plaintiff's objection to the effect that the scale of wages for carpenters, bricklayers, and common labor was increased as to each in the sum of $2 a day about April 1, 1920, and defendant testified over proper objection that he was compelled to pay, because of the advance in the price of labor during the time he was delayed, the sum of $3,500. It appears, however, from the evidence of defendant's witnesses that the foundation for the building had been erected to the grade level in the fall of 1919, and that nothing was done toward the superstructure until the 15th day of March, 1920, when some of the stone was delivered, and that the increase in the wage scale went into effect before they were ready for the cut stone. It is undisputed that the masons, carpenters and laborers were not paid for any time they did not work, and defendant produces no evidence of any payments made by him on these accounts during or on account of the delay, his evidence being to the effect that by reason of the delay he could only work one or two masons at a time, whereas if stone had been delivered as required they could have worked five or six. There is no evidence except the statement of defendant's conclusion that the cost of labor was greater than it would have been but for the delay. It is not claimed that the building could have been completed before such increase if the stone had been delivered on time. It seems quite evident, under these circumstances, that the increased cost of labor to the contractor was not the result of delay in furnishing the stone; he would have been subjected to the same increase if the stone had been delivered on time. In the situation of the case as developed on the trial, the

evidence of the increase in the wage scale was immaterial and should have been excluded.

3. Instruction No. 11 is the only one given upon the measure of damages, and is as follows:

"As already stated in these instructions, the plaintiff is entitled to recover $1,336. If you find the defendant Young is entitled to recover damages against the plaintiff, his recovery would be limited to any actual injury resulting from delay in the completion of the building caused by the plaintiff, which were not due to labor strikes. You may, in determining the amount, take into consideration the loss, if any, of defendant Young's time, the increased cost of labor, if any, during a period of delay caused by the plaintiff."

This instruction is too general and furnished no accurate guide for the jury in determining the damages. Furthermore, it permitted the jury to take into consideration the increased cost of labor, which, as we have shown, was immaterial and furnished no proper item of damage for the jury to consider.

The errors above pointed out were clearly prejudicial to the plaintiff and require the reversal of the judgment.

REVERSED AND REMANDED.

Note—See Evidence, 22 C. J. p. 573, sec. 678 (1925 Ann.); Damages, 17 C. J. p. 1001, sec. 305—Sales, 35 Cyc. p. 630.

LEYPOLDT & PENNINGTON COMPANY, APPELLANT, V. JAMES C. DAVIS, DIRECTOR GENERAL, APPELLEE.

FILED JUNE 24, 1924. No. 22824.

1. **Evidence** examined, and *held* to present questions for the jury, and to be sufficient to sustain the verdict.
2. **Carriers:** AUTHORITY OF AGENT. The station agent of a railroad company has no authority by virtue of his office to make a contract that the company will pay a claim for damages to a shipment caused by negligence, or arising out of the contract of shipment.

3. **Appeal:** HARMLESS ERROR. Where there is sufficient evidence to enable the jury to apportion the damages between two defendants, and the verdict is for defendants, an instruction requiring such apportionment, if error, is without prejudice.

4. **Carriers:** LIABILITY: PERISHABLE FREIGHT. A common carrier is not liable for injury to perishable freight due to the nature of the commodity in connection with natural causes over which the carrier has no control.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Hoagland & Carr, for appellant.

C. A. MaGaw, T. F. Hamer, Douglas F. Smith, E. E. Whitted and *J. L. Rice, contra.*

Heard before MORRISSEY, C. J., GOOD and DEAN, JJ., BLACKLEDGE and REDICK, District Judges.

REDICK, District Judge.

This action is brought by the plaintiff against the director general of railroads, as agent for the Chicago, Burlington & Quincy Railroad Company and Union Pacific Railroad Company, to recover the value of certain potatoes alleged to have been frozen during their transportation from Mitchell to North Platte, Nebraska. They were shipped from Mitchell and carried as far as Northport over the Burlington line and from Northport to North Platte over the Union Pacific. Plaintiff seeks to recover on two theories: First, the negligence of the defendants in furnishing defective cars whereby the potatoes were subjected to the freezing weather; and, second, upon an alleged contract with the agent of the Union Pacific at North Platte. The petition alleges that the cars furnished for this shipment were defective in that they contained large holes in the bottom thereof which permitted the cold air to enter from the outside and freeze the contents of the cars. There is no evidence to support this allegation, and in so far as plaintiff's case rest upon negligence, it depends upon the general proposition that, where freight is received in good

order and arrives at point of destination in bad order, a *prima facie* case is made, and the burden is placed upon the railroad company to show that the damage was caused by some agency beyond its control, and not by its negligence.

There is some discussion in the briefs as to whether the action sounds in tort or in contract, but we think this is immaterial in view of the fact that a counterclaim for demurrage filed by defendants was withdrawn, and the liability of the defendants is substantially the same whether the case is founded upon negligence or the contract of shipment.

Defendants admitted the receipt of the shipment, denied any negligence during transportation, and allege that if any damage accrued to the shipment while in the possession of the defendants it was due to the inherent nature of the commodity. Each defendant also alleged that the shipment was delivered by it in the same condition in which it had been received. There was a verdict and judgment for defendants, and plaintiff appeals.

The potatoes were loaded on November 19, arrived at Northport the 23d, and at North Platte the 24th. No question is made of delay in shipment. The question of fact for the jury to determine was whether the potatoes were frozen, before, during, or after the completion of the transportation. Plaintiff introduced evidence tending to prove that the potatoes were delivered to the Burlington Railroad in good condition, and upon arrival at North Platte about one-half of them were frozen and thereby rendered valueless, and evidence of the amount of damages. The evidence bearing upon the time when the potatoes were frozen is substantially as follows: The potatoes were dug between the 3d and 15th of November, and the maximum and minimum temperatures each day during that period are shown, from which it appears that from the 3d to the 8th the minimum ranged from 16 to 26 degrees above zero, 10 degrees on the 9th, 16 on the 10th, 15 on the 11th, 2 below on the 12th, 1 below on the 13th, 17 above on the 14th, and 24 above on the 15th. After being dug potatoes were placed in a cellar six feet deep and covered with a foot of

hay and straw and three or four inches of dirt, and when they were taken out of the cellar and loaded on the cars about ten bushels of frozen potatoes were thrown out. And in answer to the question whether or not the potatoes were frost-bitten at that time, the witness who sold and assisted loading them answered: "I think not." The potatoes were graded No. 1 by the state inspector at the time of loading. Temperatures were shown from November 19th to the 23d at Mitchell and Bridgeport (across the river from Northport), giving minimums of 26, 31, 24, 29, and 31, respectively, the maximum ranging from 42 to 61 degrees. The range of temperatures at North Platte on the 24th to 30th, inclusive, respectively, were 55 to 35, 35 to 11, 5 to zero, 10 above to 2 below, 29 above to 2 below, and 16 above to 2 below. Unloading began the 25th and was completed the 29th or 30th, the transfer from the cars to plaintiff's warehouse being accomplished by trucks, the potatoes being covered by a tarpaulin, and each trip occupying above five minutes. Unloading was carried on only between 10 a. m. and 4 p. m. on account of the severity of the weather, the doors of the cars being closed while unloading was not going on. Plaintiff introduced evidence to the effect that upon opening the car doors at North Platte there was frost on the outside of the potato sacks, and that the frozen potatoes were found in the exterior rows of sacks at the sides, top and bottom.

We think the evidence above summarized fairly presented a question for the jury as to the point of time at which the potatoes were frozen, and their finding is supported by sufficient evidence and should not be disturbed. The minimum temperatures during the period of shipment were only slightly below freezing, while both before and after shipment they reached much lower levels. The shipment was made in refrigerator cars, in good condition so far as the evidence shows; the defendants were not required to furnish heat for the cars, and if any of the potatoes were frozen during shipment, it was for the jury to draw the inference whether such fact was due to the inherent nature

of the commodity in connection with natural causes over which defendants had no control, or to lack of proper care. Plaintiff cites *Nelson & Co. v. Chicago & N. W. R. Co.*, 102 Neb. 439, but in that case there was an unexplained delay in the shipment, which the jury may have found was the cause of the loss. In the case at bar no negligent act of defendant is shown, and the proper inferences from the facts and circumstances shown were for the jury to draw.

Plaintiff showed that he refused to accept the potatoes on account of their condition upon arrival at North Platte, and offered to prove that the station agent agreed that, if he would take the potatoes and sort them out, the railroad company would pay his damages and cost of sorting, which offer was rejected by the court, and error is assigned thereon. The assignment is not well taken. There was no evidence of any authority of the station agent to bind the railroad company by such an agreement. That he had no such authority by virtue of his office is distinctly held in *Gauthier & Son v. Hines*, 120 Me. 476, and this is undoubtedly the law. Plaintiff cites *Chicago, R. I. & P. R. Co. v. Burke*, 82 Okla. 114, but in that case the contract was made by the claim agent of the railroad company whose duty it was to make settlement of such claims.

A number of objections are made to the instructions, and we have considered them all, but find it necessary to refer to only one of them. By instruction No. 10 the jury were told that if they found for the plaintiff they should find separately the amount of damage, if any, which accrued to the potatoes while they were under the control of the defendant operating the Burlington Railroad and the Union Pacific Railroad, respectively. The complaint is that there was no evidence from which the jury might determine this question, and that it was therefore impossible for the jury to find for the plaintiff in any amount. If this instruction was erroneous, it was probably without prejudice to the plaintiff, the verdict being generally for the defendants; but we think that the maximum and minimum temperatures established by the evidence prior

to, during the period of the shipment, and subsequent thereto, furnish a reasonable basis upon which the jury might rest a separate finding as to each defendant.

We find no prejudicial error in the record, and the judgment is

AFFIRMED.

Note—See Carriers, 10 C. J., secs. 148, 301, 600, 601; Appeal and Error, 4 C. J., sec. 3026.

ESTELLA M. FRANCIS ET AL., APPELLANTS, V. C. J. GARLOW, APPELLEE.

FILED JUNE 24, 1924. No. 22834.

Specific Performance Denied. Where vendee at the time for performance notified vendors that he would not complete the purchase of the land in the contract of sale, and thereafter the vendors erected a residence and outbuildings upon the land, occupied it as a home, leased portions of it for two years after the date when they were to deliver possession to the purchaser, and executed two mortgages upon the land, and subsequently brought suit for specific performance; *held*, that a decree denying such relief would not be disturbed on appeal; *held* further, that by such acts they had rendered themselves incapable of complying with the contract.

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

C. A. Sorensen and *F. L. Bollen*, for appellants.

Garlow & Long, contra.

Heard before MORRISSEY, C. J., GOOD and DEAN, JJ., BLACKLEDGE and REDICK, District Judges.

REDICK, District Judge.

This is an action by the vendor for the specific performance of a contract of purchase and sale of 160 acres of land, the petition having been filed September 10, 1921. The

contract was made out upon a printed form and contains the usual provisions, and provided for a sale at $275 an acre, of which $1,500 was to be paid in cash, and the remainder on March 1, 1920, when the purchaser was to be given possession. The following provisions are also found in the contract:

"All liens and incumbrances existing at that time (March 1, 1920) to be deducted." "It is mutually agreed that time is an essential element in this contract, and it is further agreed that in case either of the parties hereto shall fail to perform the stipulations of this contract, or any part of the same, shall pay the other party of this contract the sum of ——— dollars, C. J. Garlow to forfeit the $1,500 in full, as damages for nonfulfilment of contract."

The answer of defendant set up two defenses: (1) that the contract was a mere option; and (2) that at or about the time fixed for performance defendant notified plaintiffs that he would not take the land, and that thereafter plaintiffs went upon the land, and erected buildings thereon, and leased portions of the premises, collecting rents, and on May 5, 1920, executed a mortgage on the lands to the Columbus State Bank for the sum of $3,000, and about August 1, 1921, executed another mortgage to Garlow & Long for $587.40, wherefore defendant alleges that plaintiffs are estopped from seeking specific performance of said contract.

Plaintiffs replied, admitting the facts set up in the answer, but alleging in explanation thereof that such acts and doings by plaintiffs were upon the advice of defendant Garlow, who was acting as plaintiffs' attorney at the time. Defendant offered no evidence, but at the close of plaintiff's case the trial court rendered a finding and decree in favor of defendant, dismissing the petition, and plaintiffs appeal.

With reference to the first defense, it will be noted that the contract is somewhat peculiar in that it provides for the forfeiture on the part of defendant of the $1,500 as damages for nonfulfilment of the contract, but contains no

corresponding provision in case the plaintiffs should fail to perform, and defendant takes the position that the contract was a mere option which he might exercise or not, in which latter event he should forfeit the $1,500, which he is willing to do, and the contract would be at an end. We do not deem it necessary, however, to determine this question.

The plaintiffs testified that they had lost their copy of the contract, and that the words providing for the forfeiture were written in the copy retained by defendant after the contract was signed and delivered. They also testified that, although the copy of the contract produced by defendant appeared to have been witnessed by Long and acknowledged by plaintiffs before Long as a notary public, they never acknowledged it, and that Long never actually witnessed their signatures. Robert Francis also testified that, after defendant refused to complete the contract, he placed improvements upon the land, consisting of house, outbuildings and fences to the value of about $1,500 to $2,500, and that defendant told him that was the proper thing for him to do; that the defendant and Grover Long were law partners, and that Long advised him to give the $3,000 mortgage to the bank as security for a prior indebtedness, and thus prevent the bank joining in an application to declare the witness bankrupt; that Long also advised him to give the other mortgage, which in fact represented an indebtedness of witness to Garlow & Long for legal services in the sum of $418, and a claim of Hoagland & Company against the witness for $169.40. After March 10, 1920, and after defendant had refused to complete the contract, the plaintiffs moved upon the land in controversy and resided thereon, and, in addition to the acts of ownership already mentioned, leased the land to the father of Robert Francis for the year 1921 and collected the rent therefor.

From the above statement it will be seen that the real question for determination is whether or not the contract was abandoned by plaintiffs, and whether or not by their

conduct with reference to the land they have waived their right to insist upon specific performance. The facts do not present a question of technical estoppel, because it does not appear that the defendant has altered his position in any way in reliance upon the acts of plaintiffs; but they do present the question of fact whether or not the plaintiffs abandoned the contract, and whether or not they are now in position to perform the contract as made. While there is frequent reference in the testimony to the fact that Garlow was a member of the firm who had represented plaintiffs in a number of legal matters, no inference may properly be drawn that plaintiffs were overreached or deceived in consequence of such relation, and the matters referred to were mainly conducted by Long, and had no reference to the present controversy. The trial court, which heard the witnesses and observed their manner of testifying, was in a better position to properly weigh the evidence and determine the truth of their statements, upon which some matters appearing in the evidence would seem to cast some doubt, and we do not feel justified in disturbing the conclusions of the court on those matters. We think the court might very properly infer, as it presumably did, that plaintiffs had accepted the refusal of the defendant to complete the contract and had abandoned the same. Furthermore, the contract provided for the deduction, from the final payment of only such liens and incumbrances as existed on the property March 1, 1920, whereas it appears that two mortgages had been placed thereon after that time, and that two leases had been made for 1920 and one for 1921, during the existence of which plaintiffs were not in position to comply with their contract to give possession March 1, 1920.

Upon a careful consideration of the entire record, we conclude that plaintiffs were not entitled to specific performance, and the judgment of the district court was right.

AFFIRMED.

Note—See Specific Performance, 36 Cyc. p. 720.

LOUIS A. NELSON, APPELLANT, V. ELVIS H. WOODHOUSE, APPELLEE.

FILED JULY 7, 1924. No. 22843.

1. **Brokers:** ORAL CONTRACTS. "A verbal contract with an agent or broker to sell land for the owner or to obtain a purchaser therefor is void." *Covey v. Henry*, 71 Neb. 118.
2. **Record** examined, and *held* to support the judgment.

APPEAL from the district court for Banner county: RALPH W. HOBART, JUDGE. *Affirmed.*

Rodman & Rodman, for appellant.

L. L. Raymond and *Ray E. Lee, contra.*

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

MORRISSEY, C. J.

Plaintiff brought this action in the district court for Banner county to recover from defendant the sum of $3,000 which he alleged to be due him as commission for his services in the sale of land which belonged to defendant. There was judgment for defendant, and plaintiff appeals. Defendant had listed his land for sale with plaintiff, who was a real estate agent, under a contract by which defendant agreed to pay plaintiff as commission all of the sale price in excess of $44,800. In his petition, plaintiff set out this contract and also pleaded an oral contract under which it is alleged defendant agreed to pay plaintiff a commission of $5 an acre provided he effected a sale of the land covered by the written contract.

Plaintiff advertised the property for sale and secured a number of prospective purchasers. Through the services of plaintiff, one of these parties entered into a contract with defendant to purchase property for $54,400 and made the initial payments under this contract. The contract was never completed. Defendant paid to plaintiff the sum of $200 and no more. By this action plaintiff seeks to re-

cover the balance due under the alleged oral contract. In an amended petition plaintiff alleged that the sum which he claims is due him, and for which he seeks a recovery, is arrived at by a compromise between himself and defendant of the sum which would be due him under the terms of the written contract. Defendant denied that there was a compromise, and testified that he had canceled the written contract, as by its terms he had the right to do, but admitted that subsequently he orally agreed to pay plaintiff $5 an acre for his services in case he made a sale.

It is not necessary for us to determine at this time the validity of the written contract set out in plaintiff's petition. The oral contract is the one upon which plaintiff chiefly relies and the only one, if either, which his proof supports. Under our statute, section 2455, Comp. St. 1922, such a contract is void. And in *Covey v. Henry*, 71 Neb. 118, the rule is announced that—"A verbal contract with an agent or broker to sell land for the owner or to obtain a purchaser therefor is void."

The judgment of the trial court is right, and it is

AFFIRMED.

Note—See Brokers, 9 C. J. p. 558, sec. 60.

SOL WESLEY ET AL. V. STATE OF NEBRASKA.

FILED JULY 7, 1924. No. 23678.

1. **Criminal Law**: JURY: SEPARATION. On the trial of one charged with murder, the court may in its discretion, during the progress of the trial and before its final submission, permit the jury to separate during the several recesses of the court and go to their respective homes at the close of a day's service in the court, when the jury are properly admonished as provided in section 10150, Comp. St. 1922.

2. ———: CAUTIONARY INSTRUCTION. "Where no cautionary instruction has been requested with reference to the consideration of the testimony of witnesses employed as detectives, a defendant cannot predicate error because of the trial court's failure to instruct the jury on that point." *Kerr v. State*, 63 Neb. 115.

3. ———: INSTRUCTION: WITHDRAWAL OF COUNT. On the trial of one charged with murder, the information was in two counts: The first alleged that defendant committed the murder while attempting to commit a robbery; the second alleged the commission of the murder, but made no reference to any attempted robbery. The court on its own motion, at the close of the testimony, withdrew from the consideration of the jury the first count of the information, and submitted the cause on the second count without withdrawing from their consideration evidence which tended to show an attempt to commit a robbery. This evidence being admissible as part of the *res gestæ*, *held*, that the court did not err in failing to withdraw it from the consideration of the jury.
4. ———: NEW TRIAL: NEWLY DISCOVERED EVIDENCE. It is not error for a trial court to deny a motion for a new trial on the ground of alleged newly discovered evidence, when the witnesses offered were all within the jurisdiction of the court, known to the parties, and by the exercise of proper diligence might have been produced upon the trial.
5. **Rulings** of the trial court on the admission and exclusion of evidence have been examined and found free from error.
6. **Evidence** as to the guilt of defendant Wesley has been examined, and *held* to support the verdict and judgment.
7. **Sentence Reduced.** Evidence as to the guilt of defendant Mauldron has been examined, and *held* sufficient to support the verdict, but the sentence is reduced from the death penalty to imprisonment during the term of his natural life.

ERROR to the district court for Douglas county: CHARLES A. GOSS, JUDGE. *Affirmed: Sentence reduced as to one defendant.*

John Adams, for plaintiffs in erorr.

O. S. Spillman, Attorney General, and *Lee Basye, contra.*

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

MORRISSEY, C. J.

Defendants were jointly charged with the murder of one Deerson. Upon trial to a jury, each was found guilty of the crime of murder in the first degree. The jury fixed the

penalty as to each at death. The court pronounced judgment in accordance with the verdict, and each defendant has prosecuted error to this court.

The information filed by the county attorney contained two counts. The first count charged the murder to have been committed while defendants were attempting to rob Deerson; the second count made the charge of murder without any reference to the robbery.

January 20, 1923, one Wrennie Grogan was conducting a grocery store in the city of Omaha. According to the testimony for the state, on that evening the defendants entered Grogan's store, and, after a few moments delay, defendant Wesley drew from his clothing a revolver and directed the grocer and the other persons in the store to throw up their hands. Defendant Mauldron immediately stepped behind the counter and proceeded to take whatever money was then in the cash drawer. Almost simultaneously with these movements by defendants, Mr. Deerson, who was in no way connected with the store but was present merely as a customer, or visitor, undertook to pass out of the front door near which stood defendant Wesley. Wesley thereupon shot Deerson, inflicting a wound from which he, two days later, died.

Defendants fled from the store, but were subsequently apprehended, and, upon the trial, denied any part in the crime charged. However, their identity is so conclusively established that it is not necessary to set out even a synopsis of the proof.

In the motion for new trial and in the petition in error, many assignments of error are made, but they are recapitulated in the brief and we shall endeavor to consider them as they have been grouped in the brief. We are urged to say that it was error for the court, in the face of the seriousness of the crime charged, when there was apparent interracial feeling in the courtroom, to allow the jury to separate during recess of the court, and to go to their respective homes each night during the progress of the trial and before its final submission.

Section 10150, Comp. St. 1922 provides: "When a case is finally submitted to the jury, they must be kept together * * * until they agree upon a verdict or are discharged by the court." But this section leaves the court free to exercise its judgment in permitting the jury to separate during the progress of the trial, requiring, however, that the jury be admonished by the court as to their conduct during the progress of the trial. It is not claimed that the proper admonition was not given; there is no showing of a request that the jury be kept together, or that there appeared any evidence of a hostile feeling for defendants because of their race, or for any other reason. Nor is there anything to indicate that defendants were prejudiced because the jury were permitted to separate and go to their respective homes at the close of a day's service in the courtroom. This assignment cannot be sustained.

A number of policemen and detectives testified as witnesses for the state, and complaint is made because the court did not by its instructions specifically direct the jury as to the weight to be given to this testimony. It is true that in this state the practice permits the giving of such instructions, but in *Kerr v. State*, 63 Neb. 115, it is said: "Where no cautionary instruction has been requested with reference to the consideration of the testimony of witnesses employed as detectives, a defendant cannot predicate error because of the trial court's failure to instruct the jury on that point." In the instant case such request was not made, and the charge as a whole seems to have fairly presented the issues to the jury.

Another assignment suggests that it was error for the court, on its own motion, to withdraw from the consideration of the jury the first count of the information, which charged that defendants murdered Deerson while attempting to rob him, without also withdrawing all evidence relating to robbery. We assume that the court withdrew this charge of the information believing there was not sufficient evidence to show that defendants were attempting to rob Deerson, but rather that the evidence showed defendants

were attempting to rob the grocer. However, the evidence was admissible as part of the *res gestæ*, and, therefore, it was not incumbent upon the court to withdraw it from the consideration of the jury.

Included in another group of assignments of error we find one which alleges that the court erred in denying defendants' motion for new trial because of newly discovered evidence. The showing on this point consists of a number of affidavits which, if true, would tend to show that at the time the crime, with the commission of which defendants stand charged, was committed, defendants were at a social gathering in another part of the city. The statements made in the affidavits are improbable on their face. The witnesses were all within the jurisdiction of the court, they were known to defendants and they might have been produced at the trial. Due diligence is not shown, and the showing is, therefore, utterly insufficient.

Complaint is made of certain rulings of the court on the admission or exclusion of evidence. These rulings have been considered, but it would extend this opinion to an unwarranted length to discuss them separately. The rulings were made in conformity with the well-established rules governing the admissibility of evidence and they are free from error.

Finally, we are urged to hold that the evidence is insufficient to sustain the verdict, and that the punishment is too severe. It is sufficient to say that the evidence is so conclusive as to leave no doubt in the mind of any reader thereof that the crime was committed by defendants as detailed in an early paragraph of this opinion. The remaining question is as to the severity of the penalty imposed. As to defendant Wesley, who fired the fatal shot, there is nothing to urge in extenuation of his act, and whatever repugnance the individual may feel toward capital punishment must be put aside in obedience to the law of the state and in deference to the verdict of the jury. The judgment entered against him is affirmed, and Friday, September 26, 1924, between the hours of 6 o'clock a. m. and 6 o'clock p. m.

of that day, is fixed as the time for carrying into effect the sentence of the district court.

The case of defendant Mauldron, however, makes a somewhat different appeal. Little of his past is shown, but there is nothing in the record to indicate that prior to the evening when this homicide was committed he had been other than a law-abiding citizen; it was not he, but Wesley, who suggested the commission of a robbery; and, were it not for that wicked suggestion, Mauldron might today be a useful citizen. He is the younger of the two and he was unarmed. Under the provisions of section 10186, Comp. St. 1922, the judgment of the district court is modified to the extent that the penalty imposed is changed from the death penalty to imprisonment for life. As thus modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

Note—See Criminal Law, 16 C. J., secs. 2164, 2527, 2720; 17 C. J., sec. 3333.

FRED M. CRANE COMPANY, APPELLEE, V. DOUGLAS COUNTY ET AL., APPELLANTS.

FILED JULY 7, 1924. No. 23964.

1. Taxation: INCREASE OF ASSESSMENT. A county board of equalization is without jurisdiction to raise the assessment of any person until it has first complied with the provisions of section 5972, Comp. St. 1922, which are pertinent to such proceedings.
2. ———: VOID TAX: INJUNCTION. An injunction will lie to restrain the collection of a tax when the taxing officers acted without jurisdiction to make the assessment.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

Henry J. Beal, W. W. Slabaugh, Dana B. Van Dusen, and *John F. Moriarty,* for appellants.

Thomas B. Murray, contra.

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

MORRISSEY, C. J.

In this suit in equity plaintiff seeks to set aside an order of the Douglas county board of equalization which increased the valuation of plaintiff's property, and to perpetually enjoin the collection of so much of the tax as is based upon the increased valuation. The court granted the relief prayed, and the county has appealed.

Plaintiff is a corporation having its principal place of business in the city of Omaha and is engaged in engineering and construction work. In April, 1923, plaintiff filed with the county assessor of Douglas county what is alleged to be a full and complete schedule of its property. This schedule showed the corporation to have property of the net assessable value of $13,056.03. It was the duty of the county assessor to examine this schedule and refer it to the board of equalization, which was done. Soon thereafter plaintiff received a notice from the county assessor to appear and "explain shortage in your schedule for 1923." Plaintiff appeared before the board by Fred M. Crane, its president, and he explained the various items of the schedule, but received no intimation that any advance or increase in the schedule would be made or that such action was contemplated. July 10, 1923, plaintiff received notice that the board of equalization had increased the valuation of its assessable property to $133,109. At the time this notice was received the board had concluded its last session as a board of equalization and adjourned, and it was thus impossible for plaintiff to obtain a hearing on the increased valuation.

This appeal presents but two questions: First. Was the board of equalization acting within its jurisdiction when it increased the assessment on plaintiff's property? Second. Is a suit in equity the proper remedy?

Section 5972, subd. 4, Comp. St. 1922, provides: "In no case shall the assessment of any person be raised by the

board until such person or his agent shall be previously notified." In the instant case there was no notice given plaintiff by which he was apprised of what he was called upon to "explain," or that the board contemplated raising his assessment, nor was any complaint ever made as to plaintiff's assessment by any party. In *Brown v. Douglas County*, 98 Neb. 299, it is said: "A county board of equalization cannot raise the assessed valuation of the real estate of an individual taxpayer without a complaint and without notice to the person affected thereby." And the court held: "So much of the taxes as are levied upon the valuation above that fixed by the county assessor is void, and its collection may be enjoined." There is no basis for a different rule merely because the property assessed is personalty.

It follows that the tax complained of was imposed without authority of law, is, therefore, void, and its collection may be enjoined. *Rothwell v. Knox County*, 62 Neb. 50.

AFFIRMED.

Note—See Taxation, 37 Cyc. pp. 1098, 1263.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, APPELLEE, V. BROWN COUNTY BANK, DEFENDANT: CHICAGO TITLE & TRUST COMPANY, TRUSTEE, APPELLANT.

FILED JULY 7, 1924. No. 22874.

Banks and Banking: GUARANTY FUND. The bank guaranty fund is created "for the protection of depositors in banks;" and, unless money or its equivalent has been deposited, the guaranty fund is not liable, though the banking corporation itself may be.

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

Fradenburg & Matthews, for appellant.

O. S. Spillman, Attorney General, George W. Pratt, J. P. Palmer, William M. Ely and *D. R. Mounts, contra.*

Heard before LETTON, ROSE, and DEAN, JJ., BLACKLEDGE and REDICK, District Judges.

LETTON, J.

The claimant, Raymond J. Bischoff, a resident of Chicago, alleges that on January 10, 1921, the Brown County Bank, of Long Pine, Nebraska, executed and delivered to H. F. Bird 20 certificates of deposit, in due and regular form, amounting in all to $30,000, and drawing interest at 5 per cent.; that on about the first day of February, 1921, he purchased said certificates before maturity for a valuable consideration without notice of any defects therein, paying therefor the sum of $28,500, and they were indorsed by the payee and delivered to him; that he thereby became a creditor and depositor of the Brown County Bank, and is entitled to the protection of the bank guaranty fund. He prays judgment for $30,000 with interest and costs, and that the payment be ordered out of the guaranty fund. The receiver admits the execution of the certificate, but denies that claimant is a depositor of the bank or is entitled to the protection of the bank guaranty fund; denies that he is a *bona fide* holder; and alleges that he took them with full knowledge that the bank was insolvent and that its capital was impaired; that there was no deposit in the bank for which the certificates were issued, and that the transaction was in fact a loan of money made by him to the bank, and that the issuance of the certificates by the officers of the bank to Bird, and the transfer of the same from Bird to Bischoff, was for the purpose of covering up the true nature of the transaction. The trial court found that the relation of depositor and depository never existed between the claimant and the bank, and that the claim is not a charge against the depositors' guaranty fund of the state. It was allowed as a general claim against the bank to the amount of $31,948.53. Bischoff having been adjudged a bankrupt during the pending of the action, the Chicago Title & Trust Company, trustee, was substituted as claimant, and filed this appeal.

The uncontradicted testimony shows that in January, 1921, the bank was hard pressed for funds, and that in order to obtain money the president and cashier caused to be executed a time certificate for $30,000, payable to H. F. Bird, who was a resident of Brown county, and was willing to assist the bank to obtain funds. Mr. Bird, together with Mr. Wilson, the cashier of the bank, went to Chicago for the purpose of disposing of this certificate. After several days of unsuccessful effort Mr. Wilson met one Rockwell, a broker of that city. At Rockwell's suggestion this certificate was returned to the bank. Wilson, then, with the consent of the president of the bank, who had been consulted by long-distance telephone, executed 20 other certificates in smaller denominations, but evidencing the same amount. After several attempts Rockwell finally negotiated a sale of these certificates to the claimant Bischoff. He represented to Bischoff that the bank was in need of immediate funds to help the farmers who were very hard pressed. Bischoff testifies that he knew that was the general condition, so he accepted the story at its face value. He offered to sell the certificates at a discount of 5 per cent. Bischoff requested one Buchanan, a broker, who had formerly acted for him in the purchase of securities, to investigate the matter and report to him, and requested his bank, the Great Lakes Trust Company, to look up the standing of the Brown County Bank. Receiving favorable reports from both of these sources, he agreed to purchase the certificates at 5 per cent. discount. Rockwell wanted a cashier's check for $24,000 made payable to the Brown County Bank, and $4,500 in currency. He explained to the witness that the $4,500 in currency was to meet obligations which the bank had contracted in Chicago. Bischoff later found that the $4,500 had been divided by Rockwell, Buchanan, and one Brinkley, who had put them in touch with each other, as commission. He also was allowed the accrued interest on each certificate, and he testifies that the amount of discount was not unusual at that time. It is established that Bird never had the certificates in his pos-

session except while he was indorsing them for transfer. The $24,000 was placed to the credit of the bank with its Omaha correspondent, and became part of the assets.

At the hearing in this court counsel for the claimant was frank enough to concede that the guaranty fund could not under our former decisions be held for any more than the amount of money actually received by the bank, namely $24,000, but insisted that in equity, the bank having received $24,000 and the guaranty fund having received the benefit by the increase of the assets of the bank in that amount, the guaranty fund ought to be held to that extent. But the fund is created solely "for the protection of depositors in banks." Comp. St. 1922, sec. 8024. Bird made no deposit in the bank. He never became a depositor and he had no interest in the certificates. Bischoff, likewise, never became a depositor. True, he may have been deceived into the belief that Bird had actually made a deposit for the express purpose of assisting the bank, and that the certificates were being sold to reimburse Bird. But the fact that $24,000 of the money was to go to the bank and not to Bird was an inconsistent circumstance which should have put him upon inquiry. He knew the transaction was out of the usual course, that Bird was acting in the interests of, and that the broker was selling the paper for the benefit of, the bank. These facts do not form a basis for a claim against the guaranty fund. *State v. Farmers State Bank,* 111 Neb. 117. Again, Bischoff received 5 per cent. discount in addition to the 5 per cent. interest allowed by law and to accrued interest of from half a month to a month. This amounted to a loan to the bank at an unlawful rate, and was not within the protection of the guaranty fund. *Iams v. Farmers State Bank,* 101 Neb. 778; *State v. Banking House of A. Castetter,* 110 Neb. 564.

The fund is a creature of the statute, and, unless an actual *bona fide* deposit of money or its equivalent is made, a claim cannot fall within the provisions of the law. It is to be regretted that the limitations of the statute and the distinction between liability on the part of a bank and lia-

bility on the part of the guaranty fund have both been overlooked in several instances by purchasers of certificates of deposit unlawfully issued, and this failure to distinguish has misled innocent investors to their pecuniary loss. The guaranty law protects depositors only, and we are not vested with power to add to the statute a liability of the guaranty fund for certificates wrongfully issued which do not represent actual deposits. *State v. Farmers State Bank*, p. 380, *post*. While alike in some respects, the facts in *State v. American State Bank, ante*, p. 272, are clearly distinguishable from the facts here. In that case the bank received liberty bonds for the full face value of the certificates.

The district court reached the proper conclusion, and its judgment is

AFFIRMED.

Note—See Banks and Banking, 7 C. J. p. 485, sec. 15 (1925 Ann.).

DAVID MCMULLEN ET AL., APPELLEES, V. NASH SALES COMPANY, APPELLANT.

FILED JULY 7, 1924. No. 22863.

Negligence: COMPARATIVE NEGLIGENCE: INSTRUCTION. In an action to recover damages for personal injuries, where there is testimony from which gross negligence of each party may be inferred, it is error, under the statute on comparative negligence, to give an instruction permitting the jury to return a verdict against defendant, if he was guilty of "gross negligence" as compared with the "negligence" of plaintiff; "slight negligence" of the latter being the legal test for the purpose of comparison. Comp. St. 1922, sec. 8834; *Morrison v. Scotts Bluff County*, 104 Neb. 254.

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

Kennedy, Holland, De Lacy & McLaughlin, for appellant.

Gaines, Van Orsdel & Gaines and *Bremers & Lee, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and THOMPSON, JJ., and BLACKLEDGE, District Judge.

ROSE, J.

This is an action to recover $25,600 in damages for personal injuries resulting from a collision between a motor-cycle and an automobile truck at the intersection of Forty-eighth and Dodge streets, Omaha, September 4, 1920. David McMullen, a minor employed as a messenger by the Western Union Telegraph & Cable Company, was riding the motor-cycle at the time of the accident. He and his employer are plaintiffs. The automobile truck was owned by the Nash Sales Company, a corporation of which Thomas H. McDearmon was president. Both are defendants. Charles Jones was driving the truck when the collision occurred, and it is alleged he was then an employee of defendants acting for them as such. Plaintiffs pleaded that, while McMullen, on his motor-cycle, was going west on the north side of Dodge street where it is intersected by Forty-eighth street, the truck hit him and hurled him against an iron lamp-post. As a result both of his legs were broken and he was otherwise severely injured. Jones, while acting for defendants, is charged with negligence in driving the truck southward on the wrong side of Forty-eighth street where it crosses Dodge street; in approaching the intersection without warning at an unlawful and dangerous rate of speed; in driving the truck into the motor-cycle while McMullen was lawfully crossing Dodge street; in approaching and entering the crossing without having the truck under control; in disregarding the right of way to which McMullen was entitled because he was first to reach the intersection.

The Nash Sales Company, defendant, denied negligence on its part, and pleaded that the driver of the truck was not acting for it at the time of the accident; that, if McMullen sustained injuries, they were caused by his own gross, contributory negligence; that the driver of the truck exercised due care; that he had the right of way; that Mc-

Mullen at the time operated his motorcycle at a dangerous and unlawful rate of speed on the wrong side of the street; that he could not stop in time to prevent a collision; that he negligently attempted to pass in front of the truck and crashed into it as the result of his own gross negligence. The other defendant, McDearmon, also denied negligence and blamed McMullen for the accident and the resulting injuries. Upon a trial of the issues the jury returned a verdict in favor of McMullen and against the Nash Sales Company, defendant, for $5,000, and also in favor of McDearmon. From a judgment on the verdict, the Nash Sales Company has appealed.

It is first argued that the district court should have directed a verdict in favor of the Nash Sales Company on the grounds that the driver of the truck at the time of the accident was not engaged in the business of that corporation, that actionable negligence attributable to it was not shown and that the injuries of which McMullen complains were caused by his own gross negligence. There is a reasonable view of the evidence in which it is sufficient to sustain a verdict in favor of McMullen on all these issues.

There seems, however, to be an erroneous instruction on the law of negligence. Plaintiffs pleaded due care on their part, and charged defendants with negligence as the proximate cause of the collision. Defendants, as already stated, denied the negligence imputed to them, and took the position that McMullen was injured as the result of his own gross negligence. How the accident occurred and who caused it were controverted questions of fact for the jury. There was evidence on both sides. The witnesses did not agree. There was a conflict in their testimony. There was proof from which gross negligence on the part of the operator of each vehicle was inferable. A verdict either way under proper instructions could have been sustained. With the record in the condition outlined, the district court gave an instruction defining the degree of care and caution required of McMullen, and closing with these words:

"But should you find that plaintiff's failure to exercise

the degree of care and caution above required was not the sole and only cause of the accident and injury to the plaintiff, but only contributed thereto and in a less degree than that of the said truck-driver, if any, then that fact would not, in itself, necessarily wholly defeat a recovery on the part of the plaintiff, provided you should also find from a preponderance of the evidence that the said truck-driver was guilty of gross negligence as compared with the negligence of the plaintiff, if any, but such negligence should be considered by you in mitigation of damages in proportion to the amount of contributory negligence which you find attributable to the plaintiff."

The effect of this instruction was to permit a recovery for damages if the truck-driver was guilty of gross negligence as compared with the negligence of McMullen, if any. The comparison authorized by the instruction is between "gross negligence" of Jones and "negligence" of McMullen, while the latter's conduct, according to the statutory rule, must be tested for the purpose of his recovery by the degree of "slight negligence." The legislature declared the law to be:

"The fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison." Comp. St. 1922, sec. 8834.

Referring to this provision it was said in a recent opinion:

"The true rule is that, if plaintiff is guilty of negligence directly contributing to the injury, 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. 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, then the contributory

negligence of plaintiff, however slight, will defeat a recovery." *Morrison v. Scotts Bluff County*, 104 Neb. 254.

For the purpose of determining liability for damages, where both parties are guilty of negligence in some degree, "slight negligence" is not the same as "negligence." Under the instruction in controversy, when considered with the evidence and the statute, the term "negligence of the plaintiff" may have included "gross negligence" in the minds of the jury. The instruction was clearly erroneous and permitted a recovery not authorized by law. Owing to the divergent views of the witnesses as to the facts in controversy, there does not seem to be any substantial ground for holding that the error was not prejudicial to the Nash Sales Company. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Negligence, 29 Cyc. p. 657.

ALVIN M. MILLER, APPELLANT, V. RALPH M. BAKER ET AL., APPELLEES.

FILED JULY 7, 1924. No. 22816.

1. **Appeal:** TRIAL DE NOVO. When an equity case is appealed to this court, we are required to try the case *de novo* and reach an independent conclusion as to the findings which are required under the pleadings and the evidence. Comp. St. 1922, sec. 9150.

2. **Corporations:** LIABILITY. Plaintiff sued at law to recover $15,000 on a promissory note, drawing 8 per cent. interest, and signed by 18 defendants. The note in terms was made payable to American State Bank, of which plaintiff was president, and was indorsed, "without recourse," by the bank's cashier. On motion of defendants, over plaintiff's exception, the suit was tried as one in equity. The note was executed to raise money to pay the expenses of a corporation known as the "Wyoming Northeastern Oil Company," which was engaged in prospecting for oil. Plaintiff, who was one of the incorporators, refused to sign the note, on the ground that under section 8012, Comp. St. 1922, he was prohibited from borrowing money from a bank of which he was an officer. The money, however, was not borrowed from

American State Bank. Subsequently plaintiff borrowed $15,000 from a neighboring bank and took up the note. The money so borrowed he placed to to the credit of the oil company in the American State Bank. The $15,000 was all used to pay the corporate debts and subsequent operating expenses of the oil company. Upon trial the suit was dismissed at plaintiff's costs. *Held*. that the court erred, and plaintiff, in equity, is entitled to judgment, with costs, in the sum of $14,210.53, that being the amount sued for less plaintiff's *pro rata* share of the money borrowed, with interest on $14,210.53 at the rate of 7 per cent. per annum from the —— day of November, 1919, or such date as plaintiff placed the money in the bank to the credit of the oil company.

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

Brogan, Ellick & Raymond, Boyd, Metz & Meyer and *F. A. Wright*, for appellant.

Peterson & Devoe, Mitchell & Gantz and *Patterson & Patterson, contra.*

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

DEAN, J.

Plaintiff sued at law to recover $15,000 from defendants on a promissory note in the principal sum of $15,000, dated October 17, 1919, bearing interest at 8 per cent. per annum until paid. The note is signed by defendant Ralph M. Baker and 17 other defendants. On defendants' motion the case was tried to the court as a suit in equity. When the evidence was submitted, defendants recovered judgment and the suit was dismissed at plaintiff's costs. Plaintiff appeals.

Omitting signatures, a copy of the note sued on, with its indorsement, follows:

"$15,000.00. Alliance, Nebr., October 17, 1919. On April 17, 1920, we agree to pay to the American State Bank of Hemingford, Nebraska, the sum of fifteen thousand dollars ($15,000.00) at Hemingford, Nebraska, value received,

with interest at the rate of eight (8) per cent. from date until paid." (Revenue stamps) Indorsed: "Without recourse. American State Bank, Hemingford, Nebr. C. R. Melick, Cashier."

Some time before the date of the note, plaintiff and defendants, and some others, were interested in prospecting for oil in Wyoming. About a month before the note was signed the parties, for convenience in further prospecting, formed a corporation, namely, the Wyoming Northeastern Oil Company.

Debts had accumulated and money was needed and the makers signed the note to raise money. At this time plaintiff was president of American State Bank of Hemingford, and was also one of the incorporators of the oil company. F. W. Melick was vice-president of the bank. The note in suit remained in the bank approximately 30 days after its date, when, according to plaintiff's evidence, he borrowed $15,000 from another bank, namely, First State Bank of Hemingford, and with the borrowed money he went to his own bank and took up the note. The $15,000, so borrowed by plaintiff, was placed by him in American State Bank to the credit of the oil company, and all of it was used by it to pay past debts and to pay subsequent obligations of the company. This is nowhere denied in the record. In fact, it is expressly admitted.

At a meeting held October 17, 1919, at Alliance, there was some talk among the parties about borrowing the required money from the American State Bank of Hemingford, of which, as above noted, plaintiff was president. And it will be observed that the note in suit, as drawn up, was in direct terms made payable to this bank. All of the 18 makers of the note knew this or were chargeable with notice of it.

Six of the signers testified on the part of defendants. No other witnesses were called by them. They testified that they signed in reliance on Miller's and Melick's alleged promise that they would join in signing the note. Both Miller and Melick were at the meeting and both denied

that they ever made any such promise, and defendant Michael, who was present, and a signer, testified that he did not hear either Miller or Melick agree to sign the note. In passing, it may be noted that Melick, cashier of the bank, did not sign the note and is not a party to this suit.

Miller frankly admitted that there was talk among the makers of the note to the effect that they wanted him to join them in signing it, but that he told them he could not do so, because, as a bank officer, he was precluded by law from borrowing money from a bank with which he was so connected. In this he was corroborated by Melick. And it may here be observed that it is a felony for any person to borrow money from a bank of which he is an officer, for which a drastic penalty is provided, namely, a fine not exceeding $1,000 or a penitentiary sentence not exceeding five years, or both. Comp. St. 1922, sec. 8012. And of this law defendants were of course charged with knowledge. So that it appears from the evidence that plaintiff was solicited to do an unlawful and felonious act. And it is reasonable to assume that even an ordinarily prudent person would not comply with such request.

This case was begun as a law action, but when it came on to be heard, defendant's motion that it be tried as a suit in equity was sustained over plaintiff's exception. Under the statute, when an equity suit is appealed to this court, we are required to try the issues *de novo* and "reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." Comp. St. 1922, sec. 9150. *Greusel v. Payne,* 107 Neb. 84.

Defendants, in support of the argument that their answers present equitable issues, contend that, in view of the facts, plaintiff is estopped to maintain this action, and that in no event should he be permitted to recover any part of the $15,000 which he procured to be paid into the treasury of the oil company and which was appropriated and used

by it, under the direction of its chosen officers. In short, defendants would now have plaintiff pay all expenses and all costs incurred by the oil company, in its quest for oil fields, and would unburden themselves of all charges which pertained to the enterprise. The mere statement of the facts involved here is sufficient to show that defendants' argument is untenable. It plainly appears to us that to deprive plaintiff of equitable relief, under the facts before us, would be a clear subversion of every recognized principle of equity. The preponderance of the evidence is on the side of plaintiff.

The ancient maxim that "he who seeks equity must do equity," must be applied here. It has not been shown that defendants have been defrauded of any money by plaintiff, nor have they been deprived of any of their substantial rights by him. It is admitted that plaintiff borrowed the money for which the $15,000 note was given, and placed all of it at the disposal of the oil company, and it was all used for corporate purposes under the direction of its officers.

Equity regards substance rather than form, and, in the application of its principles to the affairs of men, it deals with an impartial hand as between contending parties. *Century Oil Company v. Department of Agriculture, ante,* p. 73. So that in the application of equitable principles to the facts it seems to us that plaintiff should stand his *pro rata* share of the obligation, namely, 1-19th part thereof, or $789.47. In *Jones v. Guaranty & Indemnity Co.,* 101 U. S. 622, 630, Mr. Justice Swayne observed: "Equity regards only the substance of things, and deals with human affairs upon that principle."

We conclude that the judgment must be, and it hereby is, reversed and the cause remanded, with directions that judgment, with costs, be entered in the district court in favor of plaintiff and against the defendants for $14,210.53, that being the amount sued for less 1-19 part thereof, as hereinbefore noted, with interest on $14,210.53 at the rate of 7 per cent. per annum from the ——— day of Novem-

ber, 1919, or such date, or dates, as plaintiff may have placed the money in question in "American State Bank of Hemingford" for the use of the oil company. Evidence may be taken to establish such date if the parties fail to agree thereon.

Inasmuch as the cause was tried as one in equity, as above noted, for an accounting between the parties, it is ordered that the judgment herein is and shall be without prejudice to opening up the suit for contribution among the parties, including plaintiff.

REVERSED.

Note—See Appeal and Error, 4 C. J. p. 726, sec. 2647; Corporations, 14 C. J., p. 1129, sec. 1776.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, APPELLEE, V. FARMERS STATE BANK OF WINSIDE, APPELLEE: CORN EXCHANGE NATIONAL BANK OF OMAHA, APPELLANT.

FILED JULY 7, 1924. No. 23114.

1. **Banks and Banking**: GUARANTY FUND: DEPOSITS. "In order to create a deposit which will be protected by the guaranty law, as the term 'deposit' is understood in section 8033, Comp. St. 1922, it is necessary that money or its equivalent shall in intention and effect be placed in or at the command of the bank under circumstances which do not transgress specific limitations of the bank guaranty law." *State v. Farmers State Bank*, 111 Neb. 117.
2. ———: DEPOSITS. Evidence, the substance of which is set out in the opinion, examined, and *held* not to constitute a deposit within the meaning and protection of the guaranty law.

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

Brome & Ramsey, for appellant.

O. S. Spillman, Attorney General, and *Fred S. Berry*, *contra.*

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

DAY, J.

In the above styled action proceedings were had resulting in the appointment of a receiver to wind up the affairs of the Farmers State Bank of Winside, hereinafter referred to as the Winside Bank. The Corn Exchange National Bank, the appellant, filed its claim with the receiver for $2,000 with interest, based upon a certificate of deposit issued by the Winside Bank. The appellant prayed that its claim be allowed as a valid claim against the Winside Bank, and that it be paid out of the guaranty fund. The receiver filed objections to the allowance of appellant's claim as a preferred claim payable out of the guaranty fund, but admitted that it was a general claim against the bank. The trial court found, and entered judgment accordingly, that the certificate of deposit held by appellant was a general obligation of the Winside Bank, but denied that it was a preferred claim payable out of the guaranty fund. From this judgment the appellant has appealed.

The certificate of deposit in question was for the sum of $2,000, was dated March 23, 1921, was payable to W. T. Waldron or order, and was due January 1, 1922. The certificate was a negotiable instrument, and the evidence is clear that the appellant is the holder thereof in due course.

Does the certificate represent a "deposit" in the bank so as to bring it within the protection of the guaranty fund? In *State v. Farmers State Bank,* 111 Neb. 117, it was held: "In order to create a deposit which will be protected by the guaranty law, as the term 'deposit' is understood in section 8033, Comp. St. 1922, it is necessary that money or its equivalent shall in intention and effect be placed in or at the command of the bank under circumstances which do not transgress specific limitations of the bank guaranty law." In determining whether a transaction creates a "deposit" within the protection of the guaranty fund, the law will look through all semblances and forms to ascertain the

actual facts as to whether there has been a *bona fide* deposit, and, if not, the guaranty fund does not protect the transaction, no matter how it may be evidenced.

The facts leading up to the issuance of the certificate are as follows: In December, 1920, the Winside Bank was hard pressed for ready money, and was having great difficulty in keeping on hand a sufficient amount of money to meet the cash reserve required by law. Fred W. Weible was president of the bank and held a controlling interest in its capital stock. The bank was capitalized for $25,000, and had a book value showing a surplus of $25,000. On December 10, 1920, L. D. Spalding and W. T. Waldron purchased from Weible 150 shares of the stock in the bank, which gave them a controlling interest therein. They paid $10,000 for the shares of stock, being $66.66 2-3 a share. Seventy-five shares were issued to each of them. Weible resigned from the office of president, but remained chairman of the board of directors of the bank. Thereupon Spalding and Waldron became president and vice-president, respectively, and the active managers of the bank. As a part of the transaction the $10,000 paid for the stock was not turned over to Weible, but was deposited in the bank in an account designated "Waldron and Spalding, Trustees." At the same time and as a part of the transaction Weible assigned his property to Waldron and Spalding in trust, with the understanding that the proceeds thereof should be placed in the Waldron and Spalding Trustee account to take up any bad paper which might be in the bank. Waldron testified that, at the time that he and Spalding became active managers of the bank, "it was hard up, like lots of them, for ready money. The reserve was short. It was overloaded." He also testified that from that time on there was a steady withdrawal of deposits, and that the bank was in bad shape financially. At different dates sums of money which had been received from the Weible assets were credited to the trustee account, and checks were drawn on the trustee account to take up some of the bad paper. On March 3, 1921, a note of John H. Neary for

$9,287.60, which was a part of the Weible assets, was put into the bank as a part of its bills receivable, and the trustee account credited with this sum. The Neary note was dated in February, 1921, and was due one year from date. There was collateral security to the Neary note consisting of second and third mortgages on real estate. On March 23, 1921, Spalding and Waldron drew a check on the trustee account for $16,000 in favor of Weible, which he deposited to his individual credit in the bank, and at the same time, and as a part of the same transaction, Weible drew two checks of $8,000 each to Spalding and Waldron. For these checks four certificates of deposit for $2,000 each were issued by the bank to Spalding and four certificates for $2,000 each to Waldron. Four of the certificates were paid before the bank failed. One of the certificates issued to Waldron is the certificate now in question. The crediting of the trustee account with the proceeds of the Neary note was in furtherance of an arrangement between Waldron and Spalding, wherein they resold 130 shares of stock in the bank to Weible for $30,000, or something over $230 a share. The balance of the purchase price above the $16,000 was paid by transferring to Waldron and Spalding certain notes.

At the time of the purchase of the Neary note by the bank, its cash reserve was far below the legal requirements, and at the time of the issuance of the certificates of deposit the cash reserve in the bank was less than $5,500. The bank should have had something over $60,000 cash reserve.

Section 8003, Comp. St. 1922, in so far as applicable here, provides in substance that a bank shall maintain a reserve of at least 15 per cent. of its deposits. Section 8004 provides that a bank shall not make any new loans or discounts if it does not have the legal reserve. At the time the $16,000 check was drawn on the trustee account there was on deposit in that account $16,277.09. The entire transaction, while appearing regular upon the face of the books, was in fact a scheme or design to enable Spalding

and Waldron to sell their shares of stock at a very much inflated value, and to secure the payment thereof at the expense of the guaranty fund. Viewed in its entirety, we think it is clear that there was not a *bona fide* deposit against which the certificates were issued.

It is next urged by appellant that, even though it be conceded that the transaction leading up to the issuance of the certificates was not a deposit within the meaning of the depositors' guaranty law, appellant being an innocent purchaser of a negotiable instrument is entitled to the protection of the guaranty law. Since this appeal was lodged in this court, and the brief of the appellant filed, this court has passed upon the direct question presented in the present case adversely to the contention of the appellant. *State v. Farmers State Bank,* 111 Neb. 117.

Counsel for appellant contend that the bank as well as the state officers are estopped to deny that the claim is a charge against the guaranty fund. In this contention counsel has failed to recognize that what might be an estoppel against the bank may not be an estoppel against the guaranty fund. The bank and its officers could do nothing to impose a liability upon the guaranty fund, except as the liability is imposed by statute. The banks, as such, have nothing to do with the guaranty fund.

The judgment of the trial court is, therefore,

AFFIRMED.

Note—See Banks and Banking, 7 C. J. p. 485, sec. 15 (1925 Ann.).

G. W. BUSH V. STATE OF NEBRASKA.

FILED JULY 7, 1924. No. 23926.

1. **Criminal Law:** EXHIBITS UNLAWFULLY OBTAINED: ADMISSIBILITY. That possession of exhibits offered in evidence in a criminal action may have been obtained in an irregular or illegal manner constitutes no valid reason for excluding them, if they are pertinent to the issues being tried.

2. ———: ———: ———. The fact that the jury may have

seen the exhibits in the courtroom prior to their being offered in evidence is not prejudicial error, where it appears that the exhibits were subsequently, during the trial, properly identified and received in evidence.

3. ———: ADMISSIONS: WARNING. Under the law of this state, it is not necessary to first warn a prisoner under arrest that any statements he may make may be used against him, as a condition to proving inculpatory statements made at the time of his arrest.

4. ———: ———. The general rule is that, before a confession made by a defendant in a criminal case may be received in evidence, it must be shown that it was freely and voluntarily made.

5. ———: ———. There is a distinction between confessions and mere inculpatory statements. Admission made by a prisoner of one, but not all, of the essential elements of the crime does not amount to a confession.

6. **Evidence** examined, and *held* sufficient to support the verdict.

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

H. T. White and *P. W. Emery,* for plaintiff in error.

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

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, GOOD, and THOMPSON, JJ., and REDICK, District Judge.

GOOD, J.

Plaintiff in error (hereinafter referred to as defendant) prosecutes error to review the record of his conviction of the offenses of unlawful possession of a still, mash and intoxicating liquors.

Defendant insists that the trial court erred in admitting in evidence certain exhibits, because their possession had been obtained by virtue of a search warrant that was issued upon a complaint which was not sworn to by an officer of the state or county, or a creditable freeholder of the county, and because the warrant did not describe with certainty

the premises to be searched. No objection is raised as to the pertinency of the evidence to the issues being tried. That possession of the exhibits may have been obtained in an irregular or illegal manner constitutes no valid reason for excluding them, if they are pertinent to the issues being tried. This precise question has been recently decided by this court in *Billings v. State,* 109 Neb. 596, wherein the authorities are reviewed and the rule announced as follows: "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."

Error is urged in permitting the county attorney to place all the equipment and material, which defendant was charged with having in his possession, in full view of the jury before the same had been offered in evidence. The exhibits must necessarily have been produced in court and in the presence of the jury before they could be properly identified by witnesses and offered in evidence. The fact that the jury may have seen the exhibits prior to being offered in evidence certainly could not have been prejudicial to the defendant. The question is devoid of merit.

It is contended that the court erred in admitting a purported oral confession, made by defendant to police officers at the time of his arrest, on the ground that he was not cautioned before he made the statement, that it might be used against him, and because it was not affirmatively shown that the alleged confession was made freely and voluntarily. While a number of the states have a statute which requires that a defendant, who is under arrest, must first be cautioned that any statements made by him may be used against him, before they can be offered in evidence, this state has no statute of that character. The general rule is that, in the absence of statute, it is not necessary to first warn a prisoner under arrest that any statements he may make may be used against him, although it is a very proper thing to do. The so-called confession consists of answers made by the defendant to questions propounded

by the police officers at the time of the arrest. When the officers went to the premises occupied by the defendant—a two-story residence property—they found the defendant on the second floor of the building, and that no other person was on that floor. They found a still in full operation, intoxicating liquor being distilled, about 2,000 gallons of mash in barrels, and a considerable quantity of intoxicating liquor. In response to questions, defendant stated that he owned the still; that he had been in the business for 30 or 40 days; that he was turning out about 70 gallons of liquor a day; and further stated: "You have caught me in the act. * * * I haven't got much to say on it till I see my attorney."

The general rule is that, before a confession may be received in evidence, it must be shown that it was freely and voluntarily made. However, we think the statements do not amount to a confession, but are merely statements against interest, or what may be strictly termed inculpatory statements. The authorities make a distinction between confessions and mere inculpatory statements. An admission, made by a prisoner, of one, but not all, of the essential elements of the crime does not amount to a confession. *Burnett v. State,* 86 Neb. 11; 16 C. J. 716, sec. 1466. The statement of the text in Corpus Juris, substantially as given, is supported by a large number of authorities. In the instant case, the statements are not sufficient, in themselves, to show the defendant's guilt. Mere possession of the still or of mash or of intoxicating liquor is not necessarily a crime. One may have in his possession a still for a legitimate and lawful purpose, as for the distilling of water. The statements do not contain any admission that defendant did not have a permit to manufacture intoxicating liquors. The statements fall short of being an admission of all facts essential to constitute the crime. But, had the statements amounted to a confession, they still were properly received in evidence. The witnesses purported to detail all that was said and done. The defendant was a witness in his own behalf. Nowhere does it appear in the

record that there was any threat or promise of immunity or any inducement of any character held out to defendant to cause him to make the statements. Taking the record as a whole, it fairly appears that the statements were made freely and voluntarily.

It is further urged that the evidence is insufficient to support the verdict. The record discloses that when the police officers entered the building they found the defendant, and no other person, on the second floor of the building and a still in full operation, 40 barrels of mash and a large quantity of intoxicating liquor; that defendant was familiar with the still and was apparently operating it; that his arms, to his elbows, were covered with mash; that he was dressed only in his underwear, trousers and shoes; that defendant claimed he had gone upstairs for the purpose of changing his clothing, and that he had taken off his shirt preparatory to putting on a clean shirt, further stating that it was the first time he had ever been in the building. It appears that he had no other clothing on the second floor than that which he had on; that there were no articles of furniture on that floor, save some chairs. There were other circumstances disclosed which it seems needless to detail. The circumstances disclosed, together with the inculpatory statements made by defendant, were clearly sufficient to warrant the jury in returning a verdict of guilty.

It is urged that the sentence is excessive. The penalty imposed is a fine of $500 and 30 days in jail. The defendant appears to have been making intoxicating liquors on a large scale. There are no mitigating circumstances disclosed, and the penalty imposed is fully justified.

No error is found. The judgment is

AFFIRMED.

Note—See Criminal Law, 16 C. J. secs. 1110, 1466, 1482, 1513, 2160; Intoxicating Liquors, 33 C. J. secs. 505, 553.

FRANK THOMPSON, V. STATE OF NEBRASKA.

FILED JULY 7, 1924. No. 23953.

1. **False Pretenses:** GIST OF OFFENSE. "In a prosecution for obtaining money by false pretenses, the gist of the offense consists in obtaining the money of another by false pretenses, with the intent to cheat and defraud." *Ketchell v. State*, 36 Neb. 324.
2. ———: INTENT. The offense of obtaining money by false pretenses is not established unless the intent to cheat and defraud is proved.
3. **Evidence** examined, and *held* to negative the intent to cheat and defraud.

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

George H. Risser, for plaintiff in error.

O. S. Spillman, Attorney General, and *Harry Silverman, contra.*

Heard before MORRISSEY, C. J., DAY, GOOD and THOMPSON, JJ., and REDICK, District Judge.

GOOD, J.

Plaintiff in error (hereinafter referred to as defendant) was convicted of the offense of obtaining, by false pretenses and with intent to defraud, money in the amount of $714.47. Defendant presents to this court for review the record of his trial and conviction. The information, in substance, charges that on January 10, 1921, defendant, with intent to cheat and defraud one McLean, did knowingly and falsely pretend and represent to McLean that defendant was the owner of 60,000 shares of stock in the Mid-Continent Oil, Gas & Refining Company (hereinafter referred to as the oil company), of the par value of $1 a share, and that said stock had been regularly issued to him and was of the reasonable value of 100 cents on the dollar; that, relying upon and believing the false statements to be true, McLean was induced to extend the time of payment of a note of $10,000, previously executed by defendant and then held

by McLean, and to increase the said loan by advancing to defendant the further sum of $750 and taking a new note from defendant for $11,000, secured by 60,000 pretended shares of stock in the said oil company.

The evidence discloses that some time previous to January 10, 1921, defendant had borrowed from McLean the sum of $10,000 and had pledged as collateral security therefor 60,000 shares of stock in the oil company. When this note became due on January 10, 1921, defendant applied to McLean for a further loan of $1,000. It was finally agreed between them that defendant would execute a new note for $11,000, and would pledge 60,000 shares, previously held by McLean, and 40,000 additional shares of stock in the oil company, together with a $3,000 note signed by one Soukup; and that McLean would deduct from the $1,000 the amount then owing him as interest upon the $10,000 note, and possibly some other items. The transaction was completed by McLean's paying to defendant the sum of $714.47 and taking the new note for $11,000, with the collateral as arranged. There is evidence that defendant at that time represented the oil stock to be worth 100 cents on the dollar, or par value. It is further shown that McLean was at that time the owner of 50,000 shares of stock in the oil company and a director of the company. McLean collected the Soukup note in full, with interest, making in the aggregate more than $3,200, which was applied upon the $11,000 note. As a part of the transaction whereby the loan to defendant was increased, defendant, on the 10th day of January, 1921, executed a written agreement, whereby he agreed to transfer and deliver to McLean, for himself personally, 5,000 shares of the stock of the oil company, and to pledge 100,000 shares of stock in the oil company, and the Soukup note for $3,000, as collateral security to defendant's note for $11,000. The contract further provided that, in event defendant failed to pay his note when due, McLean should become the owner of all the 100,000 shares of oil stock and the Soukup note.

Section 9892, Comp. St. 1922, for a violation of which

defendant was prosecuted, provides in part as follows: "Whoever by false pretense or pretenses shall obtain from any other person * * * any money, * * * with intent to cheat or defraud such person, * * * if the value of the property * * * fraudulently obtained * * * shall be thirty-five dollars, or upwards, shall be imprisoned in the penitentiary."

In the case of *Ketchell v. State,* 36 Neb. 324, it is held: "In a prosecution for obtaining money by false pretenses, the gist of the offense consists in obtaining the money of another by false pretenses, with the intent to cheat and defraud."

In *State v. Matthews,* 44 Kan. 596, it is held: "The charge of committing the offense of obtaining money or property under false pretenses cannot be maintained in any case unless it appears, not only that a false pretense was in fact made, but also that it was made with the intention of cheating or defrauding some person, and that such person was in fact cheated or defrauded to his or her injury."

In *People v. Wakely,* 62 Mich. 297, it is held: "The object of the statute is to punish cheats, and it must be made to appear, not only that some person has been defrauded, but that the person making the representations intended to defraud the person by the representations made." In that case the defendant obtained possession of a buggy and gave his note for $150 in payment, with his brother as surety. He represented that he, himself, owned a farm worth $6,000, free and clear of incumbrance, and that his brother was worth $25,000. It appears that he did own a farm, free and clear, which was worth $6,000, but that his brother was not worth $25,000. In the course of the opinion it is said: "Can it be said that a person worth $6,000, in a farm free and clear of all incumbrance, either intends to or does perpetrate a fraud in giving his note to the amount of $150 for property purchased? Whether it be true or false that his brother whose name was upon the note was worth $25,000 made no difference, unless the vendor of the buggy was actually defrauded in the transac-

tion. * * * In all cases of this kind three things, at least, must concur; the intent to defraud, the false pretense made with the intent, and the fraud accomplished."

Can it be seriously contended, under the facts disclosed, that defendant had any intent to cheat and defraud McLean? It appears that for the purpose of borrowing the additional sum of $714.47 he put up as security 40,000 shares of stock in the oil company and the Soukup note for $3,000. There is no contention that the Soukup note was not valid and worth its face value, and the evidence discloses that the note was paid in full, with interest. Conceding that the oil stock was not lawfully issued to defendant and was worthless, still the other security put up was more than four times the amount of money obtained, and this security was absolutely good and was paid in full. McLean, as a matter of fact, was not defrauded, and we are at an utter loss to understand how it can be seriously contended, under the facts disclosed, that there could have been any intent to defraud. In addition to this, it appears that the defendant was transferring to McLean 5,000 shares of stock in the oil company, apparently as a bonus for a loan of $714.47. It may be that defendant represented the oil stock to be worth 100 cents on the dollar, although he denies that he made such representation. It may be that Mr. McLean relied upon the representation, but it is at least a tax upon the credulity of any person to believe that one would give, as a bonus, stock that was of the value of $5,000 to secure a loan of $714, and it is an equal tax upon one's credulity to believe that one making the loan would believe the statement that the stock was worth 100 cents on the dollar and that the owner of it would give $5,000 in value of the stock as a bonus for securing such a loan, especially when he was putting up 40,000 additional shares of this stock and a valid note for $3,000 as collateral security.

The evidence is wholly insufficient to establish an intent to cheat and defraud McLean. In fact, it clearly negatives any such intent. Without the intent to cheat and defraud

being proved, the crime charged has not been established. The conclusion reached upon this question renders it unnecessary to consider any of the other assignments of error.

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

REVERSED AND DISMISSED.

Note—See False Pretenses, 25 C. J. secs. 11, 90.

FRANK M. TYRRELL, ADMINISTRATOR, APPELLEE, V. CORA JUDSON, APPELLANT.

FILED JULY 7, 1924. No. 22758.

1. **Gifts:** DELIVERY AFTER DEATH. A person having property may give the same in his lifetime directly to the donee, or by any suitable declaration to a third person for the use of the donee, authorizing such person to make delivery of the subject of the gift after the donor's death.
2. **Executors and Administrators:** PERSONALTY. RIGHT OF POSSESSION. An administrator is not entitled to recover property or its value as belonging to the estate of the decedent, as against defendant who is the equitable owner thereof, in the absence of proof that there are creditors of the estate whose claims or rights take precedence over that of the defendant.

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

J. C. McNerney and *D. H. McClenahan,* for appellant.

Tyrrell & Westover and *Charles E. Matson, contra.*

Heard before ROSE, DEAN, and THOMPSON, JJ., and BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

Plaintiff sues as administrator of the estate of Flora Kelley, deceased, to recover the value of certain bonds alleged to be the property of his intestate, that the defendant had obtained possession thereof and converted the same to her

own use, and that it was necessary to collect the same to pay debts owing by the estate and to pay the necessary cost of administration.

The defendant's answer was a denial, and allegations to the effect that the property had in the decedent's lifetime been made the subject of a transaction whereby a joint tenancy of defendant and the decedent in the property had been created, or a gift thereof *causa mortis,* whereby in either case defendant became entitled to the property. Defendant further alleged that there were no unpaid debts of the estate, that an order barring claims had been made, and that plaintiff had on hand in excess of $700 belonging to the estate. The plaintiff replied that there were expenses of administration and expenses for buying a tombstone that were in excess of any money in his hands and it would be necessary to collect the remainder of the personal property belonging to the estate before said claims could be paid.

The case was tried to the court without the intervention of a jury, and judgment given for the plaintiff, from which judgment the defendant appeals.

The decedent obtained a box in the vault of the Lincoln Safety Deposit Company on May 4, 1917, and applied to the custodian of the vault to know: "How can I fix this box so, should anything happen to me, my sister would have possession of the contents?" Thereupon, pursuant to the advice of the custodian, a card which was held by the deposit company was prepared and signed by the decedent, "Mrs. Flora Kelley, and sister," with the addition of her address. The name and address of the sister (defendant) were also at the time noted on the card by the custodian. The card contained in its printed part this: "As joint tenants the survivor or survivors to have access thereto in case of death of either. Either has the power to appoint a deputy, either has the right to surrender the safe." The custodian testifies: "She seemed very much exhausted the day she was talking to me as though she didn't feel well, and she said she wanted it—she didn't know what might

happen and she wanted a box." After the transaction Mrs. Kelley departed, taking the key to the box, and, in a few days, died. Soon thereafter defendant found the key in the effects of decedent and, in company with plaintiff and his wife, visited the vault of the deposit company, examined the box, and there, in the presence of the plaintiff, removed the bonds, took them with her, and has ever since claimed them as her own.

It is claimed that the facts of this transaction are not sufficient to establish a joint tenancy of the decedent and the defendant in the bonds, and perhaps this is true. Yet we find respectable authority that would go far toward sustaining such a tenancy. *Kelly v. Beers,* 194 N. Y. 49, 128 Am. St. Rep. 543; *Halsted v. Central Savings Bank,* 36 Cal. App. 500. Joint tenancies, intentionally created, are recognized in this state. *Sanderson v. Everson,* 93 Neb. 606; *Neneman v. Rickley,* 110 Neb. 446. In this case, however, it is not shown that Mrs. Kelley intended to create such an estate, nor that she was advised of the attributes pertaining to that particular estate.

The thing present in her mind and which, according to the undisputed testimony, she desired to accomplish was that she should get the use of the box in the safety vault and arrange "so, should anything happen to me, my sister would have possession of the contents." She placed the bonds in the receptacle, and they were there upon her death. The deposit company had authentic directions that her sister was entitled to receive them under that condition. She had expressed no wish to retain other control over them and had not, prior to her death, returned to the box or by any act indicated a different intention, or desire to revoke what she had done. We find here present every element of a valid gift *causa mortis* as recognized by the courts in many cases. The language used by the donor leaves no room for doubt that her acts were in expectation or contemplation of death, by reason of which she was moved to make the gift. She appeared at the time, according to the testimony of Mrs. Tatum, very much exhausted and as

though she did not feel well. Within the same month she died. No other inference is warranted than that she died of that same illness. Upon the question of delivery, the intention of the donor is clearly ascertained and was fairly consummated within the meaning of well-established rules. It should not be thwarted by a narrow construction of what was intended for, and deemed by her, under all the information she is shown to have had, a sufficient delivery. *In re Estate of Podhajsky*, 137 Ia. 742; *Bostwick v. Mahaffy*, 48 Mich. 342; *Devol v. Dye*, 123 Ind. 321.

If anything further were needed to establish the right of the defendant as against the administrator, except for the one purpose hereinafter to be considered, to the property in controversy, it is in the fact that, prior to the commencement of this suit, all the other heirs of the deceased had executed, and there were filed in the county court, assignments by them transferring to the defendant their interest in the bonds.

The remaining theory under which the plaintiff administrator might assert a right to the property, as against both the assignment and the gift, is that it is necessary to be used for the payment of approved debts of the decedent or costs of administration. *Koslowski v. Newman*, 74 Neb. 704; *Seybold v. Grand Forks Nat. Bank*, 5 N. Dak. 460; *Bright v. Ecker*, 9 S. Dak. 192; *Ackerman v. Merle*, 137 Cal. 157. The allegations of his petition are that it is so necessary. The proof wholly fails so far as concerns the element of debts owing by the estate. It is shown that there are none. Upon the matter of costs of administration or other allowable expenses, all that is suggested by plaintiff is a tombstone costing $65, items of cost not detailed, but said by him to not exceed in all $50, and fees for his own services as administrator and attorney. The whole of decedent's property consisted of a residence property in Lincoln valued at $6,000 or $7,000, the bonds in controversy herein, and $1,177 in money, of which plaintiff still has on hand $720. He states that he expects to ask an allowance for his services of $1,000, but no allowance has been

asked or made in the county court. Nothing is shown to entitle him to a payment beyond the ordinary statutory commissions, except certain litigation which was had in the district court and terminated in this court in the case of *Tyrrell v. Kelley,* 104 Neb. 555, and which involved the title to said residence property. In that case, as it turned out, the actual conflict of claims was as between the Kelleys, claiming under a deed, and this defendant, Judson, and others, claiming as heirs of Mrs. Kelley. It was decided in the district court and affirmed in this court that the property was the homestead of the decedent. Therefore it did not become assets of the estate and the estate derived no benefit from the litigation. *Judson v. Creighton,* 88 Neb. 37; *Cooley v. Jansen,* 54 Neb. 33. That case was finally disposed of in this court in May, 1920. The administrator had been appointed in June, 1917. He made no report of his acts until December, 1920, more than three years later. No mention is made therein of said litigation or of any claim or charge made or to be made on account thereof. The only other litigation mentioned in the testimony, in which services were rendered which are to be the subject of a charge, is a suit by the administrator in an attempt to collect rent of the homestead property, which terminated in the county court adversely to the administrator, and this present suit. It need hardly be said that the expense of conducting this present suit could not, in the absence of other grounds, be considered as a basis to authorize its maintenance. We are not determining whether the administrator is to be allowed compensation as attorney in said litigation, nor the amount thereof. That is primarily the business of the county court. It is, however, incumbent upon him here, if he would maintain his action, to plead and prove a definite tangible ground upon which the court should act in requiring surrender by the defendant of property to which she is otherwise entitled. This, we think it plain, he has not done; and although this court, contrary to the rule adopted in some others, has held that an administrator who is also an attorney may be allowed compensation for his

services as such attorney, it is said that, if such services were necessary for the proper administration of the estate and were beneficial thereto, the court in its discretion may allow reasonable compensation therefor. *In re Estate of Wilson*, 83 Neb. 252. The only basis presented in the instant case by the administrator for recovery of any costs or expenses of administration, that would equal or exceed the amount already in his hands, is that he expects to charge $1,000 for his services. That is not sufficient to support the judgment.

The affirmance without opinion is set aside, the judgment of the district court is reversed and the cause remanded for further proceedings consistent herewith.

REVERSED.

Note—See Gifts, 28 C. J. p. 694, sec. 109; Executors and Administrators, 23 C. J. p. 1194, sec. 434.

EDWARD BRIEGEL, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE.

FILED JULY 7, 1924. No. 22826.

1. **Railroads**: NEGLIGENCE: QUESTION FOR JURY. Where a finding of fact is required upon the necessity for an open and unfenced station ground, at the point at which cattle entered upon a railroad track, the rule governing the submission of questions of fact to the jury applies as in other cases.
2. **Instructions** examined, and held properly given and refused.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Hoagland & Carr, for appellant.

C. A. Magaw, Thomas F. Hamer, and *Thomas W. Bockes, contra.*

Heard before MORRISSEY, C. J., DEAN and GOOD, JJ., BLACKLEDGE and REDICK, District Judges.

BLACKLEDGE, District Judge.

This action was instituted to recover damages for the killing of certain cattle by defendant's railroad train at the point of Nichols station, or siding, on November 25, 1920. The direction of the railroad line is east and west, and at this point it consisted of a double-track main line and a connected switch track on the south side thereof. Somewhat west of the east end of the switch track a public highway extended north and south across the tracks. The station grounds were occupied by a beet dump, scale house, two large piles of beets containing approximately 1,500 tons, two or three cars loaded or in process of loading, and some wagons used in hauling beets from the piles to the cars, all of which were grouped approximately 300 to 350 feet west of the highway crossing and on or adjacent to the switch track, which was 33 feet from the main-line track. The right of way and grounds were under fence, except that on the east side thereof a "wing" fence which had extended southward from the cattle-guard at the crossing, along the west side of the highway to connection with the east and west fence along the south boundary of the right of way grounds, was down. There originally was a gate in this wing fence which provided entrance to the grounds, but at this time the fence was down and the space, about 135 feet, was used by the plaintiff and other beet haulers for ingress and egress. The principal use of this siding was for the loading and shipping of beets. Two or three cars were shipped daily during the season, which commenced about October 1 and lasted approximately two months. At the time of this accident the plaintiff and some others had not completed delivery of their beets and the two piles of beets remained to be loaded and shipped out. The siding was also used for the occasional outward shipment of hay and alfalfa and the reception of a car of corn.

Plaintiff owned the land nearby bordering on the west side of the highway and resided in view of this station and crossing. Upon the occasion in question his cattle strayed

out upon the highway and northward toward the railroad track. Plaintiff states that some of them entered the grounds at the unfenced space mentioned and went toward the piles of beets. Seeing them, he went across from his residence to the tracks slightly to the west of where the cattle were, for the purpose of driving them off and out of danger. While he was so engaged, defendant's train came from the west and at or near the crossing struck and killed a number of the cattle, which, when found, were all lying in or east of the highway. The evidence is that there is a clear view to the westward along the tracks for a distance of a mile or more. The engineer in charge of the train states he first saw the cattle when 100 feet from them, and that they were down on the public highway and he could not have stopped before striking them.

The plaintiff says: "When I seen these cattle around there by the beet dump and scale, and there was some of them in between the switch and the other track, and then I seen them up there, so I walked on up to the switch track, and from there on I seen some walking on the track, and then I started to go across the track to get them back again, and then just as I was going to cut across the track I looked back and saw the train coming, and then after the train came I just stepped back to let her go by, and then as it went by me, as a rule there is—I had gotten in the steam, and then the steam and smoke hit the ground, and the first thing I know the cattle was running and they were running up toward the track, and then I just thought to myself he is going to hit those cattle, and then after he was by me, then I seen where the cattle laid. That is the way it went."

Upon cross-examination, he states that he had not looked westward to see whether a train was coming, nor made an attempt to flag the train.

The verdict and judgment were for the defendant, and the assignments of error presented by the apppellant have relation to the giving and refusal of certain instructions by the trial court. We believe that a sufficient reference to the evidence has been made for the proper understanding

of the theory of the case as it was submitted by the instructions.

The court in the instructions defined negligence and contributory negligence, stated that the burden of proof was upon the defendant to prove any contributory negligence on the part of plaintiff, and stated in proper terms the rule of comparative negligence. The plaintiff contends that there was no evidence sufficient to authorize the submission to the jury of the questions of contributory negligence or of comparative negligence. We do not think this contention is sustained, because in this same connection the court gave an instruction which was requested by the plaintiff, and which we also think was proper to be given, covering the application of the doctrine of "the last clear chance" as applied to the duty of the defendant's engineer in the operation of the train on approaching the place of the accident, and thereby authorized the jury to determine whether the engineer, by the exercise of reasonable care and precaution under the circumstances in looking ahead, could have ascertained that the cattle were upon and about the track and in a position of danger, and could have thereupon stopped his train and avoided the collision. We think it clear that the plaintiff was on the ground and knew of the possible danger before the train approached, and that it was entirely proper to submit the question to the jury whether he on his part exercised reasonable care and precaution in looking for the approaching train or in attempting to signal the same. The duty apparently lay upon both the plaintiff and the engineer, seeing and appreciating the danger, to do what they reasonably could do to avoid the consequences, and the question whether they had done so was properly submitted by the court.

Appellant makes further complaint that there was error in the giving of instruction No. 9, in that it improperly limited the application of the previous instruction which submitted the rule of "the last clear chance." This instruction No. 9 was to the effect that it was not incumbent upon the engineer in the exercise of reasonable care to com-

mence to stop his train simply because the cattle were upon the right of way, if they were in no place where injury to them could be reasonably expected, but was only required to do so if or when the cattle were in such position as would cause a reasonably prudent person to believe that they were in danger of injury. This, we think, correctly stated the law and was properly explanatory of the application to be made of the doctrine stated in the previous instruction.

The assignment of error upon the refusal of the court to give instruction No. 3 requested by plaintiff cannot be sustained, because that instruction, as tendered, both omits the quality of reasonableness as applied to the care to be exercised by the engineer in keeping a lookout and in stopping the train, and submits only the question whether it was possible for him to have seen the cattle on the track and to have stopped the train. It was also objectionable in that the first paragraph charges the jury that as a matter of law it would have been negligence on the part of the engineer not to see the stock if he had looked where the view was unobstructed at least 40 rods before reaching the point. This instruction was therefore properly refused, as was also No. 4, which, although it had reference to the cattle having been frightened and caused thereby to run upon the crossing, also contained a clause to the effect that the defendant was as a matter of law required to keep the grounds at which the accident occurred fenced. This matter of fencing was the principal issue in the case, and the element of the cattle being upon the crossing was, we think, sufficiently covered by the other instructions.

The appellant further argues that the court erred in submitting to the jury the question whether the grounds at the station were such as were by law required to be fenced, and insists that the court should have determined that question as a matter of law and told the jury that the defendant railroad company was required to keep its right of way, at the point in controversy, fenced. Upon this question the court stated to the jury the requirements of the stat-

ute as interpreted by previous decisions of this court, and left it to the jury to determine whether, under the circumstances of their use, the station or grounds in question were such as were required under the law to be fenced. No complaint is made as to the form of the instructions by which this question was submitted, the complaint being solely as to the submission of the question for the determination of the jury; and it is urged that the court in its interpretation of the statute by former decisions broadened the scope thereof and added certain exceptions which were not within the legislative contemplation. It might be sufficient in this regard to say that the statutory interpretation criticized was made 20 years ago; and if the court was wrong in determining the intent of the legislature, that body has had ample opportunity to remedy the error by corrective legislation. Not having done so, we must assume that the court was correct in its interpretation. Nor do we think that the determination of this present case shall serve to widen or extend the application of the rules already made. The case in that regard is, we think, governed by the determination of this court in the case of the *Chicago, B. & Q. R. Co. v. Sevcek,* 72 Neb. 793, 799; and is also supported by *Rosenberg v. Chicago, B. & Q. R. Co.,* 77 Neb. 663; *Cole v. Duluth, S. S. & A. R. Co.,* 104 Wis. 460.

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

AFFIRMED.

Note—See Railroads, 33 Cyc. pp. 1307, 1313, 1320.

C. A. TAYLOR, APPELLANT, V. JOSEPH S. SWANSON ET AL., APPELLEES.

FILED JULY 7, 1924. No. 22842.

1. **Bills and Notes:** DEFENSE OF FRAUD: BURDEN OF PROOF. "Where fraud in the inception of a note is pleaded as a defense and supported by proof, in any action by an indorsee against the maker, the burden is on the plaintiff to show he is a *bona fide* holder." *Central Nat. Bank v. Ericson,* 92 Neb. 396.

2. **Evidence** examined, and held to support the judgment of the trial court.

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

Kelly & Schnell and *N. T. Gadd,* for appellant.

Sullivan, Squires & Johnson, contra.

Heard before MORRISSEY, C. J., LETTON, DAY and THOMPSON, JJ., and BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

This is an action to recover upon two certain promissory notes for the principal sums, respectively, of $3,750 and $250, dated September 30, 1920, signed by the defendants Swanson and payable to the Bank of New Hampton. The defense pleaded is fraud in the inception of the notes, and in the procurement of the original of which the two notes in suit were given in renewal, and a denial that plaintiff is a holder in due course.

A jury was waived in the district court, and upon trial the findings and judgment were for the defendants, from which judgment the plaintiff prosecutes this appeal.

The notes in suit are the result of certain transactions which began in September, 1919, wherein C. E. Tennant and D. E. Morefield, acting together and claiming to be agents of the Douglas Motors Corporation, purported to sell to the defendants certain of the capital stock of said corporation, for which, but without delivery of the stock, they secured two notes of the defendants, each in the sum of $3,750 and payable to the Douglas Motors Corporation. It seems that Tennant and Morefield each took one of said notes, but we are here concerned with the one only which was indorsed "Without recourse, Douglas Motors Corporation, by D. E. Morefield, Agt."

There is no substantial dispute in the record that these original notes were fraudulently obtained. The Douglas Motors Corporation never received the notes nor had any-

thing to do with them, and did not know of the transaction until about January, 1921, when the controversy arose respecting the payment of the renewal notes which are involved in this suit.

Morefield does not seem to have had any connection with the handling of this original note after his indorsement thereof. Tennant resided at New Hampton, Missouri, and was a brother-in-law of L. V. Taylor. They were both patrons of the Bank of New Hampton, and L. V. Taylor at one time was a stockholder therein. C. A. Taylor, the plaintiff, is a brother of L. V. Taylor and they were connected in business in various ways. Immediately following the maturity of the original note here mentioned, the defendants received a notice from the Bank of New Hampton to the effect that the note was due at that bank, and in September, 1920, L. V. Taylor appeared at their residence in Westerville, Nebraska, having in his possession the original note, and represented to the defendants that he was acting for the Bank of New Hampton, the owner of the note, and desired to get payment thereof. The negotiations resulted in the giving of the two notes in suit which were made September 30, 1920, payable to the Bank of New Hampton.

In his testimony the cashier of that bank states that the bank had possession of the note of $3,750 together with some other notes. He said: "I do not know when they brought them here. * * * I know we had them and I understood we were holding them as collateral for indebtedness of Taylor and Tennant." With reference to the notes in suit he states: "I can't remember the transaction. * * * This is my handwriting, indorsing to L. V. Taylor, without recourse, Robert E. Maple, Ass't Cashier." "Q. Was your bank ever the owner of those two notes? A. Not to my knowledge. Q. Can you tell how this indorsement came to be made? A. Well, my memory is that Taylor presented the notes to me. My best recollection is that L. V. Taylor brought the two notes to the bank signed by the Swansons, one for $3,750, and the other for $250.

They had been drawn on their face to the Bank of New Hampton, but the Bank of New Hampton did not own them and did not claim to own them, but they belonged to L. V. Taylor, and, as I recollect it, I then indorsed these notes over to L. V. Taylor by placing on the back thereof the words 'Indorsed to L. V. Taylor, without recourse, R. E. Maple, Ass't Cashier.' Q. Did L. V. Taylor have any authority from the Bank of New Hampton to take these renewal notes to the Bank of New Hampton? A. Not that I know of. Q. The Bank of New Hampton at no time claimed to own these notes? A. No. Q. Neither the original nor the renewals? A. No. Q. They were at the time of the renewal the property of Taylor? A. Yes. Q. Were these notes, originals or renewals, ever carried on the books of the bank? A. Not credited on the books of the bank."

The testimony of L. V. Taylor does not explain how he, or he and Tennant, became possessed of the original note. The testimony of neither of the Taylors satisfactorily explains how C. A. Taylor, plaintiff, can claim as a holder in due course. It shows, in fact, that the consideration which he claims he gave was not parted with until after he had notice of the defenses by the defendants to the notes. In such case he was not a holder in due course. *Minatare Bank v. Wilson, ante,* p. 216. It was testified by the president of the Douglas Motors Corporation that it had no knowledge of the transaction until in January, 1921, that Tennant was never an agent of the corporation for any purpose, Morefield was an agent with limited authority, and neither of them had any authority to indorse or transfer negotiable paper made to the corporation. The plaintiff claims as a transferee from L. V. Taylor, but his testimony does not support the *bona fides* of his claim. L. V. Taylor went to the defendants upon the basis that he was representing the Bank of New Hampton, a holder in due course, and the defendants, so far as disclosed by the record, knew no different until at a later period, and have been sufficiently prompt in asserting their defenses.

An unauthorized indorsement for the Douglas Motors

Corporation would not convey title. *Hamilton Nat. Bank v. Nye,* 37 Ind. App. 464, 117 Am. St. Rep. 333. Fraud having been shown in the inception of the note, the burden was upon the plaintiff to establish his status as a holder in due course. Comp. St. 1922, sec. 4670; *Central Nat. Bank v. Ericson,* 92 Neb. 396. The taking of a renewal note is not payment of the debt in the absence of a specific agreement between the parties to that effect, and without which the renewal note is open to all defenses which might have been made to the original note. *Auld v. Walker,* 107 Neb. 676; *Nebraska State Bank v. Walker,* 111 Neb. 203.

A careful consideration of the record is convincing that the district court reached the right conclusion in this case, and its judgment is

AFFIRMED.

Note—See Bills and Notes, 8 C. J. p. 984, sec. 1292; p. 1046, sec. 1358.

FARMERS & MERCHANTS BANK, APPELLEE, V. R. C. ALDERMAN ET AL., APPELLANTS.

FILED JULY 7, 1924. No. 22854.

Banks and Banking: AUTHORITY OF CASHIER: ESTOPPEL. Where the entire management of a bank is entrusted to the cashier, the bank will not be heard to deny the authority of the cashier to do an act in the corporate behalf which the charter or law does not prohibit and forbid a cashier to do.

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

McKenzie, Burton & Harris, for appellants.

P. N. Johnston and *R. A. Van Orsdel, contra.*

Heard before MORRISSEY, C. J., LETTON, ROSE and THOMPSON, JJ., and BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

Action by Farmers & Merchants Bank of Walton, Ne-

braska, against R. C. Alderman and his wife, Daisy D. Alderman, upon a promissory note executed by them January 1, 1921, to L. A. Berge as payee, it being alleged that the plaintiff became the owner in due course of the note before its maturity.

It appears without dispute in the evidence that Berge, the payee, was cashier and sole managing officer of the bank, having full charge of its business. The note is indorsed in blank by the pencil signature of Berge, and under his direction, on or about January 12, it was entered as a note of the bank in its register of bills receivable, Berge given credit in his individual account for the amount thereof and the note thereafter carried as a bank asset upon its books. The note matured March 1, 1921, and on March 21 Berge, with the note in his possession, called on the makers, where Alderman was in business in Omaha, for the purpose of making collection.

Alderman being unable to pay in money, after some negotiations they entered into a written agreement as follows:

"This is to show that I have this day purchased from R. C. Alderman, one Ford Sedan car, formerly owned by one W. N. Hill of Omaha, who is to send me a bill of sale within a few days, and as soon as received, I am to mail him his $1,000 note signed by himself, and of which is in full settlement of all accounts between us and the F. & M. Bank, Walton, Neb.

"L. A. Berge,
"R. C. Alderman."

The bill of sale was duly sent by Alderman and received by Berge, who took possession of the automobile, but failed to cancel or deliver to Alderman his note. The following May the bank was taken in charge by the state department of banking. The note in controversy was in the bank, and Alderman refusing payment and claiming payment to have been made by the transaction evidenced by the writing above set out, this case was commenced July 12, 1921.

Upon the trial the district court, under the theory that

Berge as cashier of the bank had no authority to bind it by taking the automobile in payment of the note, instructed the jury that, if they should find plaintiff was the owner of the note at the time of said transaction, then the verdict should be for the plaintiff for the amount due on the note. Under the evidence this was tantamount to an instruction to find for the plaintiff.

Without in any way recognizing a broader power or authority in the cashier of a bank than is indicated by the cases cited in argument (*Bank of Commerce v. Hart,* 37 Neb. 197; *Jones v. First Nat. Bank,* 3 Neb. (Unof.) 73; *State v. American State Bank,* 108 Neb. 98), we think it clear that this case rests upon somewhat different principles. Here the cashier was in complete control of the affairs of the bank as its managing officer and conducted its business. The bank had authority to make such a settlement. The maker dealt with the only person known to him to have, or to have had, any connection with the note as payee or owner. He had the note in possession, after maturity, with nothing upon it to indicate any limitation of his authority. If it was the property of Berge, he undoubtedly had authority to make the settlement. If it was the property of the bank, Berge also was the only person conducting the business of the bank. Alderman is not shown to have had any knowledge of the entries in the bank's books in reference to the note, or any notice that the bank claimed to own it. His explicit denial in this regard is not contradicted. It is urged that, because Alderman caused to be inserted in the writing when it was executed the final words, "and the F. & M. Bank, Walton, Neb.," notice should be imputed to him of some conflicting interest on the part of the bank; but, under the circumstances, and it being known that Berge, to whom the note was originally made, was also conducting the business of the bank, we consider that request on the part of Alderman as no more than reasonable precaution in which any prudent business man would be justified. The results show it to have been wise. It was, therefore, immaterial whether in the settlement, evi-

denced by the writing hereinbefore set out, Berge was acting for himself or for the bank. His authority was apparent and sufficient in either case and the owner was bound by his act. *Davenport v. Stone*, 104 Mich. 521, 53 Am. St. Rep. 467. The defendant in good faith parted with a valuable consideration and, not being chargeable with negligence or with notice of conflicting claims, should not be made to suffer the loss.

But for the fact that it appears in the record that the proceeds of a subsequent sale of the automobile in the sum of $398.55 came into the hands of defendant, and was originally tendered by him in this suit, the judgment should be reversed, with directions to enter a judgment for defendant. Upon this item there is, likewise, no conflict of testimony. The defendant's statement to the effect that, after having made his answer and tender thereby, the bank refusing to accept it, he applied the money on some other disconnected account due to him from Berge, who, although named as a party, was not served with process and never appeared in the suit, cannot be allowed to control its disposition here. The right result will be reached and a termination of the litigation hastened by allowing plaintiff to file within 20 days a remittitur in this court of all its judgment as of the date thereof, in excess of said $398.55. If so filed, the judgment will be affirmed for that sum; otherwise it will be reversed and remanded for further proceedings.

AFFIRMED ON CONDITION.

Note—See Banks and Banking, 7 C. J. p. 539, sec. 142.

HOWARD G. HARRIS, APPELLANT, V. THOMAS B. MCPHERSON, APPELLEE.

FILED JULY 7, 1924. No. 22870.

1. **Judgment:** RES JUDICATA. "The judgment of a state court duly authenticated as perscribed by law, where there is jurisdiction, is conclusive as an adjudication upon the subject-matter of the suit." *Keeler v. Elston*, 22 Neb. 310.

2. ———: EX PARTE AFFIDAVIT: ADMISSIBILITY. The *ex parte* affidavit of E. H. C. was inadmissible under the rules of evidence, and its admission in evidence at the trial was error.

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

McGilton & Smith, for appellant.

Baker & Ready, contra.

Heard before MORRISSEY, C. J., DAY, GOOD, and THOMPSON, JJ., and BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

This action was instituted to recover upon a foreign judgment rendered October 20, 1915, in the circuit court for Atlantic county, New Jersey, in favor of plaintiff and against defendant. That action was based upon a promissory note executed by defendant to E. H. Cuthbert and by him transferred to plaintiff. In the New Jersey court no process was served upon defendant, but an attorney of that state appeared and filed answer in his behalf. Thereafter upon notice, and defendant failing to show facts entitling him to defend therein, the answer was found to be frivolous and a judgment was entered against the defendant for the amount of the note.

In this action the defense pleaded was that the New Jersey court had no jurisdiction of the defendant because of the want of authority of the attorney to answer or enter appearance therein for the defendant. Counsel for both parties state that the question whether the attorney appearing for defendant in that court was, or was not, authorized to so appear was the only issue in the case. The trial court submitted but the one question for the determination of the jury. The verdict was for the defendant, and the plaintiff has appealed.

At the trial, over the objection of plaintiff, the defendant was permitted to testify to the circumstances, as he claimed them to be, of the giving of the note upon which

the original suit was based, and that the same was without consideration. Defendant was further permitted, in detailing a conversation between himself and Cuthbert and the attorney, which took place in December, 1917, and in which the matter under discussion was what had taken place between the same parties in August, 1915, in reference to the employment of the attorney to act in the suit then pending in the New Jersey court, to introduce in evidence an affidavit of Cuthbert made in October, 1916, stating his version of the transactions of August, 1915.

These rulings are assigned as error and we think the assignments must be sustained. It is elementary that in such a suit there can be no inquiry which seeks to go behind the original judgment and reconsider the cause or defense upon which it was based. The judgment of a court of a sister state, properly authenticated, is, in the courts of this state, conclusive upon the subject-matter of the suit. Such evidence was not pertinent to the question of employment or authority of the attorney, in the suit upon the note after its maturity, and appellee's argument that it was proper for the purpose of showing the relationship of the parties concerned in the original transaction does not carry weight. Its admission indicated to the jury the propriety of consideration by them of what they might believe to be the merits of the original case and was, we think, prejudicial. *Keeler v. Elston*, 22 Neb. 310. So, also, was the admission of the Cuthbert affidavit. It was no part of the conversation. Cuthbert himself was there present. It was in use, apparently in argument in an effort to convince the attorney that he had acted beyond the scope of his employment or instructions. The whole conversation could be material to defendant's case only as it might develop some statement, or admission, contrary to the position assumed or statements made by the attorney in his earlier connection with the case, which had gone to judgment two years before. Cuthbert does not testify on this trial, and his affidavit so received carried to the jury the weight of a sworn statement by him in reference to a material element

of the case, as to which plaintiff was deprived of the right of cross-examination. Its admission in evidence was error. *Barton v. McKay*, 36 Neb. 632.

The evidence upon the real issue, pertaining to the authority of the attorney to make the appearance in the New Jersey court, was conflicting and it was proper that that question should be submitted to the jury. We cannot determine to what extent the jury, in arriving at its conclusion, may have been influenced by the testimony erroneously admitted as hereinbefore pointed out, and the judgment of the trial court must, therefore, be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

FARMERS STATE BANK OF PETERSBURG, APPELLEE, V. TOM ANDERSON ET AL., APPELLANTS.

FILED JULY 7, 1924. No. 22713.

Chattel Mortgages: SALE BY MORTGAGOR: RIGHT TO PROCEEDS. When a sale by the mortgagor of mortgaged chattels is made with the consent of the mortgagee, the former agreeing to apply the proceeds upon the mortgage debt, the mortgagor becomes the agent of the mortgagee with reference to such proceeds, which may be recovered by the mortgagee from any person having possession thereof not having a lawful claim thereto under or through the mortgagor.

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

H. Halderson, for appellants.

Vail & Flory, contra.

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

REDICK, District Judge.

This is an action brought by the plaintiff, Farmers State Bank of Petersburg, against the defendant, Newman Grove

State Bank, to recover the proceeds of a sale of 20 head of steers upon which plaintiff held a chattel mortgage securing a note of one Tom Anderson, who is also made defendant, but the contest is between the banks. Jury was waived and trial to the court resulted in judgment for plaintiff. Defendant, Newman Grove State Bank, appeals.

The mortgage was dated November 10, 1919, and purported to cover 44 head of steers in the possession of the mortgagor in Boone county, Nebraska, to secure a note for $2,112.44. The mortgage was duly filed for record November 11, 1919, and later assigned to the plaintiff. March 1, 1920, Anderson executed a mortgage on 60 head of cattle, 12 head of horses, 100 head of hogs, purporting to be all the live stock he owned, also 140 acres of corn in field, to secure a note of $1,733 due January 1, 1921, which mortgage and note were subsequently assigned to the Newman Grove State Bank. Shortly prior to December 6, 1920, an arrangement was entered into between Anderson and the Farmers State Bank that Anderson should ship the cattle to Omaha to be sold, and apply the proceeds upon the note of the plaintiff. In pursuance of such arrangement Anderson shipped 20 head of steers, and one heifer not covered by plaintiff's mortgage, to the Interstate Live Stock Company at Omaha, in his own name, and on December 6, 1920, 18 head of steers and the heifer were sold on the market, the net proceeds of said sale amounting to $1,015.26, which was deposited by the commission company in the Stock Yards National Bank of South Omaha to the credit of the Newman Grove State Bank. December 7 one steer was sold, netting $53.30, and on December 13 the last steer was sold, netting $45.95, the proceeds being treated in the same manner as the first sale. Notice of these credits having been received by the Newman Grove State Bank, they were credited to the checking account of Tom Anderson as follows: December 7, $1,015.26; December 10, $53.30; December 15, $45.95. December 9, 1920, Anderson gave his check on the Newman Grove State Bank payable to the Farmers State Bank for the proceeds

of the first two sales, to wit, $1,068.56, which check was presented for payment, the date not being shown, and payment refused and the check protested December 13, 1920. December 20 Anderson gave his check on the Newman Grove State Bank payable to the Farmers State Bank for the proceeds of the last sale, $45.95, and the same was paid. The excuse given by defendant bank for refusing payment of Anderson's check for $1,068.56 is that on December 10, 1920, it had applied that amount upon the note of Anderson held by the bank. There is in the evidence a charge slip dated December 10, 1920, purporting to evidence such application of funds, though the same is stamped paid December 11, and appears upon the ledger account of Anderson under date of December 12. As the date of presentment of Anderson's check payable to plaintiff is not shown, it is impossible to determine with accuracy whether the application of the fund to defendant's note was made after that fact, and so the rights of the parties in such situation need not be discussed.

The precise question for determination is whether or not a mortgagee of chattels who has consented to their sale by the mortgagor upon the latter agreeing to apply the proceeds of such sale in satisfaction of the note secured by the mortgage may claim such proceeds in the hands of a bank in which without the knowledge or consent of the mortgagor the same have been deposited in the name of mortgagor, as against a claim of the bank to apply the same upon an indebtedness to it of the mortgagor, which is not yet due, without any direction from him so to do.

It is contended by defendant that the mortgagee, by consenting to a sale by the mortgagor, waived his mortgage lien. This is undoubtedly good law so far as any claim of the mortgagee against the chattels is concerned, as was distinctly held in *Seymour v. Standard Live Stock Commission Co.*, 110 Neb. 185, but there is no such question here—the mortgagor had the right to sell and title passed to the purchaser—the present dispute concerns only the proceeds of the sale. The mortgage to plaintiff covered all

the steers in the possession of Anderson at its date, and cases cited by defendant holding a description too indefinite because the mortgagor had a large number of other cattle to which the description in the mortgage might apply are not in point. The record of plaintiff's mortgage was constructive notice to defendant at the time it purchased the note and mortgage held by it, and it must therefore be charged with knowledge that, as to 44 head of steers or some lesser number, its mortgage was a second lien.

Defendant's position is that the first mortgagee, by consenting to the sale by the mortgagor, waived the lien of the first mortgagee, and that the lien did not follow the proceeds. It cites a number of cases from this state (*Littlejohn v. Pearson,* 23 Neb. 192, *Drexel v. Murphy,* 59 Neb. 210, and *Seymour v. Standard Live Stock Commission Co.,* 110 Neb. 185), but the first two of those cases were replevin actions for the recovery of the mortgaged property, and the last one, an action of conversion against the commission company which made the sale. It is clear in such cases that, as to persons dealing with the property in reliance upon actual or apparent authority of the mortgagee to the mortgagor to make the sale, the same was valid and the mortgagee must be held to have waived his lien.

New England Mortgage Security Co. v. Great Western Elevator Co., 6 N. Dak. 407, was an action against the purchaser of grain covered by the chattel mortgage, to the sale of which the mortgagee had consented, to recover the sale price, and has no application here.

The case upon which defendant seems principally to rely is *Smith v. Crawford County State Bank,* 99 Ia. 282, where it was sought to recover from the defendant bank the proceeds of the sale of mortgaged cattle, made with the consent of the mortgagee upon the agreement by the mortgagor that he would apply the proceeds to the payment of the plaintiff's mortgage. Instead of complying with his agreement, the mortgagor deposited the proceeds in defendant bank, which, with the consent of the mortgagor, applied a portion of said proceeds to a second mortgage

held by the bank, the mortgagor giving his check to the plaintiff for the balance, some $2,000, which was paid, but which was insufficient to satisfy the first mortgage, and the court held that under these circumstances the defendant, having made the application with the consent of the mortgagor, might retain the fund, saying:

"In making the sale, then, Carvell (the mortgagor) was not acting as agent for plaintiff, but dealing upon his own account. The funds, therefore, which were the proceeds of the sale, were Carvell's in so far, at least, that his disposition of the same would bind plaintiff, he having assented to Carvell's making the sale. They were not in any manner impressed with a trust character."

We are not entirely satisfied with this statement of the law though, as applied to the facts of that case, and, with the qualification stated, it may not be criticised. We think, however, that as between the parties the mortgagor was an agent of the mortgagee. It may be conceded that, inasmuch as the title to mortgaged chattels remains in the mortgagor, and he was, therefore, dealing with his own property, the validity of the sale could not be disputed by the mortgagee upon the basis of any private understanding between him and the mortgagor. Nevertheless, we think when the mortgagor received the proceeds he held them as the agent of the mortgagee for the purpose of applying them upon the mortgage debt; and there seems to be no doubt but that, as between the mortgagor and mortgagee, the lien of the mortgage was transferred from the chattels to the proceeds of the sale. This, of course, would not be binding upon any one who in the ordinary course of business received the proceeds from the mortgagor without notice of the condition under which he held them; and if the mortgagor used the same to pay a debt to such person or made any other similar disposition of them contrary to his obligations as agent, the mortgagee would have to look exclusively to the mortgagor for payment of his debt. As we said in the *Seymour* case above cited: "By this permission Wytaske (mortgagor) was made the agent of the mort-

gagee 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." The reasons for this are well stated in the case of *Tanner v. Lee*, 121 Ga. 524, in which it was held: "If without notice of another's claim thereto a creditor receives money from his debtor in payment of a preexisting debt, the true owner cannot thereafter compel such *bona fide* creditor to account therefor." The rule is founded upon the proposition that the one lawfully receiving currency from another is under no obligation to trace the payer's title, for if it were not so the creditor could never be certain that his debt was paid.

We think, however, a different question is presented in the case at bar. The fund was not received by defendant bank from Anderson, nor with his knowledge or consent. The bank simply found itself in possession of the fund and assumed that Anderson had sent it there. While it is alleged in the answer that "Anderson requested that the proceeds be used for payment of said (defendant's) note and that the amount of stock shipment returned be indorsed on said note," there is no evidence to sustain that allegation, but the facts as established by the evidence are as follows: Anderson had dealings with the defendant bank up to May 20, 1919, at which date his account was closed. There is evidence that he wrote a letter to the commission company said to contain instructions to send the proceeds to the plaintiff bank, but the letter was not introduced, and that matter, if true, cannot be considered. He has testified, however, that he gave no instructions to the commission company to send the proceeds to the Newman Grove State Bank, and it is a fair inference from the evidence that the proceeds were so transmitted by mistake of the commission company, but in accordance with the course of previous dealings it had with Anderson. Anderson had no account with defendant bank from May 20, 1919, until the fund in question was deposited there on December 7, 1920, as above detailed. Anderson had no knowledge of such de-

posit until he received notice thereof through the mail from the commission company, when he at once executed and delivered his check upon defendant bank, dated December 9, to plaintiff for $1,068.56 in compliance with his agreement. After the issuance of this check the defendant applied the fund to the payment of its debt not yet due from Anderson. Whether such application was made before or after the presentment of the check is not certain.

We are, therefore, to determine whether or not under this state of facts the bank had a right to make such application. It may be conceded, although we do not decide the question, that if Anderson had consented to such application or had drawn his check in favor of the defendant bank and delivered the same to be applied upon said indebtedness, the plaintiff could not question the transaction; but we are clearly of the opinion that without authority from the mortgagor, and the bank's position not having been altered to its detriment, the claim of plaintiff to the fund intrusted to its agent, and found in the possession of defendant under the circumstances shown, is superior to the claim, if any, of defendant. It was claimed by the president of defendant bank that its debt became due at once upon the sale of the property by the mortgagor, but the mortgage contains no such condition and the mortgagee could follow the property into the hands of the purchaser. We have concluded that as between the plaintiff and defendant the proceeds of the sale of the cattle belonged to the plaintiff, in law as well as in equity and justice.

It is proper at this point to refer to the state of the pleadings. The petition declared as for a conversion of the fund in question, alleging that the mortgagor and defendant bank connived together to have the proceeds sent to defendant bank. There is not a particle of evidence to sustain this charge, but on the contrary it appears that the mortgagor made every effort to keep his agreement with the plaintiff. The answer, as before stated, alleged a request upon the part of Anderson that the fund be applied upon defendant's mortgage, and there was no reply filed,

in which situation, ordinarily, such allegation would be taken as true. The evidence for defendant, however, disputes this allegation. It is to the effect that defendant had no communication with Anderson after the money was deposited, and the only basis for the contention is that, at the time the note and mortgage were executed, Anderson stated that he would pay defendant when he sold the cattle. This is far different from a request to apply the proceeds after the sale. The case appears to have been tried upon the theory that this was one of the disputed questions. Under these circumstances the failure to file a reply should not be considered as an admission of the disputed fact. Furthermore, at the time the bank attempted to apply the fund it had no knowledge that such fund represented the proceeds of the sale of any chattels covered by its mortgage. It simply *presumed* that such was the fact from the manner in which the proceeds came into its hands. If the defendant had no legal right to apply the fund in question as it did, as against the claim of the plaintiff, then its act in so doing was a conversion and the action is well brought on that theory; on the other hand, the judgment complained of may be sustained as an action for money received, to which the plaintiff had, in equity, a claim superior to that of the defendant.

In any view of the facts established by the record, the judgment of the district court is right, and it would subserve no useful purpose to reverse the same and require another trial upon reconstructed pleadings, as in the end no different judgment could be sustained.

AFFIRMED.

Note—See Chattel Mortgages, 11 C. J. p. 633, sec. 347.

JOHN T. MARCELL, APPELLEE, V. MIDLAND TITLE GUARANTEE & ABSTRACT COMPANY ET AL., APPELLANTS.

FILED JULY 7, 1924. No. 22876.

1. **Abstracts of Title:** OMISSION OF LIEN: DAMAGES. In an action by a purchaser of real estate against an abstract company for

failure to note in the abstract the existence of an attachment lien, later confirmed by judgment, the measure of damages is the amount of said judgment, with interest and costs, together with any reasonable expense of plaintiff in attempting to defeat such lien.

2. **Damages.** In such case, the plaintiff may not permit the property to be sold and charge the abstract company with the increased expense made necessary in procuring title from the purchaser; it was his duty to reduce his damages as much as was reasonably possible.

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

McKenzie, Burton & Harris, for appellants.

Murphy & Winters, contra.

Heard before MORRISSEY, C. J., DAY, GOOD and THOMPSON, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is an action brought by the plaintiff against the defendant abstract company and the sureties on its bond for the purpose of recovering damages occasioned plaintiff by the failure of the abstract company to note in its abstract the existence of an attachment lien. The facts as disclosed by the evidence are, substantially, that plaintiff purchased from one Lulu Headington eight lots, relying upon abstracts prepared and certified by the defendant abstract company; that the abstracts noted the pendency of a certain suit in the district court for Douglas county against plaintiff's vendor, but failed to show the issuance and levy of an attachment therein upon a portion of said lots; that after plaintiff had completed his purchase he discovered said attachment lien, and notified the abstract company that he would hold them responsible for any damages he might suffer in consequence thereof. Plaintiff lost the deed by which the lots had been conveyed to him before the same had been recorded, and, being unable to get in touch with the vendor and secure another deed, filed a petition of in-

tervention in the attachment suit by which he sought to defeat the claim of the plaintiff therein and to secure a decree quieting his title to the lots against the defendant, his vendor. February 2, 1920, judgment went for plaintiff in the attachment suit for $160 and costs, $30.40. In the same suit a decree on the petition of intervention quieting plaintiff's title was rendered July 3, 1920. Plaintiff expended $25 for costs in defending said attachment suit. An order of sale was issued under said attachment and a portion of plaintiff's lot sold for the sum of $210, of all of which proceedings plaintiff notified defendant abstract company in time to have prevented the sale. Plaintiff made no effort to pay the judgment or purchase the property at the sale, but permitted it to be sold to the plaintiff in the attachment suit, and after the sale was confirmed bought the lots from the purchaser at the sale, paying therefor the sum of $400, which he testifies was the lowest price at which he could secure the title. Upon the completion of the evidence in the court below, each party moved for a directed verdict, and thereupon the jury were discharged, and a finding and judgment rendered for the plaintiff for the sum of $473, and costs, made up of the following items: $400 paid by plaintiff to secure the title, $25 expenses, and interest on said sums. Defendant appeals.

A number of questions are discussed in the briefs, but the only one which we deem necessary to consider concerns the measure of damages. The general rule in this class of cases is that plaintiff is entitled to recover the amount of the incumbrance plus any reasonable expense to which he may have been subjected in removing it. *Chase v. Heaney*, 70 Ill. 268; *Morange v. Mix*, 44 N. Y. 315. But plaintiff claims that, by reason of the fact that defendant was notified of the entire proceedings, it was defendant's duty to remove the incumbrance and prevent the sale of the property, and that plaintiff was required to do nothing except to give notice to defendant as he did. We cannot agree with this proposition. It is a well-established rule in this state that, where there has been a breach of a contract by one

party resulting in loss to the other, it is the duty of such other party to take all reasonable steps to reduce the amount of his damages. *Uhlig v. Barnum,* 43 Neb. 584. The rule is the same in actions sounding in tort. 13 Cyc. 71. In the present case the plaintiff, at any time before confirmation of sale, might have paid the judgment and relieved his property of the lien, and we think it was his duty so to do. His failure to take this step was probably due to the fact that, owing to the loss of his deed, he had not yet procured title, but for this situation defendant was in no way responsible. The failure of the defendant to pay off the lien did not relieve the plaintiff from his duty in that regard and render the defendant liable for the increased loss which, in the event of the failure of plaintiff and the purchaser at the sale to agree upon terms, might have resulted in the loss of the property. The case at bar differs from *Security Abstract of Title Co. v. Longacre,* 56 Neb. 469, for in that case the property had been sold and sale confirmed before plaintiff discovered the existence of the lien. As was suggested in the opinion, at page 474, if the plaintiff had purchased the property under the prior mortgage and thus wiped out the attachment lien, it would have been an independent transaction of which the defendant could not claim the benefit. So here, the purchase of the outstanding title was an independent transaction with the expense of which, or the consequent loss to plaintiff, the defendant cannot be charged.

We are of the opinion that the rule of damages adopted by the district court was erroneous, and that the judgment is excessive to the extent of $228.36. The amount of plaintiff's recovery cannot exceed the amount of the judgment and costs plus $25 expense, or a total of $215.40, with interest thereon to the date of the judgment herein, to wit, $29.24, or a total of $244.64. Upon the filing in this court by the plaintiff, within 20 days, of a remittitur in the sum of $228.36, judgment will be affirmed for $244.64, with interest at 7 per cent. from January 9, 1922, and costs;

otherwise, judgment will be reversed and the cause remanded.

AFFIRMED ON CONDITION.

Note—See Abstract of Title, 1 C. J. p. 371, sec. 19; Damages, 17 C. J. p. 767, sec. 96.

ALFRED R. KEEFOVER, APPELLANT, V. JAMES VASEY ET AL., APPELLEES.

FILED JULY 7, 1924. No. 23982.

1. **Master and Servant:** EMPLOYER'S LIABILITY ACT: EMPLOYERS OF FARM LABORERS. Where a group of farmers combined in the purchase of a threshing machine for the purpose primarily of threshing their own grain, they and their employees while so engaged are not within the operation of the employers' liability law, which excludes "employers of farm laborers."
2. ———: ———: ———. Neither the fact that, prior to the accident to plaintiff, they had for compensation threshed grain of other farmers after their own threshing was finished. nor the fact that at the time of the accident they were engaged in threshing the wheat of a former part owner of the machine in compliance with a contract under which his share had been transferred for value to defendants, had the effect to convert defendants from their status as employers of farm laborers to that of conducting an independent commercial business.
3. ———: ———: FARM LABORERS. Employees threshing grain on a farm by means of a machine are engaged in farm labor equally with those so employed with a flail.
4. ———: ———: ———. "Employers of farm laborers" as a class are expressly excluded from the employers' liability law, and once the character of the labor is determined, no inquiry as to the occupation or commercial status of the employer is pertinent.

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

McCandless & McGuire and *Hazlett, Jack & Laughlin,* for appellant.

Sackett & Brewster, Sabin & Vasey and *Rinaker, Kidd & Delehant, contra.*

Lester L. Dunn and *Dale P. Stough, amici curiæ.*

Heard before MORRISSEY, C. J., DAY, GOOD, and THOMPSON, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is a proceeding under the employers' liability law to recover for the loss of an arm by the plaintiff while working in connection with a threshing machine. Compensation was allowed by the commissioner, but on appeal to the district court the award was set aside, and plaintiff has appealed to this court.

At the outset we deem it appropriate to remark that the court has been greatly aided by the exhaustive briefs and logical oral argument of counsel for both parties. All the decided cases bearing upon the questions involved have been cited, and have been discussed and distinguished with great learning by counsel on both sides.

The facts out of which the controversy arises, with one unimportant exception, are without dispute. The defendants are all farmers carrying on their pursuits near the town of Liberty in Gage county, Nebraska. They are owners or operators of neighboring farms. Prior to 1920 the farmers in that vicinity had suffered considerable delay, and consequent loss of market, in having their small grain threshed by traveling threshers, and concluded it would be to their advantage to club together and purchase a thresher for the purpose of threshing their own grain, and in that year defendants Clopper and Vasey, with three other farmers, Bradley, Goin, and Norris, purchased the thresher in question, each owning a one-fifth interest, the arrangement being that each owner should pay into the "company" proportionately for the threshing work done for him. The thresher purchased was the smallest size but one, but large enough to take care of some outside work. Prior to 1923 the machine was operated, threshing first for the owners and then for hire for others in the vicinity. Some changes occurred in the personnel of the owners, and in February, 1923, they were defendants Vasey, Clopper, Douglas (2),

Rounds, and Stahl. In that month Goin sold his interest to the defendants Douglas, which resulted in leaving a gap of several miles between the farm of Bradley and the other owners, and thereupon, February 19, 1923, an agreement was entered into whereby the defendants purchased the interest of Bradley in the machine for the sum of $150 cash and the assumption of Bradley's proportion of the purchase money note given for the machine, and on the condition insisted upon by Bradley that the defendants would thresh Bradley's grain during the season of 1923 as the first work, free of charge, subject, however, to the further condition that if the cost of such threshing was more or less than $100, the difference should be adjusted.

The plaintiff is a farmer, and for several years prior to the accident farmed an eighty-acre tract in the vicinity of the village of Liberty, spending about one-half of his time tending his own crop, the other half in working for his neighbors at odd jobs. During the first ten days of July, 1923, he was engaged in working around for several of his neighbors, to wit: Defendant Vasey, one Emerson, and one McGuire, at a daily wage of $5. About July 16 he was employed by defendant Vasey to work with the thresher. His duties were first, to fix up the threshing machine and put it in running condition, and then to "tend the separator." His wages were not fixed until after the accident, when $5 a day was agreed upon. The thresher having been started up and tried out, on the morning of July 21 the work of threshing was commenced at Bradley's farm, where some grain was threshed before dinner. After dinner, about 2 o'clock, something went wrong, the machine was stopped, and plaintiff, having made some repairs and signaled the engineer to go ahead, was attempting to fill an oil cup on the cylinder shaft, when the feeder belt suddenly broke, caught plaintiff's right arm, and almost instantly jerked it off at the elbow, necessitating amputation between the elbow and the shoulder.

The question for determination is whether or not plaintiff's injuries are compensable under the employers' lia-

bility law of this state, and, specifically, whether or not plaintiff and defendants are excluded from the benefits of said law by the following provision thereof, being subdivision 2, sec. 3029, Comp. St. 1922, reading as follows:

"(2) The following are declared not to be hazardous occupations and not within the provisions of this act; Employers of household domestic servants and employers of farm laborers."

Our problem requires us to discover the intention of the legislature in the use of the four words "employers of farm laborers." Our attention has not been called to any statute making use of these precise terms. In Iowa the excluding words are, "farm or other laborer engaged in agricultural pursuits;" Minnesota, "farm laborers;" Utah, "agricultural laborers;" Idaho, "agricultural pursuits;" Michigan, "farm laborers;" Indiana, "farm or agricultural laborers," and "employers of such persons;" and New York, "farm laborers." It is worthy of note that in these other states the emphasis seems to be placed upon the exclusion of the laborer, while in this state it rests upon the exclusion of the employer of such labor. It would seem, therefore, that the legislature (composed to a large extent of farmers) by these words have pointed out a class which it intended to exclude from the law, which class consists exclusively, or nearly so, of farmers; and while the classification, as remarked by Schneider, Workmen's Compensation Law, sec. 31, quoted by plaintiff's counsel, "was perhaps based more on legislative expedience than on sound reason," still it is the law, and if there is any question as to the propriety of the classification, that question is not now before us.

It is the contention of plaintiff that defendants in the operation of the threshing machine were not farmers engaged in farm labor, but were engaged in a commercial business and were commercial threshers, as those terms are used in the cases cited, and, further that the plaintiff, at the time of the accident, was not engaged in farm labor. The contention is based upon the fact that in prior years defendants had threshed for others, and, though this is in

dispute, that it was the intention to thresh for others in 1923 after defendants' grain had been cared for, and specially the further fact that, at the time of the accident, defendants were engaged in threshing wheat for Bradley who had sold his interest in the machine, wherefore, it is claimed the cooperative feature was absent.

Quite a number of cases discuss the questions as to what is "farm labor" and who are "farm laborers," but comparativly few deal with the operations of threshing machines and analogous operations, as of corn shellers, corn shredders, and machines for chopping feed. In the cases last referred to, for the purpose of solving these questions, a classification has been recognized, based upon the method in which the operation is carried out. In the first class are placed those cases in which the machine is independently owned by an individual or company not engaged in farming, and who, with a crew, travels about the country from farm to farm threshing grain for an agreed compensation. The members of this class are termed commercial threshers, as the business is carried on independently of farming as generally understood. In the second class are placed those farmers who own their own machines and operate solely upon their own products, and associations of farmers who own the machine together on the cooperative plan, treating their own products. The first class are supposed to be within, the second class without, the operation of the compensation acts.

Regarding the first class, the decisions are in conflict as to whether the parties, employer and employees, are within the protection of the acts. Upon the general proposition four states seem to take the affirmative, as announced in *White v. Loades*, 178 App. Div. (N. Y.) 236, in which case, however, liability was declared under a special provision covering the "operation of a vehicle," the decision of the present question being dictum. *Vincent v. Taylor Bros.*, 180 App. Div. (N. Y.) 818, based upon the dictum in the *White* case, but the proceeding was prosecuted by the plaintiff upon the theory that the defendants were in the milling

business, and the court said: "There is nothing whatever in the evidence indicating that the employers were in fact millers or that they had any interest whatever in the grain or in threshing it beyond merely separating it from the straw at a certain price per bushel. If such were the conceded fact the award should be reversed and the claim dismissed." It would appear that this case should be placed in the negative column. *Industrial Commission v. Shadowen,* 68 Colo. 69, holding that one who goes from farm to farm operating a thresher is not a farm laborer within the exception; *In re Boyer,* 65 Ind. App. 408, holding with the *Shadowen* case and distinguishing the situation from one where the farmer owned his own machine and threshed his own grain; *Roush v. Heffelbower,* 225 Mich. 664, where the employer conducted a corn-husking outfit as a commercial business; this case also distinguishes cases where farmers individually or cooperatively husk their own corn.

Cases taking the negative side of the proposition are: *Sylcord v. Horn,* 179 Ia. 936, holding that the employee of defendant operating a cornshredder for profit was a "farm laborer;" *State, ex rel. Bykle, v. District Court,* 140 Minn. 398, holding to the same effect as to a steam thresher; *Jones v. Industrial Commission,* 55 Utah, 489, which will be referred to later; and *Cook v. Massey,* 38 Idaho, 264, holding that the defendant operating a commercial thresher was engaged in an "agricultural pursuit," the excluding words of the compensation statute. We have examined the remaining cases cited in the briefs, but a discussion of them would unnecessarily extend this opinion.

There is some discussion in the briefs, and in some of the cases cited, upon a supposed distinction between one engaged in agricultural pursuits and one engaged in farm labor. Such a distinction doubtless exists in the sense that one who is engaged in the pursuit of agriculture may not necessarily be a farm laborer, but it is quite evident that every farm laborer is engaged in an agricultural pursuit, so that we do not consider this discussion pertinent to our present inquiry. All of the cases above referred to con-

cede that the threshing of grain is an operation in farming, and that an employee engaged in that operation, whether with a flail or a threshing machine, may be a farm laborer; but, in the cases cited above as in the affirmative, the status of the employee is conceived to be changed by the fact that the employer is not a farmer nor engaged in the general operation of a farm, but only in a single and particular part thereof. We are unable to perceive any logical basis for such a metamorphosis, especially when considering those statutes in which the excluding words are made specially applicable to farm laborers. Of course, the exclusion of the employee from the benefit of the statute automatically excludes the employer, for it cannot be contended that it was the intention of the legislature to exclude farm laborers who worked upon their own farm, for in such case there would be no employer or employee. As was suggested in the *Sylcord* case, if a farmer employs a third party to plow his 40-acre field, the employee of such third party doing the actual work is a farm laborer within the precise words of the statute and not entitled to its benefits, regardless of the question whether his employer was engaged in an agricultural pursuit, for, as already stated, the exclusion has express reference to farm laborers. But when we come to apply the excluding words of the Nebraska statute to the situation just adverted to, there would seem to be no room for doubt. In the statutes to which we have referred in other states, with the exception of Indiana, as already remarked, the excluding words are applied to the farm laborer; while in this state they are applied to the employer of farm laborers. The distinction may not be vital, but it appears to us that it closes the door to all other inquiry as to the character of the business of the employer, the only one permissible being whether or not he is an employer of farm laborers.

But the present case presents features differing from those in all but one of the cases referred to, in the fact that the threshing machine in question was owned by a group of farmers who purchased same primarily for the purpose of

threshing their own grain, although, after that had been accomplished, it was used to thresh for other farmers in the neighborhood for a compensation. If this last fact constituted them commercial threshers as defined in some of the cases herein referred to as in the affirmative column, as we have already shown, it would not bring them within the operation of the compensation act, nor remove them from the class of employers of farm laborers excluded by the Nebraska act. It follows that the fact that at the time of the accident the machine was employed in threshing the grain of Bradley (a matter much discussed in the briefs) is immaterial. While it is suggested in a number of cases that an employee of a farmer threshing his own grain, or a group of farmers so engaged on the cooperative plan, would not be within the protection of the compensation act, but one case has been called to our attention presenting this particular feature. *Jones v. Industrial Commission*, 55 Utah, 489, presented a case on facts substantially like those of the case at bar. There a number of farmers joined in the purchase of a threshing machine primarily for the purpose of threshing their own grain. During the first two or three years, while paying for the machine, they did considerable threshing for the public. After that they did less and limited their outside threshing generally to crops lying along the route from the farm of one coowner to another on occasions when it would not seriously interfere with the threshing of their own crops. No threshing was done in 1918 until after the accident to plaintiff, but they were preparing to thresh the grain of a son of one of the owners of the machine, and after the accident, on the same day, proceeded with that work. The Utah statute excluded "agricultural laborers" from the operation of the statute. After a painstaking review of the cases on both sides of the question, the court adopted the rule as laid down in the *Sylcord* and *Bykle* cases as based upon the better reasoning, although at the same time distinguishing them on account of the cooperative feature in the case decided. Referring to the decision of the *Jones* case, from which the appeal had

been taken, to the effect that the threshing of grain for a party who was not connected with the ownership of the machine converted the transaction into a commercial business, the court said:

"James Meldrum was one of the owners of the machine in question. He also owned a farm. His son Calvin resided with him on the farm and as a renter was interested in the grain to be threshed. Their grain was in separate stacks on the farm. The position of defendants in respect to the business, in the last analysis, logically leads to the conclusion that while threshing the stack belonging to the son, the employees were not 'agricultural laborers' within the meaning of the act and therefore were entitled to compensation at the expense of their employer, but that when they turned to the stack belonging to the father and commenced to thresh they immediately became 'agricultural laborers' and were not entitled to compensation. Such an interpretation of the meaning of our industrial act, in the opinion of the court, is inadmissible and would result in manifest discrimination and lead to inevitable confusion."

We think this language applicable to the instant case. To hold that defendants were not employers of farm laborers while threshing the grain of Bradley, but would be such when threshing the grain of Vasey, or some other part owner of the machine, would tax our powers of distinction to the point of confusion. We conclude that the judgment of the district court is correct, and it is

AFFIRMED.

Note—See Workmen's Compensations Acts, p. 41, sec. 35; p. 45, sec. 36.

NEBRASKA NATIONAL GUARD, APPELLANT, V. FRED J. MORGAN, APPELLEE.

FILED JULY 7, 1924. No. 24050.

1. **Master and Servant:** NEBRASKA NATIONAL GUARD: COMPENSATION TO EMPLOYEE. The Nebraska National Guard is a governmental agency of the state within the employers' liability law,

and an "employee" thereof is entitled to compensation for injuries received in consequence of an accident arising out of and in the course of such employment.

2. ———: "CASUAL" EMPLOYMENT. An employment is not "casual," within the terms of the employers' liability law, when the term of employment is indefinite and the work to be performed is connected with the regular business and occupation of the employer.

3. ———: COMPENSATION: EMPLOYEE OF NATIONAL GUARD. Preparing the grounds for an encampment of the Nebraska National Guard, held in pursuance of a statutory requirement that such an encampment be held for at least five days each year, is a work in the usual course of "business or occupation" of the guard, if the quoted words have any application to an employee of the state, which we do not decide.

4. Evidence examined, and *held* to sustain the finding of the district court that applicant's injuries resulted in total disability.

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

O. S. Spillman, Attorney General, and *Lee Basye,* for appellant.

Peterson & Devoe, contra.

Heard before LETTON, ROSE and DEAN, JJ., BLACKLEDGE and REDICK, District Judges.

REDICK, District Judge.

This is an action under the workmen's compensation law. The plaintiff, Fred J. Morgan, recovered an award before the compensation commissioner, which was confirmed on appeal to the district court for Lancaster county and a decree entered in favor of plaintiff. The defendant, Nebraska National Guard, has appealed to this court.

The facts out of which the controversy arises are substantially as follows: An encampment of the Nebraska National Guard was to be held in August, 1923, at grounds furnished for that purpose by the United States government near the city of Ashland, in Saunders county. It was necessary to prepare the grounds for such encamp-

ment, and, among other things, to erect shed kitchens for each company, properly screened for the purpose of excluding flies. It was deemed necessary by the adjutant general in charge of the encampment to employ a number of carpenters to erect such kitchens, and, among others, plaintiff was so employed on July 23, and worked continuously for six days until he met with the accident which is the basis of his claim for compensation. On Saturday afternoon, July 28, while plaintiff, as he says, was in search of nails for the purpose of going on with his work, he fell over some obstruction in such a way as to fracture the surgical neck of the femur in his left hip. The plaintiff was suffering at the time from rheumatism, and carried a cane, but the finding of the lower court that plaintiff's injuries are the result of an accident arising out of and in the course of his employment is sustained by the evidence and must be adopted. The accident and resulting injury being shown, the fact that plaintiff may have been suffering from disease at the time which may have contributed in some degree to cause the accident is not material. The labor commissioner and district court found that the plaintiff's injuries rendered the plaintiff totally and permanently disabled and allowed compensation at $15 a week for 300 weeks and $12 a week during the remainder of plaintiff's life. Plaintiff was earning $5.50 a day for 10 hours' work, and was paid by the state of Nebraska the sum of $33 for the six days he had been employed; and but for the accident plaintiff's employment would have continued with the other carpenters until the completion of the kitchens a few days later.

Three propositions are presented by the state as reasons for reversal of the judgment:

1. It is contended that Morgan was not an employee of the state of Nebraska. The statute defines such employee as: "Every person in the service of the state or any governmental agency created by it, under any appointment or contract of hire, express or implied, oral or written." Comp. St. 1922, sec. 3038, subd. 1. The argument here is that the Nebraska National Guard is a part of the army of the

United States under 41 U. S. St. at Large, ch. 227, sec. 1, p. 759, providing: "That the army of the United States shall consist of the regular army, the National Guard while in service of the United States," etc. Note that the National Guard is a part of the army of the United States only while in its service; and is not a governmental agency of the state. Section 3300, Comp. St. 1922, provides, however: "The active militia shall consist of the organized and uniformed military forces of the state, which shall be known as the 'Nebraska National Guard.' " Section 3302 provides that the governor shall be the commander in chief. Section 3305 vests control in the adjutant general subordinate only to the governor. Section 3340 requires that the Nebraska National Guard shall encamp for instruction not less than five days annually at such time and place as may be ordered by the commander in chief. Section 3370 authorizes the adjutant general to employ such help as may be necessary and pay for the same out of state funds provided by the legislature, and the expense of constructing these kitchens was so paid.

We are clearly of the opinion that, in the preparation for and holding of the annual encampment, the Nebraska National Guard was a governmental agency of the state within the meaning of section 3038, subd. 1, and that plaintiff was an employee thereof at the time of the accident. While the Nebraska National Guard is subject to the call of the federal government and thereupon becomes a part of the national army, until so called it is essentially a state institution, subject to the call of the governor as commander in chief for military service within the state in time of war, invasions, riots, rebellion, insurrection, or reasonable apprehension thereof (Comp. St. 1922, sec. 3322), and is a state governmental agency.

2. It is next contended that Morgan's employment was merely casual, and not in the usual course of the business, profession or occupation of the National Guard. Section 3038, subd. 3, of the statutes is as follows: "It (employee) shall not be construed to include any person whose employ-

ment is casual, and which is not in the usual course of the trade, business, profession or occupation of his employer. The term 'casual' shall be construed to mean 'occasional; coming at certain times without regularity, in distinction from stated or regular.' " To exclude plaintiff from compensation under subdivision 3, his employment must have been both casual and not in the usual course of the business, profession or occupation of the National Guard. It would seem to require no argument to support the proposition that the National Guard has no trade, business, profession or occupation within the meaning of those terms as used in the statute, as they have reference to industrial concerns, and the theory of employees' compensation acts is that the losses occasioned employees through accident shall be charged to the industry the prosecution of which is the occasion of the service. But it is not illogical to say that the holding of an encampment required by law is a part of the business or occupation of the National Guard; and the preparation of the ground in the interest of the comfort and health of the militia while performing their duties is a proper and necessary work connected therewith. Aside from this, however, we think that under subdivision 1, above quoted, every person in the service of the state, regardless of the character of the service rendered, is an employee, unless he comes within the exceptions specially provided in the act, which is not claimed here. The employment of Morgan was not casual, because it was necessarily connected with the proper performance of the duties imposed upon the National Guard. The shortness of time of his actual engagement upon the work is not controlling; his term of service was indefinite, was ended only by the accident, and in this situation, so far as this point is concerned, he would have been entitled to compensation if the accident had happened the first day or within a few hours of the commencement of his employment. See *Nedela v. Mares Auto Co.*, 106 Neb. 883.

3. Lastly, it is contended that the evidence is insufficient to sustain the finding that the applicant's injuries resulted

in total disability, and that the judgment is excessive, the claim being that, if the claimant is entitled to any compensation, he is restricted to that allowed for the total loss of the use of one leg, which would be $15 a week for a period of 215 weeks under subdivision 3, sec. 3044. The argument is that, inasmuch as the injury was to the leg only, claimant is not entitled to greater compensation than he would have been if the leg had been amputated. We cannot adopt this conclusion. While the only direct result was a fracture of the surgical neck of the femur, the evidence establishes the facts that the injury left broken ends of bone in the hip of the claimant resulting in a malplacement of the hip bone against the pelvic bone, causing irritation of the nerves coming into the hip and affecting the whole physical and nervous system in such manner as to totally disable the claimant from doing any work. The district court found that the plaintiff was suffering from total disability, and such finding is amply sustained by the evidence.

We find no error in the record, and the judgment is

AFFIRMED.

Note—See Workmen's Compensation Acts, p. 48, sec. 39; p. 51, sec. 43; p. 115, sec. 114.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT, V. I. T. AMACK, ADMINISTRATOR, APPELLEE.

FILED JULY 18, 1924. No. 24123.

1. Statutes: CONSTRUCTION. In endeavoring to ascertain the meaning of a statute, the court may examine the proceedings attending its passage through the legislature, and the various amendments made thereto.

2. ———: ———: WORKMEN'S COMPENSATION LAW. The workmen's compensation law, subdivision 2, sec. 3029, Comp. St. 1922, is as follows: "Railroad companies engaged in interstate or foreign commerce are declared subject to the powers of congress and not within the provisions of this act." *Held*, that such language

is plain, clear, and not subject to construction or interpretation, that the court has no power to amend the statute, and that an employee of such a railroad is not within the provisions of the law.

APPEAL from the district court for Webster county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed and dismissed.*

Byron Clark, Jesse L. Root and *Paul E. Boslaugh,* for appellant.

F. J. Munday, contra.

Heard before MORRISSEY, C. J., LETTON, ROSE, DEAN, GOOD and THOMPSON, JJ., and REDICK, District Judge.

PER CURIAM.

William S. Bruner, while employed by the appellant as a member of a bridge gang, was killed by a train. Claim was made for compensation under the workmen's compensation act. An allowance was made by the labor comissioner. The railroad company appealed to the district court, and from an adverse decision there has brought this appeal.

The question at issue is a narrow one. Bruner was working with a bridge gang, constructing a concrete culvert under a wooden trestle upon the main line of the Chicago, Burlington & Quincy Railroad between Kansas City, Missouri, and Denver, Colorado. It is the contention of the defendant that the provision in subdivision 2, sec. 3029, Comp. St. 1922, "Railroad companies engaged in interstate or foreign commerce are declared subject to the powers of congress and not within the provisions of this act," applies, and that hence there can be no award. The appellee rests his case upon the proposition that the work in which deceased was engaged was not connected with interstate commerce, that it was new work having no direct relation to such commerce and therefore that his employment fell within the provisions of the compensation act. Granting that deceased was not engaged in interstate commerce, is such an employee or his dependents entitled to compensation under

the law? Section 3029, Comp. St. 1922, is a general statute. The first subdivision provides: "The provisions of this act shall apply to the state of Nebraska and every governmental agency created by it, and to every employer in this state employing one or more employees, in the regular trade, business, profession or vocation of such employer." The second subdivision is as follows: "The following are declared not to be hazardous occupations and not within the provisions of this act: Employers of household domestic servants and employers of farm laborers. Railroad companies engaged in interstate or foreign commerce are declared subject to the powers of congress and not within the provisions of this act."

The determination of the question depends upon the intention of the legislature as expressed in this section. The first subdivision is inclusive in the classification of employers, and the second subdivision is exclusive. It is expressly provided that employers of household domestic servants, employers of farm laborers, and railroad companies engaged in interstate or foreign commerce are not within the provisions of this act. Can language be more clear and positive? The contention of the claimant is that the statute should be read as if it contained the word "while" or "when," as follows: "Railroad companies 'while' or 'when' engaged in interstate or foreign commerce are declared subject to the powers of congress and not within the provisions of this act." Is the court authorized to amend the act in this manner? The rule is that if the language of a statute is ambiguous the courts may construe it, but if the language is plain and unambiguous, to attempt to give it any other than its plain meaning would be judicial legislation. The legislators evidently did not have in mind the contingency that railroads engaged in interstate commerce might be employers of labor not connected with such commerce, and made no provision for such a contingency. It is argued that the statute must be construed liberally. This we concede, and this has been the uniform holding of this court, but a liberal construction cannot supply a deliberate omission.

A consideration of the progress of the workmen's compensation act through the legislature confirms this view of the legislative intent. In section 2 of the original bill "engineering works" were included as extra hazardous, and in a description of such works in section 3 railroads are included. When the act reached the senate it was amended so as to provide: "The provisions of this act shall apply to every employer in this state enumerated in this subdivision of section 6 engaged * * * in the business of carriage by land or water and loading and unloading in connection therewith (except that this act shall not be construed as applying to any railroad or railway company engaged in interstate or foreign commerce, which railroad or railway company by reason of being so engaged is not subject exclusively to the legislative power of the state of Nebraska, and for which railroad or railway company and the employees thereof a rule of liability or method of compensation has been or may be established by the congress of the United States; it being the intent and purpose that this act shall not affect or change the existing statutory liabilities and rights as between railroad or railway companies and their employees with respect to damages or compensation for accidental injuries or death caused by accident arising out of and in the course of employment)." This was amended in the house and the act as finally passed excluded "railroad companies engaged in interstate or foreign commerce." The legislature evidently considered the inclusion of such railroads and definitely rejected the idea. The court is not authorized or empowered to write such rejected matter into the statute, even though the result of the legislation seems unfair and unjust. The Nebraska statute stands almost, if not quite, alone in excluding such railroads as a class. The legislature alone has power to extend relief to this class of workers, and since the facts before us show the necessity of such legislation perhaps it may amend the law.

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

REVERSED AND DISMISSED.

Note—See Statutes, 36 Cyc. pp. 1103, 1107, 1138—Constitutional Law, 12 C. J. p. 883, sec. 387—Workmen's Compensation Acts, p. 36, sec. 31.

CORWIN M. CULVER, SPECIAL ADMINISTRATOR, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED JULY 18, 1924. No. 22820.

1. **Damages:** INJURY: QUESTION FOR JURY. Where the opinion of medical experts as to the cause which has produced a lesion of the spinal cord, causing partial paralysis, is in decided conflict, the question whether the injury to the cord was the result of external accident or was the result of disease is one for the jury, there being sufficient evidence to support a verdict based upon either theory.

2. **Witnesses:** PRIVILEGED COMMUNICATIONS: NURSES. Section 8840, Comp. St. 1922, provides: "No * * * physician or surgeon * * * shall be allowed in giving testimony to disclose any confidential communications, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." A professional nurse assisting a physician to whom such confidential communications have been made by a patient is an agent of the physician. She stands in the same relation of confidence to the patient and may not be permitted to testify to such communications unless the privilege has been waived by the patient.

3. ———: ———. A sergeant of the United States army medical corps, who is not a physician, who acts under the regulations of the army in furnishing to soldiers medical or prophylactic treatment for venereal diseases, and who does not fall within the rule as to assisting nurses herein announced, may testify to the fact that application was made to him for such treatment, and as to the nature of the service rendered by him, where such facts are material to throw some light on the question at issue.

4. **Master and Servant:** ASSUMPTION OF RISKS. As a general rule an employer owes no duty to warn an employee of mature age of

the extent of his lifting ability, and one who attempts to perform a task of this nature, requiring exertion beyond his physical strength, assumes the risk of injury therefrom.

5. ———: ———. QUESTION FOR JURY. But if an employee is directed to exercise his strength in a peculiar and unusual manner and position which casts a strain upon a part of his body where a strain may not ordinarily be sustained, and where the results of such unusual exertion cause bodily injury, the question whether this was an ordinary risk incident to the occupation or an unusual and extraordinary risk, and whether the plaintiff assumed such risk, are questions for the jury.

6. Appeal: INSTRUCTIONS: REVIEW. Where no instructions are tendered to the trial court by a party who afterwards appeals and assigns error in certain instructions, this court will not examine the charge with such a critical mind as where the trial judge has had the benefit of the views of the appellant as to the proper legal principles applicable by the tender of instructions on the points involved.

7. Damages: LOSS OF EARNING CAPACITY. In computing the damages recoverable for loss of earning capacity in actions for damages for personal injuries, under the federal employers' liability act, adequate allowance should be made for the earning power of money, and when future payments are to be anticipated the verdict should take into account the present value of the annual payments of which plaintiff in such a case, or his beneficiaries, have been deprived.

8. ———: PAIN AND SUFFERING. Damages for pain and suffering are not to be awarded as upon the basis of present worth based upon the life expectancy of the plaintiff, but as a gross sum presently payable.

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

N. H. Loomis, Edson Rich, C. A. Magaw, Thomas W. Bockes and *Rinaker, Kidd & Delehant,* for appellant.

Bartos & Bartos and *Hall, Cline & Williams, contra.*

Heard before LETTON, ROSE,, DEAN, DAY and THOMPSON, JJ., BLACKLEDGE and REDICK, District Judges.

LETTON, J.

This is an action under the federal employers' liability

act for personal injuries alleged to have been suffered by the plaintiff on account of the negligence of defendant. The facts are somewhat peculiar. Plaintiff was a brakeman, earning about $150 a month. He was employed upon a freight train running from Lincoln to Valley, Nebraska. He testified that, on December 14, 1920, the conductor directed the plaintiff and another employee to load a handcar, weighing between 500 and 600 pounds, into a boxcar. The handcar was upon a gravel platform about the level of the rails. Upon direct examination he stated that he told the conductor that the handcar was pretty heavy for three men to lift, and asked him where the section crew was. The section crew was at work elsewhere. The conductor directed him to get into the boxcar. The other two men lifted one end of the car, so that he could reach it and lift on the front end while they lifted on the back end. After failing to lift the car in this manner on account of its weight, "the conductor said, 'Twist one front wheel in and then the other, while we lift,' and I put all my strength on the one wheel and twisted it and at the same time I felt a snap in my back." The handle of the handcar was about on the same level as his feet. After the evidence in behalf of plaintiff had been taken and he had rested his case, and a motion by defendant to direct a verdict had been argued, plaintiff was recalled and testified that the handcar slipped owing to one of the men on the ground letting it go; that he was attempting to twist it and save it from going out of the car when he felt the snap in his back; that, if he had not let go, the car might have taken him out with it and probably have lit upon the other two men, and, in his judgment, the slipping of the car was due to a sudden jerk when one of the men on the ground tried to get a better grip on the handles.

The allegations of negligence in the petition are that defendant failed in its duty to see that the help furnished was sufficient to handle and load the handcar so as to avoid injury to the plaintiff; failed to furnish and provide skids and appliances or ways and means of loading heavy and

bulky articles; that, by its conductor, defendant carelessly and negligently ordered and directed the plaintiff to engage in a dangerous and hazardous undertaking, and carelessly and negligently gave him specific directions as to the manner in which he was to lift the handcar, which caused the body of plaintiff to become twisted in an unusual way and caused his spinal column and its tendons, muscles and ligaments to be bruised, torn and stretched; that plaintiff did not apprehend or understand the dangerous nature of the situation, and defendant negligently failed to caution him of the danger. It is alleged that he has become paralyzed as a result. He asks judgment for $65,000. The answer denied negligence of defendant, and alleged negligence of plaintiff and assumption of risk. The reply denied that the risk was open, obvious, apparent or known to the plaintiff. The jury returned a verdict for the plaintiff in the sum of $50,000.

The errors relied upon for reversal are: Improper activity of the trial court in the examination of witnesses and in remarks from the bench; error in excluding evidence offered by the defendant, and in the admission of improper evidence on behalf of plaintiff over objections; the giving of erroneous instructions to the jury; error in overruling defendant's motion to instruct a verdict in its favor; and that the verdict is excessive and contrary to law.

Defendant has collected and set forth in its brief a number of rulings and remarks made by the trial judge during the progress of the trial, and assigns error committed by frequent unnecessary and improper examination of witnesses by the judge. The taking of evidence covered about six days. It is possible for a trial judge to influence the jury by his manner, by the emphasis, or lack of emphasis, placed upon his certain words, and by other intangible methods not easily described, and which cannot be reproduced upon the written page. In a case involving medical expert testimony such as this, sometimes a question or rejury of such testimony to the facts. It is entirely proper mark by the court aids in the proper application by the

for the trial judge to aid in preventing misconception by properly directed questions or remarks. Of course, he should not go too far in this direction, especially in a criminal case. *Bartley v. State,* 55 Neb. 294. There is nothing wrong in a trial court asking questions when their tendency is only to develop the truth. *Leo v. State,* 63 Neb. 723. But juries are very apt, especially in doubtful cases, to be governed largely by the view the trial judge takes and to seize every indication of leaning by him to one side or the other as a guide to their action. Great care should be taken to avoid even the appearance of partiality. There were 4,511 questions asked at the trial. Complaint is made as to comparatively few remarks. When the whole record is considered, though more care might have been exercised in some instances, prejudicial error in this respect is not shown.

Aside from the very material question whether the handcar was loaded in the manner detailed by plaintiff, or whether it was loaded in the manner described by the conductor, by which method no twisting or displacement of the vertebræ could occur, the principal conflict in the evidence was over the question whether the injury to the spinal cord of plaintiff was caused by a dislocation of the vertebræ in the dorsal region due to a sudden strain placed upon him by attempting to lift a heavy weight in an improper position, thus causing a hemorrhage or apoplexy of the blood vessels of the spinal cord and subsequent degeneration of the cord at the fifth dorsal vertebra, as testified to by the medical witnesses in behalf of plaintiff, or whether it was caused by a complete transverse myelitis of the cord at the fifth dorsal vertebra as a result of syphilis, which was the opinion of the medical experts testifying on behalf of defendant. One who would read the testimony of the medical experts testifying in behalf of plaintiff would in all probability be fully satisfied and completely convinced that the degeneration of the spinal cord causing the paralysis resulted from a dislocation of the vertebræ, and would be also fully satisfied that, if the plaintiff's

version of the manner in which the handcar was loaded was true, the violent effort and overstraining it took to raise the car in its twisted position, and the slipping of the car in the hands of the other men, were the proximate and prevailing cause of his deplorable condition. On the other hand, the evidence of medical experts testifying on behalf of defendant seems fully as convincing that the destruction of the tissues of the spinal cord and consequent paralysis of the lower extremities were the result of a syphilitic infection of the blood vessels of the cord, causing a defective blood supply and consequent degeneration of that organ in the region of the fifth dorsal vertebra. It is impossible within the limits of this opinion to set forth the facts and reasoning by which each of these diverse opinions was reached. The jury might well have arrived at either conclusion. The saying is: "Who shall decide when doctor's disagree?" Under our system of jurisprudence, the jury, and not the court, is the body which is authorized by law to decide such a question, and there is sufficient evidence to support the finding that the accident caused the injury.

Whether the evidence sustains the verdict also depends in large measure upon whether the jury believed the testimony of the plaintiff or the testimony of the conductor and station-agent as to the manner in which the handcar was loaded, and the testimony of a number of experienced railroad trainmen as to whether it was proper and customary to load such handcars into boxcars by the use of only three men, without skids, planks or appliances whereby the handcar might be rolled into the boxcar. There was sufficient conflict between the testimony of the two classes of witnesses upon this point to justify a verdict either way. As to the manner in which this particular handcar was loaded, the testimony of the plaintiff was in direct conflict with that of the conductor and station-agent at Raymond who assisted in loading it. But it was the province of the jury to determine which of these witnesses was stating the facts as they actually occurred. This court has not the witnesses before it and has not the same facilities

for determining the truth or falsity of the respective narrations, even if this were within its proper function, which it is not. We are convinced that, if the jury believed the evidence on behalf of either plaintiff or defendant, there was sufficient evidence to sustain a verdict in favor of either party on this point.

The same reasoning applies to the assignment that the court erred in overruling defendant's motion to instruct a verdict in its favor.

Several questions are raised as to the privilege allowed confidential communications between physician and patient. At common law there was no such privilege. This rule still prevails when not changed by statute. The statutory privilege originated in a statute of New York passed in 1828. Its terms have been adopted in substance in many of the other states of the Union. Some courts have held that the statutes extending such a privilege to physicians or surgeons are remedial in their nature and should be liberally construed, while others take the view that they are in derogation of the common law, and an exception to the general rule; that the maxim, "*Expressio unius est exclusio alterius,*" should be applied and construed strictly; that unless the witness comes clearly within the class limited by the statute his testimony must be received, and that the burden of proving the right to the privilege is upon the person seeking to exclude the evidence. *Head Camp, W. O. W., v. Loeher*, 17 Colo. App. 247; *Colorado Springs & I. R. Co. v. Fogelsong*, 42 Colo. 341; *Indiana Union Traction Co. v. Thomas*, 44 Ind. App. 468; *Smoot v. Kansas City*, 194 Mo. 513; *Springer v. Byram*, 137 Ind. 15; *Masons Union Life Ins. Ass'n v. Brockman*, 26 Ind. App. 182; *Henry v. New York, L. E. & W. R. Co.*, 10 N. Y. Supp. 508; *Brown v. Hannibal & St. J. R. Co.*, 66 Mo. 588. In former decisions this court has seemed to rule in accordance with the view last expressed, and in view of the provisions of section 8835, Comp. St. 1922, we believe it to be the proper one to take. This section provides: "Every human being of sufficient capacity to understand the obligation of an

oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared." Certain classes of persons are then declared incompetent to testify under certain circumstances. Physicians or surgeons are not rendered incompetent by this section. Section 8840 provides: "No * * * physician or surgeon * * * shall be allowed in giving testimony to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." Section 8841 provides: "The prohibitions in the preceding sections do not apply to cases where the party in whose favor the respective provisions are enacted, waives the rights thereby conferred." A physician or surgeon therefore is a competent witness, except as to the class of confidential communications mentioned in section 8840, and also as to such communications if the privilege has been waived. *Sorensen v. Sorensen,* 56 Neb. 729; *Hayden v. Hayden,* 107 Neb. 806.

The witness Wheeler testified that he was a former sergeant in the medical corps of the United States army, stationed on the Mexican border; that he was not a physician; that he was in charge of a prophylaxis station and infirmary, and that his duties at the prophylaxis station were performed without the supervision of the medical officer. The following colloquy occurred: "Q. Did you have occasion to give attention to Arlie W. Culver at one or more of those prophylaxis stations? Q. (By Mr. Bartos) Were you acting under the orders or directions of the doctors? A. Yes, sir. Q. (By the Court) The medical officer? A. Yes, sir." The question was then asked: "Q. Did Mr. Culver ever come to you personally for treatment at a prophylaxis station when there was no medical officer or physician present?" An objection made for the same reason was sustained. The defendant offered to prove that the witness "had personal charge without the presence or supervision of any officer of the medical corps or any physician of the administration of the prophylaxis or prophy-

lactic treatment for the prevention or control of the infection of gonorrhea or syphilis; that on numerous occasions during said period the plaintiff, Arlie W. Culver, came to the said prophylactic station and stated to the witness that he had recently had sexual intercourse and desired to receive treatment, and at that time the witness personally administered and supervised said treatment." He also offered to prove that the treatment administered by him to the plaintiff was the treatment required by the war orders or regulations of the United States army, and not a treatment prescribed by physicians, and that the treatment was personally administered by the witness without instructions or directions of any medical officer, but in the regular routine of his duties. This offer was rejected.

The statute is not intended to conceal relevant facts not communicated confidentially to a physician in his professional capacity. A druggist may testify as to the kind of drugs furnished; a dentist is not within the privilege; and a professional nurse not assisting a doctor is not. *Hobbs v. Hullman,* 171 N. Y. Supp. 390; *People v. DeFrance,* 104 Mich. 563, 28 L. R. A. 139; *People v. Schuyler,* 43 Hun (N. Y.) 88; *Deutschmann v. Third Avenue R. Co.,* 84 N. Y. Supp. 887; *Kendall v. Grey,* 2 Hilt. (N. Y.) 300; *Brown v. Hannibal & St. J. R. Co., supra.* The burden of establishing the privilege has not been met by plaintiff with respect to this testimony, and since whether or not plaintiff was infected with syphilis was a very material question in the case, it was prejudicial error to exclude the offered proof.

It is assigned that prejudicial error was committed by the court when it sustained objections to the testimony of Miss Clara Rhodes as being a privileged communication. Miss Rhodes was superintendent of nurses at Dr. Fall's hospital at the time plaintiff was taken there. Preliminary inquiries were made as to the facts surrounding her duties in the hospital. Defendant offered to prove by this witness that she was present when a specimen of blood was taken from the plaintiff by Dr. Fall; that she sent this to the state laboratory at Lincoln, Nebraska, together with

a blank requesting a Wasserman test to be made of the blood, to which the name of Dr. Fall was signed, and that a few days after the specimen was mailed a report was received from the laboratory, directed to Dr. Fall, showing the result of the Wasserman test to be four plus positive. Defendant also offered to prove that the witness administered to the plaintiff at various times while he was at the hospital doses of potassium iodide and bichloride of mercury, and that she prepared injections of salvarsan.

At the time the Nebraska statute was enacted the profession of graduate or registered nurse had scarcely come into being. Observing that the same reasons which caused the extension of the privilege to physicians applied with equal force to professional nurses, New York and Arkansas have amended their statutes so as to include "a professional or registered nurse." But the legislature of Nebraska has not included such persons within the privileged class, and a nurse, merely as such, is not within such class. *Homnyack v. Prudential Ins. Co. of America*, 194 N. Y. 456. A different rule prevails where the nurse acts as one of the agents or assistants of the physician in charge. A nurse is often necessarily present at conversations between the patient and the doctor with respect to the ailment or condition of a patient, and little good would be subserved if the lips of the doctors might be sealed by the statute as to such conversations but the nurse or attendant might freely testify to all that was said and everything that was done. The purpose of the law is to protect the right of privacy, and while its scope should not be unduly extended, its very intention might be completely thwarted by the admission of testimony from this class of witnesses. In such case, if she received or heard confidential communications from a patient "necessary and proper to enable him (the physician) to discharge the functions of his office according to the usual course of practice," then the privilege extended to the physician extends equally to the nurse. 5 Wigmore, Evidence (2d ed.) secs. 2321, 2380-2383. There was no error in this ruling.

On his examination in chief plaintiff testified that he went to see the company physician, Dr. Mitchell. "Q. What happened after you went to see him? A. He made an examination quite thorough, and he said I had a gall bladder trouble, and advised me to go to Omaha to the company hospital for an operation at once, and I told him that I didn't feel that I could, that I would have to go home first." He also testified that the doctor gave him a prescription and a note to another doctor. Dr. Mitchell was called for the defense. He testified that he made an examination of plaintiff. Questions asking for what purpose this was made, whether plaintiff made any statement to him at that time with reference to the nature of his ailment or the symptoms of any ailment, as to what conversation he had with reference to the complaint of plaintiff, and whether plaintiff gave any information as to an injury, were objected to as privileged, and the objection to the questions and to the offer of proof was sustained. Irrespective of the statute as to waiver of privilege, the statute provides that, when a part of a conversation is given in evidence by one party, the whole of it on the same subject may be inquired into by the other. Comp. St. 1922, sec. 8849. Defendant was entitled to introduce the whole conversation. It was error to exclude the offered testimony. *Union P. R. Co. v. Thomas*, 152 Fed. 365.

In the direct examination of the plaintiff, he testified, in substance, that up to December 17, 1920, his physical condition was nearly perfect, that he had malarial fever for about a month when he was on the Mexican border, in the army, and that he recovered. He was then asked, "Did you ever suffer with anything else that you can recall at this time? A. No, sir." On cross-examination he was asked, "Isn't it a fact, Mr. Culver, that you were treated for a chancre by a medical officer while down on the border?" Plaintiff objected to this question as not proper cross-examination, and the objection was sustained. If the witness had answered in the affirmative, it would have tended to contradict his evidence in chief and to support the opin-

ion of the doctors called by defendant, that the injury to his spine was the result of a syphilitic affection. This was proper cross-examination, and the exclusion of this testimony was prejudicial. *Livingston v. Omaha & C. B. Street R. Co.*, 104 Neb. 118.

The negligent acts complained of in the petition were the failure to furnish sufficient help and the negligent order of the conductor to load the handcar in the manner in which the plaintiff testifies he was directed to lift. A majority of the court take the view that, since the expert medical testimony in behalf of plaintiff is to the effect that "lifting on the handcar in the ordinary way would not produce any lesion whatsoever," and that the injury was "due to sudden extension with rotation of a vertebra in the dorsal region, which was due to a sudden strain placed upon him by overweight in an improper position," the question whether there was a negligent order and whether this was an unusual and extraordinary risk, which the plaintiff did not assume, were questions for the jury.

The remaining questions are concerned with whether there was error in the giving of certain instructions to the jury, and whether the verdict is excessive and the result of passion and prejudice. It must be noted here that defendant tendered no instructions to the court presenting its particular theory of the case. In this connection it must be said that, even if some of the instructions were slightly inaccurate, where the trial court has not had the opportunity of being informed as to what the contention of the complaining party is as to the points of law involved, this court will not examine a charge with such a critical mind as where the trial judge has had the benefit of the views of such party as to the proper legal principles applicable.

In stating the issues to the jury, the trial judge gave, to the length of nearly six typewritten pages, a substantial copy of the pleadings in the case. Some of the statements in the petition are not supported by proof. We have often criticised the practice of copying lengthy pleadings into the instructions given by the court, and have said that

the trial judge should eliminate from the statement of the issues irrelevant and redundant matter, as well as allegations which the evidence has failed to substantiate. It is difficult for the jury in a lengthy trial to discriminate between charges of negligence submitted to them in instructions of the court from those which have been established by the evidence, and they may think that if these were not in evidence they would not have been mentioned by the judge. Several judgments have been reversed by this court on account of this practice. *Hutchinson v. Western Bridge & Construction Co.*, 97 Neb. 439; *Lang v. Omaha & C. B. Street R. Co.*, 96 Neb. 740; *Spieler v. Lincoln Traction Co.*, 103 Neb. 339; *Hanna v. Hanna*, 104 Neb. 231.

Since the question may arise upon a new trial, it is suggested that in computing the damages recoverable for loss of earning capacity in actions for damages for personal injuries, under the federal employers' liability act, adequate allowance should be made for the earning power of money, and when future payments are to be anticipated the verdict should take into account the present value of the annual payments of which plaintiff in such a case, or his beneficiaries, have been deprived. Damages for pain and suffering are not to be awarded as upon the basis of present worth based upon the life expectancy of the plaintiff, but as a gross sum presently payable. *Sweat v. Hines*, 107 Neb. 1; *Chesapeake & O. R. Co. v. Kelly*, 241 U. S. 485.

In view of the errors at the trial herein discussed, and of the fact that some of the other complaints made may be obviated on another trial, the judgment is reversed and the cause remanded.

REVERSED.

Note—See Appeal and Error, 3 C. J. p. 858, sec. 758; Damages, 17 C. J. p. 907, sec. 196; p. 926, sec. 222; p. 1059, sec. 361—Master and Servant, 26 Cyc. pp. 1095, 1478; Witnesses, 40 Cyc. pp. 2383, 2388.