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REPORTS

OF

CASES DETERMINED

BY THE

SUPREME COURT

OF THE

STATE OF MISSOURI

Between June 25, 1919, and December 1, 1919.

PERRY S. RADER,

REPORTER.

VOL. 279.

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JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. HENRY W. BOND, Chief Justice.*
HON. ROBERT FRANKLIN WALKER, Chief Justice.*
HON. CHARLES B. FARIS, Judge.*
HON. JAMES T. BLAIR, Judge.
HON. ARCHELAUS M. WOODSON, Judge.
HON. FRED L. WILLIAMS, Judge.
HON. RICHARD L. GOODE, Judge.*
HON. JOHN I. WILLIAMSON, Judge.*

FRANK W. MCALLISTER, Attorney-General.
J. D. ALLEN, Clerk.
H. C. SCHULT, Marshal.

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*NOTE.—On September 13, 1919, Hon. Henry W. Bond died, and on October 13th Hon. Robert Franklin Walker was elected Chief Justice. Hon. Richard L. Goode of St. Louis was appointed by Governor Gardner on October 23rd to fill the vacancy caused by the death of Judge Bond, and qualified on November 1st. Judge Charles B. Faris resigned to become Judge of the District Court of the United States for the Eastern District of Missouri, and Hon. John I. Williamson of Kansas City was on November 1st appointed by the Governor to fill the vacancy and qualified November 3, 1919.

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JUDGES OF THE SUPREME COURT

BY DIVISIONS.

DIVISION ONE.

HON. JAMES T. BLAIR, Presiding Judge.
HON. HENRY W. BOND, Judge.*
HON. ARCHELAUS M. WOODSON, Judge.
HON. WALLER W. GRAVES, Judge.
HON RICHARD L. GOODE, Judge.*
HON. STEPHEN S. BROWN, Commissioner.
HON. WILLIAM T. RAGLAND, Commissioner.
HON. CHARLES EDWIN SMALL, Commissioner.

DIVISION TWO.

HON. FRED L. WILLIAMS, Presiding Judge.
HON. ROBERT FRANKLIN WALKER, Judge.
HON. CHARLES B. FARIS, Judge.*
HON. JOHN I. WILLIAMSON, Judge.*
HQN. NORMAN A. MOZLEY, Commissioner.
HON. ROBERT T. RAILEY, Commissioner.
HON. JOHN TURNER WHITE, Commissioner.

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*NOTE.—Hon. Henry W. Bond died September 13, 1919, and was succeeded by Hon. Richard L. Goode. Hon. Charles B. Faris resigned and was succeeded November 3rd by Hon. John I. Williamson.

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CASES DETERMINED

BY THE

SUPREME COURT

OF THE

STATE OF MISSOURI

APRIL TERM, 1919.

(Continued from Vol. 278.)

JOHN P. ORRIS, Appellant, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

In Banc, June 25, 1919.

1. **INSTRUCTION: Not to Consider Character of Injury: Misleading.** In a case in which the character of the injury is a material link in the chain of circumstances tending to show negligence, an instruction which declares "the court instructs you that the mere fact that plaintiff was injured while employed by defendant is of itself no evidence whatever of defendant's negligence or liability, and there can be no recovery by the plaintiff unless the plaintiff has by a preponderance of the creditable evidence in the case established negligence on the part of the defendant, as described in other instructions herein," is misleading and harmful, in that it authorizes the jury to disregard the character of plaintiff's injury, and to conclude that "the creditable evidence" means evidence other than evidence as to the injury and character of the injury.

Held, by BOND, C. J., dissenting, that injury does not of itself warrant an inference of negligence in cases in which the doctrine of *res ipsa loquitur* has no application.

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2. ———: **Limiting Evidence to Circumstantial Evidence.** Where all the evidence pertaining to the particular issue submitted by the instruction is circumstantial, a statement therein that plaintiff seeks to prove such issue by circumstantial evidence is not error; but if there is positive and direct evidence on that particular issue an instruction restricting the proof to circumstantial evidence would be misleading.

3. ———: **Assumption of Fact.** An instruction should not assume the existence of a disputed fact. Even when there is ample evidence from which the jury may find that the tool furnished the employee was in usual and ordinary repair, that fact does not justify an assumption in the instruction that the tool was in usual and ordinary repair.

4. ———: **Conflicting: Omitting Element of Negligence: Safe Condition.** An instruction which directs a verdict for defendant if the spark-arrester of the engine on which plaintiff was fireman was in good condition, conflicts with one given for plaintiff which requires the flues also to be in good condition, the petition having charged that the injury to his eye by a burning cinder was due to a combination of defects in the flues and the spark-arrester. There being positive evidence that the flues were stopped up, and that their defective condition might have caused the injury even if the spark-arrester was in good condition, an instruction which omits all reference to the flues and directs a verdict for defendant if the spark-arrester was in good condition is error.

5. **EVIDENCE: Proof of Reputation for Truth: No Attack: Contradictory Statements.** Where there is no direct impeachment of a witness, that is, where no attempt is made to show that his reputation for truth and veracity is bad, evidence showing that his reputation is good is not admissible. Although he has made contradictory statements, either out of court, or in a former deposition, or upon a severe cross-examination at the trial, those things go to his credibility and not to his general reputation, and evidence to show his reputation for truth and veracity to be good is not admissible. [Disapproving a contrary rule announced in Miller v. Railroad, 5 Mo. App. l. c. 481; Walker v. Insurance Co., 62 Mo. App. l. c. 220, and other cases decided by the Courts of Appeals.]

Appeal from Grundy Circuit Court.—*Hon. George W. Wanamaker*, Judge.

REVERSED AND REMANDED.

Platt Hubbell and *Geo. H. Hubbell* for appellant.

(1) The defendant's instruction numbered 1 is erroneous in that said instruction tells the jury that the

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injury to plaintiff's eye is no evidence whatever of negligence. The nature and character of the injury, the manner in which the injury was received and the facts surrounding the injury are evidence for plaintiff tending to show negligence on the part of the defendant, and the court erred in withdrawing this evidence from the consideration of the jury by this instruction. Walker v. Railroad Co., 178 S. W. 110; 2 Thomp. Neg. sec. 2293; Texarkana Ry. Co. v. O'Kelleher, 21 Tex. Civ. App. 96; Myers v. City of Independence, 189 S. W. 823; Railway Co. v. Howard, 124 Ark. 588; Flannery v. Railway Co., 44 Mo. App. 400; Melican v. Electric Co., 90 Mo. App. 599, 602; Peeler v. McMillan, 91 Mo. App. 316. (2) Defendant's instruction numbered 2 is erroneous in that said instruction places the test of negligence as "when in usual and ordinary repair . . . under such circumstances" regardless of whether due care was exercised in keeping the netting in proper repair, and allowed the defendant to set up its own standard of reasonable care; and, said instruction concludes with a comment on the effect and weight of the evidence, in the nature of an argument on behalf of defendant; and, this instruction assumes the exercise of ordinary care on the part of the defendant. Railway Co. v. Proffitt, 36 Sup. Ct. Rep. 622; Frazier v. Smelting & Refining Co., 150 Mo. App. 430; Flannery v. Railway Co., 44 Mo. App. 400. (3) The defendant's instruction numbered 3 is erroneous in that said instruction arbitrarily classes all of plaintiff's evidence as circumstantial evidence and contains the erroneous and misleading abstract direction to the jury, to-wit: "it devolves upon the plaintiff to prove to your reasonable satisfaction that each one of the circumstances has been established by the evidence." Bryce v. Railway Co., 129 Iowa, 342; 38 Cyc. 1739; State ex rel. Fire & Marine Ins. Co. v. Ellison, 187 S. W. 23; Railway Co. v. Watson, 190 U. S. 287, 47 L. Ed. 1057; Schmidt v. Dubuque County, 136 Iowa, 403; Jackson v. Railroad Co., 31 Iowa, 355; St. Louis Railway Co. v. Brothers, 165 S. W. 488; 3

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Ency. Ev. 63, 64, 65; 2 Thomp. Neg. secs. 2260, 2291, 2293. There is direct evidence of negligence against defendant, in addition to circumstantial evidence. (4) The defendant's instruction numbered 4 is erroneous in that said instruction assumes that the alleged inspection on the part of the defendant was in the exercise of reasonable and due care, and said instruction submits to the jury the issue of the netting suddenly becoming out of repair after the departure of the engine from Trenton, and before it reached the point where plaintiff was injured, while there is no evidence upon which to base such an instruction and said instruction permitted the jury to wander into conjecture when such a possibility was not even suggested in the course of the trial. And, said instruction singles out the defendant's evidence of inspection and makes an unwarranted comment thereon. Holden v. Mo. Pac. Ry. Co., 177 Mo. 469; McKeon v. Railway Co., 42 Mo. 84; Scholthauer v. Railway Co., 89 Mo. App. 72; Meyer v. Railroad, 45 Mo. 138. (5) The defendant's instruction numbered 5 is erroneous because it is an argument on the part of defendant, and is an abstract proposition tending only to mislead and misguide the jury. 3 Elliott on Railroads, sec. 1245b; Louisville Ry. Co. v. Sullivan Timber Co., 138 Ala. 379; Coleman v. Railway Co., 36 Mo. App. 491. Plaintiff offered to prove and introduce evidence showing his good reputation. Defendant had offered evidence of alleged contradictory statements out of court, which entitle the plaintiff to this evidence. Miller v. Railroad, 5 Mo. App. 481; Walker v. Ins. Co., 62 Mo. App. 220; Browning v. Railroad, 118 Mo. App. 451; Berryman v. Cox, 73 Mo. App. 74; Landers v. Railroad, 134 Mo. App. 89; Gourley v. Callahan, 176 S. W. 239, 190 Mo. App. 666; Ross v. Grand Pants Co., 170 Mo. App. 291; Texas Cent. Ry. Co. v. Weidman, 62 S. W. 810; 39 Am. & Eng. Ency. Law (2 Ed.), p. 1150; Alkire Grocer Co. v. Tagart, 78 Mo. App. 166.

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Paul E. Walker and *A. G. Knight* for respondent.

(1) Defendant's instruction No. 1, given by the court, was accurate, and enunciates a correct principle of law. Blanton v. Dold, 109 Mo. 74; McFern v. Gardner, 121 Mo. App. 6; Warner v. Railroad, 178 Mo. 133; Burns v. Railroad, 176 Mo. App. 338. (2) The criticism of defendant's instruction numbered 2 is without merit. This instruction simply told the jury that plaintiff assumed the risk from cinders getting in his eyes, such as usually and ordinarily escaped through the mesh of the netting in use on the engine at the time of plaintiff's injury, when in usual and ordinary repair. The mesh of the netting—three-sixteenths of an inch—was admitted on all sides to be standard; the netting was admitted to be the standard kind in use by all roads; the only question was, whether it was out of repair by having had holes larger than three-sixteenths of an inch, either burnt or worn in it. Miles v. Coal & Coke Co., 172 Mo. App. 239, 240. (3) The objection to a portion of defendant's fourth instruction is not well taken. The plaintiff's criticism states that this instruction permitted the jury to wander into conjecture. The only question of "conjecture" is, whether the netting ever became out of repair, and we frankly concede there was no proven fact on which to base such a conclusion, but the mere "conjecture" or "guess" of the plaintiff as to the size of the flying cinder, but this "guess" was resolved in his favor by the court, and disbelieved by the jury, and he cannot complain. Krampe v. Brewing Association, 59 Mo. App. 281; Redmond v. Railroad, 225 Mo. 739; Howard v. Railroad, 173 Mo. 524; Bennett v. Lumber Co., 116 Mo. App. 699; Kelley v. C. & A. Railroad, 105 Mo. App. 365; Hach v. Railroad, 117 Mo. App. 11. (4) As to what amount of impeachment or what amount of cross-examining, or what amount of contradicting a witness, will allow of reinstatement of such witness by character proof, has been the subject of much discord in this State, as a reference to the opin-

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ions and dissenting opinions will show. But, an examination of the cases on this subject in this State will show that at least the witness's character must have been assailed, by imputing criminal conduct or moral turpitude, or impeachment of the witness's general character, in order to admit of such sustaining evidence, as distinguished from a mere contradiction, or an intimation of the want of credence in his story, or of intense interest or zeal, or the lack of recollection, or want of candor or frankness, or other of the many incidents of cross-examination. Fulkerson v. Murdock, 53 Mo. App. 151, 123 Mo. 292; Gourley v. Callahan, 190 Mo. App. 670; Ross v. Grand Pants Co., 170 Mo. App. 293.

GRAVES, J.—Whilst in the service of the defendant as fireman upon an interstate train, the plaintiff lost his left eye by reason of a burning or hot cinder escaping from defendant's engine. Plaintiff says the defendant was negligent in furnishing to him and his crew an engine which was out of repair, and that his injury was the result of such negligence.

The action is one under the Federal Act. He states the alleged negligence of the defendant thus:

"Said engine was defective in that some of the flues of said engine permitted water to leak onto the flue-sheet from the boiler of said engine, and in that some of the flues of said engine were stopped up, honeycombed with impurities and chemicals from the coal and parts of the coal and cinders, and some of said flues were stopped and filled with a mixture of cinders and coal formation, which prevented said flues from performing their proper function and which prevented the passage of smoke and flame through them; and said condition of the aforesaid flues was caused by the negligence of the defendant; and said condition of said flues required the other and remaining flues of said engine to do the work of those which were so stopped up and filled, and caused said remaining flues, which

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were open, to draw abnormally and unreasonably on the fire of said engine, and caused said remaining and open flues to pull ignited particles of coal and pieces of slack through said open and remaining flues, before said ignited pieces of coal and slack had been thoroughly burned and while the same were afire and alive and burning and caused said ignited pieces of coal and pieces of slack to escape from the smoke-stack of said engine as live cinders, burning and afire; and said engine was defective in its smoke-box netting and defective in its diaphragm and its deflector plate and defective in its other apparatus and equipment for the prevention of the escape of burning and live cinders from its smoke-stack; and said engine was defective in its steam valves, and said steam valves on both sides permitted steam to escape up the smoke-stack without going into the cylinders of said engine, and said escaping steam contributed to the passage of live and burning cinders and live and burning pieces of coal and slack up and through the smoke-stack of said engine; and said engine, by reason of the aforesaid defects, and by reason of other defects now unknown to the plaintiff, threw an unusual, unreasonable and extraordinary amount and quantity of burning coal, burning and live pieces of slack, and burning and hot cinders from its smoke-stack; and in its running and progress on the aforesaid date, said engine emitted and threw out large quantities and amounts of burning and flaming pieces of coal and slack; and, said engine then and there was not in a reasonably safe condition to be run and operated on said trip over the defendant's said track.

"The aforesaid defective condition and defects of said engine were then and there well known to the defendant, and the defendant might have known of the same by the exercise of reasonable care and diligence.

"The defendant, by the means and in the manner aforesaid, then and there and thereby negligently failed to furnish the plaintiff and his crew with a reasonably

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safe locomotive engine; and the defendant then and there and thereby negligently required the plaintiff and his crew to work with a locomotive engine which was not reasonably safe."

In its answer the defendant admitted its corporate capacity and that it was a common carrier of both passengers and freight for hire. Its further answer was (1) a general denial, (2) assumption of risk, and (3) contributory negligence. The reply was in conventional form. In the trial *nisi* the defendant had a verdict and judgment, from which the plaintiff has appealed.

As fireman on Engine No. 2028, the plaintiff left Trenton, Missouri, for Horton, Kansas, a distance of 120 miles. There is no question of the interstate character of the train which was pulled by this engine on January 31, 1914, the date of the injury. This train left Trenton early in the morning and reached Horton about five or six o'clock in the afternoon. At Jamesport Hill (something near ten miles from Trenton) plaintiff, in the performance of his duties, leaned out of the cab window to look for a semaphore, which would indicate "a block" of the road, by some other train, which train was then expected. Whilst so doing he was struck in the left eye by a hot cinder from the smock-stack of the engine, and from the injury received to this eye, it had to be removed in a very short time thereafter, and plaintiff thereby rendered unfit for further railroad service. Plaintiff says that he saw the cinder just as it struck him, and saw a portion of it as it fell off, and glanced toward the ground. He says that he knows that it was larger than a pea, and in more than one place says that in his judgment it was more than a quarter of an inch through—from a quarter of an inch to three-quarters of an inch, is his positive evidence in more than one place in the record.

Engine No. 2028 was called an engine of the 2000-class. At the rear was a fire-box, where the firing was done, and in which would be gas, flame, smoke, cinders,

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coal and fire. From a flue sheet in this fire-box in the rear ran 340 flues, 2 inches in diameter, 6 inches in circumference, and 15 feet long, to a flue sheet in the "smoke box" in the front of the engine. The exhaust of steam by the engine creates a vacuum in this "smoke box," and the suction draws the gas, smoke, and cinders through these flues from the fire box to the smoke box. The cinders (coming through these flues and as they reach the smoke box) strike a deflective plate and by suction are drawn toward the front of the smoke box up through a netting or spark arrester, and are then expelled through the smoke-stack. This wire netting is of a three-sixteenth inch mesh, but it is so arranged that the cinders do not strike it at right angles. It is slanted so that the cinders strike it at a different angle, and the experts in the case say that owing to the slant of this wire netting (if the netting is sound and not burned out or broken) the cinder which passes through would have to be less than three-sixteenths of an inch in diameter. These experts say that with a sound netting or spark arrester the cinders passing through would be of the size of a pin head to a grain of wheat.

Plaintiff testified that about one-fourth of the 340 flues in this engine were clogged up and not working, and he and other experts say that the effect of this would be to have the other flues draw harder, and thereby draw larger burning cinders from the fire box to the smoke box, which larger and hotter cinders might accumulate on this cinder screen or spark arrester and burn it out.

They say that the remaining flues have to draw harder, because the vacuum which is to be filled, is the same, and the flues to fill it are less in number. The evidence of the experienced men fix the size of the largest cinder which can pass through a perfect or sound spark arrester at the size of a grain of wheat. Plaintiff himself was a man of long experience with an

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engine, but this evidence comes from others of equal experience, and disinterested in the case.

Plaintiff testifies to the size of the cinder which struck him, and says that a cinder of that size could not have passed through the mesh of an arrester as used upon that class of engine, if the arrester had been in good condition. Defendant's evidence tended to prove that the engine had been inspected both before and after the trip made by plaintiff (upon which trip he was injured) and that the flues and spark arrester were in good condition. Further details will be left for the opinion. The assigned errors here go to the giving of sundry instructions for the defendant, and the exclusion of certain evidence offered by the plaintiff.

I. The plaintiff says that there was error committed by the court in giving for defendant its instruction numbered 1, which reads:

"The court instructs you that the mere fact that plaintiff was injured while employed by defendant, and the fact that he has sued to recover damages therefor, are of themselves no evidence whatever of the defendant's negligence or liability in this case, and there can be no recovery by the plaintiff in this case, unless the plaintiff has, by a preponderance of the credible evidence in the case, established negligence on the part of the defendant, as described in other instructions herein."

We think this instruction misleading and harmful in this case. Let us shorten the instructions so that its view may more fully appear. Thus shortened it reads: "The court instructs you that the mere fact that plaintiff was injured while employed by defendant . . . *is of itself* no evidence whatever of the defendant's negligence or liability in this case, and there can be no recovery by the plaintiff in this case, unless the plaintiff has by a preponderance of the creditable evidence in the case established negligence on the part of defendant, as described in other instructions herein."

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From this instruction the jury could well draw the conclusion that they should not consider the injury to plaintiff in determining the matter of defendant's negligence. They could well draw the conclusion that they should not consider the character of injury to plaintiff in determining the matter of defendant's negligence. They could well conclude that "the credible evidence" used in the latter part of the instruction meant evidence other than evidence as to the injury and the character of the injury. In this particular case the character of the injury is a material link in the chain of circumstances tending to show negligence. To make the matter clearer some additional facts in evidence should be stated. There is evidence tending to show that when the netting is in proper shape only small cinders escape through the smoke-stack, and that after night they would look to be alive and "just a minute and they were out: they were fine cinders." The evidence also shows that with some flues not working the suction through the others is greater, and this tends to throw the cinders out of the smoke-stack with more force and velocity. In addition the plaintiff says this particular cinder burned his eye, indicating heat and size.

So taking all the facts, the very character of the injury would be a link in the chain of circumstances tending to prove a defective spark arrester, or negligence. The eye being burned indicates heat in the cinder, as well as size. The small cinders lose their heat more rapidly upon exposure to the air. The large cinder carries its heat or burning power longer and further. So the character of the injury in a case like this, tends to show a larger cinder, and a larger cinder tends to show a defective spark arrester. In cases like this the jury should consider the injury and its character in an effort to determine negligence. This instruction in our judgment is misleading upon this matter.

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It is true that the mere fact of injury, standing alone, is no proof of negligence. In Blanton v. Dold, 109 Mo. l. c. 74, this court said: "The mere fact of an injury to plaintiff does not necessarily create a liability or warrant an inference of defendants' negligence. The burden of proof was on plaintiff to establish, directly or by just inference, some want of care to which his injury might fairly and reasonably be traced."

There is a line of cases to like effect. But these cases do not conflict with the views we have expressed in this case. These cases do not say that the character of the injury inflicted may not be a circumstance tending to show negligence, or a fact from which when coupled with other facts, negligence may not be inferred.

Instruction No. 1 says that the mere fact that plaintiff was injured is no evidence whatever of defendants' negligence. This naturally led the jury to believe that they should not consider the injury in determining negligence in this case. We think the instruction wrong and so rule. The instruction, under the peculiar facts in this case, is but little better than the instruction so forcibly condemned by BROWN, C., in Myers v. City of Independence, 189 S. W. l. c. 823. After setting out the instruction, our learned Commissioner commented thus: "The instruction illustrates that masterly use of language by which even experts are puzzled and juries wait with patience for such explanation as their author can give of the meaning of the terms he has used. It tells them that unless he has proven his case by the greater weight of the testimony they must disregard the fact that he received injuries. In a case in which, according to all authority, the fact that he received injuries cuts so large an evidential figure, it is important that the jury should be plainly instructed whether he must prove his case by the greater weight of evidence before the jury could take into consideration the fact that he was injured, or whether the fact that he was injured by the turning of the current of electricity through his body might be taken into consideration in proving 'his case'

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is not explained. A careful reading of this instruction impresses us that the words we have italicized have no logical or grammatical office in it, other than that which lies in the Websterian definition of the word 'injury' as 'an act which damages, harms, or hurts,' or its legal definition, 'an actionable wrong.' In a case of this character where so much depends upon the deduction of fact to be drawn from the occurrence of the injury the vice of such an instruction is especially manifest."

So we say of this instruction. It is misleading to the utmost. From it the jury could readily conclude that in determining negligence or liability, they should entirely exclude the injury and its peculiar character.

In Walker v. Railroad, 178 S. W. l. c. 109, we had before us this instruction: "The mere fact, if it be a fact, that plaintiff was injured, does not entitle her to recover in this case, and you should not allow such fact to influence you in arriving at your verdict." In that case, like this, the jury had found for the defendant. The foregoing instruction had been given for the defendant. Of this instruction, at p. 110, we said: "The court instructs the jury at the instance of defendant that they should not allow the fact that the plaintiff was injured to influence them in arriving at their verdict. While we understand that the fact of injury is not alone sufficient to authorize a recovery on the ground of negligence, we do not understand how it is possible for the jury to remain uninfluenced by the existence of a fact, the existence or non-existence of which is the ultimate subject of their injury. The fact that plaintiff was permitted to fall to the ground is the negligence charged. Negligence is predicated upon the fact, which the jury must find, that the fall is liable to injure her, and they must also find that the injury was the immediate result of letting her fall. There is a refinement somewhere in this instruction which we are unable to grasp, and we think that is sufficient reason for withholding the task from the jury."

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So we say in this case. The task of grasping defendant's Instruction No. 1 should have been withheld from the jury.

II. Complaint is also lodged against Instruction No. 3 given for defendant. This instruction, as far as pertinent, reads:

"You are instructed that there is no evidence in this case that the netting in use on engine 2028 on the occasion of plaintiff's injury was not a proper kind of netting and of sufficient structure and standard-make and the kind in general use on the roads of this country. The only claim of negligence in respect thereto by plaintiff being that such netting had in some way become so out of repair that at the very time and place of plaintiff's alleged injury, it would permit the escape of uncommon and unusually large cinders—larger in size than when netting was not so out of repair, and the plaintiff *on this issue* seeks to establish such facts of such netting being out of repair at the very time and place, as above mentioned, by what is known in law as circumstantial evidence."

Circumstantial Evidence.

It is urged that the instruction "arbitrarily classes all of plaintiff's evidence as circumstantial evidence" and is therefore erroneous. In 38 Cyc. 1739, the correct rule is stated thus: "A statement that plaintiff had sought to prove his case by circumstantial evidence is reversible error where it is sustained by direct and positive evidence."

But this instruction only says that the plaintiff undertook to prove a defective screen or spark-arrester by circumstantial evidence. It limits, by language, the question to that one issue. Now as a fact is the statement in the instruction correct? Upon that issue, the thing to be proved was a defective spark-arrester. No one, for plaintiff, testifies that he saw the spark-arrester, or saw defects therein. Plaintiff undertook to show that there were defects in the arrester by showing a state of facts from which the jury could infer that the

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arrester was defective. It is true that he proved by experts that a good arrester could not emit cinders larger than a grain of wheat, yet after all, the thing to be proven was defects in the arrester, and in my judgment all the facts proved were only facts from which the inference of defects could be drawn. This makes circumstantial evidence, and we see no error in the instruction. Of course there was direct evidence on the question of the flues being out of condition, but this instruction does not touch that question. The instruction speaks only of the netting and limits what it says to "this issue."

III. Instruction No. 2 for the defendant reads:

"The jury are instructed that by accepting employment as a fireman on the defendant's railroad, the plaintiff assumed all the risks and dangers ordinarily incident to such employment as a fireman, and this included all the risks and dangers from cinders getting in his eyes, such as usually and ordinarily could or would escape through the mesh of the netting in use on the engine at the time of the plaintiff's alleged injuries when in usual and ordinary repair, and for the escaping of cinders through such netting under such circumstances, there can be no recovery by the plaintiff—and this is true, regardless of the condition of said cinders as to being hot or otherwise."

Assumption of Fact.

Much is said about this instruction by learned counsel for the appellant. To our mind the defect in the instruction lies in the fact that it assumes that the defendant had exercised usual and ordinary care in the use of netting of the character used on this engine. The instruction does not leave it to the jury to determine, from the evidence, the fact as to whether or not usual and ordinary care had been exercised by defendant in this regard. There was ample evidence from which the jury could have found that the netting in use upon this engine was such as was generally used by persons in the same line of business, and from this to find that defendant had acted with usual and ordinary

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care in using this particular kind of netting, and was therefore not guilty of negligence in using it, whilst in a proper state of repair. Yet this does not always justify the assumption made in this instruction. The only thing which can be said is, that the assumption made in the instruction might be said to be harmless, or perhaps justified, on the theory that there was no countervailing proof upon the question of the general use of such netting. If this were the only error, we would feel loth to disturb the verdict. It is always best, however, to omit assumption of fact in an instruction.

IV. Instruction No. 4 for defendant reads:

"Unless the plaintiff has satisfied the jury by a preponderance—that is, by the greater weight of the credible evidence in the case—that at the very time and place of his injury, if any, the netting in the front end of Engine 2028 had become so out of repair by use or otherwise, as to allow the passage through the same of unusually large cinders, and larger than those passing through the same when in ordinary repair, the verdict and finding of the jury will be for the defendant. And, in this connection, the jury are told that if they believe and find from the evidence that such netting was inspected in the defendant's shops at Trenton, Missouri, before starting on its trip for Horton, Kansas, and was in reasonable and ordinary repair when so inspected, then even though the jury might believe that at some time after its departure and before reaching the point where plaintiff claims to have received his injury, such netting became suddenly out of repair, such fact would not warrant the jury in finding the defendant negligent and would not therefore authorize a recovery by plaintiff."

Conflicting Instruction.

It is urged that there is no evidence to show that the netting became suddenly out of repair. There is evidence of an inspection before the engine left Trenton, and it was out of repair before it had run ten miles according to plaintiff's testimony. So that if the in-

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spection was a careful one, and the condition reported was the true condition, there is some evidence to justify the clause condemned by plaintiff's counsel.

However, the trouble that we see with this instruction arises from other sources. In the first place, it assumes a reasonably careful inspection by defendant's agents. It should not do that.

But the real poison lies in the fact that it denies a recovery to plaintiff, if the jury should find that the netting was in a good state of repair when the engine left Trenton. This overlooks the fact that negligence was also charged as to the condition of the flues. Plaintiff's Instruction No. 1 covered the condition of the engine (including the condition of the arrester and the flues), and this instruction directs a verdict for defendant if the arrester was in good condition. It clearly conflicts with plaintiffs' Instruction No. 1.

The evidence tended to show that a large per cent of the flues in this engine were stopped up; that this condition of things caused greater suction in the remaining flues; that this greater suction would cause the cinders to be thrown out of the smoke-stack with greater force and rapidity; that the cinders when thrown out by an engine in good condition, usually lost their heat and fire upon reaching the air. In other words, there is evidence tending to show that even with the spark-arrester in good condition, yet the defective flues might have occasioned the injury. This because the eye was burned (according to plaintiff's evidence) and the smaller cinder might have retained its heat, because it was thrown from the smoke-stack with an accelerated speed, by reason of the defective flues. The instruction not only conflicts with plaintiff's instruction, but omits an alleged act of negligence (with evidence to show it) and directs a verdict for the defendant, if the screen was in good repair. This instruction was error.

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V. It is urged that there was error in refusing to permit the plaintiff to show his good reputation for truth and veracity. There was no direct impeachment of the plaintiff. By this we mean the defendant did not undertake to show by witnesses that the plaintiff's reputation for truth and veracity was bad. The most that can be said is that the defendant cross-examined the plaintiff as to a deposition which he had previously given, and as to some signed statements that he had made to a doctor (company doctor) who treated his eye; that the cross-examination was vigorous and tended to reflect upon the veracity of plaintiff; that the statements in the deposition and the other written statement tended to contradict the plaintiff's statement on the witness stand. There is sufficient to justify the introduction of this evidence of good character, under a long line of cases from our Courts of Appeals.

Reputation.

The rule first announced and since followed, is in Miller v. Railroad Co., 5 Mo. App. l. c. 481, whereat the St. Louis Court of Appeals said: "As the case must go back for a retrial, we may say that there is nothing in the objection of appellant to the testimony in support of plaintiff's character. His character for truth was attacked by defendant, not by direct evidence, but by the character of the cross-examination, and by evidence of statements by him, out of court, different from those sworn to by him on the stand. It is now well settled that where this is the case, it is competent for the party calling the witness to give evidence of his general good character. [1 Greenl. on Ev. sec. 462; Paine v. Tilden, 20 Vt. 554; 31 N. C. 14; 12 N. Y. 236; 34 Barb. 256.]"

So also has the Kansas City Court of Appeals ruled. Thus, in the case of Walker v. Insurance Co., 62 Mo. App. l. c. 220, that court says: "The defendant further objects that the court erred in refusing to allow it to introduce proof of the good reputation, for truth and veracity, of its agent, Miller. His character in this respect was attacked by plaintiff, not by direct

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evidence, but by the character of cross-examination and by evidence of statements and reports, etc., made by him out of court, different from those sworn to on the witness stand. 'It is now well settled,' says Judge REDFEILD, in Paine v. Tilden, 20 Vt. 554, 'that, whenever the character of a witness for truth is attacked in any way, it is competent for the party calling him to give general evidence in support of the good character of the witness. And we do not think it important whether the character of the witness is attacked by showing that he has given contradictory accounts of the matter out of court and different from that sworn to, or by cross-examination, or by general evidence of want of character for truth.' And to like effect are the following cases: Miller v. Railroad, 5 Mo. App. 47; State v. Roe, 12 Vt. 93; Isler v. Dewey, 71 N. C. 14. Accordingly it must be ruled that the court erred in rejecting defendant's offer of general evidence of the good character of its agent, Miller, for truth."

In a number of succeeding opinions this rule is approved: Berryman v. Cox, 73 Mo. App. l. c. 74; Browning v. Railroad, 118 Mo. App. l. c. 451; Landers v. Railroad, 134 Mo. App. l. c. 89; Gourley v. Callahan, 190 Mo. App. 666; Ross v. Grand Pants Co., 170 Mo. App. 291.

The rule adopted by the Court of Appeals has support in the case law. [30 Am. & Eng. Ency. Law, p. 1150.]

However many courts hold it inadmissible. [30 Am. & Eng. Ency. Law, p. 1151.]

In 30 Am. & Eng. Ency. Law, p. 1151, it is said: "Mere contradictions in the testimony of opposing witnesses, or different versions of the transactions in issue, have been generally held not to involve such an attack on the character of the witnesses as to justify the admission of general evidence of their character for truth; otherwise trials would be rendered interminable, and instead of reaching truth by the verdict, it would be likely to be stifled under a large number of

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side issues, calculated to obscure and not to elucidate the real one. The rule has been generally applied, although the contradictions in testimony are of such nature as to consequently impute fraud, immorality, or crime to the witness. Further, under the decisions in some jurisdictions, disapproving the statements of text-writers to the contrary, proof that a witness has made declarations contradictory of his testimony will not warrant the reception of such evidence; nor will the cross-examination of a witness, however severe or searching, unless admissions of extrinsic facts going to his character are wrung from him during its course. Evidence of contradictory statements is an assault on the credit rather than on the character of the witness, and therefore, does not open the way for evidence to sustain his general character."

On the other hand this court in the early case of Gutzwiller v. Lackman, 23 Mo. l. c. 172, per SCOTT, J., said: "We do not see on what principle the plaintiff was permitted to introduce evidence of his good character. The rule is stated in the books, that, as evidence is to be confined to the points in issue, the character of either party can not be inquired into in a civil suit, unless it is put in issue by the nature of the proceeding itself."

This rule has been consistently followed by this court. [Rogers and Gillis v. Troost's Admr., 51 Mo. l. c. 476; Dudley v. McCluer, 65 Mo. l. c. 243; Vawter v. Hultz, 112 Mo. l. c. 639; Black v. Epstein, 221 Mo. l. c. 305; Bank v. Richmond, 235 Mo. l. c. 542.]

We have also expressly ruled that sharp conflict in the testimony of witnesses will not authorize the introduction of evidence as to good character (State v. Fogg, 206 Mo. l. c. 716), whereat we said: "It is urged by counsel for appellant that the court committed error in the exclusion of the testimony offered to prove the defendant's reputation in the neighborhood in which he resided for truth and veracity. This testimony was properly excluded for the reason that the

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defendant's reputation for truth and veracity had not been assailed, and the mere fact that there was a conflict between his testimony and that of the prosecuting witness, is not in contemplation of law such an attack upon his reputation for truth and veracity as would warrant the court in admitting the testimony as to such reputation, for the purpose of bolstering up the testimony of the defendant, when such reputation had been in no way assailed. As applicable to this proposition we know of no rule of law which makes any distinction between the defendant as a witness and any other witness in the case; therefore we take it that the rule as announced in State v. Thomas, 78 Mo. 327, is decisive of this question."

But the Courts of Appeals seem to think that the general character of a party to a suit has been assailed, when the other side proves that at other times and places such party has made statements contradictory of the statements made on the witness stand, and the party so assailed has the right to show his general reputation for truth and veracity. The rule, as said, has support, and it has non-support in the cases. In 40 Cyc. 2759, it is said: "Some authorities hold that where a witness has been attacked by showing statements inconsistent with his testimony, he may be sustained by evidence of his good character or reputation for truth and veracity; but according to other authorities it is not permissible to sustain the witness in this manner."

It occurs to us that some of the cases overlook a possible difference between things that go to the credibility of the witness, rather than to his general reputation. When you attack his general reputation is one thing, but showing matters which affect the credibility of his statements on the witness stand is quite another and different thing. To show that a witness has made contrary statements out of court goes to the credibility of his evidence, but not necessarily to his general reputation for truth and veracity. There is a distinction

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between an attack upon the credibility of a witness's statement in court, and an attack on his general reputation for truth and veracity.

In Chapman v. Cooley, 12 Richardson (S. C.) l. c. 660, it is said: "Surely, then, character and credit are distinct things, and every assault on the credit of a witness does not involve the imputation of perjury to him, nor, indeed, any reflection on his reputation. If a witness should contradict himself in the course of his testimony, it would not be pretended that this would be a sufficient basis for evidence as to his good character; and yet there is no difference, in principle, between his contradiction of himself on the stand and outside of the court house. The consumption of the limited time which can be appropriated to the administration of justice and of the money of parties and witnesses, required by the trial of collateral issues as to character, is a great and growing mischief." See also Bank v. Assurance Co., 33 Ore. l. c. 50 et seq.

So we conclude that neither the proof of mere contradictory statements, nor a rigid cross-examination of the party, will authorize the introduction of evidence as to his general reputation for truth and veracity. Such things go to the credit to be given his testimony rather than to his reputation for truth and veracity. These things do not constitute such an attack upon his general reputation as to admit evidence to support such reputation.

I think the rule established by our Courts of Appeals goes too far. Every witness in a case might have made some contradictory statements out of court, and hence all would be entitled to show good reputation under that rule. The court can't try so many side issues in a case. Until the general reputation of a witness is attacked, no evidence to show his general reputation is admissible. Proof of contradictory statements is not an attack on general reputation.

The evidence offered by the plaintiff was properly excluded, although it would be competent under the

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rule of our Courts of Appeals. This rule we do not approve, and those cases should not longer be followed.

VI. There are other errors urged, but the foregoing covers all that we find to have substance in them.

For the reasons expressed herein the judgment is reversed and the cause remanded. *Walker, Blair* and *Williams, JJ.*, concur; *Faris, J.*, concurs in the result; *Bond, C. J.*, dissents in separate opinion, refiling his divisional opinion; *Woodson,* J., absent.

BOND, C. J. (dissenting).—Plaintiff, John P. Orris, instituted this action for personal injuries against the Chicago, Rock Island & Pacific Railway Company, to recover the sum of twenty thousand dollars damages, alleged to be due to the defendant's negligence in failing to provide "plaintiff with a reasonably safe locomotive engine" on which he was required to work; that on account of the defective condition of said locomotive, "live cinders and ignited pieces of coal struck the plaintiff in the left eye . . . and destroyed the sight thereof."

There was evidence tending to prove that on the morning of January 31, 1914, plaintiff, as fireman, with G. G. Hoffman, engineer, and Frank Nordyke, conductor, in charge of one of defendant's freight trains, left Trenton, Missouri, to make a run of one hundred and twenty miles to Horton, Kansas. About ten miles from Trenton, when they had reached what is known as the Jamesport Hill, plaintiff leaned out the left side of the engine in an effort to discover an automatic semaphore, a signal which indicates the safety of what railroad men call a "block;" that while he was in this position and looking upward toward the smoke-stack of the engine, a hot cinder struck him in the left eye. Plaintiff testified that this cinder was "from probably the size of a pea or maybe a large grape, in between there some place." The train reached Horton about six o'clock that evening and about ten-thirty or eleven o'clock that night plain-

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tiff complained to Engineer Hoffman that his eye hurt him, and Hoffman then turned back the lid and removed something from the eye "with a toothpick; a black speck of some kind." They left Horton at five o'clock the next morning, reaching Trenton again just after noon, when plaintiff went to a doctor "who took some piece of cinder" out of his eye. The eye (to use plaintiff's words) "got very much inflamed, and got so it kind of shrunk away, and there was a scar or cut on my eye that seemed to be sinking in, as if the water in my eye was seeping out; it finally got so my eye was sunken in, same as though it was going to wilt away." Plaintiff finally went to Kansas City, where a doctor removed the left eye, as the right one was being sympathetically affected.

The engine on which plaintiff was firing was the usual type of freight engine, with fire-boxes at the rear. From this fire-box gas, flame, smoke and cinders pass through flues about two inches in diameter and six inches in circumference. The engine in question was equipped with 340 flues attached to what is termed a "flue sheet" and extended from the fire-box to the front of the engine or "smoke-box." The smoke, flames and cinders pass out of the flues at the front and strike a deflector plate and by suction are drawn toward the front of the smoke-box up through a netting or spark arrester and are then expelled through the smoke stack. This netting was of standard size, having a mesh of three-sixteenths of an inch. After the cinders reach the smoke-box, they are kept in constant motion by the exhaust of steam which forms a vacuum in the smoke-box, and this constant beating of the cinders against the netting crushes them into small bits. A spark arrester is primarily used as a precaution against the ignition of fires along the railroad right-of-way and adjoining property.

On cross-examination plaintiff's testimony tends to show that he had gotten cinders in his eyes at various times; that it was nothing unusual to get small cinders

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in the eyes; that he usually went to a doctor to have them removed "as he couldn't stand to have any one pick at" his eyes; and that he did not examine the netting in the engine of which he was fireman. When asked if he knew the netting in question was burnt out, he said: "No, but then that was defective, or had a large hole in order to let that cinder through." Again: "You condemn the netting on your guess of the size of the cinder that hit you? A. Yes, sir. Q. That's the way you are going to condemn the netting? A. Yes, sir. Q. On the size of the cinder that hit you? A. Yes, sir, and knowing the cinder couldn't get through the netting if it was in proper order."

When asked if he reported any defect in the engine when they reached Horton, Kansas, he replied that he told the "engineer to report them (the flues). I didn't do it."

"Q. So you made no report about the netting in the engine? No, sir.

"Q. You didn't report to him the netting was out of fix? Or did you? A. No, sir, for the reason, the roundhouse foreman had told him in my presence (i. e. that he had no men to do the work).

"Q. What did you tell him? A. I told him to report the flues stopped up.

"Q. And that was all you told him? That's all."

G. G. Hoffman, the engineer who accompanied plaintiff to Horton, Kansas, and back, testified on cross-examination: "I believe that the tearing of holes in the fire and clinkers does not have any effect in the amount or size of cinders, because the netting would entirely govern the size and possibly the number of cinders thrown out. The engine throws cinders all the time—everybody knows that—it is a usual and common occurrence. I did not notice anything ususual about throwing cinders on this trip. . . . I did not examine the netting in the head of this engine—did not have any reason to suppose that this netting was out of condition. They have inspectors to examine these nettings.

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. . . Mr. Orris did not complain while on the road about his eye—but did complain in our room that night. He said he got a cinder in his eye. I turned back the lid over a match and brushed this particle off with a toothpick."

At the close of plaintiff's evidence the defendant offered an instruction in the nature of a demurrer to the evidence, which was overruled.

The evidence for defendant tended to show that the choking up of the flues had nothing to do with the size of cinders expelled from the smoke-stack; that the engine in question had been thoroughly overhauled about six weeks previous to the occurrence in suit; that new netting was then put in and that netting of this sort usually remainded in good condition eight or nine months.

The following "Reports of Inspection of Head Ends" introduced in evidence by defendant show the condition of the netting at the time of the accident:

"Engine No. 2028, Arrived; date 1-28. Spark arrester condition on arrival, opened, no holes in netting; condition on departure, good . . . Reams, Inspector.

"Engine No. 2028, Arrived; date 1-30. Spark arrester condition on arrival, opened good. Repairs made, Condition on departure, good . . . Reams, Inspector.

"Engine No. 2028. Arrived; date 2-1. Spark arrester condition on arrival; opened, good. Repairs made, none. Condition on departure, good . . . Smith, Inspector."

The trial resulted in a verdict and judgment for defendant, from which plaintiff appealed to this court.

I. Without stopping to inquire whether under the conceded facts there is any substantial evidence that the injury to the eye of the fireman from the emission of cinders through the smoke-stack of the locomotive was caused by the defective condition of the mesh of the spark arrester or resulted notwithstanding the mesh of the spark arrester was not out of repair and, therefore,

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was a danger ordinarily incident to the performance of his duties, which he assumed when he engaged as a fireman, it is sufficient to say that this case was submitted to a jury whose verdict for defendant is not open to review unless caused by legal error in the rulings of the trial judge.

The only errors assigned by appellant are that the court erred in giving certain instructions for defendant and in excluding proffered testimony. These will be now ruled.

It is complained that the first instruction stated "that the mere fact" of injury to plaintiff and suit therefor "are of themselves no evidence of negligence of defendant, which should be shown by a preponderance of the credible evidence in the case," etc. There was no error in this direction. Injury and suit of themselves, or *per se,* do not warrant an inference of negligence in cases where the doctrine of *res ipsa loquitur* has no application. Such has been the uniform ruling of this court. [Blanton v. Dold, 109 Mo. l. c. 74.] In such cases the plaintiff must do three things in order to discharge the burden of proving the negligence charged. First, show an injury; second, negligence on the part of the defendant; and, third, a causal connection between the negligence and the injury. In taking these steps no inference of negligence arises from proof of the naked fact of injury, and if the plaintiff stops there no recovery can be had. But the plaintiff must go further and establish negligence from other facts and circumstances. Having done that and having also shown the *efficiency* of the negligence in causing the injury, a case is then (and not until then) made for the jury, who can then look to the extent of the injury and its probable effects as the measure of the compensation which they shall give. The instruction under review was not inconsistent with these principles. [Kane v. Railroad, 251 Mo. l. c. 27; Deschner v. Railroad, 200 Mo. l. c. 333; Warner v. Railroad, 178 Mo. l. c. 133; McFern v. Gardner, 121 Mo. App. 6; Pippin v.

Character of Injury.

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Plummer Const. Co., 172 S. W. 1191; Yarnell v. Railroad, 113 Mo. l. c. 580; Zeis v. Brew. Assn., 205 Mo. l. c. 653.]

Neither was there anything to the contrary intended by the ruling of BROWN, C., in Walker v. Railroad, 178 S. W. 108, and Myers v. City of Independence, 189 S. W. 816. This distinctly appears from the concession of the learned commissioner that the bare fact of injury would not have any probative force on the issue as to negligence, but would be evidential on the final issue of the right to recover at all. Thus interpreted the language of the learned commissioner in the two cases cited is not inconsistent with the elementary principles stated above. We hold that there was no error in the instruction under review.

II. Appellant also complains of Instruction No. 2 given for defendant on the motion that it did not require the jury to "find . . . that the netting in use on the engine . . . was in usual and ordinary repair." This instruction defined assumption of risk, stating that it "included all the risks and dangers from cinders getting into his eye which ordinarily escape through the mesh or netting when in usual and ordinary repair," etc. The copulative terms "usual and ordinary" repair are not restricted to the practice of defendant alone, but include, within the scope of their meaning, the practice and custom of ordinarily prudent persons engaged in the same business. However, the undisputed fact given in the charge to the jury was that the mesh in use by defendant was three-sixteenths of an inch and of the standard in use by other railroads and adopted because reasonably safe. The single issue in this case was whether this mesh was out of repair or defective at the time of the accident, thereby causing a cinder larger than the apertures of the mesh, to hit the eye of plaintiff. The burden of proving that the mesh or netting was not in "usual and ordinary repair" was upon plain-

Assumption of Risk.

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tiff; for absent evidence to that effect, no basis for a presumption of negligence existed. Until the advent of such evidence, defendant was not required to go further than its showing of the use of this engine of a mesh of standard size and reasonably safe. We think the criticism of this instruction is hypercritical and unsound.

III. It is next complained that the court erred in that by instruction number three for defendant, in so far as it informed the jury that the burden of proving the circumstances relied upon by him to establish that the mesh of the spark arrester was out of repair, was cast upon the plaintiff. We cannot sustain this contention. We think the evidence was circumstantial and hence this was not an improper direction. It is not pretended that any witness testified positively that there was any fault or imperfection or defect of any nature whatever in the spark arrester in use on this engine. The theory to that effect was based upon a concatenation of circumstances relied upon by plaintiff as the basis of a legitimate inference that the mesh had become defective when he was hurt. Hence it was entirely proper for the court to instruct the jury that it devolved upon him to prove those circumstances in order to make a case. The whole theory of plaintiff's case, as stated by himself, was that the cinder which struck his eye was larger than one which would ordinarily escape a mesh three-sixteenths of an inch in size; therefore, inferentially, that the mesh in question had become out of repair. [Haake v. Davis, 166 Mo. App. l. c. 253; Fink v. Railroad, 161 Mo. App. l. c. 327.]

Burden of Proof.

IV. We are unable to perceive the force of the objection to Instruction No. 4. It is claimed by appellant that the instruction in question was faulty in submitting the issue of the netting "suddenly becoming out of repair after the departure of the train." There was abundant evidence

Narrowing Issues.

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for defendant that the admittedly standard-size netting had been shown by previous inspection to be in good condition and from an inspection in defendant's shops before the engine started on its trip. It was not, therefore, error in view of that evidence, to submit to the jury the issue of whether the injury to plaintiff was caused by the netting becoming suddenly out of repair after the beginning of the trip. This issue was legitimately raised by the pleadings and testimony and was the proper subject of a hypothesis in the instruction.

V. Appellant complains of instructions five and six; that one is argumentative and the other an abstraction. We do not discover any reversible error in either of them. Number five correctly told the jury that their findings should be based upon tangible evidence and reasonable and legitimate deductions and not upon mere speculation and conjecture. [Conner v. Railroad, 181 Mo. 397, 413; Giles v. Railroad, 169 Mo. App. 24; Glick v. Railroad, 57 Mo. App. 97.] Instruction numbered six, claimed to be a mere abstraction by appellant, has been often approved in this State. [Henry v. Railroad, 113 Mo. 535; Feary v. Street Ry. Co., 162 Mo. 75; Webb v. Baldwin, 165 Mo. App. l. c. 251.]

Argumentative Instruction.

VI. The final complaint of appellant is that the court erred in excluding testimony offered by him to prove his good character. This assignment is not discussed in the learned brief for appellant, nor was it urged in oral argument, and we take it, therefore, has been abandoned.

Abandoned Assignment.

The result is that the judgment in this case should be affirmed.

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THE STATE ex rel. G. W. Hill et al. v. H. M. PETTINGILL, Judge of Circuit Court, et al.

In Banc, June 25, 1919.

1. **LEVEE DISTRICT: Organized in 1903: Rights Under Amended Act of 1913: Condemnation: Reorganization.** Notwithstanding a levee district organized in 1903 under Art. 7, Chap. 122, R. S. 1909, has never reorganized under the Act of 1913, Laws 1913, p. 290, it may proceed under that act to condemn land for rights-of-way necessary for ditches, because Section 53 of the Act of 1913 provides that "all rights, powers, liens and remedies" then existent might be enforced by the mode provided by the existing law or under the provisions of the act.

2. ———: ———: **Amended Section 5703: Reorganization: Condemnation.** The Act of 1911, repealing Sec. 5703, R. S. 1909, and substituting amended Section 5703 (Laws 1911, p. 281), did not destroy the power of a levee district organized in 1903 to adopt a plan for the reclamation of swamp and wet lands within its boundaries and to condemn rights-of-way for drains and ditches necessary to accomplish such reclamation. As to districts already organized amended Section 5703 merely carried forward the power already conferred by old Section 5703 to drain swamp and wet lands and to secure rights-of-way for ditches, and Section 5713 authorized such a district to "proceed under the article as amended herein," which means that it was not necessary that the district reorganize under the Act of 1911.

3. ———: ———: **Reorganization Under Act of 1913.** Section 47 of the Levee Act of 1913 was not intended to repeal all previous acts, and leave a levee district previously organized without legal authority to proceed further in the exercise of the powers conferred on it by said previous acts.

Prohibition.

PRELIMINARY RULE DISCHARGED.

B. L. Gridley, T. L. Montgomery and *John M. Dawson* for relators.

(1) The right to condemn real estate must be strictly construed and the right of the citizen sacredly preserved under the constitution, and laws of the State,

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City of Tarkio v. Clark, 186 Mo. 285; Orrick School District v. Dorton, 125 Mo. 444; Railroad v. Schweitzer, 243 Mo. 122, l. c. 126. (2) Section 52 of the drainage act and Section 47 of the levee act, contain the words "may elect," with reference to the organization specified in the act. These words as used in this connection are mandatory and not directory. They provide the only authority for the district to avail itself of the act, of the conditions named in the sections. Deming v. Engineering & Const. Co., 154 Mo. App. 540; Hope v. Flentge, 140 Mo. 400; State ex rel. v. King, 136 Mo. 309; Steines v. Franklin County, 48 Mo. 178. (3) The circuit court has no jurisdiction to hear, try and determine the case, because the levee district has never reorganized under the law passed and approved April 7, 1913, entitled Drains and Levees, as approved by Section 47 to 52 of the act under which respondents are proceeding, and all acts are *coram non judice,* Laws 1913, p. 290 and 232; State ex rel. McWilliams v. Little River Drain. Dist., 269 Mo. 459; State ex rel. Caruthers v. Little River Drain. Dist., 196 S. W. 1117; State ex rel. McWilliams v. Bates, 235 Mo. 275; Sutherland on Statutory Construction, sec. 325, p. 412; Felt v. Felt, 19 Wis. 196; State v. Trenton, 38 N. J. L. 64; McCartee v. Orphan Asylum, 9 Cow. 437; McGrew v. Railroad, 230 Mo. 496.

C. T. Llewellyn and *Hazen I. Sawyer* for respondents.

(1) The right of respondent levee district to condemn real estate for rights of way for levees, ditches, etc., is expressly granted by Sec. 8364, R. S. 1899, which section adopts Sec. 8261, R. S. 1899, and makes it a part of the levee district laws of this State. The right of condemnation is further granted to levee districts by the Act of 1907, Laws 1907, p. 337. And it is further granted by Sec. 5706, R. S. 1909, and Sec. 26, Act of 1913, Laws 1913, p. 306. (2) Whether the word "may" as used in Sec. 47, Act of 1913, p. 318, is to be construed as "shall" is settled by the intention of the statute as

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gathered by the context and by reading the whole act as one scheme and code. Section 53 makes its provisions available and enforceable at the election of the board of supervisors. Section 47 only applies and was only intended to apply to districts other than those organized under the general levee laws. Art. 7, Chap. 122, R. S. 1899, and Art. 9, Chap. 41, R. S. 1909. The proper construction of this Act of 1913 will harmonize all its sections and carry into effect the intention of the Legislature. Easton v. Courtwright, 84 Mo. 27; State v. Ebbs, 89 Mo. App. 95; Epperson v. N. Y. Life Insurance Co., 90 Mo. App. 432; King's Lake Dr. and Levee District v. Jamison, 176 Mo. 557; State ex rel. Kyger v. Holt Co. Ct., 39 Mo. 521. The Levee Laws of 1913 are in express terms declared to be "Remedial in character and purpose." Such statutes must be liberally construed. Pulitzer Publishing Co. v. McNichols, 170 Mo. App. 709; Abbott v. Marion Mining Co., 255 Mo. 378; Co-Op. L. S. Com. Co. v. Browning, 260 Mo. 324; Armor v. Lewis, 252 Mo. 568. (3) The cases of State ex rel. McWilliams v. Little River Drainage District, 269 Mo. 459, and State ex rel. Caruthers v. Little River Drainage District, 196 S. W. 1115, cited by relators, are mere *obiter* and were not at all necessary to the decision of the case in which the remarks were made. As to these Little River Drainage District cases they were both drainage, not levee cases. The drainage district acts and levee districts acts are separate, distinct and different statutes. However such provisions as are contained in Section 47 have never been passed upon by any court of last resort in this State. Section 43 contains this language: "and its provisions shall be construed to apply to levee districts already organized or in process of organization." The provisions of Revised Statutes so far as they are the same as those of prior laws, are construed as a continuation of such laws and not as new enactments. Kamerick v. Castleman, 21 Mo. App. 587; Dart v. Bagley, 110 Mo. 42; St. Louis v.

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Tiefel, 42 Mo. 578; Cape Girardeau v. Riley, 52 Mo. 424; State ex rel. v. Heidorn, 74 Mo. 410.

BLAIR, J.—The Des Moines & Mississippi Levee District No. 1 was proceeding to condemn and appropriate lands of Ellen Hill and others for the purpose of draining swamp and wet lands within the district when application was made for a rule in prohibition to restrain the judge of the Clark Circuit Court from further action in the premises. Mrs. Hill, the original relator, has died and her heirs have been substituted as parties.

The levee district was organized December 28, 1903, under Article 7, Chapter 122, Revised Statutes 1899. The return admits that the district "has never reorganized under Sections 47, 48, 49, 50, 51 and 52 of the" Act of April 7, 1913, Laws 1913, pp. 290-321; admits that an application was made to the Clark County Circuit Court "to amend its original plan of reclamation and to authorize said district to construct drains and ditches over and upon" relator's land within the district "under and by virtue of . . . Section 39" of the Act of March 23, 1915, Laws 1915, p. 275, and that relators herein filed their exceptions and objections thereto, and that, after a hearing, the court, granted the prayer of the district's petition. It is then admitted that the "district by its board of supervisors filed a petition in condemnation under . . . Article 2, Chapter 22, Revised Statutes 1909," praying the condemnation of "rights of way over relators' lands; that commissioners were appointed, duly qualified and assessed damages and compensation to relators therefor, and aver the sums assessed have been paid into the court. It is also admitted relators filed exceptions to the report and a plea to the jurisdiction and that this plea was overruled, and that the cause is docketed and pending for trial." Respondents then aver that the district "was not required to reorganize under the Act of 1913." Other facts appear in the opinion.

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I. By the admission of the return it is disclosed the levee district was organized in 1903, under Article 7, Chapter 122, Revised Statutes 1899; has never reorganized under the Act of 1913 (Laws 1913, p. 290, et seq.); but, nevertheless, is proceeding, by the method prescribed by that act, against relators for the purpose of condemning portions of their land for rights-of-way for ditches necessary to reclaim swamp or wet lands within the district.

Remedies Under Amended Act.

Since the district has not reorganized under the Act of 1913, let it be conceded that the rule contended for (State ex rel. v. Drainage Dist., 269 Mo. l. c. 459) is applicable, i. e., that the Act of 1913 did not affect the rights, powers or duties of levee districts previously organized. It is nevertheless true, as it was held, in the case cited, to be true of drainage districts in like condition, that the district "continues to operate and proceed under the original act and the applicable amendments," including that of 1911. It is to be noted that the case cited dealt only with the question whether a stated legal duty was imposed upon the drainage district. As to that question it was held the Drainage Act of 1913 had no application, in the absence of reorganization under that act. The rule of that case is subject to the same limitation when applied in this. Section 53 of the Act of 1913 affecting levees (Laws 1913, pp. 320, 321) is, in every respect affecting the question we now propose to consider, legally (and almost literally) identical with Section 62 of the Act of 1913 (Laws 1913, pp. 266, 267) concerning drainage districts. Section 53, after providing that no right, power, remedy or lien conferred upon a levee district, previously organized, shall be impaired by the repeal of previous laws and that pending proceedings should not be affected thereby and that no obligation, contract or undertaking should be held changed, modified or invalidated by such repeal, but should remain inviolate, added the following: "All rights, powers, liens and remedies now existing in behalf of such levee districts of this State, may be en-

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forced and made available in the manner and by the means and mode now provided by law, or such rights, powers, liens and remedies may be enforced and made available under the provisions of this act, if applicable, at the election of the board of supervisors of the levee district." It is apparent the section carefully protects the rights, powers, liens and remedies from impairment by the new act. Section 52 as fully provides against the invalidation of obligations by the repeal of old laws and the imposition of new obligations by the mere passage of the new act. The quoted clause does not concern itself with the rights, powers, liens or obligations of the district, but has to do solely with the *procedure* for their enforcement. In the case of a district which was organized prior to 1913 and which has not reorganized under the act of that year, the new law left its rights, powers, liens and obligations and remedies unaffected, but gave the board of supervisors of such a district a right to employ, as they might choose, the machinery of the old law or the new act in the enforcement thereof. This provision is express, is within legislative power and must be construed according to its plain meaning. The word "remedies" casts no doubt upon this meaning. The only doubt it raises is as to the sense in which it is employed. The words "if applicable" cannot well mean "if the district has reorganized under the Act of 1913," since the section, including the quoted sentence, expressly deals with districts which have not so reorganized. These words doubtless mean "if appropriate;" "if effective for the purpose in hand," i. e., if they can reasonably be applied to the enforcement of the rights, powers, etc., with which the sentence deals. This view of the act is in full harmony with the holding in the case cited, conceding its applicability as contended for by relator. The only question concerning its applicability is one based upon language in Sections 47 and 53, which respondents suggest make the whole Act of 1913, as amended in 1915, applicable to respondent district without reorganization—a

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view which could not aid relator and need not be discussed.

II. Article 7, Chapter 122, Revised Statutes 1899, under which respondent district was organized, authorized organization for the sole purpose of constructing "levees and other works that may be deemed practicable and necessary" to protect lands subject to overflow from rivers of the State. [Section 8361, R. S. 1899.] Section 8363 empowered the district to secure rights-of-way by proceeding as provided in Section 8261, Revised Statutes 1899, i. e. by condemnation. In 1907 (Laws 1907, pp. 335, 336) Section 8361, Revised Statutes 1899, was amended so as to authorize levee districts "now or hereafter organized" to drain and ditch swamp or wet lands within the district. Sections 8259 and 8262, Revised Statutes 1899, were referred to for the method. In the same year (Laws 1907, p. 337) Section 8364 was so amended as to provide a detailed scheme for condemning rights of way for levees, ditches, drains, etc. Article 7, Chapter 122, Revised Statutes 1899, as amended in 1907, became Article 9, Chapter 41, Revised Statutes 1909. Sections 8361-8370, Revised Statutes 1899, with amendments, became Sections 5703-5713, Revised Statutes 1909. In 1911 (Laws 1911, p. 230, et seq.) an act was passed repealing Sections 5703-5713 (Art. 9, Chap. 41, R. S. 1909) and enacting sixteen sections in lieu thereof. Section 5703 of this act authorized the organization of levee districts for the purposes expressed in Article 7, Chapter 122, Revised Statutes 1899, but instead of carrying forward the provision of Section 8361, Revised Statutes 1899, as amended in 1907, concerning the drainage of swamp and wet lands within the district, as a proviso, it made such drainage one of the purposes for which a levee district might be organized under the Act of 1911. The conditions and methods of organization were appreciably changed. The adoption of a "plan for reclamation" was authorized. No method for changing such a plan was provided. Section 5713 of the Act of 1911, (Laws 1911, p.

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238) provided that in existing districts "the landowners may proceed under the provisions of the article as amended herein, and by doing so no contract, obligation, assessment or lien of the district shall be abated." Section 5704 of the Act of 1911 (Laws 1911, p. 232) was intended to incorporate in the act, by reference, certain sections of other acts.

Under the law as it existed in 1909 (Art. 9, Chap. 41, R. S. 1909) respondent district had full power to adopt plans for the reclamation of swamp and wet lands within its boundaries, and for that purpose was authorized to condemn rights-of-way for ditches and drains necessary to accomplish such reclamation. Did the Act of 1911, in repealing Section 5703, Revised Statutes 1909, and substituting amended Section 5703 (Laws 1911, p. 231) destroy that power? We think not. The amended Section 5703 empowers levee districts organized thereafter to include such a purpose in its articles of incorporation. The Act of 1911, as well as Article 9, Chapter 41, Revised Statutes 1909, authorized levee districts to drain swamp or wet land within the district. So far as concerned districts then already organized this provision of the Act of 1911 constituted merely a carrying forward into the new act of a power existing under the old. To hold otherwise would result in the conclusion that the Legislature intended to discriminate in a very material respect between the old and new districts. It would mean that new districts might proceed to the complete reclamation of lands within their boundaries, while districts organized prior to the taking effect of the Act of 1911 must content themselves with permitting swamp and wet lands within their boundaries to remain unreclaimed. Districts formed or in process of organization prior to 1911 were not authorized to incorporate for the express purpose of reclaiming such swamp and wet lands. The power was one given these districts in the manner already pointed out, and the duty to exercise it was imposed upon the boards of supervisors. If the Legislature meant to deprive such

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districts of this power and did not intend it to remain in them by force of the amended provision, it would have been easy to have made such purpose clear. Sections 5704 and 5705 of the Act of 1911 expressly gives the board of supervisors power to "construct or maintain" ditches necessary to the reclamation of any land in the district and condemn rights of way therefor. Section 5713 of the same act clearly states that districts already organized "may proceed under the article as amended herein." This does not require reincorporation. It enabled the district already incorporated to avail itself of the machinery of the act for carrying out its purposes and exerting its powers. There is no provision for the reorganization of old districts under the new Act of 1911. We think the act left in districts then organized the power to reclaim swamp and wet lands within their boundaries and condemn rights of way for ditches, etc., necessary to that end.

Since the district had the power to act, it was and is, on relator's own theory, authorized (Par. I, supra) to employ, in the exertion of that power, the procedure provided by the Act of 1913. As already pointed out, this renders unnecessary discussion of respondents' contention that Sections 47 and 53 of the Act of 1913 render that act, in every respect, applicable to respondent district, without reorganization.

III. The argument that Section 47 of the Act of 1913 was intended to repeal absolutely all previous acts, so far as districts organized prior to 1909 are concerned and leave such districts without legal authority to proceed further unless they reorganized under the Act of 1913, is unsound. It runs counter to the principle approved in State ex rel. v. Drainage District, supra, and applied in a like situation to drainage districts. It also attributes to the Legislature an intent not in accord with the announced spirit of the act itself. [Sec. 53, Act of 1913, Laws 1913.] This disposes of the question raised. The preliminary rule is discharged. All concur; *Bond, C. J.*, in result; *Woodson, J.*, not sitting.

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MISSOURI STATE LIFE INSURANCE COMPANY, Appellant, v. ELIJAH H. SALISBURY.

Division Two, July 5, 1919.

1. **INSURANCE POLICY: Acceptance.** Inconclusive negotiations concerning an insurance policy, which contains a clause that the insurance shall not take effect until the first premium is paid and the policy delivered to and accepted by the insured during lifetime and in good health, do not constitute an insurance contract. The facts of this case are reviewed, and it is held that the policy tendered by the company was never unconditionally accepted during the good health of the insured, or that the company understood that the policy sent and received was accepted, or was acceptable except upon a condition which could not be met, and that therefore there was no completed contract.

2. ———: **Non-Payment of First Premium.** A stipulation in an insurance policy requiring the first premium to be paid in advance and during the good health of the insured as a condition upon which it is to take effect is enforcible, and if the first premium was neither paid nor tendered during the insured's good health the policy did not become effective, and there is no enforcible insurance contract.

3. ———: **Payment Recited in Policy.** The payment of the first premium, where the policy itself recites that such first premium was made, cannot be disputed for the purpose of invalidating the policy; but where the recital is that "the insurance is granted in consideration of the payment in advance" of a named sum of money, "being the premium for the first year's insurance under this policy," the recital is not a specific recital of payment, but a mere statement that the first payment shall be the consideration for the issuance of the policy.

Appeal from Sullivan Circuit Court—*Hon. Nat M. Shelton,* Judge.

REVERSED AND REMANDED (*with directions*).

Jones, Hocker, Sullivan & Angert and *Vincent L. Boisaubin* for appellant.

(1) The policy on the life of Alpha O. Salisbury was only conditionally delivered for the purpose of in-

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spection and comparison, and therefore the contract was never completed. Rey v. Equitable Life Assur. Soc., 44 N. Y. 745; New v. Germania Fire Ins. Co., 171 Ind. 33; Amos-Richia v. Northwestern Mut. Life, 152 Fed. 192; Coffin v. New York Life Ins. Co., 127 Fed. 555; Gordon v. Prudential Ins. Co., 231 Pa. St. 404; Harnickell v. N. Y. Life Ins. Co., 111 N. Y. 390. (2) The application, which was a part of the policy, provided that the insurance applied for should not take effect unless the first premium was paid and the policy delivered to and accepted by the assured during her lifetime and good health. The delivery of the policy was therefore conditional and payment of the premium during good health was a condition precedent, which not being performed, the policy was never in force. Wallingford v. Home Mut. F. & M. Ins. Co., 30 Mo. 46; Yount v. Prudential Life Ins. Co., 179 S. W. 749; Bowen v. Mutual Life Ins. Co., 104 N. W. 1040; Ormond v. Assn., 96 N. C. 158; Amos-Richia v. Northwestern Mut. Life Ins. Co., 152 Fed. 192; Lyke v. Am. Nat. Ins. Co., 187 S. W. 265. (3) The policy contained no formal acknowledgment of receipt of the premium, and therefore the mere description of the amount and nature of the consideration contained in the consideration clause did not operate as an estoppel to prevent the company from denying that the policy was a completed contract. Dobyns v. Bay State Ben Assn., 144 Mo. 95; Bush v. Ins. Co., 35 N. J. L. 429; Dircks v. German Ins. Co., 34 Mo. App. 31; Lyke v. American Natl. Ins. Co., 187 S. W. 265; Amos-Richia v. Northwestern Mut. Life Ins. Co., 152 Fed. 195. (4) The premium was not paid or tendered during the good health of Mrs. Salisbury, and therefore the policy was not in force. Perry v. Security Life & Ins. Co., 150 N. C. 143; American Home Life Ins. Co. v. Melton, 144 S. W. 362; Kilcullen v. Metropolitan Life Ins. Co., 108 Mo. App. 61; Gordon v. Prudential Ins. Co., 231 Pa. St. 404; Harriman v. N. Y. Life Ins. Co., 43 Wash. 398; 5 Elliott on Contracts, sec. 4358.

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W. C. Irwin, J. W. Bingham and *Higbee & Mills* for respondent.

(1) Mrs. Salisbury unconditionally accepted the policy in suit on December 23, 1914 and signed and mailed the receipt evidencing that fact to Carson. He received this and on December 28th wrote Salisbury, congratulating them on accepting the policy. The pencil writing on this receipt, "For Inspection only," was written thereon by Carson at a later date. Four witnesses testify it was not on the receipt while Salisbury had it. (2) The policy acknowledges the payment of the premium in advance. That fact may not be disproved to invalidate the policy. Dobyns v. Bay State Ben. Assn., 144 Mo. 95. (3) Carson was authorized to take application and deliver the policy. He expressly extended credit for the premium. He agreed to take Salisbury's note for the premium due in April, 1916, and that it might be paid out of commissions on insurance Salisbury might write. Prepayment was waived by unconditional delivery of the policy, and by refusal to accept payment when duly tendered. 25 Cyc. 726, (3); Halsey v. Ins. Co., 258 Mo. 659. (4) Carson was the agent, the *alter ego,* of the Company, and authorized to waive prepayment of the premium. R. S. 1909, sec. 6938; Madison v. Ins. Co., 180 S. W. 1169. (5) The policy was delivered and accepted and credit extended for the payment of the premium during good health. It was then in force. The answers that Salisbury had no other insurance and no other applications for insurance pending were made at the instance of Carson and furnish no ground to defeat payment of the policy. 25 Cyc. 800, D; Modern Woodmen v. Angle, 127 Mo. App. 95, 112; Ins. Co. v. Mullen, 197 Fed. 299. (6) The provision that premium must be paid and the policy delivered while insured is in good health is for the benefit of the insurer and may be waived. Bell v. Mo. Life Ins. Co., 166 Mo. App. 399. And once waived cannot be recalled. Ib. p. 402; Brix v. Fidelity Co., 171 Mo.

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App. 518, 526. Mrs. Salisbury's recovery was extremely probable, says the petition. It further appears from the petition her gunshot wound was not the cause of her death. "She either fell or threw herself to the ground." If she "fell" then the condition of her health is immaterial. Coscarella v. Ins. Co., 175 Mo. App. 130, 136. (7) The policy recites that it and the application constitute the entire contract. It was therefore inadmissible to offer proof of a verbal agreement that neither policy would be accepted unless both were issued. Such a condition could be waived.

WHITE, C.—The plaintiff brought this suit for the purpose of canceling a policy of insurance written by the defendant upon the life of Alpha O. Salisbury, wife of the defendant. The petition alleged several reasons why the policy should be canceled, and among them those which are urged here and which we will consider: First, that the policy was never delivered unconditionally to the insured and there was no completed contract upon which the minds of the parties met prior to the death of Alpha O. Salisbury; and, second, that the first premium was not paid during the good health of the insured, as required by the terms of the policy.

The defendant filed an answer and counterclaim. The counterclaim alleged the policy under consideration insured the life of Alpha O. Salisbury, in the sum of ten thousand dollars for the benefit of the defendant, and that Alpha O. Salisbury died on the 10th day of February, 1915, and prayed judgment for ten thousand dollars. The plaintiff replied to the counterclaim denying the execution and delivery of the policy sued on, alleging its invalidity as a contract on account of the same matters set up in the petition, and praying for its cancellation, as prayed in the petition.

On a trial in the Circuit Court of Sullivan County judgment was rendered against the plaintiff on its petition, and for the defendant on his counterclaim for

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ten thousand dollars and interest, less the amount of the first premium. The plaintiff appealed from that judgment.

The defendant Salisbury was a school teacher and at some time early in October, 1914, he and his wife Alpha decided that they would take out insurance, each in favor of the other. They went at the matter cautiously, desiring to secure the best possible contract, and let it be known to various insurance agents what they contemplated in that respect. The result was that they were solicited by various agents and sent in applications to a number of companies with the understanding that they should receive the policies for the purpose of inspection and after a comparison would make their selection. Salisbury testified, in speaking of the agents: "I told them I thought of taking out some insurance; that I thought I was able to carry it; that I had decided on buying it about the same as I would a horse; that is, to examine two or three good policies and decide which one I would take." It was his intention to take a policy out upon his own life and that of his wife in the same company; the one he should find to be satisfactory.

Pursuant to his applications several policies upon himself and his wife were issued and delivered to him for the purpose of inspection; among them was a policy of the American Central Life Insurance Company, and a policy of the Central Life Insurance Company of Illinois. The New York Life and the Iowa National Insurance Company also submitted policies for inspection. This occurred about the 20th of October, 1914.

Matters were in this posture when C. M. Carson, agent of the plaintiff, Missouri State Life Insurance Company, heard of the contest and desired to enter the competition for his company. Salisbury at first indicated that he had enough policies from which to make his selection, but finally consented to let Carson in on the competition. Applications for Salisbury and for his wife were filled out; his, it appears, was dated on the

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22nd day of October, but that of his wife was dated the 28th of October. This is explained by both Salisbury and Carson to be on account of having to take the application to his wife and have her sign it in person, which was required by Mr. Carson; it caused a delay of a few days. There applications were sent in to the plaintiff. About the 14th of November a policy on the life of Mrs. Salisbury was sent to Carson somewhere in Illinois, and he in turn sent it to Salisbury about November 20th. On the application of Elijah Salisbury no policy was issued, because of an unfavorable result in the analysis of his urine. The matter was held up for further examination. It appears that his application was not definitely declined, but subsequently he was urged to submit to further examinations and undergo a special diet for the purpose of making a proper test. This delay and uncertainty in his application figured very materially in the subsequent negotiations between the parties.

On the 22nd of November Salisbury and his wife, having policies of the several insurance companies before them, went over the entire matter for the purpose of deciding the contest, and finally, on the 23rd of November, they decided to accept the policies of the Central Life Insurance Company of Illinois. In the meantime, however, Salisbury had so far committed himself with reference to the American Central that that company treated the policy as delivered and the contract as closed. It was said by respondent's counsel in oral argument before the court that each of these companies had recognized its liability and had paid ten thousand dollars on the life of Mrs. Salisbury.

On the 8th of December, Carson had a telephone conversation with Salisbury, telephoning from Quincy, Illinois. He testified that he then urged Salisbury to go before certain doctors whom he named for the purpose of further examination, and Salisbury promised to do so. Salisbury testified that he told Carson at that time he had not accepted the policy on his wife and that

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Carson requested Salisbury to give him another chance and urged him to send another sample of urine for examination, which he agreed to do. Carson swore he had no conversation with Salisbury after the applications were received except the telephone conversation of December 8th, until January 14, 1915. Salisbury swore that he had two other conversations with Carson—one between November 23rd and December 8th, and the other between December 8 and December 23.

When the policy on the life of Mrs. Salisbury was sent to Salisbury on November 20th, Carson enclosed a receipt for her to sign. This receipt was retained by Salisbury until December 23rd, when he mailed it to Carson at St. Louis, with a letter. Several letters between the parties appear in the record.

On the 31st day of December Mrs. Salisbury was shot through the chest. All the evidence in relation to it indicates that the shooting was accidental. She died February 10th, following. There is some evidence tending to show that she improved for a while after she was wounded, and that her death was immediately caused by a fall from a window, while walking in her sleep, but while she was still suffering from her wound.

After Mrs. Salisbury was shot the only conversations between the principal witnesses, Carson and Salisbury, relate to an endeavor on the part of the company to recover the policy on her life which was in the possession of Salisbury. Carson was ordered to recover the policy and cancel it, and Salisbury, after putting him off with several excuses, finally refused to give it up. Salisbury and Carson agreed that they had a conference on January 14th, and again on January 21st or 27th, or probably on both of these dates. The letters mentioned and these various conversations will be considered more fully in discussing the question whether the minds of the parties met.

I. Appellant claims it was never the intention of Salisbury to accept the policy of his wife unless he

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should also receive a policy on his own life; it was upon that condition that he received a policy for examination and such condition was never complied with. Also, a contemplated agency for the company on the part of Salisbury entered into the negotiations; it will be necessary to inquire how far his appointment as an agent was conditioned on his taking the policy. Mrs. Salisbury had nothing to do with any of the negotiations at any time, and all of the conversations and negotitations relating to the matter which took place were between Salisbury and Carson.

Conditional Acceptance.

It is certain that in the beginning Salisbury had determined to take out only one policy on his own life and one on the life of his wife, both to be in one company. He began his investigations with that intention, and that was the understanding he had with all the agents, including Mr. Carson, agent for the plaintiff here. It remains to determine whether there was a change in that intention communicated to the plaintiff's agent.

It is certain that on November 23rd he accepted the policy of the Central Life of Illinois and never at any time rescinded or attempted to rescind that acceptance. There is no evidence in the record to show that he ever attempted to deny a completion of the contract with that company. He did have a dispute with the agent of the American Central and refused to accept the policy which had been delivered to him for inspection, when the agent threw it down on the table and said it was Salisbury's policy and walked out. Salisbury afterwards retained that policy, but whether he reconsidered his determination to decline it before his wife was shot is not shown. So he was bound by two policies of $10,000 each on the life of his wife before he claims to have accepted plaintiff's policy.

Carson swore positively that Salisbury "said he thought he and his wife would like to take ten thousand dollars each, but that he was not going to take ten thousand dollars on his wife unless he taken that much

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on himself and he was not going to take that much on himself unless he taken the same amount on his wife, but that if I cared to take his application and submit it with the understanding that he would not have to take either policy, the one issued on his own life and the one issued on his wife's life, unless both his wife's policy and his policy were issued, or in other words he would not take either policy unless both were issued."

Carson, on acknowledging the receipt of the application on October 28, wrote Salisbury calling attention to the desirability of an agency for Salisbury and said: "Shall be pleased to go into that proposition with you when *your policies* are issued, and shall then bring them over myself and talk things over."

Salisbury said his first interview with Carson was on the 20th of October; that with some reluctance, after Carson had urged the matter of agency on him, he finally, on the 22nd of October, decided to "let him in on the contest as I had the others." In answer to the question, "What was said about your wife's policy?" he testified that there was some question about his insurability on account of a weak ankle and he said to Carson, "Now, in case my application was turned down on that it would be a serious point against them because *I was not going to take the policies in two companies.*" Salisbury again testified in speaking of the conversation he had with Carson between the 23rd of November and the 8th of December, that he told Carson if he decided to take his policy, "that I was not going to consider writing insurance when I decided on the policy," definitely eliminating *at that time* all question of the agency as a part of the agreement.

In Salisbury's mind, his possession of the policy on the life of his wife was for inspection only, for in speaking of the telephone conversation of the 8th of December when Carson called him up from Quincy, Ill., he says: "I told him [Carson] I had not accepted the policy, but that it was a pretty close decision between the Central Life and the Missouri State." Then he

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added that Carson asked him to reconsider and give him another chance, and continued: "And I finally agreed to give him another chance, and he said for me to send another sample of urine to the home office, he wanted them to have another chance, they were holding it up on that account, and he told me they had requested several samples and none had come."

This indicates that in Salisbury's mind the two policies should go together in one company; that his own physical eligibility must first be determined and his insurability approved by the company before he decided on a policy for his wife. He then relates another conversation he had with Carson about the 15th of December (Carson denies that they had any conversation at that time), and says Carson drove over from Greencastle in a car and again urged Salisbury to take an agency for the company, painting in rosy hues the profits which he might earn in that way. He told Carson that he was getting eight hundred dollars a year in teaching school and that he could get twelve hundred dollars away from home. Carson attempted to show him how he could earn enough money in the insurance business to pay his premiums with ease; he told Carson at that time he was not sure he would take his insurance, and Carson says: "How can you take this job?" "I had told him I would have all the insurance I wanted. He says, 'You cannot write life insurance for our company and hold your insurance in another company,' and I told him I would have to tell him 'no.' " He said further to Carson, "Your company is not issuing my policy." Then followed some discussion about the sample that should be sent for examination. Carson at that time, Salisbury says, attempted to show him that he could carry more than ten thousand dollars by taking an agency for the company. The conversation ended by his saying that he would talk it over with his wife and write Carson what he decided. This conversation about December 15th which Salisbury relates and which Carson denies took place shows that he had not abandon-

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ed his determination to have two policies in the same company, one for himself and one for his wife; there is nothing there to indicate that the two policies could be separated. At this conversation the prospective agency definitely entered into the consideration, and what he was going to see his wife about was whether he should take the insurance and acquire the agency. He testified that then he decided to take the agency, and begin the first day of May. He says that Carson urged him to go into the life insurance business and he would be able to carry twenty thousand dollars instead of ten. At this time, according to his story, Carson was endeavoring to have him take the one on his wife, whether he succeeded in getting his own policy through or not, showing how he could make an argument to a prospective customer, that he had a policy on his wife, but the company would not write one on him, because he was not a sufficient risk. There was nothing said at that time to indicate that he was willing to accept the policy on his wife's life without one on himself. It is certain that up to that time the minds of the parties had not met on the contract.

Salisbury swore that he definitely accepted the policy by sending in the receipt for it on December 23rd. It will be remembered that when the policy was sent to him on the 20th of November a receipt was enclosed which his wife was to sign for the policy. The receipt was returned December 23rd, with a letter. The argument here is that that was the time when he decided to accept unconditionally the policy on his wife's life, and that letter the means by which he communicated that decision to the company. The letter is as follows:

Green Castle, Mo., Dec. 23, 1914.

Mr. C. M. Carson, St. Louis, Mo.

Friend Carson: Just received your letter to-day and am wondering what is the matter that *we can't get things together.* Dr. Parsons tells me he sent that sample to you as I agreed by phone to have him do. I don't understand this failure.

I am inclosing receipts for the policy already issued and if you will make settlement with the Co. *and let me buy that one and mine, on the terms offered me when you were here, it will be*

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all right with me and we can fix our deal up when you bring my policy to me.

If you don't get that sample from Parsons very soon I will have Dr. Taylor try his hand at it as I want it to go sure, and very much oblige,

Yours very respectfully,

12-28-14 E. H. SALISBURY.

If Salisbury intended to accept the policy of his wife unconditionally he not only did not say so, but his letter shows that two conditions were still in his mind which must be complied with before it would be accepted. He wondered why "we can't get things together," indicating there was no agreement on anything; this is said in connection with the mention of his efforts to get his own application acceptable. He mentions the enclosed receipt for his wife's policy and speaks of a settlement so that it would let him *"buy that one and mine."* This negatives the idea that he had already bought *"that one"* and shows he still associates the two together, that he did not want *"that one"* without *"mine."* Then he added another condition: *"on the terms offered me when you were here."* That refers to insurance agency. On those two conditions "we can fix our deal up *when you bring my policy to me."* The letter is filled with concern about the tests in his own case, and he hardly could have used language to make clearer his determination to have *two* policies and the agency or none.

On cross-examination Salisbury had this to say about that letter and his intention at the time:

"Q. Now, you declined, did you not, to fix up the deal with him until he brought your policy; I mean the policy issued payable to you as the insured? A. I did not decline that exactly. *We could not very handy arrange an agreement of that kind, because there was a double agreement.* My policy and the settlement was going to be a little different, according to his proposition, and I wanted to wait and have it fixed up right. I wanted to wait until we *found out what was going to become finally of my policy, and then we would know which policy to take."*

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This shows conclusively that in his own mind he did not definitely or unconditionally accept his wife's policy when he sent in the receipt.

On December 28th Carson acknowledged the receipt of Salisbury's letter of the 23rd, in a letter as follows:

12-28-14

Mr. E. H. Salisbury,
Green Castle, Mo.

Dear Mr. Salisbury: Yours of Dec. 23—just this date reached me here.

Hustle up and go before Dr. Taylor, as that other sample must have not reached Company. Take prepared meal of Carmel Candy (prepared by Dr. Taylor) & let him send Company sample of urine.

Please hustle this through as I must get this through by Jan. 1st in time for an. report see?

Am glad you have decided on our policies, for we certainly are placing some big cases recently.

(next ad. Keokuk, Iowa.)

Regards,
C. M. CARSON.

It is argued by respondent that Carson's expression of pleasure because he had "decided on our policies" is conclusive on the plaintiff that the matter had been closed.

There is no warrant for that inference from the letter. That expression merely indicates that Carson thinks Salisbury has decided that the form of policies in his company are what he wants in preference to policies in other companies, but the conditions on which he would accept the one had not been met. His own must be issued. In that letter Carson is trying to hurry Salisbury with his test, so that he could pass the examination.

On the same day Carson wrote a letter to Mr. Donnelly, assistant secretary of the company, to which he added a post script referring probably to the receipt, saying: "P. S. Please see that *this* & her *husband's policies* are issued at earliest possible moment & mail to me—as this was written in strongest competition and it means other bis. C. M. C." This indicates still that Carson understood that Salisbury would not accept

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the policy on his wife's life unless he received one on his own also, and he was trying to get Salisbury's application through.

There was no further conversation or communication between the parties in relation to the matter until after Mrs. Salisbury was shot, December 31st. There is nothing here to show that Salisbury had ever receded from his first intention to have a policy on his own life and on that of his wife in the same company. Carson evidently so understood it.

Salisbury testified quite volubly about the agency matter, about the different propositions which Carson made him with reference to it, and it might be inferred from his testimony of those different conversations that he intended to accept the agency on the terms mentioned by Carson, but it does not appear anywhere that he intended to take the agency on those terms independent of securing both insurance policies.

After his wife was shot it appears to have entered Salisbury's mind that he could afford to carry much more insurance than he had thought himself able to shoulder before that time. He had already concluded his arrangement with the Central Life, and the American Central was so committed that it could not withdraw from the arrangement, and both of these he seems to have cinched. Now he wanted to carry another ten thousand dollars with the plaintiff. His optimism mounted with his wife's declining health. But he never did decide to accept the policy on the life of his wife until after the company had decided to withdraw it, and declared the entire negotiation off. Carson made a visit to Salisbury's home about the 14th of January for the purpose of getting the policy. Both he and Salisbury testified that the conversation was inconclusive. Salisbury offered some excuse; the policy was not there; it was in his trunk and he hadn't the key. By his own testimony he did not definitely declare then that he intended to retain the policy. He did so declare later.

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About the 21st of January, Carson attempted to bring the matter to a conclusion with him, but Salisbury refused to talk except in the presence of witnesses. He had employed counsel by that time. Carson also employed an attorney, and they had a conversation in the presence of witnesses, and their respective attorneys on the 27th of January. At that time Salisbury swore he said to Carson: "I told him if he would give me this office and give me this corps of men and give me a 75 per cent accredited contract, five per cent on renewals and ten per cent on the new ones that came through this office, that I would surrender the policy at the end of the year." Carson refused to accept the proposition. Thereupon Salisbury tendered $315, the amount of the first semi-annual premium on his wife's policy, and Carson refused to receive it.

The policy refers to the application as a part of the contract and contains this stipulation: "This policy and the application herefor constitute the entire contract." The application has this clause: "6. That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy delivered to and accepted by me during my lifetime and good health."

This court has held, in the case of State ex rel. v. Robertson, 191 S. W. 989, that inconclusive negotiations, such as this, do not constitute an insurance contract. This court said: "A proposition presented by the one must be accepted by the other in the form tendered; and if the acceptance omits, add to or alters the terms of the proposition made, then neither party to the negotiations is bound. So long as any element of the proposition is left open, the contract is not complete and of course is not binding on anyone," citing several cases.

On the authority of that case it is impossible to conclude that the policy tendered by the company was ever accepted unconditionally during the good health of Mrs. Salisbury, or that the company understood that it was accepted, or acceptable except upon the

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condition prescribed by Salisbury, which could not be met.

II. Another reason why the contract was never completed was because the first premium was not paid nor tendered during the good health of Mrs. Salisbury, as required by the stipulation in the application quoted above.

Payment of First Premium.

A stipulation of that character, requiring the payment of a first premium in advance as a condition upon which the policy was to take effect, is always recognized and enforced by the courts. The policy, in such case, is not effective until that condition is complied with. [Kilcullen v. Life Ins. Co., 108 Mo. App. 61; Wallingford v. Home Mut. Fire Ins. Co., 30 Mo. 46; Ormond v. Ins. Co., 96 N. C. 158; Bowen v. Mutual Life Ins. Co., 104 N. W. 1040.]

The respondent claims in this connection that the policy itself recites that payment of the first premium was made, and therefore the appellant could not disprove that recital. It is held, where a policy acknowledges the receipt of the first premium, that such receipt might be disputed for some purposes as any other receipt, but that the payment of the first premium, as recited, could not be disputed for the purpose of invalidating the instrument. It is analagous to the recital of the payment of consideration in a deed; such a recital may be proven by parol to be erroneous, but it is not permitted to show a want of consideration for the purposes of controlling the operative words of the instrument, and thereby defeat it as a contract. [Dobyns v. Bay State Ben. Assn., 144 Mo. 95, l. c. 109.] That, however, applies to cases where the receipt of the payment is specifically acknowledged. The policy in this case recites as follows:

"Consideration—This insurance is granted in consideration of the application herefor, a copy of whch is attached hereto and made a part hereof, and of the payment in advance of $312.70, being the premium for

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the first year's insurance under this policy ending on the 11th day of November, 1915, which is term insurance."

That recital is not a specific acknowledgment of payment; it merely states what the first payment shall be as consideration for the issuance of the policy. A similar recital in an insurance policy was held by the Kansas City Court of Appeals to be not an acknowledgment of payment. [Dircks v. German Ins. Co., 34 Mo. App. l. c. 41.] There was a like holding by the Springfield Court of Appeals in Lyke v. American National Ins. Co., 187 S. W. 265. The respondent cites the case of Halsey v. Ins. Co., 258 Mo. 659. It is against his contention. The policy in that case was dated May 31, 1906, and purported to go into effect from that date, but the first payment was not paid until June 5th, and it was held that the policy did not go into effect until June 5th.

The policy on the life of Alpha O. Salisbury never went into effect for the reason that the first premium was never paid nor tendered during her good health. It was tendered after she was shot, and when the company was demanding the return of the policy.

There is a suggestion in respondent's brief that the payment of the first premium in advance was waived. On December 22nd, just the day before the letter of Salisbury was written in which he sent in the receipt, Carson wrote to him urging him to try the special diet prescribed for the purpose of making test as to his condition, and said in that letter that he would try and "get you through," adding, "if not then it will be necessary to either return your wife's policy or remit at least 30 per cent of the premium at once as to go in our annual reports." This was a reference to a reduction of the first premium by 70 per cent if he took the agency. It shows the stipulation was not waived. There is no evidence of a waiver.

The judgment in favor of defendant on plaintiff's cause of action and the judgment on the defendant's

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counterclaim is reversed, and the cause remanded with directions to the trial court to enter judgment in favor of the plaintiff as prayed in the petition.

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur.

ELIZABETH WELLS et al. v. JAMES B. WELLS et al.; ORVILLE UPSON, Appellant.

Division Two, July 5, 1919.

1. **JURISDICTION: Collateral Attack: Return in Another Case.** In a partition suit a defendant, whose interest in the land was sold upon execution under a default judgment rendered in another circuit court, has the right to offer the sheriff's return in that case in evidence, for the purpose of showing that the court did not acquire jurisdiction over the persons of the defendants therein, because of insufficient service of the summons.

2. ———: **Sheriff's Return: Words Understood.** If the sheriff's return recites that he left a copy of the writ and petition "with a person family" of said defendants, the words "of the" will be understood between "person" and "family," so that it would read "with a person of the family" of defendants.

3. ———: ———: **Service Upon Husband and Wife.** If the defendants are husband and wife, and cannot be found in the county, it is proper for the sheriff to leave a copy of the petition and writ, and a copy of the writ, "with a person of the family" of said defendants, at their usual place of abode, over fifteen years of age. One such person, in contemplation of the statute, represents both defendants.

4. ———: ———: ———: **Copies for Each.** Where the defendants are husband and wife and cannot be found, the leaving of copies of the petition and writ for one, and a copy of the writ for the other, with some person of the family of said defendants, over fifteen years of age, at their usual place of abode, is all that the statute requires. If it could be construed to require such person to deliver a copy of the petition and writ to the first party served, and a copy of the writ to the other, still, in the absence of evidence to the contrary, it will be presumed that both the sheriff and said person did their duty.

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5. ———: **The Return Adjudicated.** The sheriff's return recited: "I hereby certify that I executed the within writ in Lincoln County, Missouri, on 26th day of September, 1907, by leaving a copy of the writ and petition and a copy of the writ with a person family of said Emeline M. Wells and James B. Wells at their usual place of abode over the age of fifteen years." *Held*, sufficient to uphold a default judgment.

Appeal from Montgomery Circuit Court.—*Hon. J. D. Barnett*, Judge.

AFFIRMED.

Sutton & Huston, H. W. Johnson and *A. H. Drunert* for appellant.

(1) The sheriff's return upon the summons in Farmers & Mechanics Savings Bank v. Emeline M. Wells and James B. Wells does not show that a copy of the writ and petition was left at the usual place of abode of the first party summoned with a person of the family of such party, and does not show that a copy of the writ was left at the usual place of abode of the party subsequently summoned with a person of the family of such party, and such return is wholly insufficient to support a default judgment. Gamasche v. Smythe, 60 Mo. App. 163, 165; Madison County Bank v. Suman, 79 Mo. 531; Laney v. Garbee, 105 Mo. 359; Blanton v. Jamison, 3 Mo. 53; Stewart v. Stringer, 41 Mo. 404; Colter v. Luke, 129 Mo. App. 706; Rosenberger v. Gibson, 165 Mo. 23; Smith v. Rollins, 25 Mo. 408; Nathan v. Oil Co., 187 Mo. App. 564; Nelson v. Railroad Company, 225 Ill. 197, 205; Bimeler v. Dawson, 4 Scam. (Ill.) 431; Bicknell v. Herbert, 20 Hawaii, 132, 233 U. S. 70; Thomas v. Thomas, 96 Mo. 223; Harris v. Hardeman, 14 How. (U. S.) 334; Berryhill v. Sepp, 106 Minn. 458; Enewold v. Olsen, 39 Neb. 59; Harness v. Cravens, 126 Mo. 247, 249; Real Estate Company v. Catering Company, 175 Mo. App. 684, 267 Mo. 340; State ex rel. Coleman v. Blair, 245 Mo. 680; South Missouri Pine Lumber Co. v. Carroll, 255 Mo.

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357; Orchard v. Smith, 193 S. W. (Mo.) 578; Slocomb v. Bowie, 13 La. 10; Fuller v. Caldwell, 3 Minn. 117; Hickman v. Barnes, 1 Mo. 156; Sweet v. Sanderson Brothers Steel Co., 6 Civ. Proc. R. (N. Y.) 69; Taylor v. Pridgen, 3 Wilson, Civ. Cas. Ct. App. sec. 89; Sec. 1760, R. S. 1909. (2) The return not showing actual service upon the first party summoned, by a delivery to such party in person of a copy of writ and petition, constructive service of the party subsequently summoned was not authorized by the statute except by delivery of a copy of both the writ and petition, and the return is on this ground wholly insufficient to support a default judgment. Sec. 1760, R. S. 1909.

John L. Burns for respondents.

(1) The service of writs in case of Farmers and Mechanics Savings Bank against Emeline M. Wells and James B. Wells was personal service. Mattocks v. Van Asmus, 180 Mo. App. 404, 406. (2) The return in question clearly shows that a copy of the petition and writ and a copy of the writ were duly and properly served, and that there was a substantial compliance with the statute. Collier v. Lead Co., 208 Mo. 269; State ex rel. v. Still, 11 Mo. App. 283; Howard v. Still, 14 Mo. App. 583; Ables v. Webb, 186 Mo. 246; Scharff v. McGaugh, 205 Mo. 353. (3) The sheriff's return should be given a reasonable construction. Collier v. Lead Co., 208 Mo. 269; Ables v. Webb, 186 Mo. 246; Dunham v. Wilfong, 69 Mo. 355; McMillon v. Harrison, 29 L. R. A. (N. S.) 946; Keith Bros. v. Stiles, 92 Wis. 19; Davis v. Jacksonville Line, 126 Mo. 76; Phillips v. Evans, 64 Mo. 17; Great Northern Hotel Co. v. Farrand, 90 Ill. App. 314; Cloyes v. Phillip, 149 S. W. 549; Bruce v. Cloutman, 45 N. H. 37. (4) It is presumed that public officers perform their duties rightly and properly. Collier v. Lead Co., 208 Mo. 272; State ex rel. Wilson v. Mastin, 103 Mo. 508; Hammond v. Gordon, 93 Mo. 233; Adams v. Cowles, 95 Mo. 501;

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Evans v. Robberson, 92 Mo. 198; Owen v. Baker, 101 Mo. 407. (5) Defect, if any, in the sheriff's return is cured by the Statute of Jeofails. Secs. 2119, 2120, R. S. 1909; Muldrow v. Bates, 5 Mo. 214; Weil v. Simmons, 66 Mo. 619; Blaisdell v. Steamboat, 19 Mo. 157; O'Toole v. Lowenstein, 177 Mo. App. 662; Crouchon v. Brown, 57 Mo. 38. (6) The recital in the judgment that both defendants were legally served is conclusive upon the parties in a collateral proceeding. Hardin v. Lee, 51 Mo. 245; Dunham v. Wilfong, 69 Mo. 358; Thompson v. Chicago S. F. Ry. Co., 110 Mo. 147; Freeman on Judgments, sec. 130; Adams v. Cowles, 95 Mo. 501; Draper v. Bryson, 71 Mo. 71; Jones v. Bibb Brick Co., 120 Ga. 321; Leonard v. Sparks, 117 Mo. 103; State ex rel. Kenamore v. Wood, 155 Mo. 470. (7) A broad distinction is drawn between cases where there is no service on defendant and those in which service is in some respect deficient or irregular. In the latter cases jurisdiction attaches subject to be defeated by objections to the irregularity interposed in season in some direct manner. Leonard v. Sparks, 117 Mo. 109; State ex rel. Kenamore v. Wood, 155 Mo. 470; Ellis v. Nuckols, 237 Mo. 290; Conners v. St. Joe, 237 Mo. 612; Jasper Co. v. Wadlow, 82 Mo. 172; State v. Wear, 145 Mo. 194; Cruzen v. Stephens, 123 Mo. 337; Freeman on Judgment, sec. 126.

RAILEY, C.—This is an action for the partition of 240 acres of land in Montgomery County, Missouri. The original petition was filed March 18, 1914. On January 2, 1915, an amended petition was filed, and upon which the cause was tried. After describing the land, the petition alleges that L. B. R. Wells, deceased, by his last will devised said real estate to his wife, Mary S. Wells, for life, with remainder to his grandchildren, Alice Dothage, W. S. Wyatt, Frank R. Wyatt, Harry D. Wyatt and Mary E. Wyatt, and his children, James B. Wells, John T. Wells, Elizabeth Wyatt, Alice McCune, and Martha Wyatt, subject to advancements,

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the grandchildren taking one share between them and the children taking each one share; that said James B. Wells conveyed his undivided one-sixth interest in said real estate to James M. McLellan; that said McLellan died testate, and by his will devised said one-sixth interest to Emeline Wells; that on April 25, 1914, Emeline Wells and James B. Wells, her husband, conveyed said undivided one-sixth interest to Orville Upson, said deed being filed for record July 21, 1914; that on May 1, 1914, W. H. Verser, sheriff of said county, conveyed by sheriff's deed to Charles Martin, trustee, all the right, title and interest of Emeline Wells and James B. Wells in and to said real estate, under an execution against them, which said deed was recorded in said county; that the plaintiffs and defendants are seized as tenants in common of said real estate; that the latter is not susceptible of partition in kind, and that the plaintiff, Mary S. Wells, consents that the lands be sold for the purposes of partition; and prays that the court will declare and determine the title to said real estate, adjudge partition and sale of same, and order distribution of the proceeds of said sale amongst the parties according to their respective rights and interests.

On January 25, 1915, Charles Martin, trustee, filed an answer to the second count of said amended petition, and after practically admitting the general title as alleged in the petition, except as hereafter stated, claimed to be the owner of said one-sixth interest in said real estate by virtue of the sheriff's deed aforesaid. He alleges that said deed is predicated upon an execution, which was based on a judgment rendered October 16, 1907, in the Lincoln County Circuit Court, in favor of the Farmers & Mechanics Savings Bank, against Emeline M. Wells and James B. Wells, for $686.50 debt and $8.80 costs, etc. The answer denied every other allegation in said second count of the petition.

Orville Upson, on April 27, 1915, answered and alleged therein that the interest owned by James B.

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Wells, in the estate of his deceased father, which is sought to be partitioned in this cause, was by said James B. Wells and wife sold and conveyed to James B. McLellan; that afterwards, the latter, by his will, devised said real estate to Emeline Wells; that the latter and her husband conveyed said property to defendant Orville Upson, who claims to be the owner of same, and denies that said bank, or Charles Martin, as trustee, has any interest therein.

Charles Martin, trustee, at the trial, offered in evidence the sheriff's deed aforesaid, dated May 1, 1914, purporting to convey to him, as trustee, the interest in said land of Emline M. Wells, and James B. Wells. Orville Upson objected to said deed, on the ground that the Circuit Court of Lincoln County had no jurisdiction or authority to render the judgment upon which execution was issued and said real estate was sold. This objection was overruled and an exception saved.

Orville Upson then introduced in evidence a certified copy of a petition entitled, "Farmers and Mechanics Savings Bank, Plaintiff, v. Emeline M. Wells and James B. Wells, Defendants." The suit was based on a note for $2500. There was a credit on said note, dated January 14, 1907, for $1450, and a further credit of $600 thereon, dated February 21, 1907. The summons offered in evidence, was in usual form, and directed the sheriff to summon Emeline M. Wells and James B. Wells. The sheriff's return was offered in evidence, and reads as follows:

> I hereby certify that I executed the within Writ in Lincoln County Missouri on the 26th day of September, 1907, by leaving a Copy of the Writ and petition and Copy of the Writ with a person family of said Emeline M. Wells and James B. Wells at their usual place of abode over the age of fifteen years.
>
> J. W. GENTRY,
> Sheriff of Lincoln County, Mo.

A default judgment was rendered on May 16, 1907, based on the sheriff's return aforesaid, and in which the bank is named as plaintiff and Emeline M. Wells and James B. Wells are named as defendants.

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Orville Upson also introduced in evidence a deed from James B. Wells and Emeline M. Wells, to James M. McLellan for the land aforesaid, dated July 11, 1908. The same defendant also offered in evidence the last will of James M. McLellan in which the above land was devised to his daughter, Emeline M. Wells. He further introduced in evidence the deed of Emeline M. Wells and James B. Wells, her husband, to himself, dated May 7, 1914.

The trial court found the issues against Orville Upson, and in favor of Charles Martin, trustee, and so entered as a part of its decree. Orville Upson filed his motion for a new trial, which was overruled and the cause duly appealed by him to this court.

Charles Martin, trustee, died after the case was appealed to this court, and the action was duly revived in the names of his heirs, administrators and widow, to-wit, R. S. Martin, Charles S. Martin, Wm. C. Martin and Lucy C. Martin, heirs, Willie C. Martin, widow, and Willie C. Martin and Charles S. Martin, as administrators of the Charles Martin estate, who are now respondents and trustees for said bank.

The case before us hinges on the sheriff's return in the case of Farmers & Mechanics Savings Bank, plaintiff, v. Emeline M. Wells and James B. Wells, defendants, tried in the Circuit Court of Lincoln County, Missouri, on the 16th day of October, 1907, and in which a judgment by default was rendered in favor of the bank. If the return of the sheriff, supra, is held to be valid, it leads to an affirmance of the judgment. If, on the other hand, the return is held to be void, it will require the cause to be reversed and remanded.

Sheriff's Return.

I. As this is a collateral attack, can it be legally held that the return aforesaid is void?

Section 1760, Revised Statutes 1909, which was in force at the time of the rendition of said judgment, and the sheriff's return aforesaid, as a matter of convenience, are placed in parallel columns:

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Section 1760.

"A Summons shall be executed, except as otherwise provided by law, either: First, by reading the writ to defendant and delivering to him a copy of the petition; or, second, by delivering to him a copy of the petition and writ; or, third, by leaving a copy of the petition and writ at his usual place of abode, with some person of his family over the age of fifteen years; . . . "

Sheriff's return.

"I hereby certify that I executed the within Writ in Lincoln County, Missouri on 26th day of September, 1907 by leaving a Copy of the Writ and petition and Copy of the Writ with a person family of said Emeline M. Wells and James B. Wells at their usual place of abode over the age of fifteen years.

"J. W. Gentry,
"Sheriff of Lincoln County, Mo."

a. It is manifest, that giving a plain and common-sense construction to the language of the return, the words "of the," should be construed as understood between "person," and "family," [Section 8057, R. S. 1909; Reid, Murdock & Co. v. Mercurio, 91 Mo. App. l. c. 679; Wolfe v. Dyer, 95 Mo. l. c. 551; Nichols v. Boswell, 103 Mo. 160; Thomson v. Thomson, 115 Mo. l. c. 67-8; Presnell v. Headley, 141 Mo. l. c. 191-2; Johnson v. Bowlware, 149 Mo. 451; Briant v. Garrison, 150 Mo. l. c. 667-8-9; Whitaker v. Whitaker, 175 Mo. l. c. 10-11-12; McMahan v. Hubbard, 217 Mo. l. c. 637-8.]

Supplying Words.

In discussing the legal effect of a constable's return, GOODE, J., in Reid, Murdock & Co. v. Mercurio, 91 Mo. App. l. c. 679, said: "Appellant's contention of insufficient service because the word *it* was left out of the return after the words *by reading,* will be disregarded as frivolous, the omission being obviously a clerical mistake."

In Thomson v. Thomson, 115 Mo. l. c. 67, SHERWOOD, J., speaking for Court in Banc, very clearly stated the principal of law which should apply in cases of this character, as follows: "In relation to supplying words where it is obvious that from the words used and the general tenor and context of the instrument certain words of their substance have been omitted, such words may be supplied by construction."

b. Treating the words "of the," as having been supplied between "person" and "family," the return in question would read as follows:

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I hereby certify that I executed the within writ in Lincoln County, Missouri, on 26th day of September, 1907, by leaving a copy of the writ and petition and copy of the writ with a person of the family of said Emeline M. Wells and James B. Wells at their usual place of abode, over the age of fifteen years.

It is vigorously contended by counsel for appellant that the return, with the words "of the," inserted as above, is *still* void, and that the Circuit Court of Lincoln County, Missouri, was without jurisdiction to render the judgment of 1907, in favor of the bank against Wells et al. It is insisted, that the return is void, because it "does not show that a copy of the writ and petition was left at the usual place of abode of the first party summoned with a person of the family of such party, and does not show that a copy of the writ was left at the usual place of abode of the party subsequently summoned with a person of the family of such party." . . .

Other Cases.

A large number of cases are cited under Proposition 1 of Appellant's Points and Authorities, in support of above contention. Upon a close analysis of the cases cited, we do not find *any* of them directly in point, nor do they deal with the facts of this case. We will consider the Missouri cases, quoted from in appellant's brief:

In Blanton v. Jamison, 3 Mo. l. c. 53, the return read: "I served the within summons on Benjamin Blanton, the defendant, by going to his house and leaving a true and attested copy of the summons and declaration with Lovel Harrison, a white person of said Blanton's family, above fifteen years of age, on the 23d day of September, 1829, in Hurricane Township, Lincoln County."

The above return *failed* to show, *that the process was left at defendant's dwelling house or place of abode,* as required by the statute then in existence. In disposing of the subject, WASH, J., said: "Every word of the return may be true, and yet the service may have

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been made in a manner very different from that prescribed in the statute."

In Stewart v. Stringer, 41 Mo. l. c. 404-5, WAGNER, J., in discussing the return under consideration, said: "The service and return were both plainly irregular and defective. The writ purports to have been delivered, according to the return, to one person, a white member of the family of both defendants at one and the same time. Now a person cannot be a member of two families at the same time, and it appears that but one writ was left for the two defendants, when the statute contemplates that a separate writ should be left for each of the defendants last served." The return shows that one writ was left with William Stringer for two persons of different names. If the two defendants had been husband and wife, and a copy of the writ and petition, and a copy of the writ, had been left with William Stringer, there is nothing in the opinion of the court to indicate that the service would have been held invalid.

In Madison County Bank v. Suman, 79 Mo. l. c. 530, cited by appellant, PHILIPS, J., said: "The return in this case recites: 'with a member of the family of the within named Elizabeth Suman, administratrix, over fifteen years of age, at her last usual place of abode in the county of Barton,' etc. This service is not in conformity with the statute. Her last usual place of abode might not be her present place of abode."

In Laney v. Garbee, 105 Mo. l. c. 359, there was only one defendant. The return did not show that the petition and writ were left "at the usual place of abode" of defendant. Of course it was held the return did not comply with the requirements of the statute.

In Gamasche v. Smythe, 60 Mo. App. l. c. 165-6, a foreign corporation was sued and Smythe was sought to be charged as garnishee. The service on defendant corporation was challenged, as being insufficient. ROMBAUER, J., on pages 165-6, in passing upon the return, said: "It fails to show that the defendant had no office in this State, and does not state, either in direct terms or by unavoidable inference, that the summons

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was served upon an officer or agent of the defendant in charge of any of its offices."

In Colter v. Luke, 129 Mo. App. 702, cited by appellant, JOHNSON, J., held that a return of service on a member of the family, instead of on a person of the family, was good.

Upon a careful consideration of all the cases cited by appellant, we do not find a single one, which, in our opinion, sustains appellant's contention, that the return before us is void, or that it does not substantially comply with Section 1760, Revised Statutes 1909, heretofore quoted.

c. We have also carefully examined and fully considered the cases cited in the brief of respondents, and aside from the general principles, discussed do not find that any of them in terms fit this case, although the general principles reviewed tend to support the validity of the return before us.

II. While this is a collateral attack on the judgment of 1907, yet the defendant had the legal right to offer in evidence, as he did, the original return of the sheriff, in that case, for the purpose of determining whether the court acquired jurisdiction over the persons of Emeline M. Wells and James B. Wells, under the service aforesaid, attempted to be made on them.

Collateral Attack.

In Thompson v. Pinnell, 199 S. W. l. c. 1013, Division One, in discussing the question under consideration, said: "It is equally as well settled in this State that in a collateral proceeding the record, judgment, and files of a case in the circuit court may be examined for the purpose of ascertaining whether the court had jurisdiction of the person of defendant in said cause, and notwithstanding the judgment may assert, in general terms, that the defendant has been duly served with process, yet if it should appear from the return, or some other portion of the record of equal dignity, that the service *actually* had is invalid and no appearance en-

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tered, the judgment of said court may be declared void for want of jurisdiction over the person of defendant. [Cloud v. Inhabitants of Pierce City, 86 Mo. 357; Crow v. Meyersieck, 88 Mo. 411; Milner v. Shipley, 94 Mo. 109, 7 S. W. 175; Adams v. Cowles, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74; Laney v. Garbee, 105 Mo. 355, 16 S. W. 831, 24 Am. St. Rep. 391; Hutchinson v. Shelley, 133 Mo. 412, 413, 34 S. W. 838; Norton v. Reed, 253 Mo. 251, 252, 161 S. W. 842, and cases cited: Arn v. Arn, 264 Mo. 42, 173 S. W. 1062; Williams v. Grudier, 264 Mo. 216, 174 S. W. 387; Levee Dist. v. Securities Co., 268 Mo. 663, 187 S. W. 855.]"

The authorities cited in the above case fully sustain the principles announced by the court. Hence, the default judgment rendered in favor of the bank against Mr. and Mrs. Wells, in 1907, hinges upon the validity of the sheriff's return aforesaid.

III. As it appears from the record that Emeline M. Wells and James B. Wells were husband and wife, it was proper for the sheriff to leave the writ and petition, and a copy of the writ, with a person of the family of Emeline M. Wells and James B. Wells, at their usual place of abode, over the age of fifteen years. This he did, as shown by the return before us. The sheriff performed his duty to the extent of his ability. The wife and her husband were to be served with process. He left with the person designated by statute, on whom service could be made, a copy of the writ and petition, for *one* of the defendants, and a copy of the writ for the *other* defendant. When this service had been performed, and the sheriff made his return in accordance with the facts, the court acquired jurisdiction over the persons of Emeline M. Wells and James B. Wells, whether they actually received the process or not. It would, in our opinion, be giving Section 1760, Revised Statutes 1909, an impractical and unreasonable construction, to require the sheriff, under the circumstances of this case, to state in his return any additional facts for the purpose of validating

Husband and Wife.

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same. The *person* designated by the statute to whom the sheriff was to deliver the process, represented, in contemplation of law, Emeline M. Wells and James B. Wells.

IV. It is evident from the return before us, that a copy of the *writ and petition,* for one defendant and a copy of the *writ* for the other defendant, were left with the *person* designated by the statute on whom service should be made. Even if the statute should be construed to require the *person* to deliver to the first party served a copy of the writ and petition, and to deliver to the other defendant a copy of the writ, still, in the absence of evidence to the contrary, it will be presumed, in this collateral proceeding, that both the *sheriff* and *person* did their duty. [Elrod v. Carroll, 202 S. W. l. c. 5-6; Hartwell v. Parks, 240 Mo. 543, and cases cited; Chlanda v. Transit Co., 213 Mo. l. c. 260-1; Yarnell v. Railway Co., 113 Mo. l. c. 579; Mathias v. O'Neill, 94 Mo. l. c. 528; Lenox v. Harrison, 88 Mo. 491.]

Copies for Each.

V. We have carefully considered the questions involved in this action, as well as the authorities cited upon each side. We are of the opinion, that the judgment of the trial court was for the right party. It is accordingly affirmed. *White* and *Mozley, CC.,* concur.

Conclusion.

PER CURIAM:—The foregoing opinion of RAILEY, C., is adopted as the opinion of the court. All of the judges concur.

CELIA CLARK, Appellant, v. UNION ELECTRIC LIGHT & POWER COMPANY.

Division Two, July 5, 1919.

1. **JOINT TORTFEASORS: Release of One: Effect at Common Law.** An instrument releasing one of several joint tortfeasors from liability for a tort, executed prior to the Act of March 23, 1915, Laws 1915, p. 269, is to be construed in the light of the common law as it existed in this State prior to the passage of said act, and under the common law a release of one joint tortfeasor operated to release all of them

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2. ———: ———: ———: **Covenant Not To Sue.** Where the plaintiff by written instrument does "hereby release and forever discharge" one joint tortfeasor "only from all suits, actions or causes of action which I have or might have against" said tortfeasor, a subsequent clause by which plaintiff "expressly refuses and declines to release" the other tortfeasor "from any claim for damages which I may have or might have against it" and whereby plaintiff "expressly reserves the right to enforce any and all claims that I may or might have against" said other tortfeasor did not destroy the release thus clearly made, but the instrument operated to release all the joint tortfeasors.

3. ———: ———: ———: ———: **Rule.** While the courts construe an instrument settling a claim for damages with one tortfeasor as a covenant not to sue wherever its language will permit, it cannot be so construed when it is clear from its unambiguous language that it was not intended as a covenant not to sue.

Appeal from St. Louis City Circuit Court.—*Hon. William A. Kinsey,* Judge.

AFFIRMED.

Lashly & Barnett and *George E. Egger* for appellant.

(1) The stipulation whereby plaintiff released her claim so far as the telephone company was concerned did not constitute such a technical release as would discharge the defendant, a joint tortfeasor, and should have been construed as a covenant not to sue. Ridenour v. International Harvester Co., 205 S. W. 883; McDonald v. Goddard Grocery Co., 184 Mo. App. 432; Arnett v. Railroad Co., 64 Mo. App. 368; Lumber Co. v. Dallas, 165 Mo. App. 49; Dennison v. Aldridge, 114 Mo. App. 700; Laughlin v. Powder Co., 153 Mo. App. 508. (2) The stipulation should have been construed to be a covenant not to sue, and not a technical release such as would discharge a joint tortfeasor. The stipulation contained an express reservation of the right to sue the other joint tortfeasor, the defendant herein. In the case of such reservation, notwithstanding the fact that the instrument uses the word "release" the

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instrument is not a release, but is a convenant not to sue the person released. Gilbert v. Finch, 173 N. Y. 455; Feighley v. Milling Co., 100 Kan. 430; Eden v. Fletcher, 79 Kan. 139; Nickerson v. Surplee, 174 N. Y. 139; Berry v. Pullman Co., 249 Fed. 816; Kropidlowski v. Pfister & Vogel Leather Co., 149 Wis. 421; Atchison, T. & S. Ry. Co. v. Classin, 134 S. W. 358; J. Rosenbaum Grain Co. v. Mitchell, 142 S. W. 121; El Paso & S. W. Ry. Co. v. Darr, 93 S. W. 169; Bloss v. Plymale, 3 W. Va. 393; Matthews v. Chicopee Mfg. Co., 3 Rob. (N. Y.) 711; Carey v. Bilby, 129 Fed. 203; 34 Cyc. 1085-1087. (3) It is quite apparent that it was the intention of the parties that the said stipulation should constitute a covenant not to sue and not a release. The instrument was entitled "covenant not to sue." In the body of the instrument is found language to the effect that the plaintiff elected to take under a certain benefit insurance plan in lieu of prosecuting her action for damages against the telephone company and further the instrument contains an express reservation of the right to sue this defendant. This certainly is sufficient to establish the intention of the parties not to sue and the instrument as not a release.

Jourdan, Rassieur & Pierce for respondent.

The writing, though called a "covenant not to sue," was a release of a joint tortfeasor, and therefore the release of this defendant. Dulaney v. Buffum, 173 Mo. 1; Hubbard v. Railroad, 173 Mo. 249; Chicago Herald Co. v. Bryan, 195 Mo. 587; McBride v. Scott, 132 Mich. 176.

WILLIAMS, P. J.—Plaintiff sues for damages in the sum of $10,000 for the death of her husband, Theodore C. Clark, which was alleged to have been caused by the negligence of the plaintiff on the 7th day of November, 1914.

At the close of plaintiff's evidence at the trial in the Circuit Court of the City of St. Louis, plaintiff took an involuntary nonsuit, with leave to move to set

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same aside. The court overruled the motion to set aside the nonsuit and plaintiff duly perfected an appeal to this court. The facts are sufficiently summarized in the following quotations which we take from the respective statements.

From appellant's statement we quote as follows:

"Deceased was in the employ of the Southwestern Telegraph and Telephone Company (hereinafter called the Telephone Company) as 'trouble man,' his duties consisting of locating and remedying wire trouble on the lines of his employer. On this date the defendant, Union Electric Light & Power Company (hereinafter called the Light Company), the Telephone Company and the City of St. Louis were maintaining their respective wires upon poles belonging to the Telephone Company, there being a joint user of said poles on what was known as the Manchester Line, of the Telephone Company. The Light Company maintained wires upon two cross-arms above the cross-arms and wires of the Light Company. There was a lead cable running from the ground to a cable box in the midst of the wires, which cable ran alongside of and perpendicular with the pole.

"On the date mentioned deceased was ordered by the trouble tester of the Telephone Company to go out on the Manchester Line and locate and correct what appeared to be a 'ground' on one of the wires of the Telephone Company. A test at the station with instruments used for that purpose showed that the wire was not crossed with the wires of the Light Company or with any other, but that the line was simply grounded. Deceased went out on the line and was upon the pole located at Taylor and Manchester Avenues of the Manchester Line of the Telephone Company when he was seen to fall from amongst the wires to the ground, a distance of from 30 to 36 feet. He was dead when eye-witnesses reached him. He had an electric burn in the palm of his left hand and his neck was broken. He was wearing canvas gloves at the time. It was necessary

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for deceased to climb through the wires of the Light Company to get to the wires of the Telephone Company, the space beween the Light Company's wires being from 32 to 34 inches. The Light Company was maintaining at the time certain wires on both of their cross-arms, which were carrying a heavy current, ranging from 2200 to 4400 volts, sufficiently heavy to be dangerous to human life, and other wires of the Light Company on that pole were neutral, carrying no current at all. The wires of the city and of the Telephone Company were all low-voltage and not carrying a heavy or dangerous current. The insulation on the high-tension wires of the defendant was off the wires near the pole and there were marks on the bare space of one of them, showing that a foreign body had come in contact with it at that point and that the current of electricity had been diverted from the wire into the foreign body. This mark was not upon the wire a short time before, but was there a short time after Clark was killed."

One of plaintiff's witnesses testified as follows: That the Telephone Company had a rule whereby the men were supposed to wear rubber gloves where they were handling wires which are in contact with or in close proximity with high-tension wires, but that it was not the custom of the Telephone employees to observe that rule universally, but that if they were working on high-tension wires they would observe the rule. In working with the telephone wires they would not generally use rubber gloves; that when a wire gets crossed with an electric light wire it has the same voltage as the electric light wire, and then the precaution is taken to protect the person from shock.

The following quotations are taken from respondent's statement:

"At that time the Telephone Company had provideed, among other benefits, a death benefit plan for compensation to the widow or dependents of employees killed while in the service of the company. The original fund for the creation of this plan was furnished by the

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Telephone Company and it obligated itself to make up any deficiency in the fund at the end of the year, providing that such deficiency did not exceed more than a certain percentage of the total wages paid to its em-employees during the previous year. The employees contributed no money, and made no payments to this fund, nor did they pay any premiums or assessments. One of the provisions of the plan was, that in case of accident resulting in the death of an employee, which entitled his beneficiary or beneficiaries to benefits under the regulations, he or they might elect to accept such benefits, or to prosecute such claims at law as he or they might have against the company, but that if an election was made to accept the benefits, such election was required to be in writing; and it was further provided that the company be released from all claims and demands which the beneficiaries might have against the Telephone Company, otherwise than under the regulations, on account of such accident. Under the plan, these benefits were to be paid irrespective of the question of liability, but an election had to be made.

"A demand was made on the employer for damages, and it appears that the Telephone Company denied liability, and thereafter Mrs. Clark, the plaintiff, received from the Telephone Company the sum of $2760, and executed an instrument in writing, which is as follows:

" 'Covenant Not to Sue.

" 'Whereas, On or about the 7th day of November, 1914, Theodore C. Clark, a married man of the City of Webster, St. Louis County, Missouri, was in the employ of the Southwestern Telegraph & Telephone Company, as a repairman, and was working at or near the intersection of Taylor and Manchester Avenues, in the City of St. Louis, on a pole owned by the said company on said date; and,

" 'Whereas, On said 7th day of November, 1914, while the said Theodore C. Clark was working on said pole at said location, he came in contact with a live

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wire owned by the Union Electric Light & Power Company and sustained injuries which caused his death on the same date; and,

"'Whereas, I claim that my husband, the said Theodore C. Clark, received the injuries aforesaid, and from which he died as aforesaid, under circumstances which I claim renders both the Southwestern Telegraph & Telephone Company and the Union Electric Light & Power Company liable in damages, although such liability is expressly denied by said Telephone Company in so far as it is concerned, and I, being desirous to compromise and settle the matter in so far as it relates to the said Southwestern Telegraph & Telephone Company, do hereby and have elected to accept the provisions of the plan for Employees' Pension, Disability and Death Benefits of the Southwestern Telegraph & Telephone Company in lieu of any and all actions for damages against the said Southwestern Telegraph & Telephone Company, by reason and on account of the death of the said Theodore C. Clark, my husband.

"'Now, Therefore, In consideration of the sum of $2670, to me paid by the Southwestern Telegraph & Telephone Company, the receipt whereof is hereby acknowledged, I do hereby compromise said claim, and do hereby release and forever discharge the said Southwestern Telegraph & Telephone Company only from any and all liabilities for all claims for and on account of the death of my husband, the said Theodore C. Clark, and do also release and discharge the said Southwestern Telegraph & Telephone Company only from all suits, actions or causes of action, which I have or might have against the said Southwestern Telegraph & Telephone Company, for and on account of the death of my said husband, as aforesaid.

"' I hereby expressly refuse and decline to release the said Union Electric Light & Power Company from any claims for damages which I may have or might have against it, and do not intend to hereby waive any claims

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for damages against the said Union Electric Light & Power Company for and on account of the death of my said husband, caused as aforesaid. I expressly reserve the right to enforce any and all claims that I may or might have against said Union Electric Light & Power Company.

"'In Witness Whereof, I have hereunto set my hand in the City of St. Louis, State of Missouri, this 2nd day of November, 1914.

"'Celia Weisling Clark,

"'Witnesses:

"'George C. Egger.

"'E. H. Painter.'

"Mr. George C. Egger, who appears as one of the witnesses to this instrument, was the attorney for Mrs. Clark at the time, and according to her testimony Mr. Egger had made claim against the Telephone Company and against the Union Electric Light & Power Company for damages, as such attorney, and that was prior to the settlement that was made with the Telephone Company."

It is contended that the court erred in holding that the instrument of November 7, 1914, executed by appellant to the Southwestern Telegraph & Telephone Company, was a release and was not merely a convenant not to sue said Telephone Company.

Release of Tortfeasor.

The above mentioned instrument was executed prior to the Act of March 23, 1915, Laws 1915, p. 269, which changed the common law rule concerning the legal effect of the release of one joint tortfeasor.

The instrument is therefore to be construed in the light of the common law as it existed in this State prior to the passage of the above statute. Under the common law the release of one joint tortfeasor operated to release all joint tortfeasors. [Dulaney v. Buffum, 173 Mo. l. c. 14; Hubbard v. Railroad, 173 Mo. l. c. 255; Chicago Herald Co. v. Bryan, 195 Mo. l. c. 587.]

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If the last paragraph thereof were omitted from the instrument involved in this case, no difficulty would be encountered in determining the case, because the remaining portion of said instrument is a clear and unequivocal settlement in full with, and a release of, one joint tortfeasor from "any and all liabilities" by reason of the injuries suffered, and under all the authorities would operate to release the respondent, the other joint tortfeasor.

But appellant contends that by reason of the last paragraph thereof, whereby appellant attempts to reserve the right to proceed against respondent, the instrument should be construed merely as a covenant not to sue the Telephone Company and that therefore the instrument should not operate to release respondent.

There appears to be much conflict of authority upon the question and the modern tendency of the courts appears to be along the line of construing an instrument upon this subject to be a convenant not to sue wherever the language of the instrument will permit. A full list of the authorities cited by respective counsel will be found in the Reporter's notes to this opinion, and it is unnecessary to copy the citations herein. By a reading of the decisions on the subject it will be found difficult to formulate any definite and fixed rule of construction. Each case no doubt is more or less influnced by the language of the instrument held in review. A vast dissimilarity exists in the wording of the respective instruments.

We have carefully read and reread the instrument now under review and are unable to hold that it was ever intended to be merely a convenant not to sue without doing violence to the clear and unambiguous language found in said instrument.

It may have been the intention of the appellant to avoid the legal effect of a release of one joint tortfeasor, but the proper way to have avoided such a result would have been to have refrained from releasing one joint tortfeasor. The release of one joint tortfeasor stands

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out clear in the instrument, and we know of no rule of construction that will justify us in destroying the release thus clearly made. It should not be forgotton that this is not a suit to reform the instrument. The instrument is in this case, to be construed as written.

This court passed upon the legal principle here involved in the case of Dulaney v. Buffum, supra, l. c. 15, wherein the court said: "When the plaintiffs acknowledge full satisfaction of all the injuries complained of in the petition, any effort to reserve a cause of action against those jointly liable, will not prevent the operation of the bar as to those not included in the release."

The above case has not been overruled and we think it announces the rule applicable at the time this instrument was executed, which was, as above mentioned, before the Act of 1915.

For the reasons given in the case of Dulaney v. Buffum, supra, we hold that the judgment of the circuit court was proper and should be affirmed.

It is so ordered. All concur.

W. E. EDMONDS, Appellant, v. ADOLPH SCHARFF et al., Appellants.

Division Two, July 5, 1919.

1. **RES ADJUDICATA: Ejectment: Voluntary Conveyance: Former Appeal.** While a judgment in ejectment is not *res adjudicata* as to any issue determined therein, the doctrine announced on an appeal from such judgment is an authoritative statement upon the law as applied to the facts therein presented; but a finding by the trial court that a certain deed from a husband to his wife, reciting a nominal consideration, was voluntary and void as to creditors, there being no showing that it was in fact supported by a valuable consideration, is not *res adjudicata* in a subsequent suit in equity in which a valuable consideration is asserted.

2. **WITNESS: Competency: Other Party Dead: Agent.** A woman, whose son-in-law is dead, cannot testify that he owed her notes to the amount of three hundred dollars and that she bought from him the lots in suit and had him deed them to his wife and that

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the notes were the actual consideration for the deed, which recited a consideration of one dollar. She was not the agent of the wife, but a party to the original contract, for the transaction is precisely the same as if she had purchased the lots, had the conveyance made to herself and subsequently conveyed to the wife; and under the statute (Sec. 6354, R. S. 1909), the son-in-law, "the other party to such contract," being dead, she is incompetent to testify in favor of the wife, or any person claiming under the wife.

3. **CONVEYANCE: Nominal Consideration: Voluntary: Correcting Mistake.** If no witness competent to testify is produced to show that a deed from the husband to his wife was supported by a valuable consideration, a recital therein that it was for a nominal consideration prevails, and it must be adjudged void as to his existing creditors, and neither the wife nor her grantees can maintain a suit in equity against them to correct a mistake in it.

4. **DISQUALIFICATION OF JUDGE: Judgment of Dismissal: Void Execution.** A judgment rendered by a judge not authorized to hear or determine a case is subject to collateral attack; and where a cause was submitted to a special judge and by him taken under advisement, and one of the counsel in the case afterwards became the regular circuit judge, a subsequent judgment of dismissal rendered by such regular judge is void, and an execution for costs and a sale of lands thereunder are likewise void.

5. **DOWER: Mansion House: Limitations.** Actions to establish the widow's dower in her husband's real estate, unless begun within ten years after his death, are barred by limitations; and the occupation by the widow of the mansion house thereon after her husband's death is no longer, since the Revision of 1889, an exception to the unqualified language of Section 391.

Appeal from Iron Circuit Court.—*Hon. E. M. Dearing*, Judge.

AFFIRMED in part; REVERSED AND REMANDED in part.

J. L. Fort for plaintiff.

(1) The deed should have been reformed, as sought in the first count. 7 Cyc. 255, 257; 34 Cyc. 904, 923; 24 Cyc. 57; Campbell v. Johnson, 44 Mo. 249; Jennings v. Brizeadine, 44 Mo. 335; Ford v. Unity Church, 120 Mo. 507; Bryant v. Gammon, 150 Mo. 655; Stroberry v. Walsh, 203 S. W. 291; Swearengin

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v. Swearengin, 202 S. W. 556; Wilson v. Fisher, 172 Mo. 22. (2) The consideration clause in the deed from Edwards to his wife was open to explanation. Edwards v. Latimer, 183 Mo. 626. (3) The deed from Edwards to his wife was valid against the world and conveyed the equitable title to the wife. Clark v. Thias, 173 Mo. 644; Daniels v. Goeke, 191 Mo. App. 1; Brewer v. Daniel, 198 Mo. 320; O'Day v. Meadows, 194 Mo. 604; Tennison v. Tennison, 46 Mo. 77; Hammons v. Renfrow, 84 Mo. 342. (4) Mrs. Edwards had a dower interest in this land and that interest has passed to plaintiff. R. S. 1889, secs. 2934, 4514; Phillip v. Presson, 172 Mo. 24; Graham v. Stafford, 171 Mo. 697; Smith v. Stephens, 164 Mo. 422-3; Null v. Howell, 111 Mo. 277; Beard v. Hall, 95 Mo. 16; Robinson v. Wear, 94 Mo. 687; Sherwood v. Baker, 105 Mo. 478. (5) The judgment in ejectment in the case of Scharff v. McGaugh, constitutes no bar to the granting of any relief to plaintiff, by him sought in this suit. Swearengin v. Swearengin, 202 S. W. 556. (6) The plaintiff has whatever title to the premises in suit that defendants acquired by and through the sheriff's sale. The record in this case shows that the court had jurisdiction of the subject-matter and the parties in the case in which the judgment for costs was rendered, and the law is that the judgment so rendered was a lien upon the real estate of the party against whom it was rendered, situated in the county in which the judgment was rendered. Right action and not wrong action is to be presumed in cases like this. The judgment for costs was not void on its face and its validity has never been assailed in a direct proceeding, but has been assailed in this collateral proceeding. That judgments, regular upon their face and rendered by a court having jurisdiction of the subject-matter and the parties, cannot be assailed in a collateral proceeding is elementary learning. R. S. 1909, secs. 2284, 2290; Beedle v. Mead, 81 Mo. 304; Cranor v. School Dist., 151 Mo. 127.

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Wilson Cramer for defendants.

(1) Plaintiff seeks to recover on the same title relied upon by defendant in the case of Scharff v. McGaugh, 205 Mo. 344. All questions relating thereto were considered by this court in that case and its decision is *res judicata*. (2) The sheriff's deed under exetion to plaintiff, dated September 12, 1904, and purporting to convey the interests of defendants, is void and conveys no title. (a) Because the judgment upon which the execution was issued, was rendered by J. L. Fort, then circuit judge, who had been counsel for the defendant in the cause and was disqualified from acting as judge. R. S. 1899, sec. 819. (b) Because at the time of the rendition of this judgment by Judge Fort the cause was still under advisement by Special Judge Bedford, who had tried the same and retained jurisdiction, and Judge Fort had no authority to make any order in the case. (3) In the fourth count plaintiff seeks to recover the dower interest of M. A. Edwards, widow of George L. Edwards, who died on the 22nd day of July, 1898. The present suit was brought February 5, 1910, as shown by the file marks on the petition and is barred. R. S. 1899, sec. 2979; R. S. 1909, sec. 371; Harrison v. McReynolds, 183 Mo. 533; Investment Co. v. Curry, 264 Mo. 483.

WHITE, C.—The petition in this suit was filed in 1910 in four counts, each of which seeks to affect the title to lots 10, 11 and 12 of Block 16 in the town of Bernie, in Stoddard County, Missouri. There was a judgment for defendants on counts 1, 2 and 3, and a judgment for plaintiff on count 4. The parties on both sides appealed.

It is admitted that George L. Edwards was the common source of title; he died in 1895. On December 26, 1892, he conveyed the property to his wife, M. A. Edwards, by direct deed. In the description in that deed lots 10, 11 and 12 were mentioned, but the block

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number was omitted. The consideration was recited to be one dollar. After her husband's death, in 1897, Mrs. M. A. Edwards conveyed the property to James L. Fort and James B. Buck and her title then passed by mesne conveyances to William McGaugh, who acquired it August 15, 1899. William McGaugh passed the title on by mesne conveyances to the plaintiff, W. E. Edmonds, who acquired a one-half interest in 1900 and the remaining half interest in 1902.

In December, 1892, at the time that G. L. Edwards conveyed the property to his wife, he was indebted to the firm of L. & A. Scharff in the sum of $162.40, for whiskey which he bought September 30, 1892. Suit was brought on this claim before a justice of the peace and judgment for $162.40 obtained January 19, 1893. A transcript of the judgment and proceeding before the justice was filed in the office of the clerk of the circuit court; execution issued, by virtue of which the Sheriff of Stoddard County levied upon and sold the property by correct description, and the same was purchased by L. & A. Scharff for the sum of $120, and conveyance made by the sheriff to them. The Scharffs then brought suit in ejectment against William McGaugh while he was in possession of the land; the petition was in the usual form and the answer was a general denial. Judgment of the circuit court was rendered in favor of the plaintiffs in that case for possession of the premises. The case was appealed to this court, where the judgment was affirmed. The Scharffs were put in possession in 1907, under a writ of restitution in that case.

Prior to the filing of the suit in ejectment and before the death of G. L. Edwards, L. & A. Scharff had brought suit against Lee Edwards (meaning G. L. Edwards) and M. A. Edwards, the purpose of which was to obtain equitable relief; that is, to set aside the conveyance made by G. L. Edwards to his wife. The suit was subsequently dismissed and costs assessed against the plaintiffs, L. & A. Scharff. Execution was issued upon that judgment for costs, the property sold by the

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sheriff and conveyance made to the plaintiff here, W. E. Edmonds.

The petition in this case is in four counts, as stated: The first count sets out the conveyance by G. L. Edwards to his wife with mistake in the description, the subsequent conveyance whereby the plaintiff acquired her title, and prays to have the misdescription corrected and for possession of the premises, against the Scharffs, with an accounting for the rents and profits during the time of their incumbency.

The second count of the petition sets up the title under which the plaintiff claims, the sheriff's deed under which L. & A. Scharff acquired their interest and the facts that they were in possession, and prayed for a cancellation of the sheriff's deed, as a cloud upon the title, and an accounting of the rents and profits.

The third count of the petition states a cause of action to determine the title under the statute, Section 2535.

The fourth count alleges the title of G. L. Edwards, his death, the right to dower of his widow in the property and her conveyance of the same to the plaintiff.

The answer of the defendant alleges the title by which they acquired their claim in the property under the sheriff's deed in September, 1893, and sets up the Statute of Limitations in bar of the action for dower as alleged in the fourth count of the petition.

The Circuit Court held the sheriff's deed to the Scharffs was good, denied plaintiff's right to relief as prayed in the first, second and third counts, but adjudged that he had a right to the dower of the widow, M. A. Edwards, in the property. Other facts pertinent to the different issues raised in the case will be considered as the questions which they affect arise.

I. The plaintiff's claim of title as asserted in the first and second counts of his petition is based on an assertion of the validity of the deed from G. L. Edwards,

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Showing Actual Consideration for Deed.

to his wife, made in 1892, and his right to have that deed reformed so as correctly to describe the land. The plaintiff proceeds in equity and the question is whether the deed under which he claims gave him such a right as he might enforce against the defendants in a court of equity.

Many of the questions affecting the regularity of the transaction whereby the defendants acquired their title, and some of the questions affecting the validity of the deed of Edwards to his wife, were settled in this court in the case of Scharff v. McGaugh, 205 Mo. 344. It was held by this court in that case that the judgment, and all other proceedings, by which the Scharffs acquired title, were regular. It is true, the judgment being in ejectment is not *res adjudicata* here as to any issue determined there, but the doctrine announced in that case upon the facts presented is an authoritative statement of the law as applied to such facts.

The court there held in the first place that the deed from G. L. Edwards to his wife showed on its face that it was a voluntary conveyance; it recites a consideration of one dollar; that a voluntary conveyance by a husband to his wife is void as to existing creditors. The debt to the Scharffs had been incurred and was in existence at the time the conveyance was made. It was also held that McGaugh, who claimed under Mrs. Edwards, might show there was in fact a valuable consideration for the deed which passed from her husband to her at the time. However, there was a failure of such showing in that case and the finding by the trial court that the deed was voluntary and void as to creditors was sustained. That finding is not *res adjudicata* here. This being an equity case it becomes necessary to examine the facts to see whether the recited consideration is refuted by a showing that in this case there was a valuable consideration.

Res Adjudicata.

Mrs. Edwards, who had married again and appeared under the name of M. A. Ashworth, swore that

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her mother, a Mrs. Summers, loaned her husband a considerable sum of money, for which her mother held his notes, and surrendered these notes to G. L. Edwards on execution of the deed to his wife. Mrs. Summers testified that she bought the land from G. L. Edwards, paid him three hundred dollars for it; that he owed her some notes and she gave him the notes for the lots, and had the deed made to her daughter. This same evidence was offered in the case of Scharff v. McGaugh, and was considered as part of the case, for the reason that there was no ruling by the trial court as to whether it was competent or incompetent.

Competency of Witness.

It is claimed here that the evidence is incompetent. The plaintiff admits the testimony of the widow, Mrs. Ashworth, formerly Mrs. Edwards, is incompetent, because she was a party to the transaction; that is, a party to the conveyance which is immediately the subject of the action here; her husband, the other party to the transaction, being dead. But the competency of Mr. Summers is asserted by the plaintiff, who claims that she was the agent of her daughter in procuring the property from the daughter's husband. Plaintiff cites in support of this position the case of Clark v. Thias, 173 Mo. 628, where it is held that the agent who transacts the business with a party since dead is competent to testify as to the transaction. The propriety of that ruling has been seriously questioned in later cases. [Griffin v. Nicholas, 224 Mo. 275, l. c. 326-7; Bone v. Friday, 180 Mo. App. 577; Taylor v. George, 176 Mo. App. 215; Green v. Ditsch, 143 Mo. l. c. 8; Chas. Green Real Estate Co. v. Building Co., 196 Mo. l. c. 370.]

However, the question of whether an agent conducting a transaction may afterwards testify, when the other party to the transaction is dead, hardly enters in this case Mrs. Summers was not the agent of her daughter; according to her own testimony as she gives it, she was herself the original party to the contract. Speaking of G. L. Edwards, she testified: "I bought some lots in

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Bernie from him and paid him about three hundred dollars for them. He owed me some notes which I had been trying to collect for a long time and he gave me the lots for the notes. I had the deed made to my daughter, M. A. Edwards. . . . The notes I turned over to G. L. Edwards for these lots, and they were canceled at the time, and I gave him a receipt for the account he owed me."

The effect of the transaction as she describes it is precisely the same as if she had purchased the lots and had the conveyance made to herself and subsequently had conveyed to her daughter. She is a party to the original contract or cause of action. The wording of the statute completely covers her case, Section 6354, Revised Statutes 1909. The provision is this: "*Provided,* that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify *either in his own favor or in favor of another party to the action claiming under him.*"

It was held in the case of Chapman v. Dougherty, 87 Mo. 617, that the "disability of one of the original parties to the contract or cause of action, in issue and on trial, where the other party is dead, and the survivor is a party to the suit, is co-extensive with every occasion where such instrument or cause of action may be called in question." That case is a leading case and is cited and approved in many later cases. [Goodale v. Evans, 263 Mo. l. c. 228-9; Lieber v. Lieber, 239 Mo. l. c. 13.]

In Bishop v. Brittain Inv. Co., 229 Mo. l. c. 723, numerous cases are cited and the rule which seems pertinent to the question is stated as follows: "In applying the statute it has been ruled that where, as in ejectment, the issue was title and one of the parties to a deed necessary to establish it was dead, the living party could not testify in denial of the validity of the deed (Chapman v Dougherty, supra); nor to sustain a contrat which, if established, would defeat ejectment (Hughes

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v. Israel, 73 Mo. 538); nor to establish in ejectment the contents of a lost deed (Messimer v. McCray, 113 Mo. 382); nor to establish the contract in a suit for specific performance (Teats v. Flanders, 118 Mo. 660); nor to acts of performance (Sitton v. Shipp, 65 Mo. 297); nor to reform a contract by supplying a term omitted by mistake, accident or oversight (Smith v. Smith, 201 Mo. 533)."

The disqualification is not because of the *interest* of the witness offered, but because . . . the other party to the contract, or cause of action in issue and on trial, is dead. [Weiermueller v. Scullin, 203 Mo. l. c. 471.] The party to the contract is the person who negotiated the contract, rather than the person in whose name and interest it was made. [Banking House v. Rood, 132 Mo. l. c. 262; Meier v. Thieman, 90 Mo. l. c. 442-443.]

There being no competent evidence offered to show there was a valuable consideration for the deed from G. L. Edwards to his wife, the recital that it was for a nominal consideration prevails. Under the rule as laid down in the case of Scharff v. McGaugh it was void as to creditors. The plaintiff, claiming under it, could not in equity maintain an action to correct a mistake in it. [Smith v. Smith, 201 Mo. 533, l. c. 546-7.] Nor could he maintain an action to remove, as a cloud upon his title, the sheriff's deed under which defendants claim, a deed already held in the McGaugh case to be regular. The judgment for defendant, therefore, upon the first three counts, was correct.

Correcting Mistake.

II. The plaintiff claims that the sheriff's deed, executed in 1904, whereby the land was sold under a judgment for costs rendered in 1900, in favor of Lee Edwards and against L. & A. Scharff, passed the title to Edmunds. The defendants assert that the deed is void because the judgment upon which it is based was rendered by J. L. Fort, Circuit Judge, who was incompetent to sit in the case because he had previously been of counsel for the defendant therein.

Disqualification of Judge.

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The suit in which that judgment was rendered was filed in 1894. The record entries of the court was presented in the abstract of the record here and show that March 19, 1894, on a change of venue from the regular judge, Hon. H. H. Bedford, was selected as special judge to try the cause. The files show answer filed by J. L. Fort. At the September term, 1895, on the 15th day of October, an entry appears showing that the cause was tried and taken under advisement by the Honorable H. H. Bedford, Special Judge, and at that time Honorable John G. Wear was regular judge. No entry appears as to any disposition of the case until the September term, 1900, when, on the tenth day of the term, this entry appears:

Court met pursuant to adjournment, present Hon. Jas. L. Fort, Judge.

L. & A. SCHARFF
against
LEE EDWARDS *et al.* } Civil Action

This cause coming on to be heard and there appearing no one in behalf of this plaintiff to prosecute this cause of action and plaintiff being three times called and comes not, it is therefore ordered by the court that this cause be stricken off this docket and the cost of this suit laid out and charges be assessed against plaintiff and that execution issue therefor."

Execution was issued on this judgment for costs on the 15th day of August, 1904, the property levied upon and sold, and purchased by the planitiff, Edmonds, on the twelfth day of September, 1904.

The testimony of Judge Fort as abstracted in another case was offered in evidence, and he appeared to have no definite recollection about his action in dismissing the case so many years before. He said he didn't think he dismissed the case, but that Judge Bedford might have taken the bench and dismissed it.

That part of the statute which disqualified Judge Fort from sitting in the case, Section 1928, Revised Statutes 1909, is as follows: "Sec. 1928. If the judge interested or related to either party, or shall have been of counsel in the cause, the court or judge shall

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award such change of venue without any application from either party."

The general rule is that a judgment rendered by a judge not authorized to hear or determine a case is subject to collateral attack. [23 Ency. Law & Proced. p. 1095; Horton v. Howard, 79 Mich. 642; Ex parte Bedard, 106 Mo. l. c. 627; 15 R. C. L. p. 846.] The authority of a judge to act in a given case should appear by a record entry. [Collier v. Lead Co., 208 Mo. l. c. 261-262.] Where a special judge is called to sit in the place of a regular judge he acquires jurisdiction of a case and that jurisdiction continues until the termination of the case by judgment. [State v. Moberly, 121 Mo. 609; State ex rel. v. Williams, 136 Mo. App. 330; Ward v. Bell Egolf, 157 Mo. App. l. c. 527.] Therefore when Judge Bedford was qualified as special judge and proceeded to hear the case his jurisdiction of the case continued. He heard the case and took it under advisement. Nothing more was heard from it until six years later when it appeared on the docket with Judge Fort, regular judge, presiding. If Judge Bedford had made any disposition of the case the record should have shown it. It remained on the docket undisposed of. We presume the record entries brought here are all there are in the case. There should be some entry showing a divestiture of jurisdiction on the part of Judge Bedford before the regular judge could proceed to hear the case. Yet, since all presumptions of regularity of jurisdiction are indulged, if Judge Fort had been qualified to sit in the case, this court might presume, in this collateral attack upon the judgment, that he had authority; that is, that Judge Bedford had failed to determine the case, and had been in some manner divested of jurisdiction. [Collier v. Lead Co., 208 Mo. 246; Nickerson v. Leader Merc. Co., 90 Mo. App. l. c. 338; Green v. Walker, 99 Mo. l. c. 73.]

There is no record entry of any kind to indicate that Judge Bedford appeared and made the order of dismissal. On the contrary, the plaintiff in his brief ad-

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mits that Judge Fort dismissed the cause, having been of counsel in the case while the same was pending before the Hon. H. H. Bedford as special judge, though it is probable that Judge Fort at that time did not remember that he had been of counsel. Thus Judge Fort's disqualification appearing upon the face of the record, and being admitted, the judgment of dismissal was a nullity and the sale and deed thereunder were likewise nullities and passed no title to Edmonds.

III. The plaintiff, however, claims that he was at all events entitled to an assignment of the dower of the widow in the premises. George L. Edwards was seized in fee simple of the property during his life and his title was divested by a sheriff's sale, leaving the widow's dower untouched. This dower the plaintiff claims to have acquired through conveyance from the widow M. A. Edwards. George L. Edwards died in 1895. This suit was brought in 1910. Defendant sets up the Statute of Limitations in bar of the claim for dower.

The plaintiff asserts that the Statute of Limitations did not run on account of the occupation of the mansion house by the widow after the death of her husband. There is some doubt about the facts as to that. Edmonds testified at the trial that Edwards was not living on the ground at the time of his death.

However, under the recent rulings of this court and the plain terms of the statute, Section 391, the right of action to have dower assigned is barred. Section 391 is as follows:

"Sec. 391. All actions for the recovery of dower in real estate, which shall not be commenced within ten years from the death of the husband through or under whom such dower is claimed or demanded, shall be forever barred."

As the act containing this section was originally passed in 1887, a proviso was appended to the effect that the act should not apply to persons suffering certain disabilities, nor to any case wh ere the widow is in

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possession of and enjoying the mansion house. The act was amended in the revision of 1899 so as to omit the proviso and leave the section to read as above. This court in two recent cases has commented upon the legislative intention manifested in that revision and has announced that there is no doubt the section as it now reads bars an action for dower in every case without an exception.

In Investment Co. v. Curry, 264 Mo. 483, l. c. 500, Division Number Two of this court used this language: "The fact that in the statute as originally enacted there were saving clauses in favor of the widow if she was in possession of the mansion house or under legal disability and that these several clauses were stricken out in the revision of 1889, strongly indicates the legislative purpose that there should be no exception at all to the operation of this statute."

In the case of McFarland v. McFarland, 278 Mo.—1, the statutes as originally enacted and as thus amended is again set out, and this court held that the motive of the Legislature was evident in the result, that was to "limit the quarantine of the widow to ten years and such further time as is enough to perfect a judicial assignment of her dower." A concurring opinion by GRAVES, J., in the same case, holds that Section 391 is an absolute bar to an action to recover dower, if such action is brought for the first time more than ten years after the death of the husband. These cases settle this contention against the claim of the plaintiff.

The judgment is affirmed as to the first, second and third counts, and is reversed and the cause remanded as to the fourth count, with directions to enter judgment for the defendant on that count. *Railey* and *Mozley, CC.,* not sitting.

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur.

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HULDA J. MURRELL v. KANSAS CITY, ST. LOUIS & CHICAGO RAILROAD COMPANY, Appellant.

Division Two, July 5, 1919.

1. **CONSTITUTIONAL LAW: Title: Leasing Railroad.** The title to an act passed in 1870, entitled, "An Act to amend chapter sixty-three of the General Statutes, entitled 'of railroad companies,' so as to authorize the consolidation, leasing and extension of railroads," was broad enough to authorize a designation in the body of the act of the terms and conditions upon which such leases should be made, and to include a provision that "a corporation in this State leasing its road to a corporation of another state shall remain liable as if it operated the road itself."

2. ———: **Speed Ordinance: Six Miles An Hour: Unreasonableness.** An ordinance limiting the speed of railroad passenger trains to six miles an hour at a much-used public-street crossing, 1200 feet from the station, in a city of the fourth class containing 2700 inhabitants, is not unreasonable, nor an unlawful interference with interstate commerce, but a needed protection of the public at such crossing.

3. **DEMURRER TO EVIDENCE: Practice.** Where defendant, at the close of plaintiff's case in chief, offers a demurrer thereto, and upon its being overruled puts in its own evidence, the sufficiency of the evidence to sustain the verdict must be determined from all the evidence in the case; and the appellate court, in considering the demurrer, will indulge every inference in favor of the verdict which men of average intelligence and fairness might legitimately draw from the proven facts.

4. **NEGLIGENCE: Contributory: Demurrer to Evidence: Proven Facts: Humanitarian Rule.** Where there was substantial evidence tending to prove (1) that the servants in charge of the train were negligent in failing to ring the bell, and keep it ringing, as required by statute, as it approached the public-street crossing where plaintiff's husband was killed, (2) that they were guilty of negligence in failing to give proper and timely danger signals after he was known to be in peril, (3) that they were guilty of negligence in violating the six-mile speed ordinance and which they continued to violate until he was struck by the train, (4) that they were guilty of common-law negligence in running the train, at the time and place of the accident, at a dangerous and unsafe rate of speed, (5) that the engineer was negligent in failing to reduce the rate of speed after seeing deceased in peril and

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apparently oblivious to the approaching train, and (6) that said servants were likewise negligent in failing to give danger signals with a whistle, so as to arouse in deceased a realization of the danger into which he was moving, no demurrer to the evidence can be sustained, although it be conceded that deceased, at the time and place of the accident, was guilty of negligence that directly contributed to his own death.

5. ———: **Duty of Engineer: Inference.** In the absence of evidence to the contrary, the jury have the right to draw the inference that the engineer of a passenger train entering a town was at his place in the cab, looking towards the station, since he owed that duty to his passengers, as well as to members of the public who might be upon the track at a public-street crossing.

6. ———: ———: **Inference from Sounding Whistle.** Where defendant offers evidence tending to show that the station whistle was sounded and the bell was rung before the train reached the public-street crossing, the jury have the right to infer that the engineer and fireman were at their respective places in the engine cab; and hence they have the right to infer, the view being clear and the track straight, that the engineer saw deceased in peril when the train was 500 feet away and that he was moving to a place of danger on the track at the street crossing, apparently oblivious to the approach of the train.

7. ———: ———: **Failure to Testify: Other Inferences.** Where the view was unobstructed for 500 feet before the train reached the public-street crossing where plaintiff's husband was struck, the jury have the right to take into consideration the fact that the engineer and fireman, who of all persons were best prepared to give the actual facts concerning deceased's movements, were not produced as witnesses.

Appeal from Saline Circuit Court.—*Hon. Samuel Davis*, Judge.

AFFIRMED.

Joshua Barbee and *Scarritt, Scarritt, Jones & Miller* for appellant.

(1) Sec. 3078, R. S. 1909, is unconstitutional, for the reason that the bill when enacted contained more than one subject which was not clearly expressed in the title, as provided by Section 28, Article 4, Constitution of Missouri. Williams v. Railroad, 233 Mo. 666; Witz-

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mann v. Railroad, 131 Mo. 612; St. Louis v. Bray, 213 Mo. 131; Shively v. Lankford, 174 Mo. 545; State v. Coffey Company, 171 Mo. 634; Gulf Ry. Co. v. Stokes, 91 S. W. (Tex.) 328. (2) The speed ordinance of six miles an hour of Higginsville is unreasonable, unconstitutional and an attempt to interfere with and regulate interstate commerce, contrary to Section 8 of Article 1 of the Constitution of the United States. Lusk v. Town of Dora, 224 Fed. 630; Zumault v. Railroad, 71 Mo. App. 670; White v. Railroad, 44 Mo. App. 540; Plattsburg v. Hagenbush, 98 Mo. App. 669; Murphy v. Railroad, 153 Mo. 252; Byington v. Railroad, 147 Mo. 673. (3) The trial court erred in refusing defendant's requested peremptory instructions at the close of plaintiff's evidence, and at the close of all the evidence, for the reasons, (a) the negligence of deceased Murrell barred recovery, and (b) no actionable negligence was shown against defendant. Reeve's Admr. v. Railroad, 251 Mo. 169; Keele v. Railroad, 258 Mo. 78; Laun v. Railroad, 216 Mo. 563; Pope v. Railroad, 242 Mo. 232; Moore v. Lindell Railway, 176 Mo. 538, 546; Sanguinette v. Railroad, 196 Mo. 466; Hayden v. Railroad, 124 Mo. 566; Huggart v. Railroad, 134 Mo. 673; Schmidt v. Railroad, 191 Mo. 215; Dyrcz v. Railroad, 238 Mo. 33; Lane v. Railroad Co., 132 Mo. 4; Kelsey v. Railroad, 129 Mo. 362; Walker v. Railroad, 193 Mo. 453; Burge v. Railroad, 244 Mo. 76; Farris v. Railroad, 167 Mo. App. 392; Green v. Railroad, 192 Mo. 131. (4) The court erred in submitting the case to the jury on the last-chance theory. Reeve's Admr. v. Railroad, 251 Mo. 169; Pope v. Railroad, 244 Mo. 76; Degonia v. Railroad, 224 Mo. 595; Hawkins v. Railroad, 135 Mo. App. 534; Schmidt v. Railroad, 191 Mo. 234; Boyd v. Railroad, 105 Mo. 382; Moore v. Railroad, 176 Mo. 546; McGee v. Railroad, 214 Mo. 542; Burge v. Railroad, 244 Mo. 96; Ruschenberg v. Railroad, 161 Mo. 81; Culbertson v. Railroad, 140 Mo. 59; Mammerberg v. St. Ry. Co., 62 Mo. App. 563.

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Duggins & Duggins and *Aull & Aull* for respondent.

(1) The demurrer to the evidence offered at the close of the plaintiff's testimony and at the close of all the testimony in the case was properly overruled. (a) The servants in charge of the locomotive and train that struck and killed Murrell on the crossing, failed and neglected to ring the bell on the engine as required by statute when approaching and passing over the crossing which was negligence *per se*. Lloyd v. Railroad, 128 Mo. 595; Sullivan v. Railroad, 117 Mo. 245; Gratiot v. Railroad, 116 Mo. 450; Murray v. Railroad 101 Mo. 242, Reyburn v. Railroad, 187 Mo. 565; Dickson v. Railroad, 104 Mo. 501; Hanlan v. Railroad, 104 Mo. 387; Karle v. Railroad 55 Mo. 476; McNulty v. Railroad, 203 Mo. 477; Weigman v. Railroad, 223 Mo. 699. (b) Carelessly and negligently ran said locomotive and train of cars within and through the corporate limits of the city and to and over said public crossing therein, in violation of the ordinance prohibiting the running of locomotives and trains within such limits at a rate of speed exceeding six miles an hour. This was negligence *per se* and a direct cause of Murrell's death. Miller v. Engle, 185 Mo. App. 563; Lueders v. Railroad, 253 Mo. 97; Gratiot v. Railroad, 116 Mo. 463; Jackson v. Railroad, 157 Mo. 643; Johnson v. Railroad, 259 Mo. 535; Weller v. Railroad 120 Mo. 654 Schlerth v. Railroad, 115 Mo. 88 104; Dahlstrom v. Railroad, 108 Mo. 525; Murray v. Railroad, 101 Mo. 236; Bluedorn v. Railroad, 108 Mo. 439; Graney v. Railroad, 140 Mo. 89; Keim v. Railroad, 90 Mo. 321; Schlerth v. Ry. Co., 96 Mo. 515. If the train had been running as prescribed by ordinance every reasonable inference is that deceased would have cleared the track. Lueders v. Railroad, 253 Mo. 116; Murrell v. Railroad, 105 Mo. App. 94; Johnson v. Railroad, 259 Mo. 550; Schlerth v. Railroad 96 Mo. 515; Keim v. Railroad, 90 Mo. 324; Prewitt v. Railroad, 134 Mo. 615; Graney v. Railroad, 140 Mo. 189. (2) Violation of speed ordinance, and violation of statute,

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both negligence *per se,* and causal connection between negligence and injury, sustained a verdict (barring contributory negligence as matter of law). Hunt v. Railroad, 262 Mo. 275; McNulty v. Railroad, 203 Mo. 477; McNulty v. Railroad, 166 Mo. App. 459; Stotler v. Railroad, 200 Mo. 121. (3) Contributory negligence as matter of law does not arise in this case. Dudley v. Railroad, 167 Mo. App. 665; Baker v. Railroad, 122 Mo. 544; McNulty v. Railroad, 203 Mo. 475; Weigman v. Railroad, 223 Mo. 699; Petty v. Railroad, 88 Mo. 306; Williams v. Railroad, 257 Mo. 115; Donohue v. Railroad, 91 Mo. 365; Kleiber v. Railroad, 107 Mo. 247. In no case has a pedestrian been charged with contributory negligence as matter of law where, from the very incipiency of the danger, and where from his very surroundings, he could first know of the approach of the train after he had lawfully and in the exercise of ordinary care placed himself in a position of peril. Harshaw v. Railroad, 173 Mo. App. 483. Where there are flagrant violations of the law resulting in injury, contributory negligence must be clearly made out. Yonkers v. Railroad, 182 Mo. App. 558; Weighman v. Railroad, 223 Mo. 719; Bluedorn v. Railroad, 108 Mo. 449; Kennayde v. Railroad, 45 Mo. 255; Dutcher v. Railroad, 91 Mo. 363; Petty v. Railroad, 88 Mo. 306; Baker v. Railroad, 147 Mo. 166; Jennings v. Railroad, 112 Mo. 268; Lueders v. Railroad, 253 Mo. 116; Sexton v. Railroad, 245 Mo. 254; Lyons v. Railroad, 253 Mo. 166; Weller v. Railroad, 164 Mo. 180. Where the laws are flagrantly violated contributory negligence should be submitted to the jury. Petty v. Railroad, 88 Mo. 306; Baker v. Railroad, 147 Mo. 166; Bluedorn v. Railroad, 121 Mo. 268, 108 Mo. 449. (4) If the evidence tends to, or if inferences therefrom, regardless of conter inferences, can be reasonably drawn, tending to uphold the action of the trial court; if after every inference which the trial jury might with any degree of propriety have made; if there is conflict in the evidence; if the truthfulness of a witness is in question;

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if there is reason for difference of opinion among practical men from all walks of life whether care or caution on part of deceased; or servants acted as ordinarily prudent servants under the facts and circumstances; whether they did, or had time to warn or to stop; if there is any uncertainty, the case should have been submitted to the jury and the trial court should be upheld. Miller v. Engle, 185 Mo. App. 363; Maginnis v. Railroad, 180 Mo. App. 694; Holmes v. Railroad, 207 Mo. 163; Buesching v. Gaslight Co., 73 Mo. 219; Weigman v. Railroad, 223 Mo. 722; Hunt v. Railroad, 262 Mo. 181; Troll v. Railroad, 254 Mo. 722; Stauffer v. Railroad, 243 Mo. 316-17; Weller v. Railroad, 164 Mo. 199; Murphy v. Railroad, 228 Mo. 76; Fritz v. Railroad, 243 Mo. 62; Church v. Railway, 119 Mo. 215; Williams v. Railroad, 257 Mo. 87; Dudley v: Railroad, 167 Mo. App. 647; Rollison v. Railroad, 252 Mo. 538; Johnson v. Railroad, 259 Mo. 550; Franklin v. Railroad, 188 Mo. 542; Power v. Railroad, 244 Mo. 1; Petty v. Railroad, 88 Mo. 318; Keim v. Railway, 90 Mo. 314; Lamb v. Railroad, 147 Mo. 186; Hegberg v. Railroad, 164 Mo. App. 514. Negative testimony takes the case to the jury. Murray v. Railroad, 176 Mo. 183; Moore v. Railroad, 137 Mo. App. 53; Buckry-Ellis v. Railroad, 158 Mo. App. 506; Stotler v. Railroad, 200 Mo. 107; Murray v. Railroad, 101 Mo. 242; Isaacs v. Skrainka, 95 Mo. 517. Upon a demurrer to the evidence the right doctrine to go by is: Defendant's testimony where contradicted is false; plaintiff's testimony, whether contradicted or not, is true; discrepancies, contradictions between witnesses or self contradictions by witnesses, and the weight due their testimony, are for the jury, not the court. Plaintiff is entitled to the grace of having allowed in his favor every inference springing reasonably from the proof. Fritz v. Railroad, 243 Mo. 79. (5) Deceased was in the exercise of due care. (a) He could not, when he went upon the crossing and tracks, by looking or listening have seen or heard an approaching train. No train was within sight or hearing. He could

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not tell upon what track a train was approaching, whether freight or passenger, nor in what direction to proceed to avoid it, even if he had knowledge of its approach. Harshaw v. Railroad, 173 Mo. App. 483; Dunn v. Railroad, 192 Mo. App. 260; Campbell v. Railroad, 175 Mo. 676; Gratiot v. Railroad 116 Mo. 450; Weigman v. Railroad, 223 Mo. 717; Weller v. Railroad, 120 Mo. 635; Williams v. Railroad, 257 Mo. 115. (b) The old man was not a trespasser nor did his right to pass over the crossing depend upon the permission of the railroad. Lueders v. Railroad, 253 Mo. 97. (c) When the evidence is silent, on the question as to whether the traveler, before crossing the track, looked and listened for the train, the presumption is that he did both, where there was such obstruction that had he looked he could not have seen, and had he listened it would have been difficult, if not impossible, to hear. Johnson v. Railroad 259 Mo. 547; Weigman v. Railroad, 223 Mo. 717. (d) If in and on the danger zone when the train approached, in the exercise of ordinary care, he was only required to exercise care commensurate with the situation and circumstances to extricate himself. He could not stop between tracks with safety. Weigman v. Railroad, 223 Mo. 717. A traveler in a walk four feet from the track is in the danger zone. Dunn v. Railroad, 192 Mo. App. 268. (e) A defendant cannot impart want of vigilance to one injured by reason of his acts of negligence if those very acts of negligence were the consequence of an omission of duty on the part of defendant. Weigman v. Railroad, 223 Mo. 723; Kennayde v. Railroad, 45 Mo. 262. (f) Deceased had the right to rely upon obedience to the law on the part of appellant. Mocowik v. Railroad, 196 Mo. 571; Riska v. Railroad, 180 Mo. 168; Weller v. Railroad, 164 Mo. 180; Hutchinson v. Railroad, 161 Mo. 254; Lueders v. Railroad, 253 Mo. 116; Crawford v. Railroad, 215 Mo. 414; Felver v. Railroad, 216 Mo. 213; Dutcher v. Railroad, 241 Mo. 137. (6) Sec. 3078, R. S. 1909, has been, from the time of its passage, attacked by appellant in various ways

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The section has been by the appellate courts upheld. This attack has long since been rendered nondebatable. Brown v. Railroad, 256 Mo. 532; State v. Saline County Court, 51 Mo. 350; State v. Callaway County Court, 51 Mo. 395; Fleming v. Railroad, 199 Mo. 390; O'Donnell v. Railroad, 197 Mo. 110; Fleming v. Railroad, 263 Mo. 187; Markey v. Railroad, 185 Mo. 348; Thomas v. Railroad, 101 U. S. 71; Smith v. Railroad, 61 Mo. 1, 17; Markey v. Railroad, 200 U. S. 622; Brady v. Railroad, 206 Mo. 521. Under the facts in this case the validity of the speed ordinance limiting the rate of speed to six miles an hour in approaching and passing over this crossing is no longer debatable. Holmes v. Railroad, 207 Mo. 162; St. Louis v. Weber, 44 Mo. 547; Gratiot v. Railroad, 116 Mo. 467; Jackson v. Railroad, 157 Mo. 643; Lueders v. Railroad, 253 Mo. 116; Roberston v. Railroad, 84 Mo. 123; Prewitt v. Railroad, 134 Mo. 627; Miller v. Railroad, 185 Mo. App. 574; Petty v. Railroad, 88 Mo. 306; Johnson v. Railroad, 259 Mo. 535; Eckhard v. Railroad, 190 Mo. 593; Riska v. Railroad, 180 Mo. 168. The presumption is that the speed ordinance is reasonable. Mullins v. Cemetery, 187 S. W. 1170; Hislop v. Joplin, 250 Mo. 558; St. Louis v. Theatre Co., 202 Mo. 690. (7) The court properly submitted the case to the jury on the humanitarian theory. Hunt v. Railroad, 262 Mo. 181; Maginnis v. Railroad, 182 Mo. App. 713, 187 S. W. 1165; Reyburn v. Railroad, 187 Mo. 565; Moore v. Railroad, 194 Mo. 1; Murray v. Transit Co., 108 Mo. App. 501; Klockenbrink v. Railroad, 172 Mo. 678; Murphy v. Railroad, 228 Mo. 76; Thompson v. Railroad, 243 Mo. 351; Feldman v. Railroad, 175 Mo. App. 634. Lueders v. Railroad, 253 Mo. 114; Johnson v. Railroad, 259 Mo. 550. Deceased became and was in imminent peril and the servants operating the locomotive and train saw, or by the exercise of ordinary care could have seen, him in his peril in time by the exercise of ordinary care to have slowed down the locomotive and train, to have given emergency warnings, to have used emergency ap-

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pliances, to have stopped the train, but carelessly and negligently failed so to do. Hunt v. Railroad, 262 Mo. 181.

RAILEY, C.—This action was commenced by plaintiff, in the Circuit Court of Lafayette County Missouri, on September 17, 1913, as the widow of John D. Murrell, who was killed in the City of Higginsville in said Lafayette County, by an east-bound fast-passenger train, operated at the time by the Chicago & Alton Railroad Company, by virtue of a lease in 1879, from defendant, a Missouri coporation, which was the owner of the right-of-way, road-bed, tracks, etc., where deceased was killed. On defendant's application the venue was changed to Saline County, Missouri, and there tried upon plaintiff's second amended petition, which among other things, in substance, alleges the following grounds of negligence: 1. That the statutory signals were not given for the crossing, where deceased was killed. 2. That the train in question was being operated through the city limits of Higginsville, Missouri, in violation of its six-mile speed ordinance, and while traveling at a highly dangerous rate of speed, to-wit, twenty-five to thirty-five miles per hour. 3. Failure on the part of the servants operating the train to be at their posts of duty, to slow down the train and have the same under control as it approached and passed over the crossing, when they knew and saw, or by the exercise of ordinary care could have known and seen, deceased in peril on the crossing in time, by the exercise of ordinary care, to have slowed down the locomotive and train, given emergency signals or stopped the train and averted the killing, which they carelessly and negligently failed to do.

The answer to second amended petition contains (1) a general denial; (2) a plea of negligence on the part of deceased; (3) an averment that the statutes, under which it is sought to hold defendant, are unconstitutional; and (4) that the six-mile speed ordinance

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of Higginsville is unreasonable, void, unconstitutional, and an unlawful interference with interstate commerce.

At the time of his death, deceased was sixty-seven years of age; his health was good, but he was a cripple. His right leg had been broken; he wore a stirrup on this leg; it was shorter than the other. He used a crutch under his left arm and a cane in his hand. Deceased lived about three blocks southwest of where he was killed, and walked very slowly.

It is conceded that, at the time of said killing, defendant was the lessor of the railroad right-of-way, road-bed and tracks over which the Chicago & Alton Railroad Company was operating the train which killed deceased. It is likewise conceded that, at the time of said killing, the Chicago & Alton Railroad Company was operating defendant's road, by virtue of the lease aforesaid, and that it was at the time an interstate common carrier, etc.

Plaintiff's evidence tends to show that the public crossing, where Murrell was killed, is situate in the heart of Higginsville, a city of the fourth class, with about 2700 inhabitants, the business portion of the city being north, and about half of the residence population south, of the railroad tracks, about midway between the depot and the western limits of the city, or about a quarter of a mile east of the western limits of the city and about 1200 feet west of the depot in said city. Two other public crossings intervened between the one on which Murrell was killed and the depot. There were two other public crossings between the depot and the eastern limits of the city. Murrell was killed at the intersection of Brand Street and the railroad tracks. Brand Street, after passing over the railroad tracks, west where the killing occurred, and Brand Street, with the other crossings mentioned, ran practically north and south. Brand Street was a regular traveled public road or street, and used by many residents going to and continues on north to other portions of the city. The railroad tracks ran in the general direction of east and

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from their places of business. North and south of this crossing, where the killing occurred, and west thereof, except the railroad right-of-way, were many and numerous residences, extending to and beyond the city limits on the west. The crossing, with five tracks, covered a space of about fifty feet, over which there was constructed a plank walk about four feet wide, on the west side of Brand Street, over the railroad tracks, and there was a regular north-and-south wagon crossing, east of the sidewalk. The road-bed at this crossing was elevated above the ground on each side, the tracks being constructed on a fill, some four feet or more deep, extending west for about 1200 feet, and ending at the cut mentioned in evidence. The approach to the crossing from the south was up this incline to the road-bed and south switch track, parallel and connected with four other tracks, and connected with the next track north about 100 feet or more west of the crossing. The second track, traveling north, extended west from the crossing from 800 to 900 feet, where it connected with the next track north. The third track from the south, called in the evidence a "passing track," and at times used as the main track, continued west from the crossing some 1200 feet, where it connected with the next north track, called in the evidence, "the main track," which continued west from the crossing to Kansas City, Missouri. The north, or switch track, extended west about 200 or 300 feet, and connected with the main track. Plaintiff's evidence tends to show that the tracks at the crossing were about four feet and eight inches wide, between rails; and the space between the main track and passing track was thirteen feet and two inches. The entire distance from outside of north rail to outside of south rail was about fifty feet.

Plaintiff contends that a man on the crossing looking west along the tracks could see from 500 to 600 feet. Defendant contends that a man anywhere on the crossing could see an engine approaching from the west for

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at least a thousand feet. Substantial testimony was offered in support of each contention.

The deceased came upon the board walk across the tracks, from the south, with his crutch and cane, and must have traveled north toward the main track where he was killed. The train was due at 11:35 a. m. and arrived at 11:40 a. m. on the day of the accident. Plaintiff's evidence tends to show that Murrell was crossing over the north rail of the main track when struck and killed, as his headless body, his brains, pieces of his skull, broken crutch, hat and clothing, were found immediately after the train passed, north of the north rail of the main track, between the latter and the north switch track, and some portion of same was attached to slivers on the north rail of the main track, commencing about ten feet east of the plank walk, and continuing for some distance.

Such other facts and circumstances shown by the record, as far as necessary, will be considered later, in connection with the instructions given and refused.

At the conclusion of plaintiff's evidence, the defendant interposed a demurrer thereto, which was overruled and an exception saved. At the conclusion of all the evidence, defendant again asked the court to direct a verdict in its behalf, which request was refused, and an exception saved to the ruling of the court.

The jury returned a verdict in favor of plaintiff for $2,000, and judgment was entered accordingly. Defendant, in due time, filed its motion for a new trial, which was overruled and the cause duly appealed by it to the Kansas City Court of Appeals, and certified to this court on account of the constitutional questions raised in the case.

I. The lease under which appellant was operating its trains over the property of defendant was executed in 1879. In its assignment of errors, defendant attacks the constitutionality of Section 2 of the Act of the General Assembly for 1870, at pages 90 and 91, approved March 24, 1870, and now known as Section

Title.

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3078, Revised Statutes 1909, as follows: "Section 3078, Revised Statutes 1909, is unconstitutional for the reason that the bill when enacted contained more than one subject, which was not clearly expressed in the title, as provided by Section 28, Article 4, of the Constitution of Missouri."

The above charge is more specifically stated at page 10 of appellant's brief, as follows: "By reference to the title of the act, it will be observed that at no place in the title is any reference made to holding the railroad leasing its line of railroad liable, the same as though operating it."

The title to the Act of 1870, page 89, reads as follows: "An Act to amend chapter sixty-three of the General Statutes, entitled 'of railroad companies,' so as to authorize the *consolidation, leasing* and *extension* of railroads." (Italics ours).

We had occasion to fully consider this subject in the recent case of Woodward Hardware Co. v. Fisher, 269 Mo. l. c. 276-9, where many recent authorities are collated, including some of those cited by appellant. We have no fault to find with the above cases, nor those cited by appellant, considered in connection with the general principles of law announced therein. In our opinion, they do not sustain appellant's contention, when applied to the facts before us.

In the Act of 1870, supra, the Legislature had under consideration the subject, as to what aid railroad companies might furnish each other by way of extension lease or consolidation. The State, acting through its legislative agencies, had the undoubted right in the granting of railroad charters to corporations organized under the laws of this State, to prohibit them from leasing such roads to railroad corporations, chartered under the laws of another State. The General Assembly likewise possessed the power to authorize leases under such circumstances, and to designate the terms and conditions upon which such leases could be made. [Fleming v. Railroad, 263 Mo. l. c. 186-7-8; Brown v. Railroad,

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256 Mo. l. c. 533-4; Moorshead v. United Railways Co., 203 Mo. 121; Dean v. Railroad, 199 Mo. l. c. 390; Markey v. Railroad, 185 Mo. 348.] The same principle of law is recognized by Court in Banc in the recent case of State ex rel. v. Hemenway, 272 Mo. l. c. 199.

Appellant contends that the following portion of Section 2 of the Act of 1870, to-wit, "and a corporation in this State leasing its road to a corporation of another State shall remain liable as if it operated the road itself" relates to a different subject than the *lease* mentioned in the title to the act. We do not so interpret the act. On the contrary, we think it manifest that the Legislature intended that the words quoted above should be construed as an inseparable part of the lease itself. In other words, the title to the act provided that a lease might be made, but left the legal effect thereof to be determined in the body of the act. They both relate to the same subject, and contemplate the making of a lease by the Missouri Corporation, to a railroad corporation of another State, with the understanding, that the former shall remain liable as if it operated the road itself.

The cases cited by appellant are clearly distinguishable from the case at bar in many particulars and are insufficient, in our opinion, to overturn the validity of the act under consideration. We accordingly rule that the Act of 1870 is not obnoxious to the criticism leveled against it in appellant's brief, and that it is a valid enactment.

II. Appellant contends that the Higginsville speed ordinance of six miles an hour "is unreasonable, unconstitutional, and an attempt to interfere with and regulate interstate commerce, contrary to Section 8 of Article I of the Constitution of the United States." The following authorities are cited in support of this contention: Lusk v. Town of Dora, 224 Fed. 650; Zumault v. K. C. & I. Air Line, 71 Mo. App. 670; White v. Railroad, 44 Mo. App. 540; Plattsburg v. Hagenbush, 98 Mo. App. 669; Murphy v. Lindell

Speed Ordinance.

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Ry. Co., 153 Mo. 252; Byington v. St. Louis R. R. Co., 147 Mo. 673.

In the Lusk case, supra, 224 Fed. 650, an injunction suit was brought to restrain the enforcement of a six-mile speed ordinance in a town of one thousand inhabitants. The court, under the peculiar facts of the case, sustained the injunction, and in doing so, at page 654, said: "This finding is predicated upon the idea that the danger to be apprehended can be adequately guarded against by property protecting the crossing or crossings that need protection by flagmen, without unnecessarily impeding the plaintiffs' operation of the railroad by so stringent a speed limit."

The court, by its decree, required the railroad company to maintain adequate protection against the hazards arising from the operation of trains over the crossings. It further appears that there was a watchman stationed at the principal crossing. We do not think this case can have any application to the facts before us.

In Zumault v. K. C. & I. Air Line, 71 Mo. App., 670, decided by Judge SMITH of the Kansas City Court of Appeals, it was held that the six-mile speed ordinance of Kansas City was inapplicable and oppressive in the operation of the Independence Air Line Railroad between the Grand Central Depot and the eastern limits of the city. Judge SMITH simply held that an ordinance might be declared unreasonable as to certain localities where there was no necessity for having a speed ordinance of this character.

In White v. Railroad, 44 Mo. App. 540, a speed ordinance of four miles an hour through Marshfield, Missouri, was held to be unreasonable under the facts disclosed by the record in said case. On pages 542-3, the court said: "The uncontroverted facts show that the city has a population not exceeding fifteen hundred inhabitants, and that only about one-third of its area is platted, the residue consisting of farming lands. The restriction, if valid at all, extends over this entire area.

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As far as the farm lands are concerned, the necessity of any restriction whatever is not obvious, and as far as the residue of the town is concerned, the necessity of a restriction to four miles an hour, which, as we know, is less than the maximum speed permitted in the most populous cities in this State, is equally not apparent. In the absence of any necessity shown, the restriction is clearly unreasonable. If one city may adopt it, they all may, and thereby make rapid transit, in which the people of the entire State are interested, an impossibility." In this case the ordinance was offered in evidence for the purpose of showing negligence, in a place where a cow was killed in the corporate limits. No such facts were presented, in regard to the necessity for such an ordinance as are shown in this case. The court does not intimate that a speed ordinance of six miles an hour would be held unreasonable, where the safety of the public demanded it.

In Plattsburg v. Hagenbush, 98 Mo. App. 670, the court had before it a six-mile speed ordinance of said city, and which was attacked as being unreasonable. On page 673, Judge SMITH said: "We are unable to conclude that the limitation imposed by the ordinance, when applied to trains running on that part of said railroad line between East Street and the western limits of the city, is in the least unreasonable or oppressive. A like ordinance-limitation in what was doubtless a less populous city was held by the Supeme Court to be not unreasonable. [Robertson v. Railroad, 84 Mo. 119.] And so, too, it has been held by the same court that an ordinance of the City of St. Louis, limiting the speed of certain trains to six miles an hour, was not reasonable. [Gratiot v. Railroad, *ante.*] But it seems to us that the limitation as applicable to the movement of trains on that part of the said railroad between the eastern limits of the city and Second Street is wholly unnecessary for the protection of the public." It is thus seen, from an examination of this case, that there was no intention to hold, that a city like Higginsville could not

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pass an ordinance that would be effective at the place where Murrell was killed.

In Murphy v. Lindell Ry. Co., 153 Mo. 252, and Byington v. St. Louis Railroad Co., 147 Mo. 673, cited by appellant, the validity of speed ordinances was not involved. The court, in those cases, held that unless the railway companies had accepted the ordinance which had been enacted, a third party would have no right of action based thereon for violation of same. These two cases were practically overruled in Jackson v. Railway Co., 157 Mo. 622, and in Sluder v. Transit Co., 189 Mo. 107 and following, decided by the Court in Banc.

We do not find, upon a careful examination of the authorities cited by appellant, any ground for holding the ordinance in controversy void. On the other hand, by a long and unbroken line of decisions in this State, six-mile speed ordinances have been upheld by this court, in cities and towns where they were necessary for the public welfare, and to prevent accidents at public crossings. In the following cases, speed ordinances were upheld by this court, to-wit: Karle v. Railway Co., 55 Mo. l. c. 483, where a five-mile ordinance at St. Joseph was sustained; Robertson v. Railroad, 84 Mo. l. c. 121, in which a six-mile ordinance in the town of Jamison was sustained; Merz v. Railway Co., 88 Mo. l. c. 675, in which a six-mile ordinance in the city of St. Louis was sustained; Keim v. Railway Co., 90 Mo. l. c. 321, in which the St. Louis six-mile ordinance was again sustained; Kelly v. Railway Co., 95 Mo. l. c. 285-6, in which the St. Louis ordinance was again sustained; Eswin v. Railway Co., 96 Mo. l. c. 294, in which the St. Louis ordinance was again sustained; Schlereth v. Railway Co., 96 Mo. l. c. 512, in which this court again sustained the St. Louis ordinance; Grube v. Railway Co., 98 Mo. l. c. 334, in which the six-mile speed ordinance of Kansas City was sustained; Gratiot v. Railway Co., 116 Mo. l. c. 455, in which the St. Louis ordinance was again sustained; Prewitt v. Railway Co., 134 Mo. l. c. 619-20, in which a six-mile ordinance of Sedalia was sustained;

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Jackson v. Railway Co., 157 Mo. 621, in which a six-mile speed ordinance of West Plains was sustained, and the court, in its opinion, reviewed all the former authorities of this State in relation to this subject; Stotler v. Railroad, 200 Mo. l. c. 120, in which an eight-mile speed ordinance of Laddonia was sustained; King v. Railway Co., 211 Mo. l. c. 5, in which a six-mile ordinance of Elm Flat was sustained; Johnson v. Railroad, 259 Mo. l. c. 544, in which an eight-mile ordinance of Mexico was sustained; Hunt v. Railroad, 262 Mo. l. c. 275, in which a five-mile ordinance of Cape Girardeau was sustained. The last case cited was disposed of in Court in Banc.

With this long line of decisions confronting us, sustaining six-mile ordinances, we have no disposition to declare invalid the one adopted by Higginsville in controversy here. As a police regulation it was the duty of the municipality to protect its citizens in the enjoyment of their rights, under such circumstances as are disclosed in this record.

According to the plaintiff's evidence, the Brand Street crossing was located in the heart of Higginsville, a city of the fourth class, containing 2700 inhabitants, and over which many people traveled to and from their places of business.

Upon a full consideration of all the facts connected with the case, we have reached the conclusion that the ordinance in question is not unreasonable and that, at the place where Murrell was killed, it was needed for the protection of the public.

III. It is insisted by appellant, that the trial court committed error in submitting the case to the jury on the last-chance theory.

The petition undoubtedly states a good cause of action based upon the humanitarian rule, and stands unchallenged in defendant's assignment of errors. Plaintiff's instruction numbered 3 correctly placed before the jury the law in respect to this subject, and is likewise unchallenged in appel-

Sufficiency of Evidence.

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lant's assignment of errors. Was the evidence sufficient to warrant the trial court in submitting this issue to the jury?

At the close of plaintiff's case in chief, defendant's demurrer thereto was overruled and it put before the jury its own evidence. The sufficiency of plaintiff's testimony must be determined from all the evidence in the case. It was the province of the jury to pass upon the facts, and every inference which men of average intelligence and fairness might legimitately draw from the proven facts, must be indulged in favor of plaintiff, in considering the demurrer to the testimony.

It may be conceded for the purposes of the case that deceased, at the time and place of the accident, was guilty of negligence which directly contributed to his own death, in failing to learn of the approach of the train before going upon the main track where he was killed. On the other hand, there was substantial evidence tending to show the following: That the servants in charge of the train were negligent in failing to ring the bell and keep it ringing, as required by the statute, before approaching the crossing where Murrell was killed; that they were guilty of negligence in failing to give proper and timely danger signals after deceased was known to be in peril; that they were guilty of negligence in violating the six-mile speed ordinance of Higginsville, and which they continued to violate until the time of killing; that they were guilty of common-law negligence in running the train, at the time and place of accident, at a dangerous and unsafe rate of speed; that the engineer was guilty of negligence, in failing to reduce the rate of speed with which he was running, after seeing deceased in peril, and apparently oblivious of the approach of the train; and was likewise negligent under such circumstances, in failing to give danger signals with a whistle, so as to arouse in deceased a realization of the danger into which he was then traveling.

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In the absence of evidence to the contrary, the jury had the right to draw the inference that the engineer was at his place in the cab, looking toward the depot, as he owed that duty to the passengers on his train, as well as those who might be upon the crossing. [Reyburn v. Railroad, 187 Mo. l. c. 565-6.] The jury also had the right to infer from the facts before them, that the engineer and fireman were at their respective places in the cab, as evidence was offered by defendant tending to show that the station whistle was sounded and that the bell was rung at some time before the crossing was made. Especially is this true, as the train stopped at the station and, hence, the engineer must have been performing the duty concerning the movements of the train.

No witness claims to have seen deceased after he came upon the sidewalk and started across the tracks, or to have witnessed the killing, except one Joe Fleming, who testified in behalf of defendant. This witness was not only impeached, by other witnesses, who testified in the cause, but, in our opinion, his own testimony is inconsistent and self-contradictory. It is so at variance with the physical facts, that neither court, nor jury, were bound to give credence to his testimony. But even this witness says that deceased, after he knew the train was coming, just started off and hobbled along on his crutch and stirrup as usual.

Even if it be conceded that deceased was guilty of negligence, as heretofore stated, yet the jury had the right to infer from the other facts in the case, that the engineer saw deceased in peril when the latter was less than 500 feet away, moving to a place of danger, apparently oblivious of the approach of the train. The evidence is undisputed that the train ran on over the crossing twenty-five to thirty-five miles an hour, without the slightest effort to slow down the speed of same, when, by so doing, even to the extent of two seconds, it would probably have saved the life of deceased. Plaintiff's

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evidence tends to show that deceased was in peril in front of a rapidly moving train, in plain view of the engineer for over 500 feet, when a few sharp blows of the whistle might have arrested his attention and saved him from entering upon the track. It is claimed on account of the curve that the engineer may not have seen deceased approaching the track, but the jury had the right to infer from all the evidence, as the deceased was approaching the track on the same side of the engineer, that when the comparatively straight track of 500 feet was reached, the engineer could see down the track, and had a plain view of deceased, moving toward the main track where he was killed. As said in the Reyburn case, the jury had the right to take into consideration the further fact that the engineer and fireman were not produced as witnesses, when, of all other persons, they would have been better prepared to have given the actual facts, than any one else could have done. Unless the humanitarian rule in this State is to be abandoned, the facts before us present a plain case for its application. [Reyburn v. Railroad, 187 Mo. 565; Eppstein v. Railway Co., 197 Mo. 720; Hinzeman v. Railroad, 199 Mo. 56; Holmes v. Railway Co., 207 Mo. 149; Lynch v. Railroad, 208 Mo. l. c. 34; Dutcher v. Railroad, 241 Mo. 137; Maginnis v. Railroad, 268 Mo. 667, 187 S. W. 1165.]

Many other well considered decisions of this court might be cited in line with the foregoing, but we deem the above sufficient to sustain the action of the trial court in overruling defendant's demurrer to the evidence and submitting the cause to the jury under the humanitarian rule.

Other Cases.

IV. We call especial attention to the cases of Reyburn, Hinzeman and Holmes above cited, where the facts are fully set out and the principles of law governing the same are clearly defined.

We have given full consideration to the assignment of errors submitted by appellant, as well as the propositions discussed in the respective briefs on file in

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the case. We are satisfied from the record before us that the judgment below was for the right party, and it is accordingly affirmed. *White* and *Mozley, CC.*, concur.

PER CURIAM:—The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court. All of the judges concur.

JAMES E. MAXWELL v. JAMES C. GROWNEY, Appellant, et al.

Division Two, July 5, 1919.

1. **EXPRESS TRUST: Power of Beneficiary to Mortgage.** A deed giving to the trustee power to sell, convey, pledge, mortgage or otherwise dispose of land, and to invest, re-invest or use the money derived from any such sale, mortgage or pledge, or any income arising from said property, for the use, benefit, support and maintenance of another, creates an express, active trust in the land, and gives to the beneficiary no power to sell or mortgage the same.

2. ———: **Pleading: Cause of Action: Present Interest.** An allegation that it is now necessary that plaintiff, in the exercise of the powers conferred upon him as trustee by a certain trust instrument, either lease, sell or mortgage the lands for the purposes of the trust, and that a mortgage executed by the beneficiary constitutes a cloud upon the plaintiff's title and has heretofore and does now prevent the plaintiff from carrying out the provisions of said trust, states that plaintiff had an interest in the land at the time his suit was brought.

3. ———: **Cancellation of Beneficiary's Mortgage: Discovery of Defect.** A "mind of legal acuteness" is generally, if not always, required to determine what rights of a beneficiary of a trust are alienable; and where the defect in the mortgage made by the beneficiary is of such a character as to render it invalid but can only be discovered by a mind of legal acuteness, a court of equity will remove it as a cloud upon the trustee's title.

4. ———: ———: **Sufficient Facts.** Where the trustee is unable to carry out the powers conferred upon him by the trust instrument unless the suspicion cast upon his title by a mortgage made by the beneficiary is removed, and there is no adequate legal remedy open to the trustee, a court of equity will, at his suit, cancel the mortgage.

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Appeal from Buchanan Circuit Court.—*Hon. Thomas B. Allen,* Judge.

AFFIRMED.

James C. Growney for appellant.

(1) The petition in the instant case does not state facts sufficient to constitute a cause of action. It is not alleged that plaintiff at the time he filed his bill in 1913, had any interest in the subject-matter in suit. The only allegation of interest is that in 1907 the land was conveyed to him as trustee. Shelton v. Horrell, 232 Mo. 369; 17 Ency. Pl. and Prac. p. 327. (2) The demurrer contained in appellant's answer should have been sustained for the reason that the allegation in the petition is, that the legal title is in the plaintiff, and that the defendant, John E. Maxwell, had not title or right to make the deed of trust to appellant, Growney. This shows that no grounds exist for the authority to invoke the aid of a court of equity to decree cancellation of said deed of trust for the allegation, if true, makes the deed of trust void and no extrinsic evidence is required to show its invalidity. Dunklin Co. v. Clark, 51 Mo. 60; Connecticut Ins. Co. v. Smith, 117 Mo. 297; Thorp v. Miller, 137 Mo. 231; Hannibal Ry. Co. v. Nortoni, 154 Mo. 142. (3) The evidence in the instant case shows the defendant, John E. Maxwell, *cestui que trust* in possession of this land, asserting ownership thereof, and the plaintiff claiming title thereto, being out of possession, cannot invoke equitable jurisdiction to remove cloud upon title. Graves v. Ewart, 99 Mo. 18; Davis v. Sloan, 95 Mo. 552; Turner v. Hunter, 225 Mo. 83. (4) The trust instrument is not a trust for an infant; it is not a trust for a person *non compos mentis;* it is not a trust for a spendthrift, because the instrument does not withhold from the *cestui que trust* the right of possession, neither does it deprive or withhold from him the right to alienate his

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equitable interest in the trust estate. Kessner v. Phillips, 189 Mo. 524; Wenzel v. Powder, 59 Atl. 194; Heaton v. Dickson, 153 Mo. App. 326. (5) The instrument carried the *corpus* of the estate, as well as the income for his use and benefit. It all belongs to him, and in equity he is the absolute owner thereof and can mortgage it. 1 Perry on Trusts (5 Ed.), sec. 321; 2 Perry on Trusts (5 Ed.), sec. 815; 39 Cyc. 203-229; 28 Am. & Eng. Ency. Law (2 Ed.), 1107; Wenzel v. Powder, 59 Atl. 197. (6) The evidence in this case is to the effect that the *cestui que trust* John E. Maxwell, has elected to take the trust estate as it exists—the land. That he is in possession thereof; that the plaintiff trustee admits that the *cestui que trust* had denied him any right to manage or control the trust estate. That the *cestui que trust* is enjoying the possession with the rents and profits thereof. Under such circumstances a surrender has been made by the trustee and the legal title with the possession has vested in the *cestui que trust*. Perry on Trust (5 Ed.), secs. 349, 351, 920; Sears v. Choate, 146 Mass. 398; Sparhawk v. Cloon, 125 Mass. 263.

Culver & Phillip for respondent.

(1) The petition alleges that plaintiff has an interest in the subject-matter of the suit. (2) The *cestui que trust* had no power to sell, convey or encumber the trust property. (3) The beneficiary is not even given the right to occupy the land, nor any power or control over the sale or disposition thereof, while the trustee is given full power to sell, mortgage and convey. This vests in the trustee "the full fee in the real estate itself." Cornwell v. Wulff, 148 Mo. 542. The estate of the trustee is commensurate with the powers conferred by the trust. Ewing v. Shannahan, 113 Mo. 188; 38 Cyc. 208; Higbee v. Brockenbrough, 191 S. W. 995. Under such circumstances the *corpus* of the trust estate is not liable to the payment of a judgment against the *cestui que trust,* the only theory on which this could be

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done being that the trust was a dry one, imposing no active duties on the trustee. Heaton v. Trust Company, 153 Mo. App. 328. Where the *cestui que trust* enjoys only the income or support and maintenance from the principal and the trustee is charged with any control over the trust estate, then the trust is an active one. Pugh v. Hayes, 113 Mo. 431; Walton v. Ketchum, 147 Mo. 218; Freeman v. Maxwell, 262 Mo. 24. The cases even go to the extent of holding that where the trust is an active one it is the duty of the trustee to protect the trust estate, and if the trustee becomes barred by limitation, the *cestui que trust,* even though under disability such as infancy, coveture, etc., is likewise barred. Simpson v. Erisner, 155 Mo. 157. Moreover "where the trustee is not merely the recipient of the title for the use of the beneficiary, where he has a duty to perform in relation to the property which calls for the exercise of judgment and discretion, it is an active trust, and is not affected by the Statute of Uses." Webb v. Hayden, 166 Mo. 39.

WILLIAMS, P. J.—This is a suit in equity to cancel and annul a certain deed of trust upon real estate. Trial was had in the Circuit Court of Buchanan County, which resulted in favor of plaintiff, canceling the deed of trust. From that judgment James C. Growney, the *cestui que trust,* duly perfected an appeal.

The facts may be summarized as follows:

On January 14, 1907, Margaret E. Smith et al. conveyed by warranty deed, to the plaintiff, in trust for defendant John E. Maxwell, Sr., five acres of land in Buchanan County. The deed was made subject to a life estate in said property in favor of James Maxwell and Malinda Maxwell.

John E. Maxwell, Sr., named in said deed is the father, and James Maxwell and Malinda Maxwell (life tenants) were the grandfather and grandmother, of plaintiff, James E. Maxwell, named as trustees in said deed.

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The powers given plaintiff as trustee are stated in the deed as follows:

"Giving and granting to said trustee full power and authority to grant, bargain, sell, convey, pledge, mortgage or otherwise dispose of said property, to invest, re-invest or use the money derived from any such sale, mortgage or pledge of said property or any income derived therefrom, for the use, benefit, support and maintenance of said John E. Maxwell, Sr."

The above deed was duly recorded January 15, 1907.

The survivor of the two life tenants died in 1912, or 1913 and shortly thereafter John E. Maxwell Sr., "went out and took possession of the land."

On March 23, 1914, John E. Maxwell, Sr., executed a deed of trust (being the deed of trust involved in the present suit) on said land, to secure the payment of a note of even date in the sum of $300 payable to defendant (appellant) James C. Growney.

On the following day said James C. Growney, acting as the attorney for John E. Maxwell, Sr., filed a suit in the Circuit Court of Buchanan County against the present plaintiff, the object and general nature of which was to have the legal title to said land vested in John E. Maxwell, Sr., or, failing in that, to have the trustee removed and a new trustee appointed. The case was tried, resulting in a judgment in favor of the trust and also in favor of the trustee, and no appeal was taken from said decree.

The evidence further tends to show that John E. Maxwell, Sr., moved "back to town" (St. Joseph, Mo.) in the fall of 1915, and that there was no one on the property at the time this suit was tried.

The plaintiff trustee testified that his father was without other means of support; that he (the son) had paid for the board and clothes of his father for the past several years and that in August, 1915, he as trustee decided to sell or mortgage the property for the purpose of raising the necessary money with which

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to support his father under the terms of the trust; that he then discovered for the first time the deed of trust given to secure the $300 note to defendant Growney; that by reason of the existence of the Growney deed of trust he was unable to borrow any money on the land.

Hence this suit to cancel the deed of trust, in order that the trustee might not be hampered in the execution of said trust.

I. It will be noticed that the respondent trustee is given full and complete, discretionary control over the trust estate. Under the express terms of that power he may sell, mortgage or otherwise dispose of said property; may re-invest the proceeds thereof *or* use the money derived from any such sale or mortgage or the income thereof for the support of the named beneficiary. The trust created in said land was therefore an express *active* trust. [Freeman v. Maxwell, 262 Mo. l. c. 24; 3 Pomeroy's Equity Jur. (3 Ed.) par. 991.]

Express Trust.

The full and express powers conferred upon the trustee clearly excluded the idea that the beneficiary was given a like power of disposal. It therefore follows that the beneficiary did not have an alienable interest in the land which he attempted to incumber with the deed of trust. [Partridge v. Cavender 96 Mo. 452; Higbee v. Brockenbrough, 191 S. W. Rep. 994.]

The above being true the deed of trust should be held as having no effect whatever upon the title to this land nor the powers of the trustee thereover.

II. It is contended by appellant that plaintiff's bill fails to state a cause of action in that it fails to allege that plaintiff had an interest in the land at the time the suit was filed; citing, Shelton v. Horrell, 232 Mo. l. c. 369.

Present Interest.

The petition after alleging that the land was conveyed to him in trust, etc., in 1907 proceeds: "That it

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is *now* necessary and advisible that plaintiff in the exercise of the powers conferred upon him as said trustee, either lease or sell or dispose of or encumber said lands for the purposes of said trust, but that said deed of trust so executed to said defendant Growney . . . constitutes a cloud on the title of the plaintiff in and to said real estate and has heretofore prevented and *does now* prevent the plaintiff 'from carrying out the provisions of said trust.'" (Italics ours.)

A mere reference to the foregoing portion of the bill is we think entirely sufficient to distinguish this case from the Shelton case, supra, and to show that plaintiff's present interest in the subject-matter of the suit was sufficiently alleged.

III. We are also of the opinion that the trial court acting as a court of equity properly cancelled the deed of trust in question.

Cancellation of Deed.

Appellant in insisting to the contrary relies upon a line of cases of which Hannibal & St. J. Ry. Co. v. Nortoni, 154 Mo. 142, l. c. 149, is a fair type. In that case the court said: "The deed from Blake to defendants is clearly void on its face, because Blake had no title whatever to the land, which was apparent from the records of deeds in the Recorder's office of the county. Under such circumstances a court of equity will not lend its aid to remove what is claimed to be a cloud upon the title, because there is an adequate remedy at law, and it is only where the deed sought to be removed as a cloud does not appear to be void upon its face, but is void by reason of some other infirmity, and extrinsic evidence has to be resorted to for the purpose of establishing its invalidity, or the defect is of such a character as to render the deed invalid but can only be discovered by a mind of legal acuteness, that it will do so."

The rule above announced will not protect appellant under the present situation. A "mind of legal acuteness" is generally, if not always, required to determine

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what rights of a beneficiary of a trust are alienable. This will become quite apparent to any researcher. [*Vide* the many authorities reviewed in 3 Pomeroy's Equity Jurisprudence (3 Ed.), par. 989, p. 1840, note 5, and par. 1005 and cases cited thereunder. See also 39 Cyc. 234 (e) and numerous cases thereunder.]

From the uncontradicted evidence in the case at bar it clearly appears that the trustee is unable to carry out the power conferred upon him by the settlors of the trust, unless the suspicion cast upon the trustee's title by the deed of trust in question is removed by the decree of a court of equity. There is no adequate legal remedy open to the trustee. His only adequate relief is in equity and we are of the opinion that the trial court did not go beyond its equitable powers in awarding relief under the circumstances now held in review. [Jewett v. Boardman, 181 Mo. l. c. 656-7; Pocoke v. Peterson, 256 Mo. 518-9.]

The judgment is affirmed. All concur.

JOHN CALVIN DOBSCHUTZ et al. v. LOUISA DOBSCHUTZ et al., Appellants.

Division Two, July 5, 1919.

1. **FOREIGN WILL: Effect in This State.** The will of a resident of Illinois, executed and probated there, when a copy duly authenticated is filed for record in this State, will take effect and be interpreted according to the laws of this State, exactly as if it had been originally proved here.

2. **———: ———: Partition.** Children, residents of Illinois, not mentioned in their father's will, by which he attempted to devise all his property, wherever situate, to his widow, may maintain a partition proceeding in the courts of this State and assert the same rights to land in this State, belonging to testator at the time of his death, that they could have done had he left no will.

3. **———: ———: Contrary to Will and Statute.** Children "not named or provided for" in their father's will, by bringing suit for the partition of lands belonging to him at the time of his

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death, do not seek partition contrary to any will which affects them, and consequently Section 2569, Revised Statutes 1909, which provides that no partition of lands devised by any last will shall be made contrary to the intention of the testator as expressed in the will, has no application to them.

Appeal from Ste. Genevieve Circuit Court.—*Hon. Peter H. Huck,* Judge.

AFFIRMED.

John J. O'Connor for appellants.

(1) Plaintiffs are barred from recovering under the second cause of action by Sec. 2569, R. S. 1909, which says that "no partition or sale of lands devised by any last will shall be made contrary to the intention of the testator, expressed in any such will." Stuart v. Jones, 219 Mo. 635; Sikemeier v. Galvin, 124 Mo. 367; Cubbage v. Franklin, 62 Mo. 364; Cannon v. Cannon, 175 Mo. App. 88; Stevens v. De La Vaulx, 166 Mo. 20; Stevens v. Larwill, 110 Mo. App. 151. (2) Land owned in this State by a deceased non-resident shall be disposed of according to his last will. Sec. 260, R. S. 1909. (3) Where a remedy is part of an entire and complete scheme of law as in the "law of partition," and one adopts that remedy, he must recover under that law or fail. If plaintiffs have mistaken their remedy, equity will not aid them. State ex rel. v. Allen, 45 Mo. App. 551.

Charles Fensky and *M. E. Rhodes* for respondents.

(1) A will devising real estate situated in the State of Missouri must be executed according to the laws of this State. Sec. 567, R. S. 1909. (2) If any person make his last will and die leaving a child or children, or descendant of such child or children, not named or provided for in said will, such testator, so far as regards such child or children or their descendant not provided for, shall be deemed to die intestate. Sec.

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544, R. S. 1909; Bradley v. Bradley, 24 Mo. 311; Hargadine v. Pulte, 27 Mo. 423; Thomas v. Block, 113 Mo. 66; Breidenstein v. Bertram, 198 Mo. 328; Vantine v. Butler, 250 Mo. 451. (3) In partition the interest of children omitted from the will can be determined, and all rights and equities between all persons interested in the real estate can be determined, in such proceeding. Breidenstein v. Bertram, 198 Mo. 344. (4) Under the law plaintiffs' rights secured to them by Sec. 554, R. S. 1909, are not affected, whether a will is established or annulled, and their right to maintain this action for their share of said real estate situated in Missouri would be the same as though their father died without a will. Vantine v. Butler, 250 Mo. 451.

WHITE, C.—This action seeks the partition of a large tract of land in Ste. Genevieve County. The plaintiffs are four children and heirs, of whom there were ten in all, of Moritz J. Dobschutz, deceased; the defendant, Louisa Dobschutz, is his widow, and the other defendants his six remaining children.

Moritz Dobschutz, who owned the land at the time of his death, lived and died at Belleville, Illinois, and reared his family there. All the parties were at all times residents of the State of Illinois. The land was wild; neither Dobschutz nor any of his children ever lived on any part of it. The petition alleges the relationship of the parties, the death of Moritz Dobschutz, that the widow has a dower, and the plaintiffs and remaining defendants are tenants in common of the property, subject to said dower, each being entitled to an undivided one-tenth interest, and prays for partition in the usual form.

Defendants' answer, admitting the ownership of the land in Moritz Dobschutz at the time of his death, set out at length in defense the will of Moritz Dobschutz, which was admitted to probate in the probate court of St. Clair County, Illinois, on July 31, 1913, and a copy, duly authenticated, filed for record in the office

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of the Recorder of Deeds of Ste. Genevieve County. Moritz died June 24, 1913. The will left all the property, real and personal, of the testator to his wife Louisa Dobschutz. No mention of any kind of any of testator's children was made in the will. On a trial of the case there was a judgment for plaintiffs as prayed in the petition, and the defendants appealed.

I. The rule prevails, not only in this State, but is of universal application, that the title to land can be acquired only according to the law of the place where it is situate. Land may be devised in this State by a non-resident testator, but his will will take effect and be interpreted according to the law of this State. Section 567, Revised Statutes 1909. [Hughes v. Winkleman, 243 Mo. l. c. 92; Keith v. Keith, 97 Mo. 223, l. c. 230.] The will of Moritz Dobschutz can have the same effect and only the effect it would have if he had been a resident of this State and his will had been originally proved in this State.

Foreign Will.

II. The appellants assert that the judgment here was erroneous because in conflict with Section 2569, Revised Statutes 1909, which provides that no partition of lands devised by any last will shall be made contrary to the intention of the testator as expressed in the will. It is argued that having elected to pursue the statutory remedy by proceeding in partition, the plaintiffs are bound by all the provisions of the statute relating to partition, including that section. The will gives the real estate in dispute in fee simple to the widow, Louisa Dobschutz; therefore the partition decree is in direct conflict with the very statute under which the plaintiffs are proceeding.

Section 544, Revised Statutes 1909, provides that if any person make his last will and die leaving a child or children, or descendants of such child or children in case of their death, "not named or provided for in such will," such testator shall be deemed to have died intes-

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tate as regards such child or children or their descendants. Under the plain, unequivocal provision of that section the plaintiffs are not seeking partition contrary to any will *which affects them*. So far as they are concerned there is no will; he died intestate as to them. They are no more bound by the terms of the will in respect to their remedies, than they are in respect to their substantive rights.

It has been held by this court that a pretermitted heir may maintain an action for partition of land disposed of by a will in which he was not mentioned or provided for; that is, he may "assert his rights under the statute creating an intestacy as to him." [Breidenstein v. Bertram, 198 Mo. l. c. 344; Vantine v. Butler, 250 Mo. l. c. 451.]

Appellants rely upon two cases in support of their position where it is held that partition cannot be made contrary to the terms of the will. In the first case, Stevens v. Larwill, 110 Mo. App. 140, there were no children or other descendants parties to the proceeding, and Section 544 could have no application; and besides, the parties plaintiff, collateral relatives, were expressly mentioned in the will. In the other case, Stewart v. Jones, 219 Mo. 614, l. c. 638, the plaintiff, who sought the partition contrary to the terms of the will, asserted rights which arose under the will. He could not maintain partition contrary to the terms of the will under which he claimed.

Section 544 would have no meaning if plaintiffs were denied their right to sue in this case.

The judgment is affirmed. *Mozley, C.*, concurs; *Railey, C.*, not sitting.

PER CURIAM:—The foregoing opinion by WHITE, C., has been adopted as the opinion of the court. All of the judges concur.

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LA COSETTE HENDREN et al., Trustees, Appellants, v. FREDERICK W. NEEPER et al.

Division Two, July 5, 1919.

CORPORATION: Sale of Properties: Annihilation: Injunction. A corporation organized for the express purpose of buying and selling real estate will not be destroyed by a sale of a large tract of land belonging to it; and an injunction suit to enjoin the sale, brought by a minority of the directors against the majority, who in regular meeting assembled have authorized the sale, cannot be maintained on the ground that such sale will annihilate the corporation.

Appeal from Hannibal Court of Common Pleas.—*Hon. William T. Ragland,* Judge.

AFFIRMED.

F. L. Schofield for appellants.

(1) Although the powers of the corporation as they are set out in the articles of agreement are broad enough to include the buying and selling and dealing in real estate generally, yet the incorporators, neither at the time of entering into the articles of agreement nor since, ever contemplated or purposed the exercise of these broader powers. (2) The intentions or things purposed by the corporation itself, if such intentions and purposes are to be considered apart from the wish and will of those who have constituently composed it, must be gathered from the business to which it has always confined itself. (3) Whatever the real and actual ultimate intentions and purposes, whether of the incorporators or of the corporation itself, may have been, these ultimate intentions and purposes, conceding that they have all the time existed, have always reposed in the corporate body itself, and have never been delegated or committed to its board of directors; and until so designated and committed by antecedent action of

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the stockholders, the directors possess no power or authority in the premises. (4) Notwithstanding its corporate powers extended to the buying and selling and dealing in real estate generally, it has never exercised such powers. It has never bought or sold an acre of land. Its corporate purposes, corporate efforts, corporate enterprise and practically sole and only corporate business, from the time of its organization down to the time of the commencement of this suit, have been confined to its primary purpose of owning, farming and improving the single body of lands acquired by it in the very processes of its organization. For the corporation to now go forward in the exercise of its ulterior powers by selling off the entire body of these lands and, with the proceeds, engaging in the business of buying and selling and dealing in real estate generally "at any place within the United States of America," would be a radical and complete change in its business and affairs, and it belongs to the corporate body alone, through the proper action of its members and stockholders, to determine whether or not it will make so vital a change. 2 Cook on Corp. sec. 670; Morawetz on Corp., secs. 238, 239, 240; Railway Co. v. Allerton, 18 Wal. 233; Buford v. K. N. L. Packet Co., 3 Mo. App. 166; 7 Am. & Eng. Ency. Law, p. 734, 735; 26 Am. & Eng. Ency. Law, p. 965; Hunt v. Am. Grocery Co., 81 Fed. 532; Metcalf v. Am. School Furn. Co., 122 Fed. 115; City of St. L. v. St. L. Gaslight Co., 70 Mo. 98; Field v. Roanoke Inv. Co., 123 Mo. 603; Gill v. Balis, 72 Mo. 424, 433; Cummings v. Parker, 250 Mo. 441.

Eby & Hulse and *F. W. Neeper* for respondents.

(1) If the charter of a corporation expressly authorized a lease or sale of the corporate property, such a lease or sale may be made by a majority of the directors in meeting assembled, and the minority are bound thereby. It is immaterial what the terms of the lease may be, or whether advantageous or disadvantageous

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to the stockholders. The dissenting minority have no remedy unless fraud can be shown. 2 Cook on Stock (3 Ed.), sec. 898. (2) At common law the directors have powers co-extensive with those of the corporation, and have not a mere delegated authority as common agents; and in the absence of restrictions in the charter or by-laws, directors have all the authority of the corporation itself in the conduct of its ordinary business. Generally, whatever directors do, within the scope and powers of the corporation, the corporation does. 1 Beach on Private Corporations, sec. 227; Conyngton on Corporate Management, p. 23, sec. 31; Tanner v. Railway Co., 180 Mo. 17; City of St. Louis v. St. Louis Gaslight Co., 70 Mo. 98.

MOZLEY, C.—Injunction by the minority of the board of directors of the Hannibal, Missouri, Land Company against the majority of said board, seeking to restrain said majority from selling about twenty-eight hundred acres of land owned by the Hannibal, Missouri, Land Company, a corporation.

The said Land Company was duly organized as a corporation on or about the 9th day of June, 1904, under Article 7, Chapter 12, Revised Statutes 1899. The land involved was formerly owned by William A. Munger and his brother, Lyman P. Munger, and is situated in Marion County, Missouri. The two Mungers and Lucy A. Munger, the wife of Lyman P. Munger, formed the incorporation. William A. Munger had five hundred shares, his brother, Lyman P. Munger, had four hundred and ninety-nine shares, and Lucy A. Munger, one share, all of the par value of one hundred dollars each. Upon the organization of said corporation, said William A. Munger, said Lyman P. Munger and his wife, Lucy A. Munger, deeded the whole of the lands referred to, to the corporation, the Hannibal, Missouri, Land Company, and received therefor certificates of stock in proportion to the shares they had subscribed. In the articles of incorporation it was provided as fol-

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lows: "The purposes for which this incorporation is formed are to buy and sell real estate, both farm and city property, at any place within the United States of America; and to own and hold, operate and control such real estate and to exercise such acts of ownership and control over the same as may be exercised over the ownership and control of real estate by a private citizen of the State of Missouri."

Lyman P. Munger departed this life on or about the 28th day of February, 1906, leaving a will in which he bequeathed all of his said capital stock in said corporation to his wife, Lucy A. Munger. On the —— day of May, 1911, the said William A. Munger departed this life, leaving a will in which plaintiffs, La Cosette Hendren and Thomas P. Head, were named and appointed executors, and bequeathing his said five hundred shares of the capital stock in said corporation to the said executors as trustees, with power of ultimate sale and distribution to certain named parties, who were to be the beneficiaries of the said William A. Munger. Thereafter the said Lucy A. Munger transferred one share of said stock to the defendant Frederick W. Neeper, and afterwards died, leaving a will duly proved and admitted to probate, whereby she bequeathed all of her remaining capital stock, namely, four hundred and ninety-nine shares, to the defendant Leigh A. Neeper. In addition to the lands above referred to, the Mungers owned about 1650 acres each in Illinois, and it, after the organization of the corporation, was handled through the corporation. The corporation owns other property beside that mentioned, and had about $5000 in cash. It is conceded in the record that the defendants constituted a majority of the board of directors of said corporation.

At the regular annual meeting of the board of directors of said company, one William A. Rinehart had submitted a proposition in writing to buy said 2800 acres referred to, and pay therefor to said company the sum of $124,500. All of the members of said board were present at said regular meeting, and the proposi-

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tion of Rinehart was duly laid before the board by defendant Frederick W. Neeper, one of said directors and the then president of said corporation. The matter was passed over from time to time until the 14th day of March, when said proposition was accepted by a majority vote of said board of directors, by resolution duly passed, and said board contracted to sell said lands for $124,500 as follows: $20,000 cash, upon the execution of the deed, and the further sum of $104,500 in three annual installments, payable respectively in one, two and three years from date of said sale, with interest on each of said deferred payments at five and one-half per cent. per annum from the date of sale, and the said Rinehart was to convey, by trust deed, to the corporation, said lands, to secure the payment of the balance on the purchase price of same. The plaintiffs, as trustees, at this juncture, instituted this action to enjoin the consummation of said sale. On a trial in the Hannibal Court of Common Pleas the chancellor found the issues for defendants, denied plaintiffs injunctive relief or any relief, and dismissed the bill. From that decree, plaintiffs appealed to the Saint Louis Court of Appeals, which court, because the amount involved is in excess of its jurisdiction, certified the cause to this court.

Appellants assign error as follows:

(1) Under the law and all the evidence the finding and decree should have been for plaintiffs, awarding the relief prayed. The court erred in finding for defendants and in rendering a decree dismissing plaintiffs' bill.

(2) The court erred in overruling plaintiffs' motion for a rehearing and a new trial and their motion in arrest of judgment.

Under these assignments the contention is made by appellants that if the sale of the land in controversy is consummated, it will result in annihilating the corporation and that this cannot be done without the consent of all the stockholders. We cannot subscribe to that view. To do so

Destroying Corporation.

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would be to lose sight of the purposes for which the corporation was formed. Its charter powers expressly authorizes it to buy and sell real estate—in fact recites that the corporation was formed for that purpose. The sale of the land in question has no reference to the destruction of the corporation, it is merely carrying out the specific charter power the corporation possesses. Nor is there anything in the record that discloses any attempt or desire, in making this sale, upon the part of the majority of the directors, to interfere with the integrity of the corporation.

Cook, in his admirable treatise on corporations, states the following as the law: "The law seems to be clear that all corporate contracts are to be made by the directors. This includes original contracts as well as modifications of them. If a contract is within the express or implied powers of the corporation, then the directors need not consult the stockholders nor follow their wishes, even though the latter constitute a majority or a minority, and though these stockholders object in meeting assembled or individually in the courts." [Vol. 3, par. 709, p. 2423.] Further in the same volume, paragraph 712, page 2435, it is said: "All contracts of a corporation are to be made by or under the direction of its board of directors. And in all cases the board of directors and not the stockholders, nor the president, secretary, treasurer, or other agent, is the original and supreme power in corporation to make corporate contracts. The stockholders, indeed, have very few functions. The board of directors have the widest of powers. All of the various acts and contracts which a corporation may enter into are entered into by and through the board of directors. The board of directors make or authorize the making of the notes, bills, mortgages, sales, deeds, liens, and contracts generally of the corporation."

We think there is no doubt that the majority of the board of directors were acting expressly with the charter powers of the corporation in making said contract of

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sale to Rinehart, and that said sale is legal and the corporation bound thereby.

Entertaining these views, it results that the decree of the lower court will be affirmed. It is so ordered. *White, C.*, concurs; *Railey, C.*, absent.

PER CURIAM:—The foregoing opinion of MOZLEY, C., is adopted as the opinion of the court. All of the judges concur.

FRED STEGMANN et. al., Appellants, v. HENRY L. WEEKE, Commissioner of Weights and Measures of City of St. Louis.

(No. 21,151)

Division Two, July 5, 1919.

1. **INJUNCTION: Dismissal Without Hearing.** In an injunction, if the bill states a cause of action entitling plaintiff to a hearing on the merits and he does not in any way waive his right to have the case proceed in due course, it would seem, though it is not decided, that, under Sec. 2532, R. S. 1909, the court is not authorized to dismiss the bill without a hearing on the merits and without having passed upon the matter of issuing a temporary restraining order.

2. **MEASUREMENTS: Unlawful Bushel: Prescribed By Ordinance.** An ordinance which prescribes that a bushel box shall be 23¼ inches long, 9¾ inches deep and 11 inches wide calls for a box whose cubical content is 2493.5 inches, and is contrary to the statute (Sec. 11961, R. S. 1909) which says the content of a bushel shall be 2150.4 cubic inches, and attempts to make unlawful the use of a box of any other dimensions, even though it contained the exact statutory content.

3. **MOOT CASE: Abatement: Costs.** An appeal from a judgment dismissing plaintiffs' bill for an injunction at their cost will not abate unless thereby they are given a full measure of relief. Before a defendant may abate a case by complying with the demands of the petition, he must comply with all its demands, including the payment of costs.

4. ———: ———: **Injunction: Threat to Continue Wrong.** An injunction to restrain a city officer from destroying the market boxes of plaintiffs, who are farmers and gardeners, will not abate an ap-

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peal on the ground that the objectionable sections of the ordinance under which defendant had destroyed their boxes had been repealed after the case was submitted and others enacted in lieu thereof, if the defendant has threatened to destroy, without a hearing, all boxes he believes to be of different dimensions from those prescribed by the ordinance as amended. In view of such threat, the determination of the case does not turn upon a mere moot question.

5. **INJUNCTION: Clean Hands: Determined Without Hearing.** The trial court is not empowered to decide, without a hearing on the merits, upon a mere preliminary consideration of the question whether upon the face of the petition a temporary restraining order should be issued, that the plaintiffs have not come into court with clean hands.

6. ———: ———: **Limitations of Rule.** The rule that he who comes into equity must come with clean hands has its limitations. The particular iniquity which prevents the pursuit of an equitable remedy must relate to the particular matter in hand, and must arise out of the transaction which is the subject of the suit. If the plaintiffs, who by their petition ask that a city commissioner be restrained from destroying their market boxes, who has threatened to destroy them on the ground that they are not of the dimensions prescribed by ordinance, have used the boxes with the understanding that some persons would be deceived as to their contents, they come with unclean hands; but if the facts show that the boxes have long been in use, that the purchasers of their produce fully know their contents, and fail to show that some consumer or purchaser has been deceived, they do not come with unclean hands.

Appeal from St. Louis City Circuit Court.—*Hon. Wilson A. Taylor,* Judge.

REVERSED AND REMANDED.

Edward W. Foristel, Taylor R. Young and *T. T. Hinde,* for appellants.

(1) The first cause was not heard on its merits at a final hearing, hence, since the petition states a cause of action, the court should not have dismissed the suit at the preliminary hearing on the order to show cause why a temporary injunction should not issue. And even if the petition did not state a good cause of

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action, appellants had a right to amend. Harrison v. Rush, 15 Mo. 175; State ex rel. v. Smith, 188 Mo. 179; (2) Sections 22 and 23, both original and amended, of the ordinance are unconstitutional, both under the Federal and State Constitutions, in that they impair appellants' right to contract and deprive them of their property without due process of law. Article 5 of Amendments to U. S. Constitution; Art. 2, sec. 10, U. S. Constitution; Art. 2, sec. 15, Missouri Constitution; Art. 2, sec. 30, Missouri Constitution; St. Louis v. Dreisoerner, 243 Mo. 224. (3) Original Section 23 of the ordinance is illegal under our statute providing that no city shall have the power to levy or collect a license or fee from any farmer or producer for the sale of produce raised by him, when sold from his wagon in a city. The annual inspection fee of ten cents per box is nothing more nor less than a tax, license or fee. Sec. 9516, R. S. 1909; St. Louis v. Meyer, 185 Mo. 583. (4) Original Section 22 of the ordinance violates our statute pertaining to weights and measures in at least two particulars: (a) It attempts to establish a standard bushel box with a capacity of 343.16 cubic inches in excess of the statutory standard; (b) it fixes absolute and arbitrary dimensions, thus limiting the shape, as well as the capacity, of the container. Sec. 11961, R. S. 1909; Sec. 11963, R. S. 1909.

Charles H. Daues and *H. A. Hamilton* for respondent.

(1) If an event occurs pending an appeal which renders a decision unnecessary, the appeal will be dismissed. Such condition may arise by the act of the appellee in relinquishing the right to do some act in respect to which the appeal was taken. That part of Ordinance No. 29795 against which complaint is made having been repealed, the matter presented in said cause is a moot question. (2) All substantial interest in the controversy having been extinguished, this court will not hear the appeal merely to determine the right to costs. Hicks v. St. Louis, 234 Mo. 647; Union El.

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L. & P. Co. v. St. Louis, 253 Mo. 592; Howe v. Doyle, 187 Mich. 655; Russell v. Campbell, 112 N. C. 404; Mabry v. Kettering, 91 Ark. 81; Pinkerton v. Randolph, 200 Mass. 24; Moore v. Cooper Monument Co., 81 S. E. 170; Anderson v. Cloud County, 90 Kan. 15; Wingert v. First National Bank, 223 U. S. 670, 672; Lisman v. Knickerbocker Trust Co., 211 Fed. 413.

WHITE, C.—The plaintiffs are truck gardeners and farmers, and officers of a voluntary unincorporated association which consists of twenty-five hundred members. The defendant is Commissioner of Weights and Measures of the City of St. Louis. The plaintiffs filed their amended petition in the circuit court of St. Louis on April 24, 1918, in which they set out a certain ordinance of the City of St. Louis, No. 29795, enacted on the ninth day of August, 1917, which was alleged to be in violation of the State and Federal Constitutions and unreasonable and oppressive. Under this ordinance the defendant in his official capacity had destroyed, and threatened to continue destroying, certain boxes used by the plaintiffs and other members of the association. The petition asked for a temporary restraining order and, upon a final hearing, a permanent injunction to prevent said acts on the part of the defendant.

On the filing of said petition the court issued an order directing the defendant to show cause on a certain day why a temporary restraining order should not be issued. The defendant thereupon, on the day mentioned, filed his return to the order, in which he set out certain sections of the ordinance referred to, prescribing the dimensions of boxes which might be used in the marketing of produce, and alleged that the plaintiffs in marketing their produce used boxes of other and different dimensions, contrary to the ordinance, and for that reason he had seized a number of such boxes.

After hearing the evidence upon the petition and return, the court, instead of merely passing upon the matter of issuing a restraining order, *dismissed the bill at plaintiffs' costs.*

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I. Appellants here complain that the court had no right in this mere preliminary hearing, in which the only matter to be determined by the court was whether a temporary restraining order should issue, to dismiss the bill; that the bill states a cause of action which entitled the plaintiff to a hearing on the merits, and even if it did not state a cause of action the plaintiff had a right to amend and have a trial in due course upon the merits of the case. Although the return of the defendant may be treated as an answer to the petition, it is not contended anywhere by the respondent that the taking of evidence was a trial of the case upon the merits or that the plaintiffs in any way waived their right to have the case proceed in due course. It looks as if Section 2532, Revised Statutes 1909, did not authorize this summary disposition, but the case may be disposed of without determining that question.

Trial on Merits.

II. The ordinance under which the defendant sought to justify his acts in destroying the plaintiffs' boxes, and which the plaintiffs claim is unconstitutional and unreasonable, consists of many sections. The pertinent ones set out in the petition and in the return, are sections 22 and 23. Section 22 provides that a standard bushel box shall be of the following dimensions, inside measurement: length, 23¼ inches; depth, 9¾ inches; width, 11 inches. Dimensions also are provided for half-bushel, quarter-bushel, eighth-bushel, sixteenth-bushel, and thirty-second-bushel boxes. The bushel box of the dimensions prescribed would contain 2493.56 cubic inches. The other boxes prescribing for fractional parts of a bushel correspond in capacity to the bushel box. Section 11961, Revised Statutes 1909, provides that the cubical contents of the half-bushel shall be 1075.2 cubic inches; double this would be 2150.4 cubic inches. This is approximately the same for the contents of the bushel, 2150.5 cubic inches, as provided by the Federal

Unlawful Boxes.

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statute. The cubical contents of the bushel by the ordinance is therefore 343.06 inches in excess of the actual bushel provided by the State and Federal statutes.

The boxes used by the plaintiffs are spoken of in the evidence as "short bushel" boxes. The plaintiffs only claimed that they contained three-fourths of a bushel each, but by actual measurements the contents was seven-eighths of a bushel, and, when heaped up, a bushel. These were the boxes which the plaintiffs were using to dispose of their produce at the time they were seized and destroyed by the defendant. The appellants make a statement of the case which the respondent concedes to be correct, and the statement includes the written opinion of Judge Wilson A. Taylor who heard the case, which opinion sets out at length the facts as determined by him. According to the facts as found by Judge Taylor and as supported by the evidence in the record, the plaintiffs were farmers and truck gardeners. They sold their produce in the boxes mentioned to commission merchants only, who in turn sold it in the same boxes to retail men and hucksters, and such sales were never by the bushel, but always by the box. The commission man, the purchaser, knew exactly the contents of the box, as did also the hucksters who bought from the commission men.

The ordinance provides that it shall be unlawful for any person, firm or corporation to sell or offer for sale in the city of St. Louis any fruits or vegetables *in any box* or receptacle that is of a capacity different from that prescribed, providing a penalty for the violation of the ordinance. In other words, the ordinance provides an unlawful measurement for the selling of produce. If the appellants were using a box of any other contents than the one prescribed, even though it contain the exact statutory bushel, it would be as unlawful, according to the ordinance, as the boxes they actually used. It is the enforcement of this ordinance which the plaintiffs seek to enjoin.

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Respondent, however, presents two reasons why he claims the judgment of the circuit court in dismissing the bill should be sustained here.

III. First, it is asserted, the question is now a moot question. It seems that after the case was submitted to the court in the manner mentioned the Board of Aldermen of the City of St. Louis repealed the objectionable sections of Ordinance 29795, and enacted others in lieu of them, so that there is no longer any possibility of an attempt to enforce them. So, it is argued, this court could not affect the condition of the parties by passing upon the question which is now merely academic.

Moot Question.

It is true, it has been determined by this court in several cases, when a defendant in any case voluntarily does the thing which the plaintiff seeks to have accomplished by an order of court, at any stage of the proceeding, whether it is done before or after the trial or before or after the appeal is granted, the suit may be abated. [Hicks v. City of St. Louis, 234 Mo. l. c. 653.] The repeal of an ordinance pending a prosecution under it, operates to relieve the defendant from further prosecution. [Electric Light & Power Co. v. St. Louis, 253 Mo. l. c. 603.] It is true in this case, the repeal of the ordinance at which the plaintiffs strike would disarm them, if that were all there is in the case. It is held, however, that before a defendant may abate a case by complying with the demands of the petition he must comply with *all such demands, including the payment of the cost.* [State ex rel. v. Philips, 97 Mo. l. c. 339-40.] This court there said in relation to that matter, l. c. 339: "The plaintiff had the right to have the full measure of the relief he claimed, or else by a solemn adjudication of the court, to know the why and the wherefore of the refusal which denied him redress in full of his demands." Also, l. c. 340: "Plaintiff was entitled to insist that the court should make such a thorough disposition of the whole cause as would protect him even against nominal damages or costs."

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In State ex inf. v. Standard Oil Co., 218 Mo. l. c. 390, it is held that before defendant may abate a suit in such case he must have paid all the costs. [See, also, Miller v. Assurance Co., 233 Mo. l. c. 98; in re Hutton's Estate, 92 Mo. App. l. c. 138.]

In this case the bill was dismissed at the plaintiff's costs. Not only that, but according to the statement which respondent admits is correct, the defendant intended to continue the destruction of plaintiff's boxes. If the court did not enjoin this proceeding he would continue to break up the boxes "until there is not another dinky box left in town." The threat could hardly be stronger. That is to say, the Commissioners of Weigths and Measures proposed, without a hearing, to punish all whom he believed to be violators of the ordinance as amended. So the repeal of the objectionable ordinance did not give the plaintiffs a full measure of relief, for the reason that the costs were assessed against them and for the reason that the destruction of their property was to be continued. Therefore, the determination of the case does not turn upon a mere moot question, but upon questions which the plaintiff has a right to have considered, though the result may have no effect except to determine upon whom the costs shall fall.

IV. The other point made by respondents is that the plaintiffs in this case did not come into court with clean hands. That was the theory as stated by Judge TAYLOR upon which he dismissed the bill. The fact that this question was decided without a hearing upon the merits of the case, but upon a mere preliminary consideration of the question, whether upon the face of the petition a temporary restraining order should be issued, is sufficient to stamp it as error. But inasmuch as the case is to be further considered by the circuit court it is well enough to touch upon that question.

The ancient maxim that he who comes into equity must come with clean hands has been applied to various

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kinds of cases, but it has its limitations. The particular iniquity which prevents the pursuit of an equitable remedy on the part of a plaintiff must relate to the particular matter in hand, must arise out of the transaction which is the subject of the suit. [1 Pomeroy on Equity Jurisprudence, sec. 339; Williams v. Beatty, 139 Mo. App. l. c. 174; Hingston v. Montgomery, 121 Mo. App. l. c. 462; Chicago v. Union Stockyards Co., 164 Ill. 224.]

If the plaintiffs originally had constructed the boxes, had devised their contents, and had sold with the understanding that some purchaser would be deceived, there might be some reason for saying they did not come into equity with clean hands in seeking to prevent the destruction of the boxes. But it is shown that the commission men who purchased from the farmers bought by the box, knowing fully its contents, and never by the bushel; that the purchasers from the commission men, the retail dealers and the hucksters, bought in the same way. It is not shown that any consumer was deceived by these boxes. That is a matter upon which there is no allegation and no evidence. There is no evidence even that any consumer ever purchased any produce in those boxes. The finding of Judge Taylor is to the effect: "These same short bushels are handed on down to the retailer and *very likely* to the consumer."

It is not sufficient to show that there was a possibility of unfair dealing by some remote person in the chain of transactions, but it must be shown that the plaintiffs had reason to believe actual unfair dealings would be conducted.

These same boxes had been in use for twenty-five years; when heaped up they held a bushel, when level full they held seven-eighths of a bushel. The plaintiffs in the beginning probably in each case came into a business in which several thousand other farmers and truck gardeners were engaged, and found these boxes in universal use and no complaints made. They furnished their produce in the boxes and received empties to the same number in

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return at the time of each sale. If the commission merchant didn't have the empties on hand for the exchange he would give an order on the box factory for the requisite number and the farmer immediately went there and got new boxes. It appears that most of these boxes were in fact purchased by the commission men. Neither on the face of the petition, nor on the evidence as produced at the preliminary, is there a showing that the plaintiffs came into court with unclean hands; that is a matter which should be determined upon the final hearing. If the plaintiffs knew or had reason to believe that the boxes passed on to the consumer and that the consumer was in fact deceived by them as to the contents, another question would be presented from that presented here, where no such facts are shown.

The conclusion is that the trial court was in error in dismissing the petition without a hearing, and no considerations have been presented to relieve from the consequences of that erroneous ruling.

The judgment is reversed and the cause remanded. *Railey, C.*, not sitting; *Mozley, C.*, concurs.

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur.

FRED STEGMANN et al., Appellants, v. HENRY L. WEEKE, Commissioner of Weights and Measures of City of St. Louis.

(No. 21, 152)

Division Two, July 5, 1919.

1. **WEIGHTS AND MEASURES: Legislative Power: Invasion of Right to Contract.** For the purpose of protecting the public and consumers from fraud and imposition in their purchase of commodities, the Legislature has the right, as a police regulation, to regulate weights and measures, and delegate that authority to municipal corporations, in so far as they exercise police powers; but the regulation must not be such as to invade the constitutional right to make contracts.

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2. ———: ———: ———: **Reasonable Restrictions.** A legislative exercise of the police power to fix weights and measures necessarily limits the freedom of contract that would otherwise exist; but so long as the restriction has a reasonable relation to the exercise of the power and is not so arbitrary or capricious as to be a deprivation of due process of law, freedom of contract in the constitutional sense is not interfered with.

3. ———: ———: ———: **Bushel Boxes According to Statute: Penalty for Use of Boxes of Different Dimensions.** An ordinance establishing standard bushel and half-bushel boxes to contain the same cubical content of the bushel and half-bushel prescribed by statute, to be used by truck gardeners and farmers in selling their fruits, vegetables and other produce in the city, and prescribing a penalty for the use of boxes of a different capacity and thereby sufficiently guaranteeing that boxes of a different capacity will not be used, is not unconstitutional as impairing the obligation of contracts, although it makes unlawful the use of boxes of a less capacity which have been in general use for many years.

4. ———: **Bushel Boxes of Given Dimension: No Penalty.** The court may determine whether an ordinance prescribing that bushel and half-bushel boxes to be used by farmers and truck gardeners in marketing their fruits and vegetables within the city shall be of certain dimensions, is unreasonably arbitrary, and may settle the question by inspecting the face of the ordinance, or may find it unreasonable by a state of facts which affects its operation; but an ordinance which prescribes that a bushel box shall have certain dimensions and a half-bushel box certain other dimensions, but prescribes no penalty for the use of boxes of different dimensions, but only a penalty for the use of boxes of a different capacity, is not unreasonable.

Held, by FARIS, J., concurring, that the ordinance is valid only because it prescribes no penalty for the use of boxes of different dimensions, thus making the prescription that the bushel and half-bushel boxes shall have certain dimensions only advisory, and not mandatory. *Held*, also, that the city has no power to say that the boxes shall be of a required length, width and depth.

5. ———: ———: ———: **Oppressive Enforcement: Injunction.** Plaintiffs cannot have an injunction to restrain the city from pursuing some unexpected and unthreatened prosecution. If the ordinance requires plaintiffs in marketing their vegetables and produce to use boxes having the number of cubic inches prescribed by statute for bushel and half-bushel containers, and fixes a penalty for the use of boxes of different capacity, and also goes further and prescribes that boxes of those capacities shall be of certain length, breadth and width but prescribes no penalty

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for the use of boxes of different dimensions, and their contention is that the ordinance interferes with their use of boxes of a smaller capacity which have long been in use, and they make no showing that they intend to use boxes of the prescribed capacity, the ordinance will not be held to be invalid on the theory that it will be interpreted to mean that they must use boxes of the specified dimensions and therefore will be oppressively and illegally enforced.

6. ———: **Sale By Weight.** Where the ordinance does not require the immediate purchaser from the gardeners to purchase by weight, although such purchasers are commission merchants and retail dealers who have not been deceived as to the contents of the "short" boxes long in use, yet if the commodities in the boxes can be passed on to the ultimate consumer, the city has the right, in order to provide against imposition by the use of the smaller boxes, to enact an ordinance requiring the use of boxes containing the statutory capacity of a bushel and half-bushel, and affixing a penalty for the use of boxes of different capacities.

Appeal from St. Louis City Circuit Court.— *Hon. Vital W. Garesche,* Judge.

AFFIRMED.

Edward W. Foristel, Taylor R. Young and *T. T. Hinde* for appellants.

(1) Courts have jurisdiction to enjoin the enforcement of an illegal ordinance. Coal Company v. City of St. Louis, 130 Mo. 323; Union Cemetery Assn. v. Kansas City, 252 Mo. 466; Jewel Tea Co. v. City of Carthage, 257 Mo. 383; Hays v. Poplar Bluff, 263 Mo. 516. (2) Sections 22 and 23, both original and amended, are not in harmony with the constitutional and statutory State provisions, and for that reason are illegal and void. St. Louis v. Meyer, 185 Mo. 593; Peterson v. Railroad, 265 Mo. 497; Sec. 9582, R. S. 1909; St. Louis v. Bernard, 249 Mo. 56; St. Louis v. Dreisoerner, 243 Mo. 223; Hays v. City of Poplar Bluff, 263 Mo. 516; Union Cemetery Assn. v. Kansas City, 252 Mo. 466; St. Louis v. Worlds Pub. Co., 270 Mo. 146; St. Louis v. King, 226 Mo. 334. (3) As to appellants, the ordinance is beyond the police power of the

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city to enact, unreasonable and oppressive, and for that reason void under all the authorities above cited. (4) Appellants did not have an adequate remedy at law. Coal Company v. City of St. Louis, 130 Mo. 323; Jewel Tea Company v. Carthage, 257 Mo. 383.

Charles R. Daues and *H. A. Hamilton* for respondent.

(1) By its charter the City of St. Louis is expressly invested with power to inspect, test, measure and weigh any article of consumption within said city, and to establish, regulate, license and inspect weights and measures. Charter, art. 1, sec. 1, 27; Charter, art. 1, sec. 1, 28. (2) The ordinance in question having for its purpose the protection of the inhabitants of the City of St. Louis against false weights and measures, is a valid exercise of the police power of said city and is not obnoxious to any provision of the State or Federal constitutions. Sylvester Coal Co. v. St. Louis, 130 Mo. 323; State ex rel. v. Merchants Exchange, 269 Mo. 346; Chicago v. Schmidinger, 243 Ill. 167; Schmidinger v. Chicago, 226 U. S. 578; People v. Wagner, 86 Mich. 594. (3) The City of St. Louis being authorized to establish and regulate weights and measures, may prescribe the form and dimensions of the container in which articles of consumption are marketed in said city. Turner v. State, 55 Md. 240; Turner v. Maryland, 107 U. S. 38. (4) Ordinance No. 29795, as amended, does not conflict with the Constitution or statutes of the State of Missouri, but is in complete harmony therewith. (5) The Municipal Assembly of St. Louis is vested with the power of determining the necessity of regulating business in said city, and courts will not ordinarily review the exercise of its discretion. An ordinance passed in the exercise of legal authority will not be declared void on the ground of unreasonableness unless no difference of opinion can exist upon the question, and a clear case must be made to authorize a court to interfere on that ground. St. Louis v. Weber, 44 Mo.

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547; Gratiot v. Missouri Pacific Railroad Co., 116 Mo. 450; Chillicothe v. Brown, 38 Mo. App. 609; Kansas City v. Sutton, 52 Mo. App. 398; Monett v. Campbell, 204 S. W. 32.

WHITE, C.—This is a companion case to No. 21,151 of the same title. Many facts pertinent here are fully set out in the opinion in that case and it may be read in connection with this case. However, for convenience, it is proper briefly to restate some of them. That was a suit brought by plaintiffs as farmers and truck gardeners, to restrain the Commissioner of Weights and Measures of the City of St Louis from enforcing a certain ordinance, No. 29,795. In that case the circuit court, on a preliminary hearing for the purpose of determining whether a temporary restraining order should be issued, dismissed the bill without a final hearing on the merits of the case.

The ordinance complained of, enacted August 9, 1917, provided for a bushel box, and boxes holding fractions of a bushel, in which produce, fruits and vegeables should be marketed, of a cubical content *in excess* of the statutory bushel as provided by Section 11961, Revised Statutes 1909, and by the Federal statute. The plaintiffs were using as a bushel box one containing *less* cubical contents than the statutory bushel. After that case was heard and before its determination the City of St. Louis amended the ordinance so as to make it accord with the statute of Missouri and the Federal Statute. When that was done and the former case dismissed, the plaintiffs brought this suit to enjoin the enforcement of the ordinance as amended. In their petition in this case they set out the original ordinance enacted August 9, 1917, in full, and the amendment to the same made in April, 1918.

They allege that they are farmers and gardeners and market their produce either to commission merchants, retail grocers or hucksters; that their produce is packed in wooden boxes, or crates, before being loaded,

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and in loading the boxes are packed in tiers and so arranged that the bottom tier is protected from upper tiers; that in capacity said boxes or crates range from three-fourths of a bushel, standard measure as defined by statute, to a bushel, and are used by all truck gardeners in the vicinity where plaintiffs grow their produce; that they have been used for twenty-five years in that manner and are peculiarly suited to the economical and safe delivery of produce; that the plaintiffs and other truck gardeners and farmers have on hand, complete to be used, 1,875,000 of such boxes, which cost them in the neighborhood of $350,000; that their delivery trucks are especially designed to conform to the size of said boxes and crates; that the produce which they sell is neither bought nor sold by the bushel but, by special agreement between the sellers and purchasers, it is sold by the box or crate and the purchasers from plaintiffs are not in any manner misled or deceived as to the capacity of the boxes in which the produce is sold; that they deliver their boxes full to the purchaser and receive in return in each case empty boxes of the same size and character from the purchaser.

Upon the filing of this petition and a bond in the sum of one thousand dollars, duly approved, a temporary restraining order was issued and served upon the defendant Weeke, who was ordered to show cause on a certain day why the injuction should not issue. Thereupon the defendant filed his return in the nature of an answer to the allegations of the petition. Afterwards the parties filed a stipulation as to certain facts, wherein they agreed that the case might be submitted "for final adjudication upon the petition of the said return of the respondents, to be taken and construed as an answer thereto, and the reply of the plaintiffs filed on that date, together with certain stipulations of facts." The court thereupon heard the case upon its merits, found the issues in favor of the defendant and dismissed the bill, and from that judgment the plaintiffs appealed to this court.

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Ordinance No. 29,795, in its original form provided, among other things, the duties of the Commissioner of Weights and Measures to test the accuracy of weights and measures and to seize in the name of the city, "all false weights, measures and scales, and to make arrests of persons violating the ordinance by using false weights and measures and scales." It provided for inspection of all weights and measures examined, and penalties for persons having weights and measures in their possession, for refusing to allow them to be tested and examined, and for using weights and measures that are not tested; that the commissioner should mark "condemned" weights, measures, standards, etc., that did not conform to the standard in this State, and that it should be a misdemeanor to use a weight or measure containing a less quantity than represented.

Section 22 of that ordinance fixed the dimensions for standard boxes to hold bushels, half-bushels, and other fractional parts of a bushel, making the cubical contents of such boxes greater than the statutory requirements. Section 23 of the ordinance provided for a fee of ten cents each for inspection of such boxes, that they should be inspected once a year, and that it should be a misdemeanor for anyone to use boxes of other dimensions for the purpose of selling fruits or vegetables. Those were the sections struck at in the other suit.

By the amendment of April, 1918, sections 22 and 23 of the ordinance were made to read as follows:

"Section 22. *Standard bushel box and fractional part part thereof established.* There is hereby established a standard bushel box, the dimensions of which shall be as follows; Length twenty-two inches; depth, eight and one-half inches; width, eleven and one-half inches; which bushel box shall contain twenty-one hundred and fifty and five-tenths cubic inches. There is hereby established a stardard half-bushel box, the dimensions of which shall be as follows: Length, twenty-two inches; depth, four and one-quarter inches; width, eleven and one-half inches, which half bushel box shall contain one

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thousand and seventy-five and two-tenths cubic inches. *All boxes or containers in which fruits and vegetables are sold or offered for sale shall be of the foregoing dimensions and standards, unless otherwise provided by ordinance.*

"Section 23. *Penalty.* Any person, firm or corporation who shall sell or offer for sale in the City of St. Louis any fruits or vegetables except fresh berries, cherries, currants or other small fruits, in any box or receptacle that is *of a capacity different from that hereinbefore provided,* shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars nor more than five hundred dollars."

It will be seen by this amendment Section 22 is in agreement with the statute as to the cubical contents of a bushel. The answer restates much of the same matter contained in the petition, including the ordinance, and sets out at length Judge TAYLOR'S opinion delivered in the previous case.

The stipulation which supplements the pleadings is to the effect that the defendant Commissioner of Weights and Measures intends to arrest and prosecute plaintiffs and others using boxes in violation of the ordinance as long as they fail to use boxes of the exact dimensions and contents provided in the amended ordinance, regardless of how said boxes are marked or whether said boxes contain more than the quantity marked on the box or not; that the defendant, Weeke, has not destroyed any boxes belonging to any of the plaintiffs since the 23rd day of April, 1918; "that all persons who now sell direct to the consumer of products sold by the plaintiffs are required to sell and do sell by weight and not by measure." The further fact was stipulated for what it is worth, that a number of farmers and truck gardeners, naming them, forty-five or fifty, use boxes which correspond to the requirements of amended sections 22 and 23 of the ordinance.

The amended ordinance at which this proceeding is aimed does not contain the oppressive feature of in-

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spection fee for each box contained in the original ordinance and there is no threat of the Commissioner of Weights and Measures to destroy without a hearing the boxes or other property of plaintiffs.

I. Appellant asserts that sections 22-23 of the ordinance are unconstitutional and in conflict with Article I, Section 10, of the United States' Constitution, and with Article XI, Section 15, of the Constitution of Missouri, in that the ordinance, prohibiting a person from selling his produce in any form or manner or in any quantity which he sees fit and which his purchasers desire, so long as his method is fair and characterized by honest dealing with his purchaser, impairs the right to make contracts.

Impairment of Freedom of Contract.

As a police regulation, for the purpose of protecting the public and consumers from fraud and imposition in their purchase of commodities, it is recognized by the courts that the legislative authority has the right to regulate weights and measures and delegate that authority to municipal corporations so that the latter, in so far as they exercise police powers, may regulate weights and measures. The question here is whether this regulation is such as to invade the constitutional right to make contracts. This court has considered the question in construing the statutes providing for official weighers of coal and grain. A leading case is State ex inf. v. Merchants Exchange, 269 Mo. 346. In that case the court had under consideration the constitutionality of a statute which forbade any person, corporation or association other than the duly authorized and appointed State weigher to issue any weight certificate or to issue or sign any ticket purporting to be the weight of any car, wagon, sack, or other package of grain weighed at any warehouse in the State. The court held that the purpose of the act was to protect from fraud the people who sold and bought grain, and banks who loaned money on warehouse receipts. This language is used, l. c. 358: "The whole purport of the act is for such official super-

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vision in the principal grain markets as will protect not only the buyers, but the sellers of grain. In other words, it establishes a disinterested agency between the buyer and seller, both as to weights and grades of the grain. If a wheat-grower of Missouri ships a car of wheat to St. Louis, he is not forced to take the grading and weighing of the defendant (an association of grain dealers and speculators), but he has the protection of the disinterested agency established by the State, an agency duly bonded for faithful performance of duty."

The effect of that statute then was to make the certificate of the weigher an official guaranty that the commodity which is represented was correctly represented, without further investigation on the part of the purchaser or of the seller. It would not only save time and expense in negotiations of that kind, but was a power for protection against fraud and imposition in connection with such sales. The case quotes from an earlier case, Coal Co. v. City of St. Louis, 130 Mo. 327, where a municipal ordinance similar in import was under consideration, and it was held binding and valid under the charter authority of the City of St. Louis wherein it had authority to license, tax and regulate retailers, and "establish the standard of weights and measures to be used in the City of St. Louis." It is pointed out in those cases that a purchaser or a seller may weigh his grain for his own satisfaction, but that the official weight only can be allowed in buying and selling.

In the case of Ex parte House v. Mayes, 227 Mo. 636, this court had under consideration a statute which provided that no agent or broker selling grain, etc., should have authority, under claim of right to do so by reason of any custom or rule of any board of trade, to sell such commodities except on the basis of the actual weight thereof, and any contract for such sale in violation of the act should be null and void. The Board of Trade of Kansas City had a rule which permitted the purchaser of grain to deduct a hundred pounds from a carload of such grain because of dirt and foreign sub-

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stances which were presumed to be in it and which were swept out after it was unloaded, it being common experience that about that amount of dirt on the average was in each carload. One R. J. House was prosecuted for making such deduction in accordance with the rules of the Board of Trade and in violation of the statute. It was held that the statute was valid and constitutional as a matter of police protection, and not in violation of the Constitution which prohibits any act impairing the obligation of contracts.

An ordinance of the City of Chicago, fixing the standard size of loaves of bread and prohibiting the sale of loaves of any other size, was held to be constitutional by the Supreme Court of Illinois. [Chicago v. Schmidinger, 243 Ill. 167.] The case was taken to the Supreme Court of the United States, where it was affirmed under the title, Schmidinger v. City of Chicago, 226 U. S. 578. That court, in the opinion rendered, thus comments upon the claim that the effect of the ordinance was to impair the right to contract, l. c. 589: "This court has had frequent occasion to declare that there is no absolute freedom of contract. The exercise of the police power fixing weights and measures and standard sizes must necessarily limit the freedom of contract which would otherwise exist. Such limits are constantly imposed upon the right to contract freely, because of restrictions upon that right deemed necessary in the interest of the general welfare. So long as such action has a reasonable relation to the exercise of the power belonging to the local legislative body and is not so arbitrary or capricious as to be a deprivation of due process of law, freedom of contract is not interfered with in a constitutional sense."

The law of Maryland which provided that it should be unlawful to carry out of the State any hogshead of tobacco raised in that State except as had been inspected, marked and passed according to the provisions of the act regulating the inspecting and marketing of tobacco, was held to be constitutional by the Supreme Court. [Turner v. Maryland, 107 U. S. 38.]

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The Supreme Court of Massachusetts held constitutional an act which provided that the sale of oats and meal must be by the bushel, and providing that an action could not be maintained for the price of such commodity when sold by the bag. [Eaton v. Kegan, 114 Mass. 433.]

The ordinance under consideration here fixes the cubical contents of bushel and half-bushel boxes and provides a penalty for using boxes of a *different capacity*. The effect of the ordinance is that certain commodities could not be sold except in containers containing a bushel or a half-bushel. The prohibition of the use of boxes of other capacity is sufficient guaranty that boxes of other capacity would not be used, and furnished the same protection to the purchaser that the final weighing certificates would furnish in case of the sale of hay and coal as considered by the court in the Merchants Exchange case, supra, and the Coal Company case, supra. The reason for the validity of the statute and the ordinance in those cases applies with equal force to the ordinance here. It is not unconstitutional as impairing the obligation of contracts.

II. But it is claimed that the ordinance is an unreasonable regulation in its operation, in that it not only prohibits the use of containers of any other capacity than that provided, but prescribes the exact dimensions, the length and depth of the boxes, and forbids the use of containers of equal capacity of any other shape. That is, a box may be a perfect cube and contain a bushel or a half-bushel. Of course, this court may determine whether an ordinance is reasonable or unreasonable (Union Cemetery Assn. v. Kansas City, 252 Mo. l. c. 500), and in considering the matter may settle it by inspection of the ordinance on its face, or, may find it unreasonable by a state of facts which affects its operation. [St. Louis v. Theatre Co., 202 Mo. l. c. 699.] It might be unreasonable in one place and perfectly reasonable in another. It might be unreasonable

Dimensions.

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in a mere village, whereas in a large city, with its great volume of business of the character affected, it would be a reasonable regulation. Here there are several thousand farmers engaged in raising and selling produce. There are hundreds of thousands of consumers in the City of St. Louis, many of whom, doubtless the majority, at some time or other purchase these very commodities. The evident purpose of the ordinance in providing containers of uniform shapes and sizes was that a purchaser easily could tell the exact quantity of the commodity he was buying, the presumption being that the box containing the commodity which he purchased had passed the final test as to capacity, and he need not trouble himself in relation to that matter or inquire further. Likewise, it may be said that certain definite shapes and dimensions would greatly facilitate inspection, lessen the expense of supervision for the city and conduce in no way to hamper or hinder the course of trade.

It might be said further that the plaintiffs here could not complain that the definite dimensions of the boxes were provided because they were using, or claimed the right to use, boxes of uniform dimensions and capacity. The evidence shows they nearly all used exactly the same kind of boxes, as did all other persons pursuing like business. It seems from the facts stated in the record that it was to their advantage to use exactly the same kind of containers as to shape and dimensions. However, it is sufficient answer to this point to say that no penalty is fixed for the violation of that part of the ordinance prescribing the dimensions of the box; the plaintiffs could not be prosecuted for misdemeanors unless they used boxes of *different capacity*. In that respect the ordinance is no more unreasonable than the Chicago ordinance fixing the size of loaves of bread, or the statutes and ordinances considered in the Missouri cases cited above.

III. Plaintiffs, however, assert that the ordinance will be interpreted and enforced oppressively and il-

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legally. Persons might use boxes having different length, width and depth from those mentioned in Section 22, and if they possessed the cubical contents of the boxes there provided for they would not be guilty of a misdemeanor under the provisions of Section 23. Yet, according to the stipulation, the defendant expects to prosecute plaintiffs for using boxes unless they are of the *exact dimensions* provided in the ordinance.

Oppressive Enforcement.

In this connection it appears that the only boxes which the plaintiffs use, and have no right to use, are those which do not have the *contents* provided for in Section 22. There is nothing to show that they expect to use boxes of the right capacity and of a different shape, but only expect to use the boxes they have been using which are of an insufficient capacity; therefore they are liable to incur the penalties of the ordinance in all they propose to do. This court cannot conjecture that they will use some boxes which they do not expect to use, or that they will be arrested and prosecuted for doing something which they do not intend to do. They cannot have an injunction to restrain the city from pursuing some unexpected and unthreatened prosecution.

IV. It is stipulated, as noted above, that the consumer who purchases the goods from their immediate vendors, goods which plaintiffs sell, are required to purchase by weight and not by measure. It is not stated whether this requirement is by ordinance or by contract. Section 28 of the ordinance provides that certain products enumerated, which are presumed to include some of the products sold by plaintiffs, shall be sold by weight, excepting, however, "commodities in original packages," and then provides that: "The term 'original package,' as herein used, shall be taken to mean packages in which the commodities have been packed before shipping by the grower, producer, or original packer thereof, and the contents of which have not been disturbed or diminished except for the purpose of ripening it or of replacing spoiled goods."

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This provision of Section 28 evidently would exclude plaintiffs and those pursuing a like business, from an obligation to sell by weight, or persons handling their produce in original packages from selling by weight, and therefore the ordinance is in direct conflict with this stipulation as to its purport. This section of the ordinance must be construed in connection with the other sections. It certainly was not the intention in the passage of the ordinance to make any provisions which are absolutely nugatory. There would be no purpose or use in providing for dimensions of measures to contain a bushel, and half-bushel, unless the products were sold by the bushel or half-bushel; and the exclusion of the original packers and of property which comes in original packages from the requirement to sell by weight is the only reasonable construction of the provision in Section 28 in connection with the rest of the ordinance. We must attempt to take the evident meaning of the ordinance as it reads, even though counsel for both parties may have misunderstood its meaning, or may have inadvertently construed it differently.

It is also noted that throughout the ordinance the inspection and the penalties fixed apply to *false standards, false weights and measures.* The evidence here does not show that the boxes which the plaintiffs were using were measures or standards of measures; they were simply the containers in which they sold their products. The boxes are not used like a half-bushel measure to measure out the quantity of the product, they are only used to contain the products sold. Nevertheless Sections 22 and 23, leaving out of consideration the balance of the ordinance, fix the size and shape of box and name the penalty for using those of different capacity. Those sections are valid and effective as to that purpose, regardless of the rest of the ordinance.

While it is admitted that plaintiffs sold only to commission merchants and retail dealers who were not at all deceived as to the contents of the boxes and who did not buy by the bushel, nevertheless the commodities in the

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original packages under the ordinance could be passed on to the ultimate consumer. It was entirely within the discretion of the city government to provide against imposition which they thought might occur in such sales to consumers. Their discretion and judgment in providing against possible fraud in the matter, whether sound or otherwise, is not for this court to determine. It is sufficient that the governing body deems the restrictions necessary for the protection of citizens and consumers. It has lawful authority to make the regulations and this court will not interfere.

The judgment is affirmed. *Railey, C.,* not sitting; *Mozley, C.,* concurs.

PER CURIAM:—The foregoing opinion by WHITE, C., has been adopted as the opinion of the court. *Williams, P. J.,* and *Walker, J.,* concur; *Faris, J.,* concurs in separate opinion.

FARIS, J. (concurring.)—I concur for the reason only that there is no penalty attached for the failure to use a container of the prescribed dimensions, thus leaving so much of the ordinance as prescribes the dimensions of such containers neither mandatory nor punishable, but advisory only.

Boxes of Prescribed Dimensions.

I do not agree that the City of St. Louis has the authority under the guise of a police regulation to require the use of containers of fixed and arbitrary dimensions. I concede the authority in the city to pass an ordinance requiring such containers to be of a certain capacity so as to guard against fraud and cheating and even to require such containers to be rectangular in shape, so as to minimize time and labor in ascertaining the conformity of such containers to the capacity required by the ordinance. But I do not think it lies in the power of the city to say by its ordinance that such containers must be of a required length, width and depth. Neither do I think that one using containers of an

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impeccable capacity, so far as complying with the requirement as to capacity is concerned, could be punished *in any wise* for using a longer, or a shorter, a wider or narrower, a deeper or shallower container than the arbitrary standard prescribed by ordinance.

Upon the view that the ordinance means what I have said above that it ought to mean, I concur.

J. A. FRICK, Appellant, v. MILLERS NATIONAL INSURANCE COMPANY.

Division Two, July 5, 1919.

APPEAL: No Assignment. If appellant's brief in a civil case nowhere distinctly alleges the errors upon which he relies for a reversal of the judgment, either by assignments or points and authorities, Rules 15 and 16 of the Supreme Court require that his appeal be dismissed. Mere statements that "plaintiff is entitled to recover on the undisputed facts," that "Instruction 2 should have been given," etc., do not "distinctly allege the errors committed by the trial court."

Appeal from Jackson Circuit Court.—*Hon. Thomas B. Buckner,* Judge.

DISMISSED.

Fyke & Snider and *Fenton Hume* for appellant.

Barger & Hicks and *White, Hackney & Lyons* for respondent; *Bates, Hicks & Folonie* of counsel.

WILLIAMS, P. J.—This is an action at law to recover an alleged $8,000 loss under a fire insurance policy.

Trial was had in the Circuit Court of Jackson County before the court sitting as a jury, which resulted in a judgment for defendant. Thereupon plaintiff duly appealed to this court.

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This case upon practically the same facts, but in a somewhat different form was before this court before. [Frick v. Millers National Ins. Co., 184 S. W. 1161.]

Appellant's brief contains no assignment of errors. In his brief under the head of "Points and Authorities" we find the following:

"1. Plaintiff is entitled to recover on the undisputed facts.

"2. When the policy was transferred to plaintiff by the Caney Company, the original insurer, defendant was notified of the transfer and requested to substitute plaintiff as insured and only the formal part of transfer remained to be arranged. The policy then became a new contract between plaintiff and defendant. Instruction 2 to this effect should have been given—Instruction 5. Keim v. Ins. Co., 42 Mo. 39, l. c. 41; King v. Ins. Co., 195 Mo. 290, l. c. 307; Andrus v. Ins. Co. 168 Mo. l. c. 165; Bayless v. Ins. Co. 106 Mo. App. 684; Planters Mut. Ins. Co., v. Southern S. F. Co., 56 S. W. 443.

"3. The policy permitted 60 days' vacancy or non-operation, and that length of time had not elapsed after plaintiff became the owner and insured when the fire occurred—Instruction 3.

"4. Plaintiff is not bound by acts of the Home National Bank in its dealings with defendant; the contract between said bank as mortgagee, and defendant, being a separate contract from the one between plaintiff and defendant, and there is no evidence said bank had authority to act for plaintiff—Instruction 4. Morrow v. Lancashire Ins. Co., 29 Ont. 377."

Rule 15 of this court (as amended October 23, 1917—See Supreme Court Rules on page 3 of supplement to 270 Mo. Report) provides, among other things, that "the brief for appellant shall *distinctly allege the errors committed by the trial court . . . No brief . . . which violates this rule will be considered by the court.*"

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This rule works no undue hardship upon the appellant, but when followed saves this court much time and labor in reviewing the case. In fact such a rule is wellnigh indispensable to the proper dispatch of appellate work.

Appellant's brief in the instant case nowhere distinctly alleges the errors upon which he seeks a reversal of the cause, as is required by said rule.

"It has been held that where appellant though making no formal collective assignment of errors in any given part of his brief, yet separately assigns error specifically in distinct subheads of his points and authorities, we will accept this as a substantial compliance with the statute and our rules" (Vahldick v. Vahldick, 264 Mo. l. c. 532); yet we have never held that a brief complies with this rule when, as here, it nowhere contains a distinct or specific allegation or assignment of error.

Unless Rule 15 is to be treated as a "mere scrap of paper" we are not at liberty to review the case, but under Rule 16, and the practice in regard thereto, it is our duty to dismiss the appeal for failure to comply with our rules. [Vahldick v. Vahldick, 264 Mo. 529 and cases therein cited.]

The appeal is therefore dismissed. All concur.

JAMES E. TANNEHILL, Curator of Estate of RUTH E. TANNEHILL et al., Appellant, v. KANSAS CITY, CLINTON & SPRINGFIELD RAILWAY COMPANY.

Division Two, July 5, 1919.

1. **NEGLIGENCE: Contributory: Demurrer to Evidence.** If the evidence adduced by plaintiff proves his own contributory negligence as a matter of law, and there is no room in the case for the last-chance doctrine, defendant's demurrer to the evidence should be sustained, although the evidence also establishes defendant's

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prima-facie negligence. In such case plaintiff's evidence establishing his own contributory negligence destroys the prima-facie negligence of defendant. And a demurrer to his evidence in such case is certainly available where there is a defensive plea of contributory negligence, and on reason and authority it would be available without such plea.

2. ———: ———: ———: **Bad Weather Conditions: Ringing Bell.** Conceding that the failure of the trainmen to ring the bell or sound the whistle as the train approached a public-street crossing constituted prima-facie negligence on the part of defendant, and conceding further that bad weather conditions were prevailing, yet as plaintiff's own evidence is to the effect that under ordinary conditions the driver of the automobile could have seen the train a quarter of a mile away from a place 400 feet from the crossing, and that the automobile was forty or fifty feet from the crossing when the driver last looked, and he went ahead, traveling up-grade at the rate of five or six miles per hour and could have stopped in a space of eight or ten feet, and without looking again, attempted to cross the track and the automobile was struck by the train, it must be held as a matter of law that the driver was guilty of contributory negligence, which, under the other facts, bars a right to recover damages for the death of the driver's brother, sitting in the automobile.

3. ———: ———: **Imputed to Joint Owner.** The contributory negligence of the driver is to be attributed to his brother who was a joint owner of the automobile, was engaged with him in a joint enterprise and was riding with him in the automobile at the time of its collision with a railroad train.

4. ———: ———: **Humanitarian Rule.** If the driver of the automobile could see the railroad train for the first time when it was 200 feet from the crossing, it must be assumed that the trainmen could not see the automobile at a greater distance, and if the uncontradicted evidence is that the train could have been stopped only in from 400 to 600 feet, there is no place in the case for the humanitarian doctrine, that the trainmen could have stopped the train, after they saw the driver's peril, in time to have avoided striking his automobile.

Appeal from Cass Circuit Court.—*Hon. Andrew A. Whitsett*, Judge.

AFFIRMED.

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L. M. Crouch, Parks & Son and *Campbell & Campbell* for appellant.

(1) "Contributory negligence, as a rule, is a matter of defense, which must be pleaded and proved by the defendant. When plaintiff makes out a prima-facie case, entitling him to go to the jury, the burden then shifts to the defendant, if he relies upon plaintiff's negligence, to disprove and overcome that case, to the satisfaction of the jury. And the prima-facie case for plaintiff having been made out, the case can never be peremptorily taken from the jury; for, however strong the countervailing testimony of plaintiff's contributory negligence may be, its credibility and weight are for the jury." Peterson v. C. & A. Ry. Co., 265 Mo. 462; Farrar v. Met. St. Ry. Co., 249 Mo. 210; Taylor v. Met. St. Ry., 256 Mo. 191, l. c. 213, 215; Krehmeyer v. Transit Co., 220 Mo. 639; DeRousse v. West, 200 S. W. 783; Kennayde v. Railroad, 45 Mo. 255; Underwood v. Ry. Co., 190 Mo. App. 497; Thornsberry v. Ry. Co., 178 S. W. 197, l. c. 200, par. 5; Hubbard v. Lusk, 181 S. W. 1028; Goebel v. United Rys. Co., 181 S. W. 1051; Montague v. Mo. & K. I. Ry. Co., 193 S. W. 935; Walker v. Wabash Ry. Co., 193 Mo. App. 249. (2) "On demurrer to the evidence, plaintiff is entitled to every favorable or reasonable inference arising therefrom." Lamport v. Fire & Life Assn. Co., 197 S. W. 95; Hanser v. Bieber, 197 S. W. 68; Jetter v. St. Joseph Terminal Ry. Co., 193 S. W. 956; Hendrix v. United Rys. Co., 193 S. W. 812; Montague v. Mo. & K. I. Ry. Co., 193 S. W. 935; Campbell v. St. L. & Sub. Ry. Co., 175 Mo. 161. (3) the presumption of due care on the part of H. Earl Tannehill accompained him, as he approached the railway crossing, regardless of whether or not there was any evidence to show that he looked and listened for an approaching train. McQuitty v. Kansas City Southern Ry. Co., 194 S. W. 888; Underwood v. St. L. I. M. & S. Ry. Co., 190 Mo. App. 415; Hubbard v. Lusk, 181 S. W. 1031. (4) The demurrer should have been overruled

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and the case submitted to the jury, under the evidence in the case and under the pleadings under the humanitarian or last-chance doctrine. Ellis v. Metr. St. Ry. Co., 234 Mo. 657; Flynn v. Metr. St. Ry. Co., 166 Mo. App. 187; Bruening v. St. Ry. Co., 181 Mo. App. 264; Norders v. Metr. St. Ry. Co., 168 Mo. App. 172; Flack v. Railroad, 162 Mo. App. 650; Cole v. Metr. St. Ry. Co., 133 Mo. App. 440; McNamara v. St. Ry. Co., 133 Mo. App. 645; Delmar v. Metr. St. Ry. Co., 136 Mo. App. 443; Sheldon v. St. Ry. Co., 167 Mo. App. 404; Johnson v. Traction Co., 176 Mo. App. 174; Crutcher v. Railroad, 241 Mo. 137; Taylor v. Railroad, 256 Mo. 191; Strauss v. Railroad, 166 Mo. App. 153; White v. Railroad, 202 Mo. 539; King v. Wabash Ry. Co., 211 Mo. 1; Shipley v. Metr. Str. Ry. Co., 144 Mo. App. 7; Lynch v. C. & A. Ry. Co, 208 Mo. 1; Reyburn v. Railroad, 187 Mo. 575; Rine v. Railroad, 100 Mo. 234; Krehmeyer v. Transit Co., 220 Mo. 639; Farrar v. Metr. Str. Ry. Co., 249 Mo. 220. (5) The negligence, if any, of Thos. P. Tannehill, could not be imputed to H. Earl Tannehill, for the evidence shows that H. Earl Tannehill was not driving the automobile, nor was he in any way exercising any control over the car or in any way directing Thos. P. Tannehill in its control and management, but on the contrary Thos. P. Tannehill had the exclusive control over its operation and management. Johnson v. Traction Co., 176 Mo. App. 185; Moon v. St. Louis Transit Co., 237 Mo. 434; Stotler v. C. & A. Ry. Co., 200 Mo. 146-148; Farrar v. Metr. St. Ry. Co., 249 Mo. 219; Sluder v. Transit Co., 189 Mo. 107; Ebert v. Metr. St. Ry. Co., 174 Mo. App. 45; Connor v. Railroad, 149 Mo. App. 675; Diskon v. Railroad, 104 Mo. 491; Baxter v. St. Louis Transit Co., 193 Mo. App. 598; Keitel v. Railroad, 28 Mo. App. 657.

John H. Lucas, Wm. C. Lucas and *D. C. Barnett* for respondent.

(1) There was no evidence on which to base a submission of either of the two alleged acts of negligence,

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viz.: Failure to sound the whistle or ring the bell. There was an entire failure of proof of either allegation. The rule is well established "when the evidence is of such a character that the trial judge would have a plain duty to perform in setting aside the verdict as unsupported by the evidence, it is his duty and prerogative to interfere before submission to the jury and direct a verdict for the defendant." Jackson v. Hardin, 83 Mo. 175; Hite v. Metroplitan St. Railway Co., 130 Mo. 132; Warner v. St. L. & M. R. Railroad, 178 Mo. 132; Waggoner v. Railroad, 152 Mo. App. 179; Weltmer v. Bishop, 171 Mo. 116; Sexton v. Met. St. Ry. Co., 245 Mo. 272; Burge v. Wabash Railroad, 244 Mo. 94. (2) The deceased was guilty of such contributory negligence as barred a recovery. McManamee v. Mo. Pac. Ry. Co., 135 Mo. 449; Huggart v. Mo. Pac. Ry. Co., 134 Mo. 679; Kelsay v. Mo. Pac. Ry. Co., 129 Mo. 372. (3) There is no room for the application of the humanitarian rule, and the claim therefor is without substantive evidence to support the contention. Keele v. A., T. & S. F. Railroad, 258 Mo. 77; McGee v. Wabash Railroad, 214 Mo. 541; Rollison v. Wabash Railroad, 252 Mo. 537; Phippin v. Mo. Pac. Ry. Co., 196 Mo. 343. (4) The final contention is that as the deceased was not driving the car he was absolved from the exercise of ordinary care, a contention unsustained in reason and unsupported by precedent. It was the duty of the deceased to look and listen for the approaching train, and this duty could not be shifted to his business associate. Burton v. Pryor, 198 S. W. 1120; Erie R. R. Co. v. Hurlburt, 221 Fed. 907; Brommer v. Penn. Railroad, 29 L. R. A. 924; Coby v. Q., O. & K. C. Railroad 174 Mo. App. 648.

FARIS, J.—Appellant as the curator of certain minor children of one H. Earl Tennehill, deceased, sued to recover damages for the negligent killing of the latter by a passenger train of defendant. Upon a trial *nisi*, the court at the close of plaintiff's case in chief sustained defendant's demurrer to the evidence. There-

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upon plaintiff took a voluntary nonsuit with leave. Cast in his motion to set this nonsuit aside, plaintiff in the conventional mode appealed.

The grounds upon which plaintiff, pursuant to his petition, seeks to fix liability upon defendant, are: (a) The failure and neglect of defendant's servants, agents and employees in charge of said train to sound the whistle or ring the bell upon defendant's locomotive at the crossing where the decedent was struck and killed, and (b) the negligent failure to avoid striking and killing decedent at a place whereat he could and ought to have been seen in a position of danger in time to have stopped the train and thus avoided killing him. Defendant's answer is a general denial and a plea of decedent's contributory negligence.

Decedent, who lived at Garden City, Missouri, while riding in an automobile, was struck and killed, at a grade crossing of a public highway, called in the record the "Kenagy Crossing," on December 18, 1914. The time was about one o'clock in the afternoon. The train was practically on time. The day was cloudy and overcast, damp and foggy, or misty. A light snow partially covered the ground, and the roads were muddy, or slushy. The railroad and the highway crossed at an angle of forty-five degrees.

Decedent and one of his brothers were returning to their home at Garden City from a trip to Clinton in an automobile. Decedent's brother was driving the car, which car was jointly owned by decedent, the brother who was driving, and another brother. The curtains of the car were down as the car approached this crossing, though a view of objects to the side was obtainable through celluloid covered spaces, or windows, some seven or eight inches by twelve or fourteen inches in dimensions. Decedent was about thirty-five years of age, and slightly hard of hearing. His business was that of a real estate agent, wherein he seems to have been engaged with the brother in question, and perhaps with another brother, at his home town of Garden City.

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The only eye-witness who testified upon the trial was the brother of decedent, who, as stated, was driving the car at the time the decedent was killed. Upon the testimony of this brother the case, of necessity, must largely turn. He says that as he and decedent approached this crossing and, when at a distance of some 400 feet therefrom, he looked for an approaching train; that he knew a train was due from the south at about one o'clock, but that he did not know what time of day it was. Seeing no train, though from the point at which he looked a train coming as was the one which killed decedent could ordinarily have been seen when a quarter of a mile distant from the crossing, he continued driving. When he and decedent reached a point some forty feet from the crossing and while driving on an up-grade at the rate of five or six miles an hour, he again looked for a train. From this last point of observation, a train could ordinarily have been seen a quarter of a mile away, but on this day, on account of the prevailing weather conditions, the witness says, he could only have seen a train when the same was some 200 feet distant from the crossing. Seeing no train from this final point of observation, hearing none, and hearing no crossing signals, he looked in the other direction toward Garden City and continued driving until he reached the railroad track. There he suddenly saw the locomotive right upon him, and was instantly struck, and hurled with the car and decedent some 100 feet. From this impact decedent was fatally injured, dying in the afternoon of the same day, and the witness rendered unconscious for some few minutes. The automobile, this witness says, at the rate it was traveling when struck, could have been stopped in from eight to ten feet.

Whether the required statutory signals were given by sounding a whistle, or whether the train on this day and at this time was visible at a greater distance than that stated by decedent's brother, is contradictory upon the record before us; some of plaintiff's witnesses saying these signals were given, some that they were not given,

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and some that if they were given the witnesses did not hear them. Touching the visibility of the train, so far as such visibility was affected by existing wheather conditions, some of plaintiff's witnesses say they actually saw it on this day and at this time, while it was from a quarter of a mile to a mile and a half away. This, however, by the way, for the rule requires us here to apply every inference in favor of plaintiff, and to consider in his favor the very highest points shown by the proof.

Since the case is a fact case, we will on this account reserve other facts for recital when we shall come to discuss what we deem to be the controlling law of the case.

I. As forcast, this case presents but one question; that question is, was the evidence sufficient to take the case to the jury? Plaintiff in effect contends, with absolute correctness, we think (*if it were, or could here be, considered alone*), that there was sufficient evidence of one element of negligence pleaded, that is, as to the failure of the defendant to sound the whistle or ring the bell upon the engine (Sec. 3140, R. S. 1909), as to constitute prima-facie negligence, to take the case to the jury. In this connection, plaintiff urges upon us the rule stated in the case of Peterson v. Railroad, 265 Mo. 462, which rule he excerpts bodily from the syllabus of the case. Taking the rule stated in the Peterson case as his text, plaintiff insists that since contributory negligence is an affirmative defense, the moment a prima-facie case bottomed upon defendant's negligence is made out, every such case must go to the jury, and therefore this case ought to have gone to the jury.

Contributory Negligence.

This view, we think, leaves out of consideration another controlling point by which the rule contended for is in a proper case always modified. That point is, that even if the plaintiff's evidence make out a prima-facie case, or, to be more exact, *make out proof of defendant's negligence*, yet if in developing such a case

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the evidence adduced by plaintiff also proves plaintiff's own contributory negligence as a matter of law, then the case is not one for the jury, but is one for the court, and the court ought to sustain a demurrer to the evidence. [Sissel v. Railroad, 214 Mo. 515.]

In the Sissel case, supra, GRAVES, J. upon a point presented in that case which was much similar, and wholly analogous upon principle, said at page 526, this: "Even though there was no plea of contributory negligence, yet the trial court would be authorized to take a case from the jury upon a demurrer to the evidence whenever it was shown by plaintiff's own proof there was contributory negligence, such as to preclude a recovery. Without a proper plea of contributory negligence the defendant should not be permitted to show, affirmatively, by his proof, that there was contributory negligence, but where the witnesses for plaintiff disclose the facts, and the court is thus possessed of them, such court has but one course to follow, and that is to say that by plaintiff's proof no case has been made. The rule which this court has followed is thus stated in 5 Ency. Plead. & Prac., p. 13: 'The defendant may take advantage of contributory negligence which is shown in the development of the plaintiff's case, although he has not pleaded it as a defense.' "

In the instant case, there is a defensive plea of contributory negligence. If plaintiff may not recover when his own evidence, or evidence which he offers, shows contributory negligence as a matter of law, even when defendant has not pleaded such contributory negligence, then *a fortiori* he cannot recover in such situation *when defendant has interposed this plea.* Even the case of Peterson v. Railroad, supra, which seemingly is largely relied on by plaintiff, does not, when the facts in that case are examined, nor even when the language used is carefully read, bear out the rule contended for by plaintiff. For the learned writer of that opinion, in stating the rule which is urged upon us, was careful to restrict it to cases wherein the prima-

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facie case had been made out, thus clearly negativing its application to a case wherein, though prima-facie the negligence of defendant is shown, yet goes farther and destroys such prima-facie case before he stops offering evidence, by proving his own contributory negligence as a matter of law. The rule we cite from the Sissel case is too well-settled for either dispute or cavil.

Applying this rule to the facts shown in evidence in the instant case, we are of the opinion that the plaintiff's proof shows contributory negligence of decedent as a matter of law, and thus precludes plaintiff's recovery. Numerous witnesses offered by plaintiff testified to having seen the train which killed decedent when it was from a quarter of a mile or a mile, or more, distant. Witnesses for plaintiff who were half a mile away at the moment the train struck the car could even see the car, or the debris therefrom, flying through the air. But we concede, of course, that decedent was not under the rule enjoined on us in this sort of case, required to see the train as others saw it. If there be a witness who says that the weather conditions prevailing prevented the seeing of it at so great a distance, the case, so far as this phase is concerned, is one for the jury. [Lamport v. Ins. Co., 197 S. W. 95; Hanser v. Bieber, 197 S. W. 68; Campbell v. Railroad, 175 Mo. 161].

The brother of decedent, who was in the car driving it at and prior to the moment at which the latter was struck and killed, says that he could have seen the train, under ordinary conditions, a quarter of a mile away, at a time and from a place whereat the automobile was 400 feet distant from the crossing. When decedent and his brother got within forty feet or fifty feet of the crossing, this brother again looked south down the track, in the direction whence the train was approaching, and saw—he says—nothing of this train. He then turned his head in the other direction, looking toward Garden City and away from the point whence the train was coming, and without again looking, con-

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tinued to drive toward the track, traversing the forty feet of distance, till the car went upon the track and was struck by the train. When the brother looked last, forty feet away from the track, he was in such a position that even the weather conditions considered, he could have seen the train when it was 200 feet away. Ordinarily, he says, he could from this point have seen it when it was more than a quarter of a mile away. The automobile was then going up-grade at the rate of five or six miles an hour, and could have been brought to a stop in eight or ten feet. In other words, there was space between the time the driver last looked, and the place and moment at which he tried to cross the track and was struck, to have stopped the car four or five times. There can be no other reasonable inference than that the driver was guilty of contributory negligence, which, if he had been hurt, would have precluded his recovery. We think the physical facts to be deduced from uncontradicted evidence admit of no other inference.

Other facts in the case indicate that the engine and the car both reached this crossing at about the same instant. The front wheel on the left-hand side of the car struck the pilot of the engine. The step upon the right-hand side of this pilot was badly bent, as also were the steps leading from the ground to the cab of the locomotive on this same side. Both wheels upon the left side of the car were demolished, and there was mud upon the right-hand cylinder and the driving rod of the locomotive.

Leaving this phase of the case to be again recurred to, we are further of the view that the evidence also shows the contributory negligence of decedent himself as a matter of law. Asked touching the actions of decedent at the moment the automobile approached this crossing, decedent's brother said:

"Q. And he turned around and was looking back to the rear end of the car at the time and before this collision? That is a fact isn't it? A. At the time he was.

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"Q. Was looking back at the time of this collision. he wasn't looking out in front of the car but was looking back gathering these packages that he was going to give to his children, in the back part of the car, wasn't he? A. He had just turned around.

"Q. Well it took some time to turn around didn't it, a second or so? A. Oh, it didn't take so great length of time.

"Q. Took just about as long as it would take to stop the car wouldn't it? A. About."

The above excerpt shows, we think conclusively—and there is nothing in the record to destroy or minimize its force—that decedent was not looking when he was driven into the zone of danger. He was looking to the rear instead of toward the south, or to the front, a period of time sufficient to have brought about the stopping of the car before the car went upon the track. The mathematics of the situation shows this conclusively. For if, as the only witness upon this point says, the train was running from twenty-five to thirty-five miles an hour, or if, as plaintiff's counsel assume, the train was running thirty miles an hour, and the car, as the driver thereof says, was running six miles an hour, then when the car got within ten feet of the track the train was in full view and only fifty or sixty feet away. There was then yet remaining time to stop the car, for the driver swears it could have been stopped in eight or ten feet. From the same figures, it is likewise demonstrable that when the train came into view of the deceased and his brother two hundred feet away, the car was then forty feet from the track. The space was sufficient, upon all the evidence, within which to have stopped the car four times before reaching the zone of danger. All this is true, with but slight variations, whether we take the minimum or maximum speed of the locomotive and the car, and whether we take the minimum or maximum space within which the car could have been stopped.

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In such a situation, what was said by this court in the case of Kelsay v. Railroad, 129 Mo. l. c. 372, applies: "The duty of a traveler upon a highway, in approaching a railroad crossing, to use all reasonable precautions to ascertain the approach of trains and to avoid injury by them is well settled law, not only in this court, but perhaps of all the courts of this country. This rule imperatively requires him to look carefully in both directions, at a convenient distance from the crossing, before venturing upon it, if by looking, a train could be seen. The duty will not be performed by attempting to look only from a point at which the view is obstructed. The duty is a continuing one until the crossing is reached. If there is a point between the obstruction and the track which gives opportunity to see it is the duty of the traveler to look. He can not close his eyes and thereby relieve himself of the consequences of his own neglect. [Hayden v. Railroad, 124 Mo. 566.]"

But, recurring to the question in the negligence of decedent's brother who was driving, if we were to take the view that decedent was himself free from actual negligence, we are yet of the opinion that the obvious negligence of his brother who was driving is upon the facts in this record, imputable to decedent. For this brother, as stated above, admits that after looking for the train, the time of passing of which he knew, when he was forty or fifty feet from the crossing, he then looked no more, but turned his gaze toward Garden City, which was in the opposite direction from that from which the train was coming, and continued to look in this direction till the instant at which the train was actually upon him and struck the car.

In such situation, the joint enterprise and joint ownership of the automobile considered, the negligence of the driver was imputable to the deceased.

Imputed Negligence.

It is true, that by the great preponderance of authority the negligence of the driver of an automobile is not imputable *to a mere guest, or to a*

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passenger who is riding in the machine, but who has no authority either over the machine or over the driver thereof. [Dale v. Denver Tramway Co., 97 C. C. A. 511; Baltimore v. Maryland, 92 C. C. A. 335; Lininger v. San Francisco Ry. Co., 18 Cal. App. 411; Tousley v. Pacific Ry Co., 166 Cal 457; Porter v. Jacksonville Ry., 45 Fla. 692; Ind. Traction Co. v. Love, 180 Ind. 442; Hubbard v. Bartholomew, 144 N. W. 13; Corley v. Ry. Co., 90 Kan. 70; United Railways Co. v. Crain, 123 Md. 332; Littlefield v. Gilman, 207 Mass. 539; Terwilliger v. Railroad, 209 N. Y. 522; Tonseth v. Portland Co., 141 Pac. 868; Hermann v. Rhode Island Co., 90 Atl. 813; Latimer v. Anderson County, 95 S. C. 187.]

The like rule has been applied to the negligence of the driver of an automobile for hire, in a case wherein the passenger merely gives directions as to the desired designation, but who neither has nor exercises any further control over either the machine, or the driver. [Rush v. Ry. Co., 157 Mo. App. 504; McFadden v. Lott, 161 Mo. App. 652; Thompson v. Ry., 165 Cal. 748; Roby v. K. C. Ry. Co., 130 La. 880; Meyers v. Tri-State Co., 121 Minn. 68; Wachsmith v. Railroad, 233 Pa. 465; Wilson v. Puget Sound Co., 52 Wash. 528; Galloway v. Detroit Ry. Co., 168 Mich. 343.]

But in the instant case, decedent and his brother, who was the driver of the car *of which these two and another brother were joint owners, were engaged in a joint enterprise.* They were returning to Garden City, whereat they were engaged as partners in the real estate business, from Clinton, to which place they had been on some sort of business or pleasure, the record so far as we are able to find, not disclosing which. In such case, it is almost universally held that the negligence of the driver of the car is to be imputed to the other member of the joint enterprise. [Payne v. Chicago, etc., Ry. Co., 39 Ia. 523; Nesbit v. Garner, 75 Ia., 314; Donnelly v. Brooklyn Ry. Co., 109 N. Y. 16; Schron v. Staten Island Ry. Co., 45 N. Y. Supp. 124; Boyden v.

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Fitchburg Ry. Co., 72 Vt. 89; Omaha Ry. Co. v. Talbot, 48 Neb. 628.]

Here then, whether decedent and his brother were in their journey to Clinton upon either pleasure or business bent, they were neither master and servant, employee and employer, nor guest or passenger of the other. They owned the car jointly, they were upon a joint enterprise, either of business or pleasure, and neither had any more or any less control of the car at the time than the other. In such case, it seems clear that the negligence of one part owner of the car, when engaged in a joint enterprise, is imputable to the other. So, upon either view, the ruling of the learned court *nisi* in sustaining the demurrer to the evidence was well taken.

II. But it is contended that there was a duty, arising from the humanitarian doctrine, to avoid injuring decedent. This contention upon the record before us deserves but short shift. The brother of decedent says that from a point forty or fifty feet from the track is was only possible to see the train when it was two hundred feet from the crossing. The only witness offered in the case to show within what space the train in question could have been stopped, at the rate it was running, swore that it could only have been stopped in from four hundred to six hundred feet. If decedent and his brother could see the train for the first time only when it was two hundred feet from the crossing, we may safely assume that the servants, agents and employees of the defendant in charge of its train could not see the automobile at a distance, on this day, greater than two hundred feet. Therefore, if it requires a minimum of even four hundred feet within which to stop the train, no further comment is necessary. This view, of course, leaves out of consideration the testimony of other witnesses for plaintiff who swore that the train was in fact visible at a much greater distance than two

Humanitarian Doctrine.

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hundred feet on this day. But none of these witnesses was at the point when they saw the train, that deceased and his brother occupied. Moreover, there inevitably arises in the case upon the latter view, a consideration of how far defendant was justified in concluding that decedent would stop before reaching the track, in taking the course which defendant took. The learning upon the latter point is extensive, and we need not take up space here to discuss it. Merely remarking, in passing, that if it be in fact a duty incumbent by law upon a defendant railroad to stop its trains whenever those in charge thereof see an automobile within forty or fifty feet of a railroad crossing, and running only five or six miles an hour, it would require in many cases three or four days for a train to cross this State. But upon this point, and upon the rules suggested by what we have said, we may content ourselves with saying that the record herein is replete with facts showing that this is not a last-chance-doctrine case.

It results that the view taken *nisi* was correct, and this case ought to be affirmed. Let it be so ordered. All concur.

ROBERT W. SMITH v. KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Division Two, July 5, 1919.

1. **TESTIMONY: Expert: Chiropractic: Deposition: No Timely Objection.** The admission in evidence of the deposition of a chiropractic, who did not qualify so as to give an opinion regarding the effect of plaintiff's injuries upon his physical and mental functions, taken in May, defendant's counsel being present, and read in chief, without objection, at the trial in October, and to which no objection was made until after the deponent's cross-examination was read at some length, and then for the first time counsel for defendant announced that he was going to move to strike out every portion of the testimony which attempted to give an expert opinion, but did not point out specifically the portions he expected to have striken out, was not error. There be-

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ing no designation of what portion of the deposition was incompetent, and consequently no ruling as to the admissibility of any specific portion of it, and no timely objection to it, its admission cannot be held to be error.

2. ———: ———: ———: **Improper Question and Answer Withdrawn.** Plaintiff, in taking the deposition of a chiropractic, asked a question which called for an expert opinion. Defendant objected because deponent was not qualified as an expert. The answer was recorded, an exception saved, the question repeated, and the objection renewed, whereupon plaintiff withdrew both the question and the former question and answer. Deponent was not qualified as an expert, but throughout his deposition, which was read without objection, had in effect answered the same and similar questions in detail. *Held*, that, there being no other exception to the rulings as to the admissibility of deponent's testimony, it cannot be conceived how the question and answer, even if they had not been withdrawn, injured defendant, for they added nothing to what deponent already had testified.

3. ———: **Res Gestae: Contradicting Witness.** Where the conductor of the train, of which plaintiff was a brakeman, had in his direct testimony for defendant, testified that no one had told him that the brakebeam of the car was down and that he did not know that the fireman or the plaintiff had gone under the car to adjust the beam, and on cross-examination was asked if he didn't come running up to the place where plaintiff was injured and say he had forgot the men were under the car, it was competent, for the purpose of contradiction, to prove by another witness, on rebuttal, that the conductor, at that time, was asked by the engineer why he turned the air on while the men were under the train and that he exclaimed, "My God, I forgot it; I didn't know what I was doing." [Following Gordon v. Railroad, 222 Mo. l. c. 531.]

4. **INSTRUCTION: Knowledge: Actual and Imputed.** Where the evidence tends to show that the conductor was told the brakebeam of a car was down and knew the plaintiff had gone under the car to adjust it, but did not necessarily know plaintiff was still under the car at the time he "cut in the air" which caused the floating lever to move and strike the plaintiff's head, and where there is also evidence tending to show that a "spot" signal was given, which required the conductor to know that something was wrong about the train concerning which it was his duty to obtain information, an instruction which tells the jury that if the conductor, at the time he cut in the air, knew, "or in the exercise of ordinary and reasonable care could and should have known," that the plaintiff was under the car, the defendant was guilty of negligence, is proper; the question, under such circumstances, is not solely one of actual knowledge.

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5. ———: ———: ———: **Theory of Trial.** Besides, instructions offered by defendant telling the jury that if the conductor did not know and "could not have known in the exercise of ordinary care" plaintiff's perilous position he could not recover, precludes defendant from insisting that plaintiff's instruction should have confined his right to recover to the conductor's actual knowledge.

6. **VERDICT: Presumption: Finding of Every Fact.** The court must presume that the jury found every fact of which there was evidence on the issues properly submitted tending to support the verdict.

7. ———: **Deduction for Contributory Negligence: Award for Actual Damages Only: Remittitur.** Where the petition demanded $75,000 as damages, and there was some evidence of contributory negligence, and the instruction, under the provisions of the Federal Employers' Liability Act, directed the jury to make a proportionate deduction from the actual damages suffered, if they should find there was such contributory negligence, and they returned their verdict for $37,500, it cannot be held that they found the actual damages were $37,500; for the court cannot assume that the jury found any fact, where the evidence was contradictory, that would impair their verdict, and there being positive evidence that plaintiff was not guilty of contributory negligence, the excess may be corrected by *remittitur* if the court finds the verdict excessive as to the actual damages.

8. ———: **Excessive: $25,000.** Plaintiff's head was crushed between two beams of a car; his nose was mashed over to one side; the bones of the skull were broken into pieces, and some of them taken out, leaving a space unprotected by bone, an inch and a half long and an inch wide; he suffered with convulsions until an operation was performed, indicating pressure upon and injury to the brain; two years later the evidence indicates injury to the brain; his vision is impaired, he cannot turn his eyes laterally, can only focus them on objects directly in front, and is unable to read except for a few moments at a time; there is a suppurative discharge from his nose, accompanied by a disagreeable odor; he has an ataxic walk, and fibrillary tremors, involuntary and incapable of simulation, run over his body, and in walking he lifts his legs much higher than a normal man, indicating ataxia, and in stooping over has a sensation that his brain is dropping out through the hole in the forehead. Prior to his injury he was in perfect physical condition, was an athlete, possessed an unusually quick mind, learned easily and took interest in literary pursuits; his mind is now impaired, especially his memory, and scientific tests indicate his mind is about equal to that of a child ten years of age. At the time of his injury he was 24 years of age and receiving a hundred dollars a month, and since has been unable to earn anything. The jury returned a verdict for $37,500,

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and that was reduced by the trial court to $25,000, which on appeal is, *held*, not excessive.

9. ———: ———: **Rule.** The court has never ruled that any verdict for personal injuries in excess of $25,000 is excessive. Every case must be determined on its own individual facts.

10. ———: ———: **Value of Money.** Twenty-five thousand dollars in 1904 was a much larger sum in purchasing power than the same sum in 1914.

Appeal from Jackson Circuit Court.—*Hon. Thomas Seehorn,* Judge.

AFFIRMED.

Cyrus Crane for appellant.

(1) The excessive verdict was not cured by the *remittitur* which the court ordered. The *remittitur* merely brings the verdict down to the maximum allowed by this court in the personal injury cases and does not preserve the deduction from the gross amount of damages which the jury apparently made or intended to make in the verdict. (a) There was evidence from which the jury could have found that the plaintiff was guilty of contributory negligence. (b) Total amount of damages demanded by plaintiff was $75,000. (c) The jury's verdict shows that it made a deduction on account of plaintiff's negligence. (d) The *remittitur* required by the court does not preserve such deduction. (e) The original verdict was manifestly excessive. (f) The defendant's right to a deduction because of contributory negligence must be strictly observed. Hadley v. Railway, 156 N. W. (Neb.) 765; Railway Co. v. Wright, 297 Fed. 281, 125 C. C. A. 25; Pennsylvania Co. v. Sheeley, 221 Fed. 901. (2) The verdict of the jury was excessive under either State or Federal decisions and a new trial should be ordered rather than a *remittitur.* The United States Supreme Court leaves the amount of damages to the trial and appellate courts. Railway Co. v. Bennett,

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233 U. S. 80. Federal court allowances are not more liberal than those of Missouri. Duke v. Railway Co., 172 Fed. 684; Railway Co. v. Lindsey, 201 Fed. 836; Cain v. Railway Co., 199 Fed. 211. This court is free to follow its own decisions and, therefore, should grant a new trial. Partello v. Railway, 217 Mo. 645. *Remittitur* is only used as a cure where there is no other error in the record. Cook v. Globe Printing Co., 227 Mo. 471. (3) The court erred in admitting expert opinions from witness E. C. Herron because he was not qualified. The qualifications of this witness were for the court, and not for the jury, as the court erroneously held. Fullerton v. Fordyce, 144 Mo. 530; Benjamin v. St. Ry. Co., 50 Mo. App. 608; Bradford v. Railway, 64 Mo. App. 483; Gates v. Railway, 44 Mo. App. 492. This court is not given to treating fake practitioners as experts. Weltmer v. Bishop, 171 Mo. 110. The objection made to the testimony was sufficient. Railway v .Second St. Improvement, 256 Mo. 411; Railway v. Walsh, 197 Mo. 409. (4) The court erred in admitting evidence as to Conductor Johnson's statements made after the accident occured. They were not part of the *res gestae,* nor admissible as impeaching testimony. Koenig v. Railway Co., 173 Mo. 709; Wojtylak v. Coal Co., 188 Mo. 260; Barker v. Railway, 126 Mo. 143; Price v. Thornton, 10 Mo. 135; Rogers v. McCune, 19 Mo. 558; McDermott v. Railroad, 73 Mo. 516; Adams v. Railroad, 74 Mo. 553; Devlin v. Railroad, 87 Mo. 545; State v. Hendricks, 172 Mo. 654; Gordon v. Railway Co., 222 Mo. 532. The alleged contradictory statements were not admissible for the purpose of impeachment. Hamburger v. Rinkle, 164 Mo. 407; Roe v. Bank, 167 Mo. 406. (5) Instruction one given on behalf of plaintiff was erroneous. There was no evidence or facts warranting the jury in finding that the conductor, "in the exercise of reasonable and ordinary care could and should have known that plaintiff was under the car."

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A. N. Gossett and *T. J. Madden* for respondent.

WHITE, C.—The plaintiff in an action for personal injuries was awarded a verdict against defendant in the Circuit Court of Jackson County for $37,500. Defendant's motion for new trial was overruled on condition that the plaintiff remit $12,500 from the verdict. This was accordingly done, judgment entered for $25,000, and the motion overruled. Thereupon the defendant appealed to this court.

The plaintiff was a brakeman in the service of the defendant. He was injured January 10, 1914, at Bates, Arkansas. He was working on a branch line running from Hetherman, Oklahoma, to Waldron, Arkansas. When the train, on the day mentioned, arrived at the town of Bates, it contained only three or four cars. At that point there stood on the siding a number of cars comprising a bridge-and-building outfit, consisting of seven to nine cars; these were to be taken into the train on which the plaintiff arrived. Considerable evidence was introduced to show the method by which this was done and to explain the operation of the train at that time. It is not necessary to state this in detail. Briefly, the engine and one or two cars were cut off from the train on the main line, brought on to the siding and attached to the bridge-and-building cars; the train was then run back on the main line and backed to the cars of the train which had been detached, for the purpose of coupling them on again. It seems that the conductor, a man named Johnson, remained with the section of the train which was left on the main track, while Smith, the plaintiff, was engaged in assisting to couple and line up the new cars that were brought into the train. While this was being done it was discovered that a brakebeam was down on a car near the engine. There was evidence tending to show that the fireman, a man named Weller, gave what is termed a "spot" signal, indicating to the conductor that something was wrong that required his attention. The testimony is

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contradictory as to whether such spot signal was given, and if it was given whether the conductor was in position to see it.

The plaintiff testified, and was corroborated by another witness, that he called to the conductor and told him the brakebeam was down, and was directed by the conductor to go in and fix it. The fireman, Weller, notified the engineer that the brakebeam was down. Weller got a pick and went under the car for the purpose of attempting to repair the brakebeam, and plaintiff went under for the purpose of assisting, and while there he saw that a pin which goes through what is called a "floating lever" was out of position and he attempted to fix it. In doing that his head came between the floating lever and what is termed the "needle beam," which is attached to the bottom of a car and runs crosswise. At that time the conductor, Johnson, was coupling up the rear remnants of the train with that section which had been taken in, and in doing so found some difficulty which required time, but finally made the coupling. He then made the necessary hose connections for the air and, using the term applied by the men, "cut in the air." This caused the floating lever where Smith was working to move and strike Smith's head, crushing it between that appliance and what is called the needle beam, causing the injury for which he sues.

The question as to defendant's negligence was as to whether the conductor, Johnson, before cutting in the air, knew, or by the exercise of ordinary care could have known, that the brakebeam was down, and also knew, or by the exercise of ordinary care could have known, that some of the men were under the car fixing it. If he did it was conceded that he was negligent in cutting in the air, which would be likely to cause some movement and render the position of the men dangerous.

Also it was a question whether the plaintiff was negligent in placing himself in the position in which he was, without first cutting off the air from the car where he was working. The evidence on both of these proposi-

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tions was conflicting. It seems to be conceded by the appellant that there was sufficient evidence of the defendant's negligence to warrant submission of that issue to the jury. But it is argued that the conduct of the plaintiff shows negligence upon his part so as conclusively to warrant a deduction under the Federal Employers' Liability Act from any actual damages found. There was sufficient evidence from which the jury might very properly have found that the plaintiff was not negligent in any respect, but was in the line of his duty and did not unnecessarily expose himself to a peril which might reasonably have been avoided; that he had a right to rely upon the conductor's observing ordinary care, and believed and had reason to believe that such conductor knew of his position. He swore, and there is other evidence corroborating him, that he had plenty of room and was in a perfectly safe and proper position if the cars had been allowed to remain without interference; that is, if nothing had been done with respect to the brakes.

Expert Testimony.

I. Error is assigned to the admission of the testimony of E. C. Herron who, it is claimed, testified as an expert, when his evidence showed that he was not qualified as an expert. He was a chiropractic doctor and testified to the condition of plaintiff Smith before he was injured and the relation of his hurts to his present condition. He had no license to practice medicine and had received his education as a chiropractic mainly by correspondence.

Undoubtedly counsel for plaintiff is correct in his position that Herron did not qualify so as to give an opinion regarding the effect of the plaintiff's injuries upon his physical and mental functions. He testified by deposition which was taken May 20, 1915, at Mena, Arkansas. This deposition was read at the trial which did not begin until October. The defendant was represented by counsel at the taking of the deposition and, of course, knew as well when the deposition was offered

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in evidence what it disclosed as to Herron's disqualification as it did after it was read. Yet the deposition in chief was read without objection and showed the qualification of the witness, his experience and education as a chiropractor. Witness testified that he was acquainted with the plaintiff long before the injury, and described his fine physical condition prior to that time. He explained the effect upon his movements caused by his injuries, and described what he seemed to think was the cause of the trouble; it was the displacement of certain vertebrae which affected his nerves. This alleged displacement was shown by one of the defendant's expert witnesses to be absurd and impossible. Herron also described the general condition of plaintiff and the condition of his head where it was injured. Occasionally objections were interposed and in each case they were sustained or questions withdrawn. At one point in the reading of the deposition defendant's counsel interrupted and pointed out the place to which the counsel for plaintiff might skip and continue to read, and that part which then was read gives the witness's theory about the impingement upon the nerves caused by the dislocation of some joints of the spine; also the effect of this supposed condition upon the muscles of the throat and the internal organs. All this without objection. Many objections appear in the course of the examination to the form of the questions; these appear to be entered on the deposition as originally taken, and no exceptions were saved when the answers to such questions were read to the jury. Finally, after the cross-examination of the witness was read at some length, counsel for defendant announced that he was going to move to strike out every portion of the witness's testimony which attempted to give an expert opinion, and would point out specifically the portions which he expected to have stricken out. The record does not show that any such designation was made and consequently there was no ruling as to the admissibility of any specific evidence which had been offered.

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For that reason and for the failure to object in time, the complaint that such testimony was incompetent cannot be heard now. [State v. Marcks, 140 Mo. l. c. 668-9; State v. Forsha, 190 Mo. l. c. 326-7; State v. Bateman, 198 Mo. l. c. 223-4; Hickman v. Green, 123 Mo. 165.]

In reading the deposition, this question occurred: "I will ask you if there is any part of the human body that is not affected by the brain and nerves?" This was objected to because the witness was not qualified as an expert. The objection was overruled and the exception saved. Witness answered that there was no part of the body but what was affected by the brain and nerves. The question was repeated and the objection renewed, whereupon the plaintiff's attorney withdrew the former question and answer and also withdrew the question which had just been asked.

It hardly seems that the defendant, could have been injured by the question and answer even if it had not been withdrawn, because the witness had in effect answered the same and similar questions more in detail throughout his deposition without objection and the present question, to which the objection was made, and the answer added nothing to what he had already said. No other exceptions were saved to the ruling in the testimony of Herron. It is claimed by plaintiff's counsel that the defendant was anxious to have his testimony in for the purpose of ridiculing it as a weakness in the plaintiff's case. The defendant's conduct lends color to that claim. There was no error in receiving the testimony which can be considered here.

II. The appellant claims that the court committed error in permitting a witness to testify to a statement made by Johnson, the conductor, immediately after he learned that the plaintiff was injured, in which he said that he forgot that the men were under the car. Johnson had testified in his examination in chief that no one told him the brakebeam was down and he didn't know either

Contradicting Witness: Res Gestae.

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Weller or Smith had gone under the car to adjust it. On cross-examination he was asked if he didn't come running up to where the plaintiff was caught and say he forgot the men were under the train. He replied that he didn't remember saying that. Witness Cooper then was placed upon the stand, in rebuttal, and testified that at that time Mr. Hull, the engineer, asked Johnson why he turned the air on while the men were under the train, and that Johnson exclaimed, "My God, I forgot it; I didn't know what I was doing."

The position of appellant is that this exclamation was no part of the *res gestae*, a matter not necessary to determine. It was offered for the purpose of contradicting the witness, and appellant claims it was incompetent for that purpose. Two cases are cited by appellant in support of that position. [Koenig v. Union Dep. Ry. Co., 173 Mo. 698; and Wojtylak v. Coal Co., 188 Mo. 260.] In the Koenig case, shortly after a child was killed by a street car, the motorman was asked, "Are you blind to run over a child like that?" and he replied: "I didn't see the child, I was looking at the car coming east." The court held this was not *res gestae* and not admissible for that reason. The motorman had not testified indicating that he saw the child or to any fact which this statement would tend to contradict, and the court said, l. c. 721-22: "This evidence was not offered for the purpose of contradicting the motorman, hence inadmissible for any purpose."

In the Wojtylak case the court held that a statement of that character was not admissible in that case, because it only tended to contradict a statement of the witness which was not pertinent to any issue in the case. [188 Mo. l. c. 288-89.]

In the case of Gordon v. Railroad, 222 Mo. 516, l. c. 531-2, the plaintiff, a switchman, sued for injuries caused by a defective handrail, and was permitted to show that the yard foreman, soon after the injury, had made a statement indicating that he knew of the defective appliance. He had just testified that he examined

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the handrail in question an hour and a half after the accident and found it in good condition. His declaration was held to be admissible, because it was inconsistent with his testimony. That case distinguishes the Koenig case, supra, in that the foreman had just previously testified to matters inconsistent with this declaration. Several cases are reviewed by this court in the Gordon case illustrating the principle (L. c. 533-4).

In the case of Hutchinson v. Safety Gate Co., 247 Mo. 71, l. c. 104 a statement of similar nature was admitted in evidence. The only objection to it was that the witness was not examined in relation to the matter while on the stand, but he was afterwards recalled and examined, and then the impeaching statement admitted. The competency of the testimony for the purpose was not questioned.

In this case the statement as offered indicated that Johnson knew the brakebeam was down and that someone was under the car and tended thereby directly to contradict the testimony he had just offered to the effect that he did not know those things. On the authority of the Gordon case the evidence was competent.

III. Appellant claims the court committed error in instructing the jury that if they should find from the evidence that the conductor cut in the air without first warning the plaintiff of his intention to do so, and if they further found that the conductor knew, "or in the exercise of ordinary and reasonable care could and should have known" the plaintiff was under the said car, etc., then he was guilty of negligence.

Imputed Knowledge.

It is asserted that while there was evidence that the conductor knew there were men under the car, there was no evidence on which to base that part of the instruction which authorizes the finding of negligence if by the exercise of reasonable and ordinary care he could and should have known that the men were under the car; that it was a question of actual knowledge.

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There was evidence tending to show that the conductor was told the brakebeam was down, and some of this evidence indicates that while he was so informed, and knew the men were going under the car, it would not necessarily follow that he knew the men were under the car at the moment the air was cut in. There was also evidence of a "spot" signal which indicated something was wrong that required attention. Other evidence indicates that the train was stopped for some time and, while the conductor was back toward the rear of the train at the time he cut in the air, on account of the spot signal, if it was given, he had reason to know that something was wrong about which it was his duty to obtain definite information. He himself swore positively that he did not know the men were under the car, and there is positive evidence that he was told the brakebeam was down; this would suggest to him that the men probably would be under the train for the purpose of adjusting it. The evidence was entirely sufficient to allow the instruction.

Besides, appellant tried the case on that theory. In instruction numbered 2, and instruction numbered 9, offered by defendant, the jury were told that if the plaintiff went under the car without advising the conductor that the brakebeam was down and that the conductor did not know and "could not have known it in the exercise of ordinary care" then the verdict should be for the defendant.

IV. Appellant with great ingenuity and force insists that the verdict is excessive and the defect cannot be cured by *remittitur*. The argument runs thus:

There was evidence tending to show the plaintiff was guilty of contributory negligence, and the instructions under the provision of the Federal Employers' Liability Act directed the jury to make a proportionate deduction from the actual damages suffered, if they should find such contributory negligence. The amount of recovery

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Deduction for Contributory Negligence: Award of Actual Damages Only.

demanded in the petition was $75,000, and the full amount was insisted on in the plaintiff's argument. The verdict was for half that, or $37,500. It is therefore probable that the jury found plaintiff's actual damages at $75,000, and deducted half on account of his negligence. Or they might have found his damages at $50,000, and deducted one-fourth on account of his negligence. But this court has never allowed a verdict for *actual* damages in a personal injury case to stand for more than $25,000. Therefore, the actual damage to plaintiff could not exceed $25,000, and the *remittitur* of $12,500, which the circuit court ordered did not allow for the probable finding that the plaintiff was negligent. The circuit court should have limited recovery to $25,000, actual damages, less a proportionate amount for contributory negligence, but did not. It is impossible to say what the jury might have deducted for contributory negligence if there had been such limit. Therefore, the judgment as reduced to $25,000, is excessive because of the probable contributory negligence, and the excess cannot be cured by *remittitur* because it is impossible to say what proportion the jury might have deducted from the actual damages on that account. An alternative might be found by reducing the judgment one-half, to $12,500.

Appellant cites two cases in support of this position. [Hadley v. Union Pacific Railroad Co., 156 N. W. (Neb.) 765, and Pennsylvania Co. v. Sheeley, 221 Fed. 901.] The Hadley case follows the Sheeley case, holding, as is the rule, that the construction of the Federal Employers' Liability Act by the Federal courts is conclusive upon the State courts. Both these cases hold that it is proper, in case there is evidence of contributory negligence in a suit under the act, to submit such issue to the jury. In the Sheeley case the court held it was not properly submitted to the jury, so that they might apportion the damages on that account. Nevertheless the court found it could correct that defect in the verdict by *remittitur*

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In the Hadley case the court first determined from the evidence that the actual damages should not be in excess of $18,000, and then determined that the proportionate amount on account of contributory negligence could not exceed one-fourth of that amount, and ordered a *remittitur* so as to reduce the judgment to $13,500. In each of these cases, therefore, where the amount of the deduction for contributory negligence was uncertain, the court did find it possible to correct any excess by *remittitur*. Appellant suggests that the court in those cases invaded the province of the jury, but if this court follows the Federal case, which we are presumed to do, then any excess in the verdict may be cured by *remittitur*.

However, there is another principle which applies here. That is, all presumptions are indulged in support of a verdict and a judgment. In an attack upon the propriety of a verdict the court must presume that the jury found every fact, of which there was evidence on issues properly submitted to the jury, tending to support the verdict. [Wright v. Green, 239 Mo. 449, l. c. 454; Mfg. Co. v. Insurance Co., 167 Mo. App. 566, l. c. 570.] In this case it may be conceded there was some evidence tending to show the plaintiff was negligent, while other evidence and many of the facts in the situation would lead to the conclusion that he was not negligent in getting under the car and in putting himself in the position in which he got hurt—that he was only pursuing his ordinary duty. Now, if necessary in order to sustain the verdict as rendered, we are bound to presume the jury found that he was not negligent and that the verdict rendered indicates the actual damage which they found he had incurred. This court cannot assume that the jury found any fact, where the evidence is contradictory, which would impair their verdict. It cannot be presumed that they reached a conclusion in regard to any disputed fact which would invalidate the general conclusion shown by the verdict. In that case, if this court finds the verdict

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excessive as to an award of actual damages, the excess may be corrected by *remittitur*.

V. It remains to consider whether the verdict is excessive, requiring a *remittitur* as a condition of affirmance.

The plaintiff's head was crushed between the floating lever and the needle beam. His nose was mashed over to one side, the bones of his nose crushed into his face; the bones in the skull were broken into many pieces, and these bones had to be taken out, leaving a space unprotected by bone, an inch and a half long and an inch wide. He suffered with convulsions for several hours until an operation was performed. This indicated pressure upon and injury to the brain. Blood was coming out of his eyes and ears. His suffering for some time was intense.

Excessive Verdict.

The permanence of the injury was testified to by several physicians who examined him. There was contradictory evidence as to whether any of the gray brain-matter oozed out at the time of the injury, but the evidence seemed to be uniform that his brain could be injured, and there was evidence that it was injured, by the blow, even if there was no rupture of the covering of the brain. His vision was impaired and the evidence indicates that he could not turn his eyes laterally and could only focus them on an object directly in front; he was unable to read except for a few moments at a time. A discharge came from his nose; there was a suppurative condition there, accompanied by a disagreeable odor. He had an ataxic walk and fibrillary tremors ran over his body at times; this is explained by the physicians as being entirely involuntary and incapable of similation. His eyes fluttered on account of his inability to focus them on a direct object without moving his head, and that was because the nerve supply was affected with indications that the muscles which manipulate the eye were atrophied from diease. He was continually restless and nervous, with twitching and fidgeting,

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even when he was asleep. He would squirm around and wring his hands when engaged in conversation. On a test of his equilibrium when he closed his eyes and tried to stand erect he had a tendency to fall backward to the left side. He lifted his legs much higher in walking than a normal man does, indicating ataxia. He did not sit down or move like a normal individual. In stooping over he had a sensation that his brain was dropping out through the hole in his forehead. This is characterized by the physicians as a delusion due to pressure on the brain when he stoops.

The testimony of several physicians was that this physical condition would grow worse instead of better; that in no event could he ever recover his normal condition. There was some evidence offered by defendant to the effect that he would to some extent recover.

Before plaintiff was injured he is described by the witness as being in perfect physical condition; he was an athelete and had a naturally quick mind. He was apt at school. He began working for himself at fifteen years of age as a clerk in the commissary department of a planing mill, and did the work of an ordinary clerk. He learned unusually fast, acquired a limited speaking knowledge of the German language; took great interest in the literary exercises at school; he had some education in telegraphy.

The evidence tended to show that his physical condition had affected his mind, particularly his memory. The physician of the Kansas State Penitentiary and other physicians subjected him to what is termed the Binet-Simons test, for the purpose of determining whether or not he was deficient in certain faculties of mind. Those tests are set out in the evidence, and the result was reached that his mind, by all those tests, was about equal to that of a normal child ten years old. His memory of recent events was very much impaired. The tests to which he was subjected by the physicians

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indicated that condition of his memory, his association and continuity of ideas, his perception, his conception, judgment and will. His faculty of association of ideas, that is, following one idea after another in an intelligent manner, was not that of a normal man. He was extremely slow and labored in answering questions. It was the opinion of an expert that his memory of past events prior to his injury was better than recent ones and showed that his memory must have been good before his injury. Appellant argues that his deposition and his evidence, set out in the record, shows no impairment of his mental faculties. But his manner of delivering that testimony does not appear in the record, and one physician called attention to his demeanor in court as showing the impairment of his mind and muscular control.

There was considerable evidence offered by defendant indicating that his injury was not as serious as the testimony offered by plaintiff would indicate, but there was sufficient evidence by which the jury might very properly have found that his physical and mental condition was impaired beyond any possible recovery to anything like a normal state, and that his capacity for earning a living and enjoying life were reduced to a very low point. He was injured January 10, 1914, and at the time of the trial in October, 1915, nearly two years later, he had been unable to earn anything. A sufficient time had elapsed so that the permanence of his injuries or otherwise were capable of approximate ascertainment.

Appellant asserts that this court has never allowed a damage for personal injuries in excess of $25,000, and states it as if that were a definite rule. There is no definite rule laid down by this court in any case; each individual case has been determined upon its own facts.

The case of Gordon v. Railroad, 222 Mo. 516, is mentioned as the extreme case in which this court permitted the highest possible damage for personal injuries, and that is where a verdict for fifty thousand

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dollars was cut down by the circuit court to thirty-five thousand dollars and by this court to twenty-five thousand dollars. In that case the plaintiff's injuries resulted in total paralysis in his lower extremities. He finally died of the injury before the decision was reached in this court.

The plaintiff in this case was 24 years of age and earned about a hundred dollars a month; the plaintiff in the Gordon case was 29 years of age and earned about ninety dollars a month. In the Gordon case the injury occurred in 1904, and in this case in 1914, about ten years later. Twenty-five thousand dollars in 1904 was a much larger sum in purchasing power than that sum in 1914. While the injury in the Gordon case was probably more painful and more serious in its results, we are not prepared to say that the verdict for $25,000 by the trial court was excessive.

In the recent case of Turnbow v. Kansas City Railways Company, decided at the last term of this court, a verdict for $30,000 was affirmed on condition of a *remittitur* of $5,000. The injury was the loss of both legs, possibly not as serious as the injury in this case.

Respondent cites many cases from other States where much larger verdicts for injuries no more serious than that suffered by the plaintiff have been upheld.

The judgment is affirmed. *Roy, C.,* absent.

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur.

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THE STATE v. RAY H. CUMMINS, Appellant.

Division Two, July 5, 1919.

1. **EVIDENCE: Other Burglaries: Conspiracy.** Where there is testimony that defendant, a policeman, entered into an agreement with a burglar and some women by which the moneys and goods stolen by the burglar from houses burglarized by him were to be divided among them, in return for protection to the others by defendant, testimony of other burglaries than the one specified in the indictment, which the burglar testifies were committed about the same time and in pursuance to the continuing conspiracy, is competent.

2. ———: ———: **Committed Before Conspiracy Was Formed.** When a witness was testifying concerning the burglarizing of his house defendant objected because it did not then appear that defendant was connected with any burglary except the one specified in the indictment. At that time the witnesses by which the State subsequently attempted to prove that the defendant and one of them had entered into an agreement by which defendant, in consideration of police protection for the other, was to share in the goods stolen, had not testified, and consequently the court could not then tell whether the connection would be later established. It later developed that at the time the witness's house was burglarized defendant had never met his said accomplice, but the objection was not then renewed. *Held*, first, that since the objection was not renewed, the admission of the testimony was not error, and, second, since the accomplice testified that he divided the goods which he stole from said house with defendant, under said agreement, the testimony was competent.

3. **ELECTION: Burglary and Larceny: Receiving Stolen Goods.** Where the evidence is comprehensive enough to sustain a conviction either for burglary and larceny, or for receiving stolen goods, knowing them to have been stolen, the court does not err in refusing to compel the State to elect upon which of the two counts of the indictment, charging both offenses in separate counts, it will stand.

4. **INSTRUCTION: Uncorroborated Testimony of Accomplice.** An instruction telling the jury that they are at liberty to convict the defendant upon the uncorroborated testimony of an accomplice alone, if they believe his statements are true and sufficient to establish defendant's guilt, but that such testimony, when not corroborated, ought to be received with great caution, is not error.

5. ———: **Assumption of Disputed Fact.** An instruction telling the jury that "evidence of other burglaries and larcenies were admitted

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by the court solely for the purpose of determining whether a conspiracy" existed between defendant and his accomplice to burglarize various dwellings in the city "and you are to consider this evidence for no other purpose," did not assume that other burglaries had been committed or that defendant had committed them.

6. **SUFFICIENT EVIDENCE: Burglary and Larceny.** The evidence in this case, which is fully set out in the statement, was sufficient to sustain a conviction of burglary in the second degree and larceny, and assessing defendant's punishment at five years' imprisonment for the burglary and five years for the larceny, the evidence being that defendant, a policeman, entered into an agreement with a burglar and some women by which, in consideration of protection for them, the burglar was to burglarize dwelling houses in the community and divide the stolen goods among them.

Appeal from St. Louis City Circuit Court.—*Hon. Victor H. Falkenhainer,* Judge.

AFFIRMED.

Charles A. Houts for appellant.

(1) It is not admissible, upon the trial of an indictment for burglary or larceny, to introduce evidence of other burglaries or larcenies. State v. Daubert, 42 Mo. 242; State v. Spray, 174 Mo. 569; State v. Boatright, 182 Mo. 33. (2) Where, by exception to the general rule, evidence of other crimes is admitted to show a common scheme or plan, such evidence of other crimes must in fact tend to establish a common scheme or plan; otherwise, such evidence is not admissible. State v. Hyde, 234 Mo. 200. (3) Evidence of other burglaries by Frank (an alleged co-conspirator) was not admissible for the purpose of proving the existence of a conspiracy between him and the defendant. 3 Bishop New Criminal Procedure, sec. 229; Metcalfe v. Conner, 12 Am. Dec. (Ky.) 340. (4) It is error to instruct that a defendant charged with a felony can be convicted upon the uncorroborated testimony of an accomplice. State v. Wilkins, 221 Mo. 444.

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Frank W. McAllister, Attorney-General, and *Shrader P. Powell,* Assistant Attorney-General for respondent.

(1) The verdict meets the statutory requirements in every particular. State v. Blockberger, 247 Mo. 606; State v. Kinney, 190 S. W. 306; State v. Conway, 241 Mo. 276. (2) The court did not err in permitting the State to introduce evidence of the commission of other burglaries and larcenies for the purpose of showing the intent and a common scheme and plan. State v. Myers, 82 Mo. 558; State v. Bailey, 190 Mo. 280; State v. Spaugh, 200 Mo. 594; State v. Kinney, 190 S. W. 306; State v. Patterson, 271 Mo. 109; State v. Lewis, 273 Mo. 530; State v. Othick, 184 S. W. 108. It is proper to introduce testimony showing that the defendant and others combined and confederated together for the commission of a series of criminal acts, even though a conspiracy is not charged in the indictment. State v. Collins, 181 Mo. 261; State v. Rock, 194 Mo. 432; State v. Vaughan, 203 Mo. 670; State v. Casto, 231 Mo. 408; People v. Micelli, 142 N. Y. S. 104. (3) The action of the trial court in overruling defendant's motion to require the State to elect upon which count or charge in the indictment it would stand, was erroneous. State v. Sutton, 64 Mo. 108; State v. Carrigan, 210 Mo. 366; State v. Pace, 269 Mo. 686; State v. Christian, 253 Mo. 393. (4) The evidence adduced on the trial is amply sufficient to sustain the verdict returned by the jury. State v. Concelia, 250 Mo. 420; State v. Maurer, 255 Mo. 168. (5) Instruction number one properly defined the crime of burglary and larceny. State v. Fields, 234 Mo. 623; State v. Shout, 263 Mo. 373; State v. Walker, 98 Mo. 104. Instruction number five which announces the law relative to knowingly receiving stolen property is in an approved form. State v. Sakowski, 191 Mo. 642; State v. Kosky, 191 Mo. 1. Instruction number six clearly defined the terms "common design" and "conspiracy." State v. Walker, 98 Mo. 95; State v.

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Lewis, 273 Mo. 534; Kennish v. Safford, 193 Mo. App. 372. By instruction number eight the jury was advised that they could consider evidence of receiving stolen property other than the particular instance charged in the indictment only for the purpose of showing intent and is fully sustained by the authorities. State v. Patterson, 273 Mo. 110; State v. Spaugh, 200 Mo. 594. The jury was likewise advised by instruction number 8-A, that evidence of other burglaries and larcenies was admitted for the sole purpose, and could be considered only in determining whether a common design and scheme existed between the defendant and the witness Franke. State v. Bailey, 190 Mo. 284; State v. Lewis, 273 Mo. 530. Instruction number nine and ten clearly stated the law relative to the rule for weighing the testimony of an accomplice. State v. Donnelly, 130 Mo. 649; State v. Kosky, 191 Mo. 9; State v. Bobbitt, 215 Mo. 42.

RAILEY, C.—On September 29, 1917, the grand jury of the City of St. Louis, returned into open court an indictment in two counts, charging defendant, Ray Cummins, in the first count, with burglarizing the house of Jessie Bennett and Charles Bennett on June 5, 1916, and also with stealing therefrom certain articles of jewelry of the total value of $442.50. The second count of the indictment charged defendant with receiving stolen property. On January 7, 1918, defendant waived formal arraignment and entered a plea of not guilty. He filed a motion to require the State to elect, as to which count it would proceed to trial, and this motion was overruled.

On January 8, 1918, the trial was commenced, a jury impaneled and after hearing the evidence and receiving the instructions of the court, a verdict was returned, finding the defendant guilty of burglary in the second degree and larceny as charged in the first count of the indictment, and assessing his punishment at five years' imprisonment in the State Penitentiary for the burglary and five years additional for the larceny.

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After unsuccessful motions for a new trial and in arrest of judgment, the court pronounced sentence in accordance with the terms of the verdict. Thereupon defendant was granted an appeal to this court.

The testimony submitted on the part of the State *tends to show* that the defendant was, at the time of the commission of the crime charged, a police officer in the City of St. Louis, and had been for nine or ten years prior to 1915. During the month of December, 1915, he became acquainted with one George Franke, a professional house-breaker, and entered into an agreement with Franke, by which he (defendant) was to share in the proceeds of the loot or stolen plunder, in return for the protection from arrest he was to accord to Franke. The evidence shows that some time during the month of December, 1915, Franke met defendant at the home of a Mrs. Enyart, located at 3324 Vincent Avenue, and that a Mrs. Champagne and a Mrs. Edna Stevens were at the Enyart place at the time. The two first-named women had, for some years prior to the date above mentioned, been receiving from Franke stolen property, and the last-named woman conducted a house of ill repute at 730 Carpenter Street. The arrangement seems to have been for the defendant to suggest to Franke certain houses to burglarize, and to keep the latter advised as to the actions and efforts of the police in trying to locate the guilty parties. At the suggestion of defendant, Franke rented a room at 3740 Olive Street and lived there for a number of months with a woman named Sybil White. After Franke would burglarize a home, according to plan, he would bring the loot either to 3740 Olive Street or to the home of Mrs. Enyart, and at one or the other of these places, with defendant Cummins and usually Mrs. Enyart and Mrs. Champagne present, the plunder would be divided; that Cummins had first pick, and would select out such articles as he desired, some of which he would turn over to either Mrs. Enyart or Mrs. Champagne, both of whom were his particular friends. Quite a number of

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homes were burglarized, and the stolen property, is is claimed, was divided between this defendant and the other parties above mentioned, for a period extending from December, 1915, until about the 12th of July, 1916, at which time Franke and the White woman were arrested by officers Hunt and Flavis at Grand and Olive. When they were arrested, the testimony discloses, each of them told the officers to tell "Ray" or *get word to "Ray"* and, upon inquiry, the officers ascertained that they meant *"Ray Cummins."* According to the testimony of the above officers, they reported to defendant the above remarks made by Franke and the White woman, and suggested to defendant that he ascertain their street address. Both officers said that, at defendant's suggestion, they remained some distance away while he entered into a private conversation with Franke, and reported to them that he was unsuccessful in obtaining the desired information.

Both Franke and Sybil White testified that they had an arrangement with Cummins whereby, in the event of their arrest, they would get word immediately to the defendant, and he would see that they were taken care of. The testimony discloses that defendant visited both Franke and the White woman in the holdover, and also at the jail, and sent them packages containing clothing and other articles several times. He also promised to secure a lawyer, and to see that Sybil White was released on bond. There is also evidence tending to show that defendant went to a room at 3824 Penrose Street, which was occupied by Franke and Sybil White at the time of their arrest, and took from their room several valises full of stolen property, which remained there at the time they were confined in jail. George Franke pleaded guilty to the charge made against him, and was sentenced to the penitentiary. While confined there, he testified that defendant, in company with one Crites, visited him and promised to see that he was released.

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A considerable number of articles alleged in the indictment to have been stolen from the Bennett home, as well as a number of articles stolen from the homes of other people in St. Louis, were identified at the trial, as articles which Franke had turned over to the defendant, and by the latter turned over to Mrs. Enyart. A number of these articles had been recovered by the police from the Enyart home, where some of them were found hidden in a box under a trap door in the floor at that place, and some of them were recovered from pawn shops.

Mrs. Jessie E. Bennett testified as to the robbery of the Bennett property on June 5, 1916, and after enumerating the various articles stolen she gave the value of same as $442.50. Mrs. Frank S. Wiemeyer, living at 5744 Berlin Avenue, testified that about June 3, 1916, their residence was robbed of personal property estimated to be of the value of $800 or $900. It further appears that the home of Otto Dieckmann, at 5727 Clemens Street, was robbed on December 14, 1915, and various articles of jewelry, etc., were stolen, of an aggregate value of $700. David Abrams testified that his apartment at 5515 McPherson Street was robbed on December 29, 1915, of mink furs and other property of the aggregate value of about $1200. L. W. Johnson, who lived at 5794, McPherson Street, testified that his apartment was robbed on December 1, 1916, of clothing and other property of the aggregate value of $250. Mrs. John E. Avery, who lived at 4122 McPherson Street, testified that her home was robbed on January 5, 1916, and that she lost cut glass, table-linen, etc., of the aggregate value of $100. Mr. Jules D. Block, who lived at 5715 Cates Avenue, testified, that his apartment was robbed on December 5, 1915, of clothing and other property of the aggregate value of $225.

The evidence shows, that George Franke robbed the residence above mentioned of the property taken therefrom.

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George Franke admitted that he had been confined in the reformatory at Boonville, and Pontiac, Illinois, and had been in the penitentiary of this State. He testified that he had been disposing of stolen goods to Mrs. Enyart at 3327 Vincent Avenue for a number of years, and that while visiting there one evening in December, 1915, he met defendant Ray Cummins, and was told by Mrs. Enyart, Mrs. Champagne and Edna Stevens, who were at the Enyart home at the time of his visit, that the defendant was a "good copper" and that he was stationed at police headquarters and would be able to help Franke out if he got into trouble. Franke further testified that defendant Cummins, at this meeting, talked with him about "all the good jobs I had been doing and about the reports coming into the place there" and assured him that he was "pretty safe" and "would tell me what neighborhood to go into when the police were not in the neighborhood," and he cautioned Franke to be careful and always "be very careful in a job, to change clothes as quickly as possible, and stay in the house." At another time, Franke testified, defendant told him to work in the district of Forest Park, Grand and Russell Avenue, around Grand and LaFayette Avenue, Hawthorne and Longfellow Boulevard, and wanted to know why "I did not go to Chief Young's residence," and later Chief Young's residence was robbed and "he kinda chided me about it because some one beat me to it." He testified that, at the suggestion of defendant, he and Sybil White moved to 3740 Olive Street to the home of Mrs. Agnes Gray, where they lived until shortly before the time of his arrest. He testified that defendant told him he was walking that beat, and if there were any reports made he could protect witness by not sending the report in right, or in not calling help if he was around, etc.

Franke admitted, on the witness stand, that he had burglarized the Bennett apartment, located at 5705 Clemens Avenue, and had secured entrance by removing the glass panel out of the front door, and, after enter-

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ing, took from the apartment several shirt studs, a revolver, some beads, pearl necklace, gold watch, breast pin, umbrella, a diamond lavelier and other articles which he could not recall at the time; that, in accordance with the agreement with defendant, the latter was to get the pick out of the property stolen, and on the day of the burglarizing of the Bennett apartment he took the loot to the home of Mrs. Enyart, handed over to defendant Cummins the pearl shirt studs, the cuff buttons, chain and locket on which initials were engraved, a little chain necklace and a ring. He further testified that there were present at the Enyart home, when he brought the stolen plunder from the Bennett apartment, besides Mrs. Enyart and himself, Mrs. Champagne, Sybil White and the defendant; that he showed Cummins an account of the robbery as printed in the paper, and at the time Cummins gave him a duplicate or skeleton key, with the remark, "he thought I could use it." Franke then described the robberies of the other persons heretofore set out.

Franke testified to various meetings and conversations with defendant, in regard to the loot which had been stolen, and in both direct and cross-examination said he had made an agreement with defendant by which the latter was to designate the houses which were to be robbed, and that after robbing these places he divided the plunder with defendant, as heretofore stated.

In the brief of defendant's counsel he describes Franke as follows: "After having introduced evidence of the other burglaries referred to, the State placed upon the witness stand George Franke, then confined in the State Penitentiary upon a plea of guilty to burglaries committed in the latter part of 1915 and the first part of 1916. Franke was a professional burglar. He took an early course in crime, starting as usual with self-instruction, then entering the reform schools and from there graduating into several penitentiaries. He testified to having returned to St. Louis in December, 1915. He immediately began burglarizing houses. He

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continued in this course until June, 1915, when after the Bennett robbery, referred to in the indictment, he was arrested, following which he pleaded guilty and was sent to the penitentiary. During his six months' sojourn in St. Louis he testified that he burglarized between 150 and 175 different houses. Among the houses so burglarized were the ones hereinbefore referred to."

Mrs. Christie Scott, and her son, Charles Tilley, testified that they were introduced to Franke and Sybil White by defendant at the home of Mrs. Enyart.

William Howe, who conducted a grocery store over which Franke and the White woman lived at 3724 Penrose Street, testified that he heard some one going up the back stairs a few nights after Franke was arrested, and that the person left the rooms with a bundle under his arm. Franke testified that defendant told him about having left the place above described with the valises and goods.

Richard Kent, a chauffeur testified, that he had driven defendant to 3740 Olive Street three times at night, and that the defendant would go to the second floor, put his head out of the window and remark, "All right Dick," which was a signal for the witness that he did not desire him to wait longer.

Wm. Brinkmeyer and Thomas Combs, both of whom had been employed as waiters at Dick Campbell's cafe at Grand and Olive Streets, stated they had seen defendant at the Campbell place a number of times in company with George Franke and Sybil White.

According to the evidence of Edward Jarvis, the janitor, at police headquarters, defendant had frequently sent packages to George Franke and Sybil White while they were confined in the jail, and defendant had given him to understand that he was not to say anything about it to anybody.

According to the evidence of C. L. Ferricks, while defendant was assigned to the record room at police headquarters he had access to the records and reports

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made by various policemen of burglaries and other crimes.

Sybil White testified that she commenced living with George Franke in December, 1915, and described the places heretofore mentioned where they resided. She said that she met defendant while at Mrs. Enyart's place, and that George Franke, Mrs. Enyart and defendant were together almost every night; that while living at the Olive Street address, when Franke would come in after burglarizing a home, they would divide up the stuff and give Ray and Mrs. Enyart their pick out of everything; that she had heard defendant tell Franke where to go a number of times and remarked that he would watch the police headquarters so as to notify him. She said that defendant had a key to the room where they were living and visited there almost every evening; that the plunder would be divided either there or at Mrs. Enyart's. Frequently the entire crowd would visit cabarets after the spoils had been divided. She testified that defendant visited her at the jail and assured her that he had gotten considerable of the stolen goods that was in the room at 3724 Penrose Street out of the place after their arrest.

Other testimony in behalf of the State was given along substantially the same lines.

The defendant testified, in his own behalf, that he had been a member of the police force for more than ten years and had been dismissed for taking up a collection among the police force for the purpose of defraying the expense of securing the passage of a legislative measure to increase the salary of police officers by the 1917 General Assembly, which was in violation of a rule of the police department. He admitted that he knew George Franke, and had, at the latter's request, referred him to Mrs. Gray's rooming house at 3740 Olive Street.. He said that he had frequently seen Franke while performing his duties as traffic officer at Grand and Olive, and had gone with Franke to purchase a cigar, both at the Metropolitan Store and

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Campbell's Cafe, and also met him twice at Mrs. Enyart's place. Defendant, however, denied that he had ever directed Franke to any house to be burglarized, and denied that he ever received any loot or stolen plunder from him, and denied that he had an agreement of any kind to share in the fruits of his ill-gotten gains. He explained his visits to the jail, after the arrest of Franke and Sybil White, by saying that it was in response to a note which he had received from Franke, and he had sent over to them by Jarvis some old clothes so that they might present a neat appearance when taken to court. He further admitted that he frequently went to Franke's rooms at 3740 Olive Street but said that his purpose in going there was to visit Sybil White.

Davis Israel, Patrick J. Gaffney, Lawrence P. Walsh and Hugh Murphy took the stand, and each testified that the reputation of defendant for truth and veracity and as a law-abiding citizen was good.

Joseph J. Crites testified, in behalf of defendant, that he had been employed by the Police Relief Association of St. Louis, to further the interest of the bill pending before the Legislature to increase the salaries of police officers, and stated that he met defendant Cummins in Jefferson City in March, 1917, during the session of the Legislature, and that they went to the penitentiary together. He denied the conversation testified to by George Franke in respect to what occurred at the penitentiary.

The defendant, in his own behalf, denied any knowledge of Franke being a burglar until the latter's arrest; denied that he had ever received any of the stolen property which Franke said he had received; denied the testimony of Franke and Sybil White, to the effect that defendant had advised, counseled or assisted Franke, in any way, in his unlawful practices.

Defendant's evidence shows that he had been elected and re-elected several times as secretary of the Police Relief Association and had handled its money faithfully.

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The character witnesses aforesaid testified that defendant had the reputation of being a good officer.

The case was submitted to the jury under the evidence and the instructions of the court. Defendant was found guilty, as heretofore mentioned and appealed the case to this court.

I. The first error assigned by appellant reads: "The court erred in admitting evidence of other burglaries than the one specified in the indictment." Under this proposition defendant cites: State v. Daubert, 42 Mo. 242; State v. Spray, 174 Mo. 569; State v. Boatright, 182 Mo. 33.

Other Crimes.

In the Daubert case, supra, the evidence, in regard to other crimes than the one designated in the indictment, is not set out. WAGNER, J., upon page 246, said: "Upon the trial of an indictment for larceny, evidence of the commission of a separate and distinct larceny from that charged is inadmissible. [State v. Goetz, 34 Mo. 85.] But where the evidence offered directly tends to prove the particular crime charged, it is to be received, although it may also tend to prove the commission of another separate and distinct offense. [State v. Harrold, 38 Mo. 496.] To admit the evidence, there must be a connection or blending which renders it necessary that the whole matter should be disclosed, in order to show its bearing on the issue before the court."

In passing upon this question, it is well to keep in mind that in the above case the State was offering to show that defendant had been guilty of other and independent crimes, while in the case at bar, the owners of the property testified as to the burglary and larceny, followed up by the testimony of Franke, the alleged accomplice of defendant, that he had burglarized the residence of said parties, stolen therefrom the plunder mentioned in evidence, and divided the same with defendant under their previous arrangement. The State was attempting to show a conspiracy between Franke and defendant which had for its purpose the commission of said burglaries and larceny, as well as the division of

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the proceeds of same. Among other things the State endeavored to show that Franke had been for years a notorious burglar and thief; that defendant on account of his intimate relation with Franke, and those associated with him, must have known of the business in which he was engaged and actively aided him in pursuing same. On the other hand, the defendant's counsel examined Franke with reference to various burglaries and larcenies committed by him outside of St. Louis and outside of the State of Missouri. In other words, defendant undertook to show that Franke was such a notorious thief and burglar that no jury ought to give credence to his testimony.

Defendant's objection to this class of evidence arose in this way. The State had introduced testimony of the burglarizing of the Bennett, the Wiemeyer and the Dieckmann homes, without any evidence of the defendant's connection with the burglaries and larcenies, and without objection from defendant. When Abrams was introduced as a witness to show the burglarizing of his home, the defendant's counsel for the first time objected to the introduction of evidence relating to other burglaries than that described in the indictment, and moved to strike out that part of the testimony which did not relate to the Bennett indictment. This objection was overruled, and the State was permitted to prove that Franke committed each of said burglaries and larcenies, which were objected to, and sought to be stricken out. If the evidence thus produced by the State failed to connect defendant with these burglaries and larcenies, the admission of same did him no harm, for it furnished testimony in behalf of defendant, tending to blacken the reputation of Franke, and prove him to be unworthy of belief. If, on the other hand, after the State proved the commission of said burglaries and larcenies by Franke, there was evidence tending to show that defendant received a part of said plunder, it was for the jury to determine from all the facts and circumstances in

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evidence whether it was so received by virtue of a previous arrangement with defendant.

The Spray and Boatright cases, cited by defendant, are in line with the Daubert case, supra.

The facts heretofore set out, in our opinion, sustain the action of the trial court when considered in the light of our rulings upon this subject. [State v. Lewis, 273 Mo. l. c. 530, 201 S. W. 80; State v. Patterson, 271 Mo. l. c. 109; State v. Spaugh, 200 Mo. l. c. 594; State v. Bailey, 190 Mo. 280; State v. Collins, 181 Mo. l. c. 260-1; State v. Myers, 82 Mo. 558; State v. Othick, 184 S. W. l. c. 108.]

In State v. Spaugh, 200 Mo. l. c. 594, GANTT, J., very clearly states the law of this State, in respect to above subject, as follows: "There is no doubt that it is a general rule of criminal law in this State that evidence of separate and isolated crimes cannot be given against one on trial for a specific crime, but it is equally well established in this State that proof of another crime than the one for which the defendant is on trial is competent to prove the specific crime charged when it tends to establish the motive, intent or absence of mistake or accident or the identity of the person charged with the commission of the crime on trial. [State v. Collins, 181 Mo. l. c. 260, 261.]"

In State v. Bailey, 190 Mo. l. c. 284, we said: "Hence, as already said, we think this evidence was competent to establish the identity of the defendant as the person who committed the crime; to show that it was intentional and willful, and to show that he was one of a band organized together to commit crimes of the kind charged, and to connect the offense with which he is charged in this case as a part of a common, unlawful and felonious scheme."

In State v. Othick, 184 S. W. l. c. 108, we said: "Appellant contends that the court erred in admitting over his objection the evidence as to the larceny of the Brightwell and Holmes automobiles. We are unable to agree with this contention. From the evidence it ap-

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pears that the theft of these cars was but part of the 'common scheme or plan embracing the commission of two or more crimes, so related to each other that proof of one tends to establish the other.' The evidence therefore was clearly admissible. [State v. Bailey, 190 Mo. l. c. 280, 88 S. W. 733; State v. Hyde, 234 Mo. l. c. 226, 136 S. W. 316, Ann. Cas. 1912D, 191.]"

The other cases heretofore cited are in accord with above quotations. We accordingly overrule this assignment of error.

II. Appellant's second assignment of error, reads as follows: "The court erred in admitting evidence of the burglary of the Abrams house which occurred prior to the time that Franke became acquainted with the defendant and prior to the time when it is claimed the conspiracy between Franke and the defendant was formed."

Prior to Conspiracy.

This contention is without merit, for the following reasons: (a) The objection was made when Abrams was on the stand that it did not appear up to that time that defendant was connected with any of the burglaries, except that of Bennett's. Neither Franke, nor Sybil White, had then been examined as witnesses. The court could not anticipate at that time what the evidence would be in the way of connecting defendant with the burglaries, and properly overruled the objection then made. Now, on cross-examination of Franke, he stated that he had robbed either the Dieckmann home or the Abrams home on the same day, but before he first met defendant. After making this discovery, defendant did not then ask the court to exclude the testimony of either Dieckmann or Abrams, which had been formerly admitted, but let it stand on his original objection, which was properly overruled when made. (b) The evidence as to the Dieckmann and Abrams burglaries was competent, for the reasons stated in the preceding proposition, and because Franke testified that he divided the loot which he got from both homes, under the agreement which they made that night.

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In view of the foregoing, defendant's contention, supra, was properly overruled.

III. The third assignment of error, reads as follows: "The court erred in not requiring the State to elect at the close of the case whether it would stand upon the first count (burglary and larceny) or the second count (receiving stolen property)."

Election.

If the jury believed from the evidence that there was a conspiracy between Franke and defendant to burglarize the Bennett home and to divide the loot stolen therefrom, then the verdict reached in this case was proper. If, on the other hand, the jury had found in favor of defendant as to the conspiracy, but had been satisfied from the evidence that he had accepted from Franke the goods stolen from Bennett, knowing them to have been stolen, he might have been acquitted of the burglary and larceny, and convicted of receiving stolen property. The evidence was comprehensive enough to cover both issues and, hence, the court committed no error in refusing to sustain defendant's motion to require the State to elect, whether it would stand upon the first or second count of the indictment. It correctly declared the law, in respect to this matter, in its instruction numbered seven, which is amply sustained by the decisions of this court. [State v. Pace, 269 Mo. l. c. 686; State v. Christian, 253 Mo. l. c. 393; State v. Carragin, 210 Mo. l. c. 366; State v. Miller, 67 Mo. 604; State v. Green, 66 Mo. l. c. 644; State v. Sutton, 64 Mo. l. c. 108; State v. Daubert, 42 Mo. 242.]

The trial court was within the law in overruling defendant's motion to elect, etc., and properly informed the jurors as to their duty in respect to this subject.

IV. Defendant's fourth assignment of error, reads as follows: "The court erred in instructing the jury that it might find defendant guilty upon the uncorroborated testimony of an accomplice (in this case George Franke and Sybil Brown)." Appellant cites in sup-

Upon Testimony of Accomplices Alone.

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port of above contention, State v. Wilkins, 221 Mo. 444.

We are not advised in the above assignment of error, which instruction or instructions the defendant is complaining of, but herewith set out the two given by the court, numbered nine and ten, which read as follows:

"9. The court instructs the jury that one accomplice cannot, as a witness, corroborate the testimony of another witness who is an accomplice.

"10. The court instructs the jury that they are at liberty to convict the defendant on the uncorroborated testimony of an accomplice alone if they believe the statements as given by said accomplice in his testimony are true in fact and sufficient in proof to establish the guilt of the defendant; but the jury are instructed that the testimony of an accomplice in crime, when not corroborated by some person or persons not implicated in the crime, as to matter material to the issues, that is, matters connecting the defendant with the commission of the crime charged against him and identifying him as the perpetrator thereof, ought to be received with great caution by the jury, and they ought to be fully satisfied of its truth before they should convict the defendant on such testimony."

There is nothing in the Wilkins case which is antagonistic to either of the above instructions. That numbered ten has been in terms approved by this court in State v. Bobbitt, 215 Mo. l. c. 42, where it is fully considered and the leading authorities in this State cited in support of the conclusion there reached. To same effect are: State v. Harkins, 100 Mo. l. c. 672; State v. Jackson, 106 Mo. 179; State v. Woolard, 111 Mo. 248; State v. Crab, 121 Mo. 554; State v. Dawson, 124 Mo. 422; State v. Donnelly, 130 Mo. 642; State v. Kosky, 191 Mo. l. c 9. The foregoing authorities clearly support the action of the court in giving said instructions.

V. Appellant's fifth assignment of error, reads as follows: "Instruction No. 8-A given on behalf of the

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Assumption of Fact.

State was erroneous, in that it assumed that other burglaries had been committed and that this defendant had committed them, and the court erred in giving it." The above instruction reads as follows:

"8-A. The court further instructs the jury that evidence of other burglaries and larcenies were admitted by the court solely for the purpose of determining whether a conspiracy, agreement and common design existed between the defendant and one George Franke to burglarize various dwellings in the City of St. Louis and steal goods, wares and merchandise therefrom; and you are to consider this evidence for no other purpose, for you cannot convict the defendant of any other charge than the one for which he is now on trial."

Defendant's criticism of said instruction is not well founded. It does not assume "that other burglaries had been committed and that this defendant had committed them." It simply told the jury "that evidence of other burglaries and larcenies were admitted by the court solely for the purpose of determining whether a conspiracy" existed between defendant and Franke. There is nothing in the instruction which could be construed as an intimation of the court's views of the evidence adduced. On the contrary, the jury were left to consider this question without any expression of opinion from the court.

The instruction properly declared the law, and is sustained by the authorities heretofore cited under Proposition I.

Sufficiency of Evidence.

VI. Defendant claims that the evidence was insufficient to sustain a conviction. In view of the full statement of facts heretofore made, we do not deem it necessary to again go over this subject as it was the province of the jury to pass upon the facts, under proper instructions of the court. The latter tried the case, in our opinion, with marked ability and fairness. The instructions covered every possible theory of the case in a

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satisfactory manner, and we do not find that defendant has any just grounds of complaint as to the merits of the controversy. We are of the opinion that on the facts presented in the record, the verdict as returned was supported by the testimony and is within the purview of the law.

The judgment below is accordingly affirmed. *White* and *Mozley, CC.*, concur.

PER CURIAM:—The foregoing opinion of RAILEY, C., is adopted as the opinion of the court. All of the judges concur; *Faris, J.*, in result.

MATTIE BELLE BENNETT v. CITY OF NEVADA, Appellant.

Division Two, July 5, 1919.

1. **EJECTMENT: Ouster: Improvement of Street: Verbal Direction: Trespass.** In ejectment against a city for a strip of land, wherein the answer is a general denial, the burden is upon plaintiff to prove that the city was in the wrongful possession of the land at the time the action was brought; and the mere act of the street commissioner in going upon said strip and grading it for street purposes, in obedience to a verbal instruction of the city council, is not the act of the city, and is not sufficient to establish wrongful possession by the city or to maintain ejectment against it, but amounts to no more than a trespass by him.

2. **———: Street Improvement: Ordinance Necessary.** In order to establish, open, extend or alter a street the mayor and city council must by ordinance provide that such improvement shall be made; a mere resolution or verbal motion by the council, instructing the street commissioner to improve a named strip of land, though unanimously adopted and made a matter of record, is void and does not bind the city, and if in obedience to it the street commissioner enters upon the land and grades it for street purposes, his act amounts to no more than a trespass, for which he and possibly those acting with him are liable in damages for the injury done the owner.

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Appeal from Vernon Circuit Court.—*Hon. B. G. Thurman,* Judge.

REVERSED.

A. G. King and *M. T. January* for appellant.

(1) Ejectment must be brought against a party in possession, and plaintiff must allege in his petition that defendant is in possession, and must prove it when defendant denies possession. Clarkson v. Stanchfield, 57 Mo. 573; Shaw v. Tracey, 95 Mo. 531. (2) A city can open or establish streets only by ordinance. R. S. 1909, secs. 9261, 9262. (3) When the statute prescribes that the powers of a city may be exercised by the passage of an ordinance, no other method is allowable. Rumsey Mfg. Co. v. Schell City, 21 Mo. App. 175. (4) A municipality can only be held responsible for the act of its officers when the act is authorized by ordinance, in cases where the city, as a corporation, has power to authorize action only in that way. Stewart v. City of Clinton, 79 Mo. 603; Werth v. City of Springfield, 78 Mo. 107; Reed v. Peck, 163 Mo. 333.

Chas. E. Gilbert for respondent.

(1) The owner of land wrongfully taken by a city and converted into and used as a public street, may maintain ejectment against the city for its recovery. Armstrong v. City of St. Louis, 69 Mo. 309, Anderson v. City of St. Louis, 47 Mo. 484; Walther v. Warner, 25 Mo. 277; Hammerslough v. City of Kansas, 57 Mo. 221; Warner v. Railroad Co., 57 Mo. 275; Evans v. Railroad Co., 64 Mo. 453; Bradley v. Mo. Pac. Ry. Co., 91 Mo. 500; McCarty v. Clark County, 101 Mo. 182.

MOZLEY, C.—This action is ejectment, with ouster laid on the —— day of July, 1915, and is brought against the City of Nevada alone as defendant.

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The real estate involved is described as follows: "Commence at the southwest corner of the east half of Lot two of the northwest quarter of Section Four, in Township Thirty-five, Range Thirty-one, in the City of Nevada, County of Vernon and State of Missouri, from thence run north twenty rods, thence east twenty rods, and from the point thus found as a place of beginning, run north ninety feet, thence east one hundred and sixty feet, thence south ninety feet, thence west one hundred and sixty feet to place of beginning." It will thus be seen that the lot is one hundred and sixty feet east-and-west and ninety feet north-and-south. The particular part of the lot involved here is twelve or fifteen feet off of the south end thereof, which lies between Main and Ash Streets. Plaintiff claims that the defendant city, on the date above set forth, ousted her from the possession thereof, and took the possession itself, and that the street commissioner, acting for the city, as it is alleged, did great damage thereon by plowing and grading the soil. The answer of defendant was a general denial. The case was tried before a jury in the Circuit Court of Vernon County, at the February term, 1917, which resulted in a verdict for plaintiff for possession of the land in controversy and fifty dollars damages, and monthly rents and profits fixed at $1.50 per month, upon which verdict judgment was duly entered. Motion for new trial being overruled at the same term of the court. defendant duly appealed the case to this court.

About June 15, 1915, at a meeting of the city council of defendant, it was verbally moved, seconded and carried "that the street commissioner, under the supervision of the city engineer, be instructed to put Floral Avenue, between Main and Ash streets (the strip in controversy) in proper condition." Counsel for both sides agree that no ordinance was passed authorizing the work to be done. Counsel for plaintiff proved by the the city clerk that the City of Nevada had never passed an ordinance with reference to this street, this with the

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view of relying upon the verbal motion or resolution above set forth, upon which predicate he seeks to bind the corporation. Mr. January, for the city, made the following objection in the nature of consenting to the correctness of the proof offered by plaintiff that no ordinance had ever been passed:

"Well, I will get my objection in. The defendant objects to the introduction of the minute book of the council in evidence, for the reason that it already appears in evidence that the city of Nevada never passed any ordinance opening or ordering opened any street over the ground in controversy."

As above stated, the answer of defendant was a general denial, which placed the burden on the plaintiff to prove that defendant (the corporation) was in the wrongful possession of the strip of land in controversy at the date of the institution of this suit.

Plaintiff contends, as we understand the position of her counsel, that the act of the street commissioner in grading the strip of land involved was the act of defendant (the corporation), and that on account thereof ejectment can be maintained against it. We are unable to agree with this contention. We think, and so hold, that the act of the street commissioner in grading said strip of land was done without authority and was, therefore, not binding upon defendant, because, as the record discloses, no ordinance was passed by the legislative department of the city authorizing any one to go upon plaintiff's lot and do grading or do any other act calculated to damage the property.

It has been held by this court, in harmony with the express provisions of the statute, that in order to establish, open, extend or alter any street, avenue ,etc., the mayor and board of aldermen shall provide by ordinance that such improvement shall be made. In other words, the adoption of the ordinance is the first step toward making the improvement and unless that step is taken in the legal way, the proposed improvement cannot be legally made. A mere resolution or

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verbal motion by the city council to make such improvement is absolutely void, and could not bind the city, and the act of the street commissioner in going upon the land in question and grading it without the consent of the owner amounts to no more than a trespass on his part, for which he and possibly those assisting him rendered themselves liable in damages for the injury done the plaintiff. [R. S. 1909, secs. 9161-9162; Reed v. Peck, Guitar and Watson, 163 Mo. 333, l. c. 338; Wheeler v. City of Poplar Bluff, 149 Mo. 36, l. c. 45-46; City to use v. Eddy, 123 Mo. 546, l. c. 558-559.]

We think it is clear that, under this record, ejectment cannot be maintained against the defendant city. Having reached this conclusion, it will not be necessary to notice other points made by appellant. The demurrer requested by appellant at the close of the case ought to have been sustained. Let the judgment be reversed. *White* and *Railey, CC.*, concur.

PER CURIAM:—The foregoing opinion of MOZLEY, C., is adopted as the opinion of the court. All of the judges concur.

STERLING P. BOND, Appellant, v. LUTHER H. WILLIAMS et al.

Division Two, July 5, 1919.

1. **ASSAULT AND BATTERY: Circumstances.** In an action for damages caused by assault and battery it is always permissible to show the circumstances under which the alleged assault was committed.

2. **———: Provocation: Punitive Damages: Mitigation: Malice.** In an action for damages for assault and battery, wherein punitive damages are asked, whether malice were present is an issue, and defendant may show the circumstances of provocation in mitigation of such damages, though such evidence is inadmissible in mitigation of actual damages.

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3. ———: ———: **Abusive Language: Recent Occurrence.** In order that evidence of provocation, such as abusive language, may be introduced in mitigation of punitive damages, the provocation must have occurred at the time of the assault, or so recently as to warrant an inference that the defendant was still laboring under the excitement caused by it. But no definite limits for a "cooling time" can be set. So that where plaintiff, in argument to a jury, violently abused two witnesses, characterizing them as liars and perjurers, and an hour and a half afterwards or less, as he was going from the court house to his hotel, they assaulted him, evidence of the violent language used by him was admissible, in mitigation of punitive damages, in his action against them for damages for assault and battery.

4. ———: **Malice: Definition.** An instruction declaring "malice in its legal sense does not mean mere spite, ill-will or hatred, as it is ordinarily understood, but does mean that state of disposition which shows a heart regardless of social duty and fatally bent on mischief" is appropriate in an action for assault and battery, and does not materially differ in its meaning from one defining malice as "a wrongful act done intentionally without legal justification or excuse;" and if appellant asked an instruction defining malice in the latter words and respondent the former instruction, and both were given, appellant had the benefit of both definitions, and hence cannot complain that the court did not use only his to define the term.

5. ———: **Verdict for Defendant: Nominal Damages.** Where the evidence is that the injury inflicted upon plaintiff was slight, and he presented no request for nominal damages, though in law entitled to nominal damages, a verdict for defendants, approved by the trial court, and there being no assignment in the motion for a new trial that he should have been allowed at least nominal damages, will not be disturbed on appeal on the theory that the provocation could not mitigate the actual damages unless it amounted to justification, and no actual damages were allowed.

6. **VERDICT: Against Evidence: Motion for New Trial: Insufficient Assignment.** An assignment in the motion for a new trial that the verdict is "against the evidence" and "against the law," however often repeated therein, is insufficient to permit a review by the appellate court of the evidence to show that the verdict was excessive, or inadequate, or unsupported in any respect by evidence, or erroneous in any specific particular, and in his action for assault and battery does not assign as a ground therefor that plaintiff was at least entitled to nominal damages.

Appeal from St. Louis City Circuit Court.—*Hon. Thomas L. Anderson,* Judge.

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AFFIRMED.

Lee Meriwether and *S. P. Bond* for appellant.

(1) The court erred in striking out the words "aid, abet" in plaintiff's amended petition. The rule is well settled that one who is present, aiding and abetting another who commits an assault is as much a principal as he who strikes the blow or fires the shot. Murphy v. Wilson, 44 Mo. 313; Gray v. McDonald, 104 Mo. 303; State v. Orrick, 106 Mo. 111; Miles v. Lucas, 110 Mo. 219; Brouster v. Fox, 117 Mo. App. 711; Schraper v. Ostmann, 172 Mo. App. 610. (2) The court erred in allowing witness Marbury to testify to the language used by plaintiff in his argument to the jury. Cox et al v. Whitney, 9 Mo. 531; Collins v. Todd, 17 Mo. 537; Avery v. Ray, 1 Mass. 11; Hoagland v. Forest Park Highlands Amus. Co., 170 Mo. 343; Lee v. Wooley, 19 Johns. (N. Y.) 318; State v. Atchley, 186 Mo. 174, 179; Maynard v. Beardsley, 7 Wend. (N. Y.) 560, 564; Rochester v. Anderson, 1 Bibb. (Ky.) 428; Keiser v. Smith, 46 Am. Rep. 342, 364, 71 Ala. 481; Millis v. Forrest, 2 Duer, 310; Ireland v. Billiott, 5 Iowa, 478; Thrall v. Knapp, 17 Iowa, 468; Le Laurin v. Murray, 75 Ark. 232; Dupee v. Lentine, 147 Mass. 580; Murphy v. McGrath, 79 Ill. 594, 596; Linder v. Hine, 84 Mich. 517; Elsworth v. Thompson, 13 Wend. (N. Y.) 658, 663; Roach v. Caldbeck, 64 Vt. 593. (3) The court erred in allowing the evidence of the witnesses of what the appellant said an hour and a half or more before the assault concerning Marbury, Luther Williams and King Williams, or either of them, in his argument before the jury in the case of the State of Missouri against John McBrien and to draw their conclusions as to the effect upon the audience, etc., in mitigation of damages or in extenuating the offense. (4) The remarks of the appellant in the case of the State v. McBrien were made as an attorney in behalf of his client and were therefore privileged. 3 Am. & Eng. Ency Law (2 Ed.), 294, 295. (5) No in-

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struction as to malice on behalf of defendant or defendants should be given under the law and the evidence in this case. The instruction as given is erroneous in itself. State v. Wray, 172 Mo. 639; State v. Scoggs, 159 Mo. 581. (6) The court erred in not granting plaintiff a new trial on the ground that the jury failed to award him actual damages. Le Lauren v. Murray, 75 Ark. 232, 238; Coxe v. Whitney, 9 Mo. 531; Collins v. Todd, 17 Mo. 537; Goldsmith v. Jay, 61 Vt. 488; Lovelace v. Miller, 43 So. (Ala.) 734.

Fauntleroy, Cullen & Hay and *B. H. Boyer* for respondents.

(1) The plaintiff having elected to proceed against defendants upon the charge of conspiracy and assault as the result thereof must recover upon that theory or not at all—and hence must recover against all defendants or none. Aronsen v. Ricker, 185 Mo. App. 528, 533; Rice v. McAdams, 62 S. E. 774; Hoblichtel v. Yawbert, 39 Mo. 877; Laverty v. Vanarzdale, 65 Pa. St. 507; Hines v. Whitehead, 99 N. W. (Ia.) 1064; Shafer v. Ostman, 148 Mo. App. 648. (2) The question of whether or not plaintiff had sustained any actual damage was also, by plaintiff's own instructions, left to the jury, and, having found against plaintiff on each hypothesis, plaintiff cannot now be heard to complain. Berkson v. K. C. Cable Ry. Co., 144 Mo. 229; Ellis v. Harrison, 104 Mo. 250. (3) Appellant cannot complain of the court in not instructing the jury differently because he caused such failure by failing to ask other or different instructions. Anchor Milling Co. v. Walsh, 24 Mo. App. 191. (4) Appellant asked and the court gave instructions virtually limiting his recovery to a verdict against all the defendants and warranted the jury in believing that unless he was so entitled to recover, he was not entitled to recover at all. Having thus limited himself and invited error, if error it be, appellant is in no position now to complain. Schafer v. Ostmann, 148 Mo. App. 648. (5)

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While it is the duty of the court to instruct the jury in writing on all questions of law arising in the trial of a civil case, yet it is not the court's duty to so instruct unless instructions are asked: R. S. 1909, sec. 1987; Coleman v. Drane, 116 Mo. 387; Brown v. Printing Co., 213 Mo. 611; Nolan v. Johns, 126 Mo. 159; Marion v. Railroad, 127 Mo. App. 129; Morgan v. Mulhall, 214 Mo. 461, 464; Powell v. Railroad, 255 Mo. 456; Sweet v. Bunn, 195 Mo. App. 503; Willis v. Miller, 189 Mo. App. 325.

WHITE, C.—Plaintiff brought this suit in the Circuit Court of the City of St. Louis, claiming damages for assault and battery. The petition alleged that on the 26th day of March, 1914, in the City of Farmington, the defendants unlawfully assaulted, beat and bruised the plaintiff, injuring him in a manner described. It was further alleged that the assault and battery were in pursuance of a conspiracy. Judgment was prayed for actual damages in the sum of five thousand dollars and punitive damages in the sum of ten thousand dollars. The defendants filed a general denial. On trial of the case there was a verdict and judgment for the defendants from which the plaintiff appealed. The circumstances out of which the alleged cause of action arose are as follows:

On March 26, 1914, the plaintiff, who is an attorney, was engaged at Farmington representing the defendant in the case of the State v. John O'Brien. Two of these defendants, Marbury and Luther Williams, were witnesses for the State in that trial. Defendant George K. Williams was the brother of Luther. In his argument to the jury on behalf of his client which took place in the evening, the plaintiff violently abused Williams and Marbury in the presence of a number of people, characterizing them as liars and perjurers. All three of the defendants were in the courthouse at the time, sitting in different parts of the house. After the argument was over and the case submitted

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to the jury, the plaintiff and his associate counsel walked out of the courthouse and went across the street to the hotel. As they approached the hotel the defendant Marbury accosted the plaintiff and demanded that he apologise for what he had said in the course of his speech. It appears that Marbury attempted to strike Bond, but was held by a friend from behind, so that his purpose in that respect was frustrated. About that time defendant Luther Williams appeared and struck the plaintiff, knocking him down. Defendants offered some testimony to the effect that when Marbury accosted the plaintiff he made a motion as if to draw a weapon, and then Luther Williams struck. There is also some evidence that Mr. Bass, Mr. Bond's associate, made a like demonstration before Williams struck.

Each of the defendants testified that he was aroused to extreme anger by the language of the plaintiff, but that there was no concert of action, and no conversation between them after the plaintiff made his speech, until the encounter took place. The case was submitted to the jury on instructions offered by the plaintiff to the effect that if they should find that the defendants, or either of them, acting alone or in concert with the same purpose, assaulted and beat the plaintiff without justification or excuse, they should find for the plaintiff.

I. The principal error complained of was the admission of evidence offered by the defendants showing the abusive language used by the plaintiff while addressing the jury. This was testified to by each of the defendants and other witnesses. The defendants testified that they were very much outraged by the language used, and that the excitement and indignation remained with them up to the time of the assault.

Cooling Time.

In an action for damages caused by assault and battery it is always permissible to show the circumstances under which the alleged assault was committed. Where punitive damages are asked, whether malice

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was present is an issue, and it is permissible to show the circumstances of provocation in mitigation of such damages, though such evidence is inadmissible in mitigation of actual damages. [Joice v. Branson, 73 Mo. 28; Gray v. McDonald, 104 Mo. l. c. 314.] In order, however, that evidence of provocation, such as abusive language, may be introduced for the purpose of mitigation the provocation must have occurred at the time of the assault, or so recently as to warrant an inference that the defendant was still laboring under the excitement caused by it.

Appellant, while admitting the principle of law stated, argues that a sufficient time had elapsed after the provocation and before the assault to show that the attack was made in cool blood and with malice. The authorities are not altogether in agreement as to what would be sufficient time for the passions aroused by such a provocation to subside so that it would be presumed the assault was deliberate; that is, they do not set definite limits for a period designated as a "cooling time." [State v. Wieners, 66 Mo. l. c. 27.] In general it is said that the length of time necessary to remove the excuse of provocation depends upon the circumstances of each case. As said by this court in the case of State v. Grugin, 147 Mo. l. c. 51: "No precise time, therefore, in hours or minutes, can be laid down by the court as a rule of law, within which the passions must be held to have subsided and reason to have resumed its control, without setting at defiance the laws of man's nature, and ignoring the very principle on which provocation and passion are allowed to be shown, at all, in mitigation of the offense." This passage is quoted by the court from the case of Maher v. People, 10 Mich. 212.

The appellant cites two Missouri cases in support of his position. The case of Coxe v. Whitney, 9 Mo. 531, where plaintiff, editor of a newspaper, published an article reflecting on defendant's wife. Two days later, defendant went to the room of plaintiff and made

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the assault. The court held that evidence of the provocation was inadmissible in mitigation of damages. The court said, p. 535: "The evidence of provocation which is allowed to mitigate the damages must be so recent 'as to induce a fair presumption that the violence was done during the continuance of the feelings and the passions excited by it.'" The court then makes this statement, l. c. 536: "But *ira furor brevis est*: What is done twenty-four or forty-eight hours after the provocation received, is not the result of that passion, but is the deliberate infliction of vengeance for an injury, real or supposed."

The other case is Collins v. Todd, 17 Mo. 537. In that case the plaintiff used insulting language to the defendant's niece, and this was communicated to the defendant on Sunday. The assault occurred on the succeeding Monday or Tuesday, and the court held evidence of the provocation was inadmissible, because sufficient time had elapsed to allow the presumption that the person had cooled. No other case is cited in this State by appellant holding that a shorter time between the provocation and the assault was sufficient to exclude the evidence, nor do cases in general from other States generally support the appellant's position. In the case of Dupee v. Lentine, 147 Mass. 580, the provocation occurred sometime before the assault, but the defendant learned of it just ten minutes before the assault, and the evidence was held inadmissible, but that case is contrary to the weight of authority. The case of Thrall v. Knapp, 17 Iowa, 468 is cited. In that case the provocation occurred a week before the assault, but information in relation to it was conveyed to the defendant three hours before and the evidence of provocation was held improperly admitted. It appears in that case that the court gave attention to the time in which the provocation occurred rather than the time at which the information reached the defendant. It was said that "no circumstances or provocation on the week before or the day before the assault, or any other time

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than the identical day of the assault, could be offered in evidence."

In the case of Prentiss v. Shaw, 96 Am. Dec. 475, 50 Maine, 427, the provocation was two hours before the assault, and the evidence was held admissible.

The case of Ward v. White, 86 Va. 212, 19 Am. St. Rep. 883, is where an abusive article appeared in a newspaper concerning the defendant and the next day the defendant committed the assault for which he was sued. The newspaper article was held properly admitted.

In Biggs v. State, 29 Ga. 723, the plaintiff offered an indignity to the defendant's wife one evening and on the following morning the assault occurred. Evidence of the affront was held admissible.

In the case of Dolan v. Fagan, 63 Barbour (N. Y.) 73, the plaintiff insulted the defendant with opprobrious language on a number of occasions before the assault took place. The trial court ruled that the defendant could show anything that took place on the day of the assault or the day before, but not what took place several days before. The case was reversed on the ground that the ruling excluding what took place several days before was erroneous.

In Genung v. Baldwin, 79 N. Y. Supp. 569, it was held that where the defendant on the same day and prior to the assault read some article in defendant's newspaper severely criticizing him, it might be shown in evidence in an action for assault and battery. There is a similar ruling in Marriott v. Williams, 152 Cal. 705.

In the case of Leachman v. Cohen, 91 S. W. (Tex.) 809, a livery-stable keeper hired a horse to a young man and while the horse was out word came to him that the young man was abusing the horse and driving recklessly. When the young man came in, it appears several hours later, the livery-stable keeper assaulted him, was sued for damages afterwards, and it was held that the abuse of the horse and the knowledge brought to the defendant was admissible in mitigation. In that case

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the rule was thus stated, p. 810: "Immediate provocation is such as happens at the time of the assault or so recently before it as to induce the presumption that the violence was committed under the immediate and continuing influence of a passion thus wrongfully excited."

The case of Cook v. Neely, 143 Mo. App. 632, is where a school-teacher violently whipped the son of the plaintiff at the afternoon recess; that evening about nightfall the defendant met the plaintiff and assaulted him. The suit was for damages caused by that assault. The Kansas City Court of Appeals held that the evidence of the provocation by whipping the plaintiff's son was properly admissible in mitigation of exemplary damages. In that case the provocation occurred several hours before the assault, and the boy who was whipped conveyed the information to his father as soon as he went home after the dismissal of school; two or three hours must have elapsed between the time the defendant was first excited by the information and the time the assault took place.

The same question arises in criminal prosecutions for murder where the evidence of provocation is offered to reduce the grade of the offense to manslaughter. "The cooling time" is spoken of in such cases in the same manner as it is used in civil cases for assault and battery. To reduce a homicide to manslaughter in the fourth degree under the statute, Section 4467, the killing must have occurred "in the heat of passion." A leading case is State v. Grugin, 147 Mo. 39, quoted above. In that case the defendant was charged with murder. The man killed had committed an outrage upon his daughter some days before. The father learned of the outrage at nine o'clock in the morning, he hunted up the offender and killed him at three o'clock in the afternoon. The evidence of the provocation and the information was held admissible. It was held that character of the provocation and its tendency to continue the excited state of mind must always be considered

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to determine whether the cooling time has been sufficient. In that case the provocation was extraordinary. It has been cited in later cases without criticism. [State v. Vest, 254 Mo. l. c. 465.]

While cases showing the provocation which would reduce homicide to manslaughter are cited, it is apparent that the provocation which would mitigate punitive damages in a civil action would not always be sufficient to reduce homicide to manslaughter; for instance, mere words are held not sufficient provocation to reduce homicide to manslaughter, but mere words, it is held, may produce a state of mind and arouse a passion that would mitigate damages caused by consequent assault.

Appellant asserts that his violent language offered in evidence occurred an hour and a half before the assault. The evidence fails to show the exact time. Defendants assert that the time was less. At any rate, after the offensive language was used the court continued in session and another address to the jury followed that of plaintiff, before the adjournment. The assault took place within a very few minutes after court adjourned. Under all the authorities the evidence was admissible and it was for the jury to say whether the defendants under the circumstances were actuated by malice, which would authorize punitive damages. The instructions directed the jury that they could consider such evidence only in connection with an award of punitive damages.

II. Appellant complains of an instruction given on behalf of defendants defining malice as follows: "Malice in its legal sense does not mean mere spite, ill-will or hatred, as it is ordinarily understood, but does mean that state of disposition which shows a heart regardless of social duty and fatally bent on mischief."

Malice.

That is the definition usually given in homicide cases where the presence or absence of malice may

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determine the grade of the crime, but the definition has been approved by this court in an action for damages for assault. [Morgan v. Durfee, 69 Mo. l. c. 480.] And it seems to be a generally approved definition. [18 R. C. L. p. 2, sec. 2.] The case of Morgan v. Durfee has been cited with approval in the case of Boyd v. Railroad, 236 Mo. l. c. 93.

Appellant does not contend that the definition is erroneous so far as it goes, but complains that the usual definition found in the books should have been added, to-wit: malice means a wrongful act done intentionally without legal justification or excuse.

The case of State v. May, 172 Mo. 639, includes both definitions in one, and upon that case the appellant bases his complaint. In reality, however, the two definitions are not very different in meaning. At the instance of plaintiff the court gave an instruction containing the definition which the appellant complains was left out of the defendant's instruction; so that the plaintiff had the benefit of both, and has no cause for complaint.

III. Finally the appellant argues that the verdict ought to be set aside and a new trial granted because he was allowed no actual damages. The argument is that the provocation could not mitigate the actual damages unless it amounted to justification. Instructions given on behalf of the plaintiff authorized the jury to find for the plaintiff against all defendants, provided there was a conspiracy or they acted together for a common purpose. There was little or no evidence on which to base that instruction, and the verdict of the jury is conclusive that there was no conspiracy. George K. Williams, defendant, didn't attempt to assault the plaintiff at all; Marbury made as if to assault him, but was held by friends, so that he committed no assault. The only assault of which there was any evidence was made by Luther H. Williams. Since there was a finding of no conspiracy, and no concert of action

Nominal Damages.

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this objection of the appellant can only apply to the assault made by Luther Williams. Some of the evidence indicates that the injury inflicted upon plaintiff was of a very slight nature, so that the jury might have found his damage was only nominal. This court is slow to set aside a verdict, in a case of this character, on the ground of inadequacy. [Pritchard v. Hewitt, 91 Mo. 547; Dowd v. Air Brake Co., 132 Mo. 579.] There was some evidence, though slight, that plaintiff and his companion made hostile demonstration before Luther Williams struck. The jury might have found plaintiff was not without fault at that time. [McCarty v. St. Louis Transit Co., 192 Mo. l. c. 403; Gorham v. St. L., I. M. & S. R. Co., 112 Mo. App. l. c. 208.]

The trial court overruled plaintiff's motion for a new trial, and therefore determined the verdict was not against the weight of evidence.

It is possible that the plaintiff would have been entitled to nominal damages had the question been properly presented. Some authorities hold that where the action sounds in damages only, the failure to prove actual damages is a failure to make out a case, and, though an actual violation of plaintiff's rights is proven, there can be no recovery. [8 R. C. L. sec. 5, p. 426; Woodhouse v. Powles, 8 L. R. A. (N. S.) l. c. 787.] On the other hand, the general rule is that any violation of one's rights, whether actual damages is inflicted or not, whether the action sound in tort for personal injuries, or otherwise, in the absence of actual damages, at least nominal damages may be recovered. [1 Suth. on Damages, sec. 9; Dailey v. Houston, 58 Mo. 361, l. c. 369; King v. St. Louis, 250 Mo. 501, l. c. 513.]

But the plaintiff did not assign as a ground for sustaining his motion for new trial that he should have been allowed at least nominal damages against Luther Williams. The objection to the verdict, repeated in different forms in his motion for a new trial, is that the verdict was "against the evidence" and "against the law." Such objections uniformly have been held in-

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sufficient to permit a review by this court of the evidence to show the verdict was excessive, or inadequate, or unsupported in any respect by evidence, or erroneous in any specific particular. [Polski v. St. Louis, 264 Mo. l. c. 462; Disinfecting & Mfg. Co. v. Bates Co., 273 Mo. l. c. 304; Cook v. Clary, 48 Mo. App. l. c. 169; State v. Scott, 214 Mo. l. c. 261; Raifeisen v. Young, 183 Mo. App. l. c. 511; Brosnahan v. Best Brewing Co., 26 Mo. App. l. c. 390.]

All instructions asked by plaintiff were given except one relating to the exclusion of evidence. We are not prepared to say the trial court erred in overruling the plaintiff's motion for a new trial.

The judgment is affirmed. *Roy C.*, absent.

PER CURIAM:—The foregoing opinion of WHITE, C., is adopted as the opinion of the court. *Williams, P. J.*, and *Walker, J.*, concur, *Faris, J.*, concurs in result.

THE STATE ex rel. BERT JOHNSON, Collector, v. MERCHANTS & MINERS BANK et al., Appellants.

THE STATE ex rel. BERT JOHNSON, Collector, v. CENTRAL NATIONAL BANK OF CARTHAGE et al., Appellants.

In Banc, July 7, 1919.

1. **TAXATION: Board of Equalization: Judicial Acts: Certiorari.** The State Board of Equalization in fixing the value of property in any county acts judicially, and its valuations have the force and effect of judgments of courts. Of course, if in making its valuations it exceeds its powers or statutory jurisdiction, and such fact appears upon its record, the courts can quash its judgment by *certiorari;* but the courts cannot nullify its judgment in a collateral proceeding.

2. ———: ———: ———: **Collateral Attack.** The action of the State Board of Equalization being judicial in character its judgment cannot be attacked in a collateral proceeding. To be overthrown

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there must be a direct attack upon the judgment itself for the purpose of vacating, annulling and setting it aside. It cannot be annulled by a showing, when suit is brought on a tax bill against a bank, that the board valued and assessed defendant's property at one half its true value and all other personal property in the county at forty per cent of its true value. Such a defense would be a collateral attack on the judgment, and is therefore unavailable, and evidence to show such discrimination is incompetent.

Appeal from Jasper Circuit Court.—*Hon. R. A. Pearson,* Judge.

JUDGMENT MODIFIED AND AFFIRMED.

J. W. Halliburton, A. E. Spencer and *Howard Gray* for appellants.

(1) The evidence proves conclusively that during the years 1911 to 1915, inclusive, bank stocks were assessed in Jasper County at fifty per cent of their true value, while no other property in the county was assessed at more than forty per cent of its value; that banks, prior to the institution of these suits, paid all the taxes which should have been assessed against them had they not been assessed higher than other property according to value. Mercantile Trust Co. v. Schramm, 190 S. W. 886; Iowa Cent. Ry. Co. v. Board of Review, 157 N. W. 731; Ewert v. Taylor, 160 N. W. 797. (2) The evidence shows that it had been the practice, understanding and settled policy, for many years, for the assessor and the County Board of Equalization in Jasper County to assess the personal property of the county on a basis of forty per cent of its true value, and real estate on a basis of thirty per cent; that the State Board of Equalization, with the certificate of the county clerk before it, showing that real estate and personal property had been assessed on this basis, arbitrarily raised the assessment on bank stock to fifty per cent. This is unjust and an illegal discrimination, and it is no answer to say that the stockholders of the banks have no right to complain because their property

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was not assessed at its full value in money as required by law. Bank v. Treasurer of Lucas Co., 25 Fed. 749; Eminence Distillery Co. v. Henry Co. Board, 200 S. W. 347; Porter v. Langley, 155 S. W. 1042; Lively v. Railroad Co., 120 S. W. 852; Chicago, B. & Q. R. R. Co. v. Atchison County, 54 Kan. 781; Iowa Cent. Railroad Co. v. Board of Review, 157 N. W. 731; First Natl. Bank v. Chapman, 173 U. S. 205; First Natl. Bank v. Christianson, 118 Pac. 778; First Natl. Bank v. McBride, 149 Pac. 353; State ex rel. v. Osborn, 83 N. W. 357; Drew Co. Timber Co. v. Board, 187 S. W. 942; Barz v. Board of Equalization, 111 N. W. 41; Nevada-California Power Co. v. Hamilton, 235 Fed. 317. (3) The plaintiff claims that even though all the matters alleged in defendants' answer are true, inasmuch as this is an action at law for the taxes no equitable defense can be successfully made, and that the defendants are absolutely without any remedy. We claim all of the authorities are to the contrary. First National Bank v. Treasurer of Lucas Co., 25 Fed. 749; Nevada-California Power Co. v. Hamilton, 235 Fed. 317; Arosin v. London & N. W. Am. Mtg. Co., 83 N. W. 339; Board of Comrs. Garfield Co. v. Field, 162 Pac. 733; Porter v. Langley, 155 S. W. 1042; Raymond v. Chicago Union Trust Co., 207 U. S. 20; First Natl. Bank v. McBride, 149 Pac. 353; Chicago, B. & Q. R. Co. v. Atchison Co., 54 Kan. 781; First Natl. Bank v. Christianson, 118 Pac. 778. (4) We admit that the general rule is that where the laws of a State provide for a hearing before the State Board of Equalization and an appeal from its decision, the remedy is exclusive; but in this State there is no provision for the appearance before the State Board, for any hearing or an appeal from its decision in assessing bank stock, and the only remedy the taxpayer has is to enjoin the collection of the excess or, when sued for the taxes, to set up the facts as he would were he bringing a suit to enjoin. In this case the defendants are not in a position to bring suit to enjoin because until these

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suits were filed no effort was made or had been made to collect the excess, but there was a tacit understanding that the same would not be collected. In any event, in this State the old common law procedure of requiring the defendants to bring a suit to enjoin the collection of a tax and ask to have the collector's suit at law postponed until the court had heard the equity case, no longer prevails; but under our code all can be accomplished in the one suit by the equitable answer to the plaintiff's cause of action. Martin v. Turnbaugh, 153 Mo. 172; Swope v. Weller, 119 Mo. 556; Dwyer v. Rohan, 99 Mo. App. 120.

R. A. Mooneyhan and *J. D. Harris* for respondent.

(1) The State Board of Equalization is a creature of the Constitution of the State, being created by Section 18 of Article 10 of the Constitution. By that section it is made the duty of the board to adjust and equalize the valuation of real and personal property, among the several counties. This court has ruled that the board has the inherent power to proceed to the performance of these duties without legislative authority. Railway v. State Board of Equalization, 64 Mo. 294; State ex rel. v. Vaile, 122 Mo. 33. It is further provided in the foregoing section of the Constitution that the board shall perform such other duties as are or may be prescribed by law. The Legislature has by Section 11412 provided the plan of equalization to be pursued by the State Board of Equalization, in its performance of its duties. And as there must be an end to the matter of affixing values somewhere, it is a wise law that has made the finding of the State Board of Equalization final, so long as its proceedings are not vitiated by fraud or illegality. Mercantile Trust Co. v. Schramm, 269 Mo. 489, Missouri ex rel. Hill v. Dockery, 191 U. S. 165, 48 L. Ed. 133. (2) The Supreme Court of the United States, that the State Board of Equalization has the power to classify the

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various kinds of property for the purpose of fixing valuations thereon. Mercantile Trust Co. v. Schramm, 269 Mo. 489; Missouri ex rel. Hill v. Dockery, 191 U. S. 165, 48 L. Ed. 133; Copper Queen Consolidated Mining Co. v. Arizona, 206 U. S. 474. (3) The State derived its authority to assess national bank stock from Sec. 5219, U. S. R. S. 1878. (4) The Act of Congress does not make the tax on personal (or real) property the measure of tax on bank stock, but the tax on moneyed capital in the hands of individual citizens. Money invested in railroads, mining property and stocks, business corporations and savings banks do do not fall within the class of "moneyed capital" in the sense used in the Federal statute, and it has been held that these investments do not come into competition with national bank stock and national banking, within the prohibition. First National Bank of Aberdeen v. Chehalis County, 166 U. S. 445; Hepburn v. Carlisle Burrough School Director, 90 U. S. (23 Wall.) 480, 23 L. Ed. 112; First National Bank of Aberdeen v. Chehalis County, 166 U. S. 452, 41 L. Ed. 1075. (5) Mere over-valuation is no defense. State ex rel. v. Western Union Tel. Co., 165 Mo. 502. (6) Merely because witnesses testify that the defendants' properties have been assessed at a higher per cent of the true value thereof by the State Board of Equalization than other classes of property, is not sufficient to overcome the judgment and decision of the State Board of Equalization. And even though in the opinion of witnesses for the defendants their property was equalized at fifty per cent of its true value, while other classes of property were equalized at forty per cent of the true value thereof, in the opinion of such witnesses, still this evidence cannot avail the defendants here, since the solemn judgment of the State Board of Equalization can not be impeached by such evidence. State ex rel. v. Western Union Tel. Co., 165 Mo. 502; C., B. & Q. R. Co. v. Babcock, 204 U. S. 585; Coulter v. L. & N. R. Co., 196 U. S. 599; Williams v. Garfield Ex-

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change Bank, 134 Pac. (Okla.) 863; Southern Spg. R. & C. Co. v. Board, 139 Pac. (N. M.) 159; Ray v. Armstrong, 131 S. W. 1039; People v. Pitcher, 156 Pac. 812; Hacker v. Howe, 101 N. W. (Neb.) 255; State ex rel. v. Hann. & St. J. Ry. Co., 101 Mo. 127; Ward v. Board of Equalization of Gentry County, 135 Mo. 309; Stanley v. Supervisors, 121 U. S. 535; Mercantile Trust Co. v. Schramm, 269 Mo. 489. (7) The State Board of Equalization in performing its duty, acts judicially, and its judgments are not open to collateral attack. State ex rel. v. Western Union Tel. Co., 165 Mo. 517; Western Union Tel. Co. v. State ex rel. Gottlieb, 190 U. S. 426, 47 L. Ed. 1122; State ex rel. v. Vaile, 122 Mo. 47; State ex rel. v. Neosho Bank, 120 Mo. 161; State ex rel. v. Baker, 170 Mo. 383; Hann. & St. J. Ry. Co. v. State Board of Equalization, 64 Mo. 294.

GRAVES, J.—These are two actions to recover delinquent taxes. They are consolidated and tried together below, and are so presented here. The first is a case against a state bank, and the second case is against a national bank.

It is claimed that the State Board of Equalization raised the assessed value of bank stock in Jasper County from forty per cent of their value to fifty per cent of their value, whilst said State Board of Equalization left other personal property stand at an assessed valuation of forty per cent of the value.

The tax bills in these cases were based upon the assessed valuation as certified to the county by the State Board of Equalization. The suits cover delinquencies for the five years prior to their institution. During these years and for some time prior, the banks had been paying on a forty per cent assessed valuation, instead of the fifty per cent assessed valuation as fixed by the State Board. This is the claim of the defendants. As a fact they paid about three-fourths of their taxes each year and these suits are to collect

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the unpaid portions for the five years next before the institution of these actions.

The tax bills were based upon the valuation fixed by the State Board of Equalization, and the relator is entitled to recover in this action, unless the judgment of the State Board of Equalization can be successfully attacked in this proceeding. Evidence was admitted over the objection of plaintiff, which was offered for the purpose of nullifying the judgment of the Board of Equalization. But after hearing it all the trial court entered judgment for relator. In our view of the law further details are unnecessary.

I. It is settled doctrine in this State that boards of equalization, including the county boards of equalization, as well as the State Board of Equalization, act judicially.

Judicial Act.

As to the State Board of Equalization the statute, Section 11410, thus reads: "The State Board of Equalization shall have power to send for persons and papers, to administer oaths through its officers or agents, and to take all evidence it may deem necessary to ascertain the value of the property in the different counties in the State."

So the very statute itself indicates the judicial character of its acts. This court has so ruled as to the State Board in State ex rel. v. Western Union Telegraph Co., 165 Mo. l. c. 517, whereat it is said: "The defendant cannot avail itself of these cases, for the reasons, first, that it seeks to raise the question of discrimination by a defense to an action at law to collect the taxes, and thereby collaterally attacks the judgment of the board of equalization; second, that such questions can only be raised by a direct attack, in equity, and then only upon the condition precedent that it pays or tenders the amount justly due and only asks to have the collection of the excess restrained. This the defendant has not done in this case."

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The county boards of equalization perform judicial functions, as is clearly indicated by Article 3 of Chapter 117, Revised Statutes 1909. And this court has so held. Thus in Black v. McGonigle, 103 Mo. l. c. 198 et seq., is said: "According to the plain letter of the statute, the board has not only the power to hear complaints, but it has the power, of its own motion, to equalize the valuation for the purposes named in the law, namely, so that each tract of land shall be entered at its 'true value.' In performing these duties the board acts judicially; this has been often held, and the very nature of the duty to perform makes it a judicial one. [St. Louis Mutual Life Ins. Co. v. Charles, 47 Mo. 465; Railroad v. Maguire, 49 Mo. 483; Cooley on Taxation (1 Ed.), 291.]"

To like effect in the case of State ex rel. v. Bank, 234 Mo. l. c. 197, whereat we thus spoke: "In making the order raising the valuation of the property for taxation in Christian County for the year 1905, the County Board of Equalization was acting in a judicial capacity, and, under the well-settled rule of law applicable to judgments, its action was not subject to collateral attack. [Black v. McGonigle, 103 Mo. 192; State ex rel. v. Vaile, 122 Mo. 33; State ex rel. v. Western Union Tel. Co., 165 Mo. 502; State ex rel. v. Lumber Co., 198 Mo. 430.]"

So also in State ex rel. v. Lumber Co., 198 Mo. l. c. 439, we said: "But the County Board of Equalization had jurisdiction over the lands taxed for levee purposes (Sec. 8449, R. S. 1899), and the authority to raise the assessments for benefits against all the lands (Sec. 9131, R. S. 1899), and in so doing it acted judicially. [Black v. McGonigle, 103 Mo. 192; St. Louis Mutual Life Ins. Co. v. Charles, 47 Mo. 465; Railroad v. Maguire, 49 Mo. 483; Cooley on Taxation (1 Ed.), 291; Ward v. Board of Equalization, 135 Mo. 309.] In raising the rate of taxation against the lands in the levee district it was sufficient for the board to designate a percentage of increase. [1 Cooley on Taxation

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(3 Ed.), 786.] It is not claimed that the Board of Equalization failed in any of its duties. Its proceedings were regular, proper notice given, and the result legally published and certified as required by the statute. The act of the board in raising the assessment being judicial in its character is not subject to attack in this collateral way."

Other cases along the same line are State ex rel. v. Vaile, 122 Mo. l. c. 47; Railroad v. McGuire, 49 Mo. l. c. 483; Black v. McGonigle, 103 Mo. l. c. 198; State ex rel. v. Board of Equalization, 256 Mo. l. c. 461. In the latter case, supra, BOND, J., said: "The functions of the board of equalization in judging the assessments of property are judicial, and if in the exercise of that power it shall act without rightful jurisdiction, and this should appear from the fact of its record, then *certiorari* is the proper remedy to quash its record and proceedings."

So that from the beginning to this time we have held the proceedings of these boards (both county and State) to be judicial in character. Not only so, but we have given their proceedings in fixing values the force of judgments. Other cases from this State might be cited, but these are illustrative of the whole line of our cases. Of course if such bodies in acting (as stated by BOND, J., supra) exceed their constituted power or jurisdiction, and such fact appears upon their records, then we can reach their judgments by *certiorari*. Such is the rule as to courts.

II. It being conceded (as it must be) that the action of the State Board of Equalization was judicial in character, then it must be held that its judgment cannot be attacked in this collateral proceeding. That the attack upon the judgment of the State Board of Equalization is collateral is clear from the books.

Collateral Attack.

In 23 Cyc. 1062, the difference between direct and collateral attacks is clearly stated, thus: "The term

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'collateral' as used in this connection is opposed to 'direct.' If an action or proceeding is brought for the very purpose of impeaching or overturning the judgment, it is a direct attack upon it. Such is a motion or other proceeding to vacate, annul, cancel, or set aside the judgment, or any proceeding to review it in an appellate court, whether by appeal, error, or *certiorari,* or a bill of review, or, under some circumstances, an action to quiet title. On the other hand, if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral." The same authority on the same page says: "The rule against collateral impeachment of judicial decisions applies to the determination of State and county officers or boards of officers, who, although not constituting a court, are called upon to act judicially in matters of administration, such as boards of county commissioners, boards of land commissioners, or railroad commissioners, or a State Board of Equalization."

Our rule as to what is collateral attack accords with Cyc. supra. Thus in Lovitt v. Russell, 138 Mo. l. c. 482, GANTT, P. J., said: "Now it must be borne in mind that the proceedings, under review and collaterally assailed in this case, were in the Circuit Court of Jackson County, a court of general jurisdiction. No principle of law is more universally accepted in this country than that the judgment of a court of competent jurisdiction so long as it stands unreversed cannot be impeached in a collateral proceeding, on account of mere errors, or irregularities, not going to the jurisdiction. [Union Depot Co. v. Frederick, 117 Mo. 138; Lingo v. Burford, 112 Mo. 149; Gray v. Bowles, 74 Mo. 419; 1 Black on Judgment, sec. 261.] The plaintiff did not proceed in the circuit court by bill in equity and ask to have the judgment set aside for fraud, nor did she attempt to set it aside for irregularity by motion

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or petition for review." See also the cases cited in our paragraph one, supra.

There is no doubt that the State Board of Equalization was acting within its jurisdiction when it fixed values for bank stock in Jasper County, and its judgment can not be attacked in this collateral proceeding.

In State ex rel. v. Vaile, 122 Mo. l. c. 47, BLACK, P. J., said: "A board of equalization in performing its duties, acts judicially, and its orders cannot be impeached collaterally, save for want of jurisdiction or for fraud. [Black v. McGonigle, 103 Mo. 193, and cases cited; Black on Tax Titles (2 Ed.), sec. 141.] But it is a board of special and limited powers, and when it steps outside of its jurisdiction its acts are void."

If attacked for want of jurisdiction, the fact must appear on the face of the record. So appearing, the judgment is void, and a void judgment may be attacked collaterally. But if the judgment is only voidable and not void it can only be attacked in a direct proceeding. This is hornbook law.

Judgments may be set aside for fraud, but the fraud must be such as entered into the very concoction of the judgment. But we need not discuss this, because a judgment cannot be attacked for fraud in a collateral proceeding. It must be by a direct bill in equity. It follows that the objections made by relator to all the oral evidence introduced to impeach the judgment of the State Board of Equalization should have been sustained, because such judgment cannot be thus impeached in this collateral proceeding. With this evidence stricken from the record there is nothing left to either of these cases for the defendants. The members of the State Board of Equalization could not impeach their own judgment in this collateral proceeding. Nor can the judgment of the County Board of Equalization be impeached in this collateral proceeding. This removes from the record all evidence having in view that purpose.

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Under the law these boards, both State and county (in this collateral proceeding), are presumed to have performed their duties under the law. This presumption is a finality in collateral proceedings. The face of the record does not disclose want of jurisdiction in the State Board of Equalization, and its judgment is not void. Its attack in this collateral proceeding cannot be sustained under the law. When we have stripped from the record in this case all the incompetent evidence (duly objected to below) there is absolutely nothing left to the defenses made by defendants. The many matters discussed need not be noted at all, because this is not a case wherein they could properly arise. The judgment *nisi* should be affirmed, and it is so ordered. All concur except *Woodson, J.*, not sitting.

ON MOTION TO MODIFY OPINION AND JUDGMENT.

GRAVES, J.—Motions to modify our opinion and the judgments herein have been filed. Those motions should be sustained. As stated in the opinion these two actions are to recover unpaid balances due upon taxes for the five years next preceding the bringing of the actions. It would appear that the circuit court omitted to credit the payments of a portion of the taxes paid by the two banks. Counsel for plaintiff admits the error, but in our deep interest in the vital question in the case, we overlooked this matter. Counsel offers to remit from the judgments so as to make them correct. This will be permitted.

So that in the first case, the judgment will be cut down to $93.96, which includes ten per cent for the tax attorney's fees. In the other case, the judgment will be cut to $96.36, which includes ten per cent for the tax attorney's fees.

In the cases the tax bills (five in each) show these amounts as the balance due, including the penalties and tax attorney's fees. The opinion is hereby modified,

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as are also the judgments. In the first case, judgment is entered here for the sum of $93.96, and in the second case, judgment is entered here for the sum of $96.36.

All concur except *Woodson, J.*, who is absent.

EMERY GRAVES and LOTTIE JOHNSON, Appellants, v. METROPOLITAN LIFE INSURANCE COMPANY.

In Banc, July 7, 1919.

1. **SUIT ON LOST INSTRUMENT: Insurance Policy: Affidavit.** The statutes requiring that in a suit founded upon a written instrument, if "the debt or damages claimed may be ascertained" therefrom, such instrument "shall be filed with the justice, and no other statement or pleading shall be required," and if such instrument shall be lost an affidavit stating such loss or destruction and setting forth the substance of the instrument, do not apply to a life insurance policy, for an insurance policy is not such an instrument, since it cannot be ascertained from its face the debt or damages due; and hence, it cannot be ruled that the justice fails to obtain jurisdiction of the subject-matter of an action for an amount alleged to be due on an insurance policy, on the sole ground that neither the policy nor an affidavit that it was lost was filed with the justice.

2. **LIFE INSURANCE: Extended Policy: Failure to Give Notice of Insured's Death: Bar to Recovery.** Sections 6946 and 6948, Revised Statutes 1909, providing that, in case of extended life insurance, notice of the claim and proof of death must be submitted to the company within ninety days after insured's death, must be read and construed together, and a failure to give notice and make proof of death within such time, absent waiver or estoppel or other matter of avoidance, defeats recovery. A claim under the policy is not, by said statutes, strictly speaking, defeated by reason of forfeiture, but because failure to give notice and make proof of death constitutes a failure to perform a statutory requirement essential to the creation of a valid claim against the company.

Appeal from St. Louis City Circuit Court.—*Hon. William T. Jones*, Judge.

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AFFIRMED.

James J. O'Donohoe for appellant.

(1) The policy in suit is non-negotiable and hence Section 7414 is inapplicable. The pertinent sections are Secs. 7412, 7416, R. S. 1909. Neither the filing of the instrument nor an affidavit in case of its loss or destruction is essential to jurisdiction over the subject-matter. Watkins v. American Yoemen, 188 Mo. App. 626; Sanders v. Selleck, 165 Mo. App. 392; Mansur v. Linney, 162 Mo. App. 260; Keyes & Watkins Livery Co. v. Freber, 102 Mo. App. 315; Bank v. Clifton, 263 Mo. 211; State ex rel. v. Smith, 104 Mo. 422; Dowdy v. Wamble, 110 Mo. 284; Railway v. Lowder, 138 Mo. 536; O'Brien v. People, 216 Ill. 354. (2) A policy of insurance is not a debt, but only primary evidence of a debt, and its loss or destruction does not change the obligations of the parties thereto. Dannehauser v. Wallenstein, 169 N. Y. 199; McDonnell v. Ins. Co., 85 Ala. 412. And being non-negotiable when reduced to judgment the policy is merged in the judgment and put out of existence. The judgment becomes the sole and only debt and hence section 7414 is in such cases inapplicable and section 7416 is applicable. Barber v. Baker, 70 Mo. App. 680. (3) "Courts of equity do not favor forfeitures, although life insurance companies do." Belt v. Ins. Co., 12 Mo. App. 101. Accordingly, since there are no words of forfeiture in the statutes for failure to make claim or to supply proof of death within ninety days from the decease of the insured, none should be supplied by construction. Dezell v. Casualty Co., 176 Mo. 253. (4) Time for making claim or furnishing proofs of death is not of the essence of the statute. Montgomery v. Ins. Co., 1 Bush. (Ky.) 51; Insurance Co. v. Jarboe, 102 Ky. 80; Insurance Co. v. Patterson, 22 Ky. Law Rep. 1282; Insurance Co. v. Miles, 23 Ky. Law Rep. 1705. Statutes, like policy stipulations, can be

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waived. Liebing v. Ins. Co., 269 Mo. 509; Shearlock v. Ins. Co., 193 Mo. App. 430. The policy stipulates that "if this policy is or shall become void, all premiums paid shall be forfeited to the company." It stipulates, too, that "if any premium shall not be paid when due, this policy shall be void." These stipulations dispensed with notice and proof of death. Mun v. Ins. Co., 181 S. W. (Mo. App.) 606; Dodge v. Ins. Co., 189 S. W. (Mo. App.) 609.

Nathan Frank and *Louis B. Sher* for respondent.

(1) The unqualified denial of liability after the time for proofs has expired, is no waiver of the failure to furnish them. Boren v. Brotherhood of Railroad Trainmen, 145 Mo. App. 136; Cohn v. Insurance Co., 62 Mo. App. 275; Bolan v. Association, 58 Mo. App. 531; Gale v. Insurance Co., 33 Mo. App. 672; Erwin v. Insurance Co., 24 Mo. App. 151. (2) Appellants show no valid reason why this court should refuse to follow the decision of the Kansas City Court of Appeals in the case of Chandler v. John Hancock Ins. Co., 189 Mo. App. 394. The contention below was that there was a failure to comply with the terms and provisions of Section 6948, requiring the submission of claim and making and filing proofs of death within ninety days after the death of the insured. (3) This suit being upon a lost instrument filed in the justice court, it was incumbent upon plaintiffs to verify the petition in accordance with Section 7414. The cases referred to by appellants have reference to suits filed in the circuit court. Sections 7413 and 7414 are sections that govern the filing of suits on instruments in writing in the justice court and do not refer solely to suits upon promissory notes or negotiable instruments, as is contended by the appellants. Hudson v. Wright, 204 Mo. 412.

WILLIAMS, J.—This action, originally instituted before a justice of the peace in the City of St. Louis, seeks to recover the sum of $160, and interest thereon,

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upon a policy of life insurance issued by defendant upon the life of one Ollie M. Graves.

Plaintiff recovered judgment in the justice court and defendant appealed to the circuit court. Upon trial in the circuit court judgment was rendered for defendant and plaintiffs duly appealed to the St. Louis Court of Appeals, which court (See 179 S. W. 947), reversed the judgment of the circuit court with directions, but, deeming its decision in conflict with certain decisions of the Kansas City Court of Appeals, certified the cause to this court.

The case was first heard and written in Division One, but upon a dissent the cause was transferred to and heard by Court in Banc. After the opinion was written in Division One, and before the cause was submitted In Banc, appellant filed a supplemental abstract of the record, setting forth a copy of the original statement which was filed in the justice court. This statement alleged that the insurance policy was lost. The statement was not verified, neither was there any affidavit filed with the justice which undertook to comply with Section 7414, Revised Statutes 1909.

The following facts are quoted from the Divisional opinion:

"The beneficiary died on September 5, 1906, and the insured on the 16th day of March, 1907. The insured was never married. The plaintiffs are the next of kin and are the sole surviving heirs of the insured and beneficiary. Both died intestate and left no estate. There was no indebtedness against said policy. The insured reserved the right to change the beneficiary.

"It was admitted at the trial that said policy was dated October 20, 1902, and that the premiums were paid until the 22nd day of October, 1906. It was admitted that by reason of the payment of these premiums the policy acquired a net value, three-fourths of which, when applied as a net single premium for temporary insurance, carried the policy to the death of the in-

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sured, figured according to the non-forfeiture statute of the State of Missouri.

"The insured died less than five months after default. R. J. Douglass, who wrote the application, and F. M. McDonald, collected part of the premiums thereon. The plaintiffs testified that soon after the death of the insured they notified agents Douglass and McDonald thereof, and made claim under said policy, but McDonald testified that he had quit the employ of defendant before the death of insured. The testimony of McDonald in this respect was conceded to be true.

"At the conclusion of the trial the plaintiffs asked a peremptory instruction, and a declaration of law in respect to their damages, both of which were refused and exceptions saved. Defendant likewise asked instructions, which were refused and exceptions duly saved. The case was taken under advisement by the court and on May 26, 1913, judgment was entered in favor of defendant and against plaintiffs. The court, at the time of the rendition of said judgment, filed the following memorandum:

" 'It seems clear from the evidence that plaintiffs in the case failed to furnish any proofs of the death of the deceased, as required by the policy, and by Section 6948, Revised Statutes 1909, and failed to show any acts on the part of the defendant that can be construed as a waiver of proofs. The testimony satisfies me that at the time of the conversations, or alleged conversations, of plaintiffs with Douglass and McDonald, neither of them was connected with defendant. This suit was not instituted until four years after death of deceased, which indicates that plaintiffs must have considered at the time of suit that they had no claim. For this reason judgment will go for defendant.' "

I. Respondent insists that the justice court (and hence the circuit and appellate courts) acquired no jurisdiction over the subject-matter of this case, because the appellant failed to file an affidavit before the

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justice as required by the statute when a suit is instituted before a justice upon certain lost instruments. This was the point upon which the decision turned in the Court of Appeals.

Jurisdiction.

Section 7413, Revised Statutes 1909, among other things, provides: "When the suit is founded upon any instrument of writing purporting to have been executed by the defendant, and the debt or damages claimed may be ascertained by such instrument, the same shall be filed with the justice, and no other statement or pleading shall be required."

Section 7414, Revised Statutes 1909, provides: "If such instrument be alleged to be lost or destroyed, it shall be sufficient for the plaintiff to file with the justice the affidavit of himself, or some other credible person, stating such loss or destruction, and setting forth the substance of such instrument."

If the life insurance policy upon which this suit is founded is such an instrument as is embraced within the meaning of the foregoing statutes, then under the former rulings of this court, the plaintiff having failed to file the required affidavit with the justice, jurisdiction of the subject-matter was not acquired. [Hudson v. Wright, 204 Mo. 412, l. c. 431.]

But is the insurance policy such an instrument? With all due deference to the learned Court of Appeals we feel constrained to rule that it is not such an instrument. Under the statute the instrument of writing must purport to have been executed by the defendant and must be a writing by which the *debt* or damages claimed *may be ascertained.*

In the case of Hudson v. Wright, supra, the instrument involved was a negotiable promissory note and the statute was quite properly held to apply, because the *debt* could be easily *ascertained* from the face of the instrument itself. But can as much be said for an insurance policy? Can a debt upon an insurance policy be *ascertained* by a mere inspection of the face of the policy? We think not. It would at least be

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impossible to ascertain the debt due upon this policy unless it were known that the insured's death had occurred. This fact could not be found by an inspection of the policy.

We are of the opinion that ELLISON, J., announced the correct rule, here applicable, in his separate concurring opinion in the case of Mansur v. Linney, 162 Mo. App. 260, l. c. 268, wherein he said: "This suit, manifestly, is not founded upon such an instrument of writing, mentioned in the latter section, whereby a debt or damages can be ascertained by the instrument. The written contract in this case does not ascertain any debt. It is not like a bond or note; it is merely an employment of service which may never be performed, or which may be performed in various ways. The statute contemplates such character of written instrument as need not require any pleading or explanatory statement in order to make a cause of action, for it says that 'no other statement or pleading shall be required.' What would have been said of this case if there had been filed with the justice nothing but the contract? Would that have been any indication that plaintiff had sold the land, or that, as here, while not selling it, but had done all that was necessary to give him a cause of action for his commission, or that a cause of action had by any means accrued?"

Therefore we conclude that the court acquired jurisdiction of the subject-matter of this case.

II. Appellant's right to a recovery, if at all, must arise by virtue of Sections 6946 and 6948, Revised Statutes 1909, because it appears from the evidence that but for the saving provisions of the above statutes the policy would have become forfeited by reason of the failure to pay premiums. It also stands conceded that by reason of Section 6946, supra, the term of extended insurance was sufficient to cover the date of the death.

Notice of Death.

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Section 6948, supra, among other things provides: "If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in Section 6946, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding: *Provided, however,* that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy within ninety days after the decease of the insured."

The trial court found that appellants failed to give notice of the claim and make proof of the death within ninety days as required by the above statute, and that there was no waiver by the respondent of this requirement. This being an action at law, and there being substantial evidence to support the above finding, the same is conclusive here. (In fact as we read the record it does not appear therefrom that the company had notice of this claim until this suit was instituted, which was more than four years after the death.)

The legal question presented is, Does the failure to give notice and make proof of death within the time provided by the above statute (absent waiver or other matter of avoidance), defeat a recovery?

We have reached the conclusion that this question must be answered in the affirmative. By the terms of the statute it clearly appears that the notice and making proof of death within ninety days is made a condition precedent to a right of recovery.

In the case of Liebing v. Insurance Company, 269 Mo. 509, l. c. 520, it was held that the above-mentioned proviso was enacted for the benefit of the insurer and that the insurer could waive a compliance therewith. It would necessarily follow as a corollary to the above holding that if the provision were not waived (or, we might add, avoided in some other manner, as for ex-

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ample, by estoppel), a failure to comply therewith would operate to prevent a recovery. If this were not so, then it was entirely unnecessary in that case to base the right to a recovery on the existence of such a waiver.

The Kansas City Court of Appeals in the case of Chandler v. Insurance Company, 180 Mo. App. 394, held that a recovery upon extended insurance under the provision of Section 6946, supra, could not be had (absent a waiver by the insurer), where the beneficiaries failed to give the notice or make proof of death as required under Section 6948, supra.

This exact feature of the statute has not been construed by this court, and we find no decision from other States upon similar statutes which throw any light upon the question.

We are of the opinion that the conclusion reached by the Kansas City Court of Appeals on this question in the Chandler case is correct.

The line of cases cited and relied upon by appellant, of which Dezell v. Casualty Co., 176 Mo. 253, is a fair type, are, we think, not in point here.

Appellants' present right of recovery depends upon the language of the above mentioned statutes.

In this behalf Sections 6946 and 6948, supra, must be read and construed together. When this is done it will be seen that plaintiffs' claim in the present action is not defeated, strickly speaking, by reason of forfeiture, but is defeated because plaintiffs failed to perform the statutory requirements essential to the very creation of a valid claim against the respondent.

From the foregoing it follows that the judgment of the circuit court should be affirmed.

It is so ordered.

Walker, Faris, Blair and *Graves, JJ.*, concur; *Bond, C. J.*, not sitting; *Woodson, J.*, absent.

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IN RE TWENTY-THIRD STREET TRAFFICWAY, Kansas City, v. L. T. CRUTCHER et al., Appellants.

In Banc, July 7, 1919.

1. **STREET IMPROVEMENT: Elimination of Part of Ordinance Plan.** Under the charter of Kansas City, an ordinance may provide for the widening and grading of a street, and the grading of intersecting streets, as a part of a general scheme to establish one continuous trafficway, "all as one general improvement," and a circuit court cannot ignore or alter any material part of such ordinance; and where the ordinance provided that thirteen intersecting streets should be graded or regraded so as to constitute approaches to a trafficway, the court had no authority, in an attempt to ascertain the damages and benefits, to receive a verdict or render a judgment which eliminated four of the intersecting streets from consideration.

2. ———: **General Improvement: Instruction for Separate Verdicts.** Where the charter and ordinance provide for one general improvement of a highway, crossed by thirteen streets, it is error to instruct the jury that the damages and benefits from the grading of the highway and each intersecting street are to "be considered and determined separately" and that thirteen separate verdicts are to be rendered.

3. ———: **Instruction To Disregard Testimony.** In so far as an instruction attempts to direct a jury to exercise their own judgment as to the damages and benefits free from any connection with the testimony, it is error.

4. ———: **General Improvement: Individual Benefit to Lot: Separate Assessment.** Where the charter and ordinance unite all elements of the street improvement into one general improvement, it is error to instruct the jury that they "have no right to assess any lot to pay for any of the proposed street improvements, except for such improvement as will actually benefit the particular lot," or that they "have no right to assess any greater sum against any lot than it will be actually benefited by the particular improvement." The improvement being a general one, no attempt should be made to accredit any one portion of the improvement with benefits apart from the others, except to separate the grading benefits from the condemnation benefits.

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5. ———: ———: **Damages Exceeding Benefits: As to Particular Lots.** Where the court has told the jury that the proposed street improvement is necessary as a matter of law, and that if they find the entire damages exceed the benefits they should go no further, but so report, another instruction telling them that if they find that "the total benefits from the proposed grading of any intersecting street do not equal the amount of damages to lots on such street, then you need to proceed no further as to such intersecting street," is error, in that it conflicts with the other correct instruction, and besides is contrary to the law governing such cases.

6. ———: **Damages to Non-Abutting Property.** Where the charter and ordinances made 23rd Street and the intersecting streets one for the purpose of the improvement, an instruction telling the jury that only property abutting on 23rd Street is entitled to damages is error, the evidence tending to show that the deep cut in 23rd street deprives the owners of property abutting on the intersecting streets of vehicular access thereto.

Appeal from Jackson Circuit Court.—*Hon. Harris Robinson,* Judge.

REVERSED AND REMANDED (*with directions*).

Clarence I. Spellman and *John G. Park* for appellants.

(1) The court erred in overruling appellant's motions for new trial and in arrest of judgment. The judgment did not respond to the charter and ordinance and established a different public improvement to that authorized by charter and ordinance. (a) Article 6, Section 16, is legal. Kansas City v. Woerishoeffer, 249 Mo. 1; Wells v. Street Commissioners, 187 Mass. 451, 455; Sears v. Street Commissioners, 180 Mass. 274, 62 L. R. A. 144; In re Third, Fourth and Fifth Avenues, 49 Wash. 109; City of Springfield v. Green, 120 Ill. 269, 273. (b) The elimination of four approaches destroyed the identity of the plan. The verdict and judgment did not conform to the charter and ordinance. Shaffner v. St. Louis, 31 Mo. 264. (c) The charter and ordinance should have been strictly pursued. Leach v.

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Cargill, 90 Mo. 316; St. Louis v. Koch, 169 Mo. 587, 591; Westport v. Mastin, 62 Mo. App. 647. (d) If one part of a general improvement fails, the entire improvement fails. City of Bloomington v. Reeves, 177 Ill. 161, 168. (2) The court erred in giving instruction 6, which told the jury that they must write "or cause to be written 13 separate verdicts as to the damages and benefits, one for each proposed improvement." The improvement was an entirety, not a combination of units. Authorities above. (3) The court erred in giving instruction 10, which told the jury that the damages and benefits, if any, from the grading of Twenty-third Street, and of each of the intersecting streets, must be considered and determined separately, as to each of such streets. Where a single improvement consists of distinguishable parts made one by lawful municipal action, damages and benefits must be assessed on account of the improvement as a whole, and not on account of certain of its parts. In re Third, Fourth and Fifth Avenues, 49 Wash. 109; Alden v. Springfield, 121 Mass. 27; Lincoln v. Dore, 176 Mass. 210; City of Bloomington v. Reeves, 177 Ill. 161, 168. (4) The court erred in giving to the jury instruction 11. Kansas City v. Max (In re 6th Street), 207 S. W. 503. (5) The court erred in giving instruction 13, which told the jury, in effect, that they must minutely analyze the improvement and assess only such benefits against property in the benefit district as they could directly trace to a "particular improvement." Authorities above. (6) The court erred in giving instructions 14 and 15, which converted the proceeding from "one general public improvement" into a group of 13 independent improvements. (7) The court erred in giving instructions 16 and 17, which told the jury that only persons whose property abutted on Twenty-third Street might recover damages for such regrading. (a) They misled the jury as to the issues to be tried. (b) Appellants entitled to recover for being cut off from the outside world. They had easements of access. Thurston v. St. Joseph, 51 Mo. 510; Glaessner

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v. Brew. Association, 100 Mo. 508; Heinrich v. St. Louis, 125 Mo. 424, 427; Press v. Penny & Gentles, 242 Mo. 98, 103; Gaus v. Railway, 113 Mo. 308, 315; Schopp v. St. Louis, 117 Mo. 131, 135; Versteeg v. Railway, 250 Mo. 61, 75; Rourke v. Railroad, 221 Mo. 46, 60; Downing v. Corcoran, 112 Mo. App. 645; Putnam v. Railroad, 182 Mass. 351, 353; 1 Lewis on Em. Dom. (3 Ed.), secs. 206, 121, 123; 2 Elliott on Roads and Streets (3 Ed.), sec. 1181; Dantzler v. Railway, 141 Ind. 604, 34 L. R. A. 769; Borghart v. Cedar Rapids, 126 Iowa, 313. Immaterial that complainant's property was not directly in front of the obstruction. Powell v. Railroad, 135 S. W. (Tex.) 1153; Sweeney v. Seattle, 57 Wash. 678; Rigney v. Chicago, 102 Ill. 64; C. Hacker v. Joilet, 192 Ill. 415, 425; City of Joliet v. Blower, 155 Ill. 414; Burr v. Leicester, 121 Mass. 241; Vanderburgh v. Railroad, 98 Minn. 329, 6 L. R. A. (N. S.) 741; Dairy v. Railroad, 113 Iowa, 716; Winetka v. Clirord, 201 Ill. 475; Mellor v. Philadelphia, 160 Pa. St. 614.

E. M. Harber, City Counselor, and *J. C. Petherbridge,* Assistant City Counselor, for respondents.

(1) In this proceeding thirteen different improvements were combined in one ordinance and hence in one proceeding for convenience and in order to save time and expense. There could have been thirteen separate ordinances and all filed in one proceeding, or thirteen separate ordinances and thirteen separate proceedings, or one proceeding combining all the improvements. In any event, there would have to be thirteen separate judgments, as happened in this case. (2) It was necessary to have thirteen separate verdicts—one for each improvement—because the procedure and rules for the condemnation of land to widen Twenty-third Street, is governed by Article 6 of the charter; and the procedure and rules for assessing damages and benefits for the change of grade on Twenty-third Street and the itersecting streets, is governed by Article 7 of the charter. The two procedures are entirely different—

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one relates to condemnation matters and the other to damages arising on account of the change of grades of streets. But the same jury, the same court, at the same time, may try all of them, as authorized by the practice, under the charter. (3) The instructions were not erroneous but in perfect harmony with the charter and the theory on which the proceeding was bottomed and tried. (4) The ordinance filed in this cause is a pleading and is considered the petition, with thirteen different counts to be construed and decided separately as if there were thirteen different suits. City of Tarkio v. Clark, 186 Mo. 297; Sec. 1971, R. S. 1909; K. C. Charter, 1908, sec. 12, art. 7, p. 304. (5) Lots not abutting on Twenty-third Street were not entitled to damages on account of the change of the grade of Twenty-third Street. Hence the property on Fairmount Avenue and Terrace Place, about which complaint is here made (not abutting on Twenty-third Street) was not entitled to damages on account of the change of grade on Twenty-third Street, although by the grading down of Twenty-third Street the property on such intersecting streets may be shut off entirely from access thereto by way of Twenty-third Street. Gardner v. St. Joseph, 96 Mo. App. 661; Burde v. St. Joe, 130 Mo. App. 453; Rude v. St. Louis, 93 Mo. 408; Wallace v. Railway Co., 47 Mo. App. 491; Stephenson v. Railway, 68 Mo. App. 642; Clemens v. Conn. Mut. Life Ins. Co., 184 Mo. 46; Knapp, Stout & Co. v. St. Louis, 153 Mo. 560. (6) The refusal of the jury and trial court to allow any damages for changing the grade on the two cross streets, is no legal bar to grading such streets down to meet the new grade of Twenty-third Street, if the property-owners desire to have such grading done.

R. H. Field for respondent.

(1) The verdict is in accordance with the evidence as to damages and benefits from the proposed grading. (2) The jury were not required nor authorized to

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make a verdict for damages as to Fairmount Avenue or Terrace Place in the face of their finding of the fact that the damages exceed the total amount of benefits to the city and public at large, and the private property within the benefit district. And the jury were authorized to limit the assessment of special benefits against only two-fifths of the private property in the prescribed benefit district ,and to leave out the remaining three-fifths of the private property in the benefit district unassessed. Kansas City v. Baird, 98 Mo. 221; Kansas City v. Bacon, 147 Mo. 281; Kansas City v. Bacon, 157 Mo. 474; St. Louis v. Brown, 155 Mo. 559. It was never intended to require a jury to render a verdict for damages from a proposed street grading, under Article 7 of the Charter, where the benefits did not equal the damages. It would certainly have been a vain thing for the jury to have made a verdict finding amount of damages from the proposed grading of Fairmount Avenue and Terrace Place, when they could not find the benefits to the city and the property in the prescribed benefit district in an amount equal to the amount of the damage therefrom. (3) Appellants' brief does not assign any error of fact in the finding of the jury that the damages from the proposed grading of Fairmount Avenue and Terrace Place exceeds the benefits to the city and the private property in the benefit district. Appellants' complaints here are that they have been deprived of a recovery of the damage to their property on Fairmount Avenue and Terrace Place, suffered from the proposed change of grade of Twenty-third Street, a thing not alleged nor included in their claims in question filed in this cause. The claims for damages from the proposed grading of Fairmount Avenue and Terrace Place, filed by appellants, were for the proposed change of the grade in Fairmount Avenue and Terrace Place, "in connection with the proposed Twenty-third Street Trafficway." Clements v. Yates, 69 Mo. 623; Knapp v. St. Louis, 153 Mo. 560; Fuess v. Kansas City, 191 Mo. 692. (4) Appellants are wrong in their contention that all or none of the proposed

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improvements under this ordinance must go through, because they are combined in the same ordinance as one general improvement. Section 16 of Article 6 of the Kansas City Charter, relied on by appellants, does not sustain appellants' view of this matter. This section of the charter covers mere matters of procedure only. It merely gave the city the option, in a case like this, where the thirteen improvements are combined in one general ordinance. (5) The finding of the jury on the one issue, to-wit, that the damages on the proposed grading of Fairmount Avenue and Terrace Place exceeds the benefits to both the city and the private property in the benefit district, shows that the jury ignored all of the instructions complained of in appellants' brief. And for this reason the judgment should not be reversed for errors, if any, in said instructions. It is firmly settled, and particularly in condemnation cases, that a judgment will not be reversed for error in any instruction when it is clear that the jury were not prejudiced, nor affected by such instruction. St. Louis v. Lannigan, 97 Mo. 175; Kansas City v. Block, 174 Mo. 434; St. Louis v. Brown, 155 Mo. 567; Edwards v. Mo. Pac. Ry., 82 Mo. App. 484. (6) The instructions numbered 16 and 17, excluding appellants' right to damages to property not abutting on Twenty-third Street for the grading of Twenty-third Street, are in direct accordance with the following decisions in this State. Rude v. St. Louis, 93 Mo. 408; VanDevere v. Kansas City, 107 Mo. 83; Knapp v. St. Louis, 153 Mo. 560; Clements v. Ins. Co., 184 Mo. 46; Gardner v. City of St. Joseph, 96 Mo. App. 657.

WALKER, J.—Appellants seek a review by appeal from a judgment of the Circuit Court of Jackson County in proceedings under the Charter of Kansas City, and Ordinance No. 28181, entitled, "An ordinance, to open, widen and establish Twenty-third Street from the east line of New Brook Street to the westerly line of Southwest Boulevard, and condemning the necessary

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lands therefor; providing for and authorizing the work of grading and regrading Twenty-third Street as widened, Fairmount Avenue, Benton Place, Terrace Place, Mercier Place, Circle Avenue, East Street, Holly Street, West Prospect Place, Belleview Avenue, Monitor Place, Madison Avenue and Summit Street, condemning an easement to support an embankment or fill, all as one general public improvement, to be known as the Twenty-third Street Trafficway, and providing for the cost of said improvement, and authorizing the issuance of condemnation fund certificates, and repealing Ordinance No. 26318, approved June 1, 1916."

Appellants own property on Terrace Place and Fairmount Avenue, streets intersecting Twenty-third Street, which, by the judgment of the circuit court, were eliminated from the improvement. It is contended that vehicular ingress to and egress from appellants' property will be destroyed by reason of the failure to improve these streets; that the trial court's judgment thereby abrogated the ordinance in part and established an improvement not designed or approved by the municipal authorities, and one which, without compensation, will destroy the value of appellants' property.

November 21, 1916, Kansas City filed in the office of the Circuit Clerk at Kansas City a petition for the appointment of commissioners, together with Ordinance No. 28181, and the plats and maps required by the charter. The proceeding was brought to ascertain damages and benefits arising from the establishment of the general public improvement, described in the title to the ordinance, which was enacted under Section 16 of Article 6 of the Charter of Kansas City of 1909 (p. 277), and is as follows:

"Sec. 16. When the grading or regrading of any public highway or the grading or regrading of any highway and highway or highways intersecting therewith, or the construction of tunnels, subways or viaducts in, under or upon said public highway or highways, or the taking of private property by condemnation for

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widening, opening or extending any such public highway or highways, any or all of said improvements shall be deemed by the common council to be part or parts of one general public improvement, the common council shall have the power to provide for the same in one and the same ordinance or by separate ordinances. Said ordinance or ordinances may provide for establishing or re-establishing the grade of such public highway or intersecting highway or highways or part or parts thereof, and may provide for such grading or regrading by means of cuts, fills, or viaducts, and may provide for building subways or tunnels, and may, in the same ordinance and as a part of the same general public improvement, provide also for the condemnation of private property taken or damaged by such proceeding. Such ordinance or ordinances shall in such case provide also for the payment of compensation for private property so taken or damaged either out of the general fund of the city or by special assessments upon a benefit district, or by both; the damages, if any, caused by such public improvement may be ascertained in one court proceeding or by separate court proceedings in the Circuit Court of Jackson County, Missouri, at Kansas City, as may be provided by ordinance, and all procedure for the ascertainment of damages, the service of notice, and the making of special assessments shall be conducted under such section or sections of this article or of Article VII of this charter, as the ordinance or ordinances shall provide. Such ordinance or ordinances shall provide the method by which the damages awarded in such proceeding or proceedings shall be paid, and if said damages are to be paid by special assessment upon a benefit district, said ordinance or ordinances shall fix the boundaries of said district," etc.

The portions of Ordinance No. 28181, pertinent to the matter at issue, are as follows:

Section 1 describes the land to be condemned for the widening of 23rd Street.

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Section 2, that compensation for private property so condemned is to be raised by an assessment against property within the benefit district described therein, and an assessment against Kansas City, of which not exceeding $50,000 of the proceeds of the sale of Twenty-third Street-Trafficway bonds theretofore authorized by the voters of Kansas City, may be paid as a part of the assessment against the city at large for land taken or damaged.

Section 3, that Twenty-third Street, Fairmount Avenue, Benton Place, Terrace Place, Mercier Place, Circle Avenue, East Street, Holly Street, West Prospect Place, Belleview Avenue, Madison Avenue, Monitor Place and Summit Street should be regraded to the established grade thereof between lines described.

Section 4 has reference to the cost of regrading intersecting streets.

Section 5, that the construction cost of the regrading of Twenty-third Street is to be spread over the entire benefit district and a suit brought under Article 8, Section 28, of the charter to test its validity.

Section 6, that owners of property damaged by reason of the change in the grade of the streets to be regraded, and not having waived claim thereto, shall have their damages ascertained and assesssed as provided in Article VII of the Charter of Kansas City, and that such damages be raised by assessments against the city and against private property within the benefit district described in said ordinance and in the manner authorized by Article VII of the charter.

Section 7 describes the benefit district, against which the damages arising from the opening and widening of Twenty-third Street and the grading and regrading of the various other streets shall be assessed as benefits.

Section 8 provides for retaining walls on Twenty-third Street, and Section 8½ for an easement for embankments where the proposed streets are above the level of abutting property.

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Section 9, that Twenty-third Street, when widened and graded, and a viaduct is built by Kansas City, from the Wyandotte County, Kansas, High Line Bridge, over the Kaw River, connecting with Twenty-third Street at the intersection of New Brook Street, shall, when complete, constitute the "Twenty-third Street Trafficway," and is by said ordinance established as such.

Section 10, that the improvements therein provided for have been approved and recommended by the Board of Public Works of Kansas City, Missouri, by a resolution previously adopted.

Section 11, that the council found and declared that the Board of Public Works had caused plans and specifications to be prepared, "which shows the location and description of the general public improvement herein provided for as a whole," and that all of the improvements provided for in the said ordinance, including the widening of Twenty-third Street, shall be deemed parts of one general public improvement, to be known as "Twenty-third Street Trafficway," as authorized in Section 16 of Article 6 of the Charter of Kansas City, Missouri, 1909, and that said improvements are thereby provided for and authorized, and the ordinance referred to the resolutions of the Board of Public Works, setting out the plans and specifications of the said improvement.

Section 12 defines the court proceedings.

Section 13 has relation to condemnation fund certificates, and provides that: "The Common Council hereby determines that the assessments to pay for property taken or damaged, as provided by Article 6, of the Charter of Kansas City, for the widening of Twenty-third Street, which have not been voluntarily paid within sixty days from the final confirmation of the verdict in the proceedings instituted to determine the amount of said assessments, shall be paid in ten equal annual installments bearing seven per cent interest per annum, for which the city treasurer shall issue

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condemnation fund certificates equal in amount to such unpaid assessments, which certificates shall be sold by the Board of Public Works of Kansas City as provided by Section 22 of Article 6 of the Charter of Kansas City and the provisions of Sections 22, 23, 24, 25, 26 and 27 of Article 13 of the Charter of Kansas City shall apply thereto and govern the same as far as applicable. Said certificates shall be known as and called the 'Twenty-third Street Trafficway Condemnation Fund Certificates, Series 1,' and shall be in such form as may hereafter be fixed by ordinance. The Board of Public Works shall sell such certificates at such price, not less than the face value of the amount of the special assessments, excluding interest represented by said certificates, as may be obtainable, and shall determine the manner and means of such sale. Such certificates shall be delivered by the city treasurer to the purchaser, upon payment therefor, on the order of the Board of Public Works, specifying the price which order shall be countersigned by the comptroller. The proceeds of such certificates shall be used for the payment of land taken or damaged by said improvement. Such certificates may, by agreement, be issued direct in payment for said land taken or damaged, arising from said condemnation proceedings.

"The Common Council finds and declares that the Board of Public Works of Kansas City has heretofore, by Resolution No. 4837, adopted May 8, 1914, recommended that the Common Council provide, by ordinance, that the assessment to pay for property taken or damaged shall be made in ten equal annual installments, and that condemnation fund certificates equal in amount to the unpaid assessments, as provided by Articles VI and XIII of the Charter of Kansas City, be issued therefor."

Section 14, that Kansas City shall not be liable to pay for work required to be paid in special tax bills.

Section 15, declaring the repeal of the former ordinance.

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Appellants' property is located on Fairmount Avenue and Terrace Place. We are concerned, therefore, with the judgment so far as it affects those streets.

The west bluff of Kansas City at Twenty-third Street is about eighty-five feet above the Kaw River, or the "West Bottoms." A new diagonal thoroughfare named "New Brook Street," extends along the bluff about twenty-five feet above this "bottom." To open Twenty-third Street on a plane from Southwest Boulevard to New Brook Street will necessitate a cut whose maximum will be about sixty feet between Fairmount Avenue and the present bluff. Twenty-third Street extends from the bluff eastward, and is now graded and open for travel and is paved from Terrace eastward, but must be regraded to connect with Brook Street. The streets intersecting it, from New Brook Street eastward, are in order, Fairmount Avenue, Terrace Place, Mercier Place, Circle Avenue, East Street, Holly Street, West Prospect Place, Belleview Avenue, West Madison, Madison Avenue, Summit Street. These are to be graded or regraded, but are now open and in use from Twenty-third Street in both directions. The present grade of Terrace from Twenty-third Street southward to Twenty-fourth Street is 12.45 per cent descent, and that of Fairmount from Twenty-third Street to Twenty-fourth Street is 15.47 per cent descent. Householders on those intersecting streets must now approach their homes with loaded vehicles *via* Twenty-third Street and down the respective grades on Terrace or Fairmount, and when leaving their homes must go southward over their respective streets to Twenty-fourth Street. These streets are so deep that wagons and vehicles must move southwardly down hill; they cannot move northward.

The proposed changes in grade in Twenty-third and in the intersecting streets are relatively slight from Southwest Boulevard westward until Mercier Street is reached. Here, the proposed grade practically meets the present grade. From this point proceeding west, Twenty-third Street, as proposed, will decline toward

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New Brook Street on a grade of 3.17 per cent, whereas, the present surface of Twenty-third Street rises gradually, going west from Mercier Street, and the intersecting streets now conform to it, so that the greatest divergence between the present and proposed grades are at the extreme west end near Fairmount and Terrace. One of the appellants named Doarn owns the property extending from Terrace to Fairmount, on the south side of Twenty-third Street, except twenty-five feet at the alley intersection. The cut in Twenty-third Street at Terrace Place will be 25.4 feet, whilst the cut at Fairmount Avenue on its east line will be 41.1 feet, on its west line 42.6, and at the alley between Fairmount and New Brook Street, the cut will be 44.7 feet. The cuts in front of property on Terrace and Fairmount Avenue adjacent to Twenty-third Street, when the grade of those streets is brought down to meet the new grade of Twenty-third Street, will be correspondingly severe. The ordinance provides for deep cuts on Fairmount Avenue and Terrace Place, but easy grades to both Twenty-third and Twenty-fourth Streets. The verdict and judgment established the deep cut in Twenty-third Street, but by a finding that the damages exceeded the benefit abrogated the grading at Fairmount and Terrace so as to connect with Twenty-third Street, without providing for easier access from Twenty-fourth. This having been done, appellants' property, will, they contend, be shut off from the outside world, if the judgment is affirmed; and that the property of one of the appellants (Doarn's) will be on the edge of a canyon, 25.4 feet deep at the east end of his property and 41.1 feet deep at the other, if the regrading of the intersecting streets promised him be withheld.

The purpose of the proposed widening of Twenty-third Street was to afford an approach to a high line viaduct to be constructed between Kansas City, Missouri, and Kansas City, Kansas.

After the resolution was adopted, upon which the ordinance providing for this improvement was based, notice was published, describing the proposed improve-

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ment and inviting property owners interested to examine the plans of the proceedings and present their views thereon. A public hearing for that purpose was held in the office of the Board of Public Works, and was attended by appellants and others. The plans revealed that while Twenty-third Street would suffer a great cut at the west end, Fairmount, Terrace and the other intersecting streets were to be brought down to meet the new Twenty-third Street grade, and that increased and facilitated means of ingress to and egress from appellants' property would be afforded, and on easier grades. While adjacent property would be left substantially higher than the new street grade, the new trafficway would improve the ingress and egress by Twenty-third Street and increase the utility of Twenty-fourth Street by reducing the grades and making them easier; and Fairmount and Terrace Streets would become two-way streets instead of one-way streets, as now. After examination, the Board of Public Works adopted a resolution approving plans for the grading of Twenty-third Street, as widened, and of the intersecting streets, "all as one general improvement to be known as the Twenty-third Street Trafficway."

Each of the appellants filed his claim in writing, setting out that the building of this trafficway and the change in grade of intersecting streets, as provided in said ordinance and plans, would cause his property to be damaged, etc.

Kansas City introduced in evidence Ordinance No. 28181, the maps and plats filed with it, the bond ordinance, and the judgment record in the cause filed in the Circuit Court of Jackson County, Missouri, at Kansas City, styled, "In the matter of determining the validity of ordinance of Kansas City, Missouri, No. 28181, approved November 4, 1916, and the proposed tax lien thereunder for the cost of grading Twenty-third Street, as widened from the east line of New Brook Street to the east line of Jefferson Street." This case was filed concurrently with Ordinance No.

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28181, and bears the next succeeding number in the clerk's office. It was brought under the provisions of Section 28 of Article 8 of the Charter of Kansas City of 1909, which provides that after the passage of the ordinance for constructing a viaduct and an approximate estimate of the cost of the work, the city shall file a proceeding in the circuit court in its name against the respective owners of property chargeable with the cost of the improvement. This ordinance was passed and approved, and the approximate estimate of the cost of the work made. It defines and sets forth the limits of the benefit district, and closes with a prayer that the court find and determine the validity of that ordinance and as to whether or not the respective tracts of land in the benefit district shall be charged with the lien of the work.

This validity-testing ordinance case came on before the court for hearing January 3, 1917, several days before the trial of this case began, and a judgment was entered which, among other things, recited that "the court finds, orders and adjudges that Ordinance of Kansas City No. 28181, approved November 4, 1916, entitled: An ordinance to open, widen and establish Twenty-third Street from the east line of New Brook Street to the westerly line of Southwest Boulevard and condemning the necessary land therefor; providing for and authorizing the work of grading and regrading Twenty-third Street, Fairmount Avenue, Terrace Street, etc., is in all respects valid and legal; and that the work be done in the manner and to the extent provided in said ordinance and a contract for said work, and that the same be paid for in special tax bills was expressly authorized." The judgment further provided that the proposed lien of the special tax bills for said work should be a valid lien against the property assessed to pay for said work.

Oral testimony was offered by Kansas City, showing that the Twenty-third Street Trafficway was a necessity; that the proposed depression in Fairmount Ave-

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nue, to meet the new grade, will make cuts in front of private property on Fairmount, ranging from less than one foot near Twenty-fourth Street to forty feet at Twenty-third Street, and on Terrace Street 26.8 feet at Twenty-third, tapering out to nothing near Twenty-fourth Street.

Each claim for damages by change of grade was given a number and considered in connection with the street upon which the tract abutted. If a tract was on the corner of Twenty-third Street and one of the intersecting streets, it had two numbers and was considered in connection with Twenty-third Street as well as such intersecting street. The city introduced real estate expert appraisers who inspected the various pieces of property involved. These expert witnesses agreed that lots on Terrace and Fairmount Avenue would sustain damages by the proposed change in grade in Twenty-third Street and the intersecting street, caused by this improvement. They also testified that the damages would be $24,288.53 to claimants on Fairmount Avenue, and $21,020.62 to those on Terrace Street.

Appellants' witnesses estimated the damages at $65,032.70, and explained the reasons therefor, that unless the intersecting streets were graded as planned in the improvement, the approaches to appellants' lots would be destroyed.

The following instructions given by the court are complained of:

Instruction No. 6 told the jury that they were to write thirteen separate verdicts in the case.

Instructions 10 and 13 told them they must separately assess the benefits arising from each particular improvement.

Instructions Nos. 14 and 15 told the jury that if the total benefits from the proposed grading of any of the intersecting streets do not equal in dollars and cents the amount of damage to the lots on such side street, the jury need proceed no further as to such in-

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tersecting street, except to so report to the court as to such intersecting streets.

Instructions Nos. 16 and 17, in effect, told the jury that only the property abutting on Twenty-third Street might recover damages from the grading of that street.

The jury made findings of damages and benefits as to each feature of the improvement specified in the ordinance, except as to the damages from the grading of Fairmount, Terrace, Holly and East Streets, and found that the damages exceeded the benefits upon each of such streets. No damages were awarded claimants on such four intersecting streets, the effect being to leave the improvement of such streets out of the proceeding entirely, but to sanction and approve all other features of the proposed improvement.

Claimants owning property on Madison, Summit, Monitor, Belleview, West Prospect, Circle and Mercier Streets, where the changes were relatively slight, were awarded damages, and the work ordered in the ordinance was authorized to be done, but the remaining four cross streets were left as before.

Appellants contend: (1) that the improvement being "one general public improvement" must stand or fall as such; (2) that the charter and ordinance required the jury to ascertain and report the damages caused to appellants' property by the improvement as a whole and forbade a severance of the improvement into parts; (3) that the judgment was not responsive to the charter, to Ordinance No. 28181, nor to the resolutions of the Board of Public Works, and the court therefore was without jurisdiction to render it; (4) the city and property owners in the benefit district were estopped to question the validity of any portion of Ordinance No. 28181, because of the previous judgment, to which specific reference has been made in this statement. These contentions, to which may be added the objections to instructions given, embody appellants' assignments of error.

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I. Appellants insist that Ordinance No. 28181, with its accompanying documents, upon which this controversy centers, constitutes the petition in this case; and that but one cause of action was therein stated, which consisted of the contemplated improvement as an entirety. The conclusion, although somewhat figurative in form, is not foreign to a practical interpretation of the ordinance and finds support in City of Tarkio v. Clark, 186 Mo. 285, in which the facts were not dissimilar to those at bar, and the issues were sufficiently parallel to render the ruling at least persuasive. Whether it be or not, the provisions of the ordinance interpreted in the light of the purpose of the improvement will enable it to be determined whether its provisions are to be construed together as component parts of a harmonious whole or as separable powers which may be enforced or abandoned, as the tribunal empowered to execute them may determine. The ultimate purpose of the improvement was the establishment of a trafficway or great artery of transit between the two adjacent cities. The municipal assembly clearly cognizant of the purpose in view, in framing the ordinance, employed terms therein comprehensive of the territory to be affected and specific as to the streets. It was therefore not the improving of Twenty-third Street, and in addition any of the intersecting streets, less than the entire number enumerated, that was to constitute a compliance with the ordinance, but of Twenty-third Street, and all other intersecting streets named. To illustrate: The ordinance provided that eleven intersecting streets should be graded or regraded so as to constitute approaches to the proposed trafficway. The verdict and judgment of the circuit court eliminated four of these, to-wit, Fairmount Avenue, Terrace Place, and Holly and East Streets. This constituted but a partial enforcement of the ordinance, in that it construed its provisions, not as constituting one improvement, but as being separable, and capable of enforcement by piecemeal, at the dis-

Improvement As A Whole.

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cretion of the court. The ordinance, measured by every rule of construction, which includes not only its evident purpose, but its context and subject-matter, was not thus intended to be enforced. If the intersecting streets named could be omitted, then all of same could have been omitted. That it was intended, therefore, that the separate improvements comprised in the ordinance should constitute an entirety, seems beyond question. This being true, the circuit court had no authority to receive a verdict or render a judgment which ignored any of the essentials of the ordinance required to be included therein. As applied to the facts at bar, the court could not in the ascertaining of damages and benefits eliminate from its consideration the four intersecting streets named.

Section 16 of Article 6, Charter of Kansas City, 1909, set forth in the statement, under which it was sought to ascertain the damages and benefits, has been construed in Kansas City v. Woerishoeffer, 249 Mo. 1, as authorizing an omnibus proceeding such as was rendered necessary by Ordinance No. 28181, where the purpose was to form one general public improvement.

Statutes of other States, similar in their material features to that at bar, have been upheld which provide for a combination in one proceeding of distinguishable public improvements.

In Wells v. Street Commissioners, 187 Mass. 451, 73 N. E. 554, there was a petition to quash special benefits on account of the widening and extension of Summer and Cove Streets, and the construction of the South Terminal Station in Boston, under a special statute combining those improvements. The court upheld the assessment, saying: "The constitutionality of the statute was considered and affirmed in Sears v. Street Commissioners, 180 Mass. 274. We are all of opinion that the Legislature, in dealing with the benefits by the amount of which the assessment should be limited, well might treat the changes in the streets and the construction of the station as parts of a single

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public improvement constituting one joint enterprise, bringing special and peculiar benefits to the estates in the vicinity."

In re Third, Fourth and Fifth Avenues, 49 Wash. 109, 94 Pac. l. c. 1078, similar to the instant case where the streets named were in one proceeding ordered improved by widening and cutting, it was stated: "Another point urged by appellants is that it was not lawful for the council to combine in one ordinance and as one improvement, two improvements so different from each other as the widening feature and the change of grade feature of this ordinance. We think this contention is not well taken. The ordinance relates to a unified subject, the improvement of certain streets, and it is immaterial that such subject is capable of subdivision. Appellants argue that, in levying the assessment, no lot should be assessed for any part of the widening except such as is benefited by the widening, and then only the amount of its benefit from that source. We think each lot should bear its share of the expense to the extent of the resultant benefits received by it from the improvement considered as an entirety. The widening and also the change of grade are simply elements which enter into the reasoning by which the final result is reached when fixing the amount of benefits to each lot."

In The City of Springfield v. Green, 120 Ill. l. c. 273, which was a proceeding providing for the pavement of a large number of streets and alleys, the Illinois Supreme Court said: "The ordinance is also assailed on the ground that it embraces more than one improvement. We do not think this is true, in point of fact. While many streets and parts of streets are embraced in the scheme of improvement adopted by the city, yet we regard them all as but parts of the same improvement. The city authorities, in adopting the ordinance, must have found, as a matter of fact, that these streets and parts of streets were so similarly situated, with respect to the improvement proposed to be made, as

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to justify treating them as parts of a common enterprise and single improvement, and from the record before us we think they were justified in doing so."

As illuminative of the same doctrine under a different state of facts, see City of Bloomington v. Reeves, 177 Ill. l. c. 168.

The ruling of this Court is apposite, in Shaffner v. City of St. Louis, 31 Mo. 264, based as it is upon facts similar to those at bar, and holding that a jury in ascertaining damages and benefits shall be limited to the ordinance authorizing the improvement. The court's opinion, expressed with that directness, characteristic of the style of Judge Scott, the writer, is, so far as pertinent to the issue here involved, as follows: "The proceedings were commenced under one ordinance directing the street to be opened, and before they were finished the lines of that street were altered by another ordinance, and yet the proceedings, though in conformity to the latter ordinance, were continued under the original notice which required them to be under the former one. In a matter of this kind, where all the owners of the property benefited by the opening of a street are to be taxed, it is impossible for the courts to ascertain how the variation of the line of the street will affect them. We cannot say that the alteration was not a material one; the circumstances forbid it. Some who might have acquiesced in the street as originally established, would have objected, perhaps, had they been aware of the change. The history of this proceeding shows how unwise it is to depart one iota from the law in condemning property for public use, when a few of the neighbors are by the law compelled to pay for the property condemned. The seeds of litigation in such cases will be sown broadcast, where any ground is given for the opinion that the requisite legal steps have not been taken in order to condemn the property and to assess the benefits. We are of the opinion that after the line of the street as originally established had been changed by an ordinance passed subsequently

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to the beginning of the proceedings to condemn private property for public use and to assess benefits, the mayor could not proceed under the original notice, but the proceeding first commenced should have been abandoned, and a proceeding *de novo* should have been had under another notice such as is required by the amended charter. The judgment is reversed. The other judges concur."

The Woerishoeffer case, 249 Mo. l. c. 31, heretofore referred to, distinguishes the Shaffner case, but not in regard to the ruling doctrine announced in the latter, that proceedings which deprive an owner of his property must be conducted in strict conformity with the act which authorizes them, and if not so conducted they are void.

In Leach v. Cargill, 60 Mo. 316, we held that proceedings of the nature here involved were *in invitum*, purely statutory, and hence to be strictly construed. Further, confirmatory of this ruling, we held in St. Louis v. Koch, 169 Mo. l. c. 591, that every material requirement of the statute authorizing such proceedings must be strictly complied with. It will suffice in the face of the facts, as construed in the light of the cases cited, to say that Ordinance No. 28181 did not contemplate in the construction of the trafficway the improvement of Twenty-third Street, to the exclusion of the improvement of the intersecting streets named.

II. The court, in giving Instruction 6, in effect, told the jury that they should "write or cause to be written 13 separate verdicts as to the damages and benefits, one for each proposed improvement. These separate verdicts may, when written, be bound together," etc. This was misleading. There were not thirteen separate improvements. There was but one general improvement as specified in Article 6, Section 16, of the Charter, and in the title and in Section 11 of Ordinance 28181. While this constituted but a misdirection as to the mechanical preparation of the verdict, it was nevertheless error.

Separate Verdicts.

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Instruction numbered 10, given by the court, told the jury "that the damages and benefits, if any, from the grading of Twenty-third Street and each of the intersecting streets proposed in this proceeding, must be considered and determined separately by the jury, as to each of such streets." Under the construction placed upon the ordinance authorizing this improvement, this instruction was calculated to mislead the jury. It was immaterial what the benefits might be from a particular part of the general improvement.

In re Third, Fourth, and Fifth Avenues, 49 Wash. 109, 94 Pac. 1075, 1078, construing a charter provision similar to ours, the Supreme Court of Washington held, "that in levying the assessment no lot should be assessed for any part of the widening except such as is benefited by the widening and then only the amount of its benefits from that source. We think each lot should bear its share of the expense to the extent of the resultant benefits received by it from the improvement considered as an entirety. The widening and also the change of grade are simply elements which enter into the reasoning by which the final result is reached when fixing the amount of benefits to each lot."

The improvement in the instant case was an entirety so far, at least, as it related to the change of the grade of Twenty-third Street and its intersecting streets. If any part of such grading was illegal, the whole must fail, as was held in City of Bloomington v. Reeves, 177 Ill. 168; if the conditions precedent had all been complied with, the improvement would have stood as a whole and the grading benefits to pay the grading damages assessed as a whole, because of the character of the improvement. As to the benefits assessed to pay the damages awarded for the lands taken in the condemnation proceeding, the charter and the ordinance in this case provide that they may be paid in ten annual installments; while the benefits assessed to pay the damages awarded for the change of the grade of the

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various streets must be paid in sixty days from the confirmation of the verdict. Owing to the different times of payment fixed for each, the amounts of the two different benefit assessments can not be mixed and assessed as a whole, but must be kept separate by the jury in rendering its verdict and judgment thereon entered accordingly by the trial court.

To a like effect was the ruling in Alden v. City of Springfield, 121 Mass. 27, a proceeding to revise a special assessment because of a street opening, where the court said: "The question was as to the benefit to the petitioner's land by the whole construction of the street, and the petitioner had no right to introduce evidence as to the benefit resulting from any particular piece of work done in the course of such construction."

In Lincoln v. Street Commrs., 176 Mass. 210, which was a proceeding to quash a special assessment for constructing a system of sewers and establishing building lines in the City of Boston, in estimating the special benefits, the whole improvement was taken as one, instead of separating the items. The court said: "The statute seems to contemplate the course which was adopted, so that strictly the question would be, perhaps, whether the statute could not authorize it. But if we assume the statute to be neutral, the question is, whether it can be said as a matter of law, that the commissioners were not warranted in finding street, sewer, and building lines all to be portions of one improvement. We are of opinion that they were warranted in their finding. The different elements are combined in the unity of a single though complex design."

Instruction numbered 11, complained of, is as follows: "The jury are instructed that they are the sole judges of the credibility of the testimony offered in the case and the credit which should be given the testimony

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of any witness who has testified in the case, and the jury are not bound to accept, against their own judgment and conviction, the statement or statements of any witness in the case as to damage or benefit to property from the proposed improvement." In so far as this instruction may attempt to authorize the jury to exercise their own judgment in the finding of a verdict free from any connection with the evidence, it is error and in conflict with the rule announced in In re Sixth Street, Kansas City, v. Morris, 276 Mo. 158.

Expert Testimony.

It is complained that error was committed in the giving of sub-paragraphs (2) and (3) of instruction 13, which are as follows:

Benefits to Particular Lots.

"(2) The court instructs the jury that they have no right to assess any lot or parcel of land, in the prescribed benefit district, to pay for any of the proposed street improvements, except for such of said street improvements, if any, as will actually benefit the particular lot or parcel of land assessed by the jury;

"(3) And the jury are instructed that they have no right to assess any greater sum against any lot or parcel of land in the prescribed benefit district than it will be actually benefited by the particular improvement for which the jury assesses the same."

These sub-divisions are contrary to the spirit and intent of Article 6, Section 15, of the Charter, and Section 11 of Ordinance No. 28181, which was intended to unite all of these elements of improvement into one proceeding.

As contended by appellants, a single improvement can not be dissected and the benefits assessed or withheld according to technical reasoning, but must be assessed in view of the fact that the various elements are united in a single improvement.

The refinements of reason cannot split a "general improvement" into unbeneficial parts; and no attempt should be made to accredit any one portion of this

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improvement with benefits apart from the others, except to separate the grading benefits from the condemnation benefits, as above stated.

Instructions 14 and 15 contain the same objection and will be considered together. They read as follows:

"14. If the jury shall consider and determine that the total benefits from the proposed grading of any of the intersecting streets do not equal, in dollars and cents, the amount of damage to the lots on such side street, then the jury need proceed no further as to such intersecting street, except to so report to the court as to such intersecting street or streets, if any.

Excess of Damages Over Benefits.

"15. If the jury shall consider and determine that the total benefits from the proposed grading of Twenty-third Street do not equal, in dollars and cents, the amount of damage to the lots abutting on Twenty-third Street, then the jury need proceed no further, except to so report to the court as to said Twenty-third Street."

These instructions are subject to the criticisms heretofore stated, as applicable to other instructions, and are contrary to the law governing cases of this character. They contravene the last sentence of the instruction numbered one, which properly told the jury that they were "not at liberty to pass on the question as to whether there is a public necessity for the proposed proceeding, that being a matter within the discretion of the Common Council, which has already been determined." In other words, the court announced in this instruction that the improvement was necessary as a matter of law, while instructions 14 and 15, in effect, told the jury that they might find that portions of the improvements were not needed sufficiently to require paying for them.

In a former instruction, the jury had been given the whole law on the question of damages exceeding benefits, and told that if all of the damages should exceed the benefits, they should go no further, but report, etc. Instructions 14 and 15, therefore, conflicted

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therewith, and relieved the jury of the necessity of finding that all of the benefits taken together exceeded all of the damages taken together, and authorized the jury to ignore any part of the improvement.

Instructions 16 and 17 contain the same error, and will be considered together. They read:

"16. The jury are instructed that the only property entitled to damages, if any, for the grading of Twenty-third Street, is the property abutting thereon, and that the property situated upon the intersecting streets in this proceeding, not abutting on said Twenty-third Street, is not entitled to any damages, if any, occasioned to such property by such grading of said Twenty-third Street.

Non-Abutting Property.

"17. The court instructs the jury that the owners of lands on the intersecting streets, not abutting on Twenty-third Street, are not entitled to any damage they may sustain by the proposed cut on Twenty-third Street."

Appellants contend that these instructions involve a misapprehension of the meaning and purpose of the charter and ordinance provisions, as applied to the case at bar.

The charter, Article 6, Section 16, gave authority for the improvement in this case of Twenty-third Street with intersecting streets for the purpose of opening, grading, regrading and the building of viaducts or tunnels, and Ordinance No. 28181 stated that it was drawn under authority of said article and section. The charter and ordinance made Twenty-third and the intersecting streets one for the purpose of the improvement, and the authorities which hold that the benefits need not be accredited to any particular part of the improvement, must be deemed to decide that the issue is, whether the complainant's property is damaged by the improvement as a whole. The authority of the charter cannot be dissipated and the ordinance frustrated by instructions based upon the immaterial issue of whether

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property abutting upon the proposed improvement is damaged by one part of the improvement or another.

The land of all of the appellants was and will be affected by this general improvement. The improvement, under the limitations stated, is an entirety. If any part of same damages appellants, they are entitled to recover.

These instructions, therefore, are misleading and submit an issue not presented by the pleadings.

Appellants contend, and the facts show, that after the cutting down of Twenty-third Street, appellants cannot bring vehicles to their houses from the north *via* Twenty-third Street, because of the deep cut, and cannot bring them from the south because of the steep grade. Fairmount and Terrace will become *cul de sacs,* and appellants' property isolated; that these streets will be to all essential purposes vacated; that appellants have an easement in the access to their property, which this judgment erroneously destroys without compensation.

Glaessner v. Brewing Assn., 100 Mo. 508, was a suit brought to enjoin the Anheuser-Busch Brewing Association from constructing and maintaining a railroad on, over and across Broadway, Seventh and Ninth Streets in St. Louis, which run north and south. The track was to be laid between Dorcas and Arsenal Streets, which run east and west. Plaintiff's property was seventy or seventy-five feet north of the proposed railroad and on the west side of Broadway. His complaint was that the railroad diverted travel from the front of his premises and interfered with his easement of ingress and egress. The court held that plaintiff was entitled to a permanent injunction, saying: "That the public travel will and must be greatly obstructed is clear, and if such an ordinance as this is to be upheld there is no telling where such municipal legislation will end. The trust reposed in the City of St. Louis to regulate the use of the streets is for the purpose of keeping them open and free to all, and we can but

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conclude that the ordinance in question violates that trust and is void. The city having no rightful authority to enact the ordinance, the switch tracks constructed thereunder on the public highway would be a public nuisance; and in order for the plaintiff to maintain this injunction he must show some special injury over and above the general injury to the public. Some of the evidence offered by the defendant is that the construction of the switch will not decrease the value of the plaintiff's property. On the other hand it is alleged and showed that plaintiff's property is within seventy-five feet of the proposed crossing, and the weight of the evidence is that these proposed crossings will have the effect to divert the travel to streets west of the brewery, and thereby decrease the value of the plaintiff's property, and take away some of the trade which he at this time enjoys. The evidence satisfied the trial court and it satisfies us that plaintiff will suffer an injury which entitles him to maintain this suit. The judgment is affirmed. All concur."

In Downing v. Corcoran, 112 Mo. App. 645, plaintiff brought suit to enjoin defendant from placing and maintaining obstructions in a certain private road so that plaintiff's free use of the road was interfered with. The parties both required a way to the public road. The plaintiff made use of a passway, and afterwards, at the instance of defendant, it was converted into a private road and became free to the use of the public, but defendant prevented its use by obstructions. The Kansas City Court of Appeals held plaintiff entitled to the injunction, saying: "In support of his objection to the conclusions of the trial court, defendant states several correct propositions of law and cites authority in connection therewith, but we are clear that the facts of the case leave them without just application. It is contended that plaintiff is not entitled to connection with a public highway at every point along his line. That may be granted, especially if having connection at every point would inconvenience some other

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person. But here, plaintiff had a right to reasonably convenient points of connection and it was wrong in defendant, without excuse or right to prevent his use of such points, notwithstanding there possibly may have been other places where defendant could have gotten through."

In Putnam v. Boston & Providence Railroad, 182 Mass. 351, l. c. 354, the law is thus stated: "It never has been held that one whose access to a general system of public streets in a city or town is entirely cut off, suffers only the same kind of damage by the discontinuance of a street as one of the public who is merely obliged to travel further through public streets to reach his destination. So to hold would be to extend too far the doctrine previously stated in this opinion, which as now established sometimes causes hardships, although it rests on sound principles and generally accomplishes justice. . . . We know of no adjudication, nor of any sound principle that precludes the petitioners from recovering such damages as they suffered from the deprivation of access from their property to the public streets as a necessary result of the change ordered by the aldermen. It will seldom happen that the execution of such an order will cut off access in all directions to the public streets of a city, which before had been enjoyed as an attribute of the property. When it does happen, in a case in which the statute makes compensation for damages, such damages are recoverable."

The rulings of our own and of other courts, upon the effect of the vacation of a street affording access to property, may be epitomized in the general rule announced in 1 Lewis on Em. Dom. (3 Ed.) sec. 206, p. 387, and sec. 123, p. 190, that the owner of property thus affected has a right of access in both directions which extends as far, at least, as the next connecting highway. A like doctrine is announced in 2 Elliott on Roads and Streets (3 Ed.), sec. 1181 and cases. The owner's remedy, when deprived of such a right, has

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been clearly defined by this court in the following cases: Gorman v. Railroad, 255 Mo. 483; Press v. Penny & Gentles, 242 Mo. 98; Rude v. St. Louis, 93 Mo. 413. Cases pro and con are cited in the briefs of opposing counsel. We have reviewed these with some degree of care, reaching the conclusion that error was committed by the trial court in its rulings herein; and that this case should be reversed and remanded, to be proceeded with as herein indicated. It is so ordered.

All concur; BOND, C. J., in the result. WOODSON, J., absent.

BELLE POWELL et al., Appellants, v. MARY BOWEN et. al.

In Banc, July 7, 1919.

1. **DEED OF MARRIED WOMAN: Defective Acknowledgment: Prior to 1883.** A deed made by a married woman, the certificate of acknowledgment of which simply recited that she and her husband "personally appeared before me, a notary public in and for said county, both being personally known to me and acknowledged the execution of the annexed deed," made when the statute (Secs. 680, 681, R. S. 1879) requiring that any officer taking the acknowledgment of a married woman to any deed of conveyance of real estate must examine her separate and apart from her husband, and so certify in the certificate of acknowledgment, and further certify that she executed such conveyance freely and without compulsion of her husband, was in force, was void.

2. ———: **Abandonment of Land.** The defense of abandonment, disassociated from other defenses, such as adverse possession or failure to pay taxes, has never been recognized at common law as affecting title to real property; for at common law title can neither be lost nor gained by abandonment operating alone.

3. ———: **Laches and Estoppel: Suit for Interest.** Neither *laches* nor estoppel *in pais* is as to her real estate imputable to a married woman who ever since the making of her void deed in 1882 has been under the legal disability of coverture, the reason being that prior to the Married Woman's Acts of 1889 the right of possession of a married woman's lands was in her husband and was a vested

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right which was not destroyed by those acts, and she could not before or since have maintained an action for possession. Since the Act of 1897 she could have maintained an action to determine interest, but was not compelled to do so, but that act did not divest the husband's existing right to possession, or permit her to sue for possession during his life.

Held by GRAVES, J., dissenting, that the Act of 1897 afforded to a married woman the right to assert her interest in land, and a remedy; and if she stood by for eighteen years after its enactment and saw valuable improvements made upon the land she is barred by estoppel *in pais* from asserting such interest; and estoppel *in pais* goes both to the remedy and the right, and may be set up as a defense in actions at law and suits in equity.

4. ———: **Estoppel By Covenant in Void Deed.** A married woman is not estopped to assert her interest in land by a covenant in a deed which is void as to her because not acknowledged in the manner required by statute. The deed being void, any covenant in its cannot be efficacious to produce estoppel.

5. ———: **Limitations.** Neither the ten-year, nor the thirty-one-year, nor the twenty-four-year Statute of Limitations was a bar to a married woman's suit begun in 1915 to establish her interest in land attempted to be conveyed in 1882 by a deed void because it was not acknowledged in the manner prescribed by statute, she being at the time and ever since under the legal disability of coverture. There was no time when she was capable of maintaining an action for possession, and as no such action can accrue to her until her husband's death, the thirty-one-year and the ten-year statute has never begun to run as to her, and her suit to establish her interest is not barred by the twenty-four-year statute, because it was begun in less than twenty-four years after the Act of 1897 was passed.

Held, by GRAVES, J., dissenting, that Section 1881, Revised Statutes 1909, which antedated the Married Woman's Acts of 1889, should no longer be held to except married women from the provisions of the ten-year and other statutes of limitations, but the Married Woman's Acts having made her a *femme sole*, with power to sue for her interest in lands, she should be considered discovert, and said Section 1881 should not be held to prevent the statutes of limitations from running against her.

6. ———: ———: **Thirty-year Statute: Obligation to Pay Taxes.** As between a married woman, whose deed made in 1882, in which her husband joined, was void as to her because not acknowledged in the manner prescribed by statute, and who has since been under the disability of coverture, and her husband's grantee and grantees by *mesne* conveyances, as the obligation to pay taxes

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rests up the latter, the holders of his lifetime right to possession; and hence the thirty-year Statute of Limitations does not apply to her in her suit to establish her interest in the land, she being at no time entitled to its possession.

7. **CHAMPERTY: Agreement of Attorney to Pay Cost.** An agreement by an attorney with a married woman to pay the cost of a suit to recover her interest in land, in consideration of a one-half interest in the amount recovered, even if champertous between him and her, does not serve to deprive her of relief touching the land as against a stranger to the contract.

Appeal from Pemiscot Circuit Court.—*Hon. Sterling H. McCarty,* Judge.

REVERSED AND REMANDED (*with directions*).

Duncan & Brewer for appellants.

(1) The deed made by Belle Powell and her husband, dated Sept. 15, 1882, is null and void and did not convey the land in question to Leonard for the reason that the certificate of acknowledgment to said deed fails to recite that the said Belle Powell was first made acquainted with the contents of such instrument and acknowledged said deed on examination separate and apart from her husband, and does not recite she executed said deed freely and without compulsion or undue influence of her husband. 1 Wagner's Statute 1872, p. 275, sec. 13, and sec. 14; Linville v. Greer, 165 Mo. 394; Mayes v. Price, 95 Mo. 613; Bartlett v. O'Donohue, 72 Mo. 563; Goff v. Roberts, 72 Mo. 570; Hoskinson v. Adkins, 77 Mo. 540; Hord v. Taubman, 79 Mo. 103; Rivard v. Railroad, 257 Mo. 164; Laclede Land & Imp. Co. v. Goodno, 181 S. W. 412; Bagby v. Emberson, 79 Mo. 139; Devlin on Deeds (3 Ed.), sec. 107. (2) As Belle Powell was married in the year 1870, and remained under said coverture from that time to the bringing of this suit, plaintiffs are not barred by either the twenty-four-year Statute of Limitations or the so-called thirty-year Statute of Limitations pled by defendant. Dyer v. Wittler, 89 Mo. 81; Vanata v. John-

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son, 170 Mo. 274; DeHatre v. Edmonds, 200 Mo. 267; Bone v. Tyrell, 113, Mo. 188; Howell v. Jump, 140 Mo. 457; Shumate v. Snyder, 140 Mo. 87; Land & Imp. Co. v. Epright, 265 Mo. 215; Lewis v. Barnes, 199 S. W. 212; Graham v. Ketchum, 192 Mo. 15; Babcock v. Adams, 196 S. W. 1118; Smith v. Smith, 201 Mo. 533. (3) Plaintiffs are barred neither by laches nor by estoppel. Blodget v. Perry, 97 Mo. 273; Bales v. Perry et al., 51 Mo. 453; Dameron v. Jamison, 143 Mo. 491; Mayo v. Cartwright, 30 Ark. 407; Throckmorton v. Pence, 121 Mo. 50; Myers v. DeLisle, 259 Mo. 514; Lewis v. Barnes, 199 S. W. 212; Bigelow on Estoppel (3 Ed.), 484; Acton v. Dooley, 74 Mo. 69; Monks v. Beldan, 80 Mo. 642; Harrison v. McReynolds, 183 Mo. 549; Rutter v. Carothers, 223 Mo. 640; Shannon v. Thompson, 234 Mo. 15; Henry v. Sneed, 99 Mo. 425; Rannells v. Gerner, 80 Mo. 483. (4) The deed of a married woman defectively acknowledged does not operate as an estoppel against her. Devlin on Deeds (3 Ed.), sec. 5486; Drury v. Foster, 2 Wall. 34; Smith v. Ingram, 61 L. R. A. 678. (5) The doctrine of champerty and maintenance is not applicable to this case, for the plaintiffs will not be deprived of relief because the contract between plaintiff, Belle Powell, and the plaintiff, Bex A. Trimble, may be infected with champerty. Euneau v. Rieger, 105 Mo. 682. (6) The court erred in refusing instruction number I offered by the plaintiffs declaring that under the pleading and evidence in the case the finding should be that the plaintiffs are the owners of the land in question and that the defendant, Mary Bowen, was entitled to the possession of the premises as long as the marital relation existed between plaintiff, Belle Powell, and her husband, John W. Powell. (7) As plaintiff, Belle Powell, had the legal title to the land in question under the law there could be no abandonment of the title. Tiedeman on Real Property (3 Ed.), sec. 516; Corpus Juris, p. 10, sec. 14; Barrett v. Kansas Coal Co., 70 Kan. 649; Kreamer v. Boneida, 213 Pa. 80; Tarver v. Deppen, 132 Ga. 804; Tennessee Oil Co. v. Brown, 131

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Fed. 699; Calledonia County Grammar School v. Kent, 77 Am. Dec. (Vt.) 880; Arnold v. Cramer, 41 Pa. Super, 13.

C. G. Shepard for respondents.

(1) Under the peculiar facts in this case both the twenty-four and thirty-one-year Statutes of Limitations are effective and are a complete bar to plaintiff's cause of action to quiet the title to the land in question. Faris v. Moore, 256 Mo. 123; Belfast Inv. Co. v. Curry. 264 Mo. 483; DeHatre v. Edmonds, 209 Mo. 246; Collins v. Pease, 146 Mo. 139; Fairbanks et al. v. Long, 91 Mo. 628. (2) Belle Powell and her husband abandoned the land in question in 1882, gave the land no attention from that date up to the time or just prior to the time this suit was filed, and such abandonment completely defeats their right of recovery in this case. Tayon v. Ladew, 33 Mo. 205; Shelton v. Horrell, 232 Mo. 358; Carson v. Verthoed & Jennings Lumber Co., 192 S. W. 1022. (3) Suits to quiet title under Section 2535 are not possessory actions, and the statute as first enacted did not contemplate recovering possession of the land to which the title was to be quieted under said section, therefore a married woman from and after the enactment of said section had a full and complete cause of action in her behalf for the purpose of quieting title to land, as did any other person, even though she was a married woman prior to the enactment of the Married Woman's Enabling Act and remained a married woman until the time of instituting suit. There being no exemption clause in the twenty-four or thirty-one-year Statutes of Limitations exempting married women from the operation of said statute, the courts have no right to read into said statute provisions that were not placed therein by the Legislature, therefore said statutes are as effective against married women as against other parties. (4) The Married Woman's Enabling Act emancipating her and making her *sui juris*, was encated in 1889; what is now Section 2535 was first enacted in

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1897, and it must be presumed that at the time the Legislature passed the act for quieting title to land it had in mind the Married Woman's Act, as well as the twenty-four and thirty-one-year Statutes of Limitation, and passed the statute authorizing the quieting of titles as much for the benefit of married women who could not bring a possessory action by reason of the fact that their husbands' right to possession had attached prior to the married Woman's Act, and there being no exemption in behalf of married women in either the twenty-four or the thirty-one-year Statutes of Limitation, and there being nothing said in the act to quiet title in regard to married women, it must be presumed that the Legislature had in mind the fact that married women in many instances could not bring a suit to recover possession of land, therefore, it was necessary that they have the right to bring a suit quieting the title and showing their interest in the land even though they were not entitled to the possession thereof. (5) The reading of Section 1881 clearly contemplates that the bringing of an action asserting title has the same effect insofar as arresting the Statute of Limitaion is concerned as bringing a possessory action. (6) Belle Powell, by reason of her laches and failure to look after said land or claim any right, title or interest therein, permitting the parties claiming to own said land to make expensive and valuable improvements thereon, is now estopped to come in at this late day and claim said land in its improved condition. And this condition prevailing at the time plaintiff, Belle Powell, made her deed to her co-plaintiff, Bex A. Trimble, he is likewise estopped. Tennent v. Union Life Insurance Co., 112 S. W. 754; Toler v. Edwards, 249 Mo. 152; Shelton v. Horrell, 232 Mo. 358; Rutter v. Carothers, 223 Mo. 631; Powell v. Powell, 267 Mo. 117; Moreman v. Talbot, 55 Mo. 392. (7) Under the facts in this case the doctrine of champerty and maintenance applies with all its vigor and plaintiffs cannot maintain this suit. 6 Cyc. 850; Duke v. Harper, 66 Mo. 57; Bent v. Triest, 86 Mo. 475.

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FARIS, J.—This is an action to determine interest in a certain parcel of real estate situate in Pemiscot County. Upon the trial below defendants had judgment, and plaintiffs, after the usual motions, appealed.

The facts are few and simple. Plaintiff Belle Powell married one John W. Powell on the 24th day of March, 1870, and ever since has been and was at the time of the bringing of this suit, on the 4th day of May, 1915 a married woman. While under all the disabilities of coverture, plaintiff Belle Powell (hereinafter for brevity, except where otherwise stated, referred to simply as "plaintiff") acquired title to the land in dispute. On the 15th day of September, 1882, plaintiff, together with her husband attempted to convey this land by warranty deed to one Mark T. Leonard. The form of deed used in this attempted conveyance was not the general form of warranty deed in common use at that time in the State of Missouri, but seemingly this instrument followed an Indiana form. No point is made, however, upon any portion of this instrument, except the acknowledgment appended thereto which is alleged to be defective. This acknowledgment constitutes the sole ground and *raison d'etre* of this action. Omitting venue, signature and seal of the officer taking the same, all of which are conventional and are not attacked, the acknowledgment to this deed reads thus:

"Before me Fred P. Leonard, Notary Public in and for said county, this 15th day of September, 1882, personally appeared the within named Belle Powell and John W. Powell, both being personally known to me and acknowledged the execution of the annexed deed."

A part of the land in controversy was, at the time of the above attempted conveyance thereof, in cultivation and in the possession of the grantors. The grantees in the above *instrument of conveyance*—we so denominate it for convenience—thereupon took possession of this land, and they and their *mesne* grantees continued in possession, and were in possession thereof on

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the 4th day of May, 1915, when this action was brought.

The defendants derive their paper title from the above mentioned conveyance to Mark T. Leonard. Leonard thereafter conveyed the land to one Willis Charles. Willis Charles gave a mortgage thereon to said Mark T. Leonard, which mortgage being foreclosed, the land was sold by the sheriff and purchased by one John Wilks, who entered into possession of the same and continued in possession thereof till his death. Upon the death of Wilks, the land was duly partitioned among his heirs, and the part here in dispute was set off to his daughter Mary, intermarried with one William J. Bowen, who are the defendants herein.

The several defenses interposed upon the trial will be summarized in the opinion, and no necessity exists for lengthening this statement by a recital of them here.

Upon the trial, the testimony of plainiff Belle Powell was offered in evidence by deposition. Among other things shown therein was the nature of the contract made by plaintiff Belle Powell with her co-plaintiff Bex A. Trimble. Touching this contract, plaintiff Belle Powell said in her cross-examination:

"I received information about March of this year from Bex A. Trimble that led me to believe that I could recover this land. Bex A. Trimble is one of the lawyers representing me in this case. He was to have one half of (*sic*) 50% of any land recovered by suit or compromise. Mr. Trimble and the lawyers with whom he is associated in this matter are to pay all costs and expense and to hold me harmless in regard to the costs in this suit, or any suits that might be brought for this land or any part of it."

This plaintiff further testifies that she sold the land to Mark T. Leonard, and that after she sold it to Leonard she "didn't have anything further to do about it," and that she had "never paid any taxes on it from that time, since she considered that she had no further interest in it and abandoned all claims to it." As a part of plaintiffs' case they offered a quit-

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claim deed, dated April 30, 1915, from Belle Powell and her husband, John W. Powell, conveying to plaintiff Bex A. Trimble an undivided one-half interest in the land in dispute and other lands.

If any further facts shall become necessary to an understanding of the points involved, these will be stated in the opinion.

I. The sole source of paper title in defendants, as such title is disclosed by the record, is one Mark T. Leonard, to whom as stated, plaintiff and her husband attempted to convey the land in dispute by warranty deed bearing date the 15th day of September, 1882. At the time plaintiff signed and delivered, and attempted to acknowledge the instrument in question, and for some ten months thereafter (See Laws 1883, p. 21) the law in force in this State required that any officer taking acknowledgment of a married woman to any deed of conveyance of real estate must examine such woman separate and apart from her husband (Secs. 680, 681, R. S. 1879), and so certify in the certificate of acknowledgment, and further certify that the wife executed such conveyance freely and without compulsion or undue influence of her husband.

Acknowledgment.

Mere casual reference to the acknowledgment of the deed of conveyance from plaintiff and her husband to Leonard discloses a palpable lack of conformance to the certificate of acknowledgment with the law then in force. That this deed was void is well settled—in fact, that it is so void is tacitly conceded by defendants.

Certain other facts, as shown in part by the foregoing statement, are either conceded by the parties or they are conclusively shown by the record. These we epitomize, and re-state below some of them. They are: (a) That plaintiff was married March 24, 1870, and when she attempted on the 15th of September, 1882, to convey the land in controversy to Leonard, was, is

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now, and continuously since said latter date has been, a married woman and under all the disabilities of coverture which existed by law in this State until 1889 (Sec. 6869, R. S. 1889); (b) that neither plaintiff, nor any one for her, nor her husband or any one for him, has paid any taxes of any kind on this land since September 15, 1882, but that such taxes, and all of them, have been for all the years intervening paid by defendants and those under whom defendants claim; (c) that since the date last mentioned defendants and those under whom they claim title have been in the actual, open, notorious, continuous, exclusive, peaceable and adverse possession of the lands in controversy; (d) that these lands have grown in value by reason of the labor and money expended thereon, and on account of money expended for betterment and faxes by defendants and those under whom defendants claim, from $800, their fair value when the attempted conveyance was made to Leonard, to $32,000, their present actual cash value; and (e) that by the contract of plaintiff Belle Powell with her co-plaintiff Trimble, who is an attorney at law, this action is to be maintained and prosecuted by the latter at his own expense, and plaintiff Belle Powell is to be held harmless from all costs of suit and expenses, in consideration of her conveying to said Trimble a half interest in the land in controversy.

To escape the force of the legal conclusion, arising from the fact that plaintiff's deed to Leonard, the common source of title, is void, defendants urge that plaintiffs are barred by (1) the twenty-four-year Statute of Limitations; (2) the thirty-one-year, or so called thirty-year, Statute of Limitations; (3) the ten-year Statute of Limitations as based upon the Act of 1897 (Laws 1897, p. 74), and the alleged duty of plaintiff to have begun her action within ten years after she was by the above act permitted so to do; (4) that the contract between plaintiff Belle Powell and her co-plaintiff Trimble is champertous; (5) that plaintiff Belle Powell

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abandoned this land from September 15, 1882, till May 4, 1915; and (6) that plaintiffs have been guilty of such *laches* and acts *in pais* as to estop them from asserting title after more than thirty-two years have elapsed from the date of the attempted conveyance.

II. Coming to consider whether any of the above defenses are valid as against plaintiff's paper title, we might, without examining them and for the sake of argument, concede that each and all of them except that of abandonment would be efficacious and would constitute complete defenses as against any person *sui juris*. The defense of abandonment, disassociated from other defenses, e. g., adverse possession, or a failure to pay taxes, has never been recognized as affecting title to real property at common law. For at common law, whatever the rule may have been under the Spanish or Civil law (Tayon v. Ladew, 33 Mo. 207), title to real property can neither be gained nor lost by abandonment operating alone. [Robie v. Sedgwick, 35 Barb. 319; Philadelphia v. Riddle, 25 Pa. St. 259; Perkins v. Blood, 36 Vt. 273.] Because both the defense of *laches* and that of estoppel *in pais* may be dealt with together, we do not stop to consider again whether *laches* may be imputed even to one *sui juris* when such one puts forward as the basis of his action nothing but a pure legal title. [See Kellogg v. Moore, 271 Mo. l. c. 193; Garrison v. Taff, 197 S. W. l. c. 274; Newbrough v. Moore, 202 S. W. l. c. 551; Bell v. George, 204 S. W. l. c. 519; Chilton v. Nickey, 261 Mo. l. c. 243.]

Laches and Estoppel.

Touching the insistence of learned counsel for defendants that plaintiff is barred by *laches* and by estoppel *in pais*, we are constrained to hold, perforce the authorities, that neither *laches* nor estoppel *in pais* is as to her real property imputable to a married woman, who was (and who so continued down to the date of the judgment herein) under the disability of coverture when the amendment of 1889 to the Married Woman's Act took effect. [10 R. C. L. 403; Waldron v. Harvey,

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54 W. Va. 608; Gibson v. Herriott, 55 Ark. 85; 10 R. C. L. 742; Phillips v. Piney Coal Co., 53 W. Va. 543; Crenshaw v. Julian, 26 S. C. 283; Krathwohl v. Dawson, 140 Ind. 1; Colorado Ry. Co. v. Allen, 13 Colo. 229.]

The legal reasons for this rule are fairly obvious, especially when applied to the concrete case before us. By virtue of the Law in force in 1882, and of the husband's marital rights at common law, the right of possession of the land in controversy was in the husband of plaintiff. While such husband lived, plaintiff could not have brought any possessory action for the recovery of the land in dispute. This right of possession in the husband had become a vested right before the amendment of 1889 to the Married Woman's Act took effect. The latter amendment could not divest the husband of his vested right of possession, and could not in any wise affect the husband's interest therein. No action, it is plain, except a possessory action, would have afforded plaintiff any adequate or substantial relief. Since plaintiff, during the lifetime of her husband, was unable to bring a possessory action, it follows that her failure to sue cannot be the basis of *laches*. It is true, that since both the Act of 1889 and the Act of 1897 (Laws 1897, p. 74) took effect, plaintiff, at any time since the latter date, could have brought an action to determine interest, that is, the identical action which she now has before us. But she was not compelled to bring such an action. She was not even compelled to bring the present action at the time she did bring it. She could have waited till the right of possession of the land in her husband terminated by his death, and then, within ten years, have brought ejectment.

In fact, if she had brought an action to determine interest in 1897, as soon as the act supra of that year permitted her so to do, she would have been compelled, by the same token, to have brought another action in 1907 and still another in 1917 (or even earlier and oftener than in ten-year periods, since *laches* often

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operates to bar right of action far short of the period prescribed by the applicatory Statute of Limitations). Failing to sue thus early and often, her rights would have been barred and lost to her forever, upon the doctrine of *laches* here contended for. To this absurdity it is apparent the defense of *laches* leads us when we try to apply it to the concrete case.

The right of plaintiff's husband to the possession of the land during his natural life (which right since it constitutes an estate of freehold and is in fact an estate *pur autre vie,* has been called a "life estate," because its effect upon the remainderman in some phases is similar to that of a technical life estate) saved and protected plaintiff's interest. It is fundamental that *laches,* or neglect to promptly bring or assert a cause of action to the hurt of a potential defendant, can never be imputed to one who has no right to sue, or to a case wherein a suit if brought, would not afford any actual relief. *Laches* is but a manifestation of estoppel *in pais.* The latter is the genus, the former merely a species. That estoppel *in pais* is not imputable to a married woman who rests under *the disabilities of coverture stated in the premises* is settled by what we say above, and by the authorities in this State, and by the weight of authority everywhere. [Rannells v. Gerner, 80 Mo. l. c. 483; Cockrill v. Hutchinson, 135 Mo. 67; Henry v. Sneed, 99 Mo. l. c. 425; Lewis v. Barnes, 272 Mo. l. c. 404; Crenshaw v. Creek, 52 Mo. 98; McBeth v. Trabue, 69 Mo. 642; Lowell v. Daniels, 2 Gray (Mass.) 161; 10 R. C. L. 742; Barker v. Circle, 60 Mo. 258; Mays v. Pelly, 125 S. W. (Ky.) 713; Scott v. Battle, 85 N. C. 184; Morrison v. Wilson, 13 Cal. 495; Cook v. Walling, 2 L. R. A. (Ind.) 769, and note.] We need not reiterate that we are passing only upon the concrete case before us, and not upon a case wherein the wife's separate property is involved, or a case wherein the woman married subsequent to the time at which the amendment of 1889 to the Married Woman's Act took effect.

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III. The above cases are likewise persuasive authorities against the suggestion that plaintiff was estopped by the covenant in her deed. Obviously, also, the plain reason of the thing is against any such view. For, if she is to be estopped by her deed, then such deed, to be efficacious in producing an estoppel, must of necessity be a good and valid deed, and it is axiomatic that a thing which cannot be done directly cannot, of course, be done indirectly. The deed here is utterly void. Neither can her covenant of warranty estop her, for, among other reasons against such a view, she was not estopped at common law (21 Cyc. 1344) and there was in existence and applicatory in 1882 a statute which limited and made void the covenant of a married woman, except in so far as was necessary effectually to convey her title expressed to be conveyed by such deed. [Sec. 669, R. S. 1879.] If the deed, as was the case here, was utterly void and conveyed no title by reason of such invalidity, then it follows that the covenant was void also. It results that these contentions of defendants must be disallowed.

Estoppel by Covenant.

IV. Coming to the strenuously and ably urged contentions of counsel for defendants that plaintiff is barred by the several statutes of limitations noted, we are likewise constrained to disallow each and all of these. The twenty-four-year Statutes of Limitations and the thirty-one-year statute are expressly pleaded. The ten-year statute is raised by a general denial. [Carson v. Lbr. Co., 270 Mo. l. c. 245; Land & Imp. Co. v. Epright, 265 Mo. 210.] Under the facts which were admitted, or which are conclusively shown by the proof, plaintiff without any question would have been barred by every statute of limitations pleaded, if she had not been protected by the disability of coverture. In fact, it is settled law that if she had had an existing cause of action, even the disability of coverture alone would not have saved such cause of action to her, because we have held that, *given an ex-*

Limitations.

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isting cause of action, neither insanity (Faris v. Moore, 256 Mo. 123) nor coverture will save such action after the lapse of twenty-four years of adverse possession (De Hatre v. Edmonds 200 Mo. 246), because so reads the statute. [Sec. 1881, R. S. 1909.] The difficulty under which we labor in applying the twenty-four-year statute to the facts in this case is that since plaintiff was married in 1882, her husband was entitled alone to sue, and she has never since that date, or at least until 1897, had any cause of action. Since plaintiff sued in less than twenty-four years after she had a bare cause of action, or right to sue, we need not consider a situation wherein there is, and will be, no cause of action till the death of one who holds a life estate, or an interest tantamount to such an estate. All such interests are saved, covered and protected by the outstanding life estate. [De Hatre v. Edmonds, 200 Mo. l. c. 273; Lewis v. Barnes, 272 Mo. 377; Herndon v. Yates, 194 S. W. 46; Armor v. Frey, 253 Mo. l. c. 477; Bradley v. Goff, 243 Mo. 95.]

In the case of Bradley v. Railroad, 91 Mo. l. c. 498, BRACE, J., of this court, expressed the thought with rare terseness when he said: "No cause of action accrued to her until her husband's death and until that event the Statute of Limitations did not commence to run against her or her heirs." [Dyer v. Brannock, 66 Mo. 391.]

Nor did the Act of 1897, supra, have the *effect* to divest the husband's right to possession, or to confer on the plaintiff the right to bring a possessory action, or to bring any other action which would afford either actual or present relief to her. Besides, as we have already pointed out in discussing other phases of this case, such a view would force us to assume the anomalous position of saying to plaintiff in effect, that she must have sued to determine interest within less than ten years after the Act of 1897 took effect, and that after a judgment in her favor she must continue to bring fresh suits to determine interest every ten years, while her husband lives, or lose her land as a penalty. Discussing a situation precisely analogous, we took oc-

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casion to say, in Division Two, in the case of Herndon v. Yates, 194 S. W. l. c. 48, this:

"Defendants insist that the Statutes of Limitations bar recovery; relying, it seems, upon both the ten-year statute and the thirty-year statute for this position. Both the time and sort of possession meet for a foundation for the running of these statutes were shown, we may concede for argument's sake; but learned counsel in urging the applicability of these statutes overlook the fact that the plaintiffs are remaindermen, and that Lutes, who holds the life estate, is yet alive, and therefore, since his life estate has not yet fallen in, plaintiffs were not compelled to bring this action till he died. They are not, of course, protected here by their non-age existing up till the time they married, nor by their subsequent and yet continuing coverture, because they may not tack these disabilities, but they are protected by the fact that defendants were (and yet are as to a present action in ejectment, entitled to the possession of the land in dispute till the holder of the life estate shall die. While there are a few cases wherein broad language was used which was peculiarly applicable to the facts in such cases and which language from its broadness seems to squint at the view that since the right to sue was given to plaintiffs by statute in 1897, they must have sued to determine interest within ten years thereafter (cf. De Hatre v. Edmonds, 200 Mo. 246, 98 S. W. 744, 10 L. R. A. (N. S.) 86; Burkham v. Manewal, 195 Mo. 500, 94 S. W. 520; Haarstick v. Gabriel, 200 Mo. 237, 98 S. W. 760), and while at first blush on some considerations the logic of the thing may seem also to point somewhere in that direction, yet the rule is sound and free from absurdities which holds otherwise (Armor v. Frey, 253 Mo. 447, 161 S. W. 829). For we would involve ourselves in an absurd position if we were to say that plaintiffs are barred here in this action, but that if they had but waited till the life estate fell in they would have been entitled to bring ejectment at any time within ten years subsequent to

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such event. The Statute of Limitations could not begin to run against plaintiffs till they became entitled to the possession of the land in dispute. This right to possession being postponed by the protecting life estate they were not barred here. [Bradley v. Goff, 243 Mo. 95, 147 S. W. 1012; Hauser v. Murray, 256 Mo. 58, 165 S. W. 376; Armor v. Frey, supra.]"

While the situation presented makes the case a hard one, apparently working great injustice upon the defendants, the rules of law invoked are well settled by numerous adjudged cases. These rules are the result of following the common law, unchanged till 1889 by statutes requiring a more logical and fair view of the relations and property rights of married men and women. We cannot change the law as it is written, however much the compelling justice of the situation may seem to urge. To do so would necessitate the overruling of dozens of cases and would bring about an unsettling of the law in matters wherein it has been deemed settled by Bench and Bar for almost half a century. [See Dyer v. Wittler, 89 Mo. 81; Howell v. Jump, 140 Mo. 441; Shumate v. Snyder, 140 Mo. 77; Vanata v. Johnson, 170 Mo. 269; De Hatre v. Edmonds, 200 Mo. l. c. 267; Smith v. Smith, 201 Mo. 533; Land & Imp. Co. v. Epright, 265 Mo. l. c. 215; Graham v. Ketchum, 192 Mo. 15; Dyer v. Brannock, 66 Mo. 391; Pim v. St. Louis, 122 Mo. l. c. 665; Bradley v. Railroad, 91 Mo. 493; Hall v. French, 165 Mo. l. c. 440; Smith v. Patterson, 95 Mo. l. c. 529; Babcock v. Adams, 196 S. W. 1118; Lewis v. Barnes, 272 Mo. 377.] Many other cases can be found, but these should suffice. If to-day, in order to meet a seemingly unjust and harsh case, we should change the settled law, perhaps to-morrow, again in order to meet a harsh and unjust case, we might be compelled to return to the law as it is now ruled.

V. What has been said above herein applies with equal force to the so-called thirty-year Statute of Limitations. Here plaintiff was, as between her and her

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husband, who was entitled to possession of the land (whatever her duty may have been to the State) under no obligation to pay taxes. It may indeed be said that the duty to pay taxes, considered merely as a matter between plaintiff and defendants, was upon the latter as the holders and owners of the life estate. Nor was plaintiff, as we have seen, at any time in the thirty-six years, which have now elapsed, entitled either to make an entry, or to bring a possessory action. Hence, it follows that neither the ten-year statute, the twenty-four-year statute, nor the thirty-year Statute of Limitations applies to her here.

Thirty-year Statute.

VI. Upon the question of champerty, the ruling must likewise be against the defendants. [Euneau v. Rieger, 105 Mo. l. c. 680.] If the agreement between plaintiffs Belle Powell and Bex A. Trimble *inter sese* be champertous, this fact will not serve to deprive plaintiffs of relief touching the subject-matter dealt with in the champertous contract as against a stranger to such champertous agreement. While there are in some jurisdictions—Wisconsin, for example—holdings to the contrary, and in favor of the view urged on us by defendants, the great weight of authority everywhere bears out the rule we state above. This State early took the view set forth in Euneau v. Rieger, supra. This rule is buttressed both by the reason of the thing and by the overpowering weight of the ruled cases. We see no good or sufficient reason to now change either our views upon the point or the rule announced thereon. Let this contention also be disallowed.

Champerty.

It results that the judgment of the trial court was erroneous and for the wrong party. Let this judgment be reversed and the cause remanded, with directions to the trial court to adjudge the title to the land in controversy to be in plaintiffs, subject to the right of possession of defendants therein, till such time as the husband of Belle Powell shall depart this life, if

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so it be—in the event of plaintiff's prior death, such husband shall have also an estate by curtesy. It is so ordered.

Bond, C. J., Walker, Blair and *Williams, JJ.*, concur; *Graves, J.*, dissents in separate opinion. *Woodson, J.*, not sitting.

GRAVES, J. (dissenting).—Our learned brother says this is a harsh case. To this I cheerfully accede. It is indeed so harsh, that I will not lend my assent thereto, if upon any legal theory it can be avoided. That the plaintiff in this case received the full value for her land when she sold it is not questioned; that she then, and for more than thirty-one years thereafter, abandoned all claim thereto, she admits; that she knew that her grantee was taking possession thereof, and would make improvements thereon, stands to reason from the record; that the grantee and his subsequent vendors in title did make permanent, valuable and lasting improvements is thoroughly shown; that by reason of these improvements and the advance in lands (growing with the flux of time) the cheap land of 1882 is now worth $32,000; that it required a champertous contract, at this late date, to spur her to this action, is shown. In short, the record facts are nauseating to a sense of right doing, and shocking to a keen sense of justice. I believe that there is a clear way around this wrong, and in the succeeding paragraphs will suggest them.

I. I am not unmindful of our previous rulings upon several of the questions I shall discuss. The harsh facts of this case furnish me further excuse to reiterate what I said in Babcock v. Adams, 196 S. W. l. c. 1120. I then said:

Exception to Statute.

"I have long had in mind the idea that we have misconstrued Section 1881, Revised Statutes, 1909, when read in connection with the Married Woman's Act. In origin this statute antedates the Married Wom-

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an's Act. It was at the time of its first enactment expressive of common-law doctrines. At its inception married women belonged to a class suffering disabilities, so far as the right to sue was concerned. This Section 1881 excepted the class (married women) from the limitations prescribed by Section 1879, Revised Statutes 1909, which is the ten-year Statute of Limitations. But for the exception the married woman would have fallen under the ban of said Section 1879. This exception made by Section 1881 was written into the law because of the then inability of a married woman to sue and recover her real estate. When the Married Woman's Act was passed all reason for the exception vanished. By Section 1881 she was not excepted for the reason that she was a married woman, but because she belonged to a class laboring under disabilities. When the disabilities were removed from the class (as they were by the Married Woman's Act), then the excepted class was in effect removed from the statute, and as to Statutes of Limitations the married woman stood just as all other persons *sui juris* stand; in other words, the effect of the Married Woman's Act was to repeal and modify the terms of the statute, to the extent of taking this excepted class (married women) out of Section 1881.

"Since the passage of the Married Woman's Act there is no reason for saying that a man or single woman must sue for lands within ten years, but the married woman, possessed of all the rights to sue as the others should have the statute tolled in her favor. I am aware that our opinions are the other way, but these have long since been my views, and I take this occasion to express them."

It will be noted that I concurred in the Babcock case, solely on the ground that our previous rulings constituted rules of property, and to disturb them would be to disturb property rights. But since that time we have in the case of Klocke v. Klocke, 276 Mo. 572, ruled that the overruling of an opinion of this court, which con-

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strued a statute of the State, would not effect previously acquired property rights. In other words, the ruling in the case which overruled such previous opinions would be prospective only and not retroactive. It becomes necessary at times to overrule opinions construing statutes, and which opinions have fixed rules of property. But, in view of the rule in the Klocke case, supra, this should not deter us in righting a wrong, when the mischief is such as to demand it.

In 7 R. C. L. p. 1008, the idea is most elegantly expressed: "If judges were all able, conscientious, and infallible; if judicial decisions were never made except upon mature deliberation, and always based upon a perfect view of the legal principles relevant to the question in hand, and if changing circumstances and conditions did not so often render necessary the abandonment of legal principles which were quite unexceptionable when enunciated, the maxim *stare decisis* would admit of few exceptions. But the strong respect for precedent which is ingrained in our legal system is a reasonable respect which balks at the perpetuation of error, and it is the manifest policy of our courts to hold the doctrine of *stare decisis* subordinate to legal reason and justice, and to depart therefrom when such departure is necessary to avoid the perpetuation of pernicious error."

I think we went wrong in the early cases of Throckmorton v. Pence, 121 Mo. 50, and Lindell Real Estate Co. v. Lindell, 142 Mo. l. c. 76, when we held that under the Married Woman's Act of 1889, a married woman did not have to sue until she became discovert. There were two lines of thought in the early cases at the time of our first ruling. One line held that the Married Woman's Acts (similar to our own) gave a married woman the right to sue whilst she was covert, but she was not obliged to sue where there were statutes (like our Secs. 1881 and 1894, R. S. 1909) which excepted married women from the usual statutes of limitations. The other line of cases held, that the force and effect

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of the Married Woman's Act were to strike this exception as to married women from all tolling statutes, such as our Sections 1881 and 1894, supra. Our court followed the first named line of cases, and herein much of our trouble, and all of our harsh case law. I think we erred in the two cases above cited, and under the Klocke case, supra, we can change the rule without prejudicing property rights. We should hold that the effect of the Married Woman's Act of 1889 was to strike from our Section 1881, Revised Statutes 1909, the exception as to married women. It was then Section 6767, Revised Statutes 1889. Not only so, but it would strike a similar exception from Section 1894, Revised Statutes 1909, which was Section 6779, Revised Statutes 1889.

The cases to be overruled are all cases construing statutes, and under the ruling in Klocke's case, supra, no baneful effects will follow. There is no sense in saying (since the Act of 1889 as to married women) that a man or a single woman must sue within the statutory period in order to protect their rights, and that a married woman, with the same legal right to sue, may postpone her action until she becomes discovert. There was no reason for giving her the right, unless she was to be required to exercise it, as a *femme sole.* The very purpose of the law was to place her in the position of a *femme sole.* She needed no statute to give her the right to sue after she became discovert.

The two statutes (Secs. 1881 and 1894, Revised Statutes 1909) had the exceptions therein as to married women stricken therefrom per force of the Act of 1889 as to married women. We should have so ruled from the beginning. We will have to so rule, or be troubled with other harsh and unrighteous cases, as is the case at bar. It will be noted that the two sections cover all kinds of actions, and that the exceptions are the same in each. With these exceptions stricken from these statutes, we are permitted to get to the meat of the instant case.

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II. It is urged that the plaintiff in this case could not sue for the possession, because her husband was yet alive. Under our holdings, I shall grant this proposition. But that concession does not settle the case. If the tolling statutes (Sections 1881 and 1894, R. S. 1909) no longer contain an exception as to married women, then this plaintiff is not necessarily protected by the fact that her husband, up to the date of the deed had the right of possession, and that after the deed the defendants and then their predecessors in title had the right of possession.

Estoppel.

By the Act of 1897, which, with its amendments, is now Section 2535, Revised Statutes, 1909, the plaintiff was given a cause or right of action, and a remedy. This right of action has been in her since 1897. It is this identical right of action that she is now attempting to enforce. In other words her present suit is predicated on Section 2535, supra, and is the same suit that she could and should have brought in 1897. Estoppel *in pais* is duly pleaded. Not only so, but well shown in the evidence. In other words, the record tends to show improvements on the land since 1897. A levee was completed in 1896, since which drainage of the land by a drainage plan has been perfected. Many improvements were made since 1889, including the levee. Four or or five houses have been built upon the land, whilst there was but one in 1882. But it suffices to say that the evidence tends to prove improvements made since 1897.

Mrs. Powell should have brought this suit when the right was first given her so as to stop these improvements. Failing to do so she is estopped now from maintaining the very suit she should have brought in 1897. She knew that her grantee would claim the full title from the date of her deed in 1882. She recognized this claim of full title, as is shown by her evidence. She knew that improvements would be made. She knew all these things, and is now fully estopped from maintaining this particular action, because defendants were permitted to act to their detriment. And this is true, although

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in a possessory action (not yet accrued under our rulings) she may be able to recover possession.

We are not discussing *laches,* but estoppel *in pais.* We undertook to say that there was a difference between the two doctrines in Kellogg v. Moore, 271 Mo. l. c. 193 et seq. After disposing of the question of laches in our paragraph 2 in that opinion, estoppel *in pais* is disposed of in paragraph 3 of that opinion. So that we hold that plaintiff is clearly estopped from maintaining this particular action, because (eliminating from our tolling statutes Sections 1881 and 1894, supra) the exception as to married women she had an unrestricted right to bring her action, and thereby forestall the improvements thereafter made. At that time she had the clear right not only to sue, but the clear and unobstructed right to contract. At that time she could have contracted as to her alleged reversionary interest, and having the right to contract with reference thereto, and to convey the same, the doctrine of estoppel *in pais* will apply. At that time she had all rights to sue and to contract, save and except the right to sue for possession. We concede that where one cannot sue to protect rights, she can't well be estopped. We further concede that when one cannot be bound by contract she may not be bound by estoppel. But these concessions do not reach this case. In this very case she is trying to enforce a right which could have been enforced from 1897 to the present. As to her, the doctrine of estoppel *in pais* was properly invoked, and if sustained by the facts, should preclude this particular action. Whether she may have a more successful form of action when her husband dies, is another question. It is to be hoped that some Providential act may obviate the harsh rules of law, and save defendant from dire results. But her own conduct estopped her as to this particular action.

Estoppel *in pais* is not dependent upon limitations, nor is it confined to equitable actions. The doctrine was and is recognized in common law courts. [16 Cyc. 682.] In that it differs from laches. [Kellogg v. Moore,

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271 Mo. l. c. 193 et seq.] Estoppel *in pais* may be set up as a defense in actions at law as well as in equity. [16 Cyc. 725.] Nor is this all. The doctrine goes to the *remedy* which many invoked, as well as to the right. [16 Cyc. 722.] We emphasize this, because the conduct of the plaintiff in this case has justified the invocation of estoppel *in pais*, as to the remedy, i. e. this particular suit. So I conclude that the judgment *nisi* in this suit was well within legal bounds, whatever may be the result of a future possessory action, and irrespective of any statute of limitations. The judgment should be affirmed and I so vote.

THE STATE ex rel. JEFF D. McCUNE et al., Appellants, v. ALEXANDER CARTER et al., Constituting the Board of Equalization of Audrain County.

Division One, July 9, 1919.

1. **BOARD OF EQUALIZATION: Constitution: Certiorari.** In a *certiorari* brought to quash the record of a county board of equalization, if the record shows on its face that the officers designated by the statute were named as composing the board and that they were present at its meetings, it cannot be held that such persons were not *de jure* members of the board, or that said board was illegally organized.

2. **———: Jurisdiction: Insufficient Notice: Appearance.** Whether or not the notice to the taxpayer that an increase in the assessed valuation of his property was sufficient, if he actually appeared before the board of equalization and the matter was continued, and before such increase was made he appeared specially and filed his objections thereto, his appearance vested the board with jurisdiction.

3. **———: Amending Record: Classification.** Amendments of the records of the board of equalization, made prior to its final adjournment by the direction of its presiding officer, which did not change the amount of the increase in the taxpayer's assessment, but simply specified the classes of property to which it was applicable, did not oust the board of jurisdiction, or impair the validity of the increase.

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4. ———: **Trebling Assessment.** The County Board of Equalization, after increasing the taxpayer's assessment to equal the amount of property owned by him, is by statute given power to treble the assessment upon a finding that he has given a false list.

5. ———: **Increasing Assessment: Certiorari.** In reviewing the action of the County Board of Equalization by *certiorari* the courts cannot go beyond the face of its record; and since under the statute it had authority to increase the assessment of the property returned by the taxpayer, and to add that omitted, if it had knowledge of facts justifying such action, it will not be held on *certiorari* that it exceeded its statutory powers, if it heard evidence before it made the increases and it is not denied that the taxpayer owned property equal to the amount of the increased valuation.

Appeal from Audrain Circuit Court.—*Hon. Ernest S. Gantt,* Judge.

AFFIRMED.

E. A. Shannon and *Pearson & Pearson* for appellants.

(1) Statutes imposing taxes are strictly construed against the State, and in favor of the taxpayer. 37 Cyc. 768; State ex rel. v. Alt, 224 Mo. 513; State ex rel. v. Lesser, 237 Mo. 318; State ex rel. v. Scullin, 266 Mo. 331; State ex rel. v. St. L. Co. Ct., 13 Mo. App. 54; City of Hannibal ex rel. v. Bowman, 98 Mo. App. 109. (2) A county board of equalization is a court of limited and inferior jurisdiction. Section 11402, R. S. 1909; Washington Co. v. Railroad, 58 Mo. 379. (3) Where the proceedings of inferior courts whose methods of procedure are not in accordance with the courts of the common law, are called in question, jurisdiction will not be presumed; but must of necessity appear, and be distinctly disclosed by the record, on the face of the proceeding; and can receive no help from intendments or implications. Cunningham v. Railroad, 61 Mo. 36; State ex rel. v. County Court, 66 Mo. App. 99; Rousey v. Wood, 57 Mo. App. 658. The record of such courts must show the existence of all facts necessary to

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give jurisdiction over the subject-matter, and the parties. Schell v. Leland, 45 Mo. 294; State v. Metzgler, 26 Mo. 66; Corrigan v. Morris, 43 Mo. App. 461; Fisher v. Davis, 27 Mo. App. 327. If such jurisdiction does not appear upon the face of the proceedings, their acts are void. Haggard v. Railroad Co., 63 Mo. 303. (4) The law requires, that an accurate and detailed record of the proceedings and orders of a board of equalization must be kept, showing distinctly, when it is raising the valuation of property already assessed; and, when it is adding and assessing other property "omitted from the assessor's books," designating in each instance, the "kind and class" of property raised, or assessed. Secs. 11404, 11407, R. S. 1909; State ex rel. v. Cunningham, 153 Mo. 653; Washington Co. v. Railroad, 58 Mo. 378. (5) When the valuation of property listed and assessed is raised, or property "omitted from the assessor's books" is assessed, a notice must, in either case, be served on the property owner stating the "kind and class" of property raised or assessed and the value fixed thereon by the Board; and the record of the board should show, and such notice should distinctly state whether the action of the board was on the property listed and assessed or property omitted from the assessor's books, and by it assessed for the first time. Secs. 11404, 11407, R. S. 1909; State ex rel. v. Cunningham, 153 Mo. 653; Washington Co. v. Railroad 58 Mo. 378. (6) A notice, such as the law requires to be given, on increasing the valuation of property or already assessed, or assessing property "omitted from the assessor's books," is essential to the validity of the proceeding. Sec. 11407, R. S. 1909; State ex rel. v. Springer, 134 Mo. 224. (7) A property owner does not waive his rights to a legal notice, by appearing for the sole purpose of objecting to the invalidity and insufficiency of the notice served on him, and to the jurisdiction of the board to act under the premises. His appearance for a special purpose constituted no waiver of any valid objection

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which he had to the defective process and service; for a party who is in court for one purpose, is not necessarily in for any other purpose. Schell v. Leland, 45 Mo. 293; Thompson v. Ry. Co., 110 Mo. 156. (8) The board of equalization acts judicially in either raising the assessments already listed; or, in assessing property "omitted from the assessor's books." In raising the assessment of property already listed or in assessing property "omitted from the assessor's books, the board of equalization must have evidence before it, or its act will be invalid. Secs. 11406, 11407, R. S. 1909; Washington Co. v. Railroad, 58 Mo. 378; State ex rel. v. Scullin, 266 Mo. 331. The record of the proceedings of the board should contain a statement, that evidence was taken and heard in either raising assessments of property already listed, or in assessing property "omitted from the assessor's books." Washington Co. v. Railroad, 58 Mo. 378. (9) On and after the 4th Monday of April, a board of equalization ceases to act as such, but is simply a board of appeals; and has power and authority as such to hear complaints from the property owner, on the action of the board of equalization, in either raising the valuation of his property already assessed, or in assessing property "omitted from the assessor's books;" and, can only "change or alter the same, upon it being shown by the said owner that said assessment was erroneous, or improperly made; otherwise said property and the valuation as (previously) fixed by said board, shall be extended upon the assessor's books, as in case of other property." And, it has no power or authority (on its own initiative, the property owner not appearing), to hear evidence or change the valuation thitherto raised or assessed. Sec. 11407, R. S. 1909. (10) A board of appeals has no authority to treble assessments before the board of equalization shall have had a notice filed with it, by the assessor, that the property owner has made out a list "with intent to defraud," and said board shall have given notice thereof to the property owner who

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shall have furnished such false list which notice was to specify the particulars in which said list is alleged to have been false. Sec. 11354, R. S. 1909; State ex rel. v. Baker, 170 Mo. 390. (11) The clerk had no right to change the record, in vacation of the board, upon the order, or at the dictation of any one. Sec. 11405, R. S. 1909; State ex rel. v. Wray, 55 Mo. App. 654; Corrigan v. Morris, 43 Mo. App. 461; State ex rel. v. Scullin, 266 Mo. 331. A change in the record, after it had been writttn up by the clerk, and a certified copy of which had been served on the property owner, was a fraud on the property owner. In doing so, it was wilfully depriving him of knowledge of the true record of the alleged board's proceedings against his property. Washington Co. v. Railroad, 58 Mo. 378. (12) "Under our system of taxation, there can be no lawful collection of a tax until there is a lawful assessment; and, there can be no lawful assessment, except in the manner prescribed by law and of property designated by law for that purpose." State ex rel. v. Lesser, 237 Mo. 318.

A. C. Whitson for respondents.

(1) The rule of strict construction in tax proceeding does not obtain in this State and has not since the decision of State ex rel. v. Bank, 120 Mo. 161; State ex rel. v. Timbrook, 240 Mo. 236, 238; State ex rel. v. Wilson, 216 Mo. 286; Sec. 11383, R. S. 1909. (2) The board of equalization is not a court of limited jurisdiction. Secs. 11402, 11409, R. S. 1909; Secs. 11747, 11748, R. S. 1909. It has full power and it is the duty of the board to assess and to equalize the valuation and assessment of all property both real and personal within the county. Sec. 11403, R. S. 1909; 15 C. J. 982, sec. 414, note 15. Diehl v. Page, 3 N. J. Eq. 143; William v. Ball, 52 Tex. 603; State ex rel. v. Harrison, 226 Mo. 174; State ex rel. v. Springer, 134 Mo. 212. (3) The county clerk is by the statute (Sec. 11402, R. S. 1909) made secretary of the board of equalization, and

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as such had a right to correct its records to speak the truth at any time before final adjournment of the board. The board may at any time before final adjournment correct its records. State ex rel. v. Board, 108 Mo. 235; State ex rel v. Ray, 55 Mo. App. 647; Henry County v. Salmon, 201 Mo. 151; Williams v. Silvy, 84 Mo. App. 433; State v. Jeffries, 64 Mo. 376; Becker v. Schutte, 85 Mo. App. 65. The record of the board of equalization was sufficient without any correction as made by the clerk showing the classification of the property added to the assessment list. State ex rel. v. Trust Co., 261 Mo. 448. (4) The board has a right to add omitted property to the assessment list, or to assess omitted property even though no list be given. Sec. 11407, R. S. 1909; State ex rel. v. Trust Co., 261 Mo. 448; State ex rel. v. Timbrook, 240 Mo. 236. The respondent, Guy McCune, having given a false list, the board had a right to treble his assessment. Sec. 11354, R. S. 1909; State ex rel. v. Baker, 170 Mo. 391. The procedure in adding omitted property and in adding property where a false list is given is the same. In re Sanford, 236 Mo. 686. (5) The respondents having appeared before the board, the form of the notice or whether or not notice had been given at all is immaterial. On their appearance the board had jurisdiction, and by such appearance appellants waived the giving of notice and its form and such appearance cured all defects in the notice. State ex rel. v. Baker, 170 Mo. 390; State ex rel. v. Trust Co., 261 Mo. 455; State ex rel. v. Board, 108 Mo. 243; Cooley on Taxation (3 Ed.), p. 783; Smith v. Kiene, 231 Mo. 222; State ex rel. v. Galord, 73 Wis. 306; Brown v. Weatherby, 71 Mo. 152. (6) The presumption is that the board heard evidence, and that the procedure was lawful. The board has power of its own knowledge to add omitted property or to raise the valuation of property assessed. State ex rel. v. Springer, 134 Mo. 225; Hannibal Railroad v. Board, 64 Mo. 309. (7) While the board of equalization is required to hear appeals on the 4th

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Monday in April, it is the same board and its labors are not necessarily to be completed at that time. Sec. 11404, R. S. 1909; State ex rel. v. Vaile, 122 Mo. 43. The record as returned by the respondents, and as proved at the trial, shows a record kept by the County Clerk of Audrain County, in "County Board of Equalization Record B, Audrain County." That the board met at the time as required by law (Sec. 11402, R. S. 1909), and was composed of the officers designated by the statute.

BOND, C. J.—*Certiorari* by the Circuit Court of Audrain County, directed to respondents, the Audrain County Board of Equalization, in their official capacity, requiring them either to have the original record and papers, or to certify to said court a true, full and complete copy of their record as made at their respective sessions, April 3rd, April 24th and May 15, 1916, together with a copy of the several demurrers or pleas in abatement to the jurisdiction of said alleged board, filed in said proceedings by appellants, Jeff D. and Guy McCune, on May 15, 1916, in order that the circuit court might adjudicate upon the legality of such proceedings.

In their petition for said writ of *certiorari,* relators state that they are residents of Vandalia, Missouri; that the respondents compose the County Board of Equalization of Audrain County; that at a certain meeting of said board on April 3, 1916, the board raised the assessment of relators, and thereafter duly notified them that the board would meet on the fourth Monday in April, 1916, "to hear reason, if any be given, why such increase should not be made;" that on April 24, 1916, said hearing was continued until May 15th; that on May 12th, relators, with their attorney, examined the record of said board, and thereupon each had prepared and thereafter filed, a demurrer to the jurisdiction of said board, on the ground that its action was illegal and void for not setting out the class and kind of property and the amount raised on

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each, as required by law; that sometime between May 12th, the date on which they examined the record of the board, and May 15th, the date to which their hearing was continued, the record of said board dated April 3rd, "was altered, mutilated and changed by some one other than the Clerk of the County Court of Audrain County."

At the trial the record of the board, which was introduced in evidence, showed that on April 3, 1916, the board met; that among other business transacted, the board raised the assessment of Guy McCune, Jeff McCune and of Guy and Jeff McCune as follows:

"Personal Raised. Jeff D. McCune—from $500 to $75,000 ($74,500 in money, notes and bonds; classes 5-6-7-8-9; $500 all other personal. Mayor and city assessor not voting).

"Jeff and Guy McCune—from $100 to $15,000 (Money, notes and bonds; classes 5-6-7-8-9. Mayor and city assessor not voting).

"Guy McCune—$650 to $4,000 ($3,350 money, notes and bonds. Classes 5-6-7-8-9, and $650 all other personal. Mayor and city assessor not voting)."

The following also appears in the records of the board of date Monday, April 24, 1916.

"County Board of Equalization met pursuant to adjournment with J. W. Beagles, C. C. Bledsoe, Judges of the County Court, and T. J. Kelso, County Assessor, J. W. Dry, Ex-mayor of the City of Mexico and J. T. Marshall, Assessor of the City of Mexico, present and the following business was transacted, to-wit:

"Presiding Judge Alex Carter being absent Judge C. C. Bledsoe was elected to preside over the meeting by the board. Jeff D. McCune appears before the board and on his application and by order of the board the hearing of his protest on increase of assessment was continued to Monday, May 15, 1916.

"Guy McCune appears before the board and on his application, and by order of board the hearing of his protest on increase of his assessment was continued to Monday, May 15, 1916.

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"Jeff and Guy McCune appear before the board and on their application and by order of board, the hearing of their protest on increase of assessment was continued to Monday, May 15, 1916.

"All other items as shown on the meeting of board on April 3, 1916, and not shown on minutes of this meeting, were ordered left as raised by board April 3rd. The boar dadjourned to meet Monday, May the 15th, 1916."

The following also appears on the record of the board under date May 15, 1916:

"Eugene Pearson, an attorney, appears for Jeff D. McCune and for Guy McCune; and for Jeff D. and Guy McCune jointly, and filed motions for each of the above parties.

"Motion was made and carried that the motions as filed by Eugene Pearson for Jeff D. McCune, and for Guy McCune and Jeff D. and Guy McCune, jointly, be not made a matter of record.

"Evidence on the assessment of Jeff D. McCune was heard.

"Evidence on the assessment of Guy McCune was heard.

"Evidence on the assessment of Jeff D. and Guy McCune was heard.

"Motion made and carries that the assessment of Jeff D. and Guy McCune be $15,000 in money, notes and bonds (Classes 5-6-7-8 and 9) as raised April 3rd, 1916.

"Motion made and carries that the assessment of Jeff D. McCune be $74,500 in money, notes and bonds (Classes 5-6-7-8 anl 9) and $500 all other personal as raised April 3, 1916.

"Motion made and carries that the assessment of Guy McCune be placed at $7,732 in money, notes and bonds (classes 5-6-7-8 and 9) and $150 all other personal property.

"Motion made and carries that the assessment of Guy McCune be trebled as a penalty for giving a fraudulent list making his assessment $23,646, $450 in

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class 4 and $23,196 in money, notes and bonds, classes 5-6-7-8 and 9."

The change of the record of the meeting of April 3, 1916, consisted in the addition thereto of the various classes of property to which said increases were referable. As to these matters Ros Cauthorn testified that he was Clerk of the County Court; that the entries of April 3rd, April 24th and May 15, 1916, were all in his handwriting; that the writing on the margin (of which complaint is made) was added "after his [Mr. Pearson's] visit on May 12th" and that he (Cauthorn) "wrote it there by order of the presiding member of the board of equalization . . . and it was read and approved at the last meeting."

On cross-examination by Mr. Pearson, witness Cauthorn testified as follows:

"Q. What was the occasion of your making this change? A. I was ordered to do so by the county judge, Judge Bledsoe. . . .

"Q. What did the judges say when they came in your office? A. Well, Judge Carter said he didn't approve that record as it was. Looked it over and said 'I won't approve that record as it is.' . . .

"Q. That was after May 12th when Mr. Pearson was there? A. Yes, sir.

"Q. And before May 15th? A. Yes, sir. . . .

"Q. Didn't you think it was a little strange he should come in there and order you to make the change in this proceeding? . . . A. No, I don't see why it should if his attention was called to it and he came and looked it over. I don't see why it should be strange at all.

"Q. Does the board examine your record for the purpose of approval? A. Well, not often. Occasionally they look it over, especially if they have anything special in their mind that they are not clear about they come and look it over.

"Q. And order you to change it? A. Yes, sir. I changed county records that way."

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The court found the issues for respondents and ordered and adjudged that relators take nothing by their writ and that the same be quashed, from which finding and judgment relators duly appealed.

I. Appellants complain that the record discloses that the board of equalization was illegally organized. The record shows beyond controversy that the persons acting as members of the board were those pointed out in the statute; that the board as so organized convened at the times prescribed by the statute and proceeded to discharge the duties imposed on the Board of Equalization of Audrain County, Missouri. The certification of its records by the Clerk of the County Court recited them to be the proceedings of the Board of Equalization of Audrain County, Missouri. This proceeding is one by *certiorari* to quash the proceedings of said board of said county and State, in so far as they increase the assessment of taxes against relators jointly and severally. It is not within the scope of the present proceeding to question the organization *de jure* of the Board of Equalization of Audrain County. We, therefore, put that contention aside.

Constitution of Board.

II. It is however contended that the board of equalization failed to notify defendants of its action increasing their assessments, and that such notice was jurisdictional. The answer to this is that the relators were notified and thereafter appeared at the meeting of the board on April 24th and upon their application the matters were continued until the meeting to be held on May 15th. This general appearance of relators vested the board with jurisdiction, even if there was any defect in the prior notice to them. [State ex rel. v. Baker, 170 Mo. l. c. 390 et cases cited.] At the subsequent meeting of May 15th, relators again appeared, and this time specially, and filed objections in writing to the orders of the board increasing their assessments. This appearance at the

Notice.

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adjourned meeting of the board though in limited terms, could not in any way detract from the jurisdiction which the board acquired by virtue of the previous general appearance on April 24th. We hold, therefore, that there was no lack of jurisdiction on the part of the board to deal with the question of increasing the assessment of the property of relators, as shown by the face of its record.

III. One of the points made in the written objection filed by relators at the board meeting of May 15th, 1916, was that the records of the board had been altered or changed so as to specify the respective property on account of which the increased assessments were made. The record abundantly shows that these amendments of the records of the board were made prior to its final adjournment by the direction of its presiding officer. The amendments did not change the amount of increase, but simply specified the class of property to which it was applicable. It was clearly within the right of this body to make its records speak the truth, when, in so doing, no legal injury was inflicted. These amendments could not have prejudiced relators if they owned the property specified, which does not seem to be denied. [State ex rel. v. Buchanan Co. Board Equal., 103 Mo. 235; Henry Co. v. Salmon, 201 Mo. l. c. 151.] We hold, therefore, that they did not oust the jurisdiction of the Board. [State ex rel. v. Trust Co., 261 Mo. l. c. 455; R. S. 1909, sec. 11407; State ex rel. v. Timbrook, 240 Mo. 236.]

Amending Record.

IV. It is also claimed on behalf of one of the relators that the board acted without jurisdiction in trebling his assessment. This contention cannot be sustained under the facts shown in this record. The action of the board in trebling the assessment in question was based upon a finding that the relator had given a false list. [R. S. 1909, sec. 11354; State ex rel. v. Baker, 170 Mo. l. c. 392; In re Sanford, 236 Mo. 686.]

Trebling Assessment.

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V. It affirmatively appears in the records of the board that it heard evidence as the basis of the increased assessments of relator's property. Under the statute it had the right to increase the assessments of the property returned, or to assess that omitted, or to do both, if it had knowledge of facts justifying such action. [R. S. 1909, sec. 11407.] In the matters complained of it did not act of its own knowledge, but took proof. It was charged with the duty of assessing and equalizing the valuation of all the property within the county, and seems to have been actuated by that wholesome motive in making the orders complained of. We are unable to perceive from the records before us that the board has transcended its statutory power or has violated the law in the matter of assessing the property of relators. In reviewing its action we cannot go beyond the face of the record under the decisions of this State.

It necessarily follows that the writ of *certiorari* was properly quashed by the trial court and that its judgment must be affirmed.

It is so ordered. *Blair, P. J.*, and *Graves, J.*, concur.

ROSA BARBER v. HARTFORD LIFE INSURANCE COMPANY, Appellant.

Division One, July 9, 1919.

1. **INSURANCE: Res Adjudicata: Decision of U. S. Supreme Court: Assessment: State Tax.** Only such questions as were before the court and were decided by it upon writ of error become the law of the case by force of its judgment therein. A decision of the Supreme Court of the United States holding that the Supreme Court of Missouri, in passing on the validity of certain assessments by an insurance company organized under the laws of Connecticut, had not given full faith and credit to certain public acts and judicial proceedings of the State of Connecticut, was not an adjudication of the validity of that portion of each assessment, in-

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cluding the one on which the alleged forfeiture was based, which included a state tax of two per cent of the amount thereof, nor of that portion of the unpaid assessment which contained a charge of quarterly expense dues not yet due; for the former judgment of the Supreme Court of Missouri was based on no such grounds, but was simply against the validity of the assessment and the forfeiture of the certificate for non-payment, and the question of the right of the company to include the state tax as a part of said assessment, and to declare a forfeiture for its non-payment, is one arising under a state statute, of which the Supreme Court of the United States could take no cognizance upon a writ of error, it being the rule of that court to leave to the state courts the duty of ascertaining and determining the contractual relations of parties dependent solely upon a state law; and, besides, that court did not attempt to determine the validity of assessments which included the state tax.

2. **REVERSAL OF JUDGMENT: Remand for Retrial: Further Procedure.** When a judgment is reversed by the Supreme Court and the cause is remanded for a new trial, the trial court has jurisdiction, not only to retry the issues of fact presented by the pleadings in the first trial in accordance the principles announced in the judgment of reversal, but also to reframe those issues as provided by the Code of Civil Procedure; for a retrial does not mean a mere replica of the former trial, but is a trial in the light of the experience and knowledge acquired in the interval.

3. **INSURANCE: Assessment: State Tax as Part.** An assessment which includes as a part thereof the two per cent tax mentioned in Section 7099, Revised Statutes 1909, is void, and its non-payment constitutes no ground for a forfeiture of the certificate of insurance.

4. ———: ———: ———: **Doing Business As Old-Line Company.** The fact that defendant, since it issued the certificate of insurance, has ceased to issue certificates on the assessment plan and is now doing its assessment business without a special license therefor, but is doing business simply as an old-line joint-stock company, does not affect the substantial rights of the parties to an action on the certificate, nor relieve it of the wrong of including the two per cent tax in the assessments.

5. ———: ———: ———: **Smallness of Tax.** The fact that the tax improperly included in the insured's assessment amounted to only fifteen cents on each assessment, and that the entire mortuary fund to which it accrues belongs to the certificate-holders, is no ground for upholding an attempted forfeiture of the certificate, where the insured, prior to the attempted cancellation, not only paid illegal exactions amounting to nearly, if not quite, the amount of his alleged delinquency, but also paid a considerable sum into a fund which is held for distribution among living certificate-

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holders when the amount thereof in force shall have been reduced to one million dollars.

6. ———: ———: **Forfeiture.** The law abhors a forfeiture, and this aversion has resulted in the rule that it may be prevented by a construction as technical as that by which it is invoked.

7. ———: ———: **Damages: Attorney's Fees.** The fact that when the case was before the court on a former appeal it committed error which caused a reversal of its judgment by the Supreme Court of the United States, did not affect the right of plaintiff to damages for vexatious delay and attorney's fees on a retrial.

Appeal from Johnson Circuit Court:—*Hon. C. A. Calvird,* Judge.

AFFIRMED.

Jones, Hocker, Sullivan & Angert, Geo. F. Haid and *James C. Jones, Jr.,* for appellant.

(1) The Connecticut court was a court of competent jurisdiction to determine the question of the right of the company to maintain the mortuary fund, and its decree was binding upon the company and all its members. Hartford Life Ins. Co. v. Ibs, 237 U. S. 662; Royal Arcanum v. Green, 237 U. S. 531; Hartford Life Ins. Co. v. Barber, 245 U. S. 146; Condon v. Mutual Reserve, 89 Md. 99; Taylor v. Mutual Reserve, 97 Va. 60; State ex rel. Hartford Life Ins. Co. v. Shain, 254 Mo. 78. (2) The issue as to the right and propriety of maintaining the mortuary fund and the amount that could properly be held in such fund was involved in the Connecticut case and in the case at bar. Hartford Life Ins. Co. v. Ibs, 237 U. S. 662; Southern Pacific Co. v. United States, 168 U. S. 1; Klein v. Insurance Co., 104 U. S. 88. (3) The circuit court denied full faith and credit to the decree of the Connecticut court in the Dresser case by its assumed finding as a fact, without support in the evidence and against the evidence, that the assessment in question was excessive and illegal. Creswill v. Knights of Pythias, 225 U. S. 246; Northern Pacific v. North Dakota, 236 U.

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S. 585. (4) All questions presented at the second or last trial were before the trial court on the first trial and appeared in the record on the former appeal in the Supreme Court of Missouri and the Supreme Court of the United States and the judgment of the Supreme Court of the United States became *res judicata* upon all matters and questions appearing in the record. United States Trust Company v. New Mexico, 183 U. S. 535; Chaffin v. Taylor, 116 U. S. 567; Tyler v. Maguire, 17 Wall. 283; Pitkin v. Shacklett, 117 Mo. 548; Hill v. Draper, 37 S. W. 574; Castleman v. Buckner, 202 S. W. 681; Illinois Life Ins. Co. v. Wortham, 119 S. W. 802; Clark v. Brown, 119 Fed. 130; McLure v. Bank, 263 Mo. 135. (5) The assessments collected by Hartford Life Insurance Company in Missouri were subject to the two per cent tax upon all premiums collected in the State. Sec. 7068, R. S. 1909, as construed by the trial court, imposes its penalties for failure to pay a policy of life insurance regardless of the good faith of the defense, and so construed, it deprives the defendant of its property without due process of law. Supreme Ruling v. Snyder, 227 U. S. 497; Ry. Co. v. Chicago, 166 U. S. 226.

Robert Kelley, M. D. Aber, Nick M. Bradley and *Charles E. Morrow* for respondent.

(1) The burden was on defendant to show that the assessment was necessary, not excessive and legally made. Barber v. Hartford Life Insurance Co., 269 Mo. 21; Hannum v. Waddill, 135 Mo. 153; Barney v. Modern Woodmen, 79 Mo. App. 385; Agnew v. A. O. U. W., 17 Mo. App. 254; Puschman v. Insurance Co., 92 Mo. App. 640; Johnson v. Hartford Life Ins. Co., 166 Mo. App. 275; King v. Hartford Life Ins. Co., 133 Mo. App. 612; Wayland v. Indemnity Co., 166 Mo. App. 221; Settle v. Ins. Co., 150 Mo. App. 520; Ibs v. Hartford Ins. Co., 121 Minn. 310. (2) The assessment is excessive and void. It was not calculated, computed or levied in accordance with the terms of the

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policy. (a) It contained a two per cent tax, not assessed by the company, against the assured, attempted to be collected in advance, in violation of the provisions of the terms of the policy, which was not shown was even levied and assessed by the Superintendent of Insurance, and which, under the law of Missouri, could not be levied against the assessment and was an illegal charge against assured. R. S. 1909, sec. 7099; Northwestern Masonic Aid Assn. v. Waddill, 138 Mo. 628; Westerman v. Supreme Lodge, 196 Mo. 670; Bankers Life Company v. Chorn, 186 S. W. 618; Young v. Hartford Life Ins. Co., 277 Mo. 694. (b) The dues were not payable until October, 1910, and the dividend of $1.40, in the defendant's hands, should have been applied in reduction of the assessment, and it is excessive on that account. (3) The defendant wrongfully collected from assured two per cent on all the assessments he had paid on the policy, covering a period of seventeen years, amounting to more than the assessment in question, and defendant was indebted to assured for the amount so wrongfully collected, and should have applied it to the assessment or to reduce it. National Council of Junior Order v. Thomas, 163 Ky. 364; Citizens Life Ins. Co. v. Boyle, 139 Ky. 1; Niblick on Benefit Societies, sec. 71. (4) By amending its answer, after this case was reversed and remanded, and pleading the failure to pay a subsequent assessment, due June 1, 1910, the defendant waived the alleged forfeiture for failure to pay the prior assessment for which it claims the policy was forfeited. Beatty v. Mutual, etc., Ins. Co., 75 Fed. 65; Murray v. Home Benefit Life Assn., 90 Cal. 402; Union Central Life Ins. Co. v. Jones, 17 Ind. App. 592; Union Central Life Ins. Co. v. Woods, 11 Ind. App. 335; Union Central Life Ins. Co. v. Spinks, 119 Ky. 261; Moreland v. Union Central Life Ins. Co., 104 Ky. 129; Union Central Life Ins. Co. v. Moreland, 56 S. W. 653; Union Central Life Ins. Co. v. Duvall, 46 S. W. 518; National Life Ins. Co. v. Reppand, 81 S. W. 1012; Insurance Co. v. Springgate,

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129 Ky. 627; Assurance Soc. v. Ellis, 147 S. W. 1152; 25 Cyc. 871. No notice of the subsequent assessment was given assured. Besides, the defendant claimed a forfeiture for failure to pay assessment due March 1, 1910, before suit, and on that ground only. Thereby, as a matter of law, it waived its right to claim a forfeiture on any other ground. Burges v. Ins. Co., 114 Mo. App. 180; Home Ins. Co. v. Pierce, 75 Ill. 426; Moore v. National Acc. Soc., 38 Wash. 31. (5) The defendant did not shew that the notice of the assessment was ever mailed. It cannot be proven by affidavit. Patterson v. Fagan, 38 Mo. 70; 2 C. J. 373. The stipulation in the policy, providing that a certificate of the secretary, supported by the affidavit of the person who mailed the notice, should be conclusive proof, is inconsistent with the impartial course of justice, as administered under the law of Missouri, and is against public policy and void. Hope Mutual Ins. Co. v. Flynn, 38 Mo. 483; 13 C. J. sec. 382, p. 46; French v. Willer, 126 Ill. 611; Hamilton v. Schoenberg, 47 Iowa,2385; Supreme Council v. Forsinger, 125 Ind. 52; Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170; New York Fidelity, etc., Co. v. Crays, 75 Minn. 450; Guaranty Co. of North America v. Charles, 92 S. C. 282; Mutual Reserve Fund Assn. v. Cleveland Woolen Mills, 82 Fed. 580; Doyle v. Continental I. & S. Co., 94 U. S. 535; Home Ins. Co. v. Morse, 20 Wall. (U. S.) 445; Mute v. Hamilton Ins. Co., 6 Gray (Mass.), 174; Buell v. Railroad, 53 N. Y. Supp. 749. (6) The dues under the policy were not payable until October, 1910, and defendant cannot forfeit the policy for failure to pay them before that date. Barber v. Hartford Life Ins. Co., 269 Mo. 40. (7) The Supreme Court of the United States reversed this case for the sole reason, as stated in its opinion, that the decisions of this court, affirming the judgment of the trial court, failed to give full faith and credit to the Connecticut decree, and that this error inhered in the instructions to the jury. It remanded this cause for

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further proceedings, not inconsistent with the opinion of this court. In obedience to this mandate, this court reversed the judgment and remanded this cause generally for a new trial. (8) The opinion of the Supreme Court of the United States did not hold the assessment in this case to be valid, nor did it decide the questions presented to the trial court, and presented here. On the contrary, the opinion of the Supreme Court of the United States recognized that there were both questions of law and fact left open in the case. The defendant, realizing this, amended its answer, setting up a new defense, and the plaintiff filed a reply thereto, pleading new and additional defenses, and the issues were changed. By so doing, defendant waived the question that the case was not properly remanded for a new trial and that questions were not left open to be determined by the trial court. Carrico v. Lilly, 3 O. K. Marsh (Ky.), 389; Howell v. Sherwood, 242 Mo. 513. (9) By remanding this cause generally for a new trial, without specific directions, this court gave the parties the right to amend their pleadings, and make any legal claim or defense, not concluded by the opinion of the United States Supreme Court. Wilcox v. Phillips, 260 Mo. 676. (10) Only such questions as were passed upon by the Supreme Court of the United States became the law of this case. That decision cannot be extended to matters not decided. In re Potts, 166 U. S. 263; Mutual Life Ins. Co. v. Hill, 193 U. S. 551; Ex parte Union Steamboat Co., 178 U. S. 317; In re Sanford Fork & Tool Co., 160 U. S. 247; Barney v. Winona Railroad Co., 117 U. S. 228; Tanizer v. Railroad, 191 Fed. 547; Gwinn v. Waggoner, 116 Mo. 151; Howell v. Sherwood, 242 Mo. 513. (11) By reversing this case on one ground, the Supreme Court of the United States did not consider and decide all the questions presented or which might arise at a further trial of the cause. Mutual Life Ins. Co. v. Hill, 193 U. S. 551. (12) Sec. 7908, R. S. 1909, as amended, providing for damages and attorney's fees, for vexatious refusal to pay a policy of life in-

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surance, is constitutional. Barber v. Hartford Life Ins. Co., 269 Mo. 21; Keller v. Home Life Ins. Co., 198 Mo. 440; Farmer Ins. Co. v. Dobney, 189 U. S. 301; Fraternal Mystic Circle v. Snyder, 227 U. S. 497; Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123; Fidelity Mutual Life Assn. v. Mettler, 185 U. S. 308; Iowa Life Ins. Co. v. Lewis, 187 U. S. 335; Williamson v. Liverpool, etc., Ins. Co., 141 Fed. 54.

BROWN, C.—This is a suit founded upon a certificate of life insurance upon the life of Frank Barber for $2000 for the benefit of plaintiff, then his wife and now his widow. It is dated September 4, 1893. Mr. Barber died June 5, 1910. The defendant, which issued the certificate, was then and still is an insurance company incorporated and having its principal place of business in Connecticut and doing business in Missouri. When this certificate was issued, and for a long time before and ever since, it has been doing business in this State as a stock company, issuing old-line insurance, and has also operated what is called a "Safety Fund Department," which issued certificates on the assessment plan until 1899, when it ceased issuing such policies, but continued to administer that department with respect to the certificates already issued. Barber complied faithfully with the conditions of his certificate up to March 31, 1910, when it was cancelled by the defendant on the alleged ground that he had failed to pay a mortuary assessment and a contribution to the expense fund then due and payable according to its terms.

This suit was instituted June 17, 1911, and was tried in the Johnson Circuit Court, where plaintiff had judgment upon a verdict for the amount of the face of the certificate with interest, $200 damages for vexatious delay, and $500 for attorney's fees. An appeal from that judgment was prosecuted to this court, where, on July 3, 1916, it was affirmed in an opinion published in 269 Mo. 21. In that opinion the principal facts, in-

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cluding the provisions of the certificate applicable to them, were fully stated and will not be repeated here, but will be referred to as necessary to the understanding of the questions now before us.

A writ of error from the Supreme Court of the United States was directed to this court, upon which our judgment was taken to that court for review upon certain matters wherein it was asserted that full faith and credit had not been given to certain public acts and judicial proceedings of the State of Connecticut. This referred to the power and duty of the directors under its charter in making mortuary assessments upon the certificates issued by the Safety Fund Department, and a judgment of a Connecticut court in a suit by one Dresser, on behalf of himself and all such certificate holders, in which it was adjudged that the Safety Fund Department had the right to maintain, by assessment, a fund for the prompt payment of losses, to be replenished by assessments for such losses when made and collected. The cause was heard in said court and our judgment reversed upon the last stated of these Federal questions in an opinion printed in volume 245 of the reports of said court at page 146 and following, which closes with the following words: "We are of opinion that full faith and credit was not given to the Connecticut record and that for that reason the present judgments must be reversed." It also said, in the course of the opinion, that "a jury would have been justified, at least, in finding that the call was made by the directors within the meaning of the instructions, although it did not appear that the directors went over the figures of the officers who made it up, and voted it specifically." The judgment and mandate of the court concludes as follows:

"And it is further ordered that this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this court. November 19, 1917.

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"And the same is hereby remanded to you, the said judges of the said Supreme Court of the State of Missouri, in order that such execution and further proceedings may be had in said cause, in conformity with the judgment and decree of this court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding."

Upon receiving the mandate this court entered and transmitted to the Johnson Circuit Court the following mandate:

"Now, at this day, pursuant to the mandate of the Supreme Court of the United States, heretofore filed herein, reversing the judgment of this court in said cause, it is ordered by the court that the judgment of this court in said cause, entered on the 30th day of March, 1916, affirming the judgment rendered herein by the said Circuit Court of Johnson County, be, and the same is hereby set aside and for naught held. It is further considered and adjudged by the court, in conformity with the said mandate of the Supreme Court of the United States, that the judgment aforesaid of the said Circuit Court of Johnson County, rendered on the 27th day of November, 1912, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said Circuit Court of Johnson County for a new trial. And it further appearing to the court that on the 28th day of June, 1918, the court made and directed the entry of an order overruling a motion therefor filed by the said appellant to tax the costs herein, no order is therefore made adjudging costs."

In pursuance of this mandate the cause was retried and the judgment rendered for the amount of the certificate and interest, with statutory damages and

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attorney's fee for vexatious delay, from which this appeal is taken.

I. At this trial it was shown, both by the defendant's amended pleadings and the evidence, that in each assessment made by the defendant upon this certificate, including the one on which the alleged for-

Res Adjudicata.

feiture is based, a sum was included representing a state tax of two per cent upon the amount thereof. The sums so paid amounted in all to $11.93, and defendant undertook to justify its exaction under the provisions of Section 7099, Revised Statutes 1909, as in force, in different forms, during the entire life of this certificate. The amount so included in the unpaid assessment was fifteen cents and its inclusion was and is assigned by the plaintiff as a ground for avoiding the forfeiture. The assessment on which the cancellation is based also contained a charge of $1.50 for quarterly expense dues, which the plaintiff asserts was not yet due.

The defendant at the trial objected to the consideration of each of these matters on the ground that they had been already determined by the judgment of the Supreme Court of the United States to which we have referred. The theory of this objection, so far as we are able to understand it, is that the reversal conclusively adjudicated that the certificate was in force at the former trial in the circuit court; otherwise, the judgment should have been affirmed, notwithstanding the errors found in the record with respect to the Federal questions on which the writ of error stood.

Although there was some evidence in the former trial that some such tax had been included in the assessment in question, no such point was made either in the pleadings or at the trial, or mentioned or decided by this court, which placed its affirmance solely upon the two Federal questions upon which the writ of error from the United States Supreme Court was based. Our judgment was *against* the validity of the assessment

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and the forfeiture by its non-payment. It implied nothing in its favor. The matter now before us is purely a question arising under the laws of this State, of which the Supreme Court of the United States could take no cognizance upon writ of error. [Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86, 97, 112; Same v. Same (No. 2), 212 U. S. 112, 118; Sauer v. City of New York, 206 U. S. 536, 546; Eustis v. Bolles, 150 U. S. 361; Murdock v. Memphis, 20 Wall. 590; Cohens v. Virginia 6 Wheat. 264.] These and many other cases which, follow the Cohens case, supra, have established the rule which is forcibly and logically stated by Mr. Justice Moody in the Sauer case as follows (p. 547): "This court, whose highest function it is to confine all other authorities within the limits prescribed for them by the fundamental law, ought certainly to be zealous to restrain itself within the limits of its own jurisdiction, and not be insensibly tempted beyond them by the thought that an unjustified or harsh rule of law may have been applied by the State courts in the determination of a question committed exclusively to their care." It was further said by the same eminent judge in the same case (p. 545): "This court does not hold the relation to the controversy between these parties which the Court of Appeals of New York had. It was the duty of that court to ascertain, declare and apply the law of New York, and its determination of that law is conclusive upon this court." It is clear that if the question now presented, which is clearly dependent solely of the construction and effect of a tax law of this State and the contractual relations with reference thereto of the parties to a Missouri contract was decided by this court in the former case, then the Supreme Court of the United States had no jurisdiction and did not intend by its judgment to adjudicate to the contrary.

Even had the question now brought before us been a Federal question it would have been eliminated from the case in the former appeal by our action in basing our affirmance upon other grounds. [Waters-Pierce Oil

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Co. v. Texas (No. 1), supra; Missouri, Kansas and Texas Ry. Co. v. Ferris, 179 U. S. 602; Harrison v. Morton, 171 U. S. 38; Glue Company v. Glue Company, 187 U. S. 611.] Only such questions as were before the Supreme Court of the United States and were decided by it became the law of the case by force of its judgment. Its opinion in express terms confines its decision entirely to the two Federal questions, to which we have already referred, and places its judgment upon the sole ground that, in our judgment, we failed to give full faith and credit to the Connecticut record in the Dresser case. We are without authority to extend the force and effect of that decision to other questions of which that court had no jurisdiction and did not attempt to determine. [In re Potts, Petitioner, 166 U. S. 263; Mutual Life Insurance Co. v. Hill, 193 U. S. 551; Ex parte Union Steamboat Co., 178 U. S. 317; In re Sanford Fork and Tool Co., 160 U. S. 247; Barney v. Winona Ry. Co., 117 U. S. 228.]

Our judgment remanding the cause to the Johnson Circuit. Court for retrial was in full accord with the mandate of the Supreme Court of the United States, and gave the trial court full jurisdiction, not only to retry the issues of fact presented by the pleadings in the first trial in accordance with the principles announced in the judgment and opinion of the Supreme Court of the United States, but also to reframe those issues as provided by our Code. A retrial does not mean a mere replica of the former trial, but is a trial, as the term implies, in the light of the experience and knowledge which may have been acquired in the interval. This question was fully discussed by us in Wilcox v. Phillips, 260 Mo. l. c. 676, 677-8.

II. The real question upon which this case seems to have turned in the trial court is whether or not, by the terms of this certificate, the insurance was forfeited by the failure of the insured to pay the assessment made as of March 1, 1910. It is admitted that

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Including Tax As Part of Assessment.

this assessment, as well as all other quarterly assessments made to pay losses since the issue of the certificate in September, 1893, included a charge for taxes assessed or to be assessed by and paid to the State of Missouri by the defendant under the following provision of the contract: "If the laws of any country, State, county or municipality shall require a tax to be paid by said company on account of such payments, then the mortality calls thereon shall be determined so as to cover such tax." It is contended by defendant that the law of the State of Missouri now embodied in Section 7099, Revised Statutes 1909, requiring the payment of a tax of two per cent upon premiums received on account of business done in this State, also required the payment of a tax similar in amount on all mortuary assessments made and collected from the holders of certificates or policies issued on the assessment plan, and that such liability of the insurer would constitute a valid charge against the insured under the terms of this certificate. In this way the defendant had, during the life of this policy, assessed and collected from Barber upon its quarterly assessments $11.93 as tax required by the laws of this State. In no case, nor at any time, had it been revealed to him by the form of the notice of such assessment or otherwise, that it included any such item or was made upon that plan. We cannot assume that he was advised by law of an unlawful charge, nor of fact which was not disclosed by the data in his possession. The assessment in question included the tax which, upon defendant's theory, was afterward to be paid to the State. The question is whether this tax was *exacted by the State* by the statutory provision above cited.

It is unnecessary, in view of the former decisions of this court, to elaborate this question otherwise than by citing those cases. The word "premium," in its application to insurance contracts, has a well settled meaning. The meaning of the word "assessment" in

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the same connection is equally well understood. It is upon this distinction that life insurance is divided by our Legislature into two general classes or plans, called the stipulated premium plan (Sec. 6963, R. S. 1909) and the assessment plan (Sec. 6950 Id.). As early as the October term, 1896, this court had before it the same question in Masonic Aid Association v. Waddill, 138 Mo. 628. Referring to the taxation of assessment companies under this same provision we said: "To hold that moneys received by them as *'assessments'* under this plan are *'premiums'* within the meaning of Section 2 (5958), which is now one of the 'provisions or requirements of the general insurance laws of this State,' would not only be to confound terms and disregard the well defined distinction made between them by the statute as a whole, but to ignore or directly contravene this proviso of Section 5869." These references are to the Revised Statutes of 1889. The same question was last before us in Young v. Hartford Life Insurance Company, 277 Mo. 694, in which the intermediate decisions of this court and the Courts of Appeals were cited, and the cause disposed of by holding that the assessment including the two per cent tax was void, and that its nonpayment constituted no ground for the forfeiture of the insurance. This case is peculiarly applicable, the certificate having been issued against the same fund as the one now in question, and upon the same terms with reference to forfeiture by non-payment of assessments.

These cases are founded upon a marked legislative distinction between a tax upon a burden resting upon the insured, in which the insurer can have no interest, but is a mere conduit between him and his associates, and the ordinary excise tax upon the receipts from the business of an insurer from which its profits are derived. In this case, which is a typical one, a separate payment is exacted from the insured for expenses which necessarily includes the profits of the company, while

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the tax is recouped from the mortuary assessment alone. These simply represent a mutual burden.

While the legislative policy requires no justification, we think it stands on solid ground.

III. The defendant makes the point that it is doing this assessment business without a special license therefor, but simply as an old-line joint-stock company. Appropriating the language of the Supreme Court of the United States in the same case, we are inclined to consider this a mere makeshift, which adds nothing to the substantial basis of this case. Whatever profit it may have made from its wrong must bear the burden of the resulting loss.

Makeshift.

IV. The defendant has asked with much earnestness for our consideration of the fact that in the assessment involved in this case the tax amounted only to fifteen cents, and insists that the entire mortuary fund to which it accrues belongs to the certificate-holders, and that it is inequitable therefore to sustain this certificate against its attempted cancellation. We see no force in this contention. The law, it is said, abhors a forfeiture. This aversion has resulted in the rule that it may be prevented by construction as technical as that by which it is invoked. In this case the deceased has not only paid illegal exactions amounting to nearly, if not quite, the amount of his alleged delinquency, but has paid a considerable sum into a fund which is held for distribution among living certificate-holders when the amount of insurance in force shall have decreased to one million dollars. The defendant ceased to issue this class of insurance in 1899, and the time of distribution is rapidly approaching. While equities are not available in cases of this character, we can see no equity in the defendant which can call for mitigation of the legal rule. We have referred to this question in greater detail in Barber v. Hartford Insurance Company, supra, and Young v. Hartford Life Insurance Company, supra.

Small Tax.

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V. We see nothing in the fact that we, when the cause was first before us, committed error in the decision of the Federal question upon which our judgment was reversed, which affects the right of plaintiff to damages and attorney's fees. We think the question was properly and fairly submitted. [Barber v. Ins. Co., 269 Mo. l. c. 42, and cases cited.]

Attorney's Fees.

Holding, as we do, that the certificate sued on was not by its terms subject to cancellation for failure to pay the assessment in question and finding no other error in the record, we affirm the judgment of the Circuit Court for Johnson County. *Railey, C.*, not sitting.

PER CURIAM:—The foregoing opinion of BROWN, C., is adopted as the opinion of the court; *Blair, P. J.*, and *Bond* and *Graves, JJ.*, concur.

ESTHER LENORE RANUS, By Her Next Friend, E. L. WINTERMAN, v. BOATMEN'S BANK, Appellant.

Division One, July 9, 1919.

1. **NEGLIGENCE: Insufficient Fire Escapes: Death in Dormitory.** Section 10663, Revised Statutes 1909, relating to fires escapes, is applicable to the City of St. Louis, and the death of a member of an athletic club while asleep in the fifth floor when the building was destroyed by fire affords a basis for a legitimate inference that his death was caused by the negligence of the owner in failing to comply with the statutes and ordinances relating to furnishing fire escapes.

2. ———: ———: **Question for Jury.** If the building which deceased occupied at the time it was destroyed by fire, which caused his death, falls within the classification designated in the statutes and ordinances, and was not supplied with the fire escapes required by them, the question of whether insufficient fire escapes was the proximate cause of his death is one for the jury.

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3. ———: ———: **Dormitory: Definition.** The common and ordinary significance of the word "dormitory" is a place for sleeping; and the fifth floor of an athletic club, on which 93 rooms were distinctly reserved for sleeping quarters and accommodation of its members, with provision for increasing the number of such rooms to 130, was a dormitory within the meaning of the statute and ordinance, which required that "all buildings of non-fireproof construction, three or more stories in height, used for manufacturing purposes, hotels, dormitories, schools, seminaries, hospitals or asylums, shall have not less than one fire escape for every fifty persons, or fraction thereof, for whom working, sleeping or living accommodations are provided above the second floor." And the evidence being that the building destroyed by fire did not have the requisite number of fire escapes, the question of whether the insufficient supply was the proximate cause of the death of a member of the club asleep in the dormitory was one for the jury.

4. ———: ———: ———: **Owner's Knowledge of Use.** There is no necessity of further proof that the owner of the building had knowledge that its lessee, an athletic club, was using the fifth floor of the leased premises for "dormitory" or sleeping purposes prior to the fire which destroyed the building, than the undisputed fact that the building and such floor had been so used for eleven years, during all of which time the owner occupied a portion of it.

Appeal from St. Louis City Circuit Court.—*Hon. Wm. M. Kinsey*, Judge.

AFFIRMED.

Lehmann & Lehmann and *Fauntleroy, Cullen & Hay* for appellant.

(1) The building was not a hotel or dormitory. (a) If appellant was under any duty to construct fire escapes upon the building in question, it was obligated to construct only such fire escapes as were required and designated by the Building Commissioner of the City of St. Louis. R. S. 1909, sec. 10668. (b) The building in question was not used for manufacturing purposes, was not a hotel, dormitory or school, seminary, hospital or asylum and hence no one was obligated to construct thereon one fire escape for every fifty persons for whom working, sleeping or living accommodations were provided above the second story. Secs. 6720, 10668, R. S.

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1909; Metzler v. Terminal Hotel Co., 135 Mo. App. 410; 4 Words & Phrases, p. 3349; Hillsdale v. Rideout, 82 Mich. 94; 1 Corpus Juris, p. 922; Commonwealth v. Pomphret, 137 Mass. 564. (c) It was, therefore, reversible error for the court by Instruction No. 1 to authorize the jury to find that the building was a hotel or dormitory, and to refuse to give Instruction E. requested by appellant. (2) The word "owner" as used in the fire escape laws (Sec. 10666, R. S. 1909; Sec. 421, St. Louis Ordinances 1912) means the person "standing in the shoes of the owner," and having the dominion and control of an owner. Bender v. Weber, 250 Mo. 563, 566; Behre v. Hemp, 191 S. W. 1042; Roman v. King, 202 S. W. 592; Griffin v. Freeborn, 181 Mo. App. 206; Roberts v. Cottey, 100 Mo. App. 503; Roth v. Adams, 185 Mass. 345; Radley v. Knepfly, 104 Tex. 130 (a fire-escape case); Helling v. Boss, 121 N. Y. S. 1013 (a fire-escape case); Jourdan v. Sullivan, 181 Mass. 348; Margolius v. Muldberg, 88 N. Y. S. 1048; Boutell v. Shellaberger, 264 Mo. 78, 81. A duty, carrying a weight as grave as the responsibility for human life itself, cannot be supported on a foundation as insubstantial as the baseless fabric of a name. In order to support the weight of such a duty there must be either: (a) A present legal ability to perform such duty; or (b) An act done to create, or helping to create, such duty; or (c) An act establishing or helping to establish the conditions to which such a duty is by law attached. Mo. Const. sec. 30, art. 2; U. S. Const. 14th Amend. sec. 1; and authorities above. There is no evidence in this case that appellant was in control of the building, or that it leased the building for one of the purposes designated in the fire escape laws (so as thereby to create a duty to construct fire escapes, according to the rule insisted upon by respondent), or that it ever was a party to any act which brought the building within one of the classes so covered by the fire escape laws (if it ever was brought within any such class). (3) An owner will not be held liable for breach of the

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fire escape laws unless he has leased his property for a use within such laws, or unless he knows, or by the exercise of ordinary care would know, that his property is being devoted to such use. Yall v. Snow, 201 Mo. 525; Bell v. Leslie, 24 Mo. App. 668. (4) There is no evidence whatever in this case that appellant knew, or by the exercise of ordinary care would have known, that the Missouri Athletic Club building was being used in a manner or for a purpose which brought it within the scope or operation of the fire escape laws or any of them, so as to require the number of fire escapes held by the lower court to be necessary. (5) If Mr. Ranus were in fact killed in the fire, his death may have resulted from any one of the following causes, viz: (a) The "highly combustible, dangerous and totally unfit" character of the building; (b) The "highly inflammable and extremely dangerous" nature of the alterations and furnishings and equipment, with which Mr. Ranus and his fellow members supplied their club building; (c) A violent explosion, which occurred a few minutes after the fire started, which immediately spread the flames all over the building, and which defeated all further exodus on the part of the doomed inmates; (d) A defect in the gas connections, which caused the fire to rage with unprecedented violence, and to remain beyond control until the gas pipes were dug up. "If the injury may have resulted from one of two causes, for one of which and not the other the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result, and if the evidence leaves it to conjecture, the plaintiff must fail in his action." Warner v. Railroad, 178 Mo. 134; Graefe v. Transit Co., 224 Mo. 263.

Leonard & Sibley for respondent.

(1) The building was a hotel or dormitory. (a) The building was of non-fireproof construction, three or

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more stories in height, used for a hotel or dormitory, and under the law was obliged to have "not less than one fire escape for every fifty persons or fraction thereof for whom working, sleeping or living accommodations are provided above the second story." Sec. 10668, R. S. 1909. (b) The fire escape law (Secs. 10666-10671, R. S. 1909, and Secs. 317, 318, 337, 338, 421, Ordinances St. Louis of 1912, and Secs. 101, 38, 40, 100, 94, Ordinances St. Louis of 1900) is remedial legislation, and as such is to be construed liberally with a view to effectuate the legislative intention of saving human life. Yall v. Snow, 201 Mo. 521; Rose v. King, 49 Ohio, St. 226. (c) Not only is the law to be construed liberally in the interest of the public, and strictly against the owner, but also the general rule of construing statutes, viz., search for the intention of the Legislature in enacting these police regulations. "What is within the clear meaning and implication of an enactment is as much a part of it as its very letter." Bryant v. Russell, 127 Mo. 430; 2 Sutherland on Statutory Construction, sec. 695. (d) The word "dormitory," as used in modern law, means "a place, building or room, to sleep in." Century Dictionary; Words & Phrases; 14 Cyc. 868; Webster's New International Dictionary. (e) The word "hotel," as used in modern law means "a house for entertaining strangers or travelers;" " a place where transient guests are admitted to lodge, as well as where they are fed and lodged." Webster's New International Dictionary; Century Dictionary; Metzler v. Hotel Co., 135 Mo. App. 416. (2) The owner of a building cannot shift his responsibility. He is bound, under the law, to equip the building with a sufficient number of legal fire escapes. Johnson v. Snow, 201 Mo. 450; Yall v. Snow, 201 Mo. 511; Contant v. Snow, 201 Mo. 527. It is immaterial whether or not he has leased the building. Yall v. Snow, 201 Mo. 522; Landgraf v. Kuh, 188 Ill. 493; Johnson v. Snow, 201 Mo. 455. The owner does not trespass, in entering on leased property for the purpose of erecting fire escapes. Yall v. Snow,

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201 Mo. 525. The owner cannot wait for the building commissioner to prod him into action. Steiert v. Coulter, 102 N. E. (Ind. 1913) 13; Willy v. Mulledy, 78 N. Y. 314; Carrigan v. Stillwell, 98 Mo. 253. (3) Appellant conjectures that, (a) the "highly combustible" nature of the building, and (b) the "highly inflammable" nature of the alterations may have caused the death of Mr. Ranus. It is not conjecture, but a certainty, that they caused the building to rank as of "non-fireproof construction" (Sec. 10668, R. S. Mo. 1909; Sec. 421, Rev. Code of Ordinances, St. Louis, 1912), and required it to be equipped with the legal number and legal kind of fire escapes. It is obvious that, if the building was not inflammable, and combustible, it would not have burned and the need of hasty exit by the fire escapes would not have developed. The statutes requiring fire escapes were enacted for the protection of those persons housed, employed and lodged within an inflammable and combustible building. It is an odd argument to advance—that the owner is excused for failure to equip the building with proper fire escapes because the building was of such peculiarly dangerous and inflammable construction that, in the event of fire, those within would probably be burned to death before they could reach fire escapes. anyway. (4) The question of proximate cause in this case was for the jury. The law does not countenance a rule by which "it is possible for those only to sue who are crippled, but which so seals up the facts and the law when the lips of the dead are sealed that no action may be brought for their death. Such a view penalizes the innocent for the benefit of the guilty." "Where, as here, these fire-appliance laws are violated, and death, unexplained, except by the physical facts, occurs by fire in the burning of a building not equipped with the required appliances, but which is by law required so to be, the rule of *res ipsa loquitur* should be invoked to take the case to the jury." Burt v. Nichols, 264 Mo. 1; Arnold v. Natl. Starch Co., 194 N. Y. 42; Landgraf v. Kuh, 188 Ill. 500.

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BOND, C. J.—Esther Lenore Ranus, the infant child of Arthur T. Ranus, recovered, a judgment of ten thousand dollars against the Boatmen's Bank for alleged negligence, which caused the death of her father.

On Apirl 9, 1914, at two o'clock in the morning, the seven-story brick building at the corner of Washington Avenue and Fourth Street, in the City of St. Louis, was completely destroyed by fire. The building was occupied by the Missouri Athletic Club, for club purposes, with the exception of one hundred and thirty-five feet on the Fourth Street side and fifty feet on the Washington Avenue front, which was reserved for and occupied by the Boatmen's Bank, the owner of the building.

On March 2, 1903, the bank leased to the Missouri Amusement & Club Supply Company, the part of the building above mentioned, said lease to expire April 1, 1913. Later the bank executed another lease, dated June 30, 1910, effective April 1, 1913, and expiring ten years later, to the Missouri Athletic Club, the original lessee (The Missouri Amusement & Supply Company) having gone out of business. The latter lease covered the same portion of the building as the former. Both leases provided for use of the building as a social and athletic club; that the lessee would keep it in good order and make, at its cost and expense, all repairs necessary (except as to roof, gutters, etc.); that the premises should not be used for any purpose considered more than ordinarily hazardous by the Board of Insurance Underwriters, and that the lessee take over all machinery, steam heating and elevator plants, and furnish heat, etc., to the lessor during the life of the lease.

The building in question was not fire-proof, as understood to-day, but was what is known as the slow-combustion type, and previous to its occupancy by the Missouri Athletic Club was used by the Shapleigh Hardware Company as warehouse, with general offices on the first floor. The ceiling of the bank's quarters, however, which was virtually on a level with the ceiling of the second floor, was composed of fireproof material

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which successfully withstood the terrific heat, as the bank's quarters were found to be intact after the conflagration.

On the consummation of the lease, the club undertook to remodel the building to suit the purposes of a club. In the basement a swimming tank and Turkish baths were installed; the first floor was laid with tile, the walls decorated and the space divided into lobby, office, etc.; the second floor was converted into a billiard room, a new wooden floor laid and a drop ceiling put in; the third floor was converted into a dining room with kitchens adjoining, and a portable wooden stage was provided for entertainments, equipped in the usual way; the fourth floor was made into bowling alleys, and the fifth and sixth floors were partitioned into "sleeping dormitories or apartments" (96 in number), and the seventh floor was turned into a gymnasium.

The building was equipped with a spiral fire escape on the Washington Avenue front, running to the seventh floor, which was in conformity with the city ordinances at the time it was built, and several years thereafter platforms were added running around the corner of the building to the fifth and sixth floors, said platforms extending over the roof of the adjoining building. There was also an inclosed stairway at the north end of the building intended for use in case of fire, and an outside fire escape on the Fourth Street side of the building. Both of these were built at the time the alterations were made by the club, and the east side escape was planned and erected in conformity to city ordinances, and said plans were submitted to and approved by the building commissioner. The escape on the east side passed various windows in its descent to the ground. All the alterations to the building were made with the consent and by the authority of the defendant bank.

On the day before the fire Mr. Ranus was passing through St. Louis on his way to Kansas City, where he expected to enter into new business relations. He spent the day with a business associate, and after registering

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at the club and being assigned to Room 36 on the fifth floor, his friend, who is probably the last person who saw him alive, left him there about one o'clock in the morning, just one hour before the fire. Four or five days thereafter his body was found buried in rubbish a little north of the central elevator shaft on the first floor. From the unburned portions of his trousers his watch and keys were taken.

In her petition plaintiff pleaded violation of Sections 10666, 10667 and 10668, Revised Statutes 1909, the pertinent parts of which are hereafter quoted, and further pleaded Section 421 of the Revised Code of St. Louis, which provides for the kind and description of fire escapes and their number and location by the Building Commissioner of Public Buildings, and adds, to-wit:

"Provided, however, that all buildings of non-fire-proof construction, three or more stories in height, used for manufacturing or mercantile purposes, hotels, *dormitories*, schools, seminaries, hospitals or asylums shall have not less than one fire escape for every fifty persons for whom working, sleeping or living accommodations are provided above the second story; and all public halls which provide seating room above the first story shall have such a number of fire escapes as shall not be less than one fire escape for every hundred persons calculated on the seating capacity of the hall, unless a different number is authorized in writing by the commissioner of public buildings.

"Whenever a fire escape attached to any building shall be found to be in an unsafe condition it shall be the duty of the owner, lessee, proprietor of said building to forthwith rebuild or repair the same or replace the same in a safe condition, subject to the penalties of this article. [R. C. St. Louis (Rombauer) 1912.] (Italics ours).

Defendant's answer admitted the membership of the deceased in the Missouri Athletic Club, denied other allegations, and averred that as such member he assented to the terms and conditions under which the

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lessee occupied said building, and that as such member he had the further right to control or protest against the construction, state of repair, equipment and means of protection in case of fire, and that he voluntarily occupied a room in said building without due exercise of care for his own safety.

From a judgment for ten thousand dollars entered in plaintiff's favor, the defendant duly appealed.

I. The grounds of action in this case are that the building demolished by fire was one of a class which fell within the definition of the general statutes of this State and the accordant ordinances of the City of St. Louis, requiring the owners thereof to provide specified fire escapes; that the defendant, the owner of the fee of the building, failed to perform this statutory duty and on that account became responsible in damages to plaintiff for the death of her father caused by the burning of the building in question.

That the statute relied on (which was enacted in 1901 and with subsequent amendments is now Sec. 10668, R. S. 1909) is applicatory to the City of St. Louis has been expressly adjudged by both divisions of this court. [Jackson v. Snow, 201 Mo. 450; Yall v. Snow, 201 Mo. 511.]

Fire Escape.

That a death, in circumstances like the present, affords a basis for a legitimate inference that it was caused by the negligence of the owner in failing to comply with statutes and ordinances regulating the furnishing of fire escapes, has been expressly adjudged by Division Number Two, where it was held that the circumstances attending a loss of life by fire were evidentiary and would take the case to the jury to determine, by legitimate inferences therefrom, whether or not the conflagration was the proximate cause of the death sued for. [Burt v. Nichols, 264 Mo. l. c. 18.]

Under these rulings it necessarily follows that if the building heretofore described as having been leased for ten years to the Missouri Athletic Club falls within the classification of the statutes and ordinances invoked

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by plaintiff, a case was made for the jury, since it is conceded that it was not supplied with the fire escapes described and required by the terms of Section 10668, Revised Statutes 1909, the pertinent parts of which are, to-wit:

"The number of fire escapes to be attached to any one building as required in this article shall, when the building is located within a city, be determined by the commissioner or superintendent of public buildings within such city . . . Provided, however, that all buildings of non-fire-proof construction, three or more stories in height, used for manufacturing purposes, hotels, dormitories, schools, seminaries, hospitals or asylums, shall have not less than one fire escape for every fifty persons, or fraction thereof, for whom working, sleeping or living accommodations are provided above the second story . . . unless a different number is authorized in writing by the commissioner or superintendent of buildings." [R. S. 1909, sec. 10668.]

This statute is almost literally copied in the concluding part of the second clause of Section 421 of the Revised Code of St. Louis (Rombauer, 1912) quoted above. This statute and this conformatory ordinance present, therefore, the first question to be ruled on this appeal, which is, whether or not the building in question fell within any of the descriptions and classifications of non-fire-proof buildings mentioned in the statute.

In order to resolve this question it is only necessary to refer to the use of the word "dormitory" both in the statute and in the ordinance. The common and ordinary significance of this English form of a Latin word is a place for sleeping. The building in question provided ninety-three distinct rooms for sleeping purposes and also accommodations which would have supplied one hundred and thirty people places to sleep. Although the people entitled to these sleeping quarters and accommodations were restricted to members of the club or their guests, that limitation in nowise contravenes the fact that the building itself was a dormitory and could

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be occupied as such by one hundred and thirty people. It, therefore, in the strict sense of the term, fell within the purview and intendment of the statute and ordinance when they required that a dormitory in a building constructed like the one in question should be supplied with fire escapes by the owner or lessee of the prescribed kind and number. We do not think any other conclusion can be arrived at upon a full and fair consideration of the import and meaning of the word "dormitory" as used in the statute and ordinance, in view of the fact that both of these regulatory laws have been held to be highly remedial and entitled to a broad and liberal interpretation (Yall v. Snow, 201 Mo. l. c. 521), and that they are a legitimate exercise of the police powers of the State and the City to prevent the loss of human life.

It follows that the question as to the applicability of the statute and the local ordinance must be resolved in the affirmative.

II. It is urged by appellant that there was no evidence of knowledge of defendant of the use to which its building was put. In answer to this it may be said there was no necessity of further proof of knowledge on the part of defendant that the building in question was used as a dormitory, than the undisputed fact that it had been so used for about eleven years, during all of which period the defendant bank occupied a portion of it. With the knowledge thus imputed, it became the duty of defendant to take cognizance of and conform to the statutes and ordinances requiring it to provide specified fire escapes for the prevention of a human holocaust such as took place when this building was burned.

Knowledge.

III. We have examined the instructions complained of by appellant and are unable to concur in its view that they invaded the province of the jury or were repugnant or transcended the allega-

Instructions.

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tions of the pleadings or contained misdirection requiring a reversal of this judgment.

The judgment of the trial court is affirmed.

It so ordered *Blair, P. J.*, and *Graves, J.*, concur.

J. G. STARR, Appellant, v. G. L. CRENSHAW.

Division Two, July 16, 1919.

1. **PURCHASE OF LAND: Unilateral Contract: Mutuality Supplied.** A mere option agreement to sell land, though in its inception unilateral and lacking in mutuality, may, when bottomed on a valuable consideration and accepted by the promisee within the time limited by the promisor, form the basis of an action for specific performance.

2. ———: ———: ———: **Consideration: Extension.** The word consideration is correctly defined as a benefit to the party promising, or a loss or detriment to the party to whom the promise was made. An extension by the vendor of the option agreement for thirty days, made on the last day of the option period and bottomed on a valid consideration, if accepted by the vendee on any day before the extension period expired, is enforcible and cannot be withdrawn before the expiration of such period; and if the vendor agreed to extend the option for thirty days upon condition (a) that the vendee give the vendor a certified copy of the report of his drillings for coal on the land and (b) pay interest on all deferred payments from the beginning of said thirty days in the event he should buy, and he unequivocally accepted the terms of purchase, and continued the drillings, though he did not furnish the certified report, which could be of no value to the vendor after the vendee's acceptance, there was a valuable consideration for the agreement, and the vendee is entitled to specific performance.

3. ———: **Breach of Contract for Other Reasons.** A breach of the option contract to purchase land, by the vendor before the expiration of the option period, for reasons other than the vendee's failure to perform, relieved the vendee from doing the vain and useless thing of furnishing a certified report of his drillings for coal on the land, called for by the agreement before the vendee had accepted the terms of purchase, but no longer of practical utility after he had accepted, although the drillings themselves furnished the consideration for the agreement.

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Appeal from Barton Circuit Court.—*Hon. B. G. Thurman,* Judge.

REVERSED AND REMANDED (*with directions.*)

Fred W. Kelsey and *E. F. Cameron* for appellant.

(1) It is conceded that an option to purchase land must be supported by a consideration or it can be withdrawn at any time prior to its acceptance. The option of February 1, 1916, or rather the renewal of the old option of that date was supported by a sufficient consideration to keep it open until March 1, 1916. Crenshaw offered to extend the option provided Starr would do two things: (a) Furnish reports of drilling and (b) pay interest on deferred payments from February 1, 1916, instead of from the date the deal was finally consummated. 6 Am. & Eng. Enc. (2 Ed.), 721 (8), note 6; Green v. Brooks, 81 Cal. 328. If the respondent desired the information as to the location of coal on the land drilled by Starr it was sufficient to support a consideration for a contract. Reed v. Golden, 28 Kan. 451, 42 Am. Rep. 180. A consideration may be defined as a benefit to the party promising, or a loss or detriment to the party to whom the promise is made. 13 C. J. 311 (144A). There is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not. 13 C. J. 315 (150) and 316; Glade v. Ford, 131 Mo. App. 164. After February 1st, Starr did drilling at his own expense and furnished the information to Crenshaw. This is of value to Crenshaw. Crenshaw obtained this information and if he is permitted to repudiate his promise or agreement to convey he would thereby be enabled to perpetrate a fraud upon Starr. 13 C. J. 318. (2) The prime function of courts of justice is to enforce the written law and enforce established contracts—the contract being as between the parties hereto but the law unto themselves.

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Evans v. Evans, 196 Mo. 23. (3) When Crenshaw attempted to withdraw the land from the market, that excused Starr from further carrying out any of the terms of his contract of option and making further reports as to the drilling. 6 R. C. L. sec. 374, p. 1012; Claes Mfg. Co. v. McCord, 65 Mo. App. 507; 9 Cyc. 635. (4) The fact that Crenshaw cannot convey all of the title does not relieve him from conveying that which he has, and Starr is entitled to receive such title as he has with an abatement out of the purchase money for so much as he cannot deliver. McGhee v. Bell, 170 Mo. 133; Story on Equity Juris. (13 Ed.) sec. 779. The inchoate right of dower should be deducted from the purchase price of this land. Tebeau v. Ridge, 261 Mo. 574.

H. W. Timmonds for respondent.

(1) An option giving the appellant a right to purchase respondent's land, without binding the appellant to purchase, and without consideration, is not enforceable against the respondent. Davis v. Petty, 147 Mo. 382; Wallace v. Figone, 107 Mo. App. 367. The option given appellant that expired February 1st had no consideration therefor in any respect, but was merely a privilege or permission to enter respondent's land and drill to ascertain the amount of coal underlying this land. This option was extended by respondent on condition that appellant would give respondent a certified report of his drillings and pay interest on the deferred payments from February 1st if appellant concluded to buy the land—a consideration for the extension of the option, but no consideration in any contract to sell the land. Even if so, no certified report of appellant's drillings was given respondent. The drillings from the man who did the drilling, let alone giving respondent a certified report, as he agreed to do. This report of the drillings now claimed by appellant to be the consideration to support the alleged contract sued upon is merely a pretext, certainly not of sufficient importance to sus-

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tain a contract. (2) Even where there is a binding legal contract for the sale of real estate, a decree for specific performance thereof does not go as a matter of course, but is granted or withheld as the equity of the case demands. Brown v. Massey, 138 Mo. 532; Davis v. Petty, 147 Mo. 385. (3) There must be a consideration for an option to make it a binding contract and enforceable. A mere option to buy land within a specified time does not give either party any claim for damages. Huggins v. Stafford, 67 Mo. App. 474; Ramsey v. West, 31 Mo. App. 676. And may be withdrawn at any time before acceptance.

FARIS, J.—This is a proceeding in equity by which it is sought to compel specific performance of a certain option to convey the Southwest quarter of Section 28, in Township 32, Range 33, in Barton County, Missouri.

The petition is so far in conventional form as that no attack is made thereon by defendant. Among other things, this petition contains an offer by plaintiff of his willingness, ability and readiness to pay into court the sum agreed on, and "to do each and every thing required of him by said agreement and option," and he further avers that he "has at all times been willing to perform his part of said agreement, and that defendant has refused to accept said performance, and has repudiated and seeks not to be bound by said agreement."

The answer of defendant is a general denial, and a specific denial of the legal effect of the alleged option agreement and contract, coupled with the averment that said option was without any consideration whatever, and that it was withdrawn by the defendant before it was accepted by the plaintiff, and that plaintiff for this reason has no right, or claim, or interest in said land, or any cause of action against defendant.

The evidence offered consisted largely of letters and telegrams which passed from time to time between plaintiff and defendant. There was an admission that defend-

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ant "is the owner of the property described, to-wit, the Northwest [*sic*] quarter of Section 28, Township 32, except Mrs. H. C. Timmonds owns an undivided one-half interest in the west half of said Southwest quarter section; and that Mr. Crenshaw is a married man aged 62, and his wife's age is 58."

On the 8th day of December, 1915, defendant, in answer to a letter of plaintiff, wrote plaintiff from Los Angeles, California, a letter, which, omitting formal parts and signature, reads thus:

> Yours of the 3rd inst. received and noted. Regarding the price of my coal land SW¼ 28, 32, 33, Barton County, Mo., will say I am holding it at $18,000 net; $6000 cash, balance in 3 equal annual payments of $4000, 6% interest, payable semi-annually secured by deed of trust, which trust deed will provide that payments shall be made sooner than the terms of the trust deed, provided more than one-third of the coal was taken out each year. In other words, there must be $4000 paid when one-third of the present coal has been removed, if such removal takes place before note is due and so on during the life of the trust deed. I will give you permission to enter the ground and do such prospecting as you may deem necessary anytime up until the 1st of February, without expense or obligation to myself and with the right to you to remove any machinery that you may be using on the premises for that purpose, without restraint or hindrance, on or before the 1st of February, 1916. This is in no sense of the word giving you a lease or possession of the property in any way whatever, except for the sole and only purpose of ascertaining to your satisfaction the amount of coal underlying the land. This privilege shall expire February 1st, 1916.
>
> If you decide to prospect, drop me a line that you accept my terms and I will reply immediately, otherwise you have no right or privilege whatever to enter the premises.

To this letter plaintiff, writing from Joplin, Missouri, to defendant on December 13, 1915, replied by letter, which letter, again omitting merely formal parts and signature, reads thus:

> Replying to your favor of Dec. 8th, will say we will immediately commence prospecting on your land following a reply from you giving us the privilege to commence prospecting, and have until the first day of February, and will prospect same and accept your proposition as per your letter of the 8th. If we can

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find enough coal that is available for steam shovel stripping on the 160 acres to justify us in paying your price, we will accept your terms. If we do not find enough coal so that we can afford to pay the price we will tell you the amount of coal we think is on your land.

Hoping to hear from you by return mail, I remain,

To this letter, under date of December 17, 1915, defendant replied thus:

Yours of the 13th inst. received in regard to prospecting my coal land in Barton County. In reply, I hereby authorize you to enter upon said coal land SW¼ 28, 32, 33, Barton County, for the sole purpose of prospecting same for coal at your own expense. I will give you until February 1st to do this prospecting. If you find coal satisfactory, will sell you the land on the terms stated in my letter of the 13th inst.

You must understand that this permission to enter the ground and prospect it is in no way a lease, excepting for the mere purpose of ascertaining to your own satisfaction the quantity and quality of coal underlying the property; and further, the time limited in which you are permitted to make this investigation runs to February 1st, 1916, at which time you will remove all machinery and apparatus of whatever kind from the premises.

Thereafter, as appears from further correspondence, not particularly pertinent to the point in mind, plaintiff proceeded to drill the land in question, and on January 7, 1916, advised defendant by letter that he had put down several holes, and so far the showing was fairly satisfactory. He added: "We desire to do considerable more drilling, and several days ago bad weather set in here and all work of this nature has been suspended. There is ice all over the district and the drillers cannot do any work. If the weather gets better within the next few days we will no doubt be able to complete our prospecting by the first of Feb., otherwise we may have to ask for a few days extension."

On the 31st day of January, 1916, plaintiff sent to defendant the below telegram, to-wit:

The extreme wet and stormy weather has prevented drilling on your land, and weather at this time is very unfavorable. Will you grant thirty days extension on my option to complete work?

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To this telegram, on February 1, 1916, the defendant replied as follows:

> Will extend option to March 1 provided you wil to (*sic*) give certified report your drillings, also pay interest on deferred payments from February first in event you buy the land. Other parties want 60 days to prospect as soon as you are through. Certified report will save delay. Wire at once.

To this telegram plaintiff wired on February 2, 1916, an acceptance as follows:

> Accept your proposition. Will complete drilling as soon as possible.

Thereafter, and on February 8, 1916, plaintiff wrote defendant the following letter:

> We received your telegram giving us permission until the first of March to complete the drilling, but that you wanted the notes to bear interest from the first of February in the event that we closed the deal with you. This is satisfactory to us.
>
> The weather has improved some in the last few days and we have about completed our drilling.
>
> According to the drilling there is something like 80 acres of coal on the 160 that probably can be handled with our shovel. No doubt there is more coal than this but it would be in the way of pillars and in such condition that we could not run our shovel over and take off the over burden.
>
> We find that about 30 acres of this 80 acres in the southwest corner of the 160 has about a five-foot vein or strata of sand rock. This will be very expensive operating with our shovel, as it will have to be shot and we are not sure that we can even handle this rock after it is shot. However, we are willing to try this out.
>
> In view of the fact that you will want an agreement stating that in the event a certain amount of coal should be taken off this land before the deferred payments become due, should such be the case I take it from your letter that the payments cannot run one, two and three years. If this is a fact, we deem it would be better to make you a cash offer for this property and have concluded to make an offer of $16,000 for this 160 acres. If you conclude to accept this offer, I would like to have an answer one way or the other, by wire, upon receipt of this letter.
>
> Hoping to hear from you promptly, I remain,

This letter defendant answered on February 11, 1916, as follows:

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Your favor of the 8th inst. received, and in reply will say I am willing to stand by my agreement per letter December 8th, 1915, to sell you the land for $18,000. However, I am not particular at this time about selling the land at that price; and, when you are through with the investigation, send me a statement of such investigation and call the deal off if you wish. Think I can mine the coal and make a good profit above this price.

Should you decide to buy the land, deposit $6000 in the bank of Thomas Egger on or before the 1st of March, payable to my order, on the delivery of my Warranty Deed to this land with an Abstract showing clear title, and notify me by wire when you have made such deposit and I will forward the deed to Mr. Egger with instructions to deliver to you upon the payment of this $6000 and your proper execution of the Trust Deed, per my letter of December 8th, in addition to the notes and Trust Deed and an agreement to pay the notes and Trust Deed before due, provided you take out the coal according to my letter of December 8th.

Time is the essence of my letter of December 8th; and, unless the matter is closed up strictly on time and according to the terms, I shall not feel under obligation to make the conveyance. I write you this early on this point that you may be prepared and not have an excuse for failing to be prompt. The fact is I regret now that I made you this price, however I will carry out my agreement in good faith if you are promptly on time with your part of the agreement.

Plaintiff, pending the passage between the parties of the above named telegrams and letters, continued to investigate this land by drilling the same. He caused to be drilled thereon twenty-four drill holes in all. This drilling was largely done during the month of February, 1916, and plaintiff says that all of it was probably completed before he sent to defendant the letter quoted above, wherein the statement is made by plaintiff to defendant that "there is something like 80 acres of coal on the 160 that probably can be handled with our shovel. . . . We find that about 30 acres of this 80 acres in the Southwest corner of the 160 has about a five-foot vein, or strata [*sic*] of sand rock." For the work of drilling this land plaintiff paid $453.75.

On February 23, 1916, defendant wired plaintiff, repudiating whatever agreement the above letters and facts constituted. This telegram is as follows:

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"Recd report from out attorney on abstract of title to our coal land. He says many defects in it which will likely require litigation in circuit court to correct. Therefore we withdraw the land from the market.

Between the 11th day of February, 1916, when the letter last above quoted was written by defendant to plaintiff, and the date of defendant's repudiation of the option, there seems to have been no communication between plaintiff and defendant, except a wire which plaintiff sent defendant on February 19, 1916, which wire read thus: "Your letter received. What is the best discount you will make if I pay all cash for the land? Answer at once."

Thereafter, and on February 24, 1916, plaintiff wrote defendant as follows:

I wired you this morning in which I thought I was complying with your proposition, but have since found that I was wrong and therefore withdraw the statements made in said telegram this morning, and accept your proposition as outlined in your favor of February 11th, 1916, as follows:

"Should you decide to buy the land, deposit $6000 in the bank of Thomas Egger on or before the 1st of March, payable to my order, on the delivery of my Warranty Deed to this land with an Abstract showing clear title, and notify me by wire when you have made such deposit and I will forward the deed to Mr. Egger with instructions to deliver to you upon the payment of this $6000, and your proper execution of the Trust Deed, per my letter of December 8th, in addition to the notes and Trust Deed and an agreement to pay the notes and Trust Deed before due, provided you take out the coal according to my letter of December 8th."

I am sending bank draft today for said sum of $6000 to Mr. Thomas Egger for deposit for the purpose above described, and request that you forward Warranty Deed and abstract as you have proposed, making said deed direct to "Jesse G. Starr of Joplin, Missouri," and I will execute the Trust Deed and notes for the deferred payments as outlined.

If you prefer, I can arrange to pay the whole amount in cash, which might simplify the drawing up and making of the papers and the closing of the deal, but will leave that to your pleasure. I will request Mr. Egger to notify you of the receipt of said deposit by wire as you request.

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Awaiting your advice as to the delivery of the Deed and also the abstract, I remain

Yours truly,
J. G. STARR,

I am enclosing Missouri form of Warranty Deed for your convenience in preparing deed in the form desired for this State.

Immediately thereafter, plaintiff deposited the sum of $6000 with Thomas Egger, of Lamar, Missouri, as and for the proposed first payment in cash on the land in controversy, of which fact he advised defendant by wire, adding: "Send on your abstract and deed and I will execute note and deed of trust for remainder when abstract is approved." There seems to have been no answer to this wire, nor any action whatever taken thereon by either party till September 9, 1916, when plaintiff brought this action, praying for specific performance of the alleged contract to convey.

Some few further facts will become pertinent in the course of our discussion, which facts we will set out in connection with the matters to which they are apposite.

The contract here was unilateral—in other words, a mere option in plaintiff to purchase. That such option, though in its inception unilateral and lacking in mutuality may *caeteris paribus, when bottomed on a valuable consideration and accepted by the promisee within the time limited by the promisor,* form the basis of an action for specific performance, is in this State no longer open to question. [Warren v. Castello, 109 Mo. 338; Real Estate Co. v. Spelbrink, 211 Mo. 671.]

Consideration.

Upon this view the first and most important question in this case is, was there a valuable consideration for the option? We are of the opinion there was. The word "consideration" has been defined—correctly, we think—as "a benefit to the party promising, or a loss or detriment to the party to whom the promise was made." [Roller v. McGraw, 63 W. Va. 462; Pabst Brewing Co. v. Milwaukee, 126 Wis. 110; Corbett v. Cronk-

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hite, 239 Ill. 9; Eastman v. Miller, 113 Iowa, 404; Chicora Co. v. Dunan, 91 Md. 144; Strode v. Transit Co., 197 Mo., l. c. 623; 6 Am. & Eng. Encyc. of Law, 703; 1 Parsons on Contracts, 357.]

Plaintiff, as we gather his position from his argument and brief, seems to consider that there was no binding contract which could have been enforced in this proceeding against defendant till the extension of the option till March 1, 1915, was made. But he contends that this extension, being bottomed upon a valuable consideration, could be accepted by plaintiff up to the expiration thereof on said latter date, and that the same, for the like reason that it was bottomed upon a valuable consideration, could not be withdrawn by defendant till the expiration of such date. We think this position is well taken. The defendant, on February 1, 1916, by his telegram in that behalf, agreed to extend plaintiff's option to purchase to March 1, 1916, on condition (a) that plaintiff give defendant a certified report of defendant's drillings, and (b) that he pay interest on all deferred payments from the first day of February, 1916, in the event that plaintiff should buy the land. Plaintiff immediately and unequivocally accepted this proposition, and advised defendant that he would complete drilling as soon as possible. Plaintiff thereafter, and on February 8, 1916, wrote defendant confirming his acceptance of defendant's offer of an extention for one month as made in defendant's wire. In this latter letter plaintiff offered to pay in cash the sum of $16,000 instead of the $18,000 as contained in the price made to plaintiff by defendant in deferred payments, and asked for an answer by wire. Instead of answering by wire, defendant wrote to plaintiff the letter of February 11, 1916, wherein he said that he stood by the terms of the original option to sell the land for $18,000, and that he was not particular at this time about selling the land at that price. To this letter he added this: "Should you decide to buy the land, deposit $6000 in the bank of Thomas Egger on or before

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the first of March payable to my order on the delivery of my warranty deed to this land, with an abstract showing clear title, and notify me by wire when you have made such deposit and I will forward the deed to Mr. Egger with instructions to deliver to you upon the payment of this $6000 and the proper execution of the trust deed per my letter of December 8, in addition to the notes and trust deed and an agreement to pay the notes and trust deed before due, provided you take out the coal, according to my letter of December 8. Time is the essence of my letter of December 8, and unless the matter is closed up strictly on time and according to the terms I shall not feel under obligation to make the conveyance."

Plaintiff, pursuant to the several telegrams with relation to this drilling, continued to drill the land, and, as stated, put down in all 24 drill holes, at a total expense to him of $453.75. We think there can be no doubt that this was a sufficient consideration within the purview of the definition thereof with which we premised the discussion of this point. For it was clearly "a loss or detriment to the party to whom the promise was made," that is, to the plaintiff. It was more than this; it was a potential benefit to the defendant, the party promising, in that he was to get, or was promised in the event the plaintiff failed to take the land before the expiration of the term of the option, a certified report of the drillings made, which report, as his telegram stated, would save delay when he came to sell the land to others, in the event plaintiff did not buy. Moreover, there was, in our opinion, an actual consideration promised to defendant from plaintiff, in that defendant required, and plaintiff promised to pay, interest from February 1, 1916, in lieu of the payment of such interest only from the date of acceptance. This certified report of the drilling done was never sent by plaintiff to defendant. Such a report, as we gather from the evidence, seems to be a report made up and certified by the person doing the drilling. The custom of the com-

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munity seems to require, as also does the reason of the thing, that such a report shall show the location of the drill holes upon the land, the number of such holes, together with a log of each hole, that is, a showing of the diameter and depth of the hole and of the various soils, rock, coal or other minerals or substances through which the drill passes in boring the hole. Plaintiff merely advised defendant, by a letter dated February 8th, 1916, that "there is something like 80 acres of coal on the 160 that probably can be handled with our shovel." To the sufficiency and definiteness of this report no objection was made by defendant, till he filed his answer in this action.

It is strenuously contended by defendant that the failure of plaintiff to make to defendant such certified report, among other reasons mooted, precludes the granting to defendant of the relief prayed for, or of any relief. We cannot agree to this view. In passing, it is apparent that when plaintiff closed his option by an acceptance within the period limited by the option's terms, the certified report and log of the drill holes interested defendant no more, except as a mere matter of curiosity, or as a basis for mental reflections touching whether his bargain was a good one or a bad one. This is the wholly utilitarian view, and is merely by the way. There is a stronger reason in law. That reason is, that if there was a consideration to support this option up to March 1, 1916, and we think there was and have so ruled the point, then defendant could not withdraw or recede from this option till March 1, 1916. He did, however, attempt to recede on February 23, 1916, and to this end wired plaintiff that he had "received report from our attorney on abstract of title to our coal land. He says many defects were in it, which will likely require litigation in circuit court to correct. Therefore, we withdraw the land from the market." When this notice that defendant would not abide by the option contract to sell the land to plaintiff was given, the contract in question yet had six days to run. When defendant

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breached it before it expired, for reasons other than the failure of plaintiff to perform, the latter was not bound to do the vain and useless thing of furnishing a certified report of the drillings made on the land. This is the general rule adhered to almost uniformly and in all jurisdictions. [Cumberledge v. Banks, 235 Ill. 249; Malloy v. Foley, 133 N. W. 778; Niquette v. Green, 81 Kas. 569; Long v. Nedham, 37 Mont. 408; Guillaume v. Land Co., 48 Ore. 409; Jordan v. Johnson, 98 N. E. 143; Neal v. Finley, 136 Ky. 346; McLeod v. Morrison, 66 Wash. 683.]

Likewise, this same rule has been applied, and with good reason, to breaches of an option to purchase. [Winslow v. Dundom, 125 Pac. (Mont.) 137; Cape Fear Lbr. Co. v. Small, 84 S. C. 434; Harper v. Runner, 85 Neb. 343.]

It follows that the option, (a) being bottomed upon a valuable consideration, permitted acceptance by plaintiff up to the date at which by its own terms it expired, and (b) that the refusal to abide by its terms before the expiration of the period limited therein for acceptance, relieved plaintiff from a tender of the certified report of the drillings made. Having made tender and profert of full compliance with all the terms of such option on his part in his petition, plaintiff is entitled to a decree for specific performance in so far as the condition of defendant's title will allow. This decree should go for plaintiff for the whole of the east half of the Southwest quarter of the land in controversy, and for an undivided one-half of the west half of the Southwest quarter thereof, upon payment by plaintiff to defendant of the sum of $13,500, the latter sum to be diminished by the present value of the outstanding inchoate dower of the wife of defendant, in the event such wife shall refuse to join in a conveyance of said land. [Tebeau v. Ridge, 261 Mo. 547.]

Let the case be reversed and remanded, with directions to the court *nisi* to take such further action therein as is not inconsistent with what we have herein ruled.

It is so ordered. All concur.

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JOSEPH PRAPUOLENIS v. GOEBEL CONSTRUCTION COMPANY, Appellant.

Division Two, July 16, 1919.

1. **SCAFFOLD: Movable Platform.** It is a matter of common knowledge that a platform for the use of workmen in erecting a large and tall building is readjusted and moved either laterally or perpendicularly as the work on the walls progresses, but it is none the less a scaffold on that account. Where the entire wall of a building, sixty or eighty feet long and fifty or sixty feet high, was separated into sections called panels, and the platform on which the men worked in removing the forms was moved from panel to panel as the work progressed, the platform was a scaffold within the meaning of Section 7843, Revised Statutes 1909.

2. ———: **Negligence: Specific Acts: Fall: Burden of Proof.** Testimony that one of the chains supporting the scaffold had become unfastened will support an inference that it was insecurely fastened. But it is not necessary under the statute (Sec. 7843, R. S. 1909) to prove a specific act of negligence which caused the scaffold to fall. The statute requires that the structure "shall be well and safely supported" and "so secured as to insure the safety of persons working thereon," and this language means that the giving way of scaffold and the consequent injury of a workman raises a prima-facie presumption that his employer had failed of his duty and places the burden on him to show that it gave way without any negligence on his part. The statute would possess no force or effect if the injured workman were required to point out a specific defect in the scaffold furnished him, and which fell, causing his injury.

3. ———: ———: ———: ———: **Res Ipsa Loquitur.** While the doctrine of *res ipsa loquitur* does not generally apply to a case arising between master and servant, it is so applied where the injury to the servant is caused by some appliance peculiarly within the master's knowledge and control, of which the servant is ignorant and with whose construction or arrangement he has nothing to do.

4. **NEGLIGENCE: Fellow-Servants: Carpenter and Common Laborer.** A carpenter constructed the platform on which the men were to work in taking down the scaffolding, and a common laborer had nothing to do with its constructing and knew nothing about it. Later after the platform was completed, the carpenter and laborer

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stood on the platform and were working together in taking down and receiving the timbers of the scaffold when the platform fell, injuring the laborer. *Held*, that they were not fellow-servants in the work of constructing the platform, and as the laborer's action for damages is based on a violation of the statute requiring employers to furnish safe scaffolds or structures for such work, his action is not barred on the theory that his injuries were due to the negligence of a fellow-servant.

5. ———: ———: **Detached Employee.** When the master uses one servant to construct a place in which he and the other servants are to work, and the place is made unsafe by that servant, and a fellow-servant who was not employed in that particular work is injured because of the defect, he is not the fellow-servant of the one who did that particular work so as to defeat recovery.

Appeal from St. Louis City Circuit Court.—*Hon. William T. Jones,* Judge.

AFFIRMED.

Leahy, Saunders & Barth for appellant.

(1) Defendant's instruction in the nature of a demurrer to the evidence should have been given. (a) Sec. 7843, R. S. 1909, does not cover a swinging and shifting platform such as shown in the instant case. This doctrine is known as the "shifting" or "transitory" device doctrine. Livergood v. Lead & Zinc Co., 179 Mo. 229; Anderson v. Missouri Granite & Const. Co., 178 S. W. 737; Deiner v. Sutermeister, 266 Mo. 514-19 (b) Sec. 7843, R. S. 1909, does not preclude the legal effect of a negligent act of a fellow servant, when such act is the direct and proximate cause of plaintiff's injury. Williams v. Ransom, 234 Mo. 55. (c) It devolves upon the plaintiff who relies upon the absence of the relationship as fellow servants to prove its non-existence. McGowan v. Railroad, 61 Mo. 528; Blessing v. Railroad, 77 Mo. 410; Ryan v. McCully, 123 Mo. 636; Shaw v. Bambrick-Bates Construction Co., 102 Mo. App. 666; Sheehan v. Prosser, 55 Mo. App. 569; Ryan v. Christian Board of Publication, 199 S. W. 1032. (d) By plaintiff's allegation and evidence the direct and proxi-

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mate cause of his injury was the negligent manner in which the particular chain in question was secured, when the platform was changed by the workmen during the progress of the work. (e) When plaintiff's evidence is uncontradicted, the question whether other workmen are fellow servants of the plaintiff is a question of law for the court alone to decide. McGowan v. St. Louis & Iron Mountain R. Co., 61 Mo. 528; Marshall v. Schricker, 63 Mo. 308. (f) In the case at bar the other workmen were fellow servants of the plaintiff. Richardson v. Mesker, 171 Mo. 666; Ewan v. Lippincott, 47 N. J. L. 192; O'Brien v. American Dredging Co., 53 N. J. L. 291. (g) When the evidence is uncontradicted that the negligent act of a fellow-servant is the direct and proximate cause of plaintiff's injury, a verdict should be directed for defendant. McDermott v. Pac. Railroad, Co., 30 Mo. 115; Brothers v. Carter, 52 Mo. 372; Higgins v. Mo. Pac. R. R. Co., 104 Mo. 413; Warmington v. Railroad, 46 Mo. App. 159. (2) This case in its last analysis rests upon the *res ipsa loquitur* doctrine which does not apply in master and servant cases. Sec. 7843, R. S. 1909; Deiner v. Sutermeister, 266 Mo. 514; White v. Montgomery Ward & Co., 191 Mo. App. 270; Williams v. Ranson, 234 Mo. 75; Forbes v. Dunnavant, 198 Mo. 210; Hedrick v. Kahmann, 174 Mo. App. 57; Removich v. Construction Co., 264 Mo. 43.

Joseph A. Wright, for respondent.

(1) The testimony leaves no doubt that the scaffold "was not well and safely supported," as required by Sec. 7843, R. S. 1909. This was sufficient evidence to warrant a finding of negligence, particularly in view of the obvious peril to the workmen from failure to exercise proper care in supporting the scaffold. Reber v. Tower, 11 Mo. App. 199; Denker v. Wolff Milling Co., 135 Mo. App. 340; Mayer v. Atlantic Refining Co., 254 Pa. 544; Blohm v. Boston Elevated Railway Co., 221 Mass. 390; Bartlett-Hayward Co. v. Maryland, 121 Md.

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1. (2) Plaintiff had nothing whatever to do with the erection of the scaffold, and therefore he cannot be regarded as the fellow-servant of Clark, who constructed it. Stapleton v. Hummel Mfg. Co., 202 S. W. 369; Koerner v. St. Louis Car Co., 209 Mo. 141; McGrath v. Vogel, 182 S. W. 813; White v. Montgomery Ward & Co., 191 Mo. App. 268; Lang v. Bailes, 19 N. D. 582. (3) The statute (Sec. 7843, R. S. 1909) is mandatory, and imposed the non-delegable duty on defendant to have the scaffold "well and safely supported." Deiner v. Sutermeister, 266 Mo. 505. Manifestly, if it had been well and safely supported, and the statutory mandatory observed, plaintiff would not have been injured. It is a case of statutory negligence made negligence *per se* by the law-making authority. Thompson Law of Negligence, par. 10; Burt v. Nichols, 264 Mo. 1; Johnson v. Snow, 201 Mo. 450; Yall v. Snow, 201 Mo. 511; Turner v. Railroad, 78 Mo. 580; Sluder v. St. Louis Transit Co., 189 Mo. 107; Stewart v. Ferguson, 164 N. Y. 553, 556; Cady v. Interborough Rapid Transit Co, 195 N. Y. 415, 30 L. R. A. (N. S.) 30; Madden v. Hughes, 185 N. Y. 466; McDonald Co. v. Manns, 177 Fed. 203; Steel & Masonry Contracting Co. v. Reilly, 210 Fed. 437; New York R. R. Co. v. Mooney, 223 Fed. 626. (4) The fact that defendant erected a separate and complete scaffold for each section of the building cannot defeat liability. Since each scaffold at the particular section was a separate and complete place to work, its erection carried with it the duty to make each scaffold safe. Murray v. Paine Lumber Co., 155 Wis. 409; Feldman v. Mackey Co., 161 N. Y. Supp. 564; Swenson v. Wilson Mfg. Co., 102 App. Div. (N. Y.) 477; Steel & Masonry Contracting Co. v. Reilly, 210 Fed. 437. If defendant's contention that although the ends rested on solid supports, it is relieved from liability because the center rested upon chains, then the law can be defeated by adopting the exceeding perilous method of suspending the scaffold with ropes and chains. In truth, this dangerous method, apparently adopted to save expense, is the cause of

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these workmen being injured and killed. It is the use, not the method of supporting the scaffold, that determines liability. If fastened by ropes or chains, it remains a scaffold within the meaning of the law. Deiner v. Sutermeister, 266 Mo. 505; Madden v. Hughes, 185 N. Y. 466; Flannigan v. Ryan, 89 App. Div. (N. Y.) 624, 85 N. Y. Supp. 947; Frid v. Benton, 69 L. J. Q. B. 436, 82 L. T. 193.

WHITE, C.—The plaintiff obtained judgment against defendant in the sum of fifteen thousand dollars for personal injuries received while employed by the defendant and alleged to have been inflicted through the negligence of defendant. Defendant appealed from that judgment.

The plaintiff was employed as a common laborer. The defendant had erected a concrete building to be used as a packing plant for the St. Louis Independent Packing Company. After its erection the plaintiff was injured while assisting in removing the forms which had been used in constructing the building.

The building was estimated to be between sixty and eighty feet in length and was fifty or sixty feet in width. It was sixty feet high. There had been built up along the walls on the inside of the building for the use of the workmen a framework for stationary platforms, extending to within a few feet of the ceiling. This left an open space in the centre of the building about thirty-five feet wide from the stationary framework of the scaffold on one side to the stationary framework of the scaffold on the other side. The gang of men with whom the plaintiff was working were taking down the forms from the top of the building. In order to do this a platform was constructed across the thirty-five feet of space between the stationary scaffolds on the sides in this manner: a swinging beam made of two-by-sixes about thirteen feet long, nailed together at the ends, running lengthwise of the building in the centre of this space, was suspended and supported by chains depend-

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ing from the roof. In the concrete roof there were holes three inches in diameter, through which the chains were let down. Planks were then laid across from the fixed framework on each side of this swinging support, so that it made a platform thirty-five feet long and about thirteen feet wide, extending crossways of the building, supported on each end by the solid framework, and supported in the middle by the swinging beam mentioned. The chains which went through the holes in the roof to support this structure were double and fastened together at the top. There was a large knot in one end of each chain, while the other end was wired to that knot. A four-by-four block eighteen inches long was thrust through the loop thus made. Each end of the four-by-four block rested on a short plank about a foot long and five-eighths of an inch thick and five or six inches wide, perhaps to protect the concrete.

On the 5th day of August, 1915, the plaintiff and three other men were working on the platform described. One of the four was a man named Clark, a carpenter. It seems that Clark was engaged in detaching the lumber used in the forms and handing it to the plaintiff, who in turn handed it down to another laborer. While they were so engaged one of the chains became detached from its fastening on the roof, the support of the scaffold gave way, and the four men were precipitated to the bottom of the building sixty feet below. One of them was killed and the others severely injured. All of them or their representatives sued and recovered judgments against the Goebel Construction Company. The cases other than that of the appellant went to the St. Louis Court of Appeals, where they were affirmed.

The plaintiff was a common laborer. Clark, the carpenter who was working with him at the time of the injury, had constructed the scaffold upon which they were working at some time previous to that. The plaintiff had nothing to do with that part of the work and didn't know when it was done.

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There was some evidence indicating that the ends of the chain had been insecurely fastened around the block which supported it on top of the building, or had become insecurely fastened in the progress of the work, so that it slipped through the hole and let down one end of the cross-piece which supported the platform. The building extended in an easterly and westerly direction, and as described by one of the witnesses "the farthest chain west had become unfastened and the men were precipitated to the bottom, scaffolding and all."

I. The plaintiff seeks to recover on the ground that his injury was caused by a failure on the part of the defendant to comply with Section 7843, Revised Statutes 1909, which is as follows:

Scaffold.

"All scaffolds or structures used in or for the erection, repairing or taking down of any kind of building shall be well and safely supported, and of sufficient width, and so secured as to insure the safety of persons working thereon, or passing under or about the same, against the falling thereof, or the falling of such materials or articles as may be used, placed or deposited thereon. All persons engaged in the erection, repairing or taking down of any kind of building shall exercise due caution and care so as to prevent injury or accident to those at work or near by."

Appellant asserts that the section does not cover the case of what it terms a "swinging and shifting platform" such as shown in the evidence in this case. In this appellant makes two objections to this platform as a scaffold. It was a shifting platform, it is alleged, because it was moved from time to time as the work required. It appears from the testimony that the entire length of the building was separated into sections called panels, there being eight panels. The men took down the forms for the first panel at one end of the building, then the platform was moved to the next panel by moving the chains on the roof to convenient holes further

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along. The platform was changed in that way from panel to panel, and at the time it broke down the men were working on the fifth panel. It is urged by appellant that because this platform was moved from time to time it was not a scaffold; that a scaffold must be a fixed and stationary support for the men at work. It is a matter of common knowledge that a platform for any kind of workmen in erecting a building is readjusted and moved either laterally or perpendicularly as the work on the wall of a building requires, and it would be none the less a scaffold on that account. The scaffolding on the sides of the building, made for the purpose of supporting the workmen, was evidently changed from time to time in its level as the men would mount in their work.

The other objection is that this is a swinging platform and therefore it is not a scaffold within the meaning of the statute. The effect of this position is that the employer by making the support of his scaffold a swinging or vibrating one instead of a fixed or stationary one, and thereby rendering his platform less safe, escapes the obligation and penalty of the statute. This would put a premium upon the very neglect against which the statute is aimed. This court had occasion to construe this section and define the terms "scaffolds" or "structures" to which it applies. [Deiner v. Sutermeister, 266 Mo. 505.] This was said, l. c. 518: "It is plain that it does include by the use of the words 'scaffolds or structures' all stationary platforms, staging, trestles and other similar false work used in erecting, or tearing down, buildings of any kind, in addition to the contrivance connoted by the use of the general word scaffold." Citing many cases. And further on the same page: "Moreover, as stated above, we think it is obvious from the very context of Section 7843 that in the clause 'scaffold or structures' the last word is *ejusdem generis,* and said clause is to be construed as meaning scaffolds, or *contrivances and appliances of similar use and nature to scaffolds, viz., platforms, staging, trestles*

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of whatever kind." (Italics ours). See, also, Loehring v. Construction Co., 118 Mo. App. 163. We think the structure was within the terms of the statute.

II. It is further claimed by appellant that there is no evidence of any specific negligence of the defendant which caused the injury complained of. It was stated in the testimony that one of the chains supporting the platform had become unfastened; it might be said that it was a proper inference from this that it was insecurely fastened. The chain was fastened together with wire around the block of four-by-four and could only have become unfastened if the fastening was insecure. The jury was required to find that the defendant failed to have one of said chains so fastened as to well and safely support the scaffold.

Specific Negligence.

However, was it necessary to prove a specific act of negligence as the cause of the falling of the scaffold? Where the statute imposes a duty to provide safety appliances of any kind for protection of persons from injury, the failure of the duty imposed is negligence *per se*. [Stafford v. Adams, 113 Mo. App. l. c. 721.] In a case where machinery is required to be guarded or fire escapes provided, and where such statutory duty is violated, the injury or loss in such case is presumed to be in consequence of that failure; the doctrine of *res ipsa loquitur*, is said to apply. [Burt v. Nichols, 264 Mo. l. c. 18.] In such cases the entire absence of a guard around machinery or of a fire escape is easy to prove. Here, however, arises a question of fact as to whether the scaffold provided was safe. It is contended by the defendant that besides the mere fact that the platform gave way, there would have to be some proof of a specific defect in it. The statute, Section 7843, requires that the structure "shall be well and safely supported" . . . and so secured as to *insure* the safety of persons working thereon." The use of this language would indicate that a collapse or giving way

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of such platform and consequent injury would raise a prima-facie presumption that the employer had failed of his duty and would place the burden upon him to show that it gave way without any negligence on his part.

The State of New York has a statute very similar to the one under consideration here, and it is there held, construing the statute, that the fall of such a scaffold, in the absence of evidence of any other producing cause, points to the omission of the duty enjoined by the statute in its construction and makes out a prima-facie case. [Stewart v. Ferguson, 164 N. Y. 553; Steel and Masonry Contracting Co. v. Reilly, 210 Fed. 437, l. c. 439.]

It is usually held, in the absence of a statute, where a scaffold falls when used in the ordinary way with no special strain upon it and causes an injury the doctrine of *res ipsa loquitur* applies. [Johnson v. Roach, 82 N. Y. Supp. 203.] While doctrine of *res ipsa loquitur* does not generally apply to a case arising between master and servant, there are many cases in which it is made to apply the same as in cases of persons in other relations. It is applied particularly to falling scaffolds which are provided for servants to use, when the servants have nothing to do with their construction. [Cleary v. Genl. Contr. Co., 101 Pac. (Wash.) 888; Westland v. Gold Coin Mines Co., 101 Fed. 59.] See 4 Labatt on Master and Servant, sec. 1601, note on pp. 4872-5, where the doctrine is discussed at length in connection with master and servant and the furnishing of scaffolds, platforms and safe places to work. [Robinson v. Consolidated Gas Co., 28 L. R. A. (N. S.) 586, 194 N. Y. 37.]

There are many cases in this State in which the doctrine of *res ipsa loquitur* is applied between master and servant, where the injury to the servant is caused by some appliance peculiarly within the knowledge and control of the master, of which the servant is ignorant and with which he had nothing to do. [Klebe v. Dis-

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tilling Co., 207 Mo. l. c. 487; Johnson v. Railway Co., 104 Mo. App. 588; Sackewitz v. American Biscuit Co., 78 Mo. App. l. c. 151; Burt v. Nichols, 264 Mo. l. c. 18; Ash v. Woodward & Tiernan Printing Co., 199 S. W. 994.]

The statute under consideration would possess no force or effect if the plaintiff were obliged to point out a specific defect in the scaffold or platform which was furnished him. In that case he would be entitled to recover at common law. If it wasn't the intention of the Legislature to require absolute safety in the construction of a scaffold of this kind or at least put the burden upon the employer to show that he was without fault in case of an injury from the fall of a scaffold, then the statute would serve no purpose whatever. This seemed to be the understanding of this court, though it was not decided, in the Sutermeister case, 266 Mo. l. c. 515. That case also refers to the New York decisions construing different features of this very statute. So we hold that in the absence of exculpatory showing on the part of the employer, the fall of a scaffold is prima-facie evidence of negligence on the part of the employer and a violation of the statute.

III. Appellant argues that the plaintiff is not entitled to recover in this case because the work of constructing the scaffold was done by Clark, and Clark, it is claimed, was the fellow-servant of the plaintiff. It is true, at the time the scaffold gave way, Clark and the plaintiff were fellow-servants. They were working together in the same kind of work and assisted each other in taking down the timbers comprising the form. But Clark was a carpenter; that was the general work which he did. Plaintiff was a common laborer. Clark had constructed the scaffold on which they were working before this particular work began, and plaintiff had nothing to do with it and knew nothing about it. There was an entire absence of relation of fellow-servant in the work of constructing

Fellow-Servants.

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the platform. The test of the relation as laid down, is, was the employee injured and the one inflicting the injury so associated in their work that each could observe and influence the other's conduct and report any delinquency to a correcting power, or head? [Koerner v. Car Co., 209 Mo. l. c. 154; Parker v. Hannibal & St. Joe Ry. Co., 109 Mo. 362; Stapleton v. Hummel Mfg. Co., 202 S. W. l. c. 370.] The plaintiff had no opportunity whatever to observe the work of Clark in constructing the platform and knew nothing about it. And it has been held that where workmen are working together as fellow-servants, and one of them is detached from that particular work to do some other work in relation to the general enterprise in hand, and an injury to his fellow-workman is caused by that particular detached work, with which the injured man had nothing to do, the doctrine of fellow-servant does not apply. [Raines v. Lumber Co., 149 Mo. App. l. c. 582; White v. Montgomery Ward & Co., 191 Mo. App. l. c. 272; see Most v. Goebel Constr. Co., 203 S. W. l. c. 477.] That is, when the master uses one servant to construct a place to work, and the place is made unsafe by that servant, and a fellow-servant who was not employed in that particular work is injured because of the defect, he is not the fellow-servant of the other as to that particular work so as to prevent recovery. The duty to make the place safe is non-delegable. The Raines case, supra, was a scaffold case where one of two employees was caused to construct a platform by which his fellow-employee was injured.

The appellant complains of an instruction given on behalf of the plaintiff, but the objection has been fully met in the principle discussed above.

The judgment is affirmed. *Railey* and *Mozley, CC.*, concur.

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the Court. All of the judges concur.

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DICKERSON C. McCLUNG v. PULITZER PUBLISHING COMPANY, Appellant.

In Banc, July 7, 1919.

1. **JURISDICTION: Venue: Corporation: Libel.** The Act of 1909 (Sec. 1755, R. S. 1909), declaring that "suits for libel against corporations shall be brought in the county in which the defendant is located, or in the county in which the plaintiff resides," in so far as it permits a plaintiff to bring a libel suit in the county in which he resides against a corporation whose place of business is in another county and whose newspaper in which the libel is published is printed in such other county, is invalid, in that it denies to said corporation the equal protection of the laws, since, were the libeler an individual, the plaintiff could not maintain his suit in his own county unless the libeler were found and served therein. A resident of Cole County cannot maintain a suit in the circuit court of said county against a corporation whose place of business is in the City of St. Louis and whose newspaper in which the libel is published is printed in said city, unless said corporation waives the lack of jurisdiction. [Per McBAINE, Special Judge; WALKER, FARIS and GRAVES, JJ., concurring; BOND, C. J., and BLAIR and WILLIAMS, JJ., dissenting; WOODSON, J., not sitting.]

2. **EQUAL PROTECTION: Corporations.** Corporations come within that provision of the Fourteenth Amendment declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws. Therefore the laws must extend to them the same protection they extend to individuals.

3. **———: Corporations and Individuals: Venue: Classification.** It is an advantage to a plaintiff to sue in the county in which he lives, and to a defendant to defend in the county of his residence; and a statute which permits a plaintiff in a libel suit to sue a non-resident corporation libeler in his own county, and denies to him the right to sue a non-resident individual libeler in the same county, makes an unreasonable classification against the corporation, and is invalid, since the classification is not based upon a difference bearing a just and proper relation to the attempted classification.

4. **LIBEL: Public Officials.** Citizens, through newspapers and otherwise, have the right to criticise the official acts of public officers. Rules relating to defamation of an individual in private life do

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not apply to the official conduct of a public official. A qualified privilege of free discussion and free criticism of the public acts of public officials is essential to free government.

5. ———: ———: **Matter For Court.** It is the duty and province of the court to determine whether the spoken or written published matter complained of relates to the public acts of the plaintiff and is of public interest, and to further determine whether the comments upon the facts and the criticism are qualifiedly privileged; and if the alleged libelous matter pertains solely to plaintiff's public conduct as a public official, and all the substantial facts are admitted to be true or established without substantial controversy, and the comments upon them are qualifiedly privileged, the court should not submit the case to the jury.

6. ———: **Inference.** A newspaper has a right to draw inferences from established facts as to the motives of a public official, whether such inferences are right or wrong, reasonable or unreasonable, provided they are made in good faith.

7. ———: **Qualified Privilege: Malice.** A defendant has a qualified privilege to criticise and censure the public acts of a public official, but the privilege does not exist where defendant is actuated by malice, by which is meant the presence of an improper motive.

8 ———: **Malice: Proof: Other Articles.** The burden of establishing malice or improper motive is upon the plaintiff in a libel suit; and is not established by the introduction of other articles which only show that plaintiff's conduct as a public official was being discussed and censured for the purpose of bringing about needed reforms, as defendant viewed the matter, in the management of a public institution.

Appeal from Callaway Circuit Court.—*Hon. David H. Harris,* Judge.

REVERSED.

Judson, Green & Henry for appellant.

(1) Neither the Circuit Court of Cole County nor the Circuit Court of Callaway County ever had any jurisdiction over this defendant, because Sec. 1755, R. S. 1909, authorizing plaintiffs to sue in the county of their residence in actions for libel against corporate publishers, although the defendant resides in and must be served in another county, is unconstitutional, being

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special or class legislation. It is exactly the same kind of statute as old Section 1754, which has been held unconstitutional by this court as applied to corporate publishers of libels. It is also unconstitutional because it denies to such corporations the equal protection of the law. Houston v. Pulitzer Pub. Co., 249 Mo. 337, 339; Julian v. Kansas City Star, 209 Mo. 35; Davidson v. Pulitzer Pub. Co., 178 S. W. 68. (a) This statute is unconstitutional because it unreasonably discriminates between corporate publishers of libels and all other corporations. Cases supra. (b) The statute is also unconstitutional as arbitrarily discriminating between corporations and individuals. See Cases supra; Santa Clara County v. Southern Pacific Ry., 118 U. S. 118; Gulf Ry. Co. v. Ellis, 165 U. S. 150; Barbiere v. Connolly, 113 U. S. 558; State v. Loomis, 115 Mo. 307; Wyatt v. Ashbrook, 154 Mo. 375; Russell v. Croy, 164 Mo. 97; State ex rel. v. Ry. Co., 195 Mo. 228. (c) There is no reasonable basis of classification warranting discrimination between individual and corporate publishers. State ex rel. Wyatt v. Ashbrook, 154 Mo. 375. (2) The defendant's demurrer to the evidence at the close of the case should have been sustained and the judgment should therefore be reversed. The articles complained of were both editorial discussions of a matter of the highest public interest and importance and every statement of fact in the first article was shown to be true by undisputed evidence. (a) The expression of an opinion in a general public discussion of the management of the penitentiary is not libelous or defamatory, but it is privileged in law, under the facts in evidence. Walsh v. Pulitzer Pub. Co., 250 Mo. 142; Cook v. Pulitzer Pub. Co., 241 Mo. 326; Tilles v. Pulitzer Pub. Co., 241 Mo. 609; Gandia v. Petttingill, 222 U. S. 452, 457; Branch v. Knapp & Co., 222 Mo. 532; Diener v. Star-Chronicle, 230 Mo. 613; Diener v. Star-Chronicle, 232 Mo. 416; Davis v. Shepstone, 11 App. Cas. 190; Gott v. Pulsifer, 122 Mass. 235; Duffy v. Evening Post, 96 N. Y. Supp. 629. (b) Comment and criticism includes the right to

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draw incorrect inferences and to state unjust opinions. Cook v. Pulitzer Pub. Co., 241 Mo. 326; Diener v. Star-Chronicle, 232 Mo. 417; Howarth v. Barlow, 113 App. Div. (N. Y.) 258; United States v Smith, 173 Fed. 240. (c) That it is for the court, and not for the jury, to construe the language complained of in an action for libel where the facts are not in dispute, and to determine whether it is libelous, has been held in many recent decisions of our Supreme Court. Cook v. Pulitzer Pub. Co., 241 Mo. 326; Walsh v. Pulitzer Pub. Co., 250 Mo. 142; Diener v. Star-Chronicle, 230 Mo. 613; Diener v. Star-Chronicle, 232 Mo. 416; Branch v. Knapp & Co., 222 Mo. 532. (d) That a newspaper has the right to make publication concerning and to comment upon matters of public interest and that the doctrine of privilege under the law by libel permits an honest censorship by the newspaper press over the conduct of officials in the management and conduct of public affairs is well established. Cook v. Publishing Company, 241 Mo. 354, 357; O'Rourke v. Lewiston Daily Sun Pub. Co., 89 Me. 310; Branch v. Knapp & Company, 222 Mo. 603; Coleman v. MacLennan, 78 Kas. 711; Gandia v. Pettingill, 222 U. S. 457; Cowan v. Fairbrother, 118 N. C. 418; Bearce v. Bass, 88 Me. 521; Schull v. Hopkins, 26 S. D. 21. (e) The record fails to establish that the comment contained in the publication was inspired by malice, or that the facts upon which it is based are false.

Ed E. Yates, A. T. Dumm, W. C. Irwin and *J. R. Baker* for respondent.

(1) "Courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed in their judgment, beyond reasonable doubt." State ex rel. v. Fort, 210 Mo. 526. (2) This venue section of our statute has never been directly before the Supreme

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Court. It has been referred to in cases where its validity was not involved, and it is fair to remember that all that has been said with reference to the statute is in its favor. Cook v. Globe Print. Co., 227 Mo. 522. (3) The Legislature in enacting this statute, Sec. 1755, R. S. 1909, doubtless had in mind the inequalities affecting plaintiff, as well as a corporate defendant, in the matter of libels published. If it was unfair to drag a corporate defendant to any county of plaintiff's choosing, by the same token it is equally unfair to require a citizen of the interior of the State to go to the habitat of a newspaper for his redress. And because the great newspapers, those of largest circulation and influence and therefore possessing the greatest power to injure, are published in the cities and by corporations, the Legislature very properly and without doing violence to law, placed them in a single classification. The doctrine announced by VALLIANT, J., in the minority opinion in the Julian Case, 209 Mo. 67, that "there is a difference between a corporation and an individual. The corporation is an artificial being possessing only the rights that the statute has granted and bearing the burdens that its charter imposes," etc., is the law of the land, as announced repeatedly by the United States Supreme Court, as shown by the cases cited. (4) That powers may be conferred upon or withheld from a corporation without doing violence to constitutional mandate is sound, wholesome doctrine. Beva College v. Ky., 211 U. S. 45; Hammond Pack. Co. v. Arkansas, 212 U. S. 322; Jenkins v. Cor. Mut., 171 Mo. 384. (5) The fact of the great power of the corporate libeler for harm, since such possess practically all of the great agencies for this work, suggests the right of classification; and since a corporation can only exist by grace, it has no legal right to complain that it cannot do the things or enjoy the rights that an individual may any more than an individual may complain under the Constitution that he cannot do the things or enjoy the privileges and immunities which may lawfully be done or enjoyed by a corporation. State ex rel. v. Fort, 210

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Mo. 512. (6) Suits against insurance companies under the general corporation laws of this State have been brought in the county where the cause of action accrued, practically ever since grass grew and water ran in Missouri; and this without reference to the local residence of the company. Individual insurers cannot be so sued unless residents of the county where the cause of action accrued. No good lawyer in wildest fancy has ever thought that this corporation law furnishes a constitutional objection or that such might be successfully urged by an insurance company to an action against it where it did not reside and had no agent. We have a law in Missouri which permits insurance companies even after they have withdrawn from the State and ceased to do business therein, to be sued by taking services on the insurance superintendent on outstanding policies. Of course, you could not do this in the case of an individual insurer (and there are many such in these days of individual underwriters), but who would stand up and affirm that the law referred to is unconstitutional as being discriminatory? It will be a wise man, indeed, who can maintain such a position. Such laws are valid for two reasons: (a) Corporations being children of the law are *ipso facto* subject to such burdens as the law-making power may from time to time impose. He who accepts favors must expect to bear burdens. (b) The possession of a peculiar power to do mischief possessed by a given agency, suggests of itself, the right to legislate with reference to that particular agency. To illustrate: We have special legislation against railways for setting out fire, yet railway engines are not the only offenders along this line. The traction engine owned by an individual may do it, and frequently does, yet we have special laws and special rules of evidence created by statute affecting the railway alone. Why? Because the railway has common carrier rights and in addition thereto, great power for harm in the matter suggested; so when the corporate newspaper by legislative grant becomes a common carrier of news for hire,

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it is proper classification and violative of no constitutional provision to say to it: You may not libel the citizen and drag him to your home, the seat of your greatest influence and power for redress, but if he so chooses he may make his vindication in the place where he resides and where the humiliation and injury suffered is likely to be greatest. Hatcher v. So. Ry. Co., 68 So. 55; Allen v. Smith, 95 N. E. 831. (6) "Legislation which merely affects the remedy for or against a corporation is not unconstitutional if it does not take away all remedy, or so reduce it as to have practically that effect." 1 Clark & Marshall on Private Corporations, pp. 679, 695, and p. 678, sec. 268. If a statute assailed under the equal protection provision of the Federal and State constitutions affects merely the venue of the cause, the place where it may be brought or ultimately tried, and the laws administered in each of the courts are the same, no court in Christendom has up to this hour held that such a statute is bad. The United States Supreme Court has fully settled this proposition, and it cannot be ruled in appellant's favor in this case without striking down the unanimous decision of that court in Cincinnati Street Railway Co. v. Snell, 193 U. S. 29, 48 L. Ed. 604. See, also, 12 Corpus Juris, p. 1185; Cook v. Ray Mfg. Co., 159 Cal. 694, 115 Pac. 318; Central Ga. Tar Co. v. Stubbs, 141 Ga. 172. See, also, Houston's Case, 249 Mo. l. c. 338. (7) Concluding this branch of the case, we make the following observations, some of which we get directly from the cases cited, some of which are the result of our own reflections: (a) No case can be found where a statute similar to this solely affecting the venue of actions has been held bad under the Fourteenth Amendment or under our State Constitution. (b) To require a citizen to go to the habitat of the powerful influential corporation for his redress when libeled is to create for him a worse condition than that which excited sympathy when it was held that corporations might be sued for libel in any county where same was published. If that right which has existed under the common law

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ever since there were libelers gave the plaintiff an unfair advantage in the choice of venue, does not the same objection obtain when the plaintiff can only have his action by bearding the lion in his den? (c) To hold that this statute is unconstitutional is virtually to strike down the provisions of Article 2, Section 10, Missouri Constitution, for that, *inter alia,* it guarantees an open court and a certain remedy to every injury to person, property or character. Mining & Mill. Co. v. Fire Ins. Co., 267 Mo. 583. Certainly, it has never been claimed that because an individual could not be sued where and under the same circumstances these enumerated corporations may be sued, the venue and process statutes affecting them were repugnant to constitutional provisions. (d) If reason for classification between corporations and individuals were at all needed, we think sufficient reason for the privilege of so doing arises from these considerations: Corporations exist by grace. They are the creatures of legislative generosity. They may do many things that the individual with his physical, financial and legal limitations may not do. Individual publishers of newspapers as well as other individual libelers are liable to a plaintiff to the full extent of their property holdings. Corporation libelers have no individual liability or responsibility of any kind. (e) Corporation libelers naturally fall into a class, since with perhaps two exceptions in the entire United States they own the great newspapers with their attendant power and influence where they are printed, and with an unlimited power for injury to those living remote from their seats. (f) The right to sue such newspapers at the place of residence of the one to whom wrong is done should and does exist, because there an unchallenged charge most nearly affects him. (g) Venue laws in both civil and criminal actions are not uniform, were not intended to be uniform and cannot in the very nature of things be made uniform. (8) It is claimed that defendant's demurrers at the close of the whole case should have been sustained, for that the article sued on contained mere state-

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ments of opinion, fair comment and criticism. Counsel seem to try to make a distinction in this regard between the two articles. There is none. The facts upon which these alleged opinions and comment and criticism are based are not given. One may not withhold facts and yet so denounce another by language descriptive of his conduct in such a way as to hold him up to public scorn, hatred, contempt or in a way to deprive him of the benefits of public or private confidence, or social intercourse, without *ipso facto* making himself a libeler under our law. Price v. Whiteley, 50 Mo. 441. In that case the language sued on was mere denunciation, to-wit: "I found an imp of the devil in the shape of Jim Price sitting upon the mayor's seat." If to charge one with being a coward or an imp of the devil is libelous which portray moral qualities, how much more so to say of one as warden of a penal institution that he was guilty of mediaeval barbarities toward those under his charge! To those familiar with the world's history it means anything conceivable in the way of torture practiced by the barbarian and the savage. In the first article the charges are rung again and again upon the barbarous character of the punishment inflicted by Warden McClung. The case last cited has been followed again and again. The conception of counsel that one cannot be libeled by an expression of opinion as to his moral qualities or conduct is not ever "archaic," for it never has been the law in any jurisdiction and could not by any possibility be the law under such a statute as ours. Ferguson v. Chronicle, 72 Mo. App. 465; Mauget v. O'Neill, 51 Mo. App. 35; Farley v. Chronicle, 113 Mo. App. 216; 25 Cyc. 253, note 32. To say of one that he is a "frozen snake" is libelous *per se*. Hoare v. Silverlock, 12 Q. B. 624. Or a skunk: Pledger v. State, 77 Georgia, 242. To say of a writer that he is a "presumptuous literary freak" is libelous *per se*. Triggs v. Sun, 179 N. Y. 144. "Whenever the libelous intent or seeming libelous intent appears though dimly and vaguely, as 'through a glass darkly,' the question be-

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comes one for the jury to say whether the meaning was harmless or defamatory." McGinnis v. Geo. Knapp & Co., 109 Mo. 150; Link v. Hamlin, 193 S. W. 593. Comment must be fair and without malice. This is for the jury. Cook v. Pub. Co., 241 Mo. 357; Cornelius v. Cornelius, 233 Mo. 31. To publish a libelous communication on the authority of another is to adopt it as one's own, even where the authority is given. 25 Cyc. 363. (9) That the publications sued on were inspired by malice fully appears from the fact that defendant knew them to be false or had the opportunity to learn their falsity and failed to ascertain the truth. Recklessness is equivalent to malice. Minter v. Bradstreet, 174 Mo. 444; Brown v. Kripp, 213 Mo. 695. Nor does either article with any degree of fairness characterize the punishments that obtained in the Missouri prison. When the publisher goes beyond the limits of fair criticism or comment the region of libel has been reached, and "whether those limits have been transcended is for the jury." 18 Am. & Eng. Enc. Law (2 Ed.), pp. 1021-2; Trigg v. Ptg. Co., 189 N. Y. 154; Fay v. Harrington, 176 Mass. 270. (10) Appellant reiterates the statemens in its brief that Willis was kept in the rings fourteen hours each day. This is not only untrue, but at the time of the publication of this statement defendant knew or could easily have known that it was untrue. When the truth is pleaded the evidence to sustain it must be as broad as the charge and go to the very charge. Nelson v. Musgrave, 10 Mo. 648; Whittlesey's Practice, p. 228; Odgers on L. & S. sec. 170; Townshend on L. & S. sec. 212; Starkie on L. & S. p. 342; Newell on L. & S. p. 662; Pratt v. Pioneer Press, 30 Minn. 44; Self v. Gardner, 15 Mo. 480; Faler v. Delavan, 20 Wend. 57; Thompson v. Pioneer Press, 37 Minn. 285; Mull v. McKnight, 67 Ind. 535.

McBAINE, Special Judge.—This is an action for libel, in which the plaintiff recovered judgment and the defendant appealed to this court.

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The suit was instituted in the Circuit Court of Cole County, where the plaintiff resided, and summons was served upon the defendant in the City of St. Louis.

At the return term the defendant appealed specially and filed a plea to the jurisdiction of the Circuit Court of Cole County. The plea to the jurisdiction was, in substance, that defendant was a Missouri corporation engaged in publishing a newspaper, called the St. Louis Post-Dispatch, in the City of St. Louis, where its principal office is located and that at all times mentioned in plaintiff's petition it had no office or agent in Cole County. It was alleged that the service of summons was made upon defendant by the Clerk of the Circuit Court of Cole County sending the petition and summons to the Sheriff of the City of St. Louis and that no other service was had; and, that defendant had made no voluntary appearance in the Circuit Court of Cole County. The plea alleged that the paper containing the alleged libel was first published in the City of St. Louis.

The defendant then alleged, in its plea to the jurisdiction, that if the statutes of Missouri are construed as warranting service in this manner and compelling defendant to appear in the Circuit Court of Cole County when individual defendants in libel suits can only be sued in counties of their residence, then the statutes violate the Constitutions of Missouri and of the United States in that they deny to defendant the equal protection of the laws.

The plea to the jurisdiction was overruled. The defendant then demurred to the petition on the ground that the petition on its face showed that the court had no jurisdiction. The demurrer was overruled. A change of venue was then taken by defendant to the Circuit Court of Callaway County, where the case was tried by the court and a jury. A verdict was rendered in favor of plaintiff in the sum of $20,000, but before defendant's motion for a new trial was passed upon plaintiff remitted

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$13,000 and judgment was thereupon entered against defendant in the sum of $7000.

As was stated, this is an action for libel. The petition is in two counts. In the first count the plaintiff alleged that he was the Warden of the State Penitentiary and "that by the provisions of the laws of this State, the plaintiff as such warden at all times hereinafter mentioned had and exercised the general control and supervision over the government, discipline and police regulations of and appertaining to the said penitentiary." He alleged that the defendant newspaper published an article charging him with barbarous and archaic treatment of prisoners in the penitentiary.

In the second count of the petition the same allegation is made as to the plaintiff's conduct. It was then alleged that the defendant published another article defamatory of the plaintiff of the same general nature. It was alleged that the second article was a purported letter from a convict in the penitentiary. The letter is set forth in full in the petition. The convict, in the letter, complained of the treatment of prisoners in the penitentiary, and stated, in substance, that many prisoners were severely whipped with a leather whip on their bare backs. The letter also stated that prisoners were punished by compelling them to stand on their feet, flat on the stone floor, with their arms extended above their heads and their wrists chained by hand-cuffs to a ring fastened in the wall of a prison cell. It was stated that they stand in that position from 6:30 a. m. to three p. m., and again from three p. m. to nine p. m.; that they receive one slice of bread at six o'clock in the morning, and another one at three o'clock in the afternoon; that they were given water, but no other food, and that they were compelled to sleep at night, without bedding or cover, in the cell upon a board upon the cell floor. This treatment of prisoners was criticized as horrible, ignorant, brutal and unjust, and it was said that many prisoners because of such treatment, left the penitentiary "with murder in their hearts, determined

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to make society pay them what it has allowed them, through its representatives, unjustly to suffer." The convict called upon the defendant paper to discuss the matter in the interest of society and stated: "I promise you you will uncover brutality, ignorance and vice such as would make the story of the Spanish Inquisition read like a nursery rhyme."

The letter also stated that one Steve Willis was put in the rings and kept there a great length of time until he made a confession to the officials where he had gotten some whisky found on his person. The convict stated that a confession "rung from a man under torture" has no value in a court of law and asked why such a confession should be given value in the penitentiary. It was alleged that this letter from the convict was published with comment by the defendant. The comment was that the letter was published as a statement of an intelligent man for what it was worth, and that the defendant stated "we ask Warden McClung and the members of the Board of Prison Inspectors if these charges are true. We ask Governor Major if they are true. We ask a through investigation to determine their truth or falsity."

The answer of defendant alleged that the penitentiary at Jefferson City was a public institution of the State, and that plaintiff was its warden; that defendant published a newspaper in the City of St. Louis, known as the St. Louis Post-Dispatch and that it wrote the articles mentioned in the petition of the plaintiff as Warden of the Penitentiary. The defendant alleged that the penitentiary had in it 2500 prisoners, and that the management, government and discipline thereof were matters of the highest public interest and concern to the people of Missouri, and that defendant and every citizen of the State had the right to discuss, criticize and comment upon the conduct and management of the penitentiary and its various officials. It was alleged that defendant had the right to criticize the plaintiff

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warden if in its opinion he deserved criticism or censure.

The answer alleged that before the publication of the alleged libels complained of a prisoner named Steve Willis had been punished for refusing to tell the prison officials where he obtained a bottle of whisky which had been found in his possession; that Willis was placed in a cell in solitary confinement, hand-cuffed, and his hands chained to an iron ring, fastened to the wall, the ring being placed so that his hands and arms were raised several inches above his head; that he was compelled to stand in this posture for twenty consecutive days, for 14½ hours a day; that he was not allowed to leave his cell at any time and only had one slice of bread at six o'clock in the morning and another at three o'clock in the afternoon, and had nothing else to eat during the twenty days, and that at night he was compelled to sleep upon a bare board laid upon the concrete floor of the cell without bedding or covering of any kind. It was alleged that at the end of twenty days Willis was unable to bear up longer, and that he made a false confession to the prison officials that he obtained his whisky from another prisoner named Wright; and that thereupon the prison officials released Willis and seized Wright and hand-cuffed and chained him, and that in order to obtain a release Wright confessed, and thereupon Wright was released. The answer also alleged that prior to the publication of the articles complained of, plaintiff and his deputies had caused various inmates of the penitentiary to be stripped of their clothing and their hands tied, and whipped upon there bare backs with a heavy leather strap. It was alleged that these matters were commonly known and discussed in the public press at the time both articles in question were published.

It is alleged that these articles were published for the purpose of bringing about reform in the management and discipline of the penitentiary, and that the statements of facts in the articles were substantially

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true and all matters of inference, opinion or comment in the articles were based upon the facts and were made in good faith for the purpose of bringing about reform, and that they were not libelous of plaintiff.

The reply denied the new matter in the answer.

At the trial, the evidence showed that Steve Willis was put in the rings for 20 or 21 days; that he was given a slice of bread at six o'clock in the morning and was put in the rings at 6:30 in the morning, and taken down at three in the afternoon and given another slice of bread, and was put back in the rings and kept there until nine o'clock at night, and then compelled to sleep on a board laid upon the concrete floor of the cell, without covering or bedding.

On cross-examination plaintiff stated that such was the discipline inflicted upon Steve Willis. He stated that he thought Willis was let down at three o'clock and not put back again. But he also said: "I do not know at what time he was put up and let down." He stated that he kept men in the rings 30 or 40 days. He stated that he regarded this form of punishment as proper. He said that Willis was punished for having a bottle of whisky on his person, and "that he was not strung up" to compel him to state where he had gotten his whisky. He said, though, that Willis was let down shortly after he made his confession that Wright had given him the whisky, and that Willis was let down because the officials though he had been punished enough.

The testimony of the night guard and the day guard in the punishment hall at the time Willis was strung up in the rings was that Willis was put in the rings at 6:30 in the morning, taken down at three, put back at 3:30 and kept there until nine o'clock. Willis himself also testified to the same effect.

The evidence showed that four or five prisoners were whipped with a leather whip on their bare backs during the time the plaintiff was Warden of the penitentiary. This evidence was given by the plaintiff, on

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cross-examination, and by his witness, the Deputy Warden, whom the plaintiff said did the whipping.

It was also given by two former members of the Board of Prison Inspectors who had witnessed the whipping or two negroes who were whipped for fighting. They stated that these prisoners were whipped with a strap that was two to four feet in length, attached to a wooden handle, and that the whipping was done by the Deputy Warden, and that the prisoners cried out that they would quit fighting if the Deputy Warden would quit whipping them. It was stated that when they were whipped they had their hands fastened to a ring in the wall, and that their clothing was stripped off their backs and that they were hit five or six licks on their bare backs.

Venue: Unconstitutional Statute.

I. First, is the Missouri statute, Section 1755, Revised Statutes 1909, authorizing the institution of this suit in the Circuit Court of Cole county constitutional? That section reads as follows:

"Sec. 1755. Suits for libel against corporations shall be brought in the county in which the defendant is located, or in the county in which the plaintiff resides; and when suit is instituted in the county in which the plaintiffs resides, summons may be issued to and served by the sheriff of the county in which the defendant is located." [Laws 1909, p. 347.]

It applies only to suits for libel against corporations.

Section 1751, Revised Statutes 1909, the statute covering the question of the venue in libel suits, and many other suits, against individuals, provides that suit shall be brought in the county where the defendant resides, or where the plaintiff resides and the defendant may be found.

Section 1754, Revised Statutes 1909, relating to suits against corporations, provides that the suit shall be brought in any county where the cause of action ac-

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crues, or in any county where the corporation usually keeps an office or agent for the transaction of their usual and customary business.

It is earnestly insisted by appellant that Section 1755, Revised Statutes 1909, denies to corporations charged with libel the equal protection of the law, and that it has been so decided by the prior judgments of this court. For respondent it is also strenuously argued that this statute does not deny to defendant the equal protection of the laws of Missouri, and that it has not been so decided by the prior judgments of this court. The question has been discussed learnedly by counsel for both parties, both in the printed briefs and in the oral arguments. An approach to the solution of the question will be made by making a short reference to the prior decisions of this court on this question.

Julian v. Kansas City Star Co., 209 Mo. 35, decided by the court, In Banc, is the starting point. There an action by the plaintiff was brought against the defendant in the Circuit Court of Platte County. The plaintiff lived in Jackson County, and the defendant corporation first published the alleged libel in Jackson County, where it had its office and principal place of business. A majority of this court held that the Circuit Court of Platte County had jurisdiction. GRAVES and LAMM, JJ., dissented on the ground that the court had no jurisdiction, and that if the Legislature intended to confer jurisdiction upon the Circuit Court of Platte County in a case of this nature the act of the Legislature was void and in violation of the State and Federal constitutions, in that defendant was denied the equal protection of the laws of Missouri. The basis of the dissenting opinion was that the construction given the Missouri statutes by the majority of the court made a difference between corporate libelers and individual libelers. It was pointed out that a corporation is a citizen within the meaning of the 14th Amendment to the Federal Constitution which provides that no state "shall deny to any person within its jurisdiction the

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equal protection of the laws." In Covington and Lexington Turnpike Co. v. Sandford, 164 U. S. l. c. 592, it was said that no distinction existed between corporate libelers and individual libelers, and also that no distinction existed between two individual plaintiffs, for example, one of whom had been libeled by a corporation publishing a newspaper, and the other by an individual publishing a newspaper. It was also said that such legislation was in violation of Section 10, Article 2, of the Constitution of Missouri, guaranteeing that "justice should be administered without sale, denial or delay." It was said that disadvantages were placed upon corporations charged with libel, and that there was no difference in fact between an individual charged with libel and a corporation. The majority opinion, however, was followed in several succeeding cases. [See Tilles v. Pulitzer Publishing Co., 241 Mo. 609.]

But in Houston v. Pulitzer Publishing Co., 249 Mo. 332, the rule laid down in the dissenting opinion in Julian v. Kansas City Star Company, supra, was recognized as the correct rule, and applied in that case by Court In Banc. The court held that the circuit court of Macon County had no jurisdiction of a libel suit instituted by a citizen of Cass County against the defendant corporation, whose domicile was in the City of St. Louis. Julian v. Kansas City Star Company was overruled in part. It was said that if old Section 997, Revised Statutes 1899, was to be given the construction placed upon it "by the majority in the Julian case," then the statute violates both the State and Federal Constitution. GRAVES, J., wrote the opinion for the majority of the court. WOODSON and BOND, JJ., dissented.

Jones v. Pulitzer Publishing Co., 256 Mo. 57, Division 2, was decided upon the express authority of Houston v. Pulitzer Publishing Company, 249 Mo. 332, and held that the trial court got no jurisdiction of the libel suit in question, as it was brought "in another county than that in which the plaintiff resided, or the

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defendant, if a newspaper, first published the libel or had an office or agent."

Again, in Davidson v. Pulitzer Publishing Co., 178 S. W. 68, Division One of this court held, upon the authority of the Houston case and the Jones case, supra, that the Circuit Court of Jackson County did not get jurisdiction of a suit brought by plaintiff, a resident of Jackson County, against this defendant, a Missouri corporation, with its office and place of business in the City of St. Louis. The opinion was written by WOODSON, J. All concurred, BOND, J., "for the reason that Court in Banc has decided the question."

So then we conclude that since the decision in Houston v. Pulitzer Publishing Co., 249 Mo. 332, decided April 8, 1913, this court has been of the opinion that the Legislature has not the authority, under the State and Federal Constitutions, to provide that the venue in libel suits shall be that the individual charged with libel may only be sued in the county where he resides, or where the plaintiff resides if the individual is there found, but, that in the case of a corporation charged with libel the corporate defendant may be sued in a county in this State, where neither the action accrued nor the corporation has its domicile or agent for the transaction of business, and that the Legislature may not provide that a citizen of the State, who is plaintiff in a libel suit, can sue a corporate defendant charged with libel in the county where the citizen resides while a citizen, as plaintiff, who charges an individual defendant with committing a libel, cannot sue the defendant in the county in which the plaintiff resides, unless the individual defendant shall be found in the county where the plaintiff resides.

We believe that the rule laid down in Houston v. Pulitzer Publishing Co., 249 Mo. 332, is not only the established law of this State, but that it is also sound in legal principle. For a lucid and forceful discussion of the principle we refer to the dissenting opinion in Julian v. Kansas City Star Company, 209 Mo. l. c. 97. As

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was stated by Judge GRAVES in that case the Supreme Court of the United States has definitely settled that corporations are within the protection of Section 1 of the 14th Amendment to the Constitution of the United States, providing that no State shall "deny to any person within its jurisdiction the equal protection of the laws." [Santa Clara County v. Southern Pac. Railway Co., 118 U. S. 394; Gulf etc. Railway Co. v. Ellis, 165 U. S 150.] In the latter case Mr. Justice BREWER said: "The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artfiical entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

The Supreme Court of the United States therefore laid down the rule that the property, and other rights, of the citizens were protected by this amendment when several citizens have associated themselves together under the sanction and authority of the State, for the purpose of transacting business and have brought into existence a legal entity called a corporation. These entities have received legal sanction from a very early period in the common law, and have been and are now receiving legal sanction in all of the States of the Union.

No extended discussion of the authorities need be made holding invalid many state statutes which deny to corporations and individuals the equal protection of the laws. Such a discussion would serve no useful purpose at this late date. Nowhere is the matter more clearly discussed than in Gulf Railroad Co. v. Ellis, 165 U. S. 150, in the opinion by Mr. Justice BREWER. In that case that learned jurist specifically approved a decision of this court, State v. Loomis, 115 Mo. 307, where the question is also very ably considered. In the first case Mr. Justice BREWER said, at page 155:

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"As was well said by BLACK, J., in State v. Loomis, 115 Mo. 307, 314, 21 L. R. A. 789, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employees any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void: 'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus, the Legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon statute or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and, therefore not the laws of the land.'"

Concluding the opinion, at page 165, Mr. Justice BREWER said: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles the statute in controversy cannot be sustained. The judgment of the Supreme Court of Texas is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion." See also Cotting v. K. C. Stock Yards Co., 183 U. S. 79.

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And as stated by a learned writer discussing the "equality" clause of the Federal Constitution (Guthrie, The Fourteenth Amendment to the Constitution of the United States, p. 110): "The provision, if properly construed, assures to every person within the jurisdiction of any State, whether he be rich or poor, humble or haughty, citizen or alien, the protection of equal laws, applicable to all alike and impartially administered without favor or discrimination. Thus what was the spirit became the written rule of American state governments; and equality, infused through the mass of our rights and duties, now pervades, unites, invigorates, the whole system."

Learned counsel for respondent place great reliance upon Cincinnati Street Railway Co. v. Snell, 193 U. S. 30. They argued that under the rule laid down by that case, Section 1755, Revised Statutes 1909, is constitutional. In that case the Supreme Court of the United States held a statute of Ohio not in violation of the equality clause of the Fourteenth Amendment. The Ohio statute read as follows: "When a corporation having more than fifty stockholders is a party in action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties."

A personal injury suit was brought against the defendant corporation in an Ohio court and the plaintiff under the statute took a change of venue. The trial resulted in a verdict in favor of plaintiff. It was affirmed by the Supreme Court of Ohio. A writ of error was sued out to the Supreme Court of Ohio by the defendant railroad company. The Supreme Court of the United States held the statute valid and not in violation of the equality clause of the Fourteenth Amendment. The

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opinion holds that classification made as to corporations having fifty stockholders or more was not unreasonable, and that it was in the power of the Ohio Legislature to provide that a plaintiff in a suit against a corporation having fifty stockholders or more, which was pending *in the county where the corporation keeps its principal office or transacts its principal business*, may change the venue to some other county, if he shall make an affidavit that he cannot have a fair trial in the county where the suit is instituted, and the application shall be supported by the several affidavits of five creditable persons residing in that county. A classification is made then for all corporations having fifty or more stockholders for the purpose of determining the venue of actions against the corporations where the action is pending in a county where the corporation has its principal office or transacts its principal business.

We understand the Supreme Court of the United States to hold that this is a reasonable classification, and that the defendant corporation was not denied the equal protection of the laws of Ohio, though a plaintiff against an individual defendant could not by the same means take a change of venue to another county. The court pointed out that in the forum to which the cause was removed the cause was conducted in the same way under the same rules of pleading and practice and of substantive law that would have been applied in the county where the suit was instituted. We do not understand the opinion to hold that the Legislature of a state may enact a general venue statute providing that suits of the same nature shall be brought in the county of the residence of the defendant where the defendant is an individual, and not at the residence of the plaintiff, but that suits may be brought by the plaintiff in the county of his residence if the defendant is a corporation. The Ohio statute involved no such question. Under the Ohio statute the plaintiff might change the venue to another county from the county where the corporation had its principal office or principal place of business when the

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suit was pending in such county when he made affidavit that he could not get a fair trial and supported it by the several affidavits of five creditable persons residing in such county.

Learned counsel for respondent argue that the rule was laid down in Cincinnati Street Railway Co. v. Snell, 193 U. S. 30, that the equality clause of the Federal Constitution has no application to venue statutes. We do not agree with this view. Our substantive and remedial law are inseparable. In fact, we know that the development of the common law was through the remedial side of the law. Lawyers and litigants readily recognize that there is an advantage, if one is plaintiff, to sue in the county where one lives, if the defendant is a resident of another county. To be able to do so is to save time, expense and trouble, and to have the advantage of having jury cases passed upon by one's acquaintances. The subject of local influence is one well known to the law, and there can be no denial that it is a decided practical advantage for a plaintiff to sue a non-resident defendant in the county where the plaintiff resides. The administration of the law is a practical matter, and never without the human element. People are plaintiffs and people are defendants, and money, property and other things of value are the subjects of litigation.

It is also strenuously argued by counsel for respondent that if Section 1755, Revised Statutes 1909, is not valid the personal plaintiff in a libel suit must go to the domicile of the defendant to bring suit if he is libeled, and that in the case of corporations publishing papers of large circulation in the cities of the State this would be very unfair to the personal plaintiff who does not live in one of these large cities where the corporation has its domicile. This we think is an argument more properly addressed to the Legislature of the State than to the courts. It may be conceded that the venue statutes of the State need general revision, but it is not the function of the courts to make that revision. The Legislature

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has provided for venue of cases and the courts have not the power to change those statutes if they do not conflict with the State or Federal constitutions. The Legislature of the State has the power to make reasonable classification of people and of corporations in determining the venue of actions, but it has not the power to make an arbitrary or unreasonable classification. The statute in question is not a venue statute governing the venue of all libel suits. It is a statute governing the venue of libel suits against corporations. It is not even a statute governing venue of libel suits against newspaper corporations. No good reason has been given why corporate libelers are any different from individual libelers. No reason has been given why a corporate defendant publishing a daily newspaper in the City of St. Louis with a large circulation should be subject to suit in Cole County, while an individual who publishes a paper with a large circulation in Kansas City is not subject to suit in Cole County. We believe none can be given. We believe the classification of individuals and corporations unreasonable, and not based upon "any difference which bears a just and proper relation to the attempted classification." No doubt more could be said for the reasonableness of a statute which provided that in all libel suits against individuals and corporations alike the action might be brought in the county where the plaintiff resides if there is publication of the libel in that county. But such is not the statute under consideration.

So then following the guide laid down by this court in State ex rel. v. Fort, 210 Mo. l. c. 526, as to the determination of the constitutionality of legislative enactments, viz., "to ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void unless the nullity and invalidity of the act are placed in their (the court's) judgment beyond reasonable doubt," we have concluded that the statute in question violates constitutional mandate.

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Research by learned counsel for respondent and appellant brought forth no judgment of the Federal courts nor the courts of our sister States where a statute like the one in question was passed upon. The Supreme Court of California, though, has decided a case which we believe involves a venue statute substantially like the one in question. [See Grocers' Fruit Growing Union v. Kern County Land Co., 150 Cal. 466, 89 Pac. 120.] The action was for specific performance of a contract for the sale of land. The suit was commenced in the City and County of San Francisco. The defendant denied jurisdiction and asked that the case be removed to Kern County. The motion to remove was denied. The land in question was admittedly in Kern County. It was contended that under the California Constitution, Article 6, Section 5, this suit should have been brought in Kern County. The respondent, in that case, insisted that under the Code of California the action was properly brought in the County of San Francisco, the county of the defendant's residence, and properly retained there for trial. Also under Section 16 of Article 12 of the Constitution, it was contended that the corporation had the right to insist upon the case being tried in the county where the corporation was domiciled. In suits against individuals where land was involved the individual defendant had the right to have the suit tried in the county where the land was located. It was argued by the appellant that "if the proposition be advanced that Section 16 of Article 12 of the Constitution warrants the commencement of the action in the City and County of San Francisco and forbids to defendant its right to change the place of trial, then this clause of our Constitution is violative of the Fourteenth Amendment to the Constitution of the United States, in denying to corporations the right to have an action affecting an interest in real estate tried in the county where the land is situated, while this right is accorded to natural persons." In holding that the corporation might remove the suit to the county where the land lay, and that a

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construction of the Civil Code, or a provision of the California Constitution which denied corporations that right, would violate the Federal Constitution, the California Court said, at page 474: "Where the subject-matter of the action, to-wit, land, is made the test for fixing the place of trial of the action, no reason or distinction appears, or can be made appear, why the right should be given to a natural person to have such an action tried in the county where the land is situated, and the same right should be denied to an artificial person, a corporation. . . . No conceivable ground can be suggested why a natural person should have the right of trial of an action involving an interest in land in the county where the land is situated, and the same right should be denied to a corporation. If the situation were reversed the absurdity would be patent. A law which granted to a corporation the right and denied it to a natural person would be held arbitrarily discriminative without a moment's hesitation." The California court then concluded that the Civil Code and Section 16 of Article 12 of the Constitution could be and should be so construed as to make no difference in suits against individuals and corporations where the title to land is involved.

It was suggested by the California court as is shown in the above quotation, that an act of a Legislature which granted the right to a corporation to have the suit brought where the land was located and denied the right to a natural person would be held arbitrarily discriminative without hesitation. Apply that thought to the statute under consideration, which deals differently with corporate libelers and individual libelers. Would not the courts without a moment's hesitation declare unconstitutional a statute which provided that in suits against a natural person charged with libel the action might be begun in the county where the plaintiff resided, though the natural person was a non-resident of the county, but as to corporations the suit could not be brought in the county where the plaintiff resided, but

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must be brought in the county where the corporate defendant resided? We say a statute would be clearly unconstitutional which discriminated against natural persons and provided that though they were non-residents they might be sued in the county where the plaintiff resided, and required suits against corporations to be brought where the corporate defendant had its residence.

Learned counsel for appellant cite many cases in their brief to support their argument. Time and space prevent a discussion of these authorities. They have been carefully read and considered, but have all been found distinguishable and indecisive of the matter in question. We therefore, conclude: first, that though Section 1755, Revised Statutes 1909, has not actually been passed upon by this court, yet, this court in passing upon Section 997, Revised Statutes 1899, laid down a general principle of constitutional law that condemns the thing attempted by the Legislature in enacting Section 1755; and, second, that under the decisions of this court the Supreme Court of the United States and the courts of last resort of other states, Section 1755, Revised Statutes 1909, is void, in that it contains an inequality and makes a classification bearing no reasonable, just or proper relation to the class made.

II. We are also of the opinion upon the merits of the case that the judgment should have been for the defendant below. In our opinion the case should not have been sent to the jury. There can be no question at this time that the citizens of this State, through newspapers and otherwise, have the right to criticise the official acts of the public officers of this State. The rules relating to defamation where the party alleged to have been defamed is an individual in private life do not apply where the individual alleged to have been libeled is a public official and where the alleged libelous matter is as to the conduct of the individual as a public official, viz., Warden of the State

Merits of Action.

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Penitentiary. Perhaps at one time in the English common law one did not have the privilege of freely discussing and criticising the public acts of public officials. Lord HOLT said in 1704: "If persons should not be called to account for possessing the people with an ill opinion of the government, no government can subsist, for it is very necessary for all governments that the people should have a good opinion of it." [The Queen v. Tutchin, 14 How. St. Tr. 1095.] Such is no longer the English rule. [Odgers on Libel and Slander (5 Ed.), 193.] And that this early English case does not represent the rule in this State and in this country generally is a matter of common knowledge to the bench and bar of this country. Though *imprimatur* does not exist in our law, yet we are definitely committed to the proposition in this country that freedom of discussion and freedom of criticism of the public acts of public officials is essential to free government. As was well said by LAMM, J., in Diener v. Star-Chronicle Co., 230 Mo. 613, l. c. 630: "The right of freedom of speech, of fair comment with an honest purpose in matters of public concern, is on the foot of *pro bono publico* and founded on public policy. Free discussion is the foundation on which free government itself is builded. That lost, all is lost—the two exist or perish together. They mean the same thing. It is only in despotisms that one must speak *sub rosa,* or in whispers with bated breath, around the corner, or in the dark, on a subject touching the common welfare. It is the brightest jewel in the crown of the law to seek and maintain the golden mean between defamation on one hand and a healthy and robust right of free public discussion on the other."

As we have stated the authorities in this country are numerous to the effect that there exists a qualified privilege of free comment upon public acts of public officials. [See Black v. State Co., 93 S. C. 467, 77 S. E. 51; Briggs v. Garrett, 111 Pa. St. 404; Jackson v. Pittsburgh Times, 152 Pa. St. 406; Mulderig v. Wilkes-Barre Times, 215 Pa. St. 470; Burt v. Newspaper Co.,

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154 Mass. 238; Gandia v. Pettingill, 222 U. S. 452; Branch v. Knapp & Co., 222 Mo. 580; Diener v. Star-Chronicle Co., 230 Mo. 613; Diener v. Star-Chronicle Co., 232 Mo. 416; Cook v. Pulitzer Pub. Co., 241 Mo. 326; Walsh v. Pulitzer Co., 250 Mo. 142; McClung v. Star-Chronicle Publishing Co., 274 Mo. 194. See, also, Freedom of Public Discussion, 23 Harvard Law Review, p. 413, and exhaustive study by Judge Van Vechten Veeder, a leading American authority on defamation.] No useful purpose would be served by a detailed consideration of these authorities and many others that might have been added.

It is the duty and province of the court to determine whether the matter spoken or written about is a matter of public interest. There can be no doubt but that the matter written about in this case was of great public interest. [Diener v. Chronicle Publishing Co., 230 Mo. 613.] The articles in question did not in anywise relate to the private life of the plaintiff. The only matter under discussion was his conduct as Warden of the State Penitentiary. The evidence showed that the matters of fact stated in the various articles were substantially true.

The matters of fact stated in the convict's letter which is the subject of the action in the second count were shown by the defendant to be substantially true. The evidence as to whether the matters of fact were true or false was adduced, in the main, by the plaintiff and his witnesses. It was supplemented by the evidence of the defendant. There was no attempt, however, upon the part of plaintiff to controvert the evidence of the defendant.

It is also the duty and function of the court to determine whether the comments upon the facts, the criticism, the discussion of the fact, are qualifiedly privileged. This, too, is a question for the courts and not the jury. [See the authorities above.] In our opinion the comments were qualifiedly privileged.

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As was well said by KENNISH, P. J., in Cook v. Pulitzer Publishing Co., 241 Mo. 326, where the subject-matter of the alleged defamation is a matter of public interest the plaintiff can only recover where the statements of fact are untrue, or where there is proof of express malice upon the part of the defendant. He stated the rules as follows, l. c. 363: "We think the rule to be deduced from the authorities and in accord with the better reason, is that when a defense of privileged comment on a matter of public interest is presented by the issues, the plaintiff may overcome the privilege pleaded either by proof that the publication was inspired by actual malice, or that the facts published and commented upon were false. If he fail to prove the one or the other a prima facie case will not be made out, and the court, upon the request of the defendant, should give an instruction in the nature of a demurrer to the evidence. These two grounds of attack upon the privilege pleaded are available to the plaintiff in all cases, for in publications commenting upon matters of public interest, facts are always present, stated either expressly or by necessary implication."

And in McClung v. Star-Chronicle Co., 274 Mo. 194, the same rule is announced. That was an action for libel growing out of an article written by the defendant criticizing the plaintiff for his conduct as Warden of the State Penitentiary and for his punishment of Steve Willis. This court there held the article was not actionable, but was qualifiedly privileged criticism of the plaintiff's conduct as a public official.

Nor do we think that the defendant exceeded its qualified privilege of fair comment upon the official conduct of the plaintiff in publishing that part of the convict's letter that stated that Steve Willis was strung up for the purpose of obtaining a confession from him from whom Willis received a bottle of whiskey. The plaintiff warden denied that Willis was strung up to obtain a confession from him, but stated that he was strung up for punishment for having whiskey in his

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possession. The defendant paper had the privilege of attributing that motive to the plaintiff. The prisoner Willis was strung up for twenty days, and he was released, so the Warden says, either the same day he made a confession or the next day. The defendant had, undoubtedly, the right to discuss the matter fully and to draw from the facts inference that might reasonably be drawn. This precise question was decided in Cook v. Publishing Co., 241 Mo. 326. In considering that phase of the case KENNISH, P. J., for the court said:

"Under the facts in evidence it was the undoubted right of the defendant, and of all others, to discuss the failure of the bank and the official conduct of plaintiff in connection therewith. Was this right of comment restricted to a restatement of the naked facts, without drawing inferences or expressing opinions thereon, or did the right of comment mean the right to discuss the facts and place thereon the writer's own construction, and to express his opinion of the motives which actuated the officer in his failure to examine and close the bank and protect the public, regardless of whether the opinion was right or wrong, provided it was based upon facts and was not malicious? The two facts that plaintiff and one of the owners of the bank were close political friends, and that this insolvent bank had not been examined for two years, during which time no other bank in the district had escaped examination, fully warranted the inference of that relationship as the cause of the plaintiff's omission to examine this bank. Indeed, the comment suggesting the motive follows as the shadow of the imputation already cast by the facts previously stated. Plaintiff's failure to protect the public by closing the bank may have been due to neglect or inadvertence, or to his lax enforcement of the law as to that bank because of his political friendship for the owners. It will not do to say that the right of comment would permit the defendant to suggest the first and most favorable explanation, but deny to it the right, in good faith to suggest the second, which was fully warranted

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under the conceded facts. The right to comment on matters of public interest means the right to express opinions as to the acts of a public officer and to draw inferences as to his motives, whether such opinions or inferences are right or wrong, reasonable or unreasonable, provided they are made in good faith and based upon the truth. [Branch v. Knapp & Co., 222 Mo. 580; United States v. Smith, 173 Fed. 227; Howarth v. Barlow, 113 App. Div. (N. Y.) 510; Townshend on Libel and Slander (4 Ed.), 258.]"

The important fact is that the defendant made no substantial misstatement of fact as to what the public official did. The motive attributed to the plaintiff was not unwarranted in view of the facts. Without doubt it is not libelous, in a case of this sort, where the motive of the public official is difficult to ascertain, to attribute to the public official a motive which is warranted by the facts and circumstances.

Nor was there any proof of express malice in this case. As we have stated defendant had a qualified privilege to criticize and censure the public acts of the plaintiff. This privilege though, as we have stated, is a qualified privilege. It is not an absolute privilege. There are instances of absolute privilege in the law of defamation where one is not liable, though his statements of facts are false and defamatory, but this case is not of that type. The courts in this State, following the weight of authority both in England and in this country, hold that this qualified privilege to criticize and censure the public acts of public officials does not exist where the defendant is actuated by malice. Malice in an ambiguous term. In these cases it means the presence of the improper motive upon the part of the defendant. The matter has been well put by a scholarly English writer as follows, Salmond on Torts, p. 427:

"A statement is said to possess a qualified privilege when, although false and defamatory, it is not actionable without proof of malice. Malice means the presence of an improper motive. A statement is malicious when it

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is made for some purpose other than the purpose for which the law confers the privilege of making it. 'If the occasion is privileged, it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive.' "

The burden of establishing an improper motive upon the part of the defendant was upon the plaintiff in this case. [Cook v. Pulitzer Publishing Co., 241 Mo. 336, l. c. 363; McClung v. Star Chronicle Publishing Co., 274 Mo. 194, l. c. 216; Odgers on Libel and Slander (5 Ed.), 225.]

Plaintiff attempted to prove malice by introducing in evidence other articles in the defendant's newspaper relating to the same matter. We have carefully examined these articles and we do not believe that they tend to prove that the defendant was discussing the plaintiff's conduct as a public official for any improper purpose. They only show that plaintiff's conduct as a public official was being discussed and censured to bring about needed reform in the penitentiary management, in this State, as the defendant viewed the matter.

There are many assignments of error by appellant relating to the admission and exclusion of testimony and the giving and refusing and modification of instructions. Many of the assignments present questions that deserve serious consideration. They have not, however, been decided, in view of our holding that the trial court had no jurisdiction and that the plaintiff made out no case of libel under the Constitution and laws of this State.

For the foregoing reasons the judgment below in favor of the plaintiff is reversed. *Walker, Faris* and *Graves, JJ.*, concur; *Bond, C. J., Blair* and *Williams*, JJ., concur in paragraph 2 and dissent from paragraph 1; *Woodson, J.*, not sitting.

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W. E. COLLINS et al., Appellants, v. A. JAICKS COMPANY.

In Banc, July 7, 1919.

1. **PRACTICE: Judgment on Pleadings: Ascertainment of Cause of Action.** In an action brought by property owners for the cancellation of special tax bills, wherein the pleadings consist of the petition, an answer and a reply denying the allegations of the answer, the sole question, on the filing by defendant of a motion for judgment on the pleadings, is whether the petition states a cause of action entitling plaintiffs to the relief asked.

2. **STREET IMPROVEMENT: Maintenance and Repair: Benefit Assessments.** Under the present charter of Kansas City the city has power by ordinance to direct that the cost of repairing and maintaining an existing boulevard be paid by special assessments against the abutting property, or said cost may be paid out of the funds belonging to the park district in which the improvement is made or out of the general park fund; and the exercise by the city of its option to authorize the cost to be paid by special assessments will not be held to be illegal, unless the act is clearly unreasonable, oppressive and subversive of the rights of the property owners.

3. ———: **General Power of Cities: Conclusiveness of Exercise Upon Courts: Fraud.** The power of cities to grade and improve streets is legislative and continuing, subject to such restraints as may be imposed by valid charters; and the power being conferred by charter, and the charter provision being in harmony with constitutional and statutory authorization, the courts will not interfere, either directly or collaterally, with municipal action, in the absence of fraud. The governing body of the city, and not the courts, is the judge of the necessity and expediency of the exercise of the power conferred, and the fraud that will authorize the courts to interfere with municipal action is not that it has resulted in individual hardship, or that in working out a general scheme an individual burden without corresponding benefit is imposed, but only an act so unreasonable, oppressive and subversive of the rights of citizens in the general purpose declared, as to clearly indicate an attempted abuse rather than a legitimate use of the power conferred.

4. ———: **Part of Street: Inequality of Non-Uniformity.** A city having charter power to improve or repair streets, and to "pay for

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such improvement or any part thereof" out of its general funds or by special assessments against abutting property, may pay for repaving a portion of a boulevard out of its general fund, and at a later time provide that the cost of repaving another portion shall be paid by special assessments; and in the absence of fraud, it will not only be presumed that the city authorities had good and sufficient reasons for proceeding by different methods in the two proceedings, but there was no such inequality or lack of uniformity as denied to the abutting property owners the equal protection of the laws.

5. ———: **Exemption from Subsequent Taxation: Contractual Right.** The charter and ordinance under which a street was improved do not constitute a contract with abutting property owners who paid taxes therefor, that their property will not be burdened with taxes to pay for subsequent repairs or repaving. The statute, or a charter in harmony therewith, conferring upon a municipality power to provide for the construction, repair and maintenance of streets, may be changed, so as to provide a different method of paying for the improvement, or so as to repair an improvement already made, and such change in the law does not constitute an impairment of any supposed contract between the city and the abutters, who paid for an earlier improvement, that their property will not be sujected to taxes to pay for a later improvement or repairs.

6. ———: **Maintenance: Tax Bills Prima-Facie Regular.** Special tax bills issued for the improvement of a boulevard import prima-facie validity under the charter of Kansas City, and are evidence of the liability of the property for the amount thereof; and an allegation in the petition that the resolution authorizing the improvement provided that the boulevard shall "be paved the full width thereof with bituminous pavement macadam" does not justify the conclusion that the tax bills were issued for maintenance work. Besides, the charter provides for the maintenance of a boulevard by special assessments.

7. ———: **Change in Charter: Omission of Exemption Right: Impairment of Contract.** A provision in the city's charter at the time the boulevard was paved, to the effect that when a boulevard has been constructed at the expense of the adjoining property it shall thereafter be maintained at the expense of the park district in which it is situated or out of the general park fund, did not create a contract right with abutting owners that their property would be exempt from special assessment for improvements made after the charter provision was annulled, or inhibit the annullment of such provision; nor was such exemption kept alive by a clause in the subsequent charter that "the repeal of any law by the provisions of this charter shall not in any wise affect

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any right acquired or accrued thereunder, nor shall this charter in any wise affect the right acquired or accrued under the previous charter." The operative force of the provision in the original charter prevailed so long as that charter was in existence, but no longer, and "the right acquired thereunder" did not prohibit the city, by a new charter, to provide a different method for paying for street improvements.

Appeal from Jackson Circuit Court.—*Hon. Joseph A. Guthrie,* Judge.

AFFIRMED.

Griffin & Orr and *R. B. Middlebrook* for appellants.

(1) The allegations in plaintiffs' petition specifically set up that the work in controversy is maintenance and repair and defendant by demurring to this admits the correctness of this statement for the purposes of this argument. (2) The city had no power to issue special tax bills for maintenance work. Payment for maintenance work should be paid for solely out of the maintenance fund of the park district in which Linwood Boulevard is located, which fund is generously provided for by the charter, and the abutting property should not bear the expense of maintenance and repairs. Section 31, Article 13, Charter of 1909, authorizing the issue of special tax bills, is general in its nature, covering every conceivable kind of work, including even bridges and culverts, while Sections 33 and 34 of said article are special in their nature, being expressly and specifically designed to regulate and provide for the raising and expending of a maintenance fund to take care of the maintenance and repair of boulevards and to set bounds upon its size. In the case at bar the city proposes to ignore all these special restrictions and maximums and just issue special tax bills to cover the entire cost of repairs. (3) A special provision applicable to a particular subject shall prevail over a general provision that may be inconsistent therewith. Roth v. Gabbert, 123 Mo. 32; Poor v. Watson, 92 Mo. App. 96; Ruchen-

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berg v. Railroad, 151 Mo. 85; City of Springfield v. Stark, 93 Mo. App. 76; Camp v. Wabash Railroad, 94 Mo. App. 280; State ex rel. v. Roach, 258 Mo. 552; State ex rel. Lindell Hotel Co., 9 Mo. App. 453. (4) If the charter confers the power to impose special tax bills on some abutting land and to entirely relieve other abutting land similarly situated of that burden as contended by respondent, then the owners of the burdened land are denied the equal protection of the laws within the meaning of Section One, Article 14, Federal Constitution. 8 Cyc. 1073; Cotting v. K. C. Stock Yards, 103 U. S. 107. (5) The charter of 1889, as amended in 1895, contained the following section: "Provided further, that when any parkway or boulevard has been constructed at the expense of the adjoining property, such parkway or boulevard shall thereafter be maintained at the expense of the Park District in which the same is situated or out of the general park fund." Charter 1889, art. 10, sec. 31. While this charter was in force, plaintiffs relying on this section, invested in boulevard land and expended large sums for originally constructing this boulevard (said expenditures being set forth in their petition) and tax bills were issued therefor and duly collected by the city and paid by the abutting property. The present city charter, as adopted in 1908, omitted the proviso above quoted, and plaintiffs contend that the attempt in the case at bar to burden their adjoining property with special tax bills for maintenance of a boulevard already constructed, is violation of their constitutional right. Art. 12, sec. 19, Mo. Const. To subject these lands to the cost of maintenance and repairs is to "impose a new liability in respect to considerations already past," and the same can not lawfully be done by adopting a new charter, any more rightfully than it could be done by the Legislature. R. S. 1909, sec. 9710.

Clarence S. Palmer for respondent.

(1) The provisions of the present charter authorizing the re-pavement of a boulevard and assessment of cost

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against abutting property, is not nullified by reason of the fact that the prior charter gave no such right. The provision of the former charter did not constitute a contract right of plaintiffs: (a) because there was lack of a consideration; (b) because such a contract would have been contrary to the provisions of the Constitution of 1875, relating to the exemption of property from taxation. 4 Dillon on Mun. Corp. (5 Ed.) 2581; Ladd v. Portland, 32 Ore. 272; State v. Mayor of Newark, 37 N. J. L. 424; Carstens v. Fon du Lac. 137 Wis. 465; Tilden v. Mayor, 56 Barb. (N. Y.) 361; Bradley v. McAtee, 7 Bush (Ky.) 667; Rochester v. Ry. Co., 182 N. Y. 99; Houck v. Drainage District, 248 Mo. 394; Miners Bank v. Clark, 252 U. S. 20; Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379; Grand Lodge v. New Orleans, 166 U. S. 143; Paige & Jones, "Taxation by Assessments," sec. 172. (2) The improvement in question was not maintenance but repaving. Jones v. Plummer, 137 Mo. App. 337; Bliss on Code Pleading (2 Ed.), sec. 418; Kleckamp v. Meyer, 5 Mo. App. 444. (3) Plaintiffs waited until the work was completed and they had received its benefits, and are, therefore, estopped from proceeding in equity to ask that the contractor shall receive no pay for his work. The Planet Co. v. Ry. Co., 115 Mo. 620; Jaicks v. Merrill, 201 Mo. 91; Gibson v. Owens, 115 Mo. 258; Hellenkamp v. Lafayette, 30 Ind. 192; Palmer v. Stump, 29 Ind. 329; Lafayette v. Fowler, 34 Ind. 146.

WALKER, J.—This is an action brought by property owners against a contractor for the cancellation of certain tax bills issued by Kansas City for paving Linwood Boulevard from Troost Avenue to Prospect Avenue. The pleadings consist of the petition, the answer and the reply. At the trial, the defendant filed a motion for judgment on the pleadings, which was sustained; and plaintiffs appealed. As the reply denied the allegations of the answer, the sole question was whether the

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petition stated a cause of action entitling the plaintiffs to the relief asked.

The petition, after pleading the corporate existence of certain parties plaintiff, alleges their respective ownership of certain tracts of land therein described, and that tax bills have been issued to the defendant in payment of improvements made on Linwood Boulevard. The date of the issue of these tax bills is not stated, nor their respective numbers or amounts. The existence of Linwood Boulevard from Troost Avenue to Prospect Avenue, the portion of the boulevard paved, is alleged to have been at all times under the control and management of the board of Park Commissioners of Kansas City; that, in 1900, the city authorized the pavement of Linwood Boulevard from Troost Avenue to Michigan Avenue, and, in 1909, provided for the pavement of Linwood Boulevard from Michigan Avenue to Benton Boulevard (a point farther east than Prospect Avenue), and that said work was done and tax bills issued in payment thereof, which were paid by the owners of land fronting on the boulevard. Section 31 of the Charter of 1899, as amended in 1895, which authorized the improvements made in 1900 is set out; that on August 4, 1908, Kansas City adopted a new charter. Certain provisions of this charter are pleaded; among others, Section 33, Article XIII, which provides that the maintenance fund for parks and boulevards may be assessed against all the land, exclusive of improvements in the respective park districts, and that all vehicle taxes collected in Kansas City shall be used exclusively for the construction, maintenance, repairs, etc., of parks, boulevards, etc., under the control and management of the Board of Park Commissioners.

Section 34, Article XIII, of the Charter, is also set out, which provides for a maintenance fund of ten cents per front foot on all the land fronting on boulevards or parkways.

It is further pleaded that the levy of two and a half mills upon each dollar of valuation of the real

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estate in Kansas City was levied for the year 1914; that certain sums from the vehicle license were received for that year, and that a special assessment of ten cents per front foot on the land fronting upon all boulevards was levied, and in addition, that the Common Council for the year 1914 appropriated the sum of $62,980 for improving parks and boulevards for the year 1914, and for general expenses, as provided by Section 35, Article 13, of the Charter, and that the maintenance tax and the ten-cent tax and the general taxes were all contributed to by the plaintiffs, as owners of real estate. This is followed by a conclusion of law that the funds specified were the only funds available for the improvement of Linwood Boulevard.

Plaintiffs then allege that in violation of the Charter of 1908, the Board of Park Commissioners adopted a resolution, April 27, 1914, providing "that Linwood Boulevard from a line eighteen inches east of the east line of the street car track in Troost Avenue, to a line eighteen inches west of the west rail of the street car track in Prospect Avenue, be paved the full width thereof with bituminous pavement macadam, and that the approaches to the cross streets be paved with asphalt," and that said work be paid for by the issue of special tax bills; that the Common Council, by Ordinance No. 11918, approved June 23, 1914, ordained that Linwood Boulevard should be paved as provided in said resolution, and that the work be paid for by special tax bills; that Section 12, Article 18, of the Charter of 1908, relating to the effect of the adoption of the new charter upon existing rights or liabilities, and that the issue of tax bills against plaintiffs' property was in violation of said Section 12, and further alleges that plaintiffs purchased their property relying upon the rights, privileges and exemptions supposed to be contained therein.

That the work as actually done "consists of putting a top dressing on said boulevard," and that this is what is properly, ordinarily and regularly known and desig-

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nated as maintenance and repairs, as that term is used in the charter and in ordinary parlance; but that said work, though done in accordance with plans and specifications therefor, was, in reality, a maintenance or repair of said thoroughfare.

That a portion of Linwood Boulevard, extending from Prospect Avenue east to Benton Boulevard, had, at some time prior to the work under Ordinance No. 11918, "been maintained and repaired with identically the same material and in precisely the same manner as the work done under Ordinance No. 11918, on that portion of said Linwood Boulevard hereinbefore described, upon which plaintiffs' properties do abut," and that this act of the city constituted a discrimination in violation of the charter and of the Constitution of the United States.

The petition then alleges that plaintiffs' property could not be lawfully assessed for this work, and that the imposition of the tax was contrary to the provisions of the Charter of Kansas City in force when the boulevard was originally paved (in 1900), and contrary to the spirit of the provisions of the Charter of Kansas City now in force.

The acceptance of the work by Kansas City through its proper officials and the apportionment and issue of the special tax bills to the defendant is stated, and that said tax bills purport to be liens against the plaintiffs' respective properties.

Article 12, Section 19, of the Constitution of Missouri, is then quoted, which prohibits the General Assembly from passing retrospective laws or imposing on the people of any county or municipal subdivision a new liability in respect to transactions or considerations already passed.

Finally, it is alleged that plaintiffs are denied the equal protection of the law, in violation of the Constitution of the United States, and are deprived of their property without due process of law, in violation of the

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Constitution of Missouri, and judgment is asked for the cancellation of the tax bills.

I. The burden of this petition, upon which appellants' right of action depends, is that the work in controversy was that of maintenance and repair, and that the city had no power to issue special tax bills for this character of work, which should have been paid for out of the maintenance fund of the Park District in which Linwood Boulevard is located, and not by a levy upon the abutting property.

Repair of Street.

A portion of Linwood Boulevard between Prospect Avenue and Benton Boulevard had theretofore, under a former charter (Sec. 31, Art. X, Kansas City Charter of 1889, as amended in 1895), been paved. This section had a limitation on assessing the cost of boulevard, avenue, or street improvements against abutting property owners, and provided that after having once been paved, they should thereafter be maintained at the expense of the Park District, or the improvement was to be paid for out of the general park fund.

The tax bills, the payment of which is here contested, were issued to pay for the paving of Linwood Boulevard from Troost to Prospect Avenues. An ordinance authorizing this improvement had theretofore been passed, under Section 31 of Article 13 of the present charter of Kansas City. The portions of said section of the charter having reference to the matter at issue, are as follows: "The Board of Park Commissioners shall have power to cause any road, parkway, boulevard or avenue, or part thereof, which may be under its control and management, to be graded, re-graded, paved, re-paved, curbed, re-curbed, guttered, re-guttered, or otherwise improved, repaired and maintained . . . with such material as the said board may determine, and may pay for such work or improvements, or any part thereof, out of the funds not otherwise appropriated, belonging to the park dis-

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trict in which said work or improvement is done or made, or out of the general park fund; Provided, however, That if the Board of Park Commissioners shall, by resolution, determine that any such work shall be done, and that the payment of the whole or any part thereof be made in special tax bills, the Common Council shall have the power, by ordinance, to ratify and confirm the action of said board, and authorize such work to be done, in which case and when so ratified the Board of Public Works of said city shall apportion or cause to be apportioned the cost of said work or improvements, and issue special tax bills therefor, or for any portion thereof, so ordered to be paid in tax bills, in the same manner and with the same effect as the cost of similar work or improvements is apportioned and tax bills in payment therefor issued in such city for public improvements or work upon streets not under the control or management of such Board of Park Commissioners."

It will be seen that this section does not contain the limitation found in the former charter (Sec. 31, Art. X, Charter of 1889, as amended 1895), in regard to the manner of payment of the cost of street improvements, but provides that such cost may, as determined by the Board of Public Improvements, be paid out of the Park fund or by the issuance of special tax bills, if so authorized by a resolution of the board. Incidentally it may be stated that there was a compliance with this requirement. The comprehensive nature of this section is apparent from its use of all of the terms employed in designating the streets of a city, viz.: avenues, boulevards, roads and parkways.

The power of the board to thus provide the manner in which the cost of such improvements may be paid for having been defined by the charter, it remains to be determined whether its provisions relative thereto, are valid.

Preliminary to a discussion of the immediate question here seeking solution, it is not inappropriate

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that reference be made to the general power of the city through its proper instrumentalities to make such improvements as are here contemplated. Under the present charter, it is provided that: "The city shall have power to acquire and cause to be made all public improvements designated in this article, to pay therefor, in whole or in part, out of the general fund, or in whole or in part by special assessments, and to make and levy, assess and collect special assessments to pay therefor, and to issue special tax bills to evidence such assessments." [Sec. 1, Art. VIII, bot. p. 308, present charter of Kansas City.]

The trend of judicial construction is that in the exercise of a power of this character, the courts should not either directly or collaterally interfere with municipal action in the absence of fraud. A general declaration of this rule is found in McCormack v. Patchin, 53 Mo. 33, in which it is held that the power to grade and improve streets is a legislative and continuing power, subject to such restraints as may have been imposed by the charter. It may be exercised from time to time as the wants of the municipality may require; and as to the necessity or expediency of the exercise of this power, the governing body of the municipality, and not the courts, is to be the judge; that the power to compel property owners to pave generally extends to requiring them to repave when so directed by the proper municipal authority. The rule as thus announced was reaffirmed in Farrar v. City of St. Louis, 80 Mo. 379, where it was held, that the power to pave the streets of the City of St. Louis and to charge the cost of such improvements against abutting property, conferred by certain sections of the charter of that city, and the mode of the exercise of this power under a designated ordinance, was not in conflict with the State Constitution.

The Farrar case is especially rich in its references to earlier Missouri cases discussing and defining the powers of municipalities in the exercise of the taxing power for the improvement of streets subject only

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to the limitations stated, viz.: those forbidden by the Constitution or the general laws of the State.

The later case of Skinker v. Heman, 148 Mo. 349, reasserts the doctrine of the freedom of action, in the absence of fraud, of municipal authorities in providing by ordinance in compliance with the charter, for the issuance of tax bills for a new sidewalk.

In no case have we found the rule more clearly and conclusively stated than in Heman v. Schulte, 166 Mo. 409. This was a suit on a sewer tax bill. Defendant objected to its payment on the ground that his property had no immediate access to the sewer, and hence should not have been included in the benefit district. In holding that the action of the city council was conclusive in including the property in the district, the court said, at page 417: "Not only is it the rule in this State . . . 'that when the matter of establishing sewer districts is intrusted by the Legislature to the common council, its action in the premises is conclusive in a collateral attack,' but the rule generally stated is, that where a municipal body vested with the exercise of a power, acts, its acts under that power, in the absence of fraud, are conclusive upon the courts, whether the attack made thereon is collateral or direct, and the fraud that will authorize the court's interference in the matter of municipal action, is not that the power exercised or the ordinance passed has resulted in an individual hardship in its execution, or that in the working out of the general scheme designed by an ordinance an individual burden is imposed without a corresponding benefit conferred (a necessary incident to any system of general taxation or special assessment yet devised for governmental maintenance and support); but only in those cases where the act of the municipal body is so unreasonable, oppressive and subversive of the rights of the citizen in the general purpose declared, as to clearly indicate and leave but one inference, that of an attempted abuse rather than the legitimate use of a power enjoyed; and of this qualified and limited as-

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sertion of right in the courts to interfere with municipal legislation, much doubt is felt."

A parallel ruling is found in Jennings Heights Co. v. St. Louis, 257 Mo. 291, which was an action to cancel tax bills for sewers on the ground of fraud, and that the sewers as constructed were larger than necessary. In ruling on these contentions, the court said: "It has been uniformly held that the action of the city legislature in pursuance of charter powers, in establishing a district to be benefited by sewers or other public improvements so as to justify a special assessment against the property lying within the district, is conclusive, in the absence of any evidence that it was procured by fraud or proof that it is manifestly arbitrary or unreasonable, or that the assessment is palpably unjust or oppressive."

The following cases announce the same general doctrine: Moberly v. Hogan, 131 Mo. 19; McGhee v. Walsh, 249 Mo. 266; French v. Barber Asphalt Co., 181 U. S. 324.

We had occasion in St. Louis v. United Railways, 263 Mo. l. c. 455, in what is sometimes designated as the "Mill Tax Case," to discuss somewhat elaborately the reasonableness of municipal enactments and, as necessarily incident to that discussion, the extent of the power of municipalities in regard thereto. The conclusion deduced from a review of numerous authorities was that, if an ordinance, as in the case at bar, was enacted authorizing a tax under a power conferred by a city's charter, and not in contravention of organic law, it will be held valid and the courts will be slow to interfere with its operative force; that municipal corporations are primarily the sole judges of the necessity of ordinances and the courts are loth to review their unreasonableness, if passed in strict accord with an express grant (p. 456).

II. The presumption attending the acts of city officers in the exercise of the power here in question is

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pertinent in this connection. We said, most recently in McGhee v. Walsh, 249 Mo. l. c. 294, that "we must, prima-facie, presume that they [the city officers] acted rightly, and we must presume that, in the future, they will so continue to act, and that they will promptly do and perform their several duties, under the charter of the city."

Inequality.

The foregoing was but a reaffirmance of the earlier case of Seaboard Nat. Bank v. Woesten, 147 Mo. l. c. 481, where we said: "It may be said here, that municipal officers, under the charter of St. Louis are selected, presumably, on account of their fitness and integrity. They have no private ends to subserve. We should, therefore, presume that their intentions are honest, and that, in the performance of their public duties, they deal fairly and justly with the citizen and property owner."

While in terms this has reference to a particular municipality, the general application of the rule is beyond question.

Despite the general power thus conferred upon municipalities, the latitude of its exercise and the reluctance of courts to interfere with same, it is nevertheless contended by appellants that their property should not be assessed because owners of property on another part of the street previously improved had not been assessed, and that the burden of taxation was therefore not equalized, and that the ordinance authorizing same was consequently invalid as a denial of the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Federal Constitution. The ruling of the St. Louis Court of Appeals, in Kemper v. King, 11 Mo. App. l. c. 127, 129, is apposite in determining whether the contention here made is sound. In the Kemper case, a portion of a street had been paved and the abutting property assessed therefor. Later another portion—that involved in the opinion—was paved. The abutting owners in the second improvement contended that their assessments should

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be equalized with assessments made on other portions of the street, since the street was an entirety, and that owners of property thereon should be treated alike, and should pay at the same rate. The court refused to sustain this contention, since the two sections of the street had been improved at different times, and were therefore different and distinct improvements which might be separately considered, as to the council seemed best. In ruling upon the question (p. 127) the court said: "We hold that when a municipal corporation is clothed with a general power to improve its streets, it is a matter of discretion, judicial or legislative in its nature, for the city council to determine when, in what manner, and to what extent any street improvement shall be made; that in the exercise of this discretion the city council is not bound to contract for the improvement of an entire street in order to acquire the right to charge the cost of such improvement upon the abutting property owners; but that they may, in their discretion, contract for the improvement of the street for any number of blocks, or for the length of a single block; and that this is a discretion which can not be revised by the judicial courts, unless possibly in extreme cases where there has been manifest abuse." And at page 129: "Public improvements must go on; and if the courts of justice, in their anxiety to protect property owners from a reckless or oppressive exercise of this power, hamper its exercise with unreasonable or impracticable rules, it will result that municipal corporations will not be able to let out contracts for such improvements, at a cost which fairly represents their value, and that none will bid for such contracts except at prices at which they can afford to assume the speculative chances of unfriendly litigation."

Rulings of courts of last resort in other jurisdictions affirm the doctrine announced in the Kemper case.

The case of McChesney v. Chicago, 152 Ill. 543, 38 N. E. 767, identical in principle with the case at bar, gives affirmative expression to the rule. There the city

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had previously extended certain water mains and paid for same out of general water department funds. They now propose to make further extensions to be paid for by assessments against abutting property. An appeal was taken from the confirmation of such assessments, but the court supported them and held that such a change in the method of paying for extensions was not discriminative or oppressive.

In Murphy v. People, 120 Ill. 234, 11 N. E. 202, a sewer system had been paid for out of general city funds. The cost of the present extension was assessed against abutting property. The objection that this was not uniformity was rejected by the court.

In Shelby v. Burlington, 125 Iowa, l. c. 352, suit was brought to enjoin the city from improving a street out of general funds because previously such improvements had been paid for by assessments against abutting property. The court held that: "Appellant's argument, carried to its logical end, would tie the hands of the Legislature for all time. That is to say, having adopted the theory of special assessments, it could never depart therefrom; and, *vice versa,* if it authorized payment for street improvements out of the general city funds, it could never resort to special assessments. This, of course, cannot be the law."

In the case of Ottumwa Brick Construction Co. v. Ainley, 109 Iowa, 386, 80 N. W. l. c. 511, the city provided for paving a certain street to be paid for by special assessments. Some of the property on the street not being worth anything, the city guaranteed the tax bills issued against such property, and this in effect amounted to payment by the city for that portion of the improvement. This was objected to by the other property owners assessed for this improvement. It was held that the city may thus pay part of the cost of the improvement out of its general funds. In so ruling, the court said: "There is nothing in the law to prevent a city, whose finances will admit of so doing, from paying for improvements like that in question out of

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the general fund. If it can lawfully pay for a whole, it can for a part."

In the case at bar, Kansas City had previously provided for the repaving of a portion of Linwood Boulevard and paid for the same out of the general fund. At a later time, in an entirely different proceeding, it provided for repaving another portion of the Boulevard to be paid for by special assessments against the abutting property. The city had been given specific power to proceed by either method. No showing of fraud was made or suggested, and it must be presumed that the city authorities had good and sufficient reasons for proceeding by different methods in these two different proceedings. Their decision in the matter should be conclusive, for any other rule would tie the hands of the city and impede, if not prevent, public improvements.

III. It is further contended by necessary implication from the allegations of the petition, although not definitely so stated, that the ordinance and charter provision under which it was enacted, by virtue of which the earlier improvement of a portion of Linwood Boulevard was made, constituted a contract with abutting property owners who had paid taxes therefor, which will be impaired if the same property is burdened with taxes for the present improvement. The difficulty confronting appellants in attempting to sustain this contention is that a statute conferring power upon a municipality to provide for the construction, maintenance or repair of streets does not constitute a contract. In Dillon on Munic. Corp. (5 Ed.) p. 2581, the rule is thus declared: "Charter provisions, which only confer authority upon the municipality to make original construction or paving of the city streets at the expense of the abutters, and which require the city to bear the expense of reconstruction and repaving, do not constitute a contract with an abutter who has paid an assessment for

Contract Exemption.

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original construction or repaving, that his property shall be exempt from assessment for repaving or reconstruction, and the legislature may repeal or amend such provisions at pleasure without impairing any contract right of the abutter or affecting any vested right."

Our own court follows the unbroken current of authority, as thus announced. In Houck v. Drainage Dist., 248 Mo. l. c. 394, a statute in force at the time of the original organization of the district provided for an assessment to be made and determined according to benefits found. Later, the law was changed so as to authorize a board of supervisors to levy on each acre of land in the district not to exceed twenty-five cents per acre. In discussing the validity of the change thus made, the court said: "It is contended that the section in question is void because it creates a rule of taxation not in existence at the time the defendant drainage district was organized, and the plaintiffs became members of it, and it is therefore retrospective as to them and impairs the obligation of contracts constituted by its charter . . . We do not hesitate, however, to say that the charter of a public corporation does not constitute a contract with its members that the laws it was created to administer will not be changed; and the State is still at liberty, as to them and the corporation, to continue its efforts to improve its methods of taxation with respect to these subjects."

Further, to the same effect, in Miners Bank v. Clark, 252 Mo. 20, l. c. 32, we said: "Did the city, by accepting the deed from Clark in 1901, contract away its right to later order said street improved at the expense of the abutting property owner, even though the grantor in said deed be the property owner when the improvement is later made? Unless the law constituting its charter gives such right, a city cannot contract away its right and power to levy special assessments for street improvements, and thereby create an exemption from such assessments. . . . The

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charter of cities of the third class does not give such power. In fact the legislative right to give such power might well be doubted—a point however, which we do not decide. It is true, as asserted by appellant, that a city of the third class may acquire title to land for street purposes; but we know of no rule which authorizes the city to surrender, as the purchase price of a street, its right to order that street improved in any manner authorized by law. If, therefore, the city did dispose of its right to order the street improved in the manner exercised in the present suit, it could by properly exercising that power issue valid special tax bills."

In Tilden v. Mayor, 56 Barb. (N. Y.) l. c. 361, the Court of Appeals of New York said; "The supposed contract lacks one essential element of a valid agreement, viz., a consideration. By the statute of 1813, the mayor, aldermen and commonalty were authorized, among other things, to direct the paving of streets, and to assess the expense upon the property owners or occupants of houses and lots benefited. Under this provision the owners could have been compelled to pay the expense of the pavement laid down in 1824, and therefore the promise of the corporation to bear the expense of future repairs and pavements was without consideration. The owners lost nothing by what occurred; they simply paid what by law they could have been obliged to pay, and it has never been held that the performance of a legal duty, or the payment of a legal liability, furnished any consideration to support a promise."

In Ladd v. Portland, 32 Ore. 271, 51 Pac. 654, under a state statute, it was provided that after a street in East Portland had been improved, under and by virtue of the provisions of the chapter in which that section appeared, thereafter that street or any part thereof should not be subject to be again improved, but might be repaired. A street in East Portland was improved under that law, and the cost

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charged against abutting property owners. Afterwards East Portland was consolidated with the City of Portland. In 1893 the consolidated city was given a new charter, all vested rights being preserved. Under the new charter the council was authorized to improve any street, or part thereof, and assess the cost on the abutting property owner. The street in question was improved under this provision of the charter and plaintiff sought to enjoin the collection of assessments on account thereof, relying on the provision of the old charter of East Portland under which the original improvement was made. The Supreme Court of Oregon in sustaining a judgment of the lower court refusing an injunction, said, at page 275; "The power to assess the costs of the improvement of a street upon abutting property is embraced within the sovereign power of taxation primarily in the Legislature, but which it may constitutionally delegate to local municipal governments, with or without restraints or limitations; but it is never presumed to be relinquished unless the intention to relinquish is declared in clear and unequivocal terms. [Railroad Co. v. Maryland, 10 How. 394.] And even then, if the exemption is not supported by some consideration, it may be revoked at any time. [Rector of Christ Church v. County of Philadelphia, 24 How. 300.] The charter of East Portland, under which the first improvement was made, was a partial delegation of such power to the city, and, when once exercised, was exhausted—not, however, by reason of any contract between the public and the lot owner, nor because the power of taxation in the State was not adequate to require an assessment for their reimprovement of the street, but because the power delegated to the city had by its express terms ceased to exist. And how can this provision of the charter be tortured into a contract? It does not purport to be one, for it makes no offer of exemption to the landowner, either expressly or impliedly, in consideration of the performance of some voluntary act on his part; nor does it ask or

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agree to accept anything from him which the State could not have unconditionally exacted. The assessment of the cost of improving the street in front of his property was an exercise of soveignty, and a proceeding *in invitum*. He was simply required to discharge a duty which he owed to the public, and the performance of which cannot by any show of reason be construed into a consideration moving from him to the State upon which a contract can be supported. The validity of assessments for local improvements is sustained on the theory of special benefits corresponding in value to the cost of the improvement, and so the property owner receives, in theory at least, full value for the money exacted of him; and therefore, plaintiffs' predecessor, in paying the assessments made against his property for the first improvement of the street, sacrificed no legal right, nor did he make any extraordinary or unusual contribution to the public. He simply paid for the special benefits conferred. The manifest purpose of the provision of the charter under consideration was to define the mode and extent of the power of the council in the matter of street improvements, and the limitation on the exercise of such power was a mere concession to the citizen, and an act of grace, and not a contract by which the State forever relinquishes the sovereign power of taxation. It was a limitation voluntarily imposed by the Legislature upon the powers of the city, which that department of the State government could remove at any time public policy or the interests of the municipality might seem to demand, and bound the State only so long as the statute remained unrepealed."

In Carstens v. Fon du Lac, 137 Wis. 465, 119 N. W. 117, property owners sought to enjoin the city from selling assessment certificates against property abutting on a street, which certificates had been issued for paving thereon. The law under which the paving was done provided for the charging of two-thirds of the cost to abutting property, and one-third to the city, and

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added: "Provided, however, that the provisions of this sub-division shall not apply to a second or subsequent repaving, macadamizing or graveling of any street which has been heretofore or which shall be hereafter paved, macadamized or graveled, and the whole or any portion of the expense of such improvement shall have been borne directly by the lots or parcels of land fronting or abutting on the portion of the street so improved." Subsequently, under a general charter law, the city repaved the street and attempted to charge it to the property owners. In sustaining the dissolution of a preliminary injunction, the Supreme Court at page 470, said: "The compliance with a statutory duty enjoined upon the lot owners did not create a contract by operation of law which exempted the plaintiffs from further special assessments for the cost of street paving. [City of Rochester v. Rochester Ry. Co., 182 N. Y. 99, 70 L. R. A. 773.] Neither did the 1885 statute give any vested right to exemptions from further special assessments on account of repaving. At best, all the law did was to prohibit such assessments as long as it remained in force. It was subject to amendment in this regard, and was amended by the adoption of the portion of the general charter law which related to street improvements in lieu of the provisions of the special charter."

The rule announced in the cases cited and abstracted, that the charter of a municipality does not constitute a contract with its members that the laws it was created to administer will not be changed, is stated with sufficient definiteness and declared with such unanimity of opinion, that it is unnecessary to do more than cite, in addition, some of the numerous cases from other courts in which it has been approved; and, as a corollary thereto, that a municipality may by appropriate legislation continue its efforts to improve methods of taxation with respect to the subject here under consideration: State v. Mayor of Newark, 37 N. J. L. 415; Bradley v. McAtee, 7 Bush (Ky.) 667;

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Wis. & Mich. Ry. Co. v. Powers, 191 U. S. 379; Grand Lodge v. New Orleans, 166 U. S. 143.

IV. It is further contended that this improvement is maintenance work, and that it should have been paid for out of the funds of the Park District for that purpose, in which the boulevard is located. This, plainly put, is an assumption not justified by the record. The petition alleges that the special tax bills were issued to pay for the improvement of Linwood Boulevard. These tax bills import prima-facie validity, and are evidence of the liability of the property for the charges made therein. It is expressly provided in Section 24 of Article VIII of the present city charter (compilation of 1909, bot. p. 339) "that every tax bill shall in any suit thereon be prima-facie evidence of the validity of the bill, the doing of the work and of the furnishing of the material charged for, and of the liability of the land to the charges stated in the bill." This authorizes the presumption that the proceedings leading up to and consummating in the issuance of the tax bills were regular and proper. If we look to the resolution under which the work was authorized, as disclosed by the petition, we find it is expressly alleged that the boulevard shall "be paved the full width thereof with bituminous pavement macadam, and the approaches to the cross streets with asphalt;" and that the ordinance for the work should provide, as it did, for the doing of same as provided in the resolution. In the presence of these allegations, it must be presumed that the charter provision requiring plans and specifications of the work as thus indicated, was, in the absence of any allegation of failure, adopted, or in other words, that the procedure conformed to the requirements of the law. This being true, the conclusion follows that this constituted an improvement or repaving of the boulevard rather than a mere maintenance, and that the contention of appellants is more of a conclusion of the pleaders, not

Maintenance.

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admitted by the motion for a judgment on the pleadings, than a statement of a fact. It is elementary that only facts well pleaded are admitted by a demurrer or motion which raises an issue of law. [State ex rel. U. S. Fidelity Co. v. Harty, 208 S. W. 835; Brennan v. Cabanne Avenue M. E. Church, South, 192 S. W. (Mo. Sup.) 982; Novinger Bank v. St. Louis Union Tr. Co., 189 Mo. App. 826.]

Furthermore, the only allegation of fact in the petition in regard to the character of the work is that wherein it is stated that it consisted of "putting a top dressing on said boulevard." This, according to the usual signification of the words employed, means resurfacing, which is a paving or repaving, and not maintenance. [Jones v. Plummer, 137 Mo. App. 337.] However, a complete answer to this contention is that whether this work be classified as maintenance or a paving or repaving, the city has the same authority in one case as in the other. Under Section 31 of Article 13 of the charter, supra, the payment of the cost of one may be provided for in the same manner as the other, viz.: by special assessment.

V. A resume of the contentions here made against the validity of this proceeding is, that under Article 10, Section 31, of the Charter of Kansas City of 1889, a boulevard, after construction, can only be maintained at the expense of the park district. This section is as follows: "Provided, further, that when any parkway or boulevard has been constructed at the expense of the adjoining property, such parkway or boulevard shall thereafter be maintained at the expense of the park district in which the same is situated or out of the general park fund." In support of this contention, it is urged that the former work upon the boulevard having been done under this section, a contract right was thereby created with abutting property owners that all subsequent work would be done under the same authority; and despite the fact that

Accrued Right.

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other means for paying for like work were provided for by a subsequent charter, that said section remained operative and exclusive as to improvements on the boulevard. We have shown that this section did not create a contract right, and that such a right was not impaired by the adoption of the new charter; and that the operative force of the section only prevailed so long as the charter of which it was a part was in existence, no longer. This being true, the provisions of the present charter, Section 12, Article 18, Charter of 1909, bot. p. 482, does not admit of the construction given it by appellants in that no such "right or liability was acquired or accrued" under the former charter, as is meant by this section, which is as follows: "The repeal of any law by the provisions of this charter shall not in anywise be so construed as to affect any right or liability acquired or accrued thereunder by or on the part of the city or any person or body corporate. And this charter shall not in any manner affect any right, lien or liability accrued, established or subsisting under and by virtue of the previous charter or any amendments thereto . . . Nor shall this charter be in any wise so construed as to affect the right or liability acquired or accrued under the previous charter and amendments thereto, or on the part of the city or any person or body corporate."

The interpretation sought to be given Section 31 of Article X of the former charter, and the application thereto of Section 12 of Article 18 of the present charter, would absolutely prevent any change in the new charter which imposed any other or different obligations upon persons or property of a city, than those theretofore existing. This is foreign to any reasonable construction of the law on this subject. The right of cities to frame their charters and, as a consequence, to change them, is a continuing right (Morrow v. Kansas City, 186 Mo. 675), which would be nullified under appellants' construction.

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We find no further contentions entitled to our consideration.

For the reasons stated, we are of the opinion that the petition does not state a cause of action, and the judgment of the trial court is affirmed.

It is so ordered. All concur, except *Woodson, J.*, absent.

THE STATE ex rel. G. A. McBRIDE v. FRANK SHEETZ, Appellant.

Division One, July 9, 1919.

1. **DRAINAGE DISTRICT: Sufficiency of Petition.** It was unnecessary for the petition praying for the organization of a drainage district under the Act of 1905, to state whether the ditch was to be open or closed.

2. ———: **Report of Viewers: Actual View.** The Act of 1905, did not require the report of the first board of viewers of a drainage district to show an actual view of the proposed improvement. However, the report in this case, when fairly construed, does show an actual view.

3. ———: **Notice.** If the first notice to the landowners described the proposed ditch exactly as it was described in the report of the first viewers and in the petition, and gave notice that the report had been filed, it was sufficient.

4. ———: ———: **Description of Lands.** The second notice to landowners, required by Section 5587, Revised Statutes 1909, is not required to describe the lands to be affected by the organization of the drainage district by the county court. The report mentioned in that section is that of the second board of viewers provided for by Section 5584, which requires the report to be accompanied by a plat showing the separate tracts affected and the names of their owners, and if the plat correctly describes the lands a misdescription in the second notice of certain lands is immaterial, especially if the misdescription consisted of an error giving a township number as 56 instead of 57, which error, being clerical, was subject to correction upon the face of the report.

5. ———: **Estimate of Costs.** The estimate of the costs of the improvement can be shown by the plat and profile filed with the viewers' report.

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6. ———: **Notice of Hearing Before Viewers: Due Process.** A special notice to the landowners of their right under Section 5585 to "appear before the viewers and freely express their opinions on all matters pertaining thereto" is not required, where the landowners are in court by proper notice when the viewers are appointed and notice is given of a hearing after their report is filed.

7. ———: **Notice of Bond Issue.** The statute does not require specific notice that a bond issue is contemplated as a method of securing funds; and if the petition contained a prayer for the issuance of bonds in statutory form and notice of the pendency of the petition was given, that was all that was required. Besides, a lack of authority to issue bonds is no defense to a suit to collect an installment tax.

8. ———: **Organization: Collateral Attack.** The validity of the incorporation of a drainage district is not open to collateral attack; and where there has been a colorable effort, in good faith, under a valid law, to incorporate the district, and it has been and is exercising powers vested in such public corporations and the State has not attempted to inquire into the legality of its organization, the illegality of its organization cannot be shown as a defense in a suit for taxes levied by it.

9. ———: **Assessor's Book: Collection of Tax.** There can be no valid drainage district tax without a valid assessment; but the ditch assessment book required by Sec. 5602, R. S. 1909, has no relation to the assessment of drainage taxes. Under the Act of 1905 the assessment is made by the county court, and its basis is the report of the viewers and engineer confirmed by the court; and its validity is in no way dependent upon the ditch assessment book, which the clerk is required to make up, but his failure to perform that duty does not render the tax uncollectable.

10. ———: **Taxes: Limitations.** The plea of the Statute of Limitations to a suit brought in October, 1914, for the drainage taxes of 1910, 1911, 1912 and 1913, is unavailing.

Appeal from Livingston Circuit Court.—*Hon. Fred Lamb,* Judge.

AFFIRMED.

S. L. Sheetz for appellant.

(1) Where the proceedings establishing a drainage district are void, they may be attacked collaterally. Drainage Dist. v. Ackley, 270 Mo. 172; State ex rel. v. Arcadia Timber Co., 178 S. W. (Mo.) 93; Donner v.

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Board, 278 Ill. 189; Gibson v. Drainage Dist., 191 S. W. (Ark.), 908; Williams v. Osborne, 104 N. E. (Ind.), 27. (2) Every fact essential to the jurisdiction of the county court to establish a drainage district must be shown affirmatively on the record. State ex rel. v. Wilson, 216 Mo. 277; Wayne City Drainage Dist. v. Boggs, 262 Ill. 338; Railway Co. v. Young, 96 Mo. 42; State ex inf. v. Colbert, 273 Mo. 208. (3) Where the petition, as here, is to construct a ditch to drain lands, such petition is insufficient to confer jurisdiction to straighten a water course. Where the word "ditch" is defined by the statute to include both covered and open drains, the petition must set forth whether the ditch is to be open or closed to confer jurisdiction. Wayne City Drainage Dist. v. Boggs, 262 Ill. 338; People v. McDonald, 264 Ill. 514. (4) Where the statute requires an actual view of the lands along and adjacent to the proposed ditch, the record must shew that fact. Marsh v. Supervisors, 42 Wis. 502. (5) Presumption of right acting is not indulged to support special statutory proceedings *in invitum*. Mechem on Public Officers (1 Ed.), sec. 581; Ellis v. Pac. Railroad Co., 51 Mo. 200; Zimmerman v. Snowden, 88 Mo. 218; Drainage Dist. v. Campbell, 154 Mo. 157. (6) The first notice to landowners did not set forth the report of the engineer and viewers as required by the statute, and the description of the proposed location of the ditch is so indefinite as to render the subsequent proceedings based thereon void. State ex rel. v. Wiethaupt, 254 Mo. 319. (7) The fact that all the land in one township was misdescribed in the second notice to landowners, being about 1200 acres out of a total of 7573.96 acres, renders all proceedings herein void, and the assessments sued on invalid. State ex inf. v. Colbert, 273 Mo. 198; Paschal v. Swepston, 179 S. W. (Ark.) 339; Keystone Drainage Dist. v. Drainage Dist. 180 S. W. 215; Norton v. Bacon, 158 S. W. (Ark.) 1088; McRaven v. Clancy, 171 S. W. 88. (8) Where resort is had to constructive service of notice, a sub-

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stantial, even rigid observance of the law is required, otherwise the judgment will be void. No notice was given that the proposed improvement would be paid for by a bond issue. Bobb v. Woodward, 42 Mo. 489; Winningham v. Trueblood, 149 Mo. 586; Stewart v. Allison, 150 Mo. 346; Turner v. Gregory, 151 Mo. 100; Leslie v. St. Louis, 47 Mo. 474. (9) The statute requires an estimate of the cost of location and construction of the improvement; and an apportionment of the same to each tract. No estimate was ever made so far as any record thereof can be found, and the county court acquired no jurisdiction of the proceedings. Hamilton on Special Assessments, sec. 524; Morgan Creek Drainage Comm'rs. v. Hawley, 240 Ill. 465. (10) There must be a valid assessment, its entry upon the tax book and failure of the owner to pay, to make a good cause of action. State ex rel. v. Wilson, 216 Mo. 287. No assessments were entered in a ditch assessment book as required by Sec. 5602, R. S. 1909. (11) The drainage law, "is a code unto itself," and the special Statute of Limitations therein of six months should be upheld. Drainage Dist. v. Ackley, 270 Mo. 173. (12) There was no notice given landowners that they could appear before the viewers at any time or place, as provided by Sec. 5585, R. S. 1909. Hamilton on Special Assessments, sec. 354; State v. Road Comm'rs., 41 N. J. L. 83.

W. T. Rutherford, Forrest M. Gill and *Paul D. Kitt* for respondent.

(1) This suit is for the collection of delinquent assessment for drainage tax, and the legality of the proceedings leading up to the incorporation of the drainage district cannot be inquired into in this collateral proceeding. State ex rel. v. Eicher, 178 S. W. 171; State ex rel. v. Wilson, 216 Mo. 215. (a) The tax bill in this case was prima-facie evidence of the amount due and the liability of appellant's land for the taxes.

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Secs. 5599-5600, R. S. 1909; State ex rel. v. Birch, 186 Mo. 205. (b) A drainage district is a municipal corporation, a public corporation, and the legality of its incorporation cannot be inquired into collaterally in a suit to collect back taxes; *quo warranto* is the only proceeding to question the legality of public corporations. State v. Fuller, 96 Mo. 165; Church v. Tobbein, 82 Mo. 418; Burnheim v. Rogers, 167 Mo. 171; School Dist. v. Hodgins, 180 Mo. 70; Barnes v. Construction Co., 257 Mo. 192; State v. Colbert, 273 Mo. 209; State v. West, 272 Mo. 317; State v. Young, 255 Mo. 637; State v. Blair, 245 Mo. 680; Bonderer v. Hall, 205 S. W. 542; State v. Eicher, 178 S. W. 174; Drainage Dist. v. Ackley, 270 Mo. 157. (c) The proceedings in the organization of this district are legal and fully comply with the statute under which said district was organized. Secs. 5578-5592, R. S. 1909. (2) Appellant was duly notified by publication, as required by statute (Sec. 5587), of the filing of the report of the viewers assessing benefits against his land and of the time set for hearing thereon. The court acquired jurisdiction of the person of the appellant and of the subject-matter. Secs. 5587-5592, R. S. 1909; State ex rel. v. Blair, 245 Mo. 680; Barnes v. Construction Co., 257 Mo. 192; State ex rel. v. Wilson, 216 Mo. 274; State v. Eicher, 178 S. W. 171; State ex rel. v. Neville, 110 Mo. 348. (a) The county court, by its judgment, found that the appellant was duly served with notice of the assessment of benefits on his land. This judgment is conclusive on appellant, and is not subject to attack in this proceeding. State ex rel. v. Eicher, 178 S. W. 173; State ex rel. v. Wilson, 216 Mo. 215. (3) The report of the first set of viewers conforms in all respects to the provisions of Sec. 5580, R. S. 1909, and shows that the viewers complied with the provisions of that section. (4) The first notice to landowners, given under the provisions of Sec. 5581, R. S. 1909, complies with all the essential requirements of Section 5581; the place of beginning, route and terminus of the pro-

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posed ditch and the time fixed by the court at which the petition and report would be heard are set forth in the notice. (5) The lands of the appellant are located in Sections 18 and 7, Township 56, Range 24. The notice to landowners of the report of the viewers assessing benefits on appellant's lands names appellant and correctly describes appellant's lands, and appellant has no grounds for complaint that the notice misdescribes his land. Appellant was duly notified of the assessment of his lands in this district and was notified of the date of hearing thereon. Sec. 5587, R. S. 1909; State ex rel. v. Blair, 245 Mo. 680; Barnes v. Construction Co., 257 Mo. 192. (6) It makes no difference whether notice of the issuance of bonds was made, appellant was not injured by the issuance of bonds. The petition asked for the issuance of bonds. Sec. 5579, R. S. 1909. The issuance of the tax bill in this case was authorized, and all assessments on appellant's lands drew 6 per cent from the date of the confirmation by the court until paid, and it could make no difference whether the money collected from the assessments is paid in discharge of the debt evidenced by bonds, or by the contract of construction without the bonds or by warrants issued. The amount in either event would be the same and the issuance of bonds could not prejudice or injure the appellant in any way. Secs. 5598-5599-5600, R. S. 1909; State v. Eicher, 178 S. W. 173. (7) An estimate of the cost, location and construction of the improvement was made by the viewers as is shown by the report of the viewers. (8) The statute (Sec. 5579) does not require that the petition shall state whether the ditch is to be an open or closed ditch. State ex rel. v. Taylor, 224 Mo. 453. (9) The taxes in question were not barred by the Statute of Limitations. Sec. 5599, R. S. 1909; Drainage Dist. v. Bates Co., 269 Mo. 78; State v. Wilson, 216 Mo. 291.

BLAIR, P. J.—Defendant appeals from a judgment rendered by the Livingston Circuit Court in a

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suit for drainage taxes. The district was organized in 1909.

I. (1) It was unnecessary for the petition praying for the organization of the drainage district to state whether the ditch was to be open or closed. The statute then in force (Sec. 5579, R. S. 1909) required no such allegation. [State ex rel. v. Taylor, 224 Mo. l. c. 415, 416 et seq., and cases cited.] The cases cited from other states were decided under materially different statutes. (2) The report of the first board of viewers (Sec. 5580, R. S. 1909), when fairly construed, shows it was the result of an "actual view" of the proposed improvement. It shows a "thorough examination" of the proposed drainage system from end to end and was accompanied by a plat showing "the line examined by" the viewers. Further, the statute does not require the *report* to show an actual view. We think it does so, nevertheless. The point is ruled against appellant. The case of Marsh et al. v. Supervisors, 42 Wis. l. c. 514, et seq., was decided under an assessment statute which specifically required the assessor to make affidavit that he had actually viewed all real estate assessed. No affidavit of any kind was made. The principle of that decision is not relevant to the question here. (3) The first notice to the landowners described the proposed ditch exactly as it was described in both the report of the first viewers and the petition. It also gave notice that the report had been filed. The decision in State ex rel. v. Wiethaupt, 254 Mo. 319, turned upon the fact that the description of the proposed improvement in the first notice and the description in the report of the viewers were materially different. That decision announces no principle which condemns the notice in this case. Notice of the report is required and in this case was given by stating that it was filed, and, among other things, recommended the establishment "of said ditch." The "said ditch" was described in the notice just as in the peti-

Organization.

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tion and in the report. The objection is untenable. (4) It is contended the second notice to landowners misdescribed several hundred acres of the land in the district. This notice was prescribed by Section 5587, Revised Statutes 1909. The statute required the notice to be "directed by name to every person returned by the engineer and viewers as the owner of every lot and parcel of land affected by the proposed improvement or of any interest therein, and also by name, to all others, who it may be ascertained own such land or any part thereof, and also generally to all other persons, without mentioning their names, who may own such land, or any part thereof, or any interest therein, notifying them of the general object and nature of the petition and report of the engineer and viewers, and that, on the day so fixed, the county court will hear said petition and report of the engineer and viewers," etc. There is no requirement that the notice describe the lands at all. Notice of the pendency of the petition and of the report of the first viewers had already been given, and all interested parties were affected thereby. The report mentioned in Section 5587 is that of the second board of viewers, provided for by Section 5584, Revised Statutes 1909. That section required the report to include or be accompanied by a plat, which was required to show the separate tracts affected and the names of the owners thereof. No other report of the lands affected was required by this section. There is no contention this plat did not correctly describe the lands. Further, the point that a misdescription occurred is based upon an order of the county court requiring township "57" to be substituted for "56" on "page 138 thereof" (of the report), and nothing appears to show how this affected the description of any of the lands in the district or that it in any way affected appellant's land. It was apparently a clerical error which was subject to correction from the face of the report itself. for the reasons given this contention must be overruled. (5) The report shows a plat and profile showing the

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estimated cost of the improvement were filed with the report, and the court found these estimates correct. The objection that no estimate was made is not sustained by the record. (6) Section 5585, Revised Statutes 1909, provides that any landowners affected "may appear before the viewers and freely express their opinions on all matters pertaining thereto." It is argued that notice of this right should have been given. The act required no special notice thereof. The parties were in court when the viewers were appointed and ordered to view the proposed improvement and mark out its line, etc. They were at liberty to appear before the viewers. Notice was required and given of the hearing on the report and full opportunity afforded to except to the report. This notice satisfied the due process of law clause so far as the report is concerned. (7) It is urged that no notice advised appellant that a bond issue was contemplated as a method of securing funds. The statute did not require specific notice of this intention. Notice of the pendency of the petition was given, and the petition contained a prayer for the issuance of bonds in statutory form. This was all that was required. Further, this court has held that even if there was no authority to issue bonds at all this would be no defense to a suit for the collection of an installment of the tax. [State ex rel. v. Eicher, 178 S. W. l. c. 174.]

II. There is another adequate, single reason for the conclusion that the questions discussed in Paragraph 1 cannot aid appellant.

There can be no doubt there was at least a colorable effort, in good faith, under a valid, existing law, to incorporate the drainage district; that the district has been and is exercising powers invested in such corporations, and that the State has not attempted to inquire into the legality of its organization. The validity of the incorporation is not open to collateral attack in a suit for taxes. [Kayser v. Trustees of Bremen, 16 Mo. l. c. 90; Stamper v.

Collateral Attack.

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Roberts, 90 Mo. 683; Orrick School District v. Dorton, 125 Mo. l. c. 443; City of St. Louis v. Shields, 62 Mo. l. c. 251, 252; State ex rel. v. Blair, 245 Mo. l. c. 687; Burnham v. Rogers, 167 Mo. l. c. 21; State ex rel. v. Birch, 186 Mo. l. c. 219.]

III. It is contended no ditch assessment book was made up as provided in Section 5602, Revised Statutes 1909, and, for that reason, the judgment cannot stand. Under the general revenue law the assessor's book (Sec. 11370, R. S. 1909) embodies the result of the assessor's action, and "a fair compliance with" the statutory provisions respecting it is essential to the validity of the tax; this is true because "an assessment is indispensable to the levy of a valid tax" (State ex rel. v. Schooley, 84 Mo. l. c. 452), and the assessor's book, as corrected by the boards of equalization, is the very foundation of the assessment made for general taxes. [Sec. 11407, R. S. 1909.] It is quite as true that there can be no valid drainage tax without a valid assessment. In the case of drainage taxes in suit, however, the ditch assessment book had no relation to the assessment itself. That assessment was made by the county court (Secs. 5599 and 5601, R. S. 1909) and became a lien upon the lands in the district in the proportion the sums assessed bore to the total benefits assessed. The basis of the assessment was the report of the viewers and engineer as confirmed by the court. The ditch assessment book required by Section 5602, supra, could be only a tabulation of assessments already made and already a lien by express statute. It was enacted (Sec. 5600, R. S. 1909) that the general law should apply. Under that law informalities even in the assessment do not invalidate the tax. [Sec. 11383, R. S. 1909; State ex rel. v. Wilson, 216 Mo. l. c. 287.] The assessment of the drainage tax under the Act of 1905 (Sec. 5602, R. S. 1909) was wholly independent of the ditch assessment book. The validity of the assessment in no way depended upon

Ditch Assessment Book.

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the book. The clerk should have performed his duty and made up the book, but if he did not that does not render the tax uncollectable. It falls within the rule that regulations designed to secure order, dispatch or system in proceedings for the assessment and enforcement of taxes are not mandatory in the sense that disregard of them invalidates the tax or prevents its recovery. [State ex rel. v. Phillips, 137 Mo. l. c. 265.]

IV. This suit was brought October 7, 1914, for the taxes of 1910, 1911, 1912 and 1913. The plea of the Statute of Limitations is unavailing. [Drainage Dist. v. Bates Co., 269 Mo. l. c. 91.]

Limitations.

The judgment is affirmed. *Graves, J.*, concurs; *Bond, J.*, concurs in Paragraph 2 and the result; *Woodson, J.*, absent.

J. E. AMMERMAN v. WILLIAM LINTON, CHARLES W. KIRBY and ADDA KIRBY; C. W. DURRETT, Intervener, Appellant.

Division One, July 9, 1919.

1. **SHERIFF'S DEED: Recitals: Judgment as Evidence.** The recitals in a sheriff's deed are prima-facie evidence of the facts therein set forth, and in ejectment the introduction in evidence of the judgment under which the execution sale was made is not necessary to establish title in the purchaser.

2. **———: Recital of Levy.** A sheriff's deed is not required by the statute to recite a levy upon the lands sold.

3. **APPEAL: Printing Evidence Omitted at Trial.** The printing in the abstract of a judgment rendered at a former trial of the case, which was not offered by either party at the trial which resulted in the judgment appealed from, does not put such judgment in the record, and all contentions based on such former judgment are eliminated from the case.

4. **SHERIFF'S SALE: Pending Appeal: Subsisting Judgment Against Non-Appealing Defendant.** A sale upon special execution issued upon a judgment against a mortgagor who did not appeal and

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which was never disturbed as to him, made during the pendency of the appeal which resulted in reversing the judgment rendered in behalf of the other defendant, was a sale, as to such non-appealing defendant, under a subsisting judgment.

5. ———: **At Second Term: Written Stipulation.** A sheriff's sale is not invalid because made at the second term after the issuance of special execution, rather than at the first. Besides, it is in poor grace to urge any infirmity in the sale on the ground that it was made at the second term where the parties have entered into a written agreement postponing the sale to that term in order that defendants might have longer time to redeem under the mortgage which was the basis of the judgment.

6. ———: **Collateral Attack: Misleading Notice.** A lack of proper notice of a judicial sale is an irregularity which renders the sale voidable, but not void; and being only voidable, the sheriff's deed, made under execution, cannot, because of an infirmity in the notice, be attacked in a collateral proceeding, such as an ejectment brought by the purchaser. So where the special execution recited that the debt and costs were declared a lien upon the land, and the sheriff's deed contained the same recitals, the deed cannot be attacked in ejectment on the ground that the notice of sale stated that one of the defendants owned all the lands as tenant by the entirety jointly with the other defendant and that it was the interest of such tenant that would be sold.

7. **ACKNOWLEDGMENT: Regular on Face: Hidden Defects: Record.** If a deed of trust contains a certificate of acknowledgment in proper and regular form, it is the duty of the recorder to receive the instrument and place it upon record, and if so recorded it imports constructive notice to all subsequent purchasers; and though, upon a trial in court, it is adjudged that the deed had not been acknowledged, because the notary's recitals in his certificate were false, its record nevertheless imported notice to such subsequent purchaser.

Appeal from Knox Circuit Court.—*Hon. Charles D. Stewart*, Judge.

AFFIRMED.

J. C. Dorian, Boyd & McKinley, O'Harras, Wood & Walker, and *C. W. Durett* for appellant.

(1) The plaintiff has failed to establish a consecutive chain of title indicating a legal title to the premises in question. Had he introduced the judgment se-

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cured in the first foreclosure proceedings, on which his execution and deed is based, it would have shown on its face that the judgment was void. (a) The judgment and decree in the first suit brought by the First National Bank of Stronghurst, Illinois, on April 12, 1911, was based upon the fact that Charles W. Kirby was the owner of an estate by the entirety and it authorized the sale of such an estate and that was the estate that was attempted to be sold under that judgment. First National Bank v. Kirby, 175 S. W. (Mo.) 926; First National Bank v. Kirby, 190 S. W.(Mo.) 600. (b) The Circuit Court of Knox County was without jurisdiction to authorize the sale of a tenant's interest in an estate by the entirety and its action in authorizing the sale of Kirby's interest as such a tenant by the entirety in that judgment and decree was void. Otto F. Stifel's Union Brewing Co. v. Saxy, 201 S. W. (Mo.), 67; Ashbaugh v. Ashbaugh, 201 S. W. (Mo.), 72. (c) Had plaintiff introduced the judgment in the original foreclosure proceedings, it would have shown that the judgment was void for the reason that there was no definite amount found to be due at the date of the judgment, which the defendant in that cause was entitled to have an opportunity to pay in order to prevent a sale. Rumsey v. People's Railway Co., 144 Mo. 175; Black on Judgments (2 Ed.), sec. 3, p. 8; Black on Judgments (2 Ed.), sec. 118, p. 168; 24 Cyc. 10; Railway Co. v. Fosdick, 106 U. S. 47; 5 Am. & Eng. Ency. Law, p. 376; Boone on Mortgages, sec. 189; Milhim v. Hawkeye Ins. Co., 171 Ill. App. 262; Thompkins v. Wiltberger, 56 Ill. 385. The judgment in question did not conform to the statute. Sec. 2834, 2836, 2837, R. S. 1909; Fithian v. Monks, 43 Mo. 520. (d) The effect of a general and unqualified setting aside of a judgment, order or decree is to nullify it completely and to leave the case standing as if such judgment or decree had never been rendered. Campbell v. Kauffman, 127 Mo. App. 287; Moore v. Damon, 4 Mo. App. 111; Atkison v. Dixon, 96 Mo. 577; 3 Cyc. 460; 4 Corpus Juris, p. 1204. (e) No title passes under or by virtue

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of an execution and sale following a void judgment. Janny v. Speldon, 38 Mo. 395; McNair v. Biddle, 8 Mo. 264; Otto F. Stifel's Union Brewing Co. v. Saxy, 201 S. W. (Mo.), 67; Knapp, Stout & Co. v. City of St. Louis, 156 Mo. 343; Macke v. Bird, 131 Mo. 682. (2) The special execution issued on the judgment recovered in the first suit brought by First National Bank v. Kirby was issued on the 6th day of November, 1913, and it provided that a return should be made "before the judge of our said court on the second Monday in December next," and was, therefore, dead or *functus officio* on the date of the sale to plaintiff, June 3, 1914. Secs. 2175, 2195, 2199, R. S. 1909; City of Aurora v. Lindsey, 146 Mo. 599; Jones v. Howard, 142 Mo. 117; St. Louis Brewing Assn. v. Howard, 150 Mo. 445; Stewart v. Severance, 43 Mo. 331; Bank v. Bray, 37 Mo. 194; Lackey v. Lubke, 36 Mo. 124; Wack v. Stevenson, 54 Mo. 485; Butler v. Imhoff, 238 Mo. 598. (3) A levy was essential, as the instrument sued on was not acknowledged and hence not entitled to record. Its record was unauthorized. Secs. 2794, 2797, 2798, 2809, 2810, 2811, 10381, R. S. 1909; Rivard v. Mo. Pac. Ry. Co., 257 Mo. 135; German v. Real Estate Co., 150 Mo. 570; Williams v. Butterfield, 182 Mo. 181; Bishop v. Schneider, 46 Mo. 472; Stierlin v. Daley, 37 Mo. 484; First National Bank v. Kirby, 175 S. W. (Mo.) 926; First National Bank v. Kirby, 190 S. W. (Mo.) 597; Sec. 2228, R. S. 1909; Butler v. Imhoff, 238 Mo. 598.

W. C. Ivins and *F. H. McCullough* for respondent.

(1) In ejectment, the right of possession alone is determined, and that is settled by the record title, or by title by limitation based upon possession. McAnaw v. Clark, 167 Mo. 443; Richardson v. Dell, 191 S. W. 64. (2) The recitals in the deed of the sheriff conveying the land to respondent, are presumptive evidence of the existence of the judgment and execution and the other facts recited in the deed, and in an action of ejectment the plaintiff need not produce the judgment and

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execution. R. S. 1909, sec. 2231; McCormick v. Fitzmorris, 39 Mo. 24; Samuels v. Shelton, 48 Mo. 445; Jordan v. Surghnor, 107 Mo. 520; Scharff v. McGaugh, 205 Mo. 344; Butler v. Imhoff, 238 Mo. 584. (3) Mere irregularities or defects are not sufficient to invalidate a sheriff's deed. Emory v. Joice, 70 Mo. 537; Dunn v. Miller, 8 Mo. App. 467. (4) Irregularities in the judgment, sale or sheriff's deed cannot be taken advantage of in a collateral proceeding, but only in a direct application for that purpose. Reed v. Austin's Heirs, 9 Mo. 722; Waddell v. Williams, 50 Mo. 216. (5) Under the statute, where a sale is not made at the first term of the court after the issue of the execution, said execution continues in force until the end of the second term thereafter. R. S. 1909, sec. 2228; Lackey v. Lubke, 36 Mo. 122; Butler v. Imhoff, 238 Mo. 584. (6) The real estate was charged with the lien of the judgment, hence no notice of levy or other proceeding was necessary. The execution was simply a direction to the sheriff to foreclose that lien. R. S. 1909, sec. 2199; Smith v. Thompson, 169 Mo. 553; Brewing Assn. v. Howard, 150 Mo. 445. (7) A judgment may be erroneous or defective as a personal judgment and yet be valid as a judgment of foreclosure. Trumbo v. Flournoy, 77 Mo. App. 324; Hoskinson v. Adkins, 77 Mo. 537; Hagerman v. Sutton, 91 Mo. 519. (8) The question of interest of tenant by entirety does not enter into this case, because appellant Adda states in her answer, filed in this cause, that she only owns inchoate dower in the lands. (9) As between the judgment creditor and appellant, Charles W. Kirby, and those claiming under him, the judgment in Case No. 6901 was conclusive. It was final and no appeal was taken. Murphy v. De France, 101 Mo. 151. (10) The validity of the sheriff's deed depends, only, upon whether or not it contains all essential recitals; it recites the names of the parties to the execution, the date the execution issued, the date of the judgment, the description of the land, and the time, manner and place of the sale. The above are the only

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essential recitals; all others are simply directory. Wilhite v. Wilhite, 53 Mo. 71; Gaines et al. v. Fender, 82 Mo. 507; Davis v. Kline, 76 Mo. 312; Sec. 2231, R. S. 1909.

GRAVES, J.—Action in ejectment, by petition in ordinary form. Defendant Adda Kirby answered: (1) by a general denial; (2) she avers that the right of possession is in one C. W. Durrett, stating the facts from which such conclusion is drawn. Defendant Charles W. Kirby, answers (1) by a general denial as to all matters not expressly admitted, and (2) admits that he was the former owner in fee of the land, but avers that C. W. Durrett is now the owner and entitled to the possession thereof. Defendant Linton was a tenant of Charles W. Kirby, and so answers, stating the terms of the tenancy.

C. W. Durrett, by leave of court, filed an intervening petition, by which he claimed title and the right of possession to said land by and through a trustee's deed under a foreclosure of a deed of trust executed by Charles W. Kirby, to Calvin Carder, trustee, of date March 22, 1911. The answer to Durrett, and replies to answers of defendants, were general denials. Plaintiff had judgment and the intervening petitioner, Durrett, has appealed.

Actions touching the issues involved in the instant case have been in this court heretofore. [Bank v. Kirby, 175 S. W. 926; Bank v. Kirby, 190 S. W. 597.] The records and judgments in these two cases are interwoven in the facts of the instant case. They are also, in a way, injected into the pleadings of this case. A historical review of the whole transaction will not be without good purpose.

Charles W. Kirby and his wife, Adda Kirby, lived at Stronghurst, Illinois. October 15, 1909, they executed and delivered to Elmer E. Taylor, notes aggregating $7500, which they attempted to secure by mortgage on 200 acres of land in Knox County, Missouri, the land

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involved in the instant suit. Taylor assigned the notes and mortgage to the First National Bank of Stronghurst, April 12, 1911, and said bank brought suit in the Circuit Court of Knox County to foreclose this mortgage, and Kirby and wife, supra, were the defendants. This was Cause No. 6901 in the Circuit Court of Knox County, and upon appeal here, by plaintiff, it was this land as an estate by the entirety. So it seems to have been tried below, and so it was treated here. [175 Cause No. 16935 in this court. [175 S. W. 926.] In 175 Southwestern it is erroneously stated to be Cause No. 16835, but our files show it to be No. 16935. In this Cause No. 6901, Adda Kirby, by verified answer, averred among other things that she and her husband held S. W. 926, supra.] We find upon looking at the old abstract it was admitted to be an estate by the entirety. When here we ruled that the circuit court properly found that the mortgage had not been acknowledged, but as the estate was one by entirety the mortgage was good as between the parties, and could be foreclosed. We also ruled that there was no final judgment against Adda Kirby and that the suit was prematurely brought. The cause was reversed and remanded. But it must be borne in mind that Charles W. Kirby not only failed to plead in said Cause No. 6901 in Knox County (No. 16935 in this court), but did not appeal from the judgment of foreclosure as to his interest in the land.

Whilst Cause No. 6901 from the Knox Circuit Court was pending here upon appeal, the plaintiff therein caused special execution to be issued as against Charles W. Kirby and his interest in the land, and it is under the sale and deed from the sheriff under this special execution that plaintiff claims title. This special execution was issued November 6, 1913, and sale was had thereunder in June, 1914.

March 23, 1915, after the reversal of the judgment as to Adda Kirby said Cause 6901 from Knox County Circuit, the First National Bank of Stronghurst brought another suit of foreclosure against Charles W. and

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Adda Kirby, in the Circuit Court of Knox County. This was Cause No. 7272 of that court. In this cause Charles W. Kirby plead that the judgment in Cause No. 6901 was *res adjudicata*, and a bar to Cause No. 7272, as to him. The circuit court upon trial so held, and again he did not appeal. In Cause No. 7272, the defendant Adda Kirby disclaimed that the estate was one by entirety (in 175 S. W. 926, we had held that with such an estate her mortgage was good although not acknowledged), but averred that her husband Charles W. Kirby was the owner in fee and she only had an inchoate right of dower. Notwithstanding this answer and evidence tending to prove it, the trial court held (in Case No. 7272) that the unacknowledged mortgage was binding upon Adda Kirby, and her inchoate right of dower. As said above, the court, in Case No. 7272, ruled that the judgment in No. 6901 was *res adjudicata* as to Charles W. Kirby, and he went no further. Adda Kirby appealed to this court, and Case No. 7272 in Knox Circuit Court became Case No. 19027 in this court. [190 S. W. 597.] In this cause this court held that whilst an unacknowledged deed of trust would (as between the parties) bind both husband and wife as owners of an estate by the entirety, yet such an unacknowledged instrument would not convey (even as between the parties) inchoate dower. We therefore reversed that judgment, and directed the circuit court to set aside its judgment so far as it affected the appellant Adda Kirby, and to dismiss the cause as to such appellant.

The record in this case would tend to show that Adda Kirby falsified when, in her verified answer in Case No. 6901, she averred that she and her husband held the lands as an estate by the entirety. The verification of the answer no doubt prompted the admission of record in the first case. This record shows the common source of title to be John M. Harkness. It then shows a warranty deed from John M. Harkness and wife to Charles W. Kirby. But be this as it may, plaintiff claims under the sheriff's deed aforesaid.

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Now for Durrett's claim of title and possession. On March 22, 1911, Charles W. Kirby (not joined therein by his wife) made and executed to Calvin Carder, as trustee, a deed of trust on the lands in question, to secure the payment of two notes (aggregating $6500) given by Kirby to his wife Adda Kirby. On October 21, 1915, the sheriff of the county, as successor trustee, sold the lands under this deed of trust, and executed a trustee's deed to Durrett, as the purchaser at such sale. The intervener, Durrett, claims title and the right of possession under this deed. This sufficiently outlines the case.

I. There are some harsh features in this case growing out of the false averment in Adda Kirby's answer in Cause No. 6901, to the effect that she and her husband held the land as an estate by the entirety. The case seems to have proceeded *nisi*, and here, on that theory. [Bank v. Kirby, 175 S. W. 926.]

In the instant case (a possessory action in ejectment) plaintiff showed: (1) a conveyance from the admitted common source of title to Charles W. Kirby; (2) a deed of trust from Kirby and wife to Taylor; (3) an assignment of notes and deed of trust to First National Bank of Stronghurst by Taylor; (4) the judgment of reversal by this court of the judgment in No. 6901, so far as Adda Kirby was concerned (she being the only appellee), but with a holding that the deed of trust was good between the parties; (5) special execution as against the interest of Charles W. Kirby's interest in the land; and (6) the sheriff's deed under such special execution to the plaintiff in this case.

The right of plaintiff to recover is dependent upon the validity of that deed. The appellant urges that the failure of the respondents to introduce in evidence the judgment upon which the special execution was issued creates a break in plaintiff's chain of title, and for that reason the plaintiff should not have been per-

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Sheriff's Deed.

mitted to recover. There is no substance in this contention of the appellant. It has long been held that the recitals in the sheriff's deed are prima-facie evidence of the facts therein set forth, and that the introduction of the judgment under which the sale was made is not required to make a case. [McCormick v. Fitzmorris, 30 Mo. l. c. 32; Samuels v. Shelton, 48 Mo. l. c. 449; Jordan v. Surghnor, 107 Mo l. c. 524; Scharff v. McGaugh, 205 Mo. l. c. 357. See also R. S. 1909, sec. 2231.]

If the opposite party desires to impeach the recital of the sheriff's deed, he has the right and privilege of so doing, but if the deed is a valid one on its face, the plaintiff makes out a case by the introduction of the deed, without the judgment out of which the sale and deed grew. When we say above that the party has the privilege to attack a deed, regular and valid upon its face, we do not mean that it can be done in a collateral proceeding, as in this proceeding. But of this subject later.

II. The deed does not recite a levy upon the lands sold. The statute (Section 2231, Revised Statutes 1909,) requires no such recitation. We have so held for many years. [Hunter v. Miller, 36 Mo. l. c. 147: Shelton v. v. Franklin, 224 Mo. l. c. 367; Butler v. Imhoff, 238 Mo. l. c. 595.] The deed does recite the date of the judgment, the parties to the judgment and the execution, the date of the execution and its receipt by the sheriff. It also avers that the special execution recited that such judgment is a lien and charge upon the real estate. It recited fully the particulars of the execution, as also the description of the land, and the manner of notice and all details as to the sale. In fact under the rulings, supra, as well as under others that might be cited, the deed is valid upon its face.

Recital of Levy.

III. The judgment in Cause No. 6901 was not introduced in evidence by either party. Counsel for ap-

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pellant have printed it in their brief, but that does not put it in the record. The special execution is in the record, as is also the notice of sale. Among other things the special execution recites "which said debt and costs were declared a lien and charge upon the following described property." The property described was the land sold, and the party named as execution debtor was Charles W. Kirby, the non-appealing defendant in Cause No. 6901.

Documents Not Offered At Trial.

Several of appellant's contentions are eliminated by reason of the absence of this judgment from the record. Charles W. Kirby did not appeal from this judgment, but when the bank instituted another suit of foreclosure, (Cause No. 7272) he did appear, and plead the judgment in Cause No. 6901 as *res adjudicata,* and got the court to so hold. This judgment he abided, as did also the bank, but Adda Kirby appealed, and secured a reversal of the jugment as to her. [Bank v. Kirby, 190 S. W. 597.]

An examination of our opinion (175 S. W. 597) when the bank case was first here indicates that the appeal was as against Adda Kirby only. We then said: "While the attack made by this appeal is founded exclusively upon the alleged error of the circuit court in giving judgment for the defendant Adda Kirby, there is in fact no such judgment." Going to the old files in that case we find this statement in the abstract of record: "This appeal was taken as to the interest of defendant Adda Kirby, only." The whole proceeding so shows. No additional abstract was filed. There was no reason for the plaintiff in Case No. 6901 to disturb the judgment as to Charles W. Kirby, for thus far it was in its favor. Charles W. Kirby recognized that it had not been disturbed as to him when in Case No. 7272, he plead as *res adjudicata* the judgment in Case No. 6901. So that it can be said that there was a subsisting judgment

Subsisting Judgment.

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against Charles W. Kirby at the date of the special execution under which the sale was made. So far as the showing made in the present record is concerned, it was not a void judgment.

IV. As a fact the sale under the special execution was not made at the first term of court after its issuance, but was made at the second term of the court after its issuance. The land was advertised for sale at the first term after the issuance of the special execution, but the parties stipulated that the sale should be called off in view of a possible settlement of the matter. The last clause of the agreement reads:

Sale at Second Term.

"7. It is expressly stipulated that February 1, 1914, shall be fixed as the limit of time allowed for the performance by said Adda Kirby and Charles W. Kirby of the stipulations herein made on their part to be performed, and in the event that said stipulations are not fully performed by that date, then the plaintiff has the option to again advertise and sell the interest of said Charles W. Kirby in said real estate, and in that event, the said Charles W. Kirby hereby expressly waives his right of redemption from such sale, and also his right of appeal, by writ of error, or otherwise, from the decree in said cause rendered.

"Date this 5th day of December, A. D. 1913."

The previous portions of the stipulation and agreement set out the things to be done by Charles W. Kirby and Adda Kirby to effect the proposed settlement. This agreement was signed by both Charles W. Kirby and Adda Kirby and by counsel for the bank, the opposing party. The parties are in poor grace urging this point. But in our judgment the law is well settled. The sale was not invalid because made at the second term of the court. The statute contemplates such a sale. [R. S. 1909, sec. 2228.] We have so expressly ruled. [Huff v. Morton, 94 Mo. l. c. 409. See also Lackey v. Lubke, 36 Mo l. c. 122, and Butler v. Imhoff, 238 Mo. 584.]

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This contention of the appellant cannot be sustained.

V. Whilst neither the plaintiff nor the defendants nor intervener introduced the judgment under which the sale was made, the plaintiff did introduce the special execution, the notice of sale, and the sheriff's deed. These are therefore in the record. This notice says that the sheriff will sell "all of the undivided interest of the above named defendant, Charles W. Kirby, in and to the following described lands." (Here follows the description of the lands.) Then follows in the notice the following paragraph:

Notice of Sale.

"The said defendant, Charles W. Kirby, owns all the above described lands, as tenant by the entirety, jointly with the above named defendant, Adda Kirby, and the interest of the said defendant, Charles W. Kirby, in and to all the lands above described will be sold to satisfy a judgment or decree of foreclosure rendered against him by the said Knox County Circuit Court."

The execution contains no such recital, nor does the deed made by the sheriff contain such a recital. The execution says the debt and costs were declared a lien upon the land, and directs that the debt and costs be made out of such land. The recitations of the deed follow those of the execution. Appellant contends that this notice shows that the interest in the lands sold was not the interest conveyed by the deed, as we gather their point.

By way of parenthesis it should be said that the appellant in the brief has made no formal assignment of error, but under the head of "Points and Authorities" has engaged in a running fire of points, authorities and arguments. This is no doubt the result of having counsel from other states in the case. In fact, it is a close question as to whether or not we should not dismiss the appeal for failure to comply with our rules. However, we have attempted to get the points made as best we could. Now grant it that this notice of sale is irregular,

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the deed (which is regular and valid upon its face) cannot be thus attacked in this collateral proceeding. Thus in 24 Cyc. 21, it is said: "The fact that proper notice of a judicial sale has not been given is always a sufficient ground for refusing to confirm or setting aside the sale; but according to the weight of authority it is a mere irregularity which renders the sale voidable only and not void."

A voidable sale or a voidable deed cannot be attacked in a collateral proceeding. This must be done in a direct proceeding. Only void deeds or void proceedings are available for collateral attacks.

The rule above from Cyc. has long been the rule in this State. In the early case of McNair v. Hunt, 5 Mo. l. c. 309, it is said: "It appears from the cases cited that, in Spain, thirty days notice were at some remote period required, and probably still are, but for what reason the crown of Spain could require thirty days' notice to be given in this then colony, I am unable to see. But even if that were the law, I should say that the act of the sale was merely voidable, and could not be now questioned in a collateral suit."

No notice could be much more defective than one not given for the required time. The rule in the McNair case is reannounced in Robbins v. Boulware, 190 Mo. l. c. 48, whereat the McNair case, supra, and other Missouri cases are cited and discussed. The result of the rule is that the deed is not void, but at most only voidable, and being only voidable must be attacked in a direct proceeding, and can not be attacked in a collateral proceeding.

VI. Another contention is, that inasmuch as the deed of trust from the Kirbys to Taylor was not acknowledged it was not entitled to record, and its record imparted no notice to Carder, the trustee in the deed of trust made by Kirby to secure alleged notes to his wife, nor notice to Durrett, the purchaser at the foreclosure. This calls for further facts. The deed of trust

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from Charles W. Kirby and wife, Adda Kirby, had this certificate thereon:

State of Illinois
County of Henderson. } ss.

On this 20th day of October, 1909, before me personally appeared Charles W. Kirby and Adda Kirby, his wife, to me known to be the persons described in, and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

Witness my hand and official seal. My Term expires ————190—.

J. F. McMillan,
Notary Public Henderson County, Illinois.

My commission expires
Feb. 14, 1913.

This is a good certificate and regular upon its face. It entitled the instrument to record. What appellant has in view, is, that in Case No. 6901 the trial court found that, notwithstanding this certificate of acknowledgment, as a matter of fact the notary public did not in fact take the acknowledgment of the parties. This alleged and afterward established defect was hidden and did not appear upon the instrument. Under the Missouri rule it was not only the duty of the recorder to record this instrument, which was fair upon its face. but it (when recorded) imparted notice to subsequent purchasers.

In Stevens v. Hampton, 46 Mo. l. c. 408, Judge Bliss, thus states the rule: "In view, then, of the acknowledgment as affecting the right of record and the question of constructive notice, the following would seem to be a reasonable rule; that when the recorded instrument shows upon its face that the acknowledgment was taken by a party, or party in interest, it is improperly recorded, and is no constructive notice; *but when it is fair upon its face it is the duty of the register to receive and record it, and its record operates as notice notwithstanding there may be some hidden defect.*" The italics are ours.

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To like effect the rule is stated in 1 Cyc. p. 530, whereat it is said: "But where an instrument bearing a certificate of acknowledgment or proof which is regular upon its face is presented to the recording office, it becomes his duty to record it, and the record thereof will operate as constructive notice, notwithstanding there be a hidden defect in the acknowledgment." The cases bearing upon the rule are collated by the learned author, and among them is Stevens v. Hampton, 46 Mo. 404, supra. In 1 C. J. 773, the same rule is announced, and a further collation of authorities given.

The rule is a sensible one. The recorder of deeds cannot hold inquiry as to defects not apparent upon the face of the instrument. It follows that the recording of the deed of trust from Kirby and wife to Taylor was notice to the world. The contention of appellant must be ruled against him. He not only bought with notice of the prior deed of trust, but he bought after the foreclosure of Kirby's interest, and after the sale to plaintiffs herein, and after plaintiff's deed was of record. He was not a purchaser without notice, nor was the trustee from whom he bought.

VIII. The foregoing cover the substantial contentions of appellant, as we have been able to sort them from a mass of irrelevant matter. From it all, the judgment below was well founded in law, and most certainly (from the stand point of good morals) for the right party. The conduct of Kirby and wife has not been such as to appeal to a court.

The judgment is affirmed. *Blair, P. J.*, and *Bond, J., concur; Woodson, J.*, absent.

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THE STATE ex rel. PUBLIC SERVICE COMMISSION v. MISSOURI SOUTHERN RAILROAD COMPANY, Appellant.

Division One, July 9, 1919.

1. **RAILROAD: Mandamus: Compelled Operation.** A railroad company in possession of its road may be compelled by mandamus to operate its road in accordance with the positive requirements of its charter, and mandamus is the proper remedy to compel a railroad to perform a definite duty to the public.

2. **———: Abandonment of Spur Track: Without Permission.** Since the enactment of the Public Service Commission Act of 1913 a railroad company, engaged in operating a spur or branch line, cannot determine for itself the question of its right to abandon such line, but it must apply to the Public Service Commission for leave to abandon, and may be compelled by mandamus to continue operating such spurs or branches until the Commission has acted and its order has become final.

3. **———: ———: ———: Decrease in Freight Rates.** And notwithstanding the Public Service Commission refused to permit the railroad company to charge increased freight rates asked for over the spur tracks it was operating in submission to the Commission, it cannot, without the permission of the Commission, abandon the operation of such tracks on the ground that they cannot be operated profitably at the rates permitted, but its duty is to apply to the Commision for such permission or for such adjustment of the rates over its entire line as will not work a hardship.

4. **———: ———: Operated at Loss: Confiscation.** That an order of the Public Service Commission or a judgment of court concerning a particular facility or a portion of the line of a railroad company may result in some financial loss does not necessarily bring it in to conflict with the provisions of the Constitution relating to due process of law and equal protection of the laws.

5. **———: ———: Confiscation: Raised in Mandamus.** In a mandamus brought by the Public Service Commission against a railroad company to compel it to operate certain spur tracks which it has abandoned without permission, the question of whether the order to operate, if obeyed, may result in financial loss to the company and therefore be in conflict with the Constitution, has no place.

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Appeal from Jefferson Circuit Counrt.—*Hon. E. M. Dearing,* Judge.

AFFIRMED.

J. B. Daniel for appellant.

(1) The trams in question are not railroads or parts of the railroad of appellant within the meaning of the Public Service Act or any other Missouri statute. Palm v. New Haven & Hartford Railroad Co., 17 N. Y. Supp. 471. (2) Neither the Public Service Commission nor the courts have power to require appellant to furnish transportation not included in the exercise of its franchise. Palm v. Railroad Co., supra; Northern Pacific Railway v. Teratone, 142 U. S. 492; Elliott on Railroads (2 Ed.), sec. 457; People ex rel. Van Dyke v. Colorado Central Railway, 42 Fed. 638; State ex rel. United Railways Co. v. Public Service Commission, 270 Mo. 429. (3) Mandamus is a discretionary writ, and, if the law would warrant its issue in any case to compel a railroad company to perform an act not included in the exercise of its franchise, the granting of the writ in this case was a gross abuse of the discretion of the court. State ex rel. Caster v. Kansas Postal Telegraph-Cable Co., 150 Pac. Rep. 549; State ex rel. Lyons v. Bank, 174 Mo. App. 593; State ex rel. Crow v. Bridge Co., 206 Mo. 74; Merril on Mandamus, sec. 62; State ex rel. Railroad Co., 199 Mo. App. 671. (4) The judgment rendered herein confiscates the property of appellant in violation of Section 1 of Article 14 of the Constitution of the United States and in violation of Section 20 of Article 2 of the Constitution of Missouri.

A. Z. Patterson, General Counsel, and *J. D. Lindsay,* Assistant Counsel, for Public Service Commission.

(1) The railroad company's conduct in assuming the functions of a chartered common carrier in the

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operation of its branch lines or tracks fixes its responsibility and obligations, and determines its duty to obey the laws applicable to chartered common carriers. Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252; Diamond v. Northern Pac. Railroad Co., 6 Mont. 580; 33 Cyc. 651. (2) A company will be held to be "operating" a railroad within the meaning of regulatory statutes if it runs trains on a track for any purpose. Webb v. South. Mo. Ry. Co., 92 Mo. App. 53. (3) The Public Service Act has conferred upon the Public Service Commission the power to determine whether a railroad branch line or track, long established and operating, should be abandoned. State ex rel. Caster v. Kansas Postal Tel. Co., 150 Pac. 544, P. U. R. 1915E, p. 222; Articles 2 and 3, Mo. P. S. C. Law. (4) Though appellant's operation of its branch lines and spur tracks was conducted at a loss, it should have applied to the Public Service Commission for permission to discontinue such operation, and it was unlawful to cease operation until such permission had been granted. State ex rel. Caster v. Kansas Postal Tel. Co., supra.

BLAIR, P. J.—Upon entry of the order considered in Missouri Southern Railroad v. Public Service Commission, a companion case, appellant attempted to abandon the operation of the spur tracks to which the Commission's order applied. Complaint was made, and the Commission ordered its counsel to institute such legal proceedings as might be effective to compel a continuance of the carriage of freight over the spurs. Counsel thereupon instituted this proceeding by mandamus, and, upon the filing of the return, relator filed its motion for judgment, which was sustained and a peremptory writ awarded. This appeal followed.

The return makes numerous formal admissions and then admits appellant's ownership and operation of its main line, and "that for several years prior to July 23, 1917, respondent [appellant here] main-

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tained and operated two lateral spur tracks, known respectively as Industrial Spur Tracks Nos. 1 and 2," giving their lengths, "on which spur tracks respondent has, up to July 23, 1917, supplied cars to shippers at various points along said industrial spur tracks for the shipment of lumber, ties and other commodities in carload lots, other than live stock and perishable freight, and that respondent offered said service, so long as furnished, as aforesaid, to the public generally, on equal terms;" admits that in May, 1916, it filed with the Commission tariffs applying to the spur tracks, and that " these tariffs provide that all carload traffic, except live stock and perishable freight, will be switched between main line stations and loading yards on such spur tracks at a charge of $7.50 per car;" admits that on July 23, 1917, it abandoned all freight service on the spur tracks. The return then avers that the spurs were constructed in 1900 by an incorporated saw-mill company, owning timber near the spurs, and operating saw and planing mills at Leeper, and were constructed to transport that company's timber to appellant's railroad; that the saw-mill company had no ties, switches, track fastenings and bolts in said" spur until it completed its work, and then sold the "rails, ties, switches, track fastenings and bolts in said" spur tracks to appellant; that thereafter appellant agreed with certain owners of timber in the vicinity of the spurs "to place cars for shipment, in carload lots, of freight other than live stock and perishable freight and to move the same when loaded to its railroad for five dollars per car; that thereafter, for the accomodation of all persons who might desire such service, respondent [appellant here] published tariffs showing that while it operated said industrial spur tracks it would extend the contract aforesaid to all persons so desiring such service;" that thereafter the spur tracks, as tonnage failed near their extremities, were in part abandoned and taken up, and they were gradually reduced to their present length; that in 1914

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appellant concluded the exhaustion of timber had progressed so far that further operation of the spurs would be abandoned; whereupon certain persons agreed with appellant that if it would repair the spurs for their then length and operate them for two years, these persons would furnish their timber for transportation over the spurs and pay appellant $7.50 per car transported; that appellant accepted the contract "on the condition that the same was approved by relator;" thereafter appellant "filed with relator said contract and prayed the approval of relator thereof; that respondent [appellant] was advised by relator that tariffs in conformity therewith would be filed by relator, when offered . . . if not objected to;" that appellant repaired the spurs at great expense, and filed tariffs as alleged in the application for the writ; that thereafter J. M. Mooney, a party to the contract above mentioned, filed with relator a complaint praying that appellant be required to "operate said industrial spur tracks as a part of its main line" and to be prohibited from collecting charges therefor in excess of those applicable to "any other part of the railroad;" that a hearing on this complaint was had, and the Commission found appellant had expended $5049.30 for repairs of the spurs; that for one year of operation on the spurs appellant had collected (switching charge) $2910; that the spurs contain five and eight per cent grades; that relator refused to pass upon the question whether appellant had a right to abandon the spurs, and found that the relation of common carrier existed between appellant and the public with respect to the spurs, and held that "as long as that relation exists" appellant will be "required to treat the industrial spurs the same as other parts of its line in the application of freight charges upon carload traffic other than live stock and perishable freight, and will be prohibited from charging the switching charges for the movement of freight on said spur; . . . that this order tokk effect upon July 23, 1917, and on that date appellant" elected to abandon the

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operation of said industrial spur tracks rather than suffer relator to confiscate its property by the order aforesaid; and did abandon and refuse to operate the spurs.

It is then averred that in November, 1915, relator made an order prescribing rates for appellant's railroad and that an appeal from that order is pending; that under the rates in force appellant was not receiving adequate compensation; that the order of July 23, 1917, denying the right to enforce the $7.50 switching charge, further reduced appellant's revenue $2000 per year, "and the commission in that case refused to grant to it higher rates or any other revenue from any other source, and the continued operation of Industrial Tracks 1 and 2 under said order would constitute a confiscation of respondent's property to the extent of $2000 per year; wherefore, it says the Public Service Commission is estopped to complain that it ceased the operation of said trams, and the respondent [appellant] on that account had a right to abandon the operation of said industrial tracks;" that in its answer to Mooney's complaint, appellant pleaded "that any reduction of its revenue, not compensated in some way by an increase elsewhere, would operate as a confiscation of the property" of appellant, in violation of Section one of the Fourteenth Amendment to the Federal Constitution and of Section 30 of Article 22, of the State Constitution, and appellant "now pleads the provision aforesaid" of the Constitutions "in bar of the right of relator to the writ of mandamus prayed for in this action." The return then avers relator's authority to require appellant to operate the spurs is given solely by Section 116 of the Act of 1913, which requires a hearing, and no hearing has been had; that if Section 64 of the same act authorizes this proceeding, which relator denies, still the writ should be denied because the spurs were built without a grant from the State, the operation thereof was voluntary, and appellant had the right to abandon them for good reason or no reason; that appellant

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never had charter authority to build or acquire the spurs, "and that while its action in acquiring and operating said industrial spur tracks may have been and were unlawful and without authority, and the State may compel" appellant to cease such *ultra vires* operation, it and relator are without authority to compel a continuance of such activities.

The contentions in the brief are that (1) the spurs are neither railroads nor parts of appellant's railroad within the meaning of the law; (2) neither the Public Service Commission nor the courts have power to compel appellant "to furnish transportation not included in the exercise of its franchise;" (3) "mandamus is a discretionary writ" . . . and the granting of this writ in this case was a gross abuse of the discretion of the court; and (4) the judgment rendered confiscates appellant's property and thereby violates both the State and Federal constitutions.

I. The question whether the spur tracks fall within the regulatory power of the Commission is decided in Missouri Southern Railroad Company v. Public Service Commission, page 484, a companion case.

Regulation.

II. "It is settled that a railroad company in possession of its road may be compelled by mandamus to operate its road in accordance with the positive requirements of its charter." [Elliott on Railroads (2 Ed.), sec. 458.] It is also the law that mandamus is the proper remedy to compel a railroad to perform a definite duty to the public. [Northern Pacific R. R. Co. v. Dustin, 142 U. S. 492; Railroad Co. v. Hall, 91 U. S. 343.]

Mandamus.

Let it be conceded that under the general law in force prior to the adoption of the Public Service Commission Act in 1913 the facts in this case would not have warranted the writ issued by the trial court, and that under the then law the rule in People v. Railroad,

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42 Fed. 638, cited by appellant, would have applied. This case presents a different question, i. e. can a railroad since the passage of that act, engaged in operating a spur or branch line, determine for itself the question of its right to abandon such line and act upon such determination, or must it apply to the Public Service Commission for leave? If it must so apply, can it be required to continue operating such line until the Commission has acted and its order has become final?

Abandonment Without Leave.

Section 64 of the Act of 1913 (Laws 1913, p. 600) makes it the duty of the Commission, whenever a carrier is doing or about to do anything in violation of law or an order of the Commission, or is omitting or about to omit to do anything required by law or order of the Commission, to direct its counsel to proceed in the courts by injunction or mandamus to correct or prevent the evil. Section 2 (Laws 1913, pp. 557, 558) defines a railroad as every railroad (except street railroads) "by whatever power operated for public use in the conveyance of persons or property for compensation, with all bridges, ferries, tunnels, equipment, switches, *spurs,* tracks, stations, real estate and terminal facilities of every kind used, *operated,* controlled *or* owned by *or in connection with any* such railroad." (Italics ours.) The term "rate" is defined as including, among other things, "switching charge." [Laws 1913, p. 560.] The jurisdiction of the Commission extends to all "railroads" within the State and "to the person or corporation owning, leasing, operating or controlling" them. [Laws 1913, p. 565.] The term service "is used in its broadest and most inclusive sense and includes . . . the plant, equipment, apparatus, appliances, property and facilities employed . . . in performing any service." [Laws 1913, p. 560.] The Commission is expressly vested with "the powers and duties in this act specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this act." [Sec. 3, p 561.]

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Section 26 provides that Article 2 of the act shall apply to the transportation of passengers and property . . . within this State and to any common carrier performing such service. Section 27 provides that every carrier transporting persons or freight "shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable," and prohibits excessive charges therefor. Section 29 requires the carrier to file with the Commission full schedule of all rates and gives the Commission supervisory powers over the form, posting and filing of tariffs. Section 31 provides that no change shall be made in any "rate, fare or charge, or joint rate, fare, or charge" on file, except upon notice, unless otherwise ordered by the Commission. Under Section 35 no carrier is permitted to transport persons or property until it has filed and published tariffs, nor can it charge any rate other than those filed and published. Section 43 provides that "the Commission shall have general supervision of all . . . railroads . . . and shall have power to and shall examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their lines and property, owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with all the provisions of the law, orders and decisions of the Commission and charter requirements." Sections 44 and 45 empower the Commission to require annual reports of detailed information concerning the carrier's affairs and to investigate accidents. Section 46 provides that the Commission may investigate any act or omission of carriers, and shall investigate any act or omission violative of law or an order of the Commission. These things the Commission may do of its own motion or on the complaint of an aggrieved person. Section 47 authorizes the Commission to regulate fares and the

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"regulations or practices" of carriers and "determine the just, reasonable, safe, adequate and proper regulations, practices, equipment, appliances and services thereafter to be in force, to be observed and to be used in such transportation of persons and property, and so fix and prescribe the same . . . ; and thereafter it shall be the duty of" the carrier to observe these orders. The Commission is empowered to require carriers to form a continuous line where feasible and establish joint rates and fares, and to operate through cars over connected lines. Section 48 provides that any new rate or practice affecting rates may be stayed by the Commission. Under Section 49 the Commission may order repairs, improvements, changes and additions. Further (Sec. 51) the Commission may require additional trains or equipment. Railroads (Sec. 53) cannot be constructed or extended without a certificate from the Commission. Supervision over the issuance and sale of stocks and sale or transfer of franchises and reorganization is given the Commission. All the powers of the Commission (Sec. 106) are enforcible in the courts by proper action brought by the counsel of the Commission.

In State ex rel. v. Postal Telegraph Co., 96 Kan. 298, the Supreme Court of Kansas had before it a case involving the principle determinative of this case. That was a proceeding by mandamus to compel respondent to re-establish its telegraph office at Syracuse, abandoned because it proved unprofitable. Under a Public Utilities Commission Act substantially like our act so far as concerns relevant provisions, the Kansas Supreme Court held the company could not abandon the Syracuse office without applying to the Public Unitilities Commission for authority to do so.

In this State, as in that, the act provides a complete system for the regulation and control of public service corporations. [State ex inf. v. Gas Co., 254 Mo. l. c. 534.] The act adds to the powers expressly given to the Commission all others necessary to the full and

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effectual exercise of those powers. All rates, fares, facilities, service and equipment and changes therein fall within the authority of the Commission. Adequate service and facilities are expressly required to be furnished. Questions relative to these things are to be determined by the Commission. Appellant was operating spur tracks which are included in terms in the act. Can appellant abandon this service without applying to the Commission for leave to do so? If so, any carrier can abandon any service without such leave, and, doubtless, change fares and take off equipment, whenever it comes to the conclusion that the facts justify such action. If this course be lawful, the Commission will become little more than a figurehead so far as carriers are concerned, and its powers can be ignored or invoked as the carrier may desire. In this case the carrier was operating in submission to the Commission and under rates on file. A rate was changed. Instead of applying to the Commission for an increase elsewhere or for leave to abandon the service, the carrier said, in effect, that it would not submit to the change, but would take up the track. It may be it is entitled to an order permitting it to do so. It should have applied to the Commission for the leave. Unless the power of the Commission to pass on this question is conceded, then it is apparent the exercise of some of its express powers is conditioned upon the consent of the carrier. The express power of the Commission over facilities, equipment and construction and changes therein and over the operation of trains (Secs. 49, 51, Laws 1913, pp. 588, 590) is of no avail if appellant's contention is sound. As was said by the Kansas Supreme Court: "If these utility corporations may abandon this particular service without the consent of the Commission, may they not take off their passenger trains, take up and abandon unprofitable branch lines, change the fares and rates of transportation for passengers and freight, or raise the charge for telegraph messages without the

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consent of the Commission? These questions answer themselves. To yield approval to the contention of defendants is to concede that the State's program for the regulation and control of public service corporations is ineffective; that the public utilities act has been enacted in vain." [State ex rel. v. Postal Tel. Co., supra.] The case is in point on facts and law, and we think the conclusion drawn is sound. Appellant should have taken before the Commission the question of its right to abadon the spur. If the finding of the Commission was unfavorable, a review thereof could have been had in the courts in the usual way.

III. There is no valid constitutional objection to the judgment. The general scheme of rates and compensation was not involved. That an order of a Commission or a court concerning a particular facility may result in some financial loss does not necessarily bring it into conflict with the Constitution. [Atlantic Coast Line v. Commission, 206 U. S. 1.] Further, this question is not in this case. It might better be presented in a proper proceeding for leave to abandon the spurs.

Confiscation.

Other questions raised are decided in Missouri Southern Railroad v. Pub. Serv. Commission, page 484, a companion case. The judgment is affirmed. *Graves, J.*, concurs; *Bond, J.*, concurs in the result; *Woodson, J.*, absent.

NINA THREADGILL, Appellant, v. UNITED RAILWAYS COMPANY OF ST. LOUIS.

Division One, July 9, 1919.

1. **TESTIMONY: Competency: Abandoned Objection.** An objection to the competency of a witness as an expert, for whom the court stated a reason why he was competent, to which no objection was made, after which the witness testifies without further objection, must be considered as having been abandoned.

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2. ———: **Harmless Conclusion.** Where plaintiff had testified that as her automobile turned east to cross the railway tracks she saw a north-bound street car "coming at a rapid rate of speed and at a distance of seven or eight feet from the machine," no harm was done by the statement of a witness for defendant who testified that the street car was not more than eight or ten feet distant when the automobile turned across the track and he "saw they could not help but get hit when they turned across there."

3. ———: **General Objection.** A mere objection to certain testimony and a mere motion to strike it out, both in the most general terms, no reason being assigned for either the objection or the motion, will not save for review on appeal the court's ruling overruling the motion.

4. **AUTOMOBILE: Highest Care Required of All Drivers: Negligence Imputed to Owner.** The negligence of a seventeen-year-old son of plaintiff, who was the driver of the automobile owned by her and in which she was riding, is imputable to her, and the law imposes upon the driver, and consequently upon her, the duty of exercising the highest degree of care for the safety, not only of pedestrians and other travelers on the public street, but for herself as well; and if she is injured as the result of the collision of her automobile with a street car, she cannot recover unless her driver was at the time exercising the highest degree of care.

5. ———: ———: **Statute: Contributory Negligence.** The statute (Par. 9, sec. 12, p. 330, Laws 1911) requiring any person owning, operating or controlling an automobile running on or across public roads, streets or other public highways, to use the highest decree of care that a very careful person would use under like circumstances, to prevent injury to persons on such highways, and making an owner or driver failing to use such care liable for damages to any person injured, requires such driver or owner to exercise the highest degree of care to avoid collisions with street cars and other automobiles and thereby to avoid injuring himself, as well as pedestrians and travelers on the street. It supplants the common-law rule which requires such driver or owner to be in the exercise of only reasonable or ordinary care for his own safety, and makes his failure to exercise the highest degree of care contributory negligence. [Disapproving Advance Transfer Co. v. Railroad, 195 S. W. (Mo. App.) l. c. 568, and Hopkins v. Sweeney Automobile School Co., 196 S. W. (Mo. App.) 772.]

Appeal from St. Louis City Circuit Court.—*Hon. Leo S. Rassieur*, Judge.

AFFIRMED.

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R. P. and *C. B. Williams* for appellant.

(1) The trial court erred in instructing the jury that the driver of the automobile was required to exercise the highest degree of care which a very careful person would exercise under the same or similar circumstances at the time and place mentioned in the evidence before plaintiff could recover. Advance Transfer Co. v. Chicago-Pac. Railroad Co., 195 S. W. (Mo. App.) 566; Hopkins v. Sweeney Automobile Co., 196 S. W. (Mo. App.) 772; Nichols v. Kelley, 159 Mo. App. 20; Jackson v. Southwestern Railroad Co., 189 S. W. (Mo.) 381. (2) It was error for the trial court, over the objection of the plaintiff, to permit a witness for the defendant to testify what should have been done and what should not have been done at the time of the accident to bring the driver within the rule of proper conduct. (3) The court erred in permitting a witness for the defendant, over the objection of the plaintiff, to testify that he knew the machine was going to be hit when the driver turned across the street.

T. E. Francis, S. P. McChesney and *Chauncey H. Clarke* for respondent.

(1) The court did not err in instructing the jury that it was the duty of the operator of the automobile to exercise the highest degree of care which a very careful person would exercise under the same or similar circumstances, since the duty to exercise such care was enjoined upon him by statute. Laws 1911, pp. 326, 327, 330. England v. Southwest Missouri Railway Co., 180 S. W. 34. (2) Appellant's second point, that the court erred in admitting evidence concerning what a careful chauffeur would have done, on the ground that such testimony was not a proper subject of expert testimony, cannot be considered by this court for the reason that no such objection was made in the trial court. Breen v. United Rys. Co., 204 S. W. 522; Kinlen v. Railroad,

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216 Mo. 173; Williams v. Williams, 259 Mo. 250; De Maet v. Fidelity Storage Co., 231 Mo. 629; Torreyson v. United Railways Co., 246 Mo. 696. The only objections interposed below were, (a) that the witness was not qualified as an expert, and (b) that all the facts necessary for an expert opinion were not hypothesized. (3) Appellant's third point, that the court erred in permitting a witness to testify that he knew the machine was going to be hit when the driver turned across the street, on the ground that such testimony was a statement of a conclusion, cannot be considered by this court for the reason that no such objection was made in the trial court. Authorities supra; City of Springfield v. Owen, 262 Mo. 104.

GRAVES, J.—Action for personal injuries received whilst riding in an automobile, which ran into a street car operated by the defendant. The petition charges both common law and ordinance negligence. Several ordinances are plead, and the violation thereof assigned as negligence. A recitation of all the alleged negligence will serve no good purpose, as the plaintiff saw fit to abandon all except two theories of recovery, as shown by her requested instructions. Nor under the assignments of error here is it necessary to set out in detail the diverse defenses urged in the answer. Plaintiff's theories of a recovery are found in her requested instructions numbered 1 and 2, which read:

"1. The court instructs the jury that it is admitted that on or about the tenth day of January, 1915, there was in full force and effect in the City of St. Louis, the following ordinance: '3. Whenever any car is about to pass another car going in the opposite direction near a point where it is permissible to passengers to alight from or to board a car, said car shall proceed at a rate of speed not over three miles an hour, and the motorman, driver or person in control shall ring a warning gong or bell.'

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"Now if you believe and find from the evidence that at and prior to the time of the collision in question the driver of the automobile in question knew of the existence of said ordinance and the provisions thereof and if the jury further believe and find from the evidence that on the said tenth day of January, 1915, the automobile in which plaintiff was riding was approaching or about to approach the crossing at Union and Vernon avenues going east with the intention of passing over defendant's double tracks and proceeding into Vernon avenue and that while said automobile was so approaching or about to approach said crossing and before the same had proceeded to a place of danger at said crossing, if you so find defendant's said street car in charge of its motorman was also approaching said crossing north on Union Avenue near Vernon Avenue and at such time said street car was about to pass or was proceeding in passing another street car going in the opposite direction on the said Union Avenue and near said Vernon Avenue and near a point where it is permissible to passengers to alight from or board a street car, if you so find, then it became and was the duty of the motorman in charge of defendant's said car going north on said Union Avenue to proceed in passing said street car going in the opposite direction at a rate of speed of not over three miles an hour, and to ring a warning gong or bell; and if you believe and find from the evidence that at such time and place said motorman in charge of said northbound street car ran said car at a rate of speed over three miles an hour, and at such time and place failed to ring a warning gong or bell, then the said motorman was guilty of negligence; and if you so believe and further believe from the evidence that said motorman at said time and place had run his car at a rate of speed of not over three miles an hour, or that said motorman at said time and place had rung a warning gong or bell, said collision would have been averted; and if you further believe and find from the evidence that such negligence, if any, was the direct cause of the said colli-

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sion and injury, if any, to plaintiff, then your verdict must be for the plaintiff, provided you further believe and find from the evidence that before and at the time of said collision plaintiff exercised care and caution for her own safety.

"2. The court instructs the jury that if you believe and find from the evidence that on or about the tenth day of January, 1915, Union Avenue in the City of St. Louis at its intersection with Vernon Avenue was a public crossing and a place much used for travel by automobiles and other vehicles, and that on said date one of defendant's street cars going north on Union Avenue collided with an automobile in which plaintiff was riding while said automobile was being driven across the double tracks of defendant on Union Avenue to enter Vernon Avenue going east, and that plaintiff was injured in said collision; and if the jury further believe and find from the evidence that while the machine in which plaintiff was riding was approaching the said crossing at Union and Vernon avenues, and before said machine had reached a place of danger at said crossing, if you so find, the defendant's said street car in charge of its motorman was also approaching said crossing going north, and if you further believe and find from the evidence that the said motorman at the said time in so approaching said corner failed to ring any warning gong or bell and failed to exercise ordinary care to have his said car under control so that the same could be stopped on the first appearance of danger to vehicles passing over said crossing, and that such failure so to do under the circumstances, if you so find, was negligence, and that such negligence, if any, was the direct cause of the said collision and injury, if any, to plaintiff, then your verdict must be for the plaintiff, provided you believe and find from the evidence that before and at the time of said collision plaintiff was in the exercise of ordinary care and caution for her own safety."

The court refused both these instructions as asked, and modified both of them by adding to the end of each

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some additional matter. To the end of Instruction No. 1 the court added the following: "And provided further, you find and believe from the evidence that plaintiff's son, in driving said automobile was acting for plaintiff and under her direction and control, that then before you find your verdict in her favor, you further find and believe from the evidence that her said son, in driving said automobile over and upon the public streets at the places mentioned in the evidence, was exercising the highest degree of care which a very careful person would exercise under the same or similar circumstances."

There was also a slight interlienation in this Instruction No. 1, made by the court, but no point is made thereon in the assignment of error, and this interlineation thereby becomes immaterial.

To Instruction No. 2, supra, the court added the following: "And provided further, you find and believe from the evidence that plaintiff's son, in driving said automobile was acting for plaintiff and under her direction and control, that then before you find your verdict in her favor, you further find and believe from the evidence that her said son, in driving said automobile over and upon the public streets at the places mentioned in the evidence, was exercising the highest degree of care which a very careful person would exercise under the same or similar circumstances."

The court gave the instruction as thus modified.

Upon a trial before the jury the verdict and judgment were for defendant and the plaintiff has appealed.

There are but three assignments of error. From the brief we quote thus:

"Now comes the appellant and assigns the following errors:

"(1) The trial court erred in instructing the jury that the plaintiff could not recover unless the driver of said machine, at the time of the injury, exercised the highest degree of care.

"(2) The court erred in permitting the witness B. P. Williams to give his opinion and conclusion that the

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machine could not help but get hit when he saw the driver turn across the street.

"(3) The court erred in permitting the witness Lehmann to testify what the duty of the driver of the machine was at the time of and before the injury, and to testify what things the said driver was required to do in order to make himself a careful chauffeur."

Further details of facts, as the same may become necessary, are left to the opinion.

I. Leaving the worst for the last, we shall take the assignments of error in inverse order. The respondent has printed, in an additional abstract of the record, the evidence in full. The third assignment of error goes to the following state of facts in the record. Whilst the witness Lehmann was on the witness stand the following occurred:

Abandoned Objection.

"Q. You were in the courtroom, I believe, when young Threadgill testified? A. Sir?

"Q. You have been a chauffeur, haven't you? A. Yes, sir.

"Q. I will ask you if, from the way he testified that he approached that track, if that is according to the way a careful chauffeur would approach a track under those conditions?

"Mr. Peery: I object to that.

"The Court: Objection sustained.

"Mr. McChesney: I will ask you, Mr. Lehmann, as a chauffeur, when you drive an automobile, how would you approach a crossing there, assuming that there was a car there, for the sake of argument?

"Mr. Hamilton: I object to the question; he has not qualified as an expert on that.

"The Court: He said he was a chauffeur.

"Mr. Hamilton: I object to it for the reason that it is not competent unless he takes into consideration all the facts connected with this accident. The question

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now is simply how would a careful chauffeur cross the track in front of this car?

"To which ruling of the court the plaintiff, by counsel, then and there duly excepted.

Mr. McChesney: Read the question to him, Mr. Buck.

The Court: You may state what a careful chauffeur would do in making the crossing there. A. Like this case?

"Q. Under these circumstances, under the same circumstances? A. A chauffeur that had to drive from the west side of Union going south and wants to turn to East Vernon has to strike three corners, and before his turning, has to throw out his hand, slowing up his car, and make sure that his way is clear, not leave it to anybody else.

"Mr. McChesney: That is, assuming, Mr. Lehmann, as he testified, that there was another car there.

"Q. As he testified? A. Yes, sir.

"Mr. McChesney: That is all.

"Mr. Peery: That is all."

Young Threadgill was the driver of his mother's car at the time of the collision, and had testified in the case in the presence of the witness Lehmann.

It will be noted that the question propounded by Mr. McChesney, and to which the objection was lodged and the exception saved, was abandoned. The court indicated by his ruling that Lehmann had qualified as an expert and therefore could express an opinion. The evidence shows that he had so qualified. After the objection and ruling the counsel, McChesney, asked that the question be read, but it was not.

It appears that the court then took a hand in the game. The court framed a question for the witness to answer as an expert, and to this question and the answer thereto, there was neither objection nor exception by counsel from the plaintiff. There is no reviewable error here.

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II. Mr. B. P. Williams, a business man of the city of St. Louis, was an eye witness to the accident, and was placed on the stand by the defendant. In the examination in chief the witness had said there were at least two automobiles coming down the street going to the south. He said there was a touring car, which was followed immediately by a Ford car with the top up. Plaintiff was in this Ford car and was driven by her seventeen-year-old son. The witness testified that this Ford car turned suddenly toward the east across the track upon which was coming the north-bound street car of the defendant. He had fixed the distance of the coming street car at not more than eight to ten feet from the Ford car, when the turn across the track was made, and had said that the Ford car had been following immediately behind a touring car. This was in his evidence in chief. When counsel for the plaintiff took the witness for cross-examination, he was (on such cross-examination) asked the following questions and gave the following answers:

Harmless Conclusion

"Q. The first time your attention was attracted to it was when you heard the crash? A. The first time my attention was attracted to the automobile?

"Q. Yes. A. No, sir; it was not. I was looking right at the automobile when it happened, and I saw they could not help but get hit when they turned across there.

"Mr. Peery: I object to that testimony and ask that it be stricken out.

"The Court: Motion overruled.

"To which action of the court the plaintiff then and there excepted."

The foregoing is the objection and exception referred to in the point made. The evidence given by the plaintiff herself was to the effect that as they turned to enter Vernon Avenue going east she discovered the north-bound street car "coming at a rapid rate of speed, and at a distance of about seven or eight feet from the machine." The difference between her testimony and

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that of the witness Williams lies in the fact she says their machine was following a south-bound street car, and Williams says it was following a touring automobile, and that he saw no south-bound street car at the time. They agree on the distance of about eight feet. It was evident from the detailed facts that a collision was imminent, and there was, to say the least, no harm done by the expression of the witness, when he says: "I saw they could not help but get hit when they turned across."

But in addition (and fatal to the point) no reason is assigned for the objection or for the motion to strike out. Both the objection and the motion are in the most general terms. No grounds are assigned in either the objection or the motion. The point cannot be thus saved for appellate review. [Springfield v. Owen, 262 Mo. l. c. 104; Williams v. Williams, 259 Mo. l. c. 250.]

III. The debatable assignment of error is assignment number one, supra. In this case the automobile was owned by plaintiff and was being driven by her seventeen-year-old son. Plaintiff's husband was a doctor, and had treated a child for Mr. and Mrs. Cross. After the operation the doctor suggested that the son would drive them home in the car, rather than have them take a street car. The doctor told his wife that she might go along and watch the child, as it had not come from under the anesthetic as yet. The evidence shows that the car was owned by the plaintiff, and not by the doctor. The son, the driver, was therefore driving plaintiff's car, and the negligence of her driver is imputable to her.

Highest Degree of Care.

As stated the court modified the instructions for plaintiff by adding thereto a clause which placed upon her driver the duty of exercising the highest degree of care in the running of the machine. This the appellant assigns as error. Respondent urges that such degree of care is required by the state statute, and that the

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court committed no error in so wording the instructions. Paragraph 9 of Section 12, Laws 1911, page 330, read:

"Any persons owning, operating or controlling an automobile running on, upon, along or across public roads, streets, avenues, alleys, highways or places much used for travel, shall use the highest degree of care that a very careful person would use, under like or similar circumstances, to prevent injury or death to persons on, or traveling over, upon or across such public roads, streets, avenues, alleys, highways or places much used for travel. Any owner, operator or person in control of an automobile, failing to use such degree of care, shall be liable to damages, to a person or property injured by failure of the owner, operator or persons in control of an automobile, to use such degree of care, and in case of the death of the injured party, then damages for such injury or death may be recovered, as now provided or may hereafter be provided by law, unless the injury or death is caused by the negligence of the injured or deceased person, contributing thereto."

It would seem that this statute fixes upon the driver of an automobile the duty to exercise "the highest degree of care, that a very careful person would use, under like or similar circumstances." The Springfield Court of Appeals in England v. Railroad Co., 180 S. W. l. c. 34, has so ruled.

On the other hand the Kansas City Court of Appeals in an opinion by BLAND, J., in case of Advance Transfer Co. v. Railroad, 195 S. W. l. c. 568, has taken the opposite view. In that case it is said: "It seems to us that this statute cannot but mean that the rule of 'the highest degree of care' is to be applied only to persons operating automobiles in looking out for the safety of others, and that it does not change the common-law rule that a driver is only required to exercise 'ordinary care' for his own safety. Plainly the statute was enacted to protect persons on the highways from

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injury by automobiles, death-dealing machines having great potential power for danger. [See the case of Joseph I. Hopkins v. Sweeney Automobile School Co., 196 S. W. 772, decided by this court, but not yet officially reported.] We are aware of the fact that the Springfield Court of Appeals in the case of England v. Southwestern Missouri Railroad Co., 180 S. W. l. c. 34, has construed this statute contrary to the view we have taken of it, but in that case the court had already held that, applying the common-law rule of 'reasonable care,' plaintiff was guilty of contributory negligence, and by way of argument, only, the court held that, if plaintiff was guilty of contributory negligence under the common-law rule, he must be under the statutory rule, and cites the statute under discussion."

To like effect is Hopkins v. Sweeney Automobile School Co., 196 S. W. l. c. 774, where the Transfer Company case, supra, is cited and approved, as also the Hopkins case is approved in the Transfer Company case. Both cases were handed down at the same time, and hence the cross references.

What these two cases really hold is, that as to the driver of an automobile who is injured, or whose machine is injured, or damaged, only the rule of ordinary care is applicable. They say that the statute requiring the highest degree of care is one applicable to persons traveling on or over the streets or highways. That as to such persons traveling on or over such highways he owes the highest degree of care, but as to himself, his property, or those with him, only ordinary care is required.

We cannot take this view of this statute. We think that it contemplates a rule of conduct for automobile drivers upon "public roads, streets, avenues, alleys, highways or places much used for travel." That rule of conduct is to use "the highest degree of care."

Let us see just to what the rule established by the Kansas City Court of Appeals leads. A is driving an

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automobile, exercising only ordinary care, and he collides with an automobile driven by B, and kills B; then according to the rule of that court A is liable, and properly so. But the rule does not stop here. It goes further and says that if in the collision A (who is only exercising ordinary care) chanced to be injured, instead of B, then such fact would not preclude A from recovering from B. In other words, the failure of A to exercise the highest degree of care would not be such contributory negligence as would preclude his recovery. In other words, B who did the injury would be guilty of negligence because he was not exercising the highest degree of care, but A would not be guilty of contributory negligence if he failed to exercise the highest degree of care, but did exercise ordinary care. To get at their rule differently. Both A and B, drivers of automobiles, meet and have a collision. Both are exercising only ordinary care. B chances to be lucky and A unlucky. A is injured. Under the rule of the Kansas City Court of Appeals A can recover, because B is negligent in not using the highest degree of care, and A is not negligent because (for his own protection) he has used ordinary care. We concede that the common-law rule only requires a person to exercise ordinary care for his own protection, and when such care is used there is no contributory negligence. But as NORTONI, J., in Nicholas v. Kelley, 159 Mo. App. l. c. 24, said: "This statute prescribes the obligation of high care as to all persons owning, operating or controlling an automobile running on public roads, streets, avenues, alleys, highways or places much used for travel."

The person driving a motor vehicle has a rule of conduct prescribed for him by this statute. That rule of conduct is the use of the "highest degree of care." A failure to reach the standard prescribed by the law is negligence, and if the negligence contributed to his injury he cannot recover.

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Going now to the instant case. The street railway company was entitled under this law to have the plaintiff and her driver use the highest degree of care, to the end that its property and its servants might not be injured by a failure to use such degree of care. Within the meaning of the law the street railway was a person in the street, and entitled to the same protection under the statute as a person or another automobile driver would have been. Had plaintiff's car, whilst being run in violation of this statute (that is being run without the exercise of the highest degree of care), struck and injured the street car, there can be no doubt under paragraph 9 of sec. 12, act of 1911, plaintiff would be liable in damages. The statute makes liability for damage to person or property. Not only so, but had the conductor or motorman on the street car been injured, then there would be no doubt of their right of action against plaintiff. This but demonstrates the fact that as to the street car and its occupants the plaintiff and her driver, in approaching them owed them the duty of exercising the highest degree of care, and the failure to exercise such degree of care would be negligence. It would be a singular doctrine to hold that as to others, the drivers must use the highest degree of care, but that they cannot be held to be guilty of contributory negligence if they fail to exercise such care.

As said before, this statute prescribes a rule of conduct. If a violation of the statute occasions injury to others, the person violating it is liable in damages. If on the other hand the violation of the statute occasions injury to the person violating it, such person cannot recover for injury to himself, which injury was contributed to by his own wrongful violation of law. His failure to use the highest degree of care is contributory negligence. The amendments to the instructions were proper. They but presented the idea of contributory negligence. They fixed the standard of duty as fixed by the law. The rule of the Kansas City Court of Appeals, in the cases cited is wrong.

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The foregoing covers all the assignments of error made by appellants. Neither assignment being good, it follows that the judgment should be affirmed.

It is so ordered. *Blair, P. J.*, and *Bond, J.*, concur; *Woodson, J.*, absent.

THE STATE ex rel. G. A. McBRIDE, Appellant, v. PAUL BYRD et al.

Division One, July 9, 1919.

1. **DRAINAGE DISTRICT: Suit for Taxes Pending an Appeal.** The pendency of an appeal from the judgment of the county court organizing a drainage district does not make premature a suit for taxes subsequently instituted. The appeal does not affect the benefits assessed, which are the basis of the tax suit. Under the statute (Sec. 5592, R. S. 1909) on an appeal to the circuit court only two questions can be considered, namely, compensation for property appropriated and damages to property prejudicially affected by the improvement.

2. **———: Estimates of Costs.** If the record shows that the viewers reported separate estimates of the costs of location and construction, and apportioned the same to each tract in proportion to benefits or damages received, and that the county court, with the parties before it, found as a fact that such required estimates and apportionment had been made, there is no basis for a claim on an appeal from the circuit court that the estimates were not made.

Appeal from Livingston Circuit Court.—*Hon. Fred Lamb*, Judge.

REVERSED AND REMANDED (*with directions*).

W. T. Rutherford, Forrest M. Gill and *Paul D. Kitt* for appellant.

(1) An estimate of the cost, location and construction of the improvement was made by the viewers, as is shown by the report of the viewers set out in the ab-

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stract of the record. (2) The incorporation of Drainage District No. 13 is preliminary and is not a final decree adjudicating anyone's rights from which an appeal lies; it simply organizes an entity with which to further proceed to effect reclamation. No landowner is injured by the incorporation. In re Drainage District; Buschling v. Ackley, 270 Mo. 174. (3) The judgment assessing the benefits to respondents' land became final when the report of the viewers was confirmed by the county court. The only exceptions to the report of the viewers are on the claim for compensation for damages and not to benefits. And, on appeal, the only question presented is that of damages. Sec. 5592, R. S. 1909; Drainage District v. Wabash Railroad, 216 Mo. 709.

Frank Sheetz and *S. L. Sheetz* for respondents.

(1) The statute requires an estimate of the cost of location and construction of the improvement; and an apportionment of the same to each tract. No estimate was ever made so far as any record thereof can be found, and the county court acquired no jurisdiction of the proceedings. Hamilton on Special Assessments, sec. 524; Morgan Creek Drainage Commrs. v. Hawley, 240 Ill. 465. (2) The judgment assessing benefits should be suspended until the value of the land taken for the ditch, and the damages to the remainder are ascertained. Tarkio Drainage Dist. v. Richardson, 237 Mo. 75; Morgan Creek Drainage Dist. v. Hawley, 255 Ill. 34.

BLAIR, P. J.—This and the case of State ex rel. v. Sheetz, *ante* page 429, are companion cases. Most of the questions raised in this case are decided in that. The judgment in this case was for defendant.

I. Defendant in this case, in 1910, had appealed to the circuit court from the judgment of the county court. That appeal was not shown to have been pending when this suit was tried in 1915. It is contended this

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suit for taxes was premature because of the appeal and that this justifies the judgment of the trial court in this case. Under the statute then in force (Sec. 5592, R. S. 1909) defendant's appeal, even if pending, could take to the circuit court but two questions: (1) compensation for property appropriated and (2) damages for "property prejudicially affected by the improvement." It was expressly provided that the progress of the work should neither be stayed nor prevented and that the "subsequent proceedings in the circuit court shall affect only the rights and interest of the appellant *in property* located in such drainage district." The appeal did not affect the benefits assessed or their collection. [Drainage Dist. v. Railroad, 216 Mo. l. c. 715 et seq.] The case cited by defendant (Tarkio Drainage Dist. v. Richardson, 237 Mo. l. c. 75) was decided on different facts and under a wholly different statute (Secs. 9251 et seq., R. S. 1899; Secs. 5496 et seq., R. S. 1909) usually termed the "Circuit Court Act."

Appeal.

II. Section 5584, Revised Statutes 1909, provided that the viewers "shall make separate estimates of the cost of location and construction, and apportion the same to each tract in proportion to the benefits or damages that may result to each." It is said this was not done. The trouble with this contention is that the record shows the viewers reported the required estimates and that the county court, with the parties before it, found as a fact that they had done so. There is no basis for this complaint.

Estimates.

III. For the reasons given in the preceding paragraphs and in the companion case referred to, this judgment is reversed and the cause remanded with directions to enter judgment for plaintiff in accordance with the prayer of the petition. *Graves, J.*, concurs; *Bond, J.*, concurs, in the result; *Woodson, J.*, absent.

Sheetz Case.

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MISSOURI SOUTHERN RAILROAD COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION.

Division One, July 9, 1919.

1. **PUBLIC SERVICE COMMISSION: Excessive Rates: Judicial Question.** The statute expressly gives the Public Service Commission authority to fix railroad rates, and in determining whether a proposed rate is lawful for the future the Commission does not act judicially, but simply ascertains what are the existing law and facts and applies to the particular utility the previously declared will of the Legislature.

2. **RAILROAD: Spur Tracks: Regulation of Rates by Commission.** As long as a railroad company operates spur or tram tracks in the public service it must do so subject to the regulatory powers of the Public Service Commission; and the fact that it operated them under tariff rates filed with the Commission is sufficient to warrant a finding by the Commission that it was using the two industrial spur or tram tracks, four or five miles long and connecting with its main line, in the public service; and that subjects them to regulation by the Commission.

3. ———: ———: **Included in Charter: Operation.** Whether the tariff rates to be charged by a railroad company for the carriage of freight over its spur or tram tracks are subject to regulation by the Public Service Commission is not to be made to depend on whether such tracks are included in its charter. The power of the Commission to regulate the freight charges of a railroad company is to be determined by what it does rather than by what its charter says. The Commission's supervision is not limited to lines constructed or owned by a railroad company, but is expressly by statute (Sec. 43, p. 580, Laws 1913) extended to lines operated by it; and the railroad company cannot escape lawful regulation by denying its right to operate a line which it in fact is operating in the public service under regularly published tariffs.

4. ———: **Short-Haul Rates: Reasonable Variation.** A freight rate unlawful because in conflict with a valid constitutional inhibition is unreasonable. The short-haul clause of the statute is constitutional and a freight rate violative of it cannot be upheld on the ground that it is reasonable.

5. ———: **Regulation of Rates: Estoppel: Agreement Upon Rates Charged.** A railroad company cannot rely upon estoppel under a contract void because in direct conflict with an express consti-

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tutional prohibition. Complainants are not estopped to ask the Public Service Commission to reduce within the maximum statutory charges the freight rates to be charged by a railroad company over its tram or spur lines, by the fact that, when the company was about to cease to operate the spur tracks, they entered into an agreement with it to pay charges in excess of the statutory maximum rates, and the company, in pursuance to the agreement, bought a special engine and expended five thousand dollars in putting the tracks in condition for hauling cars thereon.

Appeal from Jefferson Circuit Court.—*Hon. E. M. Dearing*, Judge.

AFFIRMED.

J. B. Daniel for appellant.

(1) The trams in question are not railroads within the meaning of the Public Service Commission Act, and the Commission has no authority to regulate or control the operation thereof or to prescribe rates to be charged for the transportation of freight over them. Palm v. Railroad Co., 17 N. Y. Supp. 471. (2) The complaint herein in effect alleges that appellant is refusing to transport freight which by law it was bound to transport, and that for freight it did transport over the trams it charged more than warranted by law. Whether or not these allegations are true are strictly judicial questions which the Commission, not being a court, had no authority to decide. City of Macon v. Pub. Serv. Com. 266 Mo. 490; State ex rel. Mo. Southern Ry. Co. v. Pub. Serv. Com., 259 Mo. 704, 727. (3) The operation of the trams by appellant was an *ultra vires* activity which the State might require it to stop, but it has no power to require appellant to continue such operation or to extend it as ordered by the Commission herein. Palm v. Railroad, 17 N. Y. Supp. 473. (4) If the Public Service Commission had power to regulate appellant's operation, such power only extended to reasonable regulation. It did not have power to destroy under the pretense of regulation, and its

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order herein cannot be upheld. North. Pac. Ry. Co. v. North Dakota, 236 U. S. 585; Railroad v. Pub. Util. Com., 95 Kan. 604; Norfolk & Western Ry. Co. v. Conley, 236 U. S. 605; Missouri v. Railroad Co., 247 U. S. 533; Kansas City & St. J. Ry. Co. v. Barker, 242 Fed. 310. (5) The complainant having filed with respondent a complaint to prevent the abandonment of service by appellant over the trams in question, and having thereafter, with other shippers and represented by counsel, agreed to the charge herein complained of, and having thereby caused appellant to expend large sums of money under said contract, was estopped to complain of said charges, and should on that account have been denied any relief under his complaint herein.

A. Z. Patterson, General Counsel, and *J. D. Lindsay,* Assistant Counsel, for Public Service Commission.

(1) Under the "Short Haul Clause" of the Missouri Constitution, and the construction thereof by this court, railroad companies are required to charge the same rates for transportation over branch lines as they charge on main lines, where the haul is of equal distance. Sec. 12, Art. 12, Mo. Constitution; McGrew v. Mo. Pac. Ry. Co., 230 Mo. 501. (2) The Public Service Commission has the power of regulation over all railroads operating as common carriers In determining whether a railroad is a common carrier, the important thing is what it actually does, not what its charter says it may do. Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252; State v. Atlantic Coast Line Ry. Co., 56 Fla. 617, 32 L. R. A. (N. S.) 639; 4 R. C. L. p. 533; 33 Cyc. 651; Avingle v. S. C. Railroad Co., 29 S. C. 265. (3) The order of the Public Service Commission under review is not an unlawful exercise of judicial functions. Though merely an administrative agency, the Commission does, and of necessity must, take cognizance of the law, whether it appears in the form of Constitution, statute or judicial decision. State ex rel.

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v. Roach, 190 S. W. 279; State ex rel. v. Le Sueur, 103 Mo. 262; State ex rel. v. Adcock, 206 Mo. 557.

BLAIR, P. J.—This is an appeal from a judgment of the Jefferson Circuit Court affirming an order of the Public Service Commission entered in the Matter of the Complaint of James M. Mooney v. Missouri Southern Railroad Company, 5 Mo. P. S. C. Rep. 250, which order, in so far as it is affirmed, required appellant to "refrain from charging or collecting for the transportation of carload shipments on the tram or spur tracks which connect with" appellant's main line and points on appellant's main line, "or between points on said trams, rates in excess of those in effect between other points on its main line, for the same distance." The trial court also accepted a suspending bond and suspended the operation of the order until the final determination of the case in this court.

Appellant owns and operates a line of railroad fifty-four miles long, which runs from Bunker in Reynolds County to Leeper in Wayne County. Connected with this line, appellant also operated two industrial spur tracks. Industrial Spur No. 1 is four and one-half miles long and joins the main line at Dairyville. Industrial Spur No. 2 is five miles in length and connects with the main line at Corridon. The evidence before the Commission and the Circuit Court showed appellant was imposing a switching charge of $7.50 for each loaded car switched between main line stations and points on either spur. This charge was in accord with tariffs filed by appellant, but never approved by the Commission, and seems to have originated out of an agreement between appellant on the one part and Complainant Mooney and other shippers on the other. The agreement was made at a conference between appellant and interested shippers, which conference resulted from a notice appellant gave in December, 1916, that it purposed to abandon Spur Track No. 1 and take up the rails. By the agreement appellant contracted to repair Spur Track

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No. 1 and operate it for two years, upon condition that the $7.50 switching charge be allowed appellant, provided the Public Service Commission would approve such charge. The shippers agreed not to oppose abandonment of the spur after two years, and that they would request the Commission to approve the switching charge. After this agreement was made, appellant expended about $5000 in repairing the spur tracks, and rendering serviceable a geared or "Shay" engine, which, because of heavy grades, it was necessary to use on the spurs. The evidence showed that the switching charge of $7.50 yielded $2910 per annum. Other facts appear in the opinion.

Appellant contends, in order, that (1) the spur tracks are not subject to regulation by the Commission; (2) the questions whether (a) appellant is charging more than a lawful rate, and (b) whether it can be compelled to operate the spurs, are purely judicial and the Commission has no jurisdiction to decide them; (3) the operation of the spurs was an *ultra vires* activity which the State might prevent, but which it could not compel, appellant to continue; (4) the Commission's power to regulate is a power to regulate reasonably and not to destroy; and (5) complainant, by his agreement, was estopped to question the validity of the switching charge.

I. The question whether appellant could be compelled to continue the operation of the spur tracks is directly presented and decided in State ex rel. Public Service Commission v. Missouri Southern Railroad Company, a companion case. Whether that question is presented by this record need not, therefore, be decided.

Compelled Operation.

II. It is contended the question whether the rate charged was excessive is a judicial question and one, therefore, which the Commission has no power to decide. The statute (Sec. 47, Laws 1913, p. 583) expressly gives the Commission authority to fix rates, and this court has held valid that dele-

Excessive Rates.

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gation of administrative power. [State ex rel. v. Public Service Commission, 259 Mo. l. c. 728.] It is true the Public Service Commission is not a court (City of Macon v. Commission, 266 Mo. l. c. 490; Rhodes-Burford H. F. Co. v. Union Elec. L. & P. Co., 2 P. S. C. 656); nevertheless, though it cannot exercise judicial functions, it must take cognizance of existing facts and the law. The act establishing it expressly requires it to do so. [Section 47, supra.] It is an "administrative arm" of the Legislature. Neither it, nor the Legislature, can ignore the Constitution, nor can the Commission proceed otherwise than in accordance with valid statutory provisions. In determining whether a proposed rate or change of rate is reasonable, i.e., whether it is the lawfully applicable rate for the future, the Commission does so in view of existing facts and controlling law. To do this it is necessary for it to ascertain what that law is, and in performing its legitimate function, i. e., putting to effect in respect to a particular utility the previous-declared will of the Legislature (Michigan Central Railroad v. Michigan R. R. Com., 160 Mich. 355), it must ascertain the existing facts, since these, under the law, determine the applicable rate. Such inquiries by the Commission are not judicial. [Prentis v. Atlantic Coast Line, 211 U. S. 210; State ex rel. v. Harty, 278 Mo. 685.] The fixing of rates for future business is legislative in character. The Commission's inquiry resulted not in a judgment respecting existing or past rates or rights, but in an order respecting rates to be charged in the future. That final act was the test of the character of the inquiry before the Commission (Louisville & Nashville R. R. Co. v. Garrett, 231 U. S. 298) and was not judicial. The point is ruled against appellant.

III. It is insisted the spur or trams are "not railroads within the meaning of the Public Service Commission Act" and not subject to regulation by the

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Regulation of Freight Rates.

Commission. The Commission found, on the evidence, that the spurs were parts of the appellant's railroad. They were being operated by appellant. Appellant had filed "tariffs, naming rates for the movement of all freight over the spur tracks in car loads, except live stock and perishable freight." Appellant's contentions are that (1) the spurs are not included in the charter; (2) only the track material is owned by appellant; (3) appellant has never operated them *as a part* of its railroad.

That appellant was operating these spurs is proved beyond doubt. That it operated them by means of an engine different from those on the main line is of no consequence on this question. The fact that it operated them under rates filed with the Commission is sufficient to warrant the finding that it was using them in the public service, and this subjects them to regulation. [Laws 1913, p. 557, et seq.; Secs. 2, 26, 27, 28, 29, 31, 35, 43, 47, 48.] As long as a carrier operates a line or spur it must do so subject to the regulatory power of the Commission. The charter is not in the record. Waiving that, the question whether a carrier must submit to regulation is settled rather by "what it does, not what its charter says." [Terminal Taxi Co. v. Dist. of Columbia, 241 U. S. 252.] The Commission's supervision is not limited to lines *constructed* by a railroad company nor to those *owned* by it; it is expressly extended (Sec. 43, Laws 1913, p. 580 and other sections, supra,) to "lines and property owned, leased, controlled *or operated*" by such company. In the circumstances it was of no importance, so far as rate regulation is concerned, who owed the fee or held the lease of the land over which the spurs extended. Appellant was conclusively shown to be operating the spurs in the public service under rates on file and was amenable to all lawful regulatory orders the Commission might make respecting rates on such spurs. It is in no position, as a reason for escaping regulation, to deny its right to operate a line which it is in fact operating in the public service

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under regularly published tariffs. The Public Service Commission Act (Sec. 26, Laws 1913, p. 570) in express terms is made to apply to any common carrier transporting freight or passengers within this State, and in terms requires such carriers to file tariffs including every "route leased, controlled or *operated* by it." [Sec. 29.] The decision in Palm v. Railroad, 17 N. Y. Supp. 471, involved a different question. Certain things, not done, were necessary in that case to make the spur there involved one constructed under the incorporating act, and the fare limitation of the act applied to roads *constructed under* the act. The act applicable in that case was penal in character and subject to strict construction. That case is not in point on the question before us.

IV. The Commission found that the rate being charged by appellant was violative of Section 12, Article 12, of the State Constitution, and Section 3173, Revised Statutes 1909, as construed in McGrew v. Railroad, 230. Mo. 496, 177 Mo. 533; State v. Railroad, 238 Mo. 23, 178 S. W. 1179, affirmed 244 U. S. 191. This is the short-haul clause or rule. There is no doubt the rate was violative thereof. It is argued there was no proof the charge complained of was unreasonable and, therefore, no basis for the order abrogating it. We think that the people in adopting Section 12, Article 12, of the Constitution conclusively determined the unreasonableness of any rate out of harmony with its provisions. If a rate violative of it can be held valid because a court or commission may conclude it was a reasonable rate, as the term ordinarily is used, then the constitutional provision is of no force of itself. In our opinion a rate unlawful because of conflict with a valid constitutional provision is unreasonable.

Short-haul Rates.

V. It is said complainant is estopped by agreement and appellant's expenditures made thereafter. No cases

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are cited and the point is not argued. Appellant cannot rely upon estoppel under a contract void because of direct conflict with an express constitutional prohibition. [10 R. C. L. sec. 112, p. 801; Southern Ry. v. Prescott, 240 U. S. l. c. 638; Melody v. Great Northern Ry. Co., 25 S. D. 606; Shorman v. Eakin, 47 Ark. 351; Railroad Co. v. Mottley, 219 U. S. l. c. 479.]

Estoppel.

The judgment is affirmed. *Bond, J.*, concurs in paragraph IV and the result; *Graves, J.*, concurs in separate opinion; *Woodson, J.*, absent.

GRAVES, J. (concurring).—Our learned brother says that the Public Service Commission based its finding upon the fact that the rate charged violated Section 12 of Article 12 of the State Constitution, as said provision of the Constitution has been construed by this court in the several McGrew cases. As a judge I have never sat in any of the McGrew cases. I was at one time of counsel in the second of those cases, although on this bench when it came here. For that reason I have never participated in any of those cases. As a lawyer I was never able to bring my mind to the court's logic or law in those cases. Nor do I agree to them now. However, the last of the line of McGrew cases decided here was taken to the Supreme Court of the United States, and that court has placed its stamp of approval on the judgment of my brothers, and I feel constrained now to yield to the construction given in those cases.

I am not convinced of the logic of those cases, but the rule is now settled by the highest arbiter, and I yield. With this explanation, I concur in the opinion.

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THE STATE ex rel. PELLIGREEN CONSTRUCTION COMPANY v. GEORGE D. REYNOLDS et al., Judges of St. Louis Court of Appeals.

Division One, July 18, 1919.

1. **MOTION FOR NEW TRIAL: General Assignment.** A general assignment of error in the giving and refusing of instructions, in the motion for a new trial in a civil case, is sufficient to authorize a review of such instructions on appeal. [Following State ex rel. United Rys. Co. v. Reynolds, 278 Mo. 554.] And a refusal by a court of appeals to rule on assigned errors in the instructions, on the ground that the assignments were general, is error, and necessitates the quashing of its opinion on *certiorari*.

2. **PLEADING: General Allegations: Common-law Negligence.** A ruling by the Court of Appeals that a petition charging that defendant was in exclusive control of the erection of a certain building and that plaintiff, in the employ of defendant, while doing carpenter work on the third floor, was, "by reason of the negligence of defendant, struck by a piece of building material, which fell from a floor above the third floor, by reason whereof plaintiff fell with great force and violence a distance of forty feet, and by reason of such falling, which was due to the negligence of defendant, plaintiff was injured," etc., charged general negligence at common law and stated a cause of action for damages, is not in conflict with any decision of the Supreme Court cited by relator.

3. ———: ———: ———: **Ordinance As Evidence.** If the petition states a cause of action of negligence at common law, an ordinance making the act of defendant negligence is evidentiary, and though not pleaded is competent evidence; and a decision of the Court of Appeals so ruling, is not in conflict with prior decisions of the Supreme Court, but in harmony therewith.

4. **CONFLICTING OPINIONS: Cases from Other Jurisdictions.** In deciding whether the rulings of a court of appeals conflict with the last previous decision of the Supreme Court, cases from other jurisdictions are not of much value.

5. **COMMON-LAW NEGLIGENCE: Liability Based on Ordinance.** A ruling by the Court of Appeals that, since the ordinance did not expressly give a cause of action for damages, but merely prescribed a duty to be performed, a common-law action of negligence would lie for a violation of the ordinance duty, is not in conflict with prior decisions of the Supreme Court.

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Certiorari.

RECORD QUASHED.

R. J. Balch and *John P. McCammon* for relator.

(1) The assignments of error in relator's motion for new trial were sufficient. Wampler v. Railway Company, 269 Mo. 464; Stid v. Railway Company, 236 Mo. 397; Collier v. Lead Company, 208 Mo. 256. It has been so held in criminal cases under a more exacting statute. State v. Noland, 111 Mo. 492. (2) The petition does not state a cause of action under the *res ipsa loquitur* doctrine. McGrath v. Transit Co., 197 Mo. 97. The petition showed a case of master and servant, did not allege any failure of defendant to use ordinary care to furnish plaintiff a reasonably safe place to work, and did affirmatively show "the injury arose from an event in its nature not so obviously destructive of safety or so tortious in its quality as in the first instance to permit no inference save that of negligence on the part of the person in control." Wall v. Jones, 18 N. Y. Supp. 674. In the case above, except as to the extent of the injury, the facts are identical. (3) Failure to lay scaffold boards over the joists and girders of the building was not common-law negligence, and testimony as to the ordinance or its violation should have been rejected. The peremptory instruction asked by defendant was proper. To admit such testimony it was necessary to plead it. Lore v. Manufacturing Co., 160 Mo. 608; Lohmeyer v. Cordage Co., 214 Mo. 685; Hogan v. Railway Company, 150 Mo. 48; Bohn v. Railway Company, 106 Mo. 433; Sutherland v. Lumber Co., 149 Mo. App. 338; Shriners v. Mullins, 136 Mo. App. 298; Smith v. Box Co., 196 Mo. 715; Barron v. Lead & Zinc Co., 172 Mo. 234; Box Company v. Saucier, 213 Fed. 312.

Claude D. Hall for respondents.

(1) It was proper to show under the petition that the defendant did not cover the joists or girders of the

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building on which plaintiff was working. (a) The plaintiff could prove any facts or circumstances which fairly tended to establish the negligence of the primary fact (the falling material and plaintiff being struck and falling) complained of. Fisher v. Golladay, 38 Mo. App. 537; Calvert v. Railroad, 38 Mo. 467; Goodwin v. Rock Isl. Ry. Co., 75 Mo. 75; Schneider v. Railroad, 75 Mo. 295-6; Edwards v. Chicago, Rock Isl. & Pac. Ry. Co., 76 Mo. 399. (b) It was defendant's duty to make plaintiff's place of work reasonably safe. By covering the joists and girders with scaffold boards, as is customary in buildings of that kind, this would have been done and the injuries to the plaintiff would have been averted. Usage or custom is relevant to show what constitutes negligence or as bearing on negligence in a given case. Jones on Evidence (2 Ed.), sec. 163, p. 184; Schiller v. K. C. Breweries Co., 156 Mo. App. 569; Gordon v. Railroad, 222 Mo. 536; Minier v. Railroad, 167 Mo. 99; Chrismer v. Tel. Co., 194 Mo. 189; Sec. 7843, R. S. 1909. (c) Under a general allegation of negligence plaintiff may properly offer evidence tending to show specific acts of negligence. Wolven v. Springfield Traction Co., 143 Mo. App. 643; Hall v. Wabash, 165 Mo. App. 115. (d) Defendant did not raise the question of variance, by filing an affidavit as required by Sec. 1846, R. S. 1909. Waldheir v. Ry. Co., 71 Mo. 514; Fisher v. Realty Co., 159 Mo. 562; Harrison v. Lakeman, 189 Mo. 589. (2) The court did not err in admitting the ordinance in evidence. Bailey v. Kansas City, 189 Mo. 514; Bragg v. Met. St. Ry., 192 Mo. 350; Robertson v. Railroad, 84 Mo. 121; Brannock v. Elmore, 114 Mo. 59. (3) The defendant's motion for a new trial does not contain a sufficient ground upon which an assignment of error as to this instruction can be based. The fifth ground of the motion for a new trial is too general and it does not state the instruction is erroneous. R. S. 1909, sec. 1841; State v. Norman, 159 Mo. 531; Wampler v. S. F. Ry. Co., 269 Mo. 464; Mfg. Co. v. Bates Co., 201 S. W. 92.

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BLAIR, P. J—*Certiorari.* The record brought here for review is that of the St. Louis Court of Appeals in Seitz v. Pelligreen Construction & Investment Company, 199 Mo. App. 388.

I. The ruling that the grounds of the motion for new trial respecting the giving and refusing of instructions were too general to authorize a review of such instructions is in conflict with the decisions of this court. State ex rel. United Railways Co. v. Reynolds et al., 278 Mo. 554, is in point and controlling.

General Assignment.

II. "The petition alleges that defendant was in charge and in exclusive control of the erection of a building on Fourth near Vine Street, in the City of St. Louis, and that on or about November 30, 1917, while plaintiff was in the employ of defendant and doing carpenter work on the third floor of the building, plaintiff was 'by reason of the negligence of the defendant, struck by a piece of building, or other material, with great force and violence, which fell from a floor above the third floor, on which plaintiff was working, by reason whereof, by reason of the negligence of defendant, the plaintiff fell with great force and violence a distance of about forty feet, from the third . . . to the first floor of said building, and that by reason of being struck as aforesaid, and by reason of falling said distance . . . which was due to the negligence of defendant,' " plaintiff was injured, etc. The Court of Appeals ruled that this petition was sufficient after judgment. The objection made on the trial was, according to the Court of Appeals, that the petition did not allege "any acts which constituted negligence." It is insisted this ruling conflicts with decisions of this court. The Court of Appeals held the petition charged general negligence and, on the trial, justified evidence of specific acts of negligence. Relator contends there is no charge

General Allegations of Negligence.

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of common-law negligence, that the petition is not based on the statute (Sec. 7843, R. S. 1909) and that no ordinance is pleaded. Several decisions of this court are cited.

(a) There is no conflict with McGrath v. Transit Co., 197 Mo. 97, since the Court of Appeals did not uphold the petition on the ground that the doctrine of *res ipsa loquitur* applied. (b) The Court of Appeals ruled that the petition counted on common-law negligence; that a motion to make more definite and certain might have been pertinent, but that a cause of action was stated. Relator cites no decisions of this court which conflict with that ruling. Its contention in this connection is more relevant to the question whether there was evidence to support the verdict.

III. An ordinance of the City of St. Louis was admitted in evidence, and the Court of Appeals upheld that ruling. The ordinance provides, in substance, that it is the duty of persons in charge of the construction of buildings to cover joists or girders above the second floor with scaffold boards or other suitable material, as the building progresses, so as sufficiently to protect workmen from falling between the joists and girders and to protect workmen on lower floors from injury from falling bricks, tools, "or other substances." The ordinance was not pleaded. The Court of Appeals applied the rule that when a cause of action is based upon a violation of duty imposed solely by ordinance, the ordinance must be pleaded; but if an ordinance is used merely as a matter of evidence it need not be pleaded any more than any other evidence. The ruling of the Court of Appeals that the petition charges a cause of action must stand, so far as this proceeding is concerned, no conflict being shown. It must be conceded the petition is not based upon a violation of the ordinance. In these circumstances the ruling of the Court of Appeals on the admission

Ordinance As Evidence.

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of the ordinance is not in conflict with, but is supported by, the decisions of this court. [Bragg v. Met. St. Ry. Co., 192 Mo. l. c. 350; Bailey v. Kansas City, 189 Mo. 503; Robertson v. Railroad, 84 Mo. l. c. 121.] If the petition stated a cause of action at common law, then the ordinance was competent.

IV. It is contended the Court of Appeals conflicted decisions of this court in ruling there was evidence justifying the submission of the Seitz case to the jury. It is not necessary to set out all the evidence detailed in the opinion of the Court of Appeals. That court states there was evidence tending to show that Seitz, under his foreman's directions, was working on the third floor; that others were working on a floor or floors above him; that these upper floors were not covered in any way, either by permanent or temporary floors or otherwise, except over a hoisting engine in another part of the building; that it was customary in such circumstances to install covering of some kind for the protection of workmen; that Seitz was struck and injured by a piece of board or wood which fell from a floor above him. (a) Cases from other jurisdictions are not of much value. We are limited to the question of conflict. (b) The Court of Appeals seems to have held that since the ordinance did not expressly give a cause of action but merely prescribed a duty to be performed, a common-law action would lie for the violation of the ordinance duty. It is said this ruling conflicts with numerous decisions of this court.

Violation of Ordinance Duty.

In Lore v. Mfg. Co., 160 Mo. l. c. 621, 622, this court held that the design of the statute requiring the master to safeguard dangerous machinery was "to modify the common-law doctrine that in the absence of a statute the master was not required to fence his dangerous machinery." If, as the Court of Appeals held, the petition states a cause of action at common law, and a cause of action for general negligence may be sustained

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by evidence of the violation of a duty imposed by an ordinance not giving expressly a cause of action (which we must concede to be correct, since no conflict is shown), then there is no ground for saying the ruling on the sufficiency of the evidence violates the Lore case, if there was evidence the ordinance was violated—and there can be no doubt there was. The holding that the common law was modified by the machinery-guarding act or by the ordinance in this case has no bearing on the question whether a cause of action for general negligence is supported by proof of violation of such ordinance. For the same reason the ruling does not conflict with Lohmeyer v. Cordage Co., 214 Mo. l. c. 687. The decisions in Bohn v. Railway, 106 Mo. l. c. 433, 434, and Hogan v. Railway, 150 Mo. l. c. 48, 49, announce the principle that in an ordinary common-law action for the infraction of a non-statutory duty ordinary care in providing reasonably safe appliances is all that is required. This principle has no relevance to the question whether the ruling of the Court of Appeals, above stated, was right or wrong. In Barron v. Lead & Zinc Co., 172 Mo. 228, it was held that in a case in which a cause of action was given by statute to surviving dependents and plaintiffs' right to sue depended solely upon the statute, a petition stating any cause of action other than one under the statute was demurrable. It is obvious this decision was not conflicted by the Court of Appeals in its ruling on the sufficiency of the evidence in the Seitz case. The statement of the principle applied by the Court of Appeals, made above, discloses it is quite dissimilar to that announced in the Barron case. The case of Smith v. Box Co., 193 Mo. 715, holds that a statute relied upon has no application to the facts alleged or proved. We find no conflict on this point with any of our decisions cited.

V. It is said the ruling of the Court of Appeals on instructions was wrong. The only instructions ruled were those asked by plaintiff in the case. No decisions of this court thought to con-

Instructions.

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flict with that ruling are cited. The question is not argued. No case has come to our attention which conflicts. The point is ruled against relator.

VI. The Court of Appeals did not rule on the assignment concerning the refusal of instructions asked by defendant in the case before it. To these, at least, it applied the doctrine condemned by the authorities cited in Paragraph I, supra. For this reason the record must be quashed. All concur, except *Bond, J.*, not sitting.

Refusal to Consider Instructions.

ST. LOUIS & TENNESSEE RIVER PACKET COMPANY, Appellant, v. EDWARD NOWLAND, JR., and UNITED STATES FIDELITY & GUARANTY COMPANY.

Division One, September 27, 1919.

1. **STEAMBOAT: Rented: Losses Covered by Insurance.** The owner of a boat, having rented it to defendant and having assumed in the charter-party all losses covered by the insurance policies, can recover from the lessee, or from the surety on his bond, which included the charter-party, for no loss which was not covered by the insurance; and consequently the only question in a suit to recover from the lessee and his surety the value of the boat which sank is whether the losses were covered by the insurance.

2. **INSTRUCTION: No Exception.** A failure of appellant to mention in its motion for a new trial an instruction given by the court of its own motion precludes a consideration of any error therein on appeal.

3. **———: Loss of Steamboat: Cause.** If the owner of a steamboat assumed all losses covered by insurance thereon except losses due to negligence or wilful conduct of the master, officers or crew or from overloading, it was not error to instruct the jury that such owner and surety were "not required to show definitely and certainly what caused the sinking of the steamer;" for if they showed that the vessel was handled with care and skill and was not overladen, it became the duty of the owner, in suing for the value of the boat which sank, to show what the cause of the

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loss was to be found in some one of the exceptions mentioned in the contract.

4. **EVIDENCE: Loss of Boat: Competent Employees.** Where the owner of the leased steamboat assumed all losses covered by insurance policies except those caused by the gross negligence, recklessness, or wilful misconduct of the master, officers or crew of the vessel, testimony of the lessee that the officers and crew selected by him as captain of the vessel were competent and careful and of good reputation in their nautical calling was competent for the purpose of meeting the issue of "wilful misconduct," although it might not have been competent in defense of a specific act of negligence.

5. ———: **Marine Protest: Used by Protestants to Establish Defense: Self-Serving Evidence.** In a suit by the owner of a steamboat, prosecuted by insurance companies for themselves and said owner in the name of the owner, against the lessee and his surety for the value of the boat which sank and was lost, a marine protest, made by the master and other officers and members of the crew at the time of the accident, and made for the benefit of the owner and those interested in the cargo and of the officers and crew as well, and containing a statement under oath of all the circumstances of the voyage leading up to the accident and of the particular accident itself, and containing a statement of the notary that he protests in behalf of all persons interested against the winds, waves and perils of rivers as the cause of the disaster, and used by the insurance companies as a basis of settlement with the owner in whose behalf the insurance was made, is competent evidence on behalf of defendants, for what it is worth, as evidence of its truth against the owner, who, having used it to obtain a settlement from the insurance companies, nevertheless seeks to recover from the lessee and his surety by disputing the facts stated in it whose truth he asserted when he obtained the settlement.

6. **REMARKS OF COUNSEL: Interest of Unnamed Party.** Where insurance companies are not only interested in the result of the suit but are substantially parties to its prosecution, though not nominal parties, remarks of counsel indicating their interest in the issue of the trial, in keeping with the facts before the jury, are not unwarranted argument.

7. **EVIDENCE: Opinion Growing Out of Experience.** An expression of an opinion by witnesses who have by actual experience obtained knowledge of the matters concerning which they testify is not incompetent or prejudicial.

Appeal from St. Louis City Circuit Court.—*Hon. Kent K. Koerner,* Judge.

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AFFIRMED.

Jourdan, Rassieur & Pierce for appellant.

(1) Where the answer admits the allegations of the petition and seeks to avoid same by pleading affirmative defenses, as in this case, the burden of proof is on defendants. Richardson v. George, 34 Mo. 104; St. Louis Tow Co. v. Orphans' Benefit Ins. Co., 52 Mo. 529; Glover v. Henderson, 120 Mo. 367; Knoche v. Whiteman, 86 Mo. App. 568; Schutter v. Adams Express Co., 5 Mo. App. 316; Kent v. Miltenberger, 13 Mo. App. 503; Gray's Harbor Comm. Co. v. Cont. Nat. Bank, 74 Mo. App. 633; Bunker v. Hibler, 49 Mo. App. 536. (2) It is error to place the burden of proof where it does not legally rest, and it was therefore error to give Instruction 10. Sidway v. Mo. Land & Live Stock Co., 163 Mo. 342; Aylward v. Briggs, 145 Mo. 604; Knoche v. Whiteman, 86 Mo. App. 570; Almes v. Conway, 78 Mo. App. 490. (3) Instructions to the jury should not be misleading and calculated to divert the jury's attention from the main issue in the case. Such was the effect of giving Instruction 9, and the court erred in giving said instruction. Sidway v. Mo. Land & Live Stock Co., 163 Mo. 342; Price v. Breckenridge, 92 Mo. 378. (4) In instructing juries it is the duty of the court to determine question of law, and to give to the jury the legal effect of contracts, and it is error to submit to them such questions of law. It was therefore error to give Instruction 5. St. L., K. C. & N. Ry. Co. v. Cleary, 77 Mo. 634, 638; Turney v. St. L. & S. F. Ry. Co., 76 Mo. 261; Brannock v. Elmore, 114 Mo. 63; Henry v. Bassett, 75 Mo. 89; Albert v. Besel, 88 Mo. 150; Morgan v. Durfee, 69 Mo. 469. (5) The marine protest made by defendant Nowland as master of the steamer Shiloh was a self-serving statement and was not admissible in evidence in favor of the defendants merely because plaintiff, as owner of the steamer, in its proofs of loss against the insurance

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companies made reference to such protest; and the court erred in admitting the protest over plaintiff's objection. Such documents, when so referred to, would be admissible against the plaintiff owner, in an action against an insurance company; or they may become admissible to contradict the person making them, but not otherwise. Richelieu Co. v. Boston Marine Ins. Co., 136 U. S. 408; Cudworth v. S. C. Ins. Co., 4 Rich. L. (S. C.) 416, 55 Am. Dec. 692. (6) It was error to permit the witness Nowland to state that in his opinion the officers and crew of the steamer were competent, careful and capable. Boggs v. Lynch, 22 Mo. 563; Langston v. South. Elec. Ry. Co., 147 Mo. 457; Boettger v. Iron Co., 136 Mo. 531. (7) It was error to permit the witness Nowland to state that the wharfage charge at a great many points is based upon her registered tonnage and not upon the tonnage she actually did carry, because such statement was immaterial and prejudicial. (8) It was error to permit the witness Wyckoff, in a case where the question of overloading was an important issue, to state that if the steamer had been overloaded she would have sunk at Scanlon, and that it would have been impossible for her to run between Scanlon and Memphis, because that is a conclusion of the witness and is an invasion of the province of the jury. Gutridge v. Mo. Pac. Ry. Co., 94 Mo. 472; Boettger v. Iron Co., 136 Mo. 536. (9) The court erred in not sustaining plaintiff's motion for a new trial, on account of misconduct of counsel in their opening and closing argument to the jury. (a) It is reversible error for counsel in their argument, to persist in arguing matters to the jury, that the court has ruled were improper, and which the court has repeatedly withdrawn. McClendon v. Bank of Advance, 188 Mo. App. 428; Haake v. Milling Co., 168 Mo. App. 180; State v. Whitworth, 126 Mo. 584; Kentucky Wagon Mfg. Co. v. Duganics, 113 S. W. (Ky.) 130. (b) The withdrawal of remarks of counsel in their argument by the

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court does not repair the damage done. O'Hara v. Lamb Const. Co., 197 S. W. (Mo. App.) 165.

John M. Wood and *McGehee, Livingston & Farabough* for respondents.

(1) The action of the court in giving, of its own motion, Instruction 10, not having been assigned as error, or called to the attention of that court, in the motion for a new trial, is not subject to review by this court. State v. Crites, 215 Mo. 91; Almond v. Modern Woodmen, 133 Mo. App. 382. (2) The court correctly instructed the jury that the burden of proof was upon the plaintiff to establish by the preponderance of the evidence the facts necessary to a verdict in its favor: (a) The pleadings did not present a case where the answer admitted the allegations of the petition, and then set up new matter in confession and avoidance. (b) Under the bond and charter-party the mere non-return of the boat did not constitute a breach of the bond. To show a breach the plaintiff had to show that she sank in such manner as not to be covered by the insurance upon her. For Nowland was not liable unless she sank in that manner. (c) The insurance was collectible unless the Shiloh sank through "gross negligence, recklessness, or wilful misconduct of the owner, master, officers or crew," or through being "unduly laden." The presumption is against these, and they must be affirmatively shown. 7 Ency. Ev. pp. 547, 548; Tidmarsh v. Washington Fire & Marine Ins. Co., 4 Mason, 439; Am. Ins. Co. v. Bryan & Maitland, 26 Wend. (N. Y.) 582; Schultz v. Pac. Ins. Co., 14 Fla. 73; Union Ins. Co. v. Smith, 124 U. S. 405; 26 Cyc. 667. (3) The court correctly charged that the defendants were not required to show definitely and certainly the exact cause of the sinking of the Shiloh. The defendants were not liable unless gross negligence, recklessness, wilful misconduct or overloading was shown. (4) The marine-protest was admissible in evidence

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against the plaintiff, because the plaintiff had adopted and used it as a part of its proofs of loss, sworn to and presented to the insurance companies. Plaintiff could not thereafter repudiate the protest. Navigation Co. v. Boston Marine Ins. Co., 136 U. S. 408, 34 Law Ed. 398; Natl. Steamship Co. v. Tugman, 143 U. S. 28, 36 L. Ed. 63. Under these circumstances the protest was admissible against the plaintiff at the instance of parties other than the insurance companies to which it was presented. Atkins v. Elwell, 45 N. Y. 745. (5) The testimony of the defendant Nowland that, so far as his observation was concerned, the officers and crew of the Shiloh were competent and careful, was admissible; if not as tending to show the exercise of care by them on the occasion of the accident, this testimony was clearly competent as bearing upon the question of Nowland's care in selecting and retaining said employees. Kenney v. Railroad Co., 70 Mo. 243; Patton v. Ry. Co., 87 Mo. 117; 8 Enc. Ev., pp. 22, 535, 538, 956; 26 Cyc. 733. (6) The argument of counsel for defendants was not misconduct entitling appellant to a new trial. Counsel stated no fact outside of the record; indulged in no abuse or vituperation; did not intentionally violate the ruling of the court. The only argument complained of consists of reference to the interest of the insurance companies in the litigation. Their interest was shown by documents on file, and the court stated that counsel might comment thereon so far as the record showed the facts. Haake v. Dulle Milling Co., 168 Mo. App. 177; Diggs v. United States, 136 C. C. A. 158; 29 Cyc. 1010.

BROWN, C.—This cause was instituted in the Circuit Court for the City of St. Louis, March 10, 1914. The petition, after alleging the corporate character of the plaintiff and defendant surety company, proceeds as follows:

"And plaintiff for cause of action states that heretofore, to-wit, on the 27th day of October, 1913, de-

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fendant Edward Nowland, Jr., as principal, and defendant United States Fidelity & Guaranty Company, as surety, made, executed and delivered to plaintiff their certain bond or writing obligatory of that date, herewith filed, marked Exhibit A, and thereby acknowledged themselves indebted, and held and bound, unto plaintiff in the just and full sum of $10,000, to the payment whereof, well and truly to be made, said defendants did bind themselves and their and each of their heirs, executors, administrators, successors and assigns.

"That said bond or writing obligatory was, however, subject to certain conditions thereunder written, to the effect that whereas contemporaneously with the execution and delivery thereof, said Edward Nowland, Jr., the principal, had entered into a contract and charter-party with plaintiff, the obligee in said bond, for the use said obligee's steamer, Shiloh (a copy of which contract and charter-party was and is annexed to said bond or writing obligatory and by reference made a part thereof as fully and effectually as if therein set forth in words and figures), therefore if said principal, defendant Nowland, should and would from time to time and at all times fully do, keep, observe and perform all of the things, stipulations, agreements, provisions, undertakings and conditions by him in the said contract and charter-party agreed to be done, observed, kept and performed, and should and would pay all of the rentals in said contract and charter-party mentioned and referred to, as and when the same should become due and payable, and should and would keep and protect the said steamer Shiloh, and plaintiff as its owner, from all claims and demands of every kind, character and description, whether for repairs made, supplies furnished, wages earned or other demands upon or against said steamer or plaintiff as her owner, and should and would keep, save harmless and protect said steamer and plaintiff, as owner thereof, of and from all attorneys' fees and other expenses, and should and would at his, said defendant Nowland's expense,

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protect and defend said steamer and plaintiff against all claims, judgments or suits that might be successfully made, brought or recovered against said boat or plaintiff as owner by reason of anything done or omitted to be done by said Nowland, and should and would return said steamer to plaintiff at the time or times and at the place and in the manner in said contract or charter party mentioned, free and clear of all liens, claims, demands or encumbrances whatsoever, and would in each and every other respect fully and faithfully carry out the said contract or charter-party, then said bond or obligation should be void, otherwise to remain in full force and effect.

"And plaintiff states that there have been breaches of said bond or writing obligatory, and as such breaches thereof this plaintiff assigns the following, to-wit:

"First. That upon the execution of said bond or writing, to-wit, on the 29th day of October, 1913, plaintiff delivered to said defendant Nowland, at Paducah, Kentucky, the said steamer Shiloh, and defendant received the same from plaintiff on said day and at said place, and the rent agreed to be paid by said defendant for the use of said steamer began to accrue on said day at the rate of $22.50 per day, payable to plaintiff, in accordance with the terms of the contract or charter-party aforesaid, on the first and fifteenth days of each month thereafter. That said defendant has failed and refused to pay unto this plaintiff the rent accruing, from and including December 1, 1913, to and including December 15, 1913, fifteen days, at $22.50 per day, amounting to $337.50, although payment thereof has been frequently demanded.

"Second. That the said defendant Nowland, being in charge of said steamer Shiloh on, to-wit, December 15, 1913, under the contract and charter-party hereinbefore mentioned, sank and lost said steamer or boat and has disabled himself from returning her to this plaintiff and has so announced to this plaintiff. That said defendant therefore has made it impossible for himself

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to comply with said contract or charter-party and return said steamer to the plaintiff at Paducah, Kentucky. in as good order and condition as when the same was received by said defendant Nowland, excepting only such usual wear as is incident to the trade or use of said steamer.

"And plaintiff states that the said steamer Shiloh, at the time she was so sunk and lost by defendant Nowland, was reasonably worth the sum and value of $12,000, and is fully lost to this plaintiff.

"Wherefore, plaintiff prays judgment against defendants for $10,000, the penalty of the bond or writing obligatory aforesaid, together with interest and costs."

The answer, omitting introduction and prayer, is as follows:

"Defendants admit that plaintiff is, and was at the times mentioned in the petition, a corporation organized and existing under the laws of the State of Missouri; that defendant United States Fidelity & Guaranty Company is, and was at the times mentioned in the petition, a corporation organized and existing under the laws of the State of Maryland and doing business and maintaining an office in said City of St. Louis; that defendant Edward Nowland, Jr., is indebted to plaintiff in the sum of $337.50 on account of rental for the steamer Shiloh up to and including December 15, 1913, but defendants say that long before the institution of this suit, and when said rental became due, defendant Nowland tendered to plaintiff said sum of $337.50 and now tenders in court said sum in discharge of the rental due under the charter-party or contract mentioned in the petition.

"For other and further answer, defendants deny each and every allegation in said petition and in each count thereof contained, except such as are hereinbefore expressly admitted.

"For other and further answer to said petition, and especially to the second county thereof, defendants state that said steamer Shiloh, which was rented by

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plaintiff under the terms of the charter-party or contract mentioned in the petition, without any fault on the part of defendant Edward Nowland, Jr., or the crew of said steamer, sank and was lost on the 15th day of December, 1913; that under the terms of said charter-party, it was made the duty of plaintiff, during the term for which the said steamer Shiloh was rented to defendant Nowland, to keep the same insured against loss from sinking, as well as from loss resulting from other causes; that defendant Nowland, under the terms of said charter-party, became liable only for the rental of said steamer Shiloh for the term mentioned in said contract, and the plaintiff assumed the liability for loss or damage to said steamer resulting from any cause, and said contract provides that the insurance on said steamer against such loss should be carried by the plaintiff in the sum of $9,000, which was the value at which said steamer was estimated by the parties, and which, less rent paid, was the price which defendant Nowland was to have for said steamer in case he exercised the option to purchase, provided for in said charter-party; that when said steamer sank defendant Nowland, under the terms of said lease, was relieved of obligation to return the same to plaintiff; that plaintiff did insure said steamer against loss resulting from or on account of its sinking and has been paid the amount of said insurance, which is more than the actual value of said steamer at the time that it sank."

The plaintiff replied by general denial. When the trial was called the defendant, having theretofore tendered $337.50 to plaintiff, deposited it in court. The plaintiff then introduced the bond sued on and the contract or charter-party therein mentioned and proved the total loss of the vessel by sinking at the dock at Memphis, Tennessee, at midnight December 14-15, 1913, and rested. It offered no evidence of the cause of the disaster.

The defendants thereupon asked the court to instruct the jury to find for them, which was refused by

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the court and defendants excepted. The charter-party mentioned in the bond and introduced by plaintiff, by its terms chartered to the defendant Nowland the steamboat Shiloh mentioned in the petition for the term of five months from the 29th day of October, 1913, when it was delivered to him at Paducah, Kentucky, for a rental of $22.50 per day to be paid semi-monthly. It contained, among many other provisions not pertinent to these issues, the following:

"Said party of the first part agrees to pay the cost of marine insurance on said steamer during said period of five months, or during the continuance of this charter-party, if, by reason of ice, as hereinafter mentioned, the same shall continue longer than five months, which marine insurance shall be to the amount of nine thousand dollars."

That "upon the expiration of said period, the party of the second part shall return said steamer to the party of the first part, at Paducah, aforesaid, in as good order and condition, as when received by him, excepting only such usual wear as is incident to the trade.

"The party of the second part agrees that said steamer shall be operated by him as a freight and passenger packet in regular trade between Memphis, Tennessee, and Henrico, Arkansas; but said party of the second part may, if he shall so desire, extend such trade as far up the river as Cairo, or as far down the river as New Orleans, providing such steamer shall be covered by proper and adequate insurance."

It was also provided that the steamboat should be operated with a full crew of competent men and that the lessee should comply with all the laws of the United States relating to said steamer and her certificates of inspection and command her at all times when possible, and give his personal skill and judgment towards seeing that she was well and properly cared for, to the same extent as if she were his own property, and give bond with good security for the fufillment of the said charter-party in all particulars and respects; and pay all ob-

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ligation and claims for which the steamer or its owner should be liable, "and that he will, in short, return said steamer to said party of the first part at Paducah, Kentucky, free and clear of all debts, claims, demands, liens or encumbrances of any kind whatsoever, made, created or resulting during the period of time the said steamer was in the possession of said party of the second part.

"Said party of the first part assumes all risks and liability to said steamer which is covered by marine and fire insurance policies upon her; also any extraordinary breakage of shafts, cylinders or machinery; also the consequences of accidental explosion or burning; but in case of loss by sinking or burning, whether such loss be total or partial, but sufficient, if partial, to render said steamer unfit for service at the time, said party of the second part shall remain with and protect said steamer to the fullest extent possible, immediately notifying said party of the first part and giving said party of the first part, or its agents or representatives, sufficient and ample time to reach the steamer and to take possession of her. In the event of any damages to said boat, rendering it unfit for service, for which party of the first part would be responsible, such as partial loss or damage by fire or sinking, the amount to be paid under this contract is to cease with the closing of the day of such accident or loss and is to continue during the period for making repairs, which repairs, party of the first part agrees to make as promptly as possible. . . . In the event of the total loss of the steamer, the charter money, or rental, shall cease on the day of such loss."

The next paragraph provides in substance that the party of the second part shall keep the steamer in as good order and condition as when received by him, ordinary wear of the trade only excepted, subject to conditions in the preceding paragraph.

An option is given in the instrument to purchase the property at $9000, with a credit of all rentals paid

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and accrued. The defendant offered and introduced three policies of insurance on the steamer Shiloh in favor of plaintiff, as follows: One for $2000 issued by the Aetna Insurance Company, one for $3500 issued by the Manheim Insurance Company and one issued by the St. Paul Fire & Marine Insurance Company for $3500. In each of them was a provision that the perils which the underwriter assumed were the unavoidable danger of rivers that should cause loss or damage to the vessel or any part thereof excepting all perils, losses or misfortunes arising from or caused by gross negligence, recklessness or willful misconduct of the owner, master, officers or crew of the vessel of any loss or damage arising from or occasioned by said vessel being unduly ladened. All these policies were in force at the time of the loss.

It was also shown and admitted that about January 21, 1914, the plaintiff made to these three insurance companies the following offer in writing:

"We are willing to borrow from you the sum of $7500 and to give you our written obligation that in compliance with the provisions of the policy subrogating you to any security which we may have for the loss of the boat outside of the insurance, we will institute in our name an appropriate suit or action at law against Ed Nowland, Jr., and the United States Fidelity & Guaranty Company, surety on his bond, to recover thereon for the amount due us from Nowland for the hire of the boat, any amounts for which we may be liable for supplies furnished it and for the value of the boat itself. Should we succeed in recovering judgment and collecting thereon, we will, after first retaining the amount due us for hire and the amount for which we may be liable for supplies, repay to you the said sum of $7500, without interest, or such proportion thereof as the recovery will warrant, but in the event there should be no recovery and collection, then we shall not be liable to return any of the $7500 borrowed nor be liable for its repayment. . . .

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"It is furthermore understood that the expense of the suit against Nowland and the surety company shall be borne between us in the proportion of seventy-five per cent by you and twenty-five per cent by us. You may select such counsel as you may deem proper for the institution and prosecution of the suit or, if you wish it, we will direct our counsel to look after this matter, together with such counsel as you may desire.

"Please advise us whether this settlement and method of compromising your liability is satisfactory. If it is, the $7500 must be paid within two weeks from this date; otherwise the adjustment is off."

This offer was accepted and the $7500 paid plaintiff on the terms expressed.

Defendants introduced the protest of the master (Nowland) and other officers and members of the crew of the Shiloh, made at the time of the accident, against objection and exception duly made by the plaintiff. They also introduced evidence tending to show that the steamer sank at the Memphis wharf at the time of the completion of a trip from the South, without fault of the defendant or the other officers, or the crew, and that it had not been overladen. On the other hand plaintiff introduced testimony that the sinking was due to carelessness and overloading.

At the close of all the evidence the defenants again asked an instruction in the nature of a demurrer to the evidence, which was refused. The court then gave a number of instructions at the request of plaintiff and defendants respectively. Among those given for the defendants are the following, upon which error is assigned in this appeal:

"5. If you find from the evidence that the Shiloh sank through one of the perils covered by the insurance upon her so that plaintiff was entitled to collect said insurance of the insurance companies, and if you find that the amount of said insurance was equal to or greater than the value of said steamer, then the plain-

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tiff is not entitled to recover for the sinking of said steamer, even though the plaintiff has not in fact collected said insurance.

"9. In order to avoid liability for the sinking of the steamer Shiloh, the defendants are not required to show definitely and certainly what caused the sinking of said steamer.

"To the giving of which instructions for defendants, and each of them, plaintiff then and there duly excepted at the time and still excepts."

The court then of its own motion gave the following instruction, to the giving of which plaintiff duly excepted at the time.

"10. The court instructs the jury that the burden of proof is on the plaintiff to establish by the preponderance or greater weight of the evidence the facts necessary to a verdict in his favor under these instructions.

"By the terms 'burden of proof' and 'preponderance of the evidence,' the court intends no reference to the number of witnesses testifying concerning any fact, or upon any issue in the case, but simply uses those terms by way of briefly expressing the rule of law, which is that unless the evidence (as to such issue) appears in your judgment to preponderate, in respect to its credibility, in favor of the party to this action on whom the burden of proof (as to such issue) rests, then you should find against such party on said issue."

The motion for a new trial does not mention this instruction. The cause was submitted to the juryy, which returned a verdict for plaintiff for $337.50, the amount of rental due and unpaid, upon which judgment was entered. After an unsuccessful motion on the part of plaintiff for new trial it took this appeal.

There are certain questions relating to the admission of evidence to which reference will be made in the opinion.

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I. This is a suit to recover $10,000, the amount of the penalty of a bond executed by the defendants to the plaintiff, conditioned for the performance of the terms of a contract technically called a charter-party, by which the Mississippi River steamer Shiloh was chartered by plaintiff to defendant Nowland for five months, to be returned to the plaintiff upon certain conditions and subject to certain contingencies to which we will presently refer. The condition of the bond was set out in the petition, and by its terms referred to the charter-party, which was thereto annexed and made a part thereof. By it the plaintiff expressly assumed all risks and liability covered by marine and fire insurance polices upon her. At that time three policies of insurance were in force insuring the plaintiff against loss of the steamer by sinking unless "caused by gross negligence, recklessness, or willful misconduct of the owner, master, officers or crew," or from "being unduly ladened." While said policies were all in force, and on the 15th day of December, 1913, the steamer was lost by sinking at the dock in Memphis, Tennessee.

Losses Covered by Insurance.

A proof of said loss, which we shall have further occasion to notice, was thereupon made by the plaintiff against the respective underwriters in the three insurance policies, and thereafter the plaintiff made a proposition in writing to each of them to the effect that they should loan plaintiff $7500, for which it would subrogate them to any security plaintiff might have for the loss of the boat outside the insurance and that it would institute in its name a suit against the defendants on this bond for the value of the boat with unpaid rentals. If successful it would repay the said $7500 without interest, otherwise it would retain the same, the said underwriters to pay seventy-five per cent of the expenses of the suit. The underwriters were also authorized to select such counsel as they might deem proper for the institution and prosecution of the suit or if they desired it would direct its own counsel to look

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after the matter, together with such counsel as they might desire. This proposition was accepted by the three underwriters. The $7500 was advanced to plaintiff and this suit was brought. The insurance companies involved in this transaction are the Mannheim Insurance Company of Mannheim, Germany; the St. Paul Fire & Marine Insurance Company of St. Paul, Minnesota, and the Aetna Insurance Company of Hartford, Connecticut.

We have made this condensed statement of the pleadings and undisputed facts involved in this appeal that we may have well in mind the parties interested in and to be bound by the result of the suit, as well as the narrow issues involved.

It will be seen from the preceding paragraph that this suit was instituted, and is prosecuted and maintained, by the plaintiff, for the use and benefit of the three insurance companies, as well as for itself. They are interested in its result to the extent of $7500. If the plaintiff recovers for the loss of the boat, they get it back to the extent of the loan and plaintiff gets the remainder. The amount sued for being ten thousand dollars, the penalty of the bond, they divide the expense exactly in proportion to the interest of each.

To the extent of the interest of the underwriters the issue is clearly defined. It is whether or not the loss of the Shiloh comes within the terms of the policies by which they have obligated themselves to pay for the loss of the boat by sinking, unless such loss was caused by gross negligence, recklessness, or willful misconduct of the owner, master, officers or crew of the vessel or from its being overladened. In the absence of these excepted causes they can be entitled to nothing. The plaintiff, having expressly assumed in the charter-party all losses covered by the insurance, is also entitled to nothing, so that the issue as to all is precisely the same; that is to say, whether the loss is covered by the policies. Being reduced to still narrower limits by the terms of the bond, including the charter-party which is a part and

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parcel of it, and the insurance policies which furnished, as we have seen the measure of the rights of all, the issue is reduced to the simple question whether the loss was caused by gross negligence, recklessness or willful misconduct of the master, officers or crew of the vessel or by its having been unduly ladened. It is admitted by appellant in his statement that there was evidence on both sides of this proposition. The jury were the judges of its character and weight, and the verdict and judgment thereon must stand unless something occurred in the trial either in the introduction of evidence, the instructions upon which it was submitted or the argument of counsel which might unlawfully influence them in this determination.

II. The first error of which the appellant complains is the giving to the jury by the court of its own motion, of instruction number ten. Whatever difficulty might attend the determination of this question has been obviated in the failure of the appellant to notice it in the motion for a new trial. This precludes its examination here.

Assignment.

III. The plaintiff also complains because the court gave at the request of defendant an instruction numbered nine which told the jury that "in order to avoid liability for the sinking of the steamer Shiloh, the defendants are not required to show definitely and certainly what caused the sinking of said steamer." It says that this was equivalent to instructing the jury that the burden was upon the plaintiff to show that the sinking of the vessel was caused by gross negligence of the officers or crew or overlading. Without expressing any opinion upon the question whether this construction, if couched in plain, simple and unmistakable words, would or would not be error, we are of the opinion that it is suceptible of no such construction. If the evidence showed to the entire satisfaction of the jury that the vessel was, at

Cause of Loss.

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and previous to the time of the sinking, handled with skill and care and that it was not overladened, it was their duty to find that the loss was covered by the insurance. The real cause might have been unknown. It might have been the opening of a seam in her bottom or collision with a concealed obstruction which had fallen from the cargo of another ship or from the dock. The cause of the disaster was immaterial except in so far as it might tend to prove that the sinking was negligent or not. If there was no negligence in the handling of the vessel at the time, then the sinking was without negligence of the officers or crew. If the disclosure of the real cause would have shown negligence, the burden was upon plaintiff to show it. That is peculiarly true in this case where the charter-party required the lessee and master to immediately notify the plaintiff of the disaster and to remain with the vessel only until the owner could take possession.

IV. The appellant predicates error upon the action of the court in permitting Captain Nowland to testify, in substance, that the officers and crew selected by him as captain of the Shiloh to assist in the navigation of the vessel were careful and competent and of good reputation in their nautical calling. This objection seems to be founded on a misapprehension as to the real office of this testimony under the pleadings in this case. Nowland was not only the owner of the vessel for the time being for all purposes connected with its navigation, but was its master charged with the employment of officers and crew. He was charged with gross negligence and mismanagement with respect to these duties. In short, the appellant vigorously insists that the burden is upon him to exonerate himself from this charge. Had he knowingly placed his vessel at the mercy of incompetent or reckless officers or crew without professional character or reputation and its loss had resulted therefrom, it is evident that the insurance companies could have availed

Character of Employees.

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themselves of this condition of the policy to avoid liability on the ground of willful "misconduct" of the master, although it might have been only ignorance on the part of the crew. The enumeration contained in the policy of those whose negligence or misconduct would exonerate the underwriters is carefully expressed disjunctively, and defendants had the right to prove specifically that each particular person so enumerated had done his duty. The point here involved bears no analogy to an attempt to disprove negligence by proving the good reputation of the party charged. In such case, except in certain instances depending upon the nature of the act charged, the evidence is inadmissible. Here it is clearly admissible in its relation to the conduct of Nowland alone.

V. Perhaps the most important question in this case is raised upon assignment of error in the admission in evidence on behalf of the defendants of the protest of the master and crew of the Shiloh.

Marine Protest.

The marine protest is ancient in its origin and stands upon solid ground with respect to its useful purpose. It is made for the benefit of the owners of the ship and those interested in its cargo as well as its officers and crew, and contains a statement under oath of master officers and men alike of all the circumstances of the voyage leading up to the particular accident, as well as of the accident itself, and gets its name from a statement of the notary that he protests in behalf of all against the winds, waves and perils of seas and rivers as the cause of the disaster. It will be seen that this statement, with its wealth of detail, is an important element in determining the cause of the disaster, especially to insurance companies, so that its incorporation into the proof of loss has become a universal caution if not a rule of law.

In this case the protest was incorporated in the proof of loss furnished by plaintiff to the three insur-

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ance companies, and of course became the basis of the claim against them. This claim thus supported resulted in the arrangement by which the plaintiff received $7500 from the underwriting companies and undertook the prosecution, with their help, of this suit, in which the sole issue between plaintiff and defendant, raised between plaintiff and the underwriters by the proof of loss supported by the protest; that is to say, whether the circumstances of that loss, so minutely and vividly related in the protest, entitled the plaintiff to recover upon the policies the amount of its loss. It now seeks, with the $7500 in hand, to dispute the facts stated in the protest upon which it obtained it. We think that having used this instrument for its benefit in that transaction, it is now admissible for what a jury might consider it worth as evidence of its truth against plaintiff. [Richelieu Co. v. Boston Insurance Co., 136 U. S. 408, 435; Atkins v. Elwell, 45 N. Y. 753, 757.] It is no less its admission than if it had written it for the purpose for which it used it.

VI. The appellant complains that counsel for respondent were permitted to make improper statements to the jury in argument. We have searched for these in the record, and find that objections were made and exceptions saved to statements indicating the interest of the insurance companies in the issue on trial. We have already referred to that interest for the purpose of showing that these companies are not only interested in the result of this case, but are substantially parties to its prosecution. This being true and the facts being fully before the jury we see no reason why they should not be referred to by counsel. We do not think the remarks of counsel as shown in the record are reversible error.

Remarks to Jury.

VII. We do not think the testimony of Captain Nowland in explanation of the difference between registered tonnage, cargo space and displacement was either

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immaterial or prejudicial, nor was the statement of river steamboat men to the effect that had the steamer been so heavily ladened as to sink at the dock in Memphis it could not have passed with the same load safely up the stream to that point, and other testimony of the same character, either immaterial or prejudicial. Such things are matters of knowledge depending largely upon the experience of the witness in his calling, which alone entitled him to speak on the subject.

Evidence.

Finding no reversible error in the record we affirm the judgment of the circuit court.

Railey, C., concurs.

PER CURIAM:—The foregoing opinion of BROWN, C., is adopted as the opinion of the court; all of the judges concur; *Bond, J.*, in the result.

FRANCES M. RIPKEY, Appellant, v. JOHN GRESHAM et al.

Division One, September 27, 1919.

1. **APPELLATE JURISDICTION: Proceeding to Open Road: Injunction.** The Supreme Court has jurisdiction of an appeal from a judgment of the circuit court dismissing the petition of a wife to enjoin the county court and highway engineer from establishing, by a proceeding to which she was not a party, a public road through lands in which she and her husband owned an estate by the entirety.

2. **PUBLIC ROAD: Estate by Entirety: Wife Not Party.** A proceeding to establish a public road through lands owned by a wife and her husband as cotenants by the entirety, is void as to the wife who was not notified of the proceeding and did not appeal, although her husband was made a party and contested the establishment of the road.

Appeal from St. Clair Circuit Court.—*Hon. Charles A. Calvird*, Judge.

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REVERSED AND REMANDED (*with directions*).

Waldo P. Johnson for appellant.

(1) In a proceeding to establish a public road the petition must be accompanied by the names of all resident landowners. R. S. 1909, Sec. 10435; R. S. 1899, sec 9414; Spurlock v. Dornan, 182 Mo. 242; Bennett v. Hall, 184 Mo. 407. (2) The word "owner" in statutes of eminent domain is used in a comprehensive sense and includes all persons having any interest in the land. 15 Cyc. 844, 845; Ry. Co. v. Baker, 102 Mo. 553; McShane v. Moberly, 79 Mo. 41; Mantz v. St. Paul, 52 Minn. 409; Gerrard v. Railroad Co., 14 Neb. 370; McCotter v. New Shoreham, 21 R. I. 43. (3) In proceedings of eminent domain, the wife, holding estate by the entirety, is a necessary party. Holmes v. Kansas City, 209 Mo. 513; Lumber Co. v. Bradfield, 153 Mo. App. 527, 532. (4) The husband cannot bind his wife as agent or otherwise in a road proceeding. Spurlock v. Dorman, 182 Mo. 242. (5) The utmost strictness is required to give proceedings of eminent domain validity. Every essential requirement of the statute must be complied with or such proceedings will be void. Anderson v. Pemberton, 89 Mo. 61; Spurlock v. Dornan, 182 Mo. 242; Nishabotna Drain. Dist. v. Campbell, 154 Mo. 151; Taylor v. Todd, 48 Mo. App. 550; Cunningham v. Railroad, 61 Mo. 33; Rousey v. Wood, 57 Mo. App. 650.

BROWN, C.—This action was instituted in the St. Clair County Circuit Court on May 15, 1915. The plaintiff is the wife of one Joseph G. Ripkey. She and her husband, as tenants by the entirety, own a tract of land in Road District Number Two of St. Clair County, Missouri, upon which they reside. The defendant John Gresham is the road overseer of said road district. The other defendants are the highway engineer and judges of the county court of said county, and

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the petitioners in a certain proceeding to establish a public road through said land. The object of the suit is to enjoin the defendants from entering upon said land and opening a public road in pursuance of an order of the county court made upon said petition.

Upon a trial had at the November term, 1915, of said circuit court, there was a finding for the defendants and judgment dismissing the plaintiff's petition, from which, after a motion for a new trial overruled, this appeal was allowed to the Springfield Court of Appeals, where the appellant filed his statement and brief. In the statement the facts relied on are tersely set forth as follow:

"The plaintiff herein was in no manner a party to the proceedings for the establishment of the road. Her name was not listed as an owner of the land, no assessment of her damages was made and she did not appear in such proceeding. Her husband, Joseph G. Ripkey, was listed as the owner of the land, made a party to the proceeding and contested the establishment of the road.

"The trial court dismissed plaintiff's bill, apparently on the ground that plaintiff was estopped by her husband's conduct."

The respondent filed no statement or brief. The Court of Appeals of its own motion certified the cause to this court on the ground that it involved the title to real estate. At the October term, 1916, of this court, Hargus and Johnson, the attorneys of record for respondents in the trial court, appeared and by leave of this court, first had and obtained withdrew from the cause as such attorneys.

There is no question of our jurisdiction in this cause. [Monroe v. Crawford, 163 Mo. 178; Baubie v. Ossman, 142 Mo. 499; Baker v. Squire, 143 Mo. l. c. 99.]

That upon the record as it stands in this court the plaintiff is entitled to the injunctive relief asked in the petition has been settled by this court in the follow-

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ing cases: Holmes v. Kansas City, 209 Mo. 513; Spurlock v. Dornan, 182 Mo. 242. The precise question received full consideration in each of those cases, and in each of them we held that the proceeding was void as to the wife who was entitled as cotenant by the entirety with her husband and who was not notified of the proceeding to appropriate the land and did not appear. We accordingly reverse the judgment of the Circuit Court for St. Clair County, and remand the cause with direction to that court to grant the injunctive relief asked in the petition.

Ragland and *Small, CC.*, concur.

PER CURIAM:—The foregoing opinion of BROWN, C., is adopted as the opinion of the court; all of the judges concur.

FRED WIESE v. JOHN THIEN et al., Appellants.

Division One, September 27, 1919.

1. **PRIVATE ROAD: Easement at Common Law.** The doctrine of private ways existed at common law, and was usually founded on a presumption of grant or reservation; as where one sold a close surrounded by his own estate he was presumed to grant the easement of access, or if he sold his surrounding estate and reserved the close a reservation of the same easement would be presumed. And it was this doctrine of presumed easement which the State recognized and perhaps enlarged in Section 20 of Article 2 of its Constitution.

2. **———: Pleading: Accessible.** The statute (Sec. 10447, R. S. 1909), prescribing the manner in which an easement of access by a private road may be acquired, prescribes no formula of words in which the petition must set forth that the petitioner is the owner of the tract of land for which the easement is desired and that no public road passes through it or touches it. Any words that expressed these facts in plain and unmistakable terms are sufficient; and if it uses such words, the petition is not defective or insufficient for that it does not employ the work "accessible" used in the statute.

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3. ———: **Character of Easement and Lands.** The right to an easement of access to private lands is not personal, but pertains to the land to which it becomes appurtenant; and the right does not depend upon the extent of the tract, nor the number of acres owned by petitioner, nor upon the lines of Government subdivisions, but it may be invoked where the petitioner owns lands on both sides of an impassable stream, and for the benefit of that part of the tract which lies on the opposite side of the stream from a public road which touches the part on that side at one corner.

4. ———: **High Bluffs: Prohibitive Expense.** The fact that the part of petitioner's tract on the side of an impassible stream, which part is touched at one corner by a public road, consists of high bluffs and craigs, and that the expense of constructing a road on that side would be prohibitive, is a strong reason for creating a private way of access to the part of the tract on the opposite side.

5. ———: **Pleading: Showing Present Access.** And the mere fact that the petitioner in his petition has described that part of his tract on the side of the impassable stream, which at one corner is touched by a public road, does not preclude him from presenting his claim to a private way to the part of the tract on the opposite side.

Appeal from Gasconade Circuit Court.—*Hon. R. A. Breuer,* Judge.

AFFIRMED.

W. S. Pope and *Robert Walker* for appellants.

(1) Neither the petition nor the evidence shows that petitioner is the owner of a tract of land not passed through or touched by a public road. Under the admitted facts, petitioner is not entitled to the private road petitioned for. Sec. 10447, R. S. 1909; Chandler v. Reading, 129 Mo. App. 63. (2) Under the admitted facts, the private road petitioned for is not a way of strict necessity. Colville v. Judy, 73 Mo. 651; Cox v. Tipton, 18 Mo. App. 450; Barr v. Flynn, 20 Mo. App. 383; Coberly v. Butler, 63 Mo. App. 556. (3) The facts in the case do not come within the purview of the provisions of Sec. 10459, R. S. 1909.

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J. W. Hensley and *Clarence G. Baxter* for respondent.

(1) The petition in this case states a cause of action: (a) Under the common law as applicable in this State. Tiedeman on Real Property (2 Ed.), sec. 609; (b) Under Sec. 20, Art. 2, Mo. Constitution; (c) Under Sec. 16, p. 658, Laws 1913; (d) Under Sec. 28, p. 661, Laws 1913. (2) Private property may be taken for private use for private ways of necessity. Sec. 20, Art. 2, Mo. Constitution. This section of the Constitution is self-enforcing. Householders v. Kansas City, 83 Mo. 488; Hickman v. City of Kansas, 120 Mo. 110; McGrew v. Railroad, 230 Mo. 548. (3) The Constitution of Missouri must be construed according to its obvious meaning. Hamilton v. St. Louis County Court, 15 Mo. 3. (4) Technical terms such as "ways of necessity" should be read and construed along with and in the light of the common law. Lowe v. Summers, 69 Mo. App. 637. (5) The Constitution of Missouri seems more liberal in the matter of granting private ways of necessity than the common law, because the common law required that ways be of "strict necessity." Belk v. Hamilton, 130 Mo. 299; Tiedeman on Real Property (2 Ed.), sec. 609. (6) Courts are not bound by legislative construction of the Constitution, neither did the Legislature intend to limit the constitutional right to private way of necessity by the enactment of Sec. 16, p. 658, and Sec. 28, p. 661, Laws 1913, or either of them, for the reason that these statutes seem to be declaratory of two instances of ways of necessity, defining same, and do not preclude the idea that there may be other instances of what might be in fact a way of necessity. Householders v. City of Kansas, 83 Mo. 488. (7) Excessive expense in procuring another way would make the way petitioned for in this case a way of strict necessity. Tiedeman on Real Property (2 Ed.), sec. 609. (8) The statute under whch the petition is drawn (Sec. 16, p. 658, Laws 1913), in its use of the

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words "public road," contemplates an accessible public road. Where there is no accessible public road passing through or touching petitioner's land where he lives and farms, then within the meaning of the law, there is no public road. A road that cannot be used by petitioner is, so far as he is concerned, no road.

BROWN, C.—This is a proceeding to open and establish a private road over the lands of appellants, connecting the lands owned and occupied by the respondent with a public road running some distance to the west of it. It was begun in the County Court of Gasconade County, in which county the petitioner resides and all the lands involved are situated. The road was laid out and established in due course by the county and damages regularly accessed. An appeal was taken from that court to the Gasconade Circuit Court where the matter was retried, and the court made its findings as required, which are fully sustained by the evidence. The findings and judgment of the circuit court were made and entered at the January term, 1916, and are as follows:

"Now on this day the above cause coming on to he heard, and the plaintiff, Fred Wiese, appearing in person and being represented by counsel, and the defendants, John Thein and Vincenit Skornia, both appearing to this suit in person and being represented by counsel, and the matters in issue being taken up and considered by the court, and the court, after seeing and hearing the evidence adduced by the plaintiff and the defendants and each of them, finds for plaintiff, Fred Wiese; finds that the said Fred Wiese is an inhabitant of Gasconade County, in the State of Missouri; that he is the owner of the south half of the northeast quarter of Section 21, Township 41 North, Range 4 West, in Gasconade County, Missouri, upon which he resides with his family; that the Bourbois River crosses the east end of his said lands in a general north to south direction, about 200 yards west of and

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nearly parallel to the east boundary line of plaintiff's said lands, and that plaintiff's residence, barn and all his buildings and all his tillable lands lie on the west side of said river, and that all that part of his lands lying on the east side of said river consists of and is a very high, rough and rugged bluff, rising steep and rocky from the water's edge, the lower part of which consists of ledges of wall rock, the other and top part of which is rough and uneven, and mostly covered with huge boulder rocks; that the east end of plaintiff's land abuts on the Franklin County line, and that no public road passes through or touches plaintiff's said lands, except on top of said bluff at the southeast corner of his said lands for a distance of sixty-nine feet; that it would be impracticable to build and construct a roadway from plaintiff's tillable lands and residence on the west side of said river, to the east and across said river over any part of said bluff to said public highway, at the southeast corner of plaintiff's said lands; and if such could be done, it would require an excessive expenditure of approximately four thousand dollars of money, and would be confiscatory of plaintiff's said lands, and further should this be done the ford of the river would be impracticable, because during a large portion of the seasons it would not be fordable on this part of the river, and such roadway from any point along this part of said river over any part of said bluff to the public road at the southeast corner of plaintiff's lands would necessarily be steep, and that after reaching the public road at this point, plaintiff could only travel in one direction, and then going nearly in an opposite direction from school, post office and trading point, as this public road starts at this point and runs in a southwest direction a distance of one and one-half mile to and across the river, thence west to and connecting with a south-to-north public road, which runs about one mile west of plaintiff's said lands, over the Bourbois bridge, through the town of Tea to Owensville and Rosebud, plaintiff's trading points on the Chicago, Rock Is-

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land & Pacific Railroad, and that this road crosses the said river at Tea post office about two miles northwest of plaintiff's farm, over the bridge over said river; and that should plaintiff be forced to the last described route, he would in addition to incurring the excessive expenses aforesaid be required to cross said river twice, at impracticable fords not bridged, and be made to go a distance of three and one-half miles to public school, four and three-quarter miles to store and post office and about fifteen miles to trading stations on railroad, making the distance to said points at least three miles further than by the route asked for in plaintiff's petition; that plaintiff's lands lie within twenty miles of the Chicago, Rock Island & Pacific Railroad, a railroad running from east to west across said country, through Owensville and Rosebud, trading points about eleven miles north of plaintiff's farm; that there is no public road passing through or touching plaintiff's said lands except as aforesaid, which said way would be entirely impracticable, and that plaintiff has no other road or outlet from his said premises except over the lands of others; that the way herein petitioned for would be practicable, providing for plaintiff a way to school of less than one mile distance, and to railroad ten or eleven miles distance, and to store and post office two miles distance, and by giving the way petitioned for he would not have to cross said river in going to school, and in going to postoffice and railroad he could cross same by way of a bridge built by the taxpayers of said county for the convenience of all the people of the community where the parties to this suit live; the court further finds that the way and road herein prayed for is practicable, and a way of necessity within the meaning of the Constitution and laws of this State; that at a former trial of this matter in the county court in which all the parties to this suit appeared in person and by counsel, damages were awarded to John Thien as follows: No damages; and that damages

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five dollars by the jury trials, and that in the trial of were awarded to Vincent Skornia in the sum of seventy- this case in this court it was agreed by all the parties to this suit that the damages awarded to the defendants in the county court were fair and reasonable, and that the same should be taken and adopted as the damages to be found and awarded in this trial in the event the issue should be found for the plaintiff.

"It is therefore ordered and adjudged by this court that the said private road be established according to the prayer of the petition and plat of same, to-wit:"

Here follows the description of the center line of the road twenty feet in width as located by the commissioners. The remainder of the judgment relates to the payment of damages and costs.

The petition is in two counts. The first asserts that the petitioner is an inhabitant of Gasconade County; that he owns the south half of the northeast quarter of Section 21 and all that part of the northeast quarter of the southeast quarter of Section 21 lying west of the Bourbois River, in Township 41 north, of Range 4 west, in said county; "that he has no road from said lands and premises except through gateways and over the lands of others." The second count states "that no accessible public road passes through or touches said land." Each count sets out in detail the necessity and use for a private road leading west from the premises described.

I. It will be seen from the foregoing statement that the only issue between these parties is a naked right of the petitioner under the Constitution and laws of this State to have access to the farm on which he resides through and over the lands of the defendants. There is no question of damages. These were admitted to be just and reasonable, and include all those elements which the law recognizes as subjects of pecuniary compensation. Whether the vigorous defense proceeds from a desire for a holiday in court or from a

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patriotic impulse to vindicate the law can make no difference. The question involved is important, as well as interesting, and is here for our consideration.

The framers of our Constitution were not inventors of the doctrine of private ways of necessity. They existed by the common law, and were usually said to be founded upon a presumption of grant or reservation; as where one sold a close surrounded by his own estate he was presumed to grant the easement of access, or if he sold his surrounding estate and reserved the close a reservation would be presumed of the same easement. In Snyder v. Warford & Thomas, 11 Mo. 328, the same doctrine was said to apply to the United States as an original proprietor in the disposition of the public lands. Judge NAPTON speaking for the court said: "The United States being the proprietor of a section of land, entirely surrounded by eight other sections, sells the section so surrounded; the purchaser acquires, by the common law, a right of way to the land he has bought, as a necessary incident of the grant. The case is not altered by the United States selling the surrounding land to different individuals. The purchasers take it subject to the burden imposed on it whilst it belonged to the Government, the original proprietor." The State did not exceed its jurisdiction over private property within its limits by recognizing and perhaps enlarging the application of this principle in Section 20 of Article 2 of the State Constitution, by excepting private ways of necessity from its guaranty of inviolability and expressly vesting in the Legislature the power to prescribe the manner in which such easements might be acquired. It was in pursuance of the authority so conferred that Section 10447, Revised Statutes 1909, by which this proceeding must be judged, was enacted. It prescribes no formula of words in which the petition must be set forth that the petitioner is the owner of the tract of land for which the easement is desired, and that no public road passes through it or touches it.

Easement.

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Petition. Any words that express these facts in plain unmistakable terms are sufficient. This petition for instance states "that no accessible public road passes through or touches said land." The word "accessible" is relied on by appellants as rendering this petition insufficient and the judgment rendered upon it null and void. The argument implies that there could be such a state of facts that a public road might touch the land and still be absolutely inaccessible to it. This involves a distinction altogether too shadowy for application by a court. To relieve the law from the charge of absurdity we must assume that the Legislature intended such a contact with the premises involved as would give access to the premises and thus avoid the necessity upon which the legislative right is founded. The petition is good and needs only to be sustained by the facts.

II. As we have already seen the right conferred by this statute is not a personal one, but pertains to the land to which it becomes appurtenant. It is the situation of the land that calls for its application, and the owner for the time being is the instrument by which the proceeding is instituted. The statute requires that he be the owner of a tract or lot of land and that no public road passes through or touches it, and it is to this tract alone that the right appertains. That the same proprietor has other lands in the same or adjoining counties does not impair his statutory remedy. The lines of Government subdivision have no application, even though they may be used in his title deeds to describe the extent of his holding. For instance; it is a matter of common knowledge that the Government, in surveying the public lands, frequently meanders a stream, so that no subdivision line is permitted to cross it; while in other cases, as appears to have been done in this, the subdivision lines cross the stream so that its bed is included in the description of sectional subdivisions. The

Character of Easement and Lands.

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method adopted makes no difference in the rights of riparian proprietors in the bed of the stream, although these rights may perhaps be affected by the nature of the stream itself. But so far as the statute now under consideration is concerned, the fact that the proprietor who invokes its remedy with respect to lands bordering upon an impassible stream may also have lands on the other side cannot affect his right of access to either tract. The effect would be the same, in all respects, as if his holdings were separated by the lands of other proprietors.

In this case the farm of the petitioner is situated on the west bank of the Bourbois River at a point where the stream is unfordable throughout a considerable portion of each year. One of its Government subdivisions extends across the river a distance of about two hundred yards. The east bank of the river is formed by a palisade of perpendicular rock surmounted by boulders which cover practically the entire strip. On this bluff runs a road which touches the east line of the strip for a distance of sixty-nine feet, and then passes southwesterly away from it. The court has found that to construct a road from its farm to the road on the top of the bluff, so that it could be used only during that portion of the year when the stream was fordable would cost approximately four thousand dollars, which would be confiscatory of his land, which means as far as it means anything that the cost would amount to as much or more than the value of his farm. It is perhaps unnecessary to take into consideration the fact that by passing this ford and climbing the bluff his children attain a school house less than a mile from his residence by going three and one-half miles and recrossing the river at another ford during that portion of the year when the stream is fordable. The same disparity of conditions exists in reaching available trading and shipping points. These facts force the conclusion that for the purpose to which the provisions of Section 10447 apply, the tract owned by peti-

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tioner on the east side of the river is, within the meaning of this section, as much a separate tract of land as if it were situated on the other side of a meandered navigable river or miles away across the level prairie. The prohibitive expense of connecting these tracts for purposes of access to the farm on the west side of the river might of itself produce that result. [Tiedeman on Real Property (2 Ed.), sec. 609 and cases cited.] Yet in this case we have the added reason that the access so obtained would be entirely inadequate to the purpose which the law is designed to serve. That purpose is such communication with the vicinage as makes the estate inhabitable under conditions indispensable to its appropriate occupation and use.

III. The only remaining question is whether the mere fact that the respondent in his petition has described his holding as including the bluff on the east side of the river precludes him from presenting the case in the aspect we have considered. We do not think so. The disclosure of the real situation in his petition has no other or greater effect than does the disclosure of the same facts in evidence. He simply presented his entire case to the county court and called for the determination of his right, and the law will not punish him for that commendable course. We think that upon the whole case as presented in the petition and upon the trial he is entitled to the relief granted him in the circuit court and its judgment is therefore affirmed.

Precluded by Petition.

Ragland and *Small, CC.*, concur.

PER CURIAM:—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All of the judges concur; *Bond, J.*, in result.

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THE STATE at The Relation and To The Use of ELBERTA PEACH & LAND COMPANY, Appellant, v. CHICAGO BONDING & SURETY COMPANY, Appellant.

Division One, October 10, 1919.

1. **RECEIVER: Suit for Funds Converted by Predecessor: Proper Relator.** A receiver appointed under Sec. 2018, R. S. 1909, cannot maintain a suit in his own name against the sureties on the bond of his predecessor; but where the order appointing the original receiver directs him to take possession of the property and with leave of court to bring such suits as shall be necessary to recover the assets, and the same power is given to the successor receiver, with nothing in the record showing an attempt to vest the legal title in either receiver, the suit to recover from the surety on the first receiver's bond for moneys converted or misappropriated, should be brought, not in the name of the successor receiver, but in the name of the company for whom the receiver was appointed.

2. **BOND: Liability for Funds Converted by Receiver: Deposit in Bank.** A bonding company cannot discharge its obligation as surety by pointing out some other person who is also legally liable for a loss. So where a receiver was appointed for an industrial company and authorized to take possession of its assets, including money on deposit to its credit, and defendant as surety executed its bond, obligating itself that the receiver would faithfully and truly account for all moneys, assets and other property that should come into his hands, and thereafter the receiver caused to be transferred on the bank's books to his credit as receiver a deposit previously made to the credit of the industrial company, and thereafter by checks signed by himself as receiver and payable to himself drew out the deposit and converted it to his own use, the bonding company is liable to the company for the amount so misappropriated, and cannot escape payment on the theory that the bank had actual knowledge that the deposit was a trust fund and that the company was the real owner thereof. The legal title of the fund was in the company, but the right to possession after its redeposit was in the receiver, and the bank was bound to pay his checks when in proper form, and therefore the surety must account for the money misappropriated; and although the industrial company, upon a showing that the bank knew that the receiver was converting the fund to his own use and with such knowledge aided him in so doing by honor-

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ing his checks, might in a proper proceeding recover from the bank, still the surety must respond upon its guaranty that the receiver would faithfully account for the money and other assets reduced to his possession.

3. **BILL OF EXCEPTIONS: Withdrawn and Another Allowed.** The allowance of a bill of exceptions by the court in term time, like any other act or proceeding, is *in fieri* during the term and can be modified or set aside. So that where a bill of exceptions was allowed and filed on the 17th and then by leave and order of court withdrawn, another approved and ordered filed in open court and actually filed on the 18th and made a part of the record was regular.

4. **VEXATIOUS DELAY: Damages and Attorney's Fees: Suit on Guaranty Bond.** It is true that Section 7068, Revised Statutes 1909, authorizing the recovery of damages and an attorney's fee for vexatious refusal to pay applies only to actions against (1) an insurance company for loss on (2) a policy of insurance; but it embraces policies of "fidelity, indemnity . . . or other insurance," and those words are broad enough to include a company licensed to do "fidelity and surety insurance" for a consideration, and in an action on the judicial bond of such a company by which, for a consideration or premium paid, it guarantees that a receiver appointed by the court will faithfully and truly account for all moneys, assets and other property that may come into his hands, it is proper for the court or jury to allow damages and a reasonable attorney's fee for its vexatious refusal to pay the principal sum converted by the receiver to his own use.

Appeal from St. Louis City Circuit Court.—*Hon. William T. Jones,* Judge.

REVERSED AND REMANDED (*with directions*) as to plaintiff.

AFFIRMED as to defendant.

Luther Ely Smith for plaintiff.

1. Defendant is an insurance company engaged in writing insurance contracts. 2 Bouvier's Law Dictionary (3 Ed.), p. 1613; Laws 1885, p. 41; Sec. 6013, R. S. 1879; Sec. 7042, R. S. 1999; 2 R. S. 1879, secs. 5987-6010. (a) Defendant was organized as an insur-

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ance company under the laws of Illinois. The act under which it is formed subjects it to the constant supervision of the Insurance Commissioner of Illinois. No agent of defendant may write a single policy for defendant without incurring a penalty, unless he has gained authority to act from the Superintendent of Insurance of Illinois. Laws Illinois 1899, pp. 260-265; 2 Ill. Ann. Stat., secs. 2544-2558, pp. 1610-1614. (b) Defendant is admitted to do business in Missouri as an insurance company. It may do "fidelity and surety insurance" in Missouri and nothing else. (c) Defendant's agent for service of process in Missouri is the Insurance Commission of Missouri. Ill. Laws 1899, p. 263, sec. 10; 2 Ill. Ann. Stat., p. 1613, sec. 2552; 2 Bouvier's Law Dict. (3 Ed.) p. 1614; Sec. 7068, R. S. 1909. (d) Defendant, as a condition of its admission to do business in Missouri, comes in subject to all the insurance provisions of the State affecting companies other than life. (2) The use of the term "bond" instead of the term "policy" is not conclusive. The law looks to the substance, not to the form. Laws 1911, p. 274; Secs. 6997, 7100, 7099, 7068, R. S. 1909; Frost on Guaranty Insurance (2 Ed.), pp. 18, 64 and 621-694; Industrial & General Trust Co. v. Tod, 67 N. Y. Supp. 363; People v. Rose, 174 Ill. 310; People v. Feitner, 166 N. Y. 129; Nye Schneider Fowler Co. v. Bridge Hoye Co., 98 Nebr. 863, 155 N. W. 235; People v. Potts, 264 Ill. 522; U. S. Fid. & Guar. Co. v. Natl. Bk., 233 Ill. 475; Hormel & Co. v. American Bonding Co., 112 Minn. 288, 33 L. R. A. (N. S.) 513; State v. Hogan, 8 N. D. 301, 73 Am. St. 759; American Surety Co. v. Folk, 124 Tenn. 139, 25 Am. & Eng. Ann. (1912D) 1024; First Natl. Bk. v. Fidelity Co., 110 Tenn. 10, 100 Am. St. 765; Roach v. Trust Co., 130 Mo. App. 491; State ex rel. v. Ogden, 172 S. W. 1172. (3) The contract in suit is a contract or policy of insurance within the meaning of the statute. Sec. 7068, R. S. 1909; U. S. Fid. Co. v. Natl. Bk., 233 Ill. 475; Amer. Bonding Co. v. Morrow, 89 Ark. 49; Remington v. Fidelity Co.,

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27 Wash. 429; Granite Bldg. Co. v. Saville, 101 Va. 217; Ice Mfg. Co. & C. Co. v. American Bonding & Trust Co., 115 Ky. 863; Willoughby v. Fidelity Co., 16 Okla. 546; Guarantee Co. v. Mechanics Savgs. & Trust Co., 80 Fed. 766; American Credit Indemnity Co. v. Athens Woolen Mills, 92 Fed. 581; American Trust Co. v. Burke, 36 Colo. 49; Frost on Guaranty Insurance (2 Ed.), sec. 243, p. 622. (4) Defendant is estopped to deny its liability to pay the penalties it has deliberately incurred. Sec. 7068, R. S. 1909; Fidelity Mut. Life Assn. v. Mettler, 185 U. S. 308, 326. (5) Vexatious refusal to pay was amply shown. Defendant, without the shadow of excuse, refused to pay one penny upon a $20,000 fidelity policy covering defalcation and embezzlement, when defalcations and embezzlement to the extent of $8036.87 was promptly shown to defendant. On the contrary, defendant relies for its defense upon the fact that the defalcations occurred through checks drawn on a bank that, as defendant contends, ought to have known that the Receiver was in the act of embezzlement when he drew and presented the checks. To describe such conduct on defendant's part as "vexatious refusal to pay" might well be termed flattery. It is the hyperbole of euphemism. R. S. 1909, sec. 7068; Cascarella v. Life Ins. Co., 175 Mo. App. 130; Brown v. Ry. Assurance Co., 45 Mo. 221; Williams v. Ins. Co., 189 Mo. 70; Keller v. Ins. Co., 198 Mo. 440; Fay v. Ins. Co., 268 Mo. 373; Barber v. Ins. Co., 269 Mo. 21; Stix v. Indemnity Co., 175 Mo. App. 180. (6) Ten per cent statutory penalty and attorney's fees should be added to the judgment for vexatious refusal to pay. R. S. 1909, sec. 7068; Laws 1911, p. 282; Cascarella v. Life Ins. Co., 175 Mo. App. 130. (7) Defendant's obligation was direct and primary. It was not discharged, and could not be discharged, except upon the principal's "truly accounting for all moneys, assets, property and effects which should come into his hands and possession, and should in all respects faithfully perform all the official duties of said receiver-

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ship." If Haydel did those things, then "this obligation shall be void, otherwise it shall remain in full force and effect." Haydel did not do those things; he did not account for all moneys that came into his hands or possession. On the contrary he appropriated to his own use the sum of $8936.87. Alderson on Receivers, sec. 165; Baltimore Assn. v. Alderson, 99 Fed. 489; Black on Receivers (2 Ed.), sec. 200; Heralson v. Mason, 53 Mo. 211; Lyon v. U. S. Co., 48 Mont. 591; Weems v. Lathrop, 42 Tex. 207; Westerfelt v. Mohrenstecker, 76 Fed. 118; Baylies on Sureties (1881), p. 3; Ice Mfg. Co. v. American Bonding Co., 115 Ky. 863; Otis Elevator Co. v. First Nat. Bank, 124 Pac. 704; Pingrey on Suretyship (2 Ed.), sec. 4; Stearns on Suretyship (2 Ed.), sec. 6; Kerr on Receivers (1872), p. 254; Van Slyke v. Bush, 123 N. Y. 47; Rankin v. Tygard, 198 Fed. 795; Commonwealth v. Gould, 118 Mass. 300; White v. Smith, 33 Pa. St. 186; Phillips v. Ross, 36 Ohio St. 458; High on Receivers (4 Ed.), sec. 130; American Surety Co. v. Lawrenceville Cement Co., 96 Fed. 25; Aultman & Taylor v. Smith, 52 Mo. App. 351; Frost on Guaranty Insurance (2 Ed.), secs 281, 283. (b) Even if defendant's position were sound, that the bank was put upon notice, it is no compliance with the terms of the bond to show that we could recover our money by suing the bank. We are not obliged to exhaust our remedies before proceeding against the surety. Heralson v. Mason, 53 Mo. 211, and authorities, supra. (8) Defendant is entitled to subrogation to any rights that the obligee and beneficiaries in the bond might have against the bank. If defendant's position is sound, it has furnished additional reasons why it, as surety, should have made prompt payment, for it has, according to its own showing, a complete case against the bank in subrogation to the rights of the obligee and beneficiaries under the bond. Clark v. First Nat. Bank, 57 Mo. App. 277; Berthold v. Sarpy, 46 Mo. 557; Furnold v. Bank, 44 Mo. 336; Fidelity Co. v. Jordan, 134 N. C. 236; National Surety Co. v.

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State Sav. Bank, 156 Fed. 21; American Bonding Co v. Mechanics Bank, 97 Md. 598; Saussenthaler v. Surety Co., 197 Mo. App. 112. (9) When the receiver drew out money from the bank he did not draw out the bank's money, but money to which he had a legal right as trustee. Natl. Bk. v. Ins. Co., 104 U. S. 54. (10) The suit is properly brought in the name of the State at the relation and to the use of the corporation in receivership. State ex rel. Fichtenkamm v. Gambs, 68 Mo. 289. But if even defendant's contention as to the proper relator were in point of fact meritorious, it was not properly raised. It could not properly be raised by objection to the introduction of evidence. It should have been raised directly by plea or answer Having failed to do so, the objection is waived. No motion in arrest of judgment was filed. In any event, the proper plaintiff is the obligee of the bond, namely, the State of Missouri, and it is in the name of this plaintiff that the suit is filed. Furthermore, even though the court should find that the successor receiver should have been named as relator, the defect is one susceptible of amendment in this court before final judgment in this court. R. S. 1909, sec. 2120; Scott-Force Hat Co. v. Houts, 127 Mo. 392; Mechanics Bank to use. v. Gilpin, 105 Mo. 17; Hunter v. Kansas City Sav. Bank 158 Mo. 262; Weil v. Simmons, 66 Mo. 617; Cruchon v. Brown, 57 Mo. 38.

Holland, Rutledge & Lashly for defendant.

(1) Where a trustee has a bank account in his name as such trustee and executes and presents checks payable to himself, such checks are void; and if the bank pays same it does not by so doing in any way lessen the indebtedness of the bank to the *cestui que trust*. Miller & Co. v. Hobdy, 159 S. W. (Tex.), 96; Duncan v. Jaudon (U. S. Sup. Ct.), 21 L. Ed. 142; Mechanics Mfg. Nat. Bank v. Furniture Co., 70 L. R. A. 311; Lee v. Smith, 84 Mo. 304; Bank v. Edwards,

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243 Mo. 564; Kitchens v. Teasdale Co., 105 Mo. App. 463; Johnson v. Knight, 56 Mo. App. 257; Bank v. Orthwein Co., 160 Mo. App. 369; Gerard v. McCormick, 14 L. R. A. 234; Dickett v. National Mechanic's Bank, 86 Md. 400. (2) Where a trustee carries an account in a bank in his name as such trustee and presents a check to the bank payable to his own order, the bank is placed upon its notice. In such case the bank is dealing with an agent, with knowledge that the latter is recreant to his trust, and if it honors such a check by paying the amount specified therein to the trustee in his individual capacity, it honors a check that is void. And the bank does not thereby lessen its indebtedness tc the *cestui que trust* or to a successor trustee. Authorities supra. (3) The referee erred in overruling appellant's objection to the introduction of any testimony in this case. Where a receiver is appointed and qualified and is guilty of a breach of his bond, if any loss results, suit should be brought in the name of the successor receiver and not in the name of the corporation that has been thrown into the hands of a receiver. (4) When after a case is tried and an appeal taken from a *nisi prius* court, a bill of exceptions is allowed by the court and filed by a losing party, the trial court thereby loses its jurisdiction in the matter of allowing a bill of exceptions; and cannot thereafter amend such bill of exceptions so filed or allow the filing of a new one. Ross v. Railroad, 141 Mo. 390; Reed v. Colp, 213 Mo. 577; Coy v. Landers, 146 Mo. App. 413; Atchison v. Chicago & Alton Ry. Co., 94 Mo. App. 572; City of Weston v. Bank of Greene Co., 192 S. W. 126; State ex rel. v. Tower Grove Verien, 206 S. W. 242. (5) The statute in reference to penalty for vexatious delay, Laws 1911, p. 282, applies only to actions against insurance companies upon policies of insurance, and has no application to actions against bonding companies upon bonds. Sams v. Railroad Co., 174 Mo. 53.

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RAGLAND, C.—This is an action on a receiver's bond. It was brought in the name of the State of Missouri at the relation and to the use of the Elberta Peach & Land Company against the Chicago Bonding & Surety Company. On motion of defendant a reference of the whole issue was directed by the court, on the ground that the trial would require the examination of a long account. The facts as found by the referee, and as to the correctness of which no question is raised, are substantially as follows:

On January 28, 1915, in a certain cause pending in the Circuit Court for the City of St. Louis, entitled Boyd, Administratrix, et al., v. Elberta Peach & Land Company, a corporation, et al., the court appointed one Henry L. Haydel receiver, authorizing and directing him as such receiver to take into his possession all of the real estate and personal property belonging to the said Elberta Peach & Land Company, including money on deposit to the credit of said company. The order of appointment was conditioned upon the giving of a bond in the sum of twenty thousand dollars to be approved by the court. Thereafter, on January 30, 1915, said Haydel presented a bond as receiver, executed by himself as principal and the defendant as surety, in the sum of twenty thousand dollars, conditioned that if said Haydel as such receiver should faithfully obey such orders as the court might make in relation to said trust and should faithfully and truly account for all moneys, assets, property and effects that should come into his hands and possession and should in all respects perform all the official duties of said receivership, the obligation to be void. The bond as presented was duly approved by the court and ordered filed and Haydel entered upon the discharge of his duties as receiver, taking into his custody and possession all of the real and personal property and assets of different kinds belonging to relator.

At the time of the receiver's qualification as such, relator had deposited to its credit with the Central

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National Bank in St. Louis the sum of $9166.35. On or about February 9, 1915, "Henry L. Haydel, Receiver of Elberta Peach & Land Company," opened an account with said Central National Bank with an initial deposit of $9166.35, which account so appeared on the books of the bank and was so manifested by the issuance of a pass book in the name aforesaid, showing said sum as credited. The referee was unable to determine from the evidence whether the relator closed its balance with the bank by check in favor of the receiver, or whether upon the request of the receiver and upon the exhibition of the order of his appointment the bank closed by debit the account in the name of the Elberta Peach & Land Company and opened a new account to balance said debit in the name of the receiver, but he found that one of these two courses was pursued. After the opening of this account Haydel from time to time deposited to his credit as receiver rents accruing from relator's real estate and collected by him as such receiver, and drew checks against the account which he signed "Henry L. Haydel, Receiver, Elberta Peach & Land Co." The total amount of assets that came into Haydel's possession for which he was bound to account was $10,209.90. This amount was made up of the bank credit of $9,166.35, rents collected in the sum of $869.37, and 32 cents allowed as interest on bank deposits. Of the total assets that came into his hands Haydel faithfully administered and accounted for the sum of $2,173.03; the remainder, $8,036.87, he converted to his own use. Of this amount $7,815 was obtained from the Central National Bank by means of checks drawn from time to time against his account as receiver. There were seven of these checks in all; they were all precisely alike except as to dates and amounts and except that in some of them H. L. Haydel was designated as payee, while in others Haydel Realty Company was designated payee. The Haydel Realty Company was a corporation in which Haydel was the sole party in interest. One of these checks is as follows:

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Central National Bank.
Saint Louis, Feb. 11th, 1915. No. 2.
Pay to the order of H. L. Haydel $400.00
Four Hundred and 00/100 .....Dollars.
H. L. Haydel.
Receiver Elberta Peach & Land Co.
(Endorsement on back):
H. L. Haydel
Haydel Realty Co.
H. L. Haydel, Pres.

The remainder of the fund embezzled, $221.87, never found its way into the bank. Haydel died May 1, 1915, leaving no real estate or assets whatever other than those to which his widow was entitled as her absolute property. May 5, 1915, the court appointed Elmer E. Pearcy successor receiver in the place of Haydel. Pearcy duly qualified and in his first inventory and report to the court disclosed that the balance of $8036.87 was due from Haydel. The court approved the report and directed Pearcy to make demand upon the defendant Surety Company for said sum and to prosecute said claim against the defendant to compel the payment of said sum. The successor receiver made demand which was refused, and he then instituted this suit.

The defendant is in the general surety and bonding business for hire. It is incorporated under the laws of Illinois and is duly admitted to do business in this State under the insurance laws thereof. The referee further found as follows:

"I think it entirely clear the principal has not faithfully accounted for the funds coming into his hands, and it must have been absolutely plain precisely what the shortage was. . . . It is not in evidence that it ever made known or discussed the contention that it was not liable, because the bank still had the funds. No authorities have been presented by it applicable to its defense under such a bond. No tender has ever been made of the amounts with which the bank question is not concerned. If the statute for penalty applies, I find vexatious refusal to pay the loss, and assess plain-

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tiff's damages therefor at ten per cent of the amount of the loss, and an attorney's fee of seven hundred and fifty dollars."

The defendant admits that if it is liable for an attorney's fee, seven hundred and fifty dollars is a reasonable allowance therefor.

The petition, after pleading all necessary matters of inducement, alleges the execution of the bond and assigns as breach that said Haydel used said funds of relator that came into his custody as receiver and appropriated the same to his own use, thereby embezzling said funds of relator. It further alleges a vexatious refusal to pay the loss. The prayer is for the penalty of the bond, and an assessment of relator's damage at $8036.87, with interest, and in addition thereto ten per cent thereof for vexatious refusal to pay and a reasonable attorney's fee.

The answer is a general denial, with this further statement:

"Further answering defendant states that whatever moneys or assets came into the possession of Henry L. Haydel as receiver of the relator were fully and completely accounted for by said Henry L. Haydel as receiver to the relator by lawfully and properly expending and disbursing a portion thereof in behalf of relator and by returning the balance to the relator, or by leaving it in a bank or banks in such manner that relator has since come into possession of same."

At the inception of the hearing before the referee the defendant objected to the reception of any evidence on the ground that the petition, did not state a cause of action, in that, the right of action, if any, is in the successor receiver and not the Elberta Peach & Land Company. The objection was overruled.

The referee recommended judgment for the penalty of the bond and an assessment of damages in relator's favor at the amount of its loss caused by Haydel's defalcation, with interest, amounting to $8738.54, not allowing attorney's fee for relator or the additional

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ten per cent for vexatious refusal to pay. Numerous exceptions were timely filed by both plaintiff and defendant. All of these the court overruled and rendered judgment for the penalty of the bond and awarded relator execution for damages in accordance with the referee's recommendations. Both sides appeared and stipulated that the two appeals be consolidated and heard as one cause in this court.

All of defendant's exceptions to adverse rulings of the referee and the trial court were properly saved for review, and in the final analysis present but two questions for decision on defendant's appeal. The first is whether the suit is properly brought at the relation and to the use of the Elberta Peach & Land Company; the second is whether either the relator or successor receiver sustained any loss by the Central National Bank having honored Haydel's checks as above set out and charging them against his account as receiver.

The referee reported as one of his conclusions of law, that the statute of Missouri, Laws 1911, with reference to vexatious delay, has no application to this action. Plaintiff filed written exceptions to the report in this respect. This was overruled by the court. If the record shows that exception was made and saved to this ruling, its correctness is for determination on plaintiff's appeal. On March 17, 1919, plaintiff presented to the trial court in which the cause was tried its bill of exceptions; it was signed by the judge and an order of court entered of record making the bill, so allowed, signed and sealed, a part of the record in the cause. On the following day the plaintiff discovered the deficiences of the bill of exceptions, and upon its motion, the order, made on the day previous, allowing, signing and sealing plaintiff's bill of exceptions, and making the same a part of the record, was by the court ordered vacated and set aside. Thereupon the plaintiff presented its bill of exceptions and the same was allowed, signed, sealed and made a part of the record. Whether the bill of exceptions presented on March 18,

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1919, is a part of the record is the first question for decision on plaintiff's appeal.

I. Taking up for consideration the questions raised on defendant's appeal, its first contention is that the cause of action, if any, did not accrue to the Elberta Peach & Land Company, but to the successor receiver. This contention is based on the proposition that "the main purpose of the orginal suit was to divest the Elberta Peach & Land Company of any jurisdiction over its assets and of any right to collect unpaid claims, and to place the *legal title* exclusively in the receiver in order to protect both creditors and stockholders." In this connection it is pertinent to observe that "the main purpose of the original suit" is not disclosed by the record. All that appears is that in a certain pending cause in which the Elberta Peach & Land Company was a party defendant, said company was in receivership; that the original receiver was by the order appointing him authorized and directed to take into his possession all of the real estate and personal property belonging to said company including money on deposit to his credit, and, with leave of court, to bring such suits as should be necessary to recover its assets and debts due it, and that the successor receiver was invested with the same duties and powers. That part of the order directing the receiver with leave of court to bring suits is by no means tantamount to an authorization to bring such suits in his own name, hence it is not shown that either the receiver or his successor had any but the powers usually and ordinarily vested in such an officer of the court. The present receiver, therefore, did not by virtue of his appoinntment become vested with the legal title to either the choses in possession or the choses in action of the Elberta Peach & Land Company. Whether the court had the power to invest him with such title, it is not necessary to decide. It is apparent, therefore, that the manner of instituting this suit by him is governed by the rule generally and

Proper Plaintiff.

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ordinarily applicable in such cases. "The weight of authority clearly supports the proposition that the receiver must sue in the name of the person having the legal right, and that when neither the Laws of the State nor the order of his appointment authorize him to proceed in his own name, he can only proceed in the name of the person in whom the right of action existed before the receiver's appointment." [High on Receivers (4 Ed.), sec. 209.] The rule applies even though the order of his appointment authorized him to prosecute suits for the collection of such choses in action as may come into his hands and he must still proceed in the name of the legal owner and can not sue in his own name. [Battle v. Davis, 66 N. C. 252.] This is the long established pratice of courts of equity and still obtain unless changed by statute. This is in effect the ruling in State ex rel. v. Gambs, 68 Mo. 289, in which it was held that a receiver appointed under what is now Section 2018 of the Practice Act cannot maintain a suit in his own name against the sureties on the bond of his predecessor. It is true the receiver may maintain an action for the conversion of property and injury thereto after the same has come into his possession, but this is on the ground that his possessiin and not his appointment gives him such a qualified and special interest in the property as to enable him to maintain such an action. In this case, as the right of action arising out of the original receiver's misappropriation, if such is the fact, of the funds of the Elberta Peach & Land Company accrued before the appointment of the present receiver, the company had the legal right thereto, and, as the right was not divested by the receiver's appointment, the suit was properly brought in the company's name.

II. The defendant's next point is that, conceding that Haydel as receiver "committed wrongs in connection with the bank account which he had as such receiver at the Central National Bank, the relator has in no way

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been injured by such wrong, because it has sustained no loss. In other words, it is a case of *damnum absque injuria.*" Defendant's contention seems to be this: that as the bank had actual knowledge that relator was the real owner of the fund represented by the credit, and as checks drawn by the receiver against the same gave notice of such facts as put the bank upon inquiry, and which, had they been followed up, would have disclosed that the receiver was converting the fund to his own use, it should not have honored the checks, and by paying the same it in no wise lessened the bank's debt to the relator; that notwithstanding the bank's forms of bookkeeping, it still has relator's money and that all that it is necessary for the relator's receiver to do to recover it, is to make a demand of the bank therefor, and, if the bank arbitrarily refuses to pay, sue it. This all sounds well, if the extraordinary notions entertained by the defendant regarding its duties in the premises and the proper discharge thereof be for the moment forgotten, but it certainly involves a misconception both of the facts and the applicatory rules of law.

Liability of Surety and Bank.

When Haydel was appointed receiver the fund to relator's credit in the bank was $9,1666.35. The relator sustained the relation of depositor to the bank, whereby the bank was indebted to it in that sum. The legal title to this chose in action was in relator. The appointment of the receiver *per se* did not change this status. Haydel as receiver, however, withdrew this fund from the bank, and, regardless of the method employed, that is what he in effect did. This he had a right to do in the lawful performance of his duty, for he was merely taking into his possession this part of relator's assets. When Haydel redeposited the money to his own credit as receiver, he in his representative capacity, and not the relator, became the depositor. The bank was then indebted to him as receiver, and in that capacity he had the legal title to the bank credit. [Michie on Banks and Banking, sec. 130 (d); Anderson v. Walker, 49

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S. W. (Tex.) 937; Union School Twp. v. Bank, 102 Ind. 464.] And the bank was bound to pay his checks when in proper form, for the contract between a bank and its depositor is that the former will pay according to the checks of the latter. [Cen. Nat. Bank v. Life Ins. Co., 104 U. S. 54.]

The equitable doctrine of following a trust fund has no application to this case. The assets of the bank have not been enriched to the extent of relator's loss. The fund is not in the bank. Haydel withdrew and appropriated it to his own use. The only theory upon which it can be held that the bank is liable to relator is that of aiding in and thereby becoming a party to the conversion of the fund. Haydel had a right to check the fund out of the bank in the lawful performance of his duty; what he did not have a right to do was to use it for his own benefit when so withdrawn. The bank was bound to honor his checks unless it had actual or constructive knowledge that Haydel when he presented the checks for payment was then and by means thereof intending to divert the fund. If this latter hypothesis is true, the bank is liable to relator for its participation in Haydel's breach of trust. [Miller v. Hobdy, 159 S. W. (Tex.) 96; Duckett v. Mechanics' Bank, 86 Md. 400; Duncan v. Jaudon, 21 L. Ed. (U. S. Sup. Ct.) 142.]

It is elementary that the defendant may not discharge its obligation as surety by pointing out some other person who is also legally liable for relator's loss. If, however, the entire fund had stood on the bank's books to Haydel's credit as receiver at the time of his death, the defendant would not have performed its duty by merely saying to the court, "The money is in the bank to Haydel's credit; go get it." In the first place the fund would have been payable only on the checks of Haydel's executor or administrator, notwithstanding its trust character (Schluter v. Bank, 117 N. Y. 125), and in the second place it would not have been a performance of the conditions of the bond. It was

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Haydel's duty on the termination of his authority, and after his death, that of his executor or administrator, to "account for" the assets that had come into his hands as receiver. This was his duty under the law and it was a condition of the bond, and to "account for" is a condition not satisfied short of paying the fund into court or according to the court's order. [State v. Williams, 77 Mo. 463, 471.] This same duty devolved upon defendant as Haydel's surety. Under the bond in suit it was bound with its principal as an original promisor and, not having accounted for a portion of the funds entrusted to its principal, it is liable to that extent. [Pingrey on Suretyship (2 Ed.), sec. 4; Delmar Inv. Co. v. Lewis, 271 Mo. 317; Loewenthal v. McElroy, 181 Mo. App. l. c. 405.]

III. On plaintiff's appeal defendant's contention is that the bill of exceptions allowed, signed and filed on March 18th is a nullity and no part of the record in the cause, because the court's statutory authority to allow and sign a bill of exceptions, tendered by plaintiff, was exhausted by the allowance and signing of one on the 17th. The situation might be as defendant contends had the bill of the 17th been allowed and signed by the judge in vacation. That is not the case here, however. The bill having been allowed by the *court,* its action in so doing, like any other act or proceeding, was *in fieri* during the term, and could be modified or set aside altogether should the court be moved so to do. On the 18th and during the same term, when the court vacated and set aside the order of the 17th, allowing the bill, it thereupon became a mere paper filed in the cause without vitality as a bill of exceptions, because in legal effect it had never been "allowed" as such by the court. From this it follows that the bill allowed, signed and filed on the 18th, within the time limited by the statute, became a part of the record in the cause.

Bill of Exceptions.

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IV. Plaintiff, as appellant, complains of the action of the trial court in adopting the referee's conclusion of law that the statute allowing damages and attorney's fee for a vexatious refusal to pay has no application in this case. The statute in question is Section 7068, Revised Statutes 1909, as amended by the Act of 1911, Laws 1911, p. 282, and reads as follows: "In any action against any insurance company to recover the amount of any loss under a policy of fire, cyclone, lightning, life, health, accident, employers' liability, burglary, theft, embezzlement, fidelity, indemnity, marine or other insurance, if it appears from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed ten per cent on the amount of the loss and a reasonable attorney's fee," etc. A reading of this section makes it apparent that an action to be within its terms must have two characteristics: First, it must be against an insurance company; and, second, it must be to recover a loss under a policy of insurance. The questions for decision, therefore, are (1) whether the defendant Bonding & Surety Company is an insurance company, and (2) whether the receiver's bond which it executed as surety is a policy of insurance, both within the meaning of said section. To ascertain what companies and what contracts were intended by the Legislature in the use of the terms "insurance company" and "policy of . . . other insurance," the sections should be considered in connection with the unwritten law of insurance as administered by the courts at the times of its original enactment and subsequent amendment, and with the statutes with which it is *in pari materia.*

The domain of insurance law is no longer limited to the interpretation and enforcement of fire, life and marine insurance contracts. In recent years a multitude of other forms of insurance have obtained, covering almost every conceivable risk incident to modern business

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and industrial life. Concurrently with the extension of the insurance business there has been a corresponding development of insurance law through the application to the new and varied forms of insurance contracts of the fundamental rules and principles governing the older ones. By this means there has come into existence, with many others, a branch of the insurance law known as gauranty insurance, which embraces "fidelity," "commercial" and "judicial" insurances. Of these, commercial or indemnity insurance and judicial insurance, so called, are of the more recent origin, [Frost on Guaranty Ins. (2 Ed.), 11.] In the bonds or policies of guaranty insurance, the more natural attitude of a "surety" is assumed. but they are contracts of insurance none the less. [Guarantee Co. v. Bank and Trust Co., 80 Fed. 766.] In fact the contract of suretyship is inherently that of insurance. The surety is an insurer of the debt, the fidelity, or the undertaking of his principal. (Pingrey on Suretyship and Guaranty, sec. 2), and when he engages in the business of furnishing surety for hire, his obligation is no longer construed under the *strictissimi juris* rule, but is subject to the rules of construction applicable to insurance policies generally. So that speaking generally, the contracts of suretyship issued by surety companies, origanized for the purpose of furnishing surety for hire, such as the defendant, are contracts of insurance. In current decisions dealing with such contracts the courts continually refer to them indifferently as "bonds," "indemnity contracts," "insurance bonds," "insurance contracts" and "guaranty policies." [Roark v. Trust Co., 130 Mo. App. 401; Boppart v. Surety Co., 140 Mo. App. l. c. 683; Rule v. Anderson, 160 Mo. App. 347; Association v. Am. Bonding Co., 197 Mo. App. 430; People v. Rose, 174 Ill. 310; Remington v. Fid. Dep. Co., 27 Wash. 429; Industrial & Gen'l Trust Co. v. Tod, 67 N. Y. Supp. 362; People v. Potts, 264 Ill. 522; State ex rel. v. Ogden, 172 S. W. 1172; Am. Bond. Co. v. Morrow, 80 Ark. 49.] The statute in question was originally

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enacted many years ago when all of the business in this State was done by foreign companies. Its provisions covered in terms actions on policies of fire, life and marine insurance, practically the only forms of insurance in vogue at the time. Subsequently in 1869 a statute was enacted authorizing the incorporation of companies to do an insurance business other than life. The insurances expressly named in this statute were fire, marine, live stock, health, accident and fidelity, but it included "all other kinds of legitimate insurance business." It has since been amended from time to time to include lightning, hail, windstorm, burglary and theft insurance. In 1885 a law was passed authorizing any company having a paid up capital of not less than $200,000, incorporated under the laws of this State or any other state or foreign government, for the purpose of transacting the business of becoming surety on the bonds or obligations of persons or corporations, or of insuring the fidelity of persons holding places of public or private trust, to become and be accepted as surety on the bond, recognizance or other writing obligatory of any person or corporation in or concering any matter in which the giving of a bond is authorized, required or permitted by the laws of the State. It provided however, that no company not incorporated under the laws of this State should engage in such business until it complied with all the provisions of the law relating to insurance companies other than life. In the Revised Statutes of 1889, 1899, and 1909, this act appears as a part of the article relating to insurance other than life in the chapter on insurance, becoming Section 6997, Revised Statutes 1909. In 1911 that section was amended by adding a proviso: "That no domestic corporation shall be licensed *to do the business aforesaid*, until it has deposited $200,000 with the Insurance Superintendent of the State, in trust for the protection and security of its *policy holders*. No corporation, organized or incorporated under the laws of any other state . . . shall be licensed *to do the business aforesaid*, unless it has on deposit . .

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a like deposit of $200,000 for the protection and security of its *policy holders* in the United States." [Laws 1911, pp. 274, 275.]

The same Legislature in 1911 amended said Section 7068 so that it included actions on policies of cyclone, lightning, health, accident, employers' liability, burglary, theft, embezzlement, fidelity and indemnity insurance.

The defendant was chartered under the laws of the State of Illinois "to conduct a surety company business and for a consideration to guarantee the fidelity of persons holding public or private places of trust, and the performance of contracts, bonds, recognizances, undertakings of every kind, and of becoming surety on bonds required by law and on every kind of contract, obligation and undertaking of persons, firms and corporations." In that state it operates under the supervision of the insurance department thereof. It was admitted under the insurance laws of this State to do herein only the business of "fidelity and surety insurance," and is subject to the visitorial powers of the State Superintendent of Insurance as an insurance company. From the character of business which the defendant is authorized to do, and which it does do, from the necessary implications of the statutes referred to and from the construction put thereon by the executive departments of the State and by the defendant itself, the conclusion is irresistible that the defendant is an insurance company within the intent and meaning of the statute under consideration.

The referee and the trial court following him were unable to reach the conclusion that a judicial bond, such as the receiver's bond, in this case, is a policy of insurance. It is true that a judicial bond is in the precise form and verbiage when executed by a compensated surety company as when executed by an accommodation surety, and it is also possibly true that the same rules of construction applicable to the latter should be applied to the former. But the construction

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of the bond, that is, a delimitation of the boundaries of liability thereunder, is not involved in this case. The only question here is whether it is a policy of insurance within the meaning of the statute permitting recovery of damages for a vexatious refusal of an insurance company to pay a loss. If the bond in suit were one to insure the fidelity of a bank cashier, or to guarantee the performance of a contract for a public improvement, it would be unquestioned that the one would be a policy of indemnity insurance and the other a policy of fidelity insurance. The bond here insures the faithful performance by the principal of all the official duties of the receivership, and is essentially of the same character as the fidelity bond and the indemnity bond. All three are issued by the defendant in its business as a surety company; for the execution of all three it receives a money consideration, known as a premium, proportioned to the amount and term of the liability to be insured; in all three the obligees are characterized as policy holders by the statute authorizing the defendant to do business in this State, and requiring it to make a deposit for their security; in all three the obligees or beneficiaries are injured in precisely the same way by a vexatious refusal of the surety company to pay a loss, so that, the premises considered, it seems unreasonable to suppose that the Legislature intended to provide a remedy for those having actions on fidelity and indemnity bouds and not for those having actions on judicial bonds. Under statutes very similar to ours the Appellate Division of the Supreme Court of New York held that a bond to stay execution pending an appeal, executed as surety by a surety company, having identically the same charter powers as the defendant, was a contract of insurance. [Industrial & Trust Co. v. Tod, supra.] After reviewing the authorities and discussing the questions at length, Mr. Frost in his illuminating work on guaranty insurance comes to the conclusion that judicial bonds of the kind executed by the so-called surety companies for compensation can be

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properly termed contracts of insurance. [Frost on Guaranty Insurance (2 Ed.), sec. 243 et seq.] With that conclusion we agree, at least for the purposes of this case.

The statute nowhere speaks of judicial bonds or judicial insurance *in eo nomine;* but it designates actions "on policies of . . . fidelity, indemnity . . . or other insurance." Judicial bonds and fidelity and indemnity insurance contracts are *ejusdem generis,* in that, they are all species of guaranty insurance. It follows that the receiver's bond on which this action was instituted is a policy of "other insurance" within the meaning of the statute.

Our conclusion on the whole is that this action is within the terms of the statute, and the court should, on the facts found by the referee, in addition to the loss and interest, have allowed relator as damages ten per cent of the loss and an attorney's fee of seven hundred and fifty dollars.

On defendant's appeal the judgment is affirmed; on plaintiff's appeal it is reversed and remanded to the end that the trial court may enter judgment for plaintiff in accordance with the views herein expressed, which that court is hereby directed to do.

Brown and *Small, CC.,* concur.

PER CURIAM: The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court. All of the judges concur; *Bond, J.,* in the result.

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CASES ARGUED AND DETERMINED

BY THE

SUPREME COURT

OF THE

STATE OF MISSOURI

AT THE

OCTOBER TERM, 1919.

JAMES McCORD, Administrator of Estate of ORVIS McCORD, v. CHARLES E. SCHAFF, Receiver of Missouri, Kansas & Texas Railway Company, Appellant.

Division Two, October 14, 1919.

1. **NEGLIGENCE: Engineer: Vice-Principal.** The engineer operating a locomotive engine on defendant's railroad is a vice-principal of defendant, and if his conduct in failing to supply with sufficient water the boiler of the engine which exploded amounted to negligence, contributing in whole or in part to the death of the fireman, the defendant is liable in damages, because the engineer's negligence was the defendant's negligence.

2. ———: ———: **Defective Appliances: Irrelevant: Allegata et Probata.** If the action for damages was tried on allegations that it was the duty of the engineer in charge of the engine which exploded to see that it was properly supplied with water, that he negligently failed to perform that duty, that such failure was the proximate cause of the explosion of the boiler and that the death of the fireman resulted from such negligence, defective appliances could not affect the case, and expert testimony and speculation as to whether the appliances for supplying water to the boiler were defective were irrelevant; but, it being conceded that the explosion was due to an insufficient amount of water in the boiler, the whole issue, under such charge, was whether it was the duty of the engineer to see to it that the boiler was properly supplied.

3. ———: ———: **Supplying Boiler With Water.** There being no evidence beyond the merest speculation that the fireman who was killed when the engine exploded for lack of water had made any attempt to pump water into its boiler, or had asked or been directed to do so, and it being the unquestioned duty of the engineer to pump it, the engineer's failure to do so, thereby causing the explosion and the death of the fireman, was a negligent act, for which the railroad company must respond in damages.

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4. ———: ———: ———: **Failure to Call Witness With Knowledge.** The failure of a party to call witnesses within his power who know vital facts affecting the issue on trial is to be taken as a strong circumstance against him. So where a locomotive engine exploded because of a lack of a proper amount of water in its boiler and such explosion caused the death of the fireman, and the main issue at the trial was whether it was the duty of the engineer to see to it that the boiler was properly supplied with water, the fact that the railroad company, when sued for damages by the fireman's father, did not call the engineer, or a student fireman who was on the engine, neither of whom was injured, or account for its failure to call them, is a strong circumstance against the defendant, in the absence of any testimony that the fireman was directed or asked or assumed to pump water into the boiler.

5. ———: **Damages: Compensation: Life Expectancy of Paintiff.** An instruction on the amount of damages which a plaintiff may recover as compensation for the negligent death of another is erroneous which bases the damages solely on the life expectancy of the deceased and does not require the jury to take into consideration the plaintiff's expectancy in determining said amount; and where a father sues for the loss of his adult son, the instruction should take into consideration the life expectancy of the father alone.

6. ———: ———: ———: **Prior Contributions.** In a suit by a father for compensation by way of damages for the negligent killing of his adult son, the testimony should develop the exact number of months the son contributed to the support of his parents, and the amount contributed each month, or in some other way establish an exact basis for calculating what the son would have contributed to their support during their life expectancy had he lived.

Appeal from Saline Circuit Court.—*Hon. Samuel Davis* Judge.

REVERSED AND REMANDED.

J. W. Jamison for appellant.

(1) The court erred in overruling defendant's peremptory instruction to find for the defendant. The specification of negligence on which plaintiff went to the jury was in substance and effect that the explosion was occasioned solely by the negligence of the engineer in failing to see that the engine was properly supplied with water. Plaintiff must stand or fall under the foregoing specific charge of negligence. Northam v. United Rys. Co., 176 S. W. 229; McNamee v. Ry. Co., 135 Mo. 447; Yall v. Gillham, 187 Mo. 498; Roscoe v. Ry. Co.,

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202 Mo. 588; Kirkpatrick v. Ry. Co., 211 Mo. 83; Davidson v. Transit Co., 211 Mo. 361; Price v. Ry. Co., 220 Mo. 454;. Applegate v. Ry. Co., 252 Mo. 197. (2) If the explosion resulted from defects in the water glass and gauge cocks or other appliances, plaintiff cannot recover, because he elected to abandon that theory and relied solely on alleged negligence on part of the engineer. Authorities supra; Cunningham v. Journal Co., 95 Mo. App. 47; Jones v. Cooperage Co., 134 Mo. App. 324; Armour & Co. v. Arbuckle, 123 C. C. A. 435. (3) The inference is clear that the low water in the boiler was due to the negligence of the fireman, and, therefore, plaintiff has no case. Va. Ry. Co. v. Linkous, 144 C. C. A. 386; Louisville Ry. Co. v. Short, 73 So. 17; Gr. Northern Ry. Co. v. Wiles, 240 U. S. 444. (4) The evidence was insufficient to justify the court authorizing the jury to award the father and mother of deceased any amount as compensation on the theory that they had sustained a substantial pecuniary loss on account of the death of their son. The evidence, at most, merely showed that the deceased son made only occasional gifts of small amounts to his father and mother. An occasional contribution from a son to a parent does not establish a condition of dependency. Bortel v Northern Pac. Ry. Co. 111 Pac. 788; Garrett v. Ry., 235 U. S. 313; Vining v. Rexford, 120 C. C. A. 418. (5) The evidence was not sufficient to authorize the giving by the court of plaintiff's instruction authorizing the assessment of any damages. Moreover, neither the facts nor the law warrant the giving of said instruction. No tables of mortality, or other evidence, were offered tending to show the expectancy of life of the deceased son. No proof was offered as to the expectancy of life of the father and mother of deceased to each of whom the jury in its verdict awarded damages in the sum of $5000. No evidence was offered of the present cash value of the future benefits of which the beneficiaries were deprived by the death, making adequate allowance according to the circumstances for the earning power of

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money. Chesapeake & Ohio R. Co. v. Kelly, 241 U. S. 458; Stevens v. L. & P. Co., 208 S. W. 630; Smith v. Pryor, 195 Mo. App. 259; Jones v. Railroad, 78 So. 568. (6) The verdict of the jury in awarding the father and mother of deceased each the sum of $5000 was grossly excessive. Panhandle Ry. Co. v. Huckabee, 207 S. W. 329; Bagley v. St. Louis. 268 Mo. 259.

Claude Wilkerson and *E. P. Sizer* for respondent.

(1) It is claimed the evidence was not sufficient to justify an award of damages to the father and mother. The trouble with appellant on this point is that he starts with the erroneous assumption that the evidence "at most only shows occasional gifts." This might be true as to the "dress patterns" and gifts to the mother and sister, but not so of the monthly payments of five to fifty dollars—"and other times he would send every pay check; the largest amount was $50." "Then as he would have good or bad months it would range five, ten and twenty dollars per month." This is a substantial showing of pecuniary loss and should support the verdict. Railroad v. Callard, 185 S. W. 1108; Railroad v. Thome, 185 S. W. 840; Rains v. Railroad, 85 S. E. 294; Dooley v. Railroad, 79 S. E. 970. The case of Smith v. Pryor, 195 Mo. App. 259, cited and relied upon by appellant, is not in point, as deceased in that case left no children or parents and his only "next of kin" was a half sister, who had been married and was 47 years old. It is only when the action is prosecuted under the Federal Act for "next of kin" other than widow, children or parents, that it is necessary to show dependency of the beneficiaries. Dooley v. Railroad, 79 S. E. 970; Smith v. Pryor, 195 Mo. App. 264. (2) Appellant contends that it was error to give instruction 3 on measure of damages, because of the alleged failure to introduce the mortuary tables to show expectancy of the deceased and the parents. The case of Railroad v. Kelly, 241 U. S. 458, nowhere lays down the rule that the tables must be introduced.

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While such tables might be competent testimony under certain restrictions, they are not the absolute guide and are only advisory. Railroad v. Putnam, 118 U. S. 545. But as wise as are the judges of the Supreme Court of the United States, that court in the Kelly case, in the concluding paragraph, refuses to hazard even a guess at what should be the proper formula to submit to a jury the question of the pecuniary loss, and contents itself with subjoining an interminable list of decisions from the various states to show how hopelessly in conflict are the appellate courts. Railroad v. Kelly, 60 L. Ed. 1123. The next decision relied upon by appellant is the case of Stevens v. K. C. Light Co., 208 S. W. 630. This case is plainly authority for respondent instead of appellant, and shows the wisdom of refusing to follow such tables as absolutely guides. (3) Defendant is now precluded from raising any objection to the instruction on the measure of damages, because if he wanted a more definite instruction he should have requested such; and having failed to do so, is now precluded. Frisco v. Brown, 60 L. Ed. 970; Railroad v. Skaggs, 60 L. Ed. 531; Railroad v. Ernest, 60 L. Ed. 1100. When plaintiff's instructions are right as far as they go, the duty is on defendant to request more definite instructions before he will be permitted to convict the trial court of error. Browning v. Railroad, 124 Mo. 55; Minter v. Bradstreet, 174 Mo. 491; Smith v. Fordyce, 190 Mo. 31; Waddell v. Railroad, 213 Mo. 8; Armelio v. Whitman, 127 Mo. App. 698. (4) Under all the circumstances the verdict is fair and just and should not be disturbed. When we consider the value of all that McCord was doing for his parents, which was pecuniary, and that under the McCullough case, prospective gifts, etc., are elements of a pecuniary value to be taken into consideration by the jury, together with the natural increasing wants of the parents as age comes on apace, and the increasing ability of the son to support them, we respectfully claim the verdict is right and just. McCullough v. Railway, 160 Iowa, 524; Dooley

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v. Railroad, 79 S. E. 970; Railroad v. Dyer, 172 S. W. 18.

MOZLEY, C.—This action was brought under the Federal Employers' Liability Act and seeks to recover damages on account of the death of Orvis McCord, who was a fireman on an engine and an inter-state employee of defendant. On the 4th day of July, 1916, the engine on which McCord was working as fireman, when about fifteen miles from Sedalia, Pettis County, Missouri, pulling an extra freight, exploded, and so injured McCord that he died a few hours later without regaining consciousness. The explosion occurred by reason of not having sufficient water in the boiler of the engine. In addition to the fireman, the engineer and a student fireman were on the engine at the time, but there is nothing in the record of any injury to either of them.

The petition was in two counts identical, except in count one it was sought to recover for alleged conscious pain between the time of the accident and the death of McCord a few hours later, but upon this count the jury found for the defendant. The second count was finally amended so that the cause of action was based upon the alleged negligence of the engineer in failing to see that said engine was supplied with sufficient water to the boiler to prevent an explosion. It is conceded, however, by both sides that the explosion happened because the water was allowed to get too low in the boiler to cover the crown shield.

At the time of the death of McCord he was 27 years of age, and the plaintiff, James McCord, was 56 years of age, and the mother, Laura McCord, 54 years of age. Trial of the case in the Circuit Court of Saline County where it had gone on a change of venue from Pettis County, after demurrer to the evidence had been overruled, resulted in a verdict for defendant on the first count of the petition, and a verdict for plaintiff on the second count in the sum of $10,000, apportioned

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by the jury $5000 to plaintiff and $5000 to the mother. Motion for new trial was overruled and the cause is properly lodged in this court on appeal.

I. The engineer on the engine that exploded was vice-principal of the defendant, and if his conduct amounted to negligence contributing in whole or in part to the death of McCord, the defendant is bound thereby, because the engineer's negligence was the defendant's negligence. It is conceded that the explosion of the engine was caused by lack of sufficient water to cover the crown shield. A great deal of speculation, expert testimony, etc., was indulged in as to whether the appliances for supplying water to the boiler were defective, but as the case was tried before a jury on a charge of negligence on the part of the engineer, in this, that he was in charge of said locomotive and that it was his duty to see that said engine was properly supplied with water, that he negligently failed to perform that duty and the explosion resulting in the death of McCord proximated from such negligence, we are unable to see how defective appliances (and they were not defective) could affect the case. The whole question as we see it is, was it the duty of the engineer to see that the boiler was properly supplied with water? (Incidentally we remark that the engineer did not testify at the trial, nor did the student fireman who was on the engine, although there is no evidence that either was injured). These appliances for furnishing water to the boiler were placed thereon by defendant for the express purpose of enabling the engineer, by their timely use, to avoid the catastrophe that happened. Under the rule of the defendant, No. 502, the dead fireman was under the direction and control of the engineer. The rule reads:

Engineer's Negligence.

"Firemen when on the road, are under the supervision and direction of the engineer, and must obey the orders of the engineer respecting the proper use of fuel and the performance of their duties."

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As to whose duty it was, under the rule, to pump water to the boiler the following appears in the testimony of William Rothmeyer, road foreman of engineers for defendant:

"Q. What about pumping water? A. That is conditional with the engineer and fireman. We haven't placed any restrictions on the fireman pumping the engine. If the fireman is qualified and the engineer wants to assume the responsibility of him pumping that engine, why, that is optional with the two, and if he asks to pump the engine he can do so."

There is no evidence beyond the merest speculation that the dead fireman had made any attempt to pump water into the boiler or that he was directed to do so, or that he asked to pump said engine or assumed to do so, and it being the unquestioned duty of the engineer to pump it, his failure to do so, thereby causing the explosion and the death of McCord, was a negligent act for which defendant is responsible.

As stated above, neither the engineer nor the student fireman who were on the engine when the explosion occurred, was called by defendant as a witness at the trial of the case, notwithstanding each of them was in possession of the facts of the explosion and the movements of the deceased fireman just preceding the explosion. It has been held that failure of a party to call witnesses within his power who know vital facts affecting the issue upon which the case is tried, is taken as a strong circumstance against such party. [Reyburn v. Railroad, 187 Mo. 565, l. c. 575; McClanahan v. Railroad, 147 Mo. App. 386, l. c. 411; Evans v. Trenton, 112 Mo. l. c. 404.]

Without pursuing this feature of the case further, we think there was sufficient evidence to go to the jury on the question of whether or not the engineer was negligent and their finding that he was negligent ought not to be disturbed.

II. A great many points are urged by appellant for a reversal of the case which are unnecessary to dis-

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cuss or decide, since under our view it will have to be reversed and remanded on account of a vitally improper instruction given to the jury on behalf of plaintiff, on the measure of damages. Said instruction reads as follows:

Damages.

"If you find the issues for the plaintiff under the second count of the petition you should, in assessing the damages, take into consideration the age and earning capacity of the deceased and the amounts, if any, that he had been contributing to his parents, and you should give such sum as you may believe to be a fair and just compensation, for whatever sum you may believe from the evidence the said Orvis McCord was reasonably certain to have contributed to his parents had he not been killed, and such a sum should be sufficient to compensate them for the pecuniary loss, if any, they have sustained by reason of the death of the said Orvis McCord, but not to exceed the sum of twenty thousand dollars, the amount prayed for in the petition."

The damages authorized to be recovered by this instruction are based solely on the expectancy in life of deceased, and does not take into consideration the expectancy in life of the plaintiff, or in anywise advise the jury that plaintiff's expectancy is a matter necessary to take into consideration in determining what the amount of the verdict should be. It has been held in a number of cases which we think were well considered that the expectancy of the plaintiff must be determined by the jury and that failure to do so is error.

Under the proof in this case the expectancy of the plaintiff was vastly less than that of deceased, and it, therefore, became vital to a just verdict that the damages assessed be based upon the expectancy of plaintiff rather than upon that of deceased.

In the case of Illinois Central Railroad Co. v. Crudup, 63 Miss. 291, l. c. 303, it was held that the expectancy that the one who, according to the course

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of nature, would die first was the one upon which the damages awarded should be based. The court said: "If it be shown that the deceased in the course of nature would have died first, his expectation of life should control, for he could confer no benefit after his death; on the other hand, if the next of kin would die first, his expectation should govern, for he could not receive a benefit from any one after his death. Since the plaintiff, the father of deceased, would by all known probabilities have died in the course of nature before his son, his expectancy and not that of the son should control."

In the case of Stevens v. K. C. Light & Power Co., 208 S. W. 630, l. c. 631, the cause was reversed and remanded, and we think properly so, on account of an instruction given to the jury by the court below. That instruction, like the one under consideration, made the basis of recovery the expectancy in life of deceased, wholly ignoring the expectancy of the plaintiff. The court (Kansas City Court of Appeals) passing on that instruction said: "There is this further objection to the instruction. It bases the damages to plaintiffs on the expectancy of life of the deceased alone, when in fact the expectancy of life of the plaintiff must also be considered. Her damages consisted in the loss of deceased's support. There are two lives to be considered, hers and her deceased husband's. She was only entitled to damages estimated on the length of his life, if she lived longer than he, for no damages could accrue to her after her death. The husband's duty to support his wife ceases, of course, at her death. Therefore her loss in his death cannot reach beyond her own life."

The jury was not advised, or directed as they should have been by the instruction under consideration, that the verdict should have been based solely on the expectancy in life of plaintiff, since, as above pointed out, his expectancy was vastly less than that of deceased and, according to the course of nature, he would

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die first. But it is manifest that the jury did base its verdict upon the wrong expectancy, without giving plaintiff's expectancy any consideration whatever. This is made certain by the grossly excessive amount of damages awarded. Plaintiff was 56 years of age, his expectancy in life was, therefore, according to recognized mortality tables, 16.89 years. The extent of his right to recover was the support (in money) deceased would probably have given him during the life of his expectancy had not deceased lost his life.

What the record shows deceased had already given does not enter into the matter except in so far as it gives a basis to reckon from as to what future contributions may have been. This court will take judicial notice of many things, but we think this rule has never been so far extended in its application as to include matters known only to the plaintiff, matters which are vitally necessary to him by way of proof in making his case. We say this, because there is in the record nothing of certainty, disclosing what the monthly contributions were. It is passing strange that plaintiff who knew all the facts, and his counsel who questioned him on the witness stand, *did not develop by the testimony the exact number of months during which no donations were made and the exact number of months during which donations were made and the amount each month* and thus not have left the court to grope in darkness over a vital matter which it could not possibly know anything about save what the record so meagerly discloses. The plaintiff furnished the whole of the testimony as to these donations, as follows:

"Well, now, the amount of money he sent me would depend entirely upon the amount of business on the road and the amount of salary he was drawing; some months he would not send anything; one month he sent $50, sometimes he would $20, sometimes $10, and sometimes $5."

Further than this the record is absolutely barren. How many months during the year he sent nothing the

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record does not tell. How many months he sent $20, $10, or $5, the record is likewise silent, and we are left in the dark without means of knowing the truth of the matter. We have no right to guess at it, since, as before stated, it was a part of plaintiff's proof which was highly important to make clear by his testimony. We are not justified in guessing at it for him, nor will we do so. The record, so far as the proof justifies a statement, discloses a donation of $85 a year to the plaintiff, these being the amounts named by the plaintiff as having been contributed. This sum multiplied by plaintiff's expectancy equals $1435.65, and thus it is seen that the verdict returned was not only reckoned from the wrong basis, but in addition, as above stated, is grossly excessive. The jury not having been advised properly by the instruction supra, the verdict returned results in a miscarriage of justice and should be reversed and remanded. It is so ordered.

Railey, C., not sitting; *White, C.*, concurs.

PER CURIAM:—The foregoing opinion of MOZLEY, C., is hereby adopted as the opinion of the court; *Walker* and *Faris, JJ.*, concur; *Williams, P. J.*, dissents.

THE STATE v. ROBERT CANTRELL, Appellant.

Division Two, October 31, 1919.

1. **APPEAL: Not Perfected Within A Year: Dismissal.** An appeal from a judgment adjudging appellant guilty of murder in the second degree, which is not perfected within one year, must be dismissed upon the motion of the Attorney-General; and a filing in the Supreme Court of a certified copy of the bill of exceptions only, is not a perfecting of the appeal.

2. ———: ———: ———: **Supplying Lost Record.** The trial court has power, even after appeal taken, to supply a lost indictment or other lost record; and while it is the duty of the clerk to make up the transcript in a criminal case, it is the duty of appellant to see to it that the clerk acts in a timely way, and to take steps

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to supply a lost or destroyed document or record in the case; and where he files in the Supreme Court only a bill of exceptions, and does not, until after the Attorney-General has filed a motion to dismiss his appeal on the ground that he had not perfected it within one year, make any attempt to supply the lost indictment and other original files, and makes no showing and exhibits no diligence why he has not done so within the time prescribed by the statute, his appeal will be dismissed.

Appeal from Wright Circuit Court.—*Hon. C. H. Skinker*, Judge.

DISMISSED.

George C. Murrell and *L. O. Neider* for appellant.

Frank W. McAllister, Attorney-General, *Henry B. Hunt*, Assistant Attorney-General, for respondent.

FARIS, J.—Defendant, convicted in the Circuit Court of Wright County of murder in the second degree, for that, as it was alleged, he had shot and killed one Samuel McAllister has, after the usual motions, appealed. The State, by the Attorney-General, prosecuting in this behalf its pleas, has filed its motion to dismiss this appeal.

The circumstances of the homicide of which defendant was convicted are therefore not material to the question confronting us, which is: Should this appeal be dismissed for the failure of the defendant to perfect it within twelve months after it was granted? [Sec. 5313, R. S. 1909.] In full the section of the statute relied on by the State reads thus:

"If any person taking an appeal to the Supreme Court, on a conviction for a felony, other than those wherein the defendant shall have been sentenced to suffer death, shall fail to perfect the appeal within twelve months from the time the appeal is granted, the Attorney-General may file his motion before the Supreme Court asking that the appeal may be dismissed, whereupon the court shall make an order that the

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appeal be dismissed, unless the defendant shall show to the satisfaction of the court good cause for not perfecting his appeal."

The Attorney-General, invoking the application of the statute supra, moves the dismissal of defendant's appeal upon the below facts:

The appeal was granted on the 4th day of April, 1918. On the 22nd day of March, 1919, defendant caused to be filed in this court (Secs. 5308, 5309, R. S. 1909; State v. Pieski, 248 Mo. 715) a certified copy of the bill of exceptions. Neither "a full transcript of the record in the case," nor the "judgment and sentence," as the statute requires (Sec. 5308, supra), was included among the documents so caused to be filed. This status inured till after the expiration of the twelve-months period limited by Section 5313, supra; upon which, and on the 14th day of April, 1919, the Attorney-General filed his said motion to dismiss the appeal. Pending this motion, and evidently being spurred to some action thereby, defendant suggested diminution of the record and prayed for our order in *certiorari* to the Circuit Court of Wright County to send up a true, complete and correct copy of the record in this cause. This writ issued and in return thereto the clerk of the Wright County Circuit Court certified and sent up to us the entire record proper in this case, save and except the "original files" as his return shows, all of which files, including (so far as is lacking for the uses of this review) the indictment, the return says, are lost and cannot be found, and therefore are not included in the record sent up to us. Other orders, not pertinent to the point before us, were made by this court, and which therefore, lest they obscure the one salient question, it is not necessary to set down here.

Thus stand the record and the facts on the record before us. Upon these facts should the motion of the State to dismiss this appeal to be sustained?

It is obvious, we think, that the question in the final analysis resolves itself into the query whether the

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duty incumbent upon defendant of perfecting his appeal in twelve months (Sec. 5313, supra) and of causing a full transcript of the record to be filed here within that time, carries with it the further duty of supplying lost documents which are vital to an appeal. We have reached the conclusion that it does include such a duty, in a criminal case, in the light of the provisions of Sections 5309 and 5313, supra. [State v. Pieski, supra.] There is no doubt any longer existing as to the inherent power of the circuit court to permit the supplying of a lost indictment, which, as we have seen, is the only pertinent document missing in the instant case. Nor is there any doubt that the circuit court which tries a case subsequently appealed has ample power to supply lost papers in the case after the appeal is taken and while the appeal is pending here and, to such end and extent at least, retains jurisdiction in the case. So much being settled law, it is clear that there rests upon some one the duty of supplying this lost indictment, in order that appellate review may be had. Ought this duty to be saddled upon the State, which prevailed below, or upon the defendant, who seeks to nullify the judgment *nisi* upon the ground of alleged error occurring on the trial? Clearly, we think, upon defendant who seeks to fasten error upon the trial court, rather than upon the State which is the prevailing party and in whose favor the presumption of right action operates.

While by statute the duty rests upon the clerk to make up the transcript, the duty is yet upon the appellant, perforce Sections 5309 and 5313, supra, to see to it that the clerk acts in a timely way. [State v. Pieski, 248 Mo. 715.] Moreover, it is plain that the clerk is powerless to supply a lost or destroyed document in the case. [Dougherty v. Ringo, 7 Ky. L. 360; Mayo v. Emery, 103 Ky. 637.] Therefore, again we say both the reason of the thing and the ruled cases (Fellheimer v. Eagle, 79 Ark. 201; In re Haywood, 154 Calif. 312; Wolf v. Smith, 6 Ore. 73) saddle this

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duty upon the party who avers error in the trial *nisi*. In the case of Fellheimer v. Eagle, supra, the Supreme Court of Arkansas said: "When a part of the record in the case has been lost or destroyed before a transcript thereof has been made for this court, it is the duty of the appellant by appropriate proceedings in the trial court, to reinstate the record." Reading Section 5309, supra, as construed by us (State v. Pieski, supra), in the light of Section 5313, supra, we are constrained to hold that it was the duty of defendant in the instant case to perfect his appeal in the statutory twelve months set out in the section last supra, by supplying the lost indictment; and that, failing to do so, he has thereby failed to perfect his appeal within the time limited by law and the motion of the State to dismiss ought to be sustained.

We are not saying that defendant could not by a timely and appropriate proceeding or showing under the broad provisions of said Section 5313, save dismissal or obtain time beyond the allotted twelve months within which to supply lost documents and enable him to perfect his appeal. But he has taken no steps, made no showing, and exhibited no diligence or interest whatever in this matter.

So far as our researches have extended, the peculiar facts of the instant case are *res integra* in this State. A case bearing in remote principle some analogy to the situation now before us, is that of Campbell v. Greer, 197 Mo. 463, wherein the case, which was a civil suit, was reversed and remanded here because the pleadings were lost and no efforts had been made to supply them. We think it is enough to say as a reason for distinguishing the Campbell-Greer case from the instant case, that in the former there was no statute requiring the perfecting of the appeal in a fixed time under penalty of dismissal for a failure to do so.

Let the appeal be dismissed. All concur.

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PROSPER R. MEEKER, by HARRY MEEKER, Next Friend, v. UNION ELECTRIC LIGHT & POWER COMPANY, Appellant.

In Banc, November 17, 1919.

1. **NEGLIGENCE: Separate Acts: Allegations: Proof of One: Electric Wire.** A petition alleging that "defendant negligently and carelessly permitted one or more of its said wires charged with electricity, to become uninsulated and broken in two, and to fall to the surface of said alley and to remain broken in two and down while fully charged with electricity, when it knew, or ought by the exercise of the highest degree of care and caution to have known, that they were so uninsulated and broken and down," charges three acts of negligence, namely, negligently permitting said wires (1) to become uninsulated, (2) to break in two and (3) to fall to the ground; and plaintiff was not required to prove all three charges, but if he proved that the wire became uninsulated or broken in two, and remained in that condition for such a length of time as to have enabled defendant to discover the defect by the use of proper care, then defendant is liable to a pedestrian who stepped upon the wire, even though it was not down for more than a moment.

2. ———: **Uninsulated Electric Wire In Alley: Notice: Proximate Cause.** Substantial evidence that defendant was repeatedly notified that its electric wire was defective, spluttering and making blue light, and had ample time to have repaired it before it broke in two and fell in the alley and neglected to do so, is sufficient to charge defendant with gross negligence; and if after such notice, and the breaking and falling of the wire, a boy, running through the alley, came in contact with it and was injured, defendant is liable in damages for his injuries, even though the wire had fallen only a few moments before he came in contact with it and defendant had no notice that it was actually down; for in such case, neglect to repair the defective wire after repeated notice or after ample time to have discovered its defective and dangerous condition, was the proximate cause of the boy's injury. Under such circumstances the length of time the wire was down was wholly immaterial.

3. ———: **Separate Acts: Proof of One: Instructions: Broadening Issues.** Where plaintiff's petition charges three separate acts of gross negligence, proof of any one of them which was the proxi-

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mate cause of his injury will justify a verdict in his favor; and an instruction which submits the three charges alleged, does not broaden the issues.

4. ———: **Evidence: Telephone Communication.** Where an electric light company had a telephone in its office with a given number and said number was published in the telephone directory, and a user of said telephone called said number and some one answered by giving the name of the company, a communication then imparted to the said company that its electric wires in a certain locality were crippled, to which the reply came, "All right; we will attend to it," is admissible evidence in a subsequent action for damages by a boy who was burned by one of said crippled wires, even though the witness did not know the name of the person who answered for the company.

5. **VERDICT: Excessive: $35,000.** Plaintiff came in contact with one of defendant's electric wires, and was badly burned in his hands, arms, chest, abdomen, back and upper legs; one hand was amputated at the wrist; he has very imperfect use of the fingers of the other hand, but the upper part of the arm is dead, and the constrictions are such that it has become fastened to the skin of the body, and that condition can never be remedied; the burns about the chest and abdomen were so severe that the cavity of one lung and the abdominal cavity are permanently constricted; he can never use his remaining hand for any kind of work; he suffered indescribable nervous agony for several months, and all his life he must be a broken, helpless and suffering cripple. The jury returned a verdict for $50,000, which was by the trial court reduced to $35,000. *Held*, that the judgment for $35,000 will not be disturbed.

Appeal from St. Louis Circuit Court.—*Hon. Rhodes E. Cave*, Judge.

AFFIRMED.

Jourdan, Rassieur & Pierce for appellant.

(1) The court erred in refusing to give the instructions in the nature of a demurrer to the evidence. Beave v. Transit Co., 212 Mo. 352; State ex rel. National Newspaper Assn. v. Ellison, 176 S. W. 11; Degonia v. Railroad, 224 Mo. 564; State ex rel. v. Ellison, 270 Mo. 645; Bank v. Murdock, 62 Mo. 70; Mansur v. Botts, 80 Mo. 651; Black v. Railroad, 217 Mo. 672;

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Tinkle v. Railway Co., 212 Mo. 445; Eads v. Galt Tel. Co., 199 S. W. 710; McGrath v. Transit Co., 197 Mo. 97. (2) The court erred in giving plaintiff's instruction numbered 1: (a) Because said instruction takes a wider range and is broader than the allegations of negligence in the petition. Authorities, supra. (b) Because said instruction uses the word "negligently" without any explanation or definition of its meaning, thus leaving the jury to apply its notions of what was intended by the use of the word. Raybourn v. Phillips, 160 Mo. App. 535. (3) The court erred in permitting the witness Meyer to testify to an alleged telephone conversation supposed to have been had with a representative of the company, although the witness admitted that he did not know whom he was talking to. Strack v. Telephone Co., 216 Mo. 614. (4) The court erred in refusing to set aside the verdict *in toto* because it was excessive, and because the judgment for $35,000 is still excessive. Campbell v. United Rys. Co., 243 Mo. 142; Partello v. Railroad, 217 Mo. 645; Chlanda v. Transit Co., 213 Mo. 244; Finnegan v. Mo. Pac. Ry., 244 Mo. 608, 261 Mo. 481; Freeman v. Tel. Co., 160 Mo. App. 271.

Henry G. Miller, Samuel W. Baxter and *Charles E. Morrow* for respondent.

(1) The plaintiff did not have to prove all the assignments of negligence, but only enough of the acts of negligence charged to make a case. Van Horn v. Transit Co., 198 Mo. 481; Newlin v. Railroad, 222 Mo. 393; Gannon v. Gas Light Co., 145 Mo. 511; Moyer v. Railroad, 189 S. W. 842; Spalding v. Met. St. Ry. Co., 129 Mo. App. 607; Dutro v. Met. St. Ry. Co., 111 Mo. App. 264; Hoffman v. Walsh, 117 Mo. App. 278; McMurray v. Oil & Gas Co., 159 Mo. App. 623; Yost v. Atlas, 191 Mo. App. 434; Mullery v. Tel. Co., 191 Mo. App. 126, 127. (2) The defendant negligently permitted the wires to become uninsulated and to break in two and fall to the surface of the alley. To make a

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case plaintiff did not have to prove that they were down for such a length of time that defendant knew or ought to have known it and remedied the danger. Hoover v. Railway Co., 159 Mo. App. 421; Booker v. Railroad, 144 Mo. App. 273; Heberling v. Warrensburg, 204 Mo. 618. (3) Where a petition charges that the defendant negligently committed a particular act, it furnishes the predicate for the proof of all incidental facts and circumstances, both of omission and commission which tend to establish the negligence of the primary fact complained of. Fisher v. Golladay, 38 Mo. App. 538; Olsen v. Railroad, 68 Minn. 155; Reynolds v. Van Beuren, 64 N. Y. Supp. 724; Henry v. Navy Yard Route, 94 Wash. 526; Kennedy v. Hawkins 102 Pac. (Ore.) 733, 25 L. R. A. (N. S.) 606; Jones v. City of Portland, 35 Ore. 512; Ware v. Gay, 11 Pick. 106; McCauley v. Davidson, 10 Minn. 418; Clark v. Railroad, 15 Fed. 588; Grinde v. Railroad, 42 Iowa, 376; Indianapolis Ry. Co. v. Keeley, 23 Ind. 133. (4) Plaintiff's instruction No. 1 was within the purview of both the petition and the evidence and has been approved. Booker v. Railroad, 144 Mo. App. 282. (a) Instruction No. 1 required the jury to find every fact necessary to make the defendant guilty of the negligence charged, and the fact that it used the word "negligently" without defining it does not render the instruction bad, for it states all the elements of actionable negligence. Sweeney v. Kansas City Cable Ry. Co., 150 Mo. 385; Mather v. Railroad, 166 Mo. App. 142; O'Leary v. Kansas City, 127 Mo. App. 77; Rattan v. Railway, 120 Mo. App. 279; Burns v. Railroad, 76 Mo. App. 342; Anderson v. American Sash & Door Co., 182 S. W. 820. (b) The meaning of the word negligently is well understood and no definition of it was necessary. Sweeney v. Kansas City Cable Ry. Co., 150 Mo. 401. (c) The word "negligently" used in this instruction without definition merely characterized the act and is not improper. Mather v. Railroad, 166 Mo. App. 149; Burns v. Railroad, 176 Mo. App. 330-342; Anderson

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v. American Sash & Door Co., 182 S. W. 820. (d) If the defendant desired a definition of the term "negligently," used in said instruction, it was its duty to ask an instruction defining it. Quirk v. Elevator Co., 126 Mo. 293. (e) But the defendant cannot complain of the alleged error, if any, in the use of the word "negligently" in this instruction, without defining it because the same term was used by the defendant in instruction A, given by the court at its request, in reference to the negligence of the defendant and was likewise so used in instruction 2, asked by the defendant and refused by the court. Quirk v. Elevator Co., 126 Mo. 279; Grocery Co. v. Smith, 74 Mo. App. 424; Herman v. Owen, 42 Mo. App. 392; Anderson v. American Sash & Door Co., 182 S. W. 820. (5) There was no total failure of proof in this case. On the contrary, the facts proven make the defendant liable for plaintiff's injury. It is not even contended that the facts proven, if found by the jury to be true, will not entitle the plaintiff to recover under the law. The evidence was admitted without objection or exception. The defendant remained silent and made no claim or affidavit of surprise, and does not even claim in its motion for new trial that its demurrer to the evidence should have been given. Under these circumstances, even if the evidence tended to prove a cause of action different in some respects from the one alleged in the petition, which we deny, the court should have treated the matter as an immaterial variance and submitted by instructions the question of liability in accordance with the proof made. R. S. 1909, sec. 1846; Chouquette v. Southern Elec. Ry. Co., 152 Mo. 257; Mellor v. Mo. Pac. Ry. Co., 105 Mo. 455; Ridenhour v. Kansas City Cable Ry. Co., 102 Mo. 270; Crawford v. Stock Yards Co., 215 Mo. 394; Harrison v. Lakeman, 189 Mo. 581; Chamlee v. Planters Hotel Co., 155 Mo. App. 158; Bowles v. Railroad, 167 Mo. App. 272; Hensler v. Stix, 113 Mo. App. 162; Litton v. Railroad, 111 Mo. App. 140; Parsons v. Quinn, 127

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Mo. App. 525. (6) The court did not commit error in refusing to strike out the testimony of the witness Meyer. Wolf v. Railroad, 97 Mo. 473; Globe Printing Co. v. Stahl, 23 Mo. App. 451; Publishing Co. v. Warehouse, 123 Mo. App. 18. This evidence was competent, although the witness did not know the person to whom he *was* talking, just as much as if the witness had gone personally to the defendant's "trouble department" and talked to this same person in charge of it, whose name he did not know. Reed v. Railroad, 72 Iowa, 166. (a) But defendant did not object to the question asked this witness at the time; made no objection to the admission of this testimony, but took the chance of a favorable answer, and when the answer came from the witness adverse to it, moved to strike out the testimony. The competency of this evidence was waived and the motion came too late. Roe v. Bank of Versailles, 67 Mo. 426; State v. Marcks, 140 Mo. 668; Mann v. Balfour, 187 Mo. 290; Maxwell v. Railroad, 85 Mo. 196; Foster v. Railroad, 115 Mo. 165; Drainage District v. Railroad, 266 Mo. 71; Lutz v. Met. St. Ry. Co., 123 Mo. App. 499; Thomas v. Met. St. Ry. Co., 125 Mo. App. 131; Utz v. Insurance Co., 139 Mo. App. 552; Osborn v. Railroad, 144 Mo. App. 119; Compressed Air Co. v. Fulton, 166 Mo. App. 27; Dehmer v. Miller, 166 Mo. App. 513. (b) The defendant nowhere assigned in its motion for new trial the refusal to strike out this testimony as an error and cannot raise the question now in this court. Salmons v. Railroad, 271 Mo. 402. (7) The verdict of $50,000 was not excessive and the judgment of $35,000, after *remittitur*, is not excessive. Finnigan v. Railroad, 261 Mo. 481; Corby v. Telephone Co., 231 Mo. 447, 448; Hill v. Union Electric Co., 269 Mo. 99; Clark v. Railway Co., 234 Mo. 396; Hollenbeck v. Railroad, 141 Mo. 113; Henderson v. Kansas City, 177 Mo. 477; Chitty v. Railroad, 166 Mo. 435; Dougherty v. Railroad, 97 Mo. 647; Hamilton v. Rich Hill Mining Co., 108 Mo. 364; Wald-

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hire v. Railroad, 87 Mo. 37; Scullin v. Railroad, 184 Mo. 695; Myers v. City of Independence, 189 S. W. 816; Miller v. Harpster, 201 S. W. 854; Salmons v. Railway Co., 197 S. W. 35; Breen v. United Rys. Co., 204 S. W. 52; Shaw v. Kansas City, 196 S. W. 1091; Hubbard v. Wabash Ry. Co., 193 S. W. 579.

WOODSON, J.—The plaintiff brought this suit in the Circuit Court of the City of St. Louis against the defendant, to recover the sum of seventy-five thousand dollars for personal injuries received by him through the alleged negligence of the defendant. The trial resulted in a judgment for the plaintiff in the sum of $50,000, which upon motion by the defendant was by the court reduced to $35,000. After taking the proper preliminary steps therefor, the defendant duly appealed the cause to this court.

The charging part of the petition was as follows:

"The defendant negligently and carelessly permitted one or more of its said wires then and there charged as aforesaid, to become uninsulated and broken in two, and to fall to the surface of said alley, and to remain broken in two and down then and there while fully charged with electricity as aforesaid, when it knew, or ought by the exercise of the highest degree of care and caution to have known, that said wires were so uninsulated and broken and down as aforesaid, and liable if touched by any human being while so uninsulated, broken and down and charged as aforesaid, to cause serious injury or destroy human life."

The petition then alleges that while said wires were thus in said alley, "uninsulated, broken in two and down and charged with electricity as aforesaid," the plaintiff, while walking along in said alley, came in contact with said wires, and was thereby violently precipitated to the ground and seriously, painfully and permanently injured. He sues for $75,000 damages.

After the general denial the answer contained the following:

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"Further answering, defendant states that, although plaintiff saw, or by the exercise of ordinary care on his part might have seen, that the wire referred to in the petition had burned through and that one end was lying in the alley, and although he was warned not to touch it because it was dangerous to do so, and well knowing that there was such danger, he nevertheless approached it or came in contact with it and his negligence, in the above particulars, was the proximate cause of his injuries or directly contributed thereto."

There is no controversy as to what the evidence of the plaintiff tended to prove, but there were numerous objections made and preserved as to the competency and relevancy of much of that evidence; and I will therefore set out the substance of the testimony of the witnesses as preserved in the record, and thereafter pass upon the objections thereto saved.

The plaintiff was about fourteen years of age at the date of the injury which occurred in the City of St. Louis on June 15, 1915.

The defendant, Union Electric Light & power Company, is a corporation, engaged in the business of furnishing and selling electric light and power in said city. In certain portions of St. Louis it strings its wires upon poles and such wires extend along, over and across streets and alleys. On the date in question and for a long time prior thereto, the defendant maintained a wire carrying 2,200 volts of electricity, along a public alley running east and west from Clifton Avenue to Tamm Avenue, in the southwestern part of St. Louis, and in the rear of a number known as 6273 Magnolia Avenue. Surrounding this alley are streets as follows: Clifton Avenue, running north and south; Magnolia Avenue, running east and west; Columbia Street, running east and west, and Tamm Avenue, running north and south. The wire in question was strung on poles on the south side of the alley and at a point in the rear of 6273 Magnolia Avenue; it crossed the alley diagonally and extended through the top of a tree. Nearby, located upon the cross-arms of

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one of the posts, was a transformer, the purpose of which was to reduce the current carried on the primary wire, that is, the 2,200 volts, to 110 and 220 volts in order that it might be distributed to residences and business houses nearby, for electric lighting and other purposes. Such distribution was made to a saloon conducted by Charles Meyer, at 6400 Old Manchester Road, about 125 feet from the point where the accident occurred; and to the residence of Mrs. G. B. Huffington, 6233 Magnolia Avenue, as well as to the residence of other persons residing in that neighborhood.

About two weeks previous to the accident Mrs. Joseph Stewart, who then lived at 6273 Magnolia Avenue, and whose rear gate opens on the alley at the point where the plaintiff was injured, noticed the electric wire which ran in the rear of her house and at the place where the boy was injured, burning like a street car wire would be "when the trolley would be off." Her house sat some distance back from the alley and she was sitting in her bedroom rocking her baby. The boughs of the trees were waving and every time the tree rubbed against the wire it would cause a flash and a flame to be thrown sufficient to light up the bedroom in which she sat. The flashes and flames would occur when the wind blew the tree against the wire. After the accident she saw the limb and it looked as if it were dead, and there was a groove in it about the size of the wire, indicating where the wire had rubbed.

Miss Gertrude Castle, who resided at 6263 Magnolia Avenue, noticed, two days before the accident, that at a point close to the pole, to which the wire in question was attached, there was no insulation upon the wire; that it was in a sizzling condition and cast a blue flame. On the Sunday preceding the Tuesday on which the accident occurred, there had been an electrical storm and Miss Castle and her mother, Mrs. G. B. Huffington, heard a sizzling sound and saw a blue flame flashing from the wire at the pole outside of the house, in this alley and at the point where the wire subsequently broke. They

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discovered that the electric lights in their house were not burning. Miss Castle looked up the defendant's number in the telephone book, placed the call and was answered by a lady, who said, "Union Electric Light & Power Company." Miss Castle told her that the lights were out and asked her to attend to it. The person speaking for the Union Electric Light & Power Company said, "Just a moment; I will speak to the man who has charge of that division," and a moment later she said, "Yes; someone will be out to fix them this afternoon."

The record discloses the fact that this witness, as well as all the others who testified that they called the defendant over the telephone to complain of the defects or the troubles they were having with the wires and 'phones, had no personal knowledge of the persons who answered the 'phone, or who they represented, except that they presumed that they were agents of the defendant from the facts that they called its number and the response came therefrom. This evidence was objected to and exception duly saved.

This was about one o'clock. About four o'clock Miss Castle again tried the lights and found they were not on and she telephoned again to the Union Electric Light & Power Company, got the same party who told her the same thing, and about six o'clock the lights were on. The sizzling noise and the popping which she heard, continued throughout the day and was about as loud as a fire cracker.

This occurred on Sunday, June 13th. The accident happened about four o'clock on the afternoon of Tuesday, June 15th.

For ten days or two weeks before that Sunday, she had noticed that the lights in the house would be off sometimes as long as three or four minutes. At other times they would gradually get dimmer and dimmer, until the wires in the incandescent were just a red glimmer, then gradually get brighter. When Miss Castle telephoned to the defendant company she told it that the wires were defective, and the party answering the

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telephone stated that some one would be out. The statement of Miss Castle is corroborated in every particular by that of her mother, Mrs. G. B. Huffington, with whom she resided. Their house was located fifty feet back from the alley, and there were three houses on lots forty feet wide, between the Huffington house and the point where the sizzling noises were heard and where the accident occurred. Mrs. Huffington heard this noise continuously from Sunday, the 13th, to Tuesday, the 15th, about 11 o'clock, at which time she left home.

Charles F. Meyer, who conducted the saloon at 6400 Old Manchester Road, about one hundred or one hundred twenty-five feet from the point where plaintiff was injured, and who received power and light from the wire in this alley which subsequently broke and caused the injury to Prosper H. Meeker, noticed, a week or ten days before the accident, that the wires were slack and that every time the wind blew the wires would touch, and such contact would cause his lights to go out or flicker. He could see the wires from his bedroom and noticed a blue flame thrown from the wires every time they came in contact. At one time it threw a blue flame the same as "if a trolley wire got off the trolley." Meyer got the telephone books, found the telephone number of the Union Electric Light & Power Company, called it on the phone, and asked if he was talking to the Union Electric Light & Power Company, and was informed by the person at the phone that he was. He then said, in the telephone conversation, that his lights were out; "that there was something wrong on the outside." He called the trouble department of the Union Electric Light & Power Company twice and made similar reports. On another occasion he had James Crecelius call the defendant on the phone and make a similar report. The first time he called the defendant he reported that he didn't have power and the answer was, "We will attend to it." These reports were made by Meyer to defendant a week or ten days before the injury was sustained by Prosper H. Meeker, and at that time it was evident that the wires

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which later became burned and broken in two and fell to the surface of the alley were uninsulated, sagging together, producing flashes, making popping and sizzling noises and causing the lights in dwelling and business houses to flicker, grow dim and go out. Defendant was repeatedly informed of this condition. There was no insulation upon the wire at all between Meyer's place of business and the pole for a long time prior to the time the wires burned through and fell to the ground. The insulation was hanging down in strings. This was the wire with which plaintiff came in contact when it, due to its uninsulated condition and its sagging and touching wires, became burned, broken in two and fell to the surface of the alley. The second time he telephoned to defendant he specifically stated that the wire in the alley was throwing blue flames, and the reply was that they would attend to it. This conversation occurred four or five days before the accident.

James Crecelius likewise called the defendant on the telephone and reported the lights out at Meyer's place, five days before the accident. He, too, called the number of the Union Electric Light & Power Company on the telephone, obtained a response and was referred to the trouble department. Crecelius is a man who has electrical knowledge and he discussed the situation with the company's representative on the phone at the time. Crecelius told him bositively that there was nothing wrong with the lights on the inside. The defendant promised to send a man out there as soon as possible. This was about five days before Prosper Meeker was hurt. Crecelius states he has had about eighteen year's experience in the electrial business; that when wires charged with electricity come in contact a short circuit is caused, producing a flashing, blowing out of fuses, the going out of lights, the flickering of lights and that the final effect of such contact, if continued, will be that the wires will become crystallized and burned until they come apart. The evidence of F. H. Worthington, general

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foreman for defendant, is to the same effect. This is exactly what happened in this case. Upon the breaking of such wires, if a secondary wire, that is, one carrying a small voltage, should come in contact with a primary wire, that is, one carrying a large voltage (in this case 2,200 volts,) the secondary wire would take the primary voltage. It is amply proven in this record and is an admitted fact in this case that wires when coming in contact uninsulated and charged with electricity will burn and break in two (defendant's answer). The flames, flashes, sizzling noises and flickering lights are all indications of a meeting of such wires and are warnings of a dangerous condition which results in a severance of wires.

Defendant produced as a witness one Henry Burgeatz, who testified that on June 11, 1915, at 1:04 a. m., the Union Electric Light & Power Company received a call from Columbia and Clifton that a primary fuse was out and they sent a trouble man, John Schneider, to find out the cause. On the same day at 6:16 a. m., it received a complaint in reference to condition of wires in this locality. On June 13th, at 7:27 p. m. they received a complaint from 6239 Magnolia Avenue. On each occassion a man was sent out to find the trouble. A trouble man is supposed to look for the trouble, and it is his duty to examine the wires in the immediate neighborhood to find out the cause of the trouble. This the defendant did not do, although the dangerous condition was making itself manifest for ten days or two weeks prior to the injury.

Mrs. Carrie Menkhaus, who lived at 6271 Magnolia Avenue, was in the basement of her home about a quarter of four o'clock on the afternoon of June 15, 1915. While there she heard a popping noise which sounded so distinctly that she came out of the basement to see the cause of it. As she came up, she saw the wire in question break and fall apart, one piece falling over the tree heretofore mentioned, and extending down through the branches to the alley.

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Mrs. Charles Murphy, of 6267 Magnolia Avenue, was in her kitchen and she heard a cracking sound and she, too, came out to see the cause. She saw the wires break; two fell towards the west down into the alley, and the other two along the pole into the alley. The day was pleasant and the sun was shining. It had rained on the Sunday previous, but had not rained thereafter. The wires broke and fell about ten minutes before plaintiff was injured.

Prosper H. Meeker was fourteen years of age on the 24th day of September, 1914, and on the day on which he sustained the injuries herein complained of, viz., June 15, 1915, he had been at school. He was acquainted with the alley, and formerly lived at 6273 Magnolia Avenue, in the rear of which the alley runs. After he reached home he started to go to Clifton Heights Park in company with Dedrich Schumacher, a boy seventeen years of age. They entered the alley at the west end and started to run down it at top speed. This is the testimony of the injured boy, Dedrich Schumacher and Bertha Stevenson. Prosper Meeker was a little ahead of Dedrich as they ran. The latter noticed the wire hanging down through the trees and shouted, "Look out for the wire!" Prosper did not hear this admonition. Immediately he either ran into or fell against the wire, there was a flash of electricity, the wires wriggled around Prosper's body, his clothing burst into flames and he fell prone to the earth, blood pouring from his mouth. Dedrich tried to take the wire from him and was knocked down, receiving a severe shock. He ran to Meyer's saloon, called for help, called Dr. Kirkpatrick, and returned to the scene of the accident. Prosper had been in contact with the wire two or three minutes before Dedrich ran to the saloon. Floyd Benson and Charles Campbell ran from Meyer's Saloon and extricated the injured boy. Benson had to look for a place on the wire where it was insulated and at the time was wearing rubber soles and heels, hence he escaped injury. When these men came to Prosper's

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relief he was lying on his face, with the wires crumpled up underneath his body. Blood was running out of his nose and mouth and his shirt was in flames. His clothes were burning, and as the wires were removed from contact flesh came with the smouldering clothing; there was an arc of electricity.

Dr. Kirkpatrick found the injured boy in a vacant lot near the scene of the injury, where he had been borne by his rescuers. Blood was oozing from his nose and mouth and his body showed severe burns. An examination by Dr. Upshaw at the hopital diclosed "an extensive burn, including the entire arm, upper part of the left arm and inner surface down to the wrist, and the middle finger. Extensive burns extended irregularly over the chest, down over the abdomen, around over the abdomen and back, up irregularly over the back close to the spine, back up to the shoulder. The surface was entirely burnt off down into the muscle. He was also suffering from a severe burn to the right hand, completely baring the bones of all four fingers and the first phalanx of thumb; also the entire palm surface of the hand; the side up into the wrist was all burnt out. He also had a burn on each thigh, anteriorly, at the time that I examined him." All four of the fingers and the first joint of the thumb on the right hand were removed. He suffered severe pain and it was four days before he became rational. The left arm is fastened to the body for three-fourths of the distance of the upper arm. The muscles of the upper arm are completely destroyed. His back and side are in a contracted condition, scarred, and at the time the case was tried, had not entirely healed. He has no use of the left arm and hand. There is no movement scarcely of the elbow and no operation will remedy the condition. The right arm is normal, but the hand and fingers are entirely destroyed. The wrist motion is badly impaired. The palm of the right hand is scarred tissue. The left breast is completely destroyed. The chest cavity is narrow, due to contraction, and this is the case with

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the abdominal cavity. The treatment extended for over a period of four months. During the treatment something like 234 skins grafts were made at different intervals. He suffered great pain and is permanently impaired from performing any work with his hands in any occupation he may take up. His nervous organism is impaired and there will remain considerable pain caused by the pinching of the nerves. Dr. Henry, a practitioner of twenty-five years' experience, testified that "the injured boy had the most extensive burn I have ever had the opportunity of observing and recover."

The different doctors who attended plaintiff have described his injuries as follows:

Dr. Robert Y. Henry testified: "I am a practicing physician and surgeon, having graduated from the Homeopathic Medical College of Missouri, then afterwards the Polyclinic, Chicago, and have been practicing since 1890. I have had a good deal of experience. I know the plaintiff and treated him for injuries. I saw him first in consultation with Dr. Upshaw, who had charge of his case in St. Anthony's Hospital in June, 1915, shortly after he was injured. He had the most extensive burn I have ever had an opportunity of observing, and recover. When I first saw him I did not think it was possible for him to recover from the injury. I found his right forearm and hand so badly burned it required the amputation of some of his fingers, and a burn extending over the left side of his body, including his arm and back and side and shoulder. The burn extended nearly to the hip, around past the median line front, and extending back nearly to the middle of the back. This arm had a third degree burn; that is, the skin was entirely burned from it, including some of the muscular tissues. We afterwards did repeated skin grafts. I don't remember exactly, something like 140 grafts were made at different intervals, and suceeded ultimately in getting the raw surface covered with skin, but he has a permanent—what we call a burn contracture on the left side of the body; that is, the

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arm is bound to the body from the shoulder practically to the elbow, and I want to say that that condition cannot be remedied, even though the arm would have been dressed in this position (illustrating) and were in the position during the entire term this repair was going on.

"Burn contracture will draw down; it will fasten it to the body; and that is what is taking place in this case, and it will be permanent, and no operation will ever be able to correct it. If we had kept the arm in an extended position in this manner (illustrating) while the skin was healing over the burned surfaces, just as soon as you would have to remove the extension of the limb, the contracture would have taken place; it will draw right down to the body. We have that experience in burned hands. He will have some use of the forearm; he will have absolutely no use of that arm from the shoulder to elbow. It is as completely bound to the body as it can be and will always remain so, but he does have some use with the forearm and hand. The use of the fingers is impaired to a certain extent, but he will have some use of his hand. He cannot raise his hand to his face for the reason he has no use of the arm. He does have some use of the forearm. He was severely burned and is burned all over his chest, and these constrictures will restrict and impair the function of the left lung, for the reason that there is no expansion on that side of the chest, and there is a lot of inflammatory exudates which prevents the complete functioning of his left lung. His right forearm and right hand were so badly burned it required an amputation of the fingers. We tried to save them, but had to amputate them. A little of the thumb was saved, but not enough to be of any functional benefit. He had a burn in under the surface of his right arm, forearm chiefly. The burns are permanent and he has lost the permanent use of the forearm of his right hand.

"The last examination I made of the boy was probably six weeks or two months ago. When I first saw

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him, all over the burned surface which I have mentioned, the skin and part of the flesh was entirely burned away, leaving a perfectly raw, seared surface; the muscles were exposed, the facias were entirely exposed over this burned area; a conplete third degree burn in every part. By a third degree burn is meant a burn into the muscular tissue. At this time there is a scarred tissue all over this region that was burned white; it is plainly visible all over this burned area. The right hand has a scarred appearance. It is slick and reddish in appearance and ulimately will become more white in appearance. The condition I have described could have been brought about by a burn from electricity. The injuries are permanent.

"He is permanently impaired from performing any work with his hands of any consequence, in any occupation that he may take up. As to the effect upon his physical and general health, I think it will be the means of shortening his life, and he certainly will not have the resistance a normal man will have; he will be a weaker man in every respect. While I was treating him I only saw him probably seven or eight times in consultation, and during the various skin grafting operations. He was unconscious part of the time and did not know what he was talking about. At all times he was highly nervous in suffering intense pain, and the repeated dressings which the wound required kept him highly nervous during the entire time. The nervous system is made up of nerve cells which may be shocked in many ways, that is, either from fright or from pain or from actual injuries, and in this case no doubt all of these elements had something to do with shocking the nervous system. I think in many ways he will have a permanent impairment of the stability of his nervous organism by having so severe an injury and shock as he received at this time. From the scarred tissue and contractures there will be impingement or pinching of the nerves which will cause him considerable pain, because there is not the freedom of motion or movement of any of the tendons or nerves as there would be in a perfect physio-

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logical condition, and this will be permanent. He had intense pain from the shock and burns while he had raw surfaces.

"I think any burn from any cause is painful. I do not know that an electrical burn is more painful than burns from fire, friction or what it may be. A burn is painful at all times and continues over a great period of time, unless there is a complete destruction of the nerves supplying the parts; then it would not be so painful. He has extensive scars over the regions I mentioned and they will be permanent and distinctly visible."

Dr. Henry E. Kirkpatrick testified: "I found Prosper Meeker lying on a vacant lot about twenty yards from the alley in the rear of 6200 Magnolia Avenue. He was right there on the ground with his shirt practically burned off him and blood oozing from his nose and mouth. He was bleeding, and I ran back half a block for my automobile and took him home. His residence was about two blocks and a half from the place of injury. Meeker was put on a bed, and I stripped him of all clothes remaining on him and examined his injuries and dressed them.

"These injuries were severe burns over the left shoulder and arm, the whole left side of the chest and the entire armpit, and the burn was of dense, brawny, hard nature, which caused me to fear a third-degree burn. His right hand, especially the third finger of the right hand, at that time showed the burnt bone sticking through the flesh. The other fingers of the right hand and thumb were injured, but at that time it was impossible to determine the extent of the injury. I treated him that day, and in the evening I was called back again.

"A few days later I saw him at St. Anthony's Hospital at the invitation of Dr. Upshaw, and about six weeks later, after he was brought home. I saw him at the home in a bathtub where Dr. Upshaw was dressing him. At St. Anthony's Hospital I was given an opportunity to see his injuries, but more especially I saw the

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condition of the boy. He was running temperature, and there were symptoms of sepsis or blood poison. His temperature was 103 or 104. It is impossible to handle an extensive burn of the kind without some degree of infection. At that time the operation had not been performed on his right hand. The skin at that time showed some suppuration at the edges, where it was beginning to slough, and there was pus material oozing from the wounds that necessitate constant dressing and redressing. The fingers of the right hand were blackened at that time, showing they were no longer giving their circulations, so that they were practically dead. He was delirious from the absorption. He was very sick, and my opinion at that time was that he would not live.

"It is always painful to dress burns as extensive as these burns were. The last time I saw him at his home, about six weeks after the injury, the right wrist looked at that time as though it was going to be necessary to amputate the right hand about the wrist. The fingers at that time had been amputated, at least some of them had. The burn at the left arm and shoulder and armpit showed at that time the extensive sloughing that had taken place, showing the muscles beneath. His temperature had gone to normal and he was resisting the blood poison. He was very sensitive to pain, and as to his nervous system, I could not say much, except that he was very sensitive to pain. He was at the time suffering from pain and it was severe. At least it would be painful during and after the dressing; how long after I don't know. The injuries described are permanent, and I think the effect that they will have on his general health will be to shorten his days and to retard his growth."

Dr. H. A. Upshaw testified: "I was called in consultation in the case of Prosper Meeker by my brother on the day of the injury, June 15, 1915. I examined the plaintiff, having met the case at St. Anthony's Hospital, and found the boy suffering with an extensive

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burn, including the entire arm, upper part of the left arm and inner surface down the wrist, and the middle finger. Extensive burns extended irregularly over the chest, down the abdomen, around over the abdomen and back, irregularly over the back close to the spine, back up to the shoulder. The surface was entirely burned off down into the muscle. He was also suffering a severe burn to the right hand, completely baring the bones of all four fingers and the first phalanx of the thumb; also the entire palm surface of the hand; the side up intc the wrist was all burned out. He also had a burn on each thigh, anteriorly, at the time when I examined him. We immediately applied treatment to allay the irritation and also to prevent toxemia, the absorption of toxine, and to assist the kidneys in elimination, on account of the loss of the fissures of the skin, the glands of elimination, and we watched him closely for several days before we could do anything surgically. He was not unconscious, but seemed in a dazed condition. The pulse got high as 160, and his temperature ran up, and he became in a very critical condition for several days. For five or six days the first week we hardly thought he would live. We had to remove all four of the fingers and the first joint of the thumb on his right hand. We continued the moist-pack treatment until we got rid of the burnt tissue; then we applied skin graft. The treatment continued over a period of about four months. His health during this time was very bad. He suffered with uremia a great deal, and also albuminaturia, due to the loss of secretion of the glands and skin. The urine was constantly full of albumen, which we had to combat continuously. The effect on his nervous system will be permanent. The termination of all these nerves had been destroyed, and that is bound to cause an effect upon the nervous system. He suffered very severe pain and was semiconscious and unconscious for about four days before he became really rational. The left arm is fastened to the side for about three-fourths of the distance of the upper arm. The muscles of the upper arm

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are completely destroyed. The arm has grown tight to the body, due to contracting of the scarred tissue, and everything was done that could be done to prevent it. His back and side are now in a contracted condition, scarred—contraction of the scarred tissue—and it is not entirely healed and will not be for some time. Practically, as far as labor is concerned, he has no use now of the left arm and hand. There is no movement scarcely at all of the elbow, just as of the wrist and arm, and no operation will remedy the condition, because, when you separate the scarred tissue, it will immediately draw back again. You cannot prevent it. It has been tried again and again. The right arm is normal, but the hand, fingers, are entirely destroyed. The thumb motion is very good, but the wrist motion is badly impaired. The palm of the right hand is just contracted scarred tissue. It was all destroyed, all sloughed out. The left breast on the left side of the chest is completely destroyed. The chest cavity is narrow, due to contraction. The abdominal cavity is also narrow, due to contraction. It has the effect of narrowing the chest, and that causes a pressure on the lung and does not allow the lung to respond in respiratory action as it should, and throws more work on the right lung. The condition in which I found this boy could have been produced by a burn from electricity. The effect of all these injuries will be an impairment to his general health, due to the narrowing of the cavity lung, which interferes with peristalsis of the bowels, and will impair the nerves, and this condition is permanent. The conditions I saw in this boy, will, without question, shorten his life and he will suffer some pain continually on account of these contractions. The pain was intense each time the dressings were changed, and they had to be changed often on account of the sloughing of the tissues. All the sloughed tissues would hang on."

Dr. Ira W. Upshaw testified: "Prosper Meeker's case was my case, and I first saw him about six o'clock on the day of the injury at his home. He was taken to

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the hospital as soon as I could get an ambulance. I examined him, and found the right hand, the palm of it, practically destroyed; the burn ran over the back of it. The fingers, the flesh was burnt off and exposed the bones. About half the bone of the thumb was exposed. The left side burn extended down over the chest to about the lower edge of the ribs or just below, even to the abdominal cavity, and down the back about the same distance. The forearm was almost entirely destroyed; the flesh not entirely, but it was very badly burnt down the elbow. Below the elbow burns were not very severe. On each thigh he had a burn on the anterior part of the thigh. The majority of these burns were third-degree burns, and that means complete destruction of the tissue. To relieve the shock as much as possible and to allay the pain, he was given elimination treatment, the usual treatment in cases of burns. Following his admission to the hospital he was semiconscious. Toxemia was somewhat developed, that is, the absorption of poison through the destruction of the skin; and we combated that with serums and the treatment usually used in those cases. The boy became very seriously ill, his pulse got very high, his temperature high, and after six or eight days we thought he would not live. Following that there were times when we thought he was improving; times when we thought he was not. After a time the tissue came off, the majority of it, and after we got rid of the burnt tissue the boy got in a better condition, for the skin grafted and improved materially. It was necessary to take off all the fingers and the thumb at the first joint of his right hand. On account of the contraction of the scarred tissue his left arm is adherent to his side. He has good motion of the wrist and hand and a slight motion of the elbow, but not above. About three-fourths of the arm from the shoulder to the elbow is now grown and bound down to his left side, and the motion there is destroyed. I think he can bring it up to his chin by bringing his head down to it. These injuries were a very severe shock to his

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nervous system and it is permanent. These other injuries are permanent. On account of the contraction of the tissues he will have considerable trouble, and his trouble will increase. On account of the contraction there is pressure on the lung, causing more or less solidification of the upper part of the lung, and the lung will not grow any larger. We grafted skin on at least three-fourths of the tissue that was burnt on his body."

Dr. H. A. Cleveland testified: "I am acquainted with nervous disorders and injuries to the nerves, not as a specialist, but in a general way. I know Prosper Meeker and examined him about the middle of June at the request of Doctor Upshaw, as consultant. I found him in a condition of profound shock, shock being injury to the nervous and vascular system that may result from physical or psychical strain. It creates a permanent instability of the nervous system. On examination I found his right hand practically destroyed, the fingers and part of the thumb. A very extensive burn at the left side, in front, the chest, the abdomen and back, and the entire left arm, down to the wrist, part of the hand and fingers on the left side. They were third-degree burns. I saw him frequently after that. His condition during the first or second week became progressively worse; his condition was very serious. He went into a coma, not continuous, and was delirious at times. Then he began to improve to the extent that the wounds began to heal. The edges of this burn began to heal exceedingly slowly, and after several weeks the condition of the urine appeared, it having been exceedingly toxic and containing much albumen. This was on account of the overworking of the kidneys. Several operations were performed for skin grafting. The earlier operations were the removal of his fingers and dead tissue, as it seemed somewhat loosened. He was not put under an anesthetic for every operation and they were exceedingly painful. His condition today is one of permanent disability, resulting directly from the burn. By that I mean that he is practically unable to

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use his left hand at all. The arm is fastened to the side of his body, and he is going to have a marked restriction of normal respiration because of the contraction of the left side, and he is going to have more or less symptoms from his gastro-intestinal tract, due to contraction and pulling of the abdominal wall. He is going to have a permanent injury to his nervous system, as readily can be seen by his face to-day. That is the direct result of the shock received at the time. I have not examined this boy since about the first of October. At that time the contraction was excessive. The left arm down to the elbow was fastened directly to the body. There was no muscular tissue in the upper part of the arm practically at all, and then there were the excessive scar tissues through the forearm and on the left hand. On his right hand I remember three or four of these fingers were practically gone, and a part of his thumb. The scars are burned white, more or less bloodless along the edge, as no blood vessels were working there. They had a pink or over-red color. The effect of these injuries and this shock and the treatment will shorten his life. He suffered excessive pain up to about the first of September from the time of the injury. In the treatment he was required to sit in a chair night and day. I cannot remember accurately the number of skin grafts, but something over two hundred about two hundred and thirty-four."

Plaintiff's instruction numbered 1, on which the case was submitted to the jury, was as follows:

"1. If the jury believe from the evidence that on the 15th day of June, 1915, the defendant company owned and was then and there and for a long time prior thereto had been using the wires mentioned in the evidence in the conduct of its business, and that defendant was at all said times engaged in the business of furnishing and selling electricity in the City of St. Louis, and that its said wires were strung to poles, and that said poles and wires at the place mentioned in the evidence where plaintiff was injured, if you so find, were on, in, along and

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over a public alley and highway in said city, and that said wires, in the conduct of defendant's business were then and there charged with and carrying currents of electricity;

"And if the jury further believe from the evidence that at a point in said alley in the rear of residence No. 6273 Magnolia Avenue, in said city, the defendant negligently permitted one of its said wires then and there charged with electricity to become uninsulated and to come in contact with another wire or wires or some other object and to chafe and rub against said wire or wires or some other object, and to become broken in two, and to fall to the surface of said alley;

"And if the jury further believe from the evidence that on the 15th day of June, 1915, by reason of said wire then and there being uninsulated and coming in contact with, and rubbing and chafing against another wire or wires, or some other object, if you so find, said wire was, while so charged with electricity, if you so find, negligently permitted by defendant to become broken in two at said point in said alley, and then and there fall to the surface of said alley at said place, while charged with electricity, and that plaintiff while traveling on said alley, came in contact with said wire, and that an electric current from said wire was then and there communicated to plaintiff and he was thereby shocked, burned and injured;

"And if the jury further believe from the evidence that defendant knew, or by the exercise of the utmost care of an ordinarily careful and prudent person engaged in the same or similar business, under like or similar circumstances, could have known that said wire was so uninsulated, and was so coming in contact with and rubbing and chafing against another wire or wires or some other object, and was on account thereof liable to break in two and fall to the surface of said alley, a sufficient length of time before the plaintiff was injured, if you find he was injured, for the defendant, in the exercise of the utmost care of an ordinarily careful and pru-

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dent person engaged in the same or similar business under like or similar circumstances, to have remedied the same, and averted the injury to plaintiff, and negligently failed to do so, and that by reason thereof the plaintiff was injured, and that plaintiff himself was not guilty of any negligence which directly contributed to cause his injuries, if any, then you must find for the plaintiff."

I. Counsel for defendant first complain of the action of the court in refusing to give its demurrer to the plaintiff's evidence. The ground of this complaint is that the petition contains but a single charge of negligence, namely, in permitting its wires to become separated and suspended in the alley where the plaintiff was injured, when the uncontradicted evidence shows that the injury occurred within ten minutes after they were parted and fell, which was too short a time in which the defendant could possibly have rejoined the same or otherwise avoided the injury.

Demurrer.

The plaintiff's answer to this complaint is that the petition does not consist of a single charge of negligence as previously stated, but contains three separate and distinct allegations of negligence, namely: (1) That the defendant negligently permitted the wires to become uninsulated, (2) to break in two and (3) to fall to the ground.

In our opinion the contention of counsel for plaintiff is the correct construction of the petition. It clearly charges the defendant with negligently permitting the wire to become uninsulated, to break in two and to fall to the surface of the alley. The three allegations are connected with the copulative conjunction "and," which word connects the two last charges with the first, which in plain English means that the defendant not only negligently permitted the wire to become uninsulated, but negligently to break in two, and negligently to fall upon the surface of the alley.

The law is well settled in this State that the plaintiff did not have to prove all three of those charges. Any

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one or more of them, if proven, were sufficient to make out the plaintiff's case. If the defendant negligently permitted the wire to become uninsulated, and come in contact with the branches of a tree or another wire for such a length of time as to have enabled it to have discovered the defects, in time to have prevented the injury, but did not do so, and on that account the plaintiff was injured, then the defendant is liable, even though the wire was not down for more than a moment.

Proximate Cause.

The evidence not only showed that the defendant had ample time in which to have discovered the defects mentioned and to have remedied the same in time to have prevented the injury, but it also showed that it was repeatedly notified of those defects ten or fifteen days before the injury occurred, and that it neglected to remedy the same during all that time, which was clearly negligence of the grossest kind.

Under those conditions the length of time the wire was down was wholly immaterial, for the negligence consisted in permitting the wire to part and fall upon the surface of the alley; that was the continuing and the proximate cause of the injury, just as much so as if the wire had fallen upon the plaintiff, instead of upon the ground and he had run into it while it was in that position.

The foregoing ruling is well supported by the following cases: Hoover v. Railway Companies, 159 Mo. App. 416, l. c. 421; Heberling v. Warrensburg, 204 Mo. 604, l. c. 618. This point is ruled against the defendant.

II. Counsel for defendant next insist that the court erred in giving instruction numbered 1 for the plaintiff. The ground of this insistence is that the instruction broadened the issues made by the pleadings, it being their contention that the petition, as previously contended, charged only a single act of negligence, while the instruction submitted the three charges before mentioned.

Broadening Issues.

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There is no merit in this insistence for the reasons stated in paragraph one of this opinion in connection with ruling of the court in refusing the defendant's demurrer to the evidence. While the plaintiff had the right to prove and submit to the jury all the charges of negligence contained in the petition, yet he was not required to so do, the proof of any one or more of them being all the law required, and the finding of the jury upon such in his favor justified a verdict in his behalf. [Van Horn v. Transit Co., 198 Mo. 481; Newlin v. Railroad, 222 Mo. 375, l. c. 393; Gannon v. Gas Light Co., 145 Mo. 511; Moyer v. Railroad, 198 S. W. 839, l. c. 842; Spaulding v. Met. St. Ry. Co., 129 Mo. App. 607; Dutro v. Met. St. Ry. Co., 111 Mo. App. 258, l. c. 264; Hoffman v. Walsh, 117 Mo. App. 278; McMurry v. Prairie Oil and Gas Co., 159 Mo. App. 623; Yost v. Atlas Portland Cement Co., 191 Mo. App. 422, l. c. 434; Mullery v. Tel. Co., 191 Mo. App. 118, l. c. 126, 127.]

III. Counsel requested the court to give the following instruction to the jury, which the court refused, and the defendant duly excepted:

"The court instructs the jury that if they shall find and believe, from the evidence, that the wires in question fell so short a time before the plaintiff was injured that the interval of time was not reasonably long or sufficient in which to have enabled defendant to remedy or remove the danger, then the plaintiff cannot recover and it will be the duty of the jury to return their verdict in this case in favor of the defendant."

Instruction.

This instruction was practically a demurrer to the evidence and if it was error to refuse it, it was for the same reason error to refuse the demurrer. I say this for the reason that the undisputed evidence was that a sufficient time did not elapse between the falling of the wire and the happening of the injury to have permitted the defendant to have repaired the defect, and thereby have avoided the injury. Under the facts of

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this case, as previously stated, the length of time the wire was down is wholly immaterial.

The action of the court in refusing this instruction was proper.

IV. It is next insisted by counsel for defendant that: "The court erred in permitting the witness Meyer to testify to an alleged telephone conversation supposed to have been had with a representative of the company, although the witness admitted that he did not know whom he was talking to," and cites in support thereof, the case of Strack v. Telephone Co., 216 Mo. l. c. 614.

Telephone Communication.

While the language of that case seems to lend support to the defendant's contention, yet the facts are so meagerly and imperfectly stated that it is difficult to determine what was the real point held in judgment, and for that reason that case has but little weight in the determination of the question here involved.

Here the evidence shows that the defendant had a telephone in its office with a given number which was published in the telephone book, and that the witnesses in this case picked up that book and called that number, and in response thereto someone answered and said, "This is the Union Electric Light & Power Company," and thereupon the complaints heretofore set out in the statement of the facts were related to that person, who replied in substance to each and all of the witnesses, "All right; we will send some one out and have it repaired."

This court, in the case of Wolfe v. Missouri Pacific Ry. Co., 97 Mo. 473, passed squarely upon this question and held this character of testimony admissible, and in discussing the question, BARCLAY, J., speaking for the entire court, on page 481, used this language: "A question arose incidentally at the trial upon the admission in evidence of a conversation held through the telephone between some one at the instrument in plaintiffs' private office and the witness. It was admitted,

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though the witness did not identify the voice of the speaker as that of either of the plaintiffs or their clerk. The courts of justice do not ignore the great improvement in the means of intercommunication which the telephone has made. Its nature, operation and ordinary uses are facts of general scientific knowledge, of which the courts will take judicial notice as part of public contemporary history. When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible. The ruling here announced is intended to determine merely the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission. It may be entitled, in each instance, to much or little weight in the estimation of the triers of fact, according to their views of its credibility, and of the other testimony in support, or in contradiction of it."

The same rule is announced in the following cases: Globe Printing Co. v. Stahl, 23 Mo. App. 451; Publishing Co. v. Warehouse Co., 123 Mo. App. l. c. 18; Reed v. Railroad, 72 Iowa, 166.

The latter case well considers the question, and it holds that although the witness did not recognize the voice of the person to whom he was talking at the other end of the line, the conversation had between them was nevertheless admissible, just as much so as if the witness had gone personally to the defendant's "trouble department" and had talked to this same person in charge of it, whose name he did not know.

We most heartily approve that doctrine; this court cannot shut its eyes to the fact that the telephone systems of this country extend all over it, penetrating

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almost every business house and residence throughout the length and breadth of the land, and that a very large percentage of the gross business of the country is transacted over the telephone; and in view of these facts, to hold that conversations had over them regarding business transactions are inadmissible in evidence, would virtually destroy their usefulness, for the simple reason that but few who talk over the telephone are personally acquainted with the telephone boy or girl to whom he talks, nor can they recognize their voices. And, as was well held in case of Wolfe v. Railway Co., supra, when one places himself in connection with a telephone system through an instrument placed in his office with a given number thereto, he thereby invites communications with him regarding business through that channel, and that such communications are inadmissible in evidence upon the theory that the person who has charge of that telephone in his office is, presumably, his agent or servant for the purpose of receiving those communications.

The court properly overruled the defendant's objections to that evidence, and its ruling in admitting the same was correct.

VI. The final and last error complained of by counsel for defendant is that the amount of the verdict is excessive. The jury returned a verdict for $50,000, but the court required the plaintiff to remit $15,000 and then rendered judgment for the plaintiff for $35,000. During the argument of this case the writer was impressed with the idea that the verdict was excessive, but since carefully reading the evidence of the entire record regarding the plaintiff's horrible injuries, their character, extent and permanency, I have changed my opinion in that regard, and I am inclined to concur with the learned trial judge who heard this evidence and saw the plaintiff and observed the character and extent of his injuries, which placed him in a far better position to

Excessive Verdict.

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observe and judge what would be a reasonable sum to compensate the plaintiff for his injuries than this court is in.

Finding no error in the record, the judgment is affirmed. All concur except *Blair* and *Graves, JJ.*, who dissent as to amount of judgment.

WILLIAM S. SWIFT et al., Doing Business Under Name of AMERICAN SCALE COMPANY, v. CENTRAL UNION FIRE INSURANCE COMPANY, Appellant.

Division One, December 1, 1919.

1. **PAROL CONTRACT: Consideration Must Be Pleaded.** A petition based on a parol contract of insurance, which neither avers the payment of a premium nor a promise to pay, does not state a cause of action; for no consideration being alleged or implied, the petition is fatally defective.

2. **———: ———: Amendment After Judgment.** A petition which states no cause of action at all cannot be amended after judgment so as to state one. If the parol contract sued on was a mere *nudum pactum* and no consideration was pleaded, the petition cannot be amended after trial and judgment so as to allege a consideration. A petition which absolutely states no cause of action cannot be amended after judgment.

3. **———: In Praesenti: Fire Insurance: For Future: Variance.** A parol contract for insurance to begin on a certain day in the future and to run for one year may be entered into by the parties, and where the premium is collected the courts enforce it; and the fact that the agreement was for the same amount of insurance as that named in an existing policy, but at an increased rate, does create a fatal variance between the proof and an allegation that "the contract so entered into was upon the same general terms and conditions as those embraced" in the previous written contract.

Appeal from Jackson Circuit Court.—*Hon. Kimbrough Stone*, Judge.

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REVERSED AND REMANDED.

Hugh C. Smith, Paul E. Bradley and *Leslie J. Lyons* for appellant.

(1) The petition stated no cause of action. 13 C. J. 722; 9 Cyc. 717; 4 Ency. Pl. & Pr. 928; 2 Bates on Pl. & Pr. 1252; 1 Boone's Code Pl. 29, sec. 19; Montgomery County v. Auchley, 92 Mo. 126; Wesson v Homer, 25 Mo. 81; McNulty v. Collins, 7 Mo. 69; Muldrow v. Tappan, 6 Mo. 276; Robinson v. Levy, 217 Mo. 488. (2) Methods of raising defect in petition proper. Chandler v. Railway Co., 251 Mo. 592; Childs v. Ry. Co., 117 Mo. 414; Greer v. Railway Co., 173 Mo. App. 276; McGrew v. Railroad Co., 230 Mo. 496. (3) Amendment of petition after judgment was error. Porter v. Railway Co., 137 Mo. App. 293; Coleman v. Ins. Co. 69 Mo. App. 566; Shaw v. Ins. Co., 79 Mo. 420; Hart v. Harrison Wire Co., 91 Mo. 414; Andrew v. Lynch, 27 Mo. 167; O'Toole v. Lowenstein, 177 Mo. App. 662; Golden v. Morn, 126 Mo. App. 518; Sawyer v. Railway Co., 156 Mo. 468; Elfrant v. Seiler, 54 Mo. 136; Case v. Fogg, 46 Mo. 47; Merrill v. Mason, 159 Mo. App. 601, 141 S. W. 454. (4) There was a fatal variance between the pleadings and the proof. Worth v. Ins. Co., 64 Mo. App. 583; Shepard v. Boone Ins. Co., 138 Mo. App. 20; Wallette v. British-Am. Ins. Co., 91 Md. 471; Prescott v. Jones, 69 N. H. 305; Taylor v. Ins. Co., 47 Wis. 365; Idaho Co. v. Ins. Co., 8 Utah, 41.

George H. English, Jr., for respondents.

(1) The court did not err in admitting testimony under the pleadings. (a) The objection was so vague and general that the court would have been justified in overruling it, even if the ground now advanced were well taken. Clark v. Loan Co., 46 Mo. App. 248. (b) The petition set forth a good cause of action, even before it was amended, and the court committed no er-

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ror in overruling the objection to the introduction of any evidence. (2) The court properly permitted the amendment of the petition. R. S. 1909, sec. 2119, subdivs. 8 and 9; R. S. 1909, secs. 1851, 2120; Meyer v. Schmidt, 130 Mo. App. 333; Thomasson v. Insurance Co., 114 Mo. App. 109; Sandusky v. Courtney, 168 Mo. App. 325; Murphy v. Insurance Co., 70 Mo. App. 78; Buck v. Ry. Co., 46 Mo. App. 55. (2) There was no error in overruling the demurrers. The proof precisely sustained the pleadings, showing a valid contract whereby in consideration of plaintiffs' promise to pay the premium defendant promised to insure plaintiffs against loss by fire. This contract was in force at the time of the fire, whether it be construed to commence at the date of the conversation which constituted the contract or at the date of the expiration of the then existing policy. 19 Cyc. 673; Elliott on Contracts, par. 4203; Embrey v. Dry Goods Co., 115 Mo. App. 130, 127 Mo. App. 383; Lingenfelter v. Ins. Co., 19 Mo. App. 252; Duff v. Fire Association, 129 Mo. 460; Lowery v. Danforth, 95 Mo. App. 441; Green v. Cole, 103 Mo. 70.

GRAVES, J.—This case reaches us upon due certification by the Kansas City Court of Appeals. Majority and minority opinions are here to enlighten us.

The action is one on a parol contract of insurance, and such contract omitting description of the property is thus averred in the petition:

"Plaintiff states that on or about the 15th day of July, 1913, defendant by its oral contract of insurance made and entered into between the plaintiff and the defendant, insured for one year the following described property, the same being the property of these plaintiffs, namely:

"Said contract of insurance so entered into as aforesaid between plaintiffs and defendant was upon the same general terms and conditions so far as those

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embraced in a certain written contract of insurance made and entered into between the defendant and these plaintiffs under date of July 30, 1912, which said last named contract or policy of insurance is in words and figures as follows:"

Following this was set out *in haec verba* an old policy on the same property, which covered a period from noon July 30, 1912, to noon July 30, 1913. Then followed averments of due performance of the contract by plaintiffs, and of the destruction of the property by fire.

Plaintiffs had judgment in the circuit court, which judgment is reversed by the majority opinion of the Court of Appeals, and the cause remanded.

Defendant urges two reasons for the reversal of the judgment: (1) that the petition failed to state a cause of action, in that it failed to allege a consideration for the pleaded parol contract of insurance; and (2) that the contract proven by the evidence was not the contract pleaded, and that this variance between proof and pleading was fatal. The trial court, after judgment, permitted the petition to be amended, so as to aver a consideration, and this is urged by plaintiff. Defendant says that the petition was fatally defective and it was error to permit its amendment. Such are the issues here.

I. This action is on a parol contract of insurance. Whilst the parties may differ as to the exact nature of the contract, there is no disagreement upon the matter of it being a parol contract. It is further clear that the petition avers no consideration for this parol contract. It is averred that defendant agreed to insure the property of plaintiffs, but in consideration of what, is not stated. The petition neither avers the payment of a premium, nor a promise to pay such. In actions upon the kind of contract here sued upon, the petition is fatally defective without an allegation as to a consideration for the promise al-

Consideration.

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leged to have been made by the defendant. In 4 Ency. Plead. & Prac. it is said, at page 928:

"In the absence of statutory enactments to the contrary, it is necessary, in actions upon contracts, to allege a consideration, except in the case of contracts under seal, bills of exchange, and negotiable promissory notes, all of which by intendment of law import a consideration."

In Missouri we have a statute (Sec. 2774, R. S. 1909), but it only applies to instruments in writing. It does not cover a parol contract of insurance as here involved. The very recent work, 13 Corpus Juris, page 722, thus states the rule:

"If the contract in suit is under seal it imports a consideration and none need be alleged, and the same is true if the instrument sued on is negotiable according to the law merchant. And by statute in some jurisdiction every written contract is made to import a consideration, and where this is so, it is not necessary for plaintiff to allege the consideration. But the consideration is an essential part of a contract, and, in the absence of statutory relief from the rule, a party declaring on a contract which at common law does not import a consideration must fully and truly state the consideration as well as the promise founded on it, and must prove it as laid. If no consideration is stated, it is a fatal defect which may be taken advantage of by demurrer, motion in arrest of judgment, or writ of error."

The rule above stated is practically a rescript from 9 Cyc. p. 717.

Going to the text-writers, we find that Bliss on Code Pleading (3 Ed.), p. 400, sec. 268, says:

"Contracts, to be valid, must be founded upon a consideration, and, except as to those that import it, the consideration must be proved, and, consequently, should be stated. The petition should set it out, or show the contract to be one where the law so imports it as to dispense with the proof. Contracts, thus, at common

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law, importing consideration, are, first, 'deeds'—that is, instruments of writing executed with the formality of a seal, our laws thus following the Roman, which validated contracts without consideration if 'clothed' with certain, though not the same, formalities, while those unclothed were 'nude' and invalid, unless supported by a consideration—and, second, 'bills of exchange' and 'negotiable promissory notes.'" See also Section 308 of same author.

In Chitty's Treatise on Pleading, vol. 1, star page 300, we find:

"In declaring upon a contract not under seal, it is in all cases necessary to state that it was a contract that imports and implies consideration, as a bill of exchange or promissory note, or expressly to state the particular consideration upon which it was founded; and it is essential that the consideration stated should appear to be legally sufficient to support the promise, for the breach of which the action is brought." And further, on the same page, we find: "In declaring upon bills of exchange and promissory notes and some other legal liabilities, the mere statement of the liability which constitutes the consideration is sufficient; (1) but in other cases of simple contracts, it is necessary that the declaration should disclose a consideration, which may consist of either benefit to the defendant, or detriment to the plaintiff; (2) or the promise will appear to be *nudum pactum,* and the declaration will consequently be insufficient."

So in the case at bar the promise of the defendant to insure the property of the plaintiffs is a *nudum pactum* under the facts pleaded. No consideration for the promise is averred.

Boone's Code Pleading, page 29, sec. 19, states the rule very tersely in this language: "Where a consideration is not implied, it is the very gist of an action founded upon contract, and must be specially averred."

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As seen from the authorities cited supra, the contract involved here is not one which imports a consideration, or one wherein there could be an implied consideration. In other words the very gist of this action has been omitted in the pleading.

This court from an early day has recognized this rule. In one of the latter cases, Montgomery County v. Auchley, 92 Mo. l. c. 129, BLACK, J., said: "Generally, in cases of simple contracts, the consideration should be formally and expressly pleaded." See also Hart v. Harrison Wire Company, 91 Mo. 418 et seq.; McNulty v. Collins, 7 Mo. 69; Wesson v. Horner, 25 Mo. l. c. 82.

In the latter case the answer pleaded an alleged contract or agreement. To this agreement the plaintiff made the point that no consideration was pleaded. This court said: "The agreement set up in the defendants' answer amounts to no defense to the plaintiffs' action. There is not the slightest consideration *set forth* or *mentioned* moving to plaintiffs for any such promise or agreement; it is a mere *nudum pactum.*"

From these authorities it is clear that the petition in this case is defective in its failure to plead a consideration for the contract sued upon herein. To our mind it is fatally defective, but this question we take next.

II. Plaintiffs contend that the defect was cured by amendment after trial and judgment; defendant, contra.

Amendment.

We think this petition states no cause of action at all, and from nothing a live cause of action cannot be evoluted by amendments, and especially by amendments after judgment.

As the petition stood it pleaded a *nudum pactum* which was not actionable. Where a *nudum pactum*, i. e., no contract is pleaded, can you, after trial and judgment, amend your petition so as to show a contract? It is not a cause of action defectively stated in this petition, but it is a petition stating no cause of action

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at all, because the *nudum pactum* pleaded was not binding and not actionable.

As stated by Boone, an allegation of a valid consideration was the gist of the action. In Andrews v. Lynch, 27 Mo. l. c. 169, this court said:

"The old rule of the English judges that a verdict would supply whatever of necessity must have been proved to the jury has never been held to extend to cases where the gist of the action is omitted. Nor have the various statutes of amendments and jeofails enacted in several of our States and embodying this principle ever been construed to embrace a case where no cause of action is stated. [1 Bac. Abr. p. 16; 1 Petersdorf Ab. 871; Winston's Exr. v. Francisco, 2 Wash. 189; Chichester v. Voss, 1 Call, 71.] Our statute upon this subject contains nothing new or additional to the old rule."

The omission of the petition before us was not one as to form, but one as to substance. The very gist of the action was omitted. This petition was bad, and should have been held bad upon a general demurrer. Defendants objected to the introduction of any evidence thereunder, because it failed to state a cause of action. Speaking to a similar situation this court, in Hart v. Harrison Wire Company, 91 Mo. l. c. 420, said:

"This objection, if of the character we hold it to be, is not one of form, but goes to the substance of the action, and is good, on motion in arrest of judgment, and may be made at any stage of the proceedings, and, even in this court, for the first time. The rule is, that wherever a general demurrer would be well taken, a motion in arrest is equally available, and if the petition is bad on general demurrer thereto, the judgment, for the same reason, is equally bad on motion in arrest. [Grove v. City of Kansas, 75 Mo. 672; Weil v. Greene County, 69 Mo. 281.]"

It cannot be questioned that the petition in this case was bad upon general demurrer. A statement of a *nudum pactum* is not the statement of a cause of

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action. A petition which states absolutely no cause of action is not one subject of amendment after trial and judgment. As said by NAPTON, J., in the Andrews-Lynch case, supra, our Statute of Jeofails does not avail. In other words, the rules applicable to defectively stated causes of action have no application in cases where no cause of action is pleaded.

The trial court was in error in permitting the amendment after trial and judgment, and in error in refusing to sustain the defendant's request for a directed verdict. These errors necessitate a reversal of the judgment herein. Upon the question here involved the learned opinion of ELLISON, J., well expresses the rule. In such opinion he fully distinguishes the cases relied upon by the plaintiffs, and the learned judge writing the minority views. The curious can consult those opinions.

But as this case must go back for a re-trial, it is well to note a question urged here, which is not dealt with by the Court of Appeals. It is urged that even after the amendment of the petition by averring a parol contract upon a valid consideration, there is a fatal variance between the contract pleaded and the contract proven. This question we take next.

III. Defendant urges that the contract pleaded is a parol contract of insurance *in praesenti*, whereas the evidence showed a mere agreement to enter into a contract of insurance at a later date. Judge JOHNSON in the minority opinion in the Court of Appeals thus fairly quotes the testimony of the plaintiff, leaving out immaterial portions:

Variance.

"He said to me that the twenty-four-hundred-dollar policy would expire in a short time . . . I told him then distinctly to renew that one, because there was no other place I could get it, and I wanted that policy continued, and he said he would do it. I understood him to say he would do it and supposed it was done. . . . I dismissed it then from my mind, supposing, of course, he would renew it just as he said he would. I left

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town and went away soon after that, supposing the insurance was taken care of."

As a fact the old policy did not expire for some twenty days. The record also shows that the agent issued policies ordered by plaintiffs and collected later. In other words, the agent of defendant kept an account with plaintiffs on insurance matters. The agent said he did not agree to renew the policy, nor did the plaintiffs order it renewed, because of an advance in the rates. However, upon the point now before us, this is by the way-side.

We are not prepared to agree with defendant's version of the alleged parol contract. We think the evidence discloses a contract *in praesenti*. This conclusion is reached by the application of a simple illustration. What plaintiffs wanted was a policy of insurance which would cover their property from July 30, 1913, to July 30, 1914. On the day that Swift talked to Clinton, defendant's agent, such agent could have made out and signed a written policy of insurance specifying therein that the property was insured for $2400 from the 30th day of July, 1913, to the 30th day of July, 1914, and dated such policy on the day of the talk, i. e., July 9th or 10th, 1913. If the agent had actually done this, there would have been no liability under the policy until July 30th, but there would have been thereafter. In other words, the agent of the defendant agreed to renew the old policy, except as to premium, and the time covered for the insurance. It was within the power of the agent on July 9th to then or on that day renew or issue a policy covering the property described in the old policy, for a premium then agreed upon, with liability fixed between July 30, 1913, to July 30, 1914. What they could have done in writing on July 9th, they could do by parol. If on July 9th the agent could have, by a written policy, issued and dated July 9th, insured plaintiff's property for a period from July 30th 1913, to July 30, 1914, a valid parol contract to the same effect could have been

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made. In fact, a parol agreement of insurance always precedes the actual written agreement. And it is these parol contracts that the courts enforce.

We think that a fair construction of Swift's testimony makes a parol contract of insurance *in praesenti*, in which contract there was the provision that the dates between which liability for fire existed were from July 30, 1913, to July 30, 1914.

This we think is a reasonable construction of the language of the witness, Swift. They were not actually renewing or extending the old contract, because they were changing the consideration. But even if they were actually renewing the old policy, it could have been done as well on the 9th of July, as upon the expiration of the old policy. The renewal would simply be dated July 9th and the term of insurance therein named would have been from July 30, 1913, to July 30, 1914. We see no variance between the pleading and the proof, save and except there was proof of an agreed consideration, and no pleading of a consideration. For the reasons stated in paragraph one above, the judgment is reversed and the cause remanded. All concur.

THE STATE ex rel. JAMES HAGERMAN, JR., Collector of City of St. Louis, v. ST. LOUIS & EAST ST. LOUIS ELECTRIC RAILWAY COMPANY, Appellant.

Division One, December 1, 1919.

1. **TAXES: Prima-Facie Case: Interstate Railway.** The record of the valuation and assessment of the property of an electric railway over an interstate bridge of the State Board of Equalization made in scrupulous conformity to the methods and plans prescribed by the statute, and certified by the State Auditor, together with an admitted correct copy of the tax bill containing complete itemizations of the kind of property and rate of taxation, makes a prima-facie case against such railway for such taxes.

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2. ———: ———: **Tax Bill.** The statute does not require that the tax bill be filed with the petition in a suit against railroads for delinquent taxes. It makes the record of the State Board of Equalization certified by its secretary prima-facie evidence of the facts therein recited in such suits. But a correct tax-bill can be offered as evidence.

3. ———: **Double Electric Railway Over Interstate Bridge.** Where an electric railway by contract is given the right to operate its trolley lines over an interstate bridge belonging to other corporations, in consideration of a payment to them of a certain portion of the passenger fares received by it, its trolley wires, poles, cars, rails and other property owned and used by it in operating an electric railway are subject to taxation, and if such properties are separately assessed, and the other companies are assessed with taxes for the value of the bridge itself and its other structural elements, there is no double taxation. The corporate grantee of a right of user of the bridge can be separately assessed for taxes according to the value of its trolley lines and other distinct property used in operating its electric railway over the bridge. [Distinguishing State ex rel. v. Railroad, 196 Mo. 523.]

4. ———: **Discrimination: Neglect to Assess Other Property.** The neglect of the State Board of Equalization to assess other railroads liable to assessment under the same valid statutes under which defendant's railway properties were assessed, was not such a discrimination as invalidated the assessment against defendant.

5. ———: **Franchise.** A railway company which by the terms of its charter possesses the right to construct and operate a railroad, and has obtained permission from the city to operate its street railway over an interstate bridge for a period of fifty years, has a railroad franchise other than a franchise to be a corporation; and when the franchise to operate a railroad, which rested primarily in legislative grant, became consummate when it obtained permission of the city to occupy the bridge, its said franchise became taxable, upon a mileage basis, and could be assessed under the designation of "all other property."

6. ———: **Property Outside State: Railway Over Interstate Bridge.** The State Board of Equalization does not exceed its authority by taxing the tangible and intangible property of an electric railway, operated over an interstate bridge, within the territorial limits of this State.

Appeal from St. Louis City Circuit Court.—*Hon. Wm. Kinsey*, Judge.

AFFIRMED.

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Dawson & Garvin for appellant.

(1) The tax bill is not legal evidence in this case, because (a) not authenticated by certificates of the collector or filed with the petition as required by law. R. S. 1899, sec. 9303; State ex rel. v. Scott, 96 Mo. 75; State ex rel. v. Phillips, 102 Mo. 664. (b) It is not baed on a valid assessment. State ex rel. v. Cunningham, 153 Mo. 642; Cort v. City of Cameron, 19 Mo. App. 585. (2) The allegation of the petition "that defendant owned, on June 1, 1906, 346 miles of roadbed and superstructure rolling stock and 'all other property mentioned in Laws 1901, sec. 2, p. 232,'" is contrary to the facts. (3) The State Board has no authority (even where it has jurisdiction) either by name or under any disguise, as increased valuation, to add property which does not belong to defendant.' State ex rel. v. Cunningham, 153 Mo. 642; State ex rel. v. Alt., 224 Mo. 513. (4) The trial court erred in not nonsuiting plaintiff as requested by defendant. R. S. 1899, sec. 9303; State ex rel. v. Railroad, 135 Mo. 618; State ex rel. v. Cunningham, 153 Mo. 642; State ex rel. v. Bank of Cartersville, 180 Mo. 717; Union Transit Co. v. Kentucky, 199 U. S. 194, 210; Louisville, Ferry Co. v. Kentucky, 188 U. S. 385, 396; Mahan v. Meredith Bank, 160 Mo. 640; Leavell v. Blades, 237 Mo. 695; Laws 1901, p. 232; State ex rel. v. Brinkop, 238 Mo. 298; (5) The tax sought to be collected is in part double taxation and hence illegal. The same roadbed and superstructure was taxed against the St. Louis Bridge Company and said tax paid by it. Constitution art. 10, secs. 3 and 4; State ex rel. v. Railroad, 196 Mo. 524; State ex rel. v. Bridge Co., 134 Mo. 32; State ex rel. v. Railroad, 215 Mo. 479; Wright v. Cent. of C. R. C., 236 U. S. 674; State ex rel. v. Brinkop, 238 Mo. 298. (6) The attempted taxation of defendant is unjust discrimination and in violation of the Constitution and laws of Missouri. Constitution art. 1, sec. 8; City of Independence v. Gates, 110 Mo. 374; Kansas City v.

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Grush, 151 Mo. 134; Brookfield v. Tooney, 141 Mo. 625. The steam railroad companies using said Eads Bridge are not taxed on roadbed and superstructure or rolling stock on said bridge, or on their lease of all the properties of said St. Louis Bridge Company, specifically or under head "all other property," which is in accordance with the law of Missouri. (7) Where the State Board of Equalization has jurisdiction, its valuation and assessments must be in accordance with the statutory requirements as construed by the courts. R. S. 1899, sec. 9358; State ex rel. v. Railroad, 135 Mo. 618; State ex rel. v. Lesser, 237 Mo. 318. No personal property is taxable unless the statutes declare it to be taxable. State ex rel. v. Lesser, 237 Mo. 310; State ex rel. v. Bank of Carterville, 180 Mo. 717; Union Transit Co. v. Kentucky, 199 U. S. 194. The franchise to be a corporation is not taxable. Laws 1901, p. 232. (8) Property having its situs outside of Missouri is really, if not specifically, included contrary to law. The trial court erred in refusing to so declare the law as requested by defendant. Pac. Railroad Co. v. Cass County, 53 Mo. 17; State ex rel. v. Stephens, 146 Mo. 681; State ex rel. v. Brinkop, 238 Mo. 298; Railroad v. Penn, 198 U. S. 341. (9) Defendant owned no intrastate railroad property and did no intrastate business in Missouri, and the employment of the "unit rule" or "mileage" system of valuation and assessment in this case was illegal. Fargo v. Hart, 193 U. S. 490; Louisville Ferry Co. v. Kentucky, 188 U. S. 396; Union Transit Co. v. Kentucky, 199 U. S. 210; Union Rate Cases, 230 U. S. 352; State ex rel. v. Wiggins Ferry Co., 208 Mo. 642; Railroad v. Ark. ex rel. Norwood, 235 U. S. 350; Bacon v. Illinois, 227 U. S. 512. (10) The jurisdiction of the State Board of Equalization to assess is limited to certain kinds of steam and street railroad property, specified in R. S. 1899, section 9339 (viz., length of roadbed and superstructure in city through or in which it is located in this State, rolling stock and all other movable property) owned and used

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by a railroad corporation operated as such by virtue of its public franchises, and which does all or a considerable part of its railroad business wholly within the State of Missouri. R. S. 1899, sec. 9344; State ex rel. v. Merchants Bank, 160 Mo. 640; Railroad v. Cass County, 53 Mo. 17; Leavell v. Blades, 237 Mo. 695. (a) The maintenance of defendant's charter to be a railroad corporation merely does not make defendant or its property assessable or taxable by the State Board of Equalization as a railroad within the meaning of the Constitution and statutes. Laws 1901, p. 232; R. S. 1909, secs 11551, 11552; Anderson v. Morris E. and R. Co., 216 Fed. 83; State ex rel. v. Brinkop, 238 Mo. 298. (b) Property tangible and intangible never in Missouri is not taxable by Missouri. St. Louis v. Wiggins Ferry Co., 78 U. S. (11 Wall.) 423; Leavell v. Blades, 237 Mo. 695; State ex rel. v. Brinkop, 238 Mo. 298; State ex rel. v. Lesser, 237 Mo. 310; State ex rel. v. Wiggins Ferry Co., 208 Mo. 622; Louisville Ferry Co. v. Kentucky, 188 U. S. 396; Union Rate Cases, 230 U. S. 352. (11) The attempted taxation of defendant is a direct burden upon interstate commerce and in violation of Article 1, section 8, of the Constitution of the United States, giving Congress sole power to regulate commerce among the several states. Fargo v. Hart, 193 U. S. 490; St. Louis v. Wiggins Ferry Co., 78 U. S. (11 Wall.) 423; South Covington Ry. Co. v. Covington, 235 U. S. 537.

Thomas G. Rutledge and *J. M. Lashly* for respondent.

(1) The same questions involved here have been determined by this court under the same statutes, for railroad taxes levied under the classification of "all other property" in the taxation of that part of the intangible property of the Wiggins Ferry Company that was located in Missouri, and the question decided in favor of the validity of the tax in the case of State ex rel. Hammer v. Wiggins Ferry Co., 208 Mo. 622. (2) The

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law under which this assessment was made was passed in 1901 (Laws 1901, p. 232, now Secs. 11551-2, R. S. 1909) to give a legal basis to the assessment of the intangible property of corporations owning, operating and managing public utilities, and was undoubtedly based upon the decisions of the Federal Supreme Court holding such intangible values to be property properly taxable in a state in the proportion that the length of the road there bears to the entire system. State ex rel. Hammer v. Ferry Co., 208 Mo. 622; St. L. Ry. v. Arkansas, 235 U. S. 350. (3) The law presumes that the Board of Equalization does its duty in making the assessment and making the computations and valuation upon which it is based. The valuation will, therefore, be presumed to be correct. As to details of procedure the statute is directory merely. State ex rel Hammer v. Ferry Co., 208 Mo. 662; State ex rel. v. Tel. Co., 165 Mo. 516; State v. Lord, 118 Mo. 4; Agan v. Shannon, 103 Mo. 661; Pittsburgh Ry. v. Backus, 154 U. S. 421; State ex rel. v. Hannibal Ry., 113 Mo. 308. The mere overvaluation of this road is not a defense, as the courts will not take on themselves the functions of a revising or equalizing board. Sec. 11399, R. S. 1909; Stanley v. Albany Co., 121 U. S. 535; Western U. Tel. Co. v. Missouri, 190 U. S. 420. (4) A state may exact from a railway company a tax upon that portion of its property within its borders, and, in assessing it for the purposes of taxation, take into consideration its value as a going concern and as a part of a general system extending over several states. State ex rel. Hammer v. Ferry Co., 208 Mo. 662; St. Louis Railroad Co. v. Norwood, 235 U. S. 350; Amer. Refrig. Transit Co. v. Hall, 174 U. S. 70; Western U. Tel. Co. v. Taggart, 163 U. S. 1; Western U. Tel. Co. v. Atty.-Gen., 125 U. S. 530; Western U. Tel. Co. v. Atty.-Gen., 141 U. S. 46; Maine v. Grand Trunk Ry., 142 U. S. 217; Cleveland Ry. v. Backus, 154 U. S. 439; Henderson Bridge Co. v. Kentucky, 166 U. S. 150; L. & N. Railroad Co. v. Greene, 244 U. S. 522; Atl. & P. Tel.

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Co. v. Philadelphia, 190 U. S. 160; Glue Co. v. Oak Creek, 247 U. S. 321; Postal Tel. Co. v. Adams, 155 U. S. 688; Express Co. v. Minnesota, 223 U. S. 335; Car. Co. v. Penn, 141 U. S. 18; Wisconsin Ry. Co. v. Powers, 191 U. S. 379. To be objectionable, interference with interstate commerce must be direct and not the mere incidental effect of the requirement of the usual proportional contribution to the public maintenance.

BOND, J.—This is a suit by the Collector of the City of St. Louis for taxes for the year 1907, assessed by the State Board of Equalization against .364 of a mile of railroad, owned and operated by the defendant corporation in the City of St. Louis.

The case was submitted to the trial judge, a jury being waived, upon an agreed statement of facts. The finding and judgment of the court were rendered in favor of the plaintiff for taxes and interest in the sum of $8356.19, to which was added one thousand dollars attorneys' fee, allowed and taxed as costs. Defendant duly appealed.

The agreed statement of facts, or so much thereof as is pertinent, will be stated in connection with the rulings made upon the errors insisted upon in the brief and argument of appellant.

I. It is claimed that plaintiff failed to prove the case stated. The defendant procured a charter from the State of Missouri in the year 1889, as a railway company, with its western terminus in Missouri and an eastern terminus in Illinois. It has exercised the franchise granted thereunder by entering into contracts with the St. Louis Bridge Company, a corporation organized in Missouri and Illinois and the owner of a toll bridge, known as the Eads Bridge, extending from the City of St. Louis, Missouri, to the City of East St. Louis, Illinois; the Missouri Pacific Railroad Company and the Wabash Railway Company, by virtue of which contracts the defendant,

Prima-Facie Case.

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in consideration of a certain division of the fare collected from passengers which it should transport across the upper deck of said bridge, was permitted to operate thereon electric trolley cars. In April, 1902, these contracts were cancelled and a new one made by defendant with the Terminal Railroad Company of St. Louis which had previously acquired the leasehold of said bridge. This "said substitute agreement is of date April 11, 1902, and permits defendant to operate electric cars on the upper roadway of said bridge for fifty years unless sooner terminated by said Terminal Company." Two connecting street railways, both Illinois corporations, are made parties to this contract, the object of their joinder being to secure to the passengers carried by them a continuous passage over defendant's electric trolley-car railroad running over said bridge and terminating in St. Louis, Missouri. In this connection the agreed statement of facts further recites:

"Under said agreement the said Terminal Association retains ownership and control of the tracks over which said trolley cars are to be run for passenger traffic only; said passengers are to be carried for a certain division of the fare of not less than five nor more than ten cents per passenger, as determined by said Terminal Company to be paid by said bridge passengers for riding across said Eads Bridge; said electric cars to be run between the termini of said bridge; and for refusal, inability or failure of the other parties to direct travel destined to pass by way of East St. Louis to or from said City of St. Louis exclusively to said Eads Bridge, or to keep the other conditions of said agreement, said Terminal Company reserves the right to declare said agreement terminated and canceled."

The defendant company was incorporated originally for $100,000. Its capital stock was subsequently increased to $250,000 in 1890, and in 1902 to $500,000. Its bonded indebtedness is $500,000, on which it pays five

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per cent interest, and has always paid dividends on its stock.

The tax bill sued on contains intemizations according to the statute of the nature and valuation of defendant's property and the rate of taxation levied thereon for that year, showing the aggregate amount sued mitted to be correct, was filed with the petition. The petifor. The original bill was not filed, but a copy, adtion is substantially in the form prescribed by Section 11593, Revised Statutes 1909.

In assessing the property of defendant for the year 1907, the Board of Equalization specified the value of its passenger cars, its money on hand, the proportion of its rolling stock in this State, the proportion of its roadbed and superstructure in this State, and lastly "all other property" at $500,000.4625 per mile, which last item, computed at the length of the road in this State, amounted to $173,000.16. The addition of all the items at $186,019.98, is the basis of the taxes levied.

The agreed facts show that at the time of this assessment defendant "owned property in the State of Missouri consisting of certain poles and overhead trolley wires erected and maintained on the west end of said tinuation of other poles and overhead trolley wires erect-Eads Bridge as a necessary working part and coned and maintained on the east or Illinois end of said bridge, all under said agreement of July 26, 1889, and said substitute agreement, and also $26,524.55 on deposit on June 1, 1906, in a certain bank of the city of St. Louis, Missouri, which was proceeds of said business done on said bridge under said agreements, and also two cars valued at $850 each."

The property, tangible and intangible, owned and operated in this State by defendant, possessed great value and earning power and to provide for its taxation, the statutes relating to the taxation of franchises other than that of corporate entity, were enacted. [Laws 1901, p. 232; R. S. 1909 secs. 11551, 11552.] The

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method and plan of assessment and valuation prescribed in these statutes was scrupulously followed by the State Board of Equalization. The record of its action was filed with the Auditor (R. S. 1909, sec. 11573) whose certificate thereof is made prima-facie evidence of the facts therein recited (R. S. 1909, sec. 11578; State ex rel. v. Met. St. Ry. Co., 161 Mo. 188). We think this and other evidence in the agreed statement of facts sufficed to make a prima-facie case for plaintiff.

We have not overlooked the contention that the admittedly correct tax bill copied in the agreed statement was not filed with the petition. That is not required by the statutory form applicable to suits against railroads for delinquent taxes. [R. S. 1909, sec. 11593; State ex rel. v. Railroad, 113 Mo. 297.]

II. It is insisted by appellant that the tax assessed in this case is void because double taxation, in that the bridge, subject to the easements evidenced by the contract under which defendant conducts and operates its electric railway, was also assessed for taxation against the grantors to the defendant.

Double Taxation.

It will be observed that in the assessment of the property of defendant the State Board of Equalization left out of view all of the structural elements essential to the purposes for which the bridge was built and the uses to which it was to be put, and confined its view exclusively to those things which were descriptive of the separable ownership of the defendant under and by virtue of the contract possessed by it to operate and conduct its electric railway over the upper surface of the bridge, and those things which it had placed on the bridge to facilitate the operation of its electric trolley railway.

It is perfectly plain from the agreed statement of facts that the owners of the bridge were not the owners of the rolling stock, the metals or rails over which the trolley line ran, nor the right of user thereof, nor the

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trolley poles and wires, and it was these, coupled with the franchise value arising from the use and operation of them by the defendant railroad, which the Board of Equalization intended to assess as the property of defendant. And it is equally clear that in its separate assessment of taxation on the bridge itself, against the owners thereof, the board did not take cognizance of the property and franchises assessable to the owners of the trolley company. There is nothing in this method of taxation which militates against the doctrine stated in State ex rel. v. Railroad, 196 Mo. 523, where it was correctly held that a bridge as an entirety, having been taxed once, could not, without violating the constitutional principles forbidding double taxation, be taxed a second time against the lessor. In the case at bar the bridge as a bridge, embracing its multiform uses as such, was taxed against the owners thereof, but that assessment in nowise precluded the State Board of Equalization from making another assessment against the corporate grantee of a contract of user of a right of way for its electric trolley line over said bridge. The properties taxed were distinct and the ownerships were different, and there is nothing in the agreed statement of facts which shows that the Board of Equalization had in mind the values of the property belonging to defendant when it assessed the bridge property against its separate owners.

Our conclusion is that the action of the State Board of Equalization in levying the assessment sued for, did not contravene the constitutional inhibition against double taxation.

III. There is no merit in the contention of unjust discrimination in this case. Whether defendant is taxable depends wholly upon the provisions of Sections 11551, 11552, Revised Statutes 1909 (Laws 1901, p. 232). If those statutes are valid and applicable, then the taxes assessed against defendant in this

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Neglect to Assess Other Railroads.

case were lawfully made, irrespective of the omission of the State Board of Equalization to make assessments under the same statutes against other railroads liable to assessment thereunder. The cases cited by appellant on this point are wholly irrelevant in that they refer to the *invalidity* of a law or city ordinance, which, by its terms, was not uniform as to the same classes. Here there is no dispute as to the validity of the statutes requiring taxation of franchises, for the only point made is that the board neglected to assess others liable under a valid law.

Franchise.

IV. Appellant insists that the tax assessment is illegal because the defendant owns no railroad franchises except the franchise to be a corporation, which is a non-taxable one. This is a misconception. The defendant does not own railroad franchises other than that implied in that of a grant of a charter to it. It possesses, by the terms of its charter, the right to contract and operate a railroad. The bridge over which its track is laid is, in a general sense, a public highway. Under the Constitution of this State, its right to operate its street railway over the public highway (the bridge) could only be exercised by the consent of the local authorities having control of the highways proposed to be occupied by such street railway. [Constitution, art. 12, sec. 20.] When it obtained this permission to operate its street railway on this public highway for fifty years, the legislative grant instantly became effective and vested in appellant a valuable franchise wholly distinct from its franchise of artificial entity (State ex rel. v. Railroad, 140 Mo. l. c. 549) and one which is specifically assessable for taxation under the terms of the statutes providing for taxation of franchises. [State ex rel. v. Wiggins Ferry Co., 208 Mo. 622.] Proceeding under these statutes and in accordance with the method prescribed in a subsequent section (Sec. 11559, R. S. 1909) the Board of Equalization assessed and adjusted the taxes laid on defendant's franchises on a mileage basis

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and after the hearing of evidence, and in so doing it arrived at the conclusion that the value of the intangible property of defendant is Missouri was $173,000.16. It referred to this specific assessment as one made on "all other property" of defendant, a method of distinguishing the various items approved in State ex rel. v. Wiggins Perry Co., 208 Mo. 622. In the present case, as has been seen, the franchise to operate a railroad resting primarily in legislative grant, became consummate when the consent to occupy the bridge for that purpose was obtained, for then it ripened into a legislative privilege and fell within the correct meaning of the term "franchise," which implies a privilege conferred by law to do that which "does not belong to the citizens of the country generally as a common right." [12 R. C. L. 173, sec. 1 et seq.; State ex rel. v. Weatherby, 45 Mo. l. c. 20.] According to the agreed facts this franchise vested in appellant, was a practical monoply with a possible life of fifty years.

V. Nor are we able to concur in the view that in the assessment sued on in this case, the Board of Equalization undertook to tax property outside the jurisdiction of the State of Missouri. On the contrary the description of the property taxed, the itemization of amounts, discloses that they were referable only to tangible and intangible property of defendant within the territorial limits of this State.

Jurisdiction.

VI. It is finally insisted by appellant that the taxation sued upon is void under the Federal Constitution vesting in Congress the power to regulate interstate commerce and prohibiting the states from taking property without due process.

Interstate Property.

It is not within the power of the states to put a direct burden on interstate commerce, the exclusive regulation of which is granted to Congress by the Constitution of the United States (U. S. Constitution, art. 1, sec. 8). But this provision does not prevent the assess-

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ment of property situated in the several states because it is a part of a unified system which is appropriated to interstate commerce. In such cases the property "may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, [for] taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged. [Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194; Adams Exp. Co. v. Kentucky, 166 U. S. 171; Fargo v. Hart, 193 U. S. 490.] So it has been held that a tax on property and business of a railroad operated within the State might be estimated prima-facie by gross income, computed by adding to the income derived from business within the State the proportion of interstate business equal to the proportion between the road over which the business was carried within the State to the total length of the road over which it was carried. [Wisconsin & Mich. Ry. Co. v. Powers, 191 U. S. 379.] Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately at least, in the long run, come out of income, obviously taxes called taxes on property, and those called taxes on income or receipts, tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern." [Galveston etc. Ry. Co. v. Texas, 210 U. S. 217, 227.]

Under the agreed statement of facts appellant owned a usufruct in about one-third of a mile of railroad track on that portion of the bridge within the limits of Missouri. It also owned, as stated before, the rails, the superstructure and wires which enabled it to operate its trolley cars over this line. It also owned money on deposits in banks in Missouri; also the franchise of operating its railroad, granted to it by

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the Legislature of the State, and consented to by the local authorities in charge of the bridge. All of this property was within the territory of this State and, therefore, its assessment for taxation did not impose a direct burden upon interstate commerce under the principles declared and the rule stated in the foregoing quotation from the opinion of the Supreme Court of the United States and the authorities therein cited. The imposition in the case at bar was purely a tax on property as such, locally situated and upon a Missouri franchise locally enjoyed. It was assessed in strict accordance with the provisions of the statutes of this State and the Board of Equalization, in making this assessment, was entitled to consider the increase in value of the property assessed by reason of its being an integral part of a railroad engaged in interstate traffic, and they were entitled to discerp the value of the property in Missouri from that of the other property of which it was a part, in the manner prescribed in the statute providing for its assessment and sanctioned by the foregoing decision of the Supreme Court of the United States. This, we think, was substantially done in the present case. We find nothing in the agreed statement of facts which tends to show that this assessment was so laid as to take the property of appellant without due process.

Our conclusion is that the judgment of the trial court must be affirmed. It is so ordered.

Blair, P. J., and *Graves, J.*, concur; *Woodson, J.*, absent.

STELLA BAKER v. MARVIN H. GATES et al., Executors of Will of JEMUEL C. GATES, Appellants.

Division One, December 1, 1919.

1. **NEW TRIAL: Sufficiency of Evidence: Appellate Practice.** If there was any evidence developed at the trial to uphold a verdict

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for plaintiff, the order granting to her a new trial must be affirmed on appeal; if there was none, the order will be set aside and the verdict for defendants reinstated.

2. **LEASE: Relation: Right of Lessor to Inspect.** If the written contract granted to the lessee an estate for years, and entitled him to possession during the term against the lessor, without any right to enter except to inspect the quarry work and ascertain whether or not it was being performed according to agreement, the relation was that of lessor and lessee.

3. **CREATION OF NUISANCE: Liability of Lessor.** If the intended use of leased premises by the lessee would, of necessity, create a nuisance, the lessor must be held to have authorized the nuisance and to be answerable for consequent damage; for no one may use, or agree that some one else may use, his property so as to harm others.

4. ———: ———: **Explosions in Stone Quarry: Question for Jury.** That a hill, leased for a stone quarry, could not be worked without danger to persons and property 400 or 450 feet from the place of blasting, and that therefore the blasting constituted a nuisance, is deducible from testimony showing that the danger was continuous, or at least occurred at intervals for a considerable period, and that it disturbed dwellers within the range of the blast, and persons exercising the common right of travel on street cars on a boulevard 400 to 450 feet from the point of blasting; and that a nuisance did not necessarily arise from the work may be inferred from evidence that the quarry could be worked without risk to the neighborhood and that before the day of the injury to plaintiff as she was riding on a street car no debris had been thrown as far as the boulevard; and hence, whether, under such circumstances, a nuisance would necessarily arise from the work, was a jury matter.

5. ———: ———: **Quarry Operated by Receiver and Not by Lessee.** Where the leased quarry was not being operated by the lessee at the time a flying stone struck a passenger on a street car, or by any one else for whose conduct the lessor was responsible, but, without the consent of either, by a receiver in bankruptcy of a construction company under an order of court, neither the lessor nor the lessee is liable in damages for the injury to the passenger, the lessee's only connection with the work at the time being at most that of an employee or agent of the receiver.

Appeal from Jackson Circuit Court.—*Hon. Thomas B. Buckner,* Judge.

REVERSED AND REMANDED (*with directions*).

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J. R. Bell and *Lathrop, Morrow, Fox* and *Moore* for appellants.

There is no liability on part of owner of premises for act of trespasser in possession and control. Shippey v. Kansas City, 254 Mo. 25; Pope v. Boyle, 98 Mo. 527; Grogan v. Foundry Co., 87 Mo. 321; Reinhardt v. Holmes, 143 Mo. App. 212; Mayer v. Shrump, 111 Mo. App. 54; Gildersleeve v. Overstolz, 97 Mo. App. 303; Powell v. Kenaday, 95 Mo. App. 713; Schmidt v. Cook, 23 N. Y. Supp. 799; Wolf v. Kilpatrick, 101 N. Y. 146.

J. K. Cubbison, Wm. G. Holt and *H. G. Pope* for respondent.

(1) The trial court has a discretion to grant one new trial, and the appellate court will not interfere with its exercise of that discretion, however much it may disagree with that court upon such ruling, when there is any substantial evidence to support it. When the trial judge is not satisfied with the verdict, or when he thinks the verdict is against the weight of the evidence, it is not only his right but his plain duty to grant a new trial. Fitzjohn v. Transit Co., 183 Mo. 78; Harper v. Hotel Co., 142 Mo. 378; Haven v. Railroad, 155 Mo. 216; Kreinzel v. Stevens, 155 Mo. 285; Grace v. Railroad, 156 Mo. 301; Herndon v. Lewis, 175 Mo. 125; Ottomeyer v. Pritchett, 178 Mo. 165; Warner v. Railroad, 178 Mo. 129; Casey v. Transit Co., 186 Mo. 229; Franklin v. Railroad, 188 Mo. 542. (2) The blasting operations in question were inaugurated, created and started by Gates and Spitcaufsky and they were joint tortfeasors. If they knew or should have known that said blasting operations might cause danger or injury to others they were responsible for all the natural and probable consequences of such action, and neither one can escape such responsibility because of the acts of their agents or of an independent contractor. Gates entered into a contract with John Spitcaufsky by the terms of which Spitcaufsky was to do the blasting for the benefit

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of Gates, and defendants cannot escape liability on the theory that Spitcaufsky (who plaintiff introduced proof showing was doing the blasting at the very moment of the accident to plaintiff) was a trespasser on said land where the blasting was being done, and especially when the evidence shows that all the defendants did prior to the accident was to serve written notice on Spitcaufsky in an attempt to cancel said contract or lease, and which attempt simply resulted in a lawsuit between defendants and Spitcaufsky which was brought by Gates after said accident, and when the evidence further shows that defendants took no further steps, outside of serving said notices, to stop said blasting operations by Spitcaufsky prior to said accident. Salmon v. Kansas City, 241 Mo. 14; Daneschocky v. Sieben, 193 S. W. 966; Dillon v. Hunt, 11 Mo. App. 246; Railway Co. v. Morey, 47 Ohio St. 207; Railway Co. v. Coskry, 92 Ala. 254; Carman v. Railroad, 4 Ohio St. 399; McCarrier v. Hollister, 15 S. D. 366; Robinson v. Webb, 11 Bush. 464; Norwalk Gaslight Co. v. Norwalk, 63 Conn. 495; Anderson v. Fleming, 66 L. R. S. (Ind.) 125; Nashville v. Brown, 9 Heisk. (Tenn.) 1; Weber v. Railroad, 20 App. Div. (N. Y.) 292; Cooley on Torts (2 Ed.), 644; Railroad v. Watkins, 43 Kan. 50; James v. McMinimy, 93 Ky. 471; Vogel v. New York, 92 N. Y. 19; Clark v. Fry, 8 Ohio St. 358; Walker v. New York, 107 App. Div. 351; Richmond v. Smith, 101 Va. 161; Cohen v. New York, 113 N. Y. 532; Chapman v. Rochester, 110 N. Y. 273; Decatur v. Hamilton, 89 Ill. App. 561; Smith v. Davis, 22 App. D. C. 298; Frick v. Kansas City, 117 Mo. App. 488; Brown v. Scruggs, 141 Mo. App. 632; Carson v. Construction Co., 189 Mo. App. 120; Johnson v. Machine Co., 193 Mo. App. 199.

GOODE, J.—This is an action for damages caused by a personal injury to plaintiff. At the conclusion of the evidence the court directed a verdict for the appellants, Marvin H. Gates and B. T. Whipple, as executors of the last will of Jemuel C. Gates, deceased; but after-

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wards entered an order sustaining plaintiff's motion for new trial, without stating the reason for the order. The appeal was taken by said Marvin H. Gates and B. T. Whipple, as executors.

The case was begun against Jemuel C. Gates, Joseph M. Jones, receiver of the Spitcaufsky Construction Company, and John Spitcaufsky. Jemuel Gates died during the pendency of the proceeding and an answer to an amended petition filed by plaintiff was put in by said executors at the January term, 1917. As between plaintiff and Joseph M. Jones, as said receiver, the case was settled December 29, 1914, for one hundred dollars, plaintiff signing a stipulation to dismiss as to the receiver and to prosecute no further the cause against him. Jones was receiver of the Spitcaufsky Construction Company under an appointment made in a proceeding in bankruptcy.

Plaintiff was hurt between eight-thirty and nine o'clock on the morning of August 4, 1914, and while she was a passenger in an electric trolley car running southward on Southwest Boulevard, a main thoroughfare between Kansas City, Missouri, and the City of Rosedale, Kansas. As the car was passing a quarry some four hundred and fifty feet from the boulevard, three charges of powder or dynamite were exploded in the quarry, hurling fragments of rock as far as the boulevard, some of it falling about the car, and one striking plaintiff's wrist. The weather was warm; the car windows were open and plaintiff had rested her arm on the windowsill. There was evidence that on previous days in the year, blasts had been discharged in the quarry, violent enough to throw rocks three or four inches in diameter, as was the one which struck plaintiff, and perhaps some larger, onto the boulevard and beyond it.

The quarry was in a piece of ground known as Deitz hill, an eminence a hundred feet or more high and from 400 to 450 feet west of the boulevard and the street railway tracks thereon. The land where Deitz

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hill is belonged to Jemuel Gates, who demised it, February 12, 1913, by a written agreement, to John Spitcaufsky, for fifteen years. The quarry is situated on the brow of the hill, facnig eastwardly toward Southwest Boulevard. Tracks of two or three steam railroads extend near the east foot of the hill, between it and the boulevard, nearly on a level with the boulevard, but further from it than from the hill. One dollar is recited to have been paid and received as part of the consideration for the lease, but the instrument says the term was granted "principally for and in consideration of the premises, covenants and agreement to pay, do and perform those moneys, acts and things which the lessee hereinafter promises, covenants and agrees to pay and do." What Gates wanted was to have Deitz hill reduced to the level of the adjacent tracks of the railroad companies, and Spitcaufsky's undertaking to do this was the true consideration for the agreement. The contract contemplated that Spitcaufsky might make contracts with "companies, corporations or persons" to take out and crush rock on the premises; that such contracts should not impair or diminish the obligation of the lessee to perform his covenants, and there is a recital that it was understood "the personal qualifications of the lessee are largely the inducement of the lessor to enter into this lease." It was further provided that the lease was to be terminated "by the death or incapacity of the lessee," and that any person, company or corporation at that time in the actual occupancy of the premises and performing the contemplated work under contracts with the lessee, might continue operation upon giving the lessor satisfactory sureties and in a specified amount, for the strict observance by such occupant of the terms of the agreement (Pars. I, IV and XII of Lease). It was agreed that the lease should neither be assigned nor recorded and the lessee was to use every effort and devote his entire time to the removal of all rock and material above the grade of the railroad tracks, "the very purpose and

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essence of this agreement being that such work shall be conducted with all dispatch." The lessor and his agents were to have access to the property for the purpose of inspecting the work as it proceeded, and Gates was accorded the option to terminate the lease for breach of any of the stipulations by Spitcaufsky, by serving certain notices on him.

On December 8, 1913, Jemuel Gates served notice on John Spitcaufsky that, because of the latter's failure to comply with certain specified terms of the lease, Gates had elected to terminate it on January 15, 1914, unless prior to that date Spitcaufsky had complied with those terms. Another notice was served on Spitcaufsky, January 17, 1914, from which it appears he had written to Gates that he had complied as requested; but Gates reiterated his complaint of Spitcaufsky's defaults and declared the lease at an end.

On July 21, 1914, two weeks before the accident in question Jemuel Gates served a notice on Joseph M. Jones, as receiver of the Spitcaufsky Construction Company, demanding that Jones desist from trespassing upon the Deitz hill property and taking rock from the quarry; saying that he would be held accountable for past and future trespasses; further saying Spitcaufsky had violated the terms on which he had been given the right to take rock from the premises, and because of the violation Gates had cancelled his right; that neither Spitcaufsky nor any one else had the right to permit Jones to enter upon or take rock from the premises.

Jemuel Gates filed an action against John Spitcaufsky to the March term, 1915, of the Jackson County Circuit Court to quiet Gates's title to the premises, setting forth breaches of the terms of the lease as stated in the aforesaid notices, and that the lease had become null and void; that Spitcaufsky had recognized the lease was at an end, but notwithstanding those facts was "claiming the right of possession of the above described premises by virtue of the said lease and has refused to cancel or surrender the said lease in writing and thereby said lease, although terminated, in fact

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constitutes a cloud upon the title of this plaintiff to the property described in said lease and that plaintiff is remediless at law," etc. Spitcaufsky denied by answer the alleged breaches. At the July term, 1917, when the action was in the names of Marvin H. Gates and B. Thompson Whipple, as executors of Jemuel Gates, a judgment was rendered that the lease had been terminated; that neither Spitcaufsky nor any one claiming by, through or under him had any right, title, interest or dominion over the leasehold premises, and the lease instrument was declared cancelled and removed as a cloud upon the title of Jemuel Gates and his executors.

The amended petition on which the case at bar was tried, alleges Gates leased the premises to Spitcaufsky to use as a stone quarry, and by agreements in the lease authorized and permitted Spitcaufsky to take rock and dirt from the hill; that Gates knew Spitcaufsky in removing the dirt and stone and levelling the hill, would explode large blasts of nitro-glycerine, dynamite and other high explosives; knew the explosions would throw dirt, gravel and rock to great distances and would endanger the lives and property of persons in the vicinity and of passengers on street cars on Southwest Boulevard. It was alleged, next, that Joseph M. Jones was at all times mentioned in the petition, the duly appointed, qualified and acting receiver of the Spitcaufsky Construction Company; that said Jones, as such receiver, was on August 4, 1914, and for a long time prior thereto had been, in charge and control of the stone quarry and Construction Company; that Jemuel Gates, on August 4, 1914, and long prior thereto, knew said Jones, as such receiver, was carelessly and negligently using nitro-glycerine, dynamite, powder and other high explosives, and knew, or should have known, that said receiver, by his negligent methods of blasting, was throwing rock and dirt from the hill and endangering the lives and property of adjacent property owners and the traveling public. This allegation also occurs:

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"Plaintiff further states that John Spitcaufsky during all the times hereinafter mentioned, was aiding, guiding, directing and assisting said Joseph M. Jones, the receiver, in the operation of said stone quarry, and as agent of said receiver was carelessly and negligently aiding, guiding and directing the operation of said stone quarry."

After the averment just quoted, the petition alleges that Jemuel C. Gates as the owner of the premises and John Spitcaufsky and Joseph M. Jones as receiver, were, on August 4, 1914, in charge of and operating the premises as a rock quarry; that Gates and Jones, as receiver, and Spitcaufsky were, on said date, operating and conducting a nuisance; that they knew, or should have known, said quarry was a nuisance and knew it was a menace to the traveling public; on August 4, 1914, Gates and Jones, as receiver, and Spitcaufsky knew, or should have known, street cars were constantly operated on Southwest Boulevard past the stone quarry, with passengers in the cars continually in danger of rocks thrown by the blasts; that said defendants caused and permitted such blasts to be made and as a natural result thereof plaintiff was struck by a rock, etc.

Regarding who was operating the quarry on and prior to August 4th, the receiver, Joseph M. Jones, testified as follows: He was receiver in bankruptcy of the Spitcaufsky Construction Company; he had never been given permission by either Jemuel Gates or his executors to go on the land; the blasting was done by men employed by him and who were on his payroll as receiver of said Construction Company, and he paid them; he was conducting the operations as such receiver; had been ordered to take possession of all the property of the Construction Company, and went to Deitz hill to take possession of its property there; some of the men who had been at work there previously continued to work under him, and some did not; John Spitcaufsky went to the hill occasionally, and he discussed with Spitcaufsky the work in a general way, but the foreman in charge for him as

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receiver was named Stubblefield; as receiver he (Jones) continued to use some of the tools and mules previously used by the Construction Company; he took charge of the affairs of that company about June 13, 1914, and did no work in the quarry after November, 1914.

If there is any evidence to uphold a verdict for plaintiff, the order for a new trial must be affirmed; if there is none, it ought to be set aside and the verdict for appellants reinstated. [Ottomeyer v. Pritchett, 178 Mo. 160, 165; Fitzjohn v. Transit Co., 183 Mo. 74, 78.] The position taken for plaintiff is that the contract between Jemuel Gates and John Spitcaufsky was entered into by the former for the purpose of binding Spitcaufsky to perform work on Deitz hill which would endanger persons in the vicinity and on the boulevard, even if done with due care; and this would lay Gates liable for any damages occurring in the course of the work, whether the contract created the relation of lessor and lessee between him and Spitcaufsky, or proprietor and independent contractor. The relation established was that of lessor and lessee; for the instrument granted to Spitcaufsky an estate for years in the premises, and entitled him to possession during the term against Gates, who had no right to enter except to inspect the work and ascertain whether or not it was being performed according to agreement. [1 Tiffany on Landlord and Tenant, sec. 15, p. 141.] If the intended use of the premises by Spitcaufsky would, of necessity, create a nuisance, Gates, as lessor, must be held to have authorized the nuisance, and to be answerable for consequent damage; for no one may either use, or agree that some one else may use, his property so as to harm others. This fundamental principle has been applied in cases where the facts were quite like those before us. In Harris v. James (45 L. J. Q. B. [N. S.] 545) the action was against a landlord who had let a field to a tenant to operate a quarry on it, the necessary result of blasting in the quarry being to throw dirt and stone on plaintiff's land. That being true, the court held

Nuisance: Liability of Lessor.

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the landlord liable, although he would not have been if the injury had been caused by the tenant's lack of skill or care in blasting.

And so it was ruled where a house was let for the storage of powder and a damaging explosion occurred; it appearing the vicinity was so populous that a powder magazine must be a nuisance. [Prussak v. Hutton, 51 N. Y. Supp. 761.]

And where an owner leased his premises for a kiln to dry lumber, a process which, however carefully managed, would endanger by fire the house of the plaintiff, and his house in fact caught fire from the kiln, the owner was made to respond in damages. [Helwig v. Jordan, 53 Ind. 21.]

Other apposite authorities might be cited, and among them Gilliland v. Railroad, 19 Mo. App. 411, where the rule on the subject was adopted as it is stated in a standard treatise:

"In order to charge the landlord the nuisance must *necessarily* result from the ordinary use of the premises by the tenant, or for the purpose for which they were let; and where the ill results flow from the improper or negligent use of the premises by the tenant, or, in other words, where the use of the premises may or may not become a nuisance, according as the tenant exercised reasonable care, or used the premises negligently, the tenant alone is chargeable for the damages arising therefrom." [2 Wood on Landlord & Tenant (2 Ed.), p. 1283.]

The inference that the quarry on Deitz hill could not be worked without danger to persons and property as far away as Southwest Boulevard, is deducible from the facts in proof; and as there was testimony to show the danger was continuous, or at least occurred at intervals for a considerable period, the work was, in the strict sense of the word, a nuisance; for it disturbed persons who dwelt within range of the blasts in the quarry and also persons on the boulevard in the exercise of the common right to travel there. [Pollock on Torts

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(6 Ed.), 385; Tiffany on Landlord & Tenant, sec. 102, p. 681.] And it was a jury matter whether a nuisance would necessarily arise from the work, as there were facts in evidence to prove the quarry could be worked without risk to the neighborhood; also that before the day of the accident no debris had been thrown as far as the boulevard. [Prussak v. Hutton, 51 N. Y. Supp. 761; Fish v. Dodge, 4 Denio, 311.]

Therefore the question for decision here is whether there is evidence to prove John Spitcaufsky, or any one else for whose conduct the lessor Gates was responsible, was operating the quarry and thereby maintaining the nuisance at the time plaintiff was hurt. It is asserted Spitcaufsky was working the quarry on that day, either by and for himself exclusively, or in conjunction with Jones, the receiver, and that because of Spitcaufsky's separate or joint charge of the work, he caused plaintiff's hurt, and Gates, who authorized the work, is answerable too. Attentive study of every item of evidence to warrant a finding that Spitcaufsky was wholly or partly in charge of operations when the accident happened, have satisfied us there was no evidence tending to prove he was. The case made by the petition is that the receiver was in charge and control on that day and long prior thereto, and that Spitcaufsky was aiding, guiding and directing the work as the receiver's agent, instead of in his individual capacity. Several witnesses testified to seeing John Spitcaufsky about the quarry on and prior to the day of the accident, giving orders and directing the work, but there is nothing in this inconsistent with the averment of the petition that Spitcaufsky was acting as Jones's agent, or contradictory of the testimony of the receiver that he was operating the quarry and had been in charge since June 13th, nearly two months before the date of the accident. It is said the petition filed by the appellants as executors of the lessor to remove the cloud of the lease from the title, shows Spitcaufsky was in possession of the hill or in charge of the work on

Trespasser.

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it on August 4, 1914, and long after. We have quoted the only passage of that petition which refers to what Spitcaufsky was doing or claiming, and it has no tendency to prove Spitcaufsky was working the quarry when the accident occurred, or later, but only that he claimed an interest and right of possession.

The receiver was not operating there with the consent of Jemuel Gates or the appellants, and so testified. Besides, a notice had been served on him July 8, 1914, by Jemuel Gates that he was trespassing on the leased premises and to desist from taking rock from them. It might be deduced from circumstances in proof, although there is no direct testimony to that effect, that Spitcaufsky Construction Company had been operating the quarry under a contract with John Spitcaufsky, the lessee, as provided in paragraphs one and four of the lease agreement, and that Jones, having been appointed receiver in bankruptcy of said company, took over the work. If Spitcaufsky had contracted with the Construction Company to take rock and dirt from the hill, a contract authorized by the lease agreement, the lessor would have been as responsible for an injury done while the Construction Company was in charge as for one caused by Spitcaufsky himself. But the relation of lessor and lessee did not exist between Gates and the receiver, and no fact appears to indicate that the receiver was working the quarry under authority from Gates as licensee. The lease agreement will not bear the interpretation that Gates was responsible for the torts of a possible receiver in bankruptcy of some person or company whom Spitcaufsky might employ. Whatever right, if any, Jones possessed to conduct the quarry, he got from the court which appointed him. This is by the way, for it is not contended for respondent, that Gates was answerable for the receiver's torts, the argument being that there is evidence to support an inference that Spitcaufsky was doing the work. We hold there was none to show he was doing it, except as agent or employee of the receiver. Spitcaufsky might be liable as a joint tort-

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feasor for any injury done while thus acting, and that is the theory of the petition; but Gates as lessor would not be answerable for Spitcaufsky's acts while in the employ of a person who had no authority, direct or indirect, to work the quarry.

The judgment is reversed and the cause remanded, with directions to set aside the order sustaining the motion for new trial and to reinstate the verdict for appellants and render judgment thereon. All concur.

AMERICAN FOREST COMPANY, Appellant, v. JOSEPHINE R. HALL et al., Administrators of Estate of JOHN C. HALL.

Division One, December 1, 1919.

1. **NECESSARY PARTIES: Pledgor of Note Alone: Trustee of Express Trust: No Possession.** It is not enough to authorize the pledgor of a negotiable note, exceeding in amount the debt for which pledged, to maintain suit on the note in his name alone, that the pledgee loan it to him for purposes of protest, consent to and aid the pledgor in the suit, and through his counsel present the note in evidence at the trial; but in order to constitute the pledgor a trustee of an express trust, the pledgee must actually part with the physical possession of the note. If the original payee, after his assignment of the note, becomes possessed thereof, he can maintain the action in his name alone, notwithstanding his name is indorsed thereon in blank, for under the statute (Sec. 10018, R. S. 1909) he can strike out the indorsement and make a paper title in himself; but without actual possession, the right to strike out the indorsement, or to maintain an action on the note as the trustee of an express trust, does not exist.

2. ———: ———: ———: ———: **Pledged Note in Excess of Debt.** The fact that the notes, indorsed in blank, exceed the amount of the debt for whose payment they were pledged, does not authorize the pledgor alone, without actual physical possession of the notes, to maintain suit thereon, although the pledgee consents to such suit. By an indorsement in blank and delivery notes are fully negotiated, and the indorser loses all title thereto, even title to the excess of the amount thereof over the debt for which they are pledged, and for the title to pass back to the indorser or pledgor there must be an actual redelivery. Nor does the fact

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that the pledgee loaned the notes to the pledgor for purposes of protest, nor that the pledgor in his petition alleges that he is the owner and legal hold thereof, make him the trustee of an express trust, for he must prove such allegation.

Appeal from Jackson Circuit Court.—*Hon. Harris Robinson,* Judge.

AFFIRMED.

George H. Williams and *John A. Hope* for appellant.

(1) The pledgees, had they so elected, could have proceeded in their own names. 3 R. C. L. sec. 202, p. 994; 21 R. C. L. secs. 29 and 31, pp. 666 to 669; Logan v. Smith, 62 Mo. 455; White v. Phelps 100 Am. Dec. (Minn.) 190. (2) But, having the consent of the pledgees, plaintiff American Forest Company, pledgor, also had the right to proceed in its name alone. Under the facts and circumstances above stated, this action was and is properly prosecuted in the name of American Forest Company as sole plaintiff. (a) Plaintiff is a trustee with respect to the rights of its pledgees of the notes. And the Code expressly sanctions the prosecution of such an action in the name of the trustee without joining the beneficiary. Sec. 1730, R. S. 1909. West Plains Bank v. Edwards, 84 Mo. App. 469; Springfield to use. v. Weaver, 137 Mo. 670. The same principle is applied in Beattie v. Lett, 28 Mo. 596; Guerney v. Moore, 131 Mo. 668; Carter v. Butler, 264 Mo. 325. (b) Section 1730, is said to have been copied from the New York Code, Harrigan v. Webb, 49 Mo. App. 504. The Court of Appeals of New York has held that the pledgor may maintain the suit if there is such recognition of him by the pledgee as will "protect the defendant upon a recovery against him from a subsequent action by the assignor." Hays v. Hathorn, 74 N. Y. 504. Under the circumstances, payment by the defendants of any judgment rendered against them in this action would bar any subsequent action by the pledgees. And this is as far as defendants have any right to

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inquire. Jolly v. Huebler, 132 Mo. App. 686; Hutchings v. Reinhalter, 23 R. I. 520; Dyer v. Sebrell, 135 Cal. 598; Greene v. McAuley, 70 Kan. 607. (c) It is the universal rule, independent of the above statutory provision (Sec. 1730), that the pledgor, having as in this case the acquiescence of the pledgee, may sue in his own name for the benefit of himself and his pledgee, and recovery should not be denied on the ground that the note is pledged or that only the pledgee can sue. 21 R. C. L. sec. 31, p. 669; 3 R. C. L. sec. 200, p. 991; 2 Daniel on Negotiable Instruments (6 Ed.), secs. 1181a, 1191, 1192, 1200 and 1201. (d) The following further authorities support our contention that plaintiff can proceed in its own name: Nicolay v. Fritschle, 40 Mo. 67; Barber v. Straub, 111 Mo. App. 585; Hovey v. Sebring, 24 Mich. 232; Titonic Bank v. Bagley, 68 Me. 250; McCallum v. Driggs, 35 Fla. 288; Jump v. Leon, 192 Mass. 513; Fay v. Hunt, 190 Mass. 378; Lowell v. Bickford, 201 Mass. 545.

Chas. H. Winston for respondents.

(1) The payee of the notes cannot sue on the notes already indorsed and transferred by such payee, nor can such payee lawfully collect the notes. R. S. 1909, secs. 10001, 10092, 10003, 10021, 10027 and 10174; Overall v. Ellis, 32 Mo. 327. The indorsements and delivery of the notes had the same effect to transfer the entire legal title to the assignees, and left nothing in the assignor but a right to demand an accounting upon certain contingencies. Overall, Admr. v. Ellis, 32 Mo. 327, 38 Mo. 209; Lee v. Turner, 89 Mo. 489; Neuhoff v. O'Reilly, 93 Mo. 169; Turner v. Hoyle, 95 Mo. 346; Keim v. Vette, 167 Mo. 399; Wright Inv. Co. v. Frisco Realty Co., 178 Mo. 80. (2) Neither the probate court, nor the circuit court on appeal, has any power or jurisdiction to allow any equitable claim or demand of assignor or pledgor or indorser of the four notes held by the bank and trust company whether as assignees,

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pledgees or indorsees of said notes; nor has the probate court, or the circuit court on appeal, any jurisdiction to allow appellant any conditional right or claim or demand before the happening of the condition, if any, upon which such conditional right or claim or demand shall have become absolute, if at all, and so be a legal right, claim or demand, and not a mere equitable or conditional right, claim or demand. Tenny v. Lasley, 80 Mo. 664; Stevens v. Stevens, 172 Mo. 37; R. S. 1909, sec 10174; Jeffers v. Oliver, 5 Mo. 433; Langham to use of Ortley v. Lebarge, 6 Mo. 355; Davis v. Christy, 8 Mo. 570; Wooden v. Butler, 10 Mo. 718; Webb v. Morgan, 14 Mo. 430; Boeka v. Nuella, 28 Mo. 180; Beattie v. Lett, 28 Mo. 596; Bennet v. Pound, 28 Mo. 598; Brady v. Chandler, 31 Mo. 28; Hutchings v. Weems, 35 Mo. 285; Simmons v. Belt, 35 Mo. 461; Thomas v, Wash, 1 Mo. 665. "Our statute of assignments clearly requires the legal owner to sue in his own name." Boeka v. Nuella, 28 Mo. 180; Beattie v. Lett, 28 Mo. 596; Bennet v. Pound, 28 Mo. 598; Simmons v. Belt, 35 Mo. 461.

GRAVES, J.—There is a mass of record in this case, and a brief for respondent (we mean designated as Statement, Brief and Argument) of 198 pages. The pertinent facts are within a small compass, as also are the legal questions involved.

On December 1, 1910, the Chicot County Cotton-Alfalfa Farm Company (a Missouri corporation) made and executed four notes of $15,000 each to the "American Forest Company" (a New York corporation). These four notes were secured by deed of trust on some lands in the State of Arkansas. The maker of these notes, as appears on the face thereof, was the Farm Company supra. On the back of each note appeared the names of Wallace Estill, John C. Hall and Odon Guitar, Jr. We take it from the record that such was the condition of the paper when delivered to the American Forest Company. The notes were due re-

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spectively in three, four, five and six years. Before the maturity of either of said notes, the American Forest Company indorsed the note due in three years, by signing its name on the back thereof, and delivered the same to the Broadway Bank, of St. Louis, as collateral security for its note to such bank for some $15,000. In like manner the other three were indorsed and delivered to the St. Louis Union Trust Company, as collateral security to a note of large proportions held by that company, and executed by the American Forest Company.

There is a long history preceding the giving of the four $15,000 notes, signed as aforesaid, but most of it is immaterial to the real issues here. So far as material (if at all) it will be left for the proper points in the opinion. The notes upon their face referred to the deed of trust aforesaid, and the deed of trust contained a provision as follows:

"It is expressly agreed and understood that failure to pay the interest upon said notes, or any of them, annually, when due and continuance in such default for a period of thirty days, shall cause all of said notes to become immediately due and payable, though not then due by the tenor, terms and effect thereof."

The deed of trust, in describing the four notes which it was given to secure, says:

"Whereas, the said Chicot Co. Cotton-Alfalfa Farm Company is indebted to the said party of the third part, the American Forest Company, in the sum of sixty thousand dollars, evidenced by four certain negotiable promissory notes of even date herewith for the sum of fifteen thousand dollars each, and due and payable respectively in three, four, five and six years from their date, with interest at the rate of five per cent per annum from date until paid, interest being payable upon said notes annually, *and each of said notes being indorsed by Wallace Estill, of Estill, Mo., Odon Guitar, Jr., of St. Louis, Mo., and John C. Hall, of Kansas City, Mo.,*

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and all of said notes being payable at the office of said American Forest Company in St. Louis, Mo."

Both the notes and the deed of trust referred to in the face of the notes placed the signers upon back thereof in the capacity of indorsers, as we formerly understood that term.

July 30, 1913, John C. Hall died intestate, and his widow and son were made the adminstrators of his estate in the Jackson County Probate Court. On July 20, 1914, the American Forest Company presented a demand against the John C. Hall estate, in which it sought an allowance of $57,919.73 in its behalf, alleging that:

"The said John C. Hall during his lifetime, to-wit, on the first day of December, 1910, made, executed and delivered, at the city of Kansas City, Missouri, for value received, his four certain negotiable promissory notes for the sum of fifteen thousand dollars each, payable on or before three, four, five and six years, respectively, after said December 1, 1910, to the order of American Forest Company, with interest at the rate of five per cent per annum from date; copies of which said notes are hereto attached and marked Exhibits 'A,' 'B,' 'C' and 'D,' respectively."

And further pleading the deed of trust the said demand avers the maturity of all the notes, and the *ownership* of the notes in form as follows:

"And this claimant avers that the recitals in said deed of trust were made a part of each of the several notes hereinbefore referred to, as made, executed and delivered by said John C. Hall, by recital and reference in each of said notes to said deed of trust, as will more fully appear by the copies of said notes hereto attached.

"Claimant further avers that it still is the legal holder and owner of all said notes.

"Claimant further avers that the first of the aforesaid notes is overdue and unpaid, according to the face and reading thereof, and the three remaining notes have been duly and legally declared due by the under-

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signed as the holder thereof, because of the failure to pay the interest due annually, and the default thereof for a period of thirty days thereafter, in accordance with the provisions of the deed of trust securing same, referred to and described in the face of said notes, a copy of which is hereto annexed; all four of which notes have been duly presented for payment, and payment thereof having been refused, have been duly and formally protested for non-payment, and the maker and indorsers duly notified thereof."

Unverified copies of the four notes and copy of the deed of trust were attached to the demand, as was also a notice of demand. The notice above thus describes the liability of John C. Hall, on the four notes:

"Josephine R. Hall, Administratrix of the estate of John C. Hall, deceased, will take notice that the undersigned, American Forest Company, a corporation, has a demand against said estate for the sum of sixty thousand dollars and for interest thereon from December 1, 1912, to date, amounting to the sum of thirty-four hundred and forty-six dollars and twenty-five cents, with protest fees of twelve dollars founded on four promissory notes *indorsed by said John C. Hall,* of which the following are copies:"

The copies are the same as those attached to the demand or claim. Upon trial in the probate court, judgment went for defendants. Upon trial *de novo* in the circuit court (to which appeal was taken from the probate court) there was a like result. In the circuit court trial was had without the intervening of a jury. Instructions given and refused indicate in a way the views of that court. The instructions, both given and refused, upon both sides are as follows:

"Thereupon, plaintiff asked the court to declare the law to be as set forth in the following three declarations of law, numbered respectively 1, 2, and 3, to-wit:

"1. The court declares that under the law, the pleadings, and the evidence in the case, the claimant,

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American Forest Company, is entitled to recover and that the four notes presented for allowance herein must be allowed and classified in the fifth class as demands against the estate of John C. Hall, deceased, for the full amount thereof, less any payments which the Court may find to have been made thereon.—*Refused.*

"2. If the court finds that the estate of John C. Hall, deceased, is liable on the four notes involved herein, then the claimant, American Forest Company, is a proper party to present and have the said notes allowed in its name as claim against said estate; notwithstanding the court may further find and believe from the evidence that one of said notes was and is now pledged to the Broadway Bank as collateral to secure a debt of said Forest Company to said bank of less amount than the pledged note, and notwithstanding also that the three remaining notes were and are now pledged to the St. Louis Union Trust Company as collateral to secure a debt of said Forest Company to said Trust Company of less amount than said three pledged notes.—*Refused.*

"3. Notwithstanding the court may find and believe from the evidence that the American Forest Company was a New York corporation and maintained an office and had business transactions in this State, yet if the court further finds and believes from the evidence that such maintainance of an office and business transactions were merely incidental to and connected with commerce or business transactions done or had in other states, then said American Forest Company was engaged in interstate commerce and was not subject to the statutes of this State concerning foreign corporations doing business in this State, and was not required to comply therewith, and it is no defense to the claim sought to be allowed herein that the said American Forest Company had not complied with the statutes of this State relating to foreign corporations doing business in this State.—*Given.*"

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And at the same time defendants asked the court to give the following seven declarations of law, numbered respectively 1, 2, 3, 4, 5, 6 and 7, to-wit:

"1. The court declares the law to be that under the law and the evidence in this case the American Forest Company cannot recover, and the finding must be for the appellees.—*Given.*

"3. The court declares the law to be that having written its name 'American Forest Co., J. H. Byrd, Pres.'" on the backs of each and all of the four promissory notes, Exhibits 1, 2, 3 and 4, read in evidence, and having thereupon delivered the first note due, said Exhibit 1, to the Broadway Bank of St. Louis, Mo., so indorsed, for a valuable consideration, and having also thereupon delivered said other three notes, Exhibits 2, 3 and 4, to the St. Louis Union Trust Company of St. Louis, Mo., so indorsed for value, appellant cannot recover herein." —*Given.*

"6. The court declares the law to be that the American Forest Company cannot have or maintain action as a pledge of the four notes in the sum of $15,000 each, read in evidence, without joining the Broadway Bank and the St. Louis Union Trust Company as co-plaintiffs, with appellant in this action in the probate court; and that inasmuch as said Broadway Bank and said St. Louis Union Trust Company were not joined with the American Forest Company as plaintiffs in said probate court, the finding must be for appellees.—*Given.*

"2. The court declares the law to be that appellant's claim or demand as pledgor of the four notes of $15,000 each, is not the same claim or demand as that stated in the petition filed in the probate court by American Forest Company on the twentieth day of July, 1914, but in another and different claim or demand or cause of action from that set forth and contained in said petition; and that therefore, the claim or demand of appellant as a pledgor of said four notes cannot be allowed by the circuit court on this appeal.—*Refused.*

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"4. The court declares the law to be that, if American Forest Company had any right of action against Chicot County Cotton-Alfalfa Company on the four notes, Exhibits 1, 2, 3 and 4, read in evidence, or on either or any thereof, then the right of action against the appellees herein on the cause of action stated in appellant's petition, filed July 20, 1914, in the probate court in this suit, is barred by the Statute of Limitations and the estate of John C. Hall, deceased, is exonerated from any and all liability.—*Refused.*

"5. The court declares the law to be that inasmuch as neither of the four promissory notes, Exhibits 1, 2, 3 and 4, read in evidence, was ever filed in the Probate Court of Jackson County at Kansas City, Mo., and neither thereof is or has been filed in this, the circuit court of said county in this suit, and inasmuch as appellant has not filed with said notes the affidavit required by Revised Statutes 1909, Sections 201 and 202, neither said probate court nor the circuit court can allow said notes as a claim or demand herein.—*Refused.*

"7. The court declares the law to be that the American Forest Company was a foreign corporation doing business as such in the State of Missouri without any license therefor at the time when the four promissory notes and the deed of trust, Exhibits 1, 2, 3, 4 and 5, read in evidence, were made and delivered in said State of Missouri, and that said promissory notes are and ever were void in so far at least as concerns the American Forest Company; and that by reason thereof appellant cannot recover herein.—*Refused.*"

From the adverse judgment in the Circuit Court, the American Forest Co. has appealed. It should be added that from the time the American Forest Company endorsed the notes, and delivered the one to the Broadway Bank and the other three to the St. Louis Trust Company, the possession of the same has been in those two financial institutions, and in addition the debts for which they were held as collateral have only been partially paid. This outlines the case.

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I. It is clear from instructions 3 and 6 given by the trial court for the defendant that the court took the position that the pledgor, the American Forest Company, could not (acting alone) maintain this action. This is the crucial question in the case, as we see it. A few additional facts should be stated. Whilst the notes were pledged, yet at the time this action was begun, the notes, in amounts, exceeded the debts for which they were pledged. That is to say, the note pledged to the Broadway Bank, exceeded by a $1000 the debt for which it was pledged, as such debt existed at the institution of this suit. So also the three notes with the Trust Company exceeded by several thousand dollars the debt for which they were pledged. In addition, the pledgees of the notes consented to and aided in this action by the pledgor. The pledgees not only turned over the notes for the purpose of protest, but through their own counsel had the notes present for the trial. In short, they not only consented to, but assisted in the prosecution of the action in the name of the pledgor. Were these two instructions proper under these facts?

Necessary Parties: Suit by Pledgor: Trustee of Express Trust.

The plaintiff first contends that it is a trustee of an express trust, and can maintain this suit without joining its beneficiaries, and calls our attention to Section 1730, Revised Statutes 1909. The question is whether or not the evidence in this case makes the American Forest Company a trustee of an express trust. The evidence shows that the two pledgees permitted the American Forest Company to have the notes for the purpose of protest, after which the possession was reverted to the pledgees. It is clear that the pledgees did not turn over the physical possession of these notes to the pledgor at the institution of the suit. The notes were not filed with the claim. Only copies thereof were filed. In fact, the evidence tends strongly to show that, whilst the pledgees were assisting in the prosecution of the claim, yet they held on like grim

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death to the possession of the notes. When introduced in evidence on the trial they came from the possession of the pledgees. After being introduced in evidence, they were not left with the court or with the papers in the case, but again reverted to the possession of the pledgees. There can be no doubt that the pledgees might have turned over these notes to the pledgor for suit in its name, and that under such circumstances the pledgor would be a trustee of an express trust, and could sue without joining the pledgees. This was expressly ruled by this court in Springfield to use. v. Weaver, 137 Mo. l. c. 760, whereat this court said:

"The evidence shows that the bank, which held the tax bills as collateral, turned them over to Reilly the payee for collection, and authorized the suit to be instituted if necessary. This authority constituted Reilly the trustee of an express trust under the decisions of this court and gave him the right to sue in his own name under express provisions of the statute. He had possession of the bill and held the legal title; and the fact that it was impressed with a trust to the bank did not deprive him of the right to sue in his own name. [R. S. 1889, sec. 1991; Snider v. Express Co., 77 Mo. 527, and cases cited; Fisher v. Patton, 134 Mo. 32.]"

This was a tax bill, and our court (Dickey v. Porter, 203 Mo. l. c. 23) has drawn a distinction between commercial paper and a tax bill; but on the idea that the delivery by the pledgee or assignee to the pledgor or assignor of the instrument for the purpose of bringing suit upon and collecting it, would make the pledgor or assignor a trustee of an express trust, we take it the rule would be the same in each case. In other words, had the pledgees or assignees of these notes redelivered them to the American Forest Company for the purpose of having that company sue upon and collect them, there would be no question that the American Forest Company could maintain the suit in its name, as trustee of an express trust. This, because of the agreement between the parties. But the evidence in this case dis-

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closes no such facts. Here the pledgees or assignees were holding on to the possession like grim death. They seemingly encouraged the suit, but did not turn over the possession to the American Forest Company prior to the suit for the purpose of maintaining the suit. They hung to the possession even during the trial, as they did before, and as they did thereafter. If they ever had an idea of making the American Forest Company a trustee they evidenced but little confidence in their trustee. The facts in evidence do not bear out the theory of a trustee of an express trust. If they did, there would be no trouble with the case for the plaintiff. Such a relationship must have some evidence to sustain it. The record here shows no such understanding or agreement as to make the American Forest Company a trustee of an express trust. A condition precedent is absent, i. e., the transfer of the possession of the notes to the American Forest Company. This was emphasized in the case of Springfield to use. v. Weaver, supra; whilst the Dickey-Porter case, supra, is broader and holds that the payee in a tax bill (pledged for less than its amount) has a right to sue on the bill, the court clearly recognizes a distinction between pledges of this kind (tax bills) and assigned notes or commercial paper.

The rule as to who can sue is well stated by BROWN, C., in Carter v. Butler, 264 Mo. l. c. 325, thus:

"In Dugan v. United States, 3 Wheat. 172, perhaps the leading modern case upon the subject, the Supreme Court of the United States formulated the rule as follows: 'After an examination of the cases on this subject (which cannot all of them be reconciled), the court is of opinion that if any person who indorses a bill of exchange to another, whether for value or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the bona-fide holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorse-

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ments in full subsequent to the one to him without producing any receipt or indorsement back from either of such indorsees, whose names he may strike from the bill, or not, as he may think proper.' This case was decided in 1818. In 1859 Mr. Story, in his excellent work on Promissory Notes, sec. 452, said of it that it seemed to be the better opinion maintained in America, notwithstanding some early doctrine the other way. In the same year the doctrine to its fullest extent was unqualifiedly indorsed by this court in Beattie v. Lett, 28 Mo. 596, and it has now been placed entirely beyond our control by the Legislature, in Section 10018, Revised Statutes 1909, which is as follows: 'The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.' Section 10160 defines 'holder' to be 'the payee or indorsee of a bill . . . who is in possession of it.' This definition was evidently intended to meet the legal situation we have just been considering, by excluding from its terms all payees and indorsees not in possession, as well as by including the payee or indorsee in possession for the time being."

So in the case at bar, had the American Forest Company (after its assignment of the notes) become possessed thereof, it could have brought and maintained the suit, notwithstanding its name as indorser was written thereon. With possession, it could have stricken out the indorsement and made a paper title to the notes. But it must be borne in mind that the condition precedent to all this, is the possession of the notes by the person suing. Without this possession the right to strike out indorsements does not exist. The mere introduction of the instruments in evidence, coming as they did from the hands of the pledges or assignees, did not either in law or in fact remove the indorsement. On the other hand, the source from which the instruments came at the trial indicated that possession had

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never been surrendered, and that the indorsements were in full force and effect. So that whilst we recognize to its fullest extent that the assignee of commercial paper may place the same in the hands of the assignor or *pledgor* and direct him to bring suit, and thus authorize a suit in the name of the pledgor as a trustee of an express trust, yet the facts of this case do not bring it within the rule. At the bottom of the rule stands the transfer of the possession, and the facts of this case thoroughly negative the transfer of possession. The theory of a trustee of an express trust is not in the case.

II. It is urged that the pledgees were willing to have the pledgors bring the suit, and consented to the suit; but this is not sufficient, so long as they hold on to the possession. It required the transfer of possession to give the pedgor the right to sue, on the theory of a trustee. This we suggest in addition to what is said in Paragraph One, supra.

Consent Without Possession.

It is also urged that, because the notes for which the notes in suit were pledged did not equal the notes involved here, this surplus left in the pledgor the right to sue. Dickey v. Porter, supra, is cited as an authority. That was a tax bill, and falls within a different category. Such instruments are choses in action, but not commercial paper. The Dickey-Porter case recognized the difference, as does also Richardson v. Ashby, 132 Mo. l. c. 245. The blank indorsement of these notes and the subsequent delivery thereof to the Broadway Bank and the St. Louis Union Trust Company placed the right to sue in those corporations.

By Section 10001, Revised Statutes 1909, it is provided: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery."

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By Section 10002, Revised Statutes 1909, it it further provided: "The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement."

And by Section 10004, Revised Statutes 1909, it is provided: "An indorsement may be either special or in blank; and may also be either restrictive or qualified, or conditional. A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery."

The instruments before us were indorsed in blank and delivered as aforesaid before maturity. They were therefore fully negotiated, within meaning of our statutes.

It is true that Section 10003, Revised Statutes 1909, says: "The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part it may be indorsed as to the residue." But no such indorsement was made here.

The indorsement and delivery of these notes constituted a negotiation of them under the statutes. They would thereafter pass by delivery, it is true, [R. S. 1909, sec. 10001.] But under all the evidence in this case there was no redelivery of these notes to the original payee, in the sense of transferring any kind of title. By the indorsements and delivery, first made, the payee, American Forest Company, lost all title to the notes. They were unconditionally negotiated. The said original payee could not sue thereon. In an early case (Brady v. Chandler, 31 Mo. l. c. 29) SCOTT, J., said:

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"The instrument sued on was a note, and the justice of the peace had jurisdiction of the action. [McGowen v. West, 7 Mo. 569.] Before the action was brought Brady & Bro. had assigned the note to William Brady. After the assignment, there was no title to Brady & Bro., legal or equitable. They then had no right to bring this action. They were the plaintiffs as the cause stood. The endorsing a suit for the benefit of another is a matter of no importance in determining who are the real parties to the suit. Although the action was stated to be to the use of William Brady, that did not make him a party. The suit should have been brought in the name of William Brady. [Jeffers v. Oliver, 5 Mo. 433.]"

It is true in this case, that the payees, Brady & Bro. had made what our Section 10004, Revised Statutes 1909, denominates a special indorsement. They had indorsed to Wm. Brady. But whilst in the case at bar the indorsements were in blank, the delivery carried the title to Broadway Bank and St. Louis Union Trust Company just as effectively as if the indorsement had been special. It required a redelivery to transfer the title back to American Forest Company, and no such redelivery was ever made or attempted to be made.

In Hutchings v. Weems, 35 Mo. l. c. 286, this court said:

"This was a suit commenced in a justice's court upon an instrument in the nature of a promissory note. There was judgment in the circuit court for the plaintiff, and the defendant moved in arrest of judgment, for the reason that the suit was improperly brought in the name of Hutchings to the use of Blackford. The motion was overruled and the defendant appealed. The motion should have been sustained. The law is imperative that suits must be brought in the name of the real parties in interest (excepting the few cases specially provided for by statute). Judgment will be reversed and the cause remanded to the circuit court, where the record can be so amended as to make the real party in

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interest the plaintiff, if that court find that it should be done in furtherance of justice."

Blackford was the assignee of the instrument and Hutchings was the payee. This suggestion makes the quotation, supra, clear.

Our statutes contemplate the bringing of the action by the party in interest. It does not exclude, but includes, the trustee of an express trust. Absent this relationship, as we hold in this case, then the actual party in interest must bring the suits. In the instant case the indorsements and delivery of these notes placed not only the title, but the right to sue in the Broadway Bank and the St. Louis Union Trust Company. That title and that right might have been reinvested in the American Forest Company by a redelivery of the negotiated notes to it, but this was not done. A loaning of the notes for purpose of protest did not meet the situation. Nor did the production of the notes at the trial by the pledgees meet the situation. The evidence fails to show further negotiation of these notes by delivery.

In the claim filed, the American Forest Company asserted, as it was bound to do, that it was the legal, owner and holder of notes. This it failed to prove. From it all we feel constrained to hold that the peremptory instruction to find for defendants was properly given.

With this view the other instructions drop out of the case.

The judgment is affirmed. *Blair, P. J.*, concurs; *Bond, J.*, concurs in result; *Woodson, J.*, not sitting.

ON MOTION FOR REHEARING.

GRAVES, J.—We are confronted with a vigorous motion for rehearing in this case, and the vigor of it, occasions this opinion.

I. It is first urged in the motion that: "The denial of plaintiff's right to sue on the pledged notes is based in the opinion upon a theory of the law which has no application. The opinion follows Brady v. Chandler, 31 Mo. 29; Hutchings v. Weems, 35 Mo. 286, and Carter

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v. Butler, 264 Mo. l. c. 325. In each of these cases the situation before the Court was that of a complete transfer or assignment of the whole ownership and possession of the note. In such cases the question as to who can sue on the note is, of course, controlled by the ordinary law of negotiable instruments and possession by the plaintiff at the time of the commencement of the action and thereafter is necessary."

The trouble with our learned brothers is that they have overlooked an express statute on the subject of commercial paper. They have made out no case of pledgor or pledgee in the literal and true sense of those terms. They show notes indorsed in blank, which when delivered (as was true here) carries the full title and interest. The only error we have discovered in the opinion, is where we use in the statement the words "pledgor" and "pledgee," when we should have used the "assignor" and "assignee."

In the opinion we called to counsel's attention several sections of our negotiable instrument law, but these are overlooked by our learned brothers at the bar.

Section 10003, Revised Statutes 1909, among other things says: "The indorsement must be an indorsement of the entire instrument." The previous sections designate how indorsements shall be made and the effect thereof. Under Section 10001, Revised Statutes 1909, these notes were fully and completely negotiated in law, when they were indorsed in blank, and delivered. There is no dispute that the notes were indorsed in blank and delivered. Under the law the negotiation of the notes stands admitted. This negotiation of the notes, under these statutes, carried all of the American Forest Company's rights therein. Section 10004, Revised Statutes 1909, seems to contemplate "restrictive or qualified or conditional" indorsements, but the American Forest Company, did not so indorse. It may be (a question we do not decide) that the American Forest Company might have so indorsed these notes as to have retained title or interest in them, but they did not do so. This Com-

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pany fully negotiated these notes, and it never afterward acquired possession thereof. How we can say in one breath that our commercial paper has been fully negotiated (as were these notes), and then in the next breath say the payee therein has an interest in them, is beyond our reasoning. "Negotiated" as written in our statute means something. It is meaningless in the view of learned counsel. The statute says that it means that the transferee is the holder thereof. The holder thereof is the person possessed of the right to sue. We reiterate that GANTT, J., in Dickey v. Porter, 203 Mo., recognizes clearly the distinction between negotiable and non-negotiable instruments. He was dealing with a pledged tax-bill and not a negotiable note, as we have here. His ruling is authority for our ruling; and not adverse to it.

II. We did not discuss (it is true) the question as to whether or not the banks by their conduct might not have been estopped from suing upon these notes, had the American Forest Company obtained judgment. That question was not a vital one in the case. In fact it is not a question at all. The question here is the right of the American Forest Company to sue upon these notes, and not whether or not by acts *in pais*, the banks have estopped themselves from suing thereon. Live and vital issues of the case are the ones for discussion in the opinion and not side and irrelevant issues. Whether the conduct of the banks might have estopped them from further action in the premises should be left to a case where the question is vital. The question here is, did the American Forest Company, after negotiating these notes, have the right to sue upon them? When this question is kept in mind, the case is a simple one as under our law as to negotiable instruments they had parted with all their rights in and to these notes. There is no restriction in their indorsement, so far as this record shows.

To clarify the situation, suppose the banks had sued upon these notes, and the defendants had suggested

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by their answer that there was a defect in the parties plaintiff in that the American Forest Company was a party in interest and should have sued along with the banks? What should a court do in this situation, with the clear and unqualified indorsement of the notes, and the delivery admitted? The question answers itself.

There is no substance in the motion for rehearing and it should be overruled. If the mistake in thus bringing the suit works a hardship, it is not one brought about by law or this court. Let the motion be overruled. *Blair, P. J.*, and *Woodson, J.*, concur.

JAMES P. NEWELL, Public Administrator in Charge of Estate of A. J. ODEGAARD, v. BOATMANS BANK, Appellant.

Division One, December 1, 1919.

1. **DORMITORY: Athletic Club.** A seven-story brick building, the west half of which was occupied by an athletic club, having a kitchen and dining room on the third floor, a banquet hall and ten sleeping rooms on the fourth floor, thirty-six sleeping rooms and a library on the fifth floor, thirty-nine bed rooms on the sixth floor, having in all sleeping accommodations for one hundred and twenty-five persons, in which seventy persons were sleeping at the time of the fire, was a dormitory within the meaning of Section 10668, Revised Statutes 1909, and was required to be equipped with fire escapes as provided by Sections 10666, 10667 and 10668.

2. **DEATH IN DORMITORY: Insufficient Fire Escapes: Proximate Cause: Res Ipsa Loquitur.** When fire safety-appliance laws are violated, and death, unexplained except by the physical facts, occurs as a result of fire in a building not equipped with the required appliances, but which is by law required to be so equipped, the case should go to the jury under the rule of *res ipsa loquitur*, although there is no positive evidence that the death was due to a lack of such appliances. Even though there was no physical obstruction between the room in which deceased was sleeping and a near-by exit to a fire escape, unless the fire barred the way, yet if no person sleeping in other rooms opening on the corridor escape by said exit, and there is further evidence from which it may be inferred that had there been

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the required appliances at another part of the corridor he might have escaped, the rule applies, and the jury must determine the proximate cause of his death.

3. **NEW TRIAL GRANTED: Weight of Evidence: Appellate Practice.** Where under the facts in evidence the rule of *res ipsa loquitur* required the case to go to the jury, and they returned a verdict for defendant, the action of the trial court, granting to plaintiff a new trial on the ground that the verdict was against the weight of the evidence, will not be disturbed on appeal.

Appeal from St. Louis City Circuit Court.—*Hon. John W. Calhoun,* Judge.

REMANDED FOR NEW TRIAL.

Lehmann & Lehmann and *Fauntleroy, Cullen & Hay* for appellant.

(1) The building was not a hotel or a dormitory, but was a "club house," for which the number of fire escapes should be determined by the building commissioner of the City of St. Louis. Hence the plaintiff in resting his action upon the theory that the building was a hotel or dormitory, proceeded upon the wrong theory and was not entitled to go to the jury. R. S. 1909, secs. 10666, 10667, 10668. (2) There was no evidence proving or tending to prove that the failure of the bank to construct and maintain additional fire escapes was the proximate cause of the death of deceased. The facts themselves show lack of proximate cause. Armaindo v. Ferguson, 55 N. Y. Supp. 769; Radley v. Knepfly, 104 Tex. 139. (3) The facts of this case bring it within the class referred to by this court in the case of Burt v. Nichols, 264 Mo. 1, wherein the court said: "We can readily appreciate a case wherein the facts themselves show lack of probable cause."

Watts, Gentry & Lee for respondent.

(1) That the identical building in question falls within the provisions of the statutes which were violated, was held by this court recently in the case of Rauns

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v. Boatman's Bank, 279 Mo. 332. (2) Sufficient facts were shown to justify the court in submitting to the jury the question as to whether or not the violation of the statutes was the proximate cause of Odegaard's death. Burt v. Nichols, 264 Mo. l. (3) This court will defer to the discretion of the trial judge in granting a new trial on the ground that the verdict is against the weight of the evidence.

RAGLAND, C.—John Odegaard lost his life in the fire which destroyed in the early morning of March 9, 1914, the building occupied by the Missouri Athletic Association. He was about thirty-two years of age, had never been married, and left no relatives in this State. Aged parents, dependent upon him for support and to whose support he was contributing at the time of his death, survived him, and were living in the City of Chicago. This suit was instituted by the public administrator of the City of St. Louis, having in charge his estate, and wherein he seeks to recover damages against defendant as owner of the building for having negligently caused the death of his intestate, in that, it had not prior to the fire equipped said building with suitable and safe fire escapes and balconies as required by the statutes of this State. The defendant answered by way of general denial. An affirmative defense was also pleaded, but it seems to have been abandoned.

The building in question was a seven-story structure situated at the northwest corner of Fourth Street and Washington Avenue in the City of St. Louis. The east half of the building up to the third story was occupied by the defendant as a bank, and was fireproof. The remainder of the building was not fireproof, and was occupied by the Missouri Athletic Association for its various club activities. The kitchen and dining room were on the third floor; a large room used for a banquet hall and dancing and about ten sleeping rooms were on the fourth floor; thirty-six sleeping rooms and a library were on the fifth floor; and thirty-nine bed

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rooms were on the sixth floor. Some of these rooms were equipped with two beds, so that the sleeping accommodations above the second floor were sufficient for as many as one hundred and twenty-five persons. About seventy persons were sleeping in this part of the building at the time of the fire. Working accommodations were also provided for one hundred and twenty persons above the second floor. There was a three-or-four-story building occupied as a seed store on the west side of defendant's building and immediately adjacent to it; there was a spiral fire escape on the south side on Washington Avenue, near the southwest corner of the building, which connected with landings at openings into the fifth and sixth stories; there was a stair fire escape on the east side on Fourth Street, near the north end of the building, which extended from the seventh floor, and passed windows in each story all the way down; and there was a metal stairway enclosed in a brick shaft outside of the main wall of the building on the north side and adjoining the projecting ell, which extended from the seventh down to the first floor, and with which each story communicated by a door. To get to it from the fifth floor it was necessary to go from a lobby through what was known as the linen room. There was sufficient blank wall on the Fourth Street side near the southeast corner of the building for a fire escape to have been placed there without passing any window.

The alarm was turned in about 1:55 a. m., and the fire chief arrived on the scene approximately three minutes later. He first observed flames pouring out of the windows in the second and third stories on the south and east sides, the heat being more intense on the east or Fourth Street side. About twenty minutes thereafter the entire east wall went down, carrying with it the major portions of all the floors. The north, south and west walls were left standing, and the rooms adjoining the south wall, as well as most of the floor of the corridors immediately adjoining them, remained intact.

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The fire must have originated on the floor separating the second and third stories. After it got under headway the central stairway and the central elevator shaft operated as huge chimneys through which masses of flame and smoke shot upward, pouring out in great volumes into the adjacent halls and corridors on each floor. Up and down these corridors men were running to and fro, uttering cries, in vain efforts to escape. No one got out of the building by way of the Fourth Street fire escape, because the flames coming from windows below the sleeping quarters by which it passed made its use impossible. A few found their way out down through the enclosed stairway and some jumped from the windows on the west side on to the seed store roof. Some half dozen persons came down the Washington Avenue escape, but, so far as the evidence discloses, only one from the fifth floor, a man who occupied Room 1, which had a window opening directly on to the balcony leading to the escape.

The accompanying plat shows the plan of the fifth floor. Odegaard occupied Room 2 the night of the fire. It will be observed that the east-and-west corridor, into which his room opened, had two windows at its west end, through which, apparently, a person could go on to the balcony or landing leading to the Washington Avenue fire escape, and that but a few steps would have

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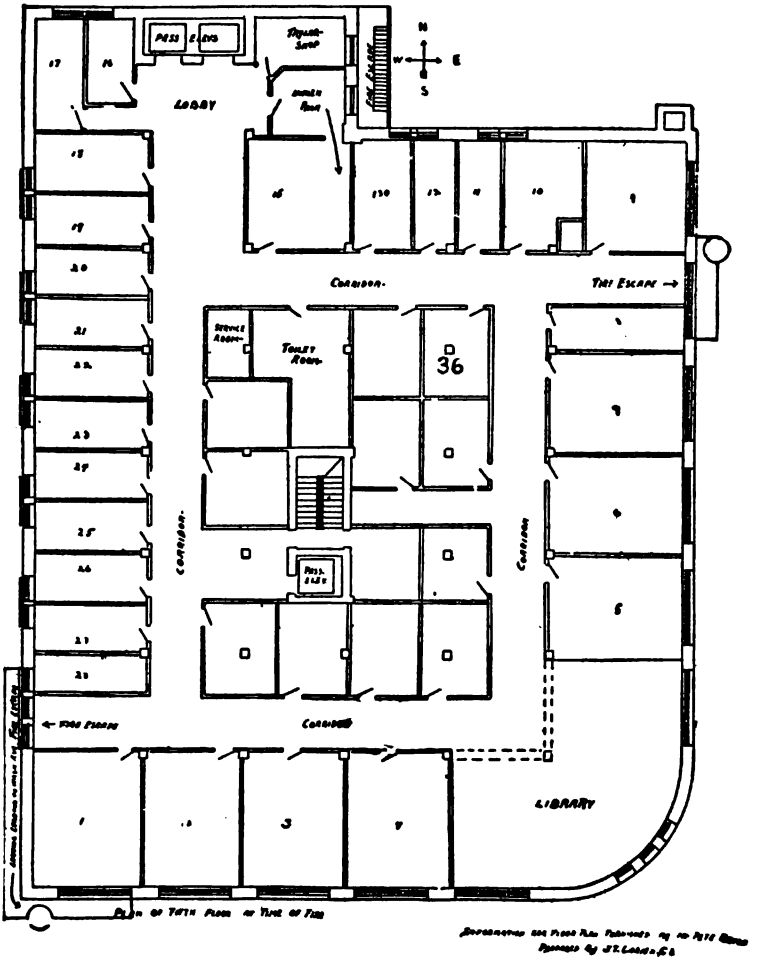
PLAT OF THE FIFTH FLOOR



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sufficed to have taken him from the door of his room to these windows. There were double sliding doors between Rooms 1 and 2, but they were kept locked and the occupant of Room 2 had no key. From some hearsay evidence, to which no objection was made, it appears that the door from Room 1 into the corridor was locked at the time of the fire and during its progress. This was probably true. An examination of the plat will further disclose that before the partitions were burned the smoke could not get into the east corridor until it had passed up and down the west corridor and around through the north and the south corridors. In this connection it may be said that the occupant of Room 9 tried the Fourth Street fire escape and found it too hot, then went west in the north corridor running east and west to the west corridor running north and south, at this point he found that he could not go south in this corridor on account of the flame and smoke issuing from the elevator shaft and stairway. Occupants of the sixth floor on the north and west sides experienced similar conditions. The body of the occupant of Room 3 was found just inside the door of his room; it was not burned, but from its appearance he died from suffocation. Room 4 was not occupied.

The deceased was last seen alive, so far as the evidence discloses, when he left the dining room a few minutes after eleven o'clock the night of the fire, stating to friends that he was tired and was going to bed, and bidding them goodnight. After the fire, and when the firemen were able by means of the Washington Avenue fire escape to go into Rooms 1 and 2, which were scorched and burned but still intact, as was the corridor leading to the fire balcony on the west side, they found deceased's watch, jewelry and the clothes that he had worn the previous day placed in the room in the same way that he usually disposed of them on retiring, and the bed had the appearance of having been occupied, but his body was not found in any of these rooms on the south side, nor in the corridor. The evi-

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dence does not show where his body was found, but a body that was taken from some part of the ruins was identified as his from certain characteristics it was known to possess, principally that of an enlarged knee joint.

The cause was tried to a jury and a verdict for defendant returned. The court sustained a motion for a new trial on the sole ground that the verdict was against the weight of the evidence. From the order granting a new trial defendant has appealed. For reversal of this order it relies on two propositions: (1) that the building in question was not a "dormitory" within the meaning of Section 10668, Revised Statutes 1909, which prescribed for buildings so used a minimum number of fire escapes, and plaintiff, having based his action upon the theory that it was a dormitory, was not entitled to go to the jury; and (2) that there was no evidence proving or tending to prove that the failure of the bank to construct and maintain additional fire escapes was the proximate cause of the death of deceased, that the facts themselves show lack of proximate cause.

I. The case of Ranus v. Bank, 279 Mo. 332, was to recover damages for a death that occurred in this same fire and on the same ground of negligence alleged here. In that case the same question as to the character of the building was presented as here, and after a full consideration we held that the use that was made of the building in part constituted it a dormitory within the meaning of said Section 10668. With that ruling we are entirely satisfied. In that case it was conceded, as it is in this, that the building was not equipped with fire escapes in compliance with Sections 10666, 10667 and 10668, Revised Statutes 1909.

Dormitory.

II. In support of its second contention appellant points out "that deceased's room was No. 2; that he was occupying it at the time of the fire, that it was within a few feet of a fire escape, which was accessible

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either through the folding doors into Room 1 or through the hall running straight from Room 2 to the balcony at the end thereof; that these rooms and the fire escape and immediate environs were measurably intact after the fire; that the body of Odegaard was not found in his room or at any point between his room and the fire escape." From this it draws the conclusion, "that deceased, with the means of escape at hand, failed to avail himself of them; that not lack of facilities of escape, but failure to use those supplied, caused his death." Appellant is slightly inaccurate in its statement of the facts. It does not appear that the fire escape was accessible to the deceased through Room 1. The sliding doors were certainly locked, and it is probable that the door opening from Room 1 into the corridor was also locked. However, so far as the evidence discloses, unless the fire itself barred the way, there was no physical obstruction between the deceased and the exit to the balcony at the west end of the corridor. What efforts, if any, he made to reach it cannot be known. If any saw him, their voices are also silent. The presumption is that he tried to escape, to live rather than die. It may be that some temporary barrier prevented his leaving the building by this window. It may be that at the time he was aroused and started from his room the smoke and gas and flame, coming through the elevator shaft and stairway, had so filled the south end of the west corridor and the west end of the south corridor that he could not make his way through it, and that the east end of the south corridor and the east corridor were still comparatively free from smoke and gas, in which event he no doubt went east in the south corridor seeking a way out, and had there been a fire escape at the southeast corner of the building attached to the blank wall, or had the one on the east side near the north end been so placed as not to have passed windows, he probably would have escaped. These are possible inferences. One thing is reasonably certain, and that is, that not a single person on the fifth floor escaped

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through the exit leading to the fire balcony at the west end of the south hall. The facts of this case bring it squarely within the rule announced in Burt v. Nichols, 264 Mo. 1, viz: "When fire safety-appliance laws are violated and death, unexplained except by the physical facts, occurs by fire in the burning of a building not equipped with the required appliances, but which is by law required so to be, the rule of *res ipsa loquitur* should be invoked to take the case to the jury, where all inferences *pro* and *con* and all matters of contributory negligence can be resolved under proper instructions by the triers of fact." There was evidence, therefore, to take the case to the jury on the issue of proximate cause. Whether their verdict should have been set aside on the ground that it was against the weight of the evidence was a matter that lay wholly within the discretion of the trial court.

The order granting a new trial is affirmed and the cause remanded.

Brown and *Small, CC.*, concur.

PER CURIAM:—The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court. All of the judges concur.

A. M. WHITWORTH et al., Appellants, v. T. N. DAVEY.

Division One, December 1, 1919.

1. **USURY: Commissions Paid Trustee.** In determining whether the money demanded and paid to the holder of notes secured by deed of trust, the commissions paid to the trustee, who had advertised the property for sale, but did not sell it because of the payment of the notes, cannot be charged against the payee.

2. **———: Fixed By Statute.** In the absence of a law limiting the rate of interest, there can be no usury; and unless the rate exceeds the applicatory statutory maximum, there is no usury in a particular case.

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3. ———: **Eight Per Cent Compounded Semi-Annually: Recovery: Applicatory Statutes.** A stipulation in the written contract that interest shall be compounded semi-annually is void, under Section 7185, Revised Statutes 1909, which says that "interest shall not be compounded oftener than once a year;" but though the contract calls for eight per cent interest, to be compounded semi-annually, the payor of the note cannot under Section 7182 recover back the excess paid, for that section in express terms applies only to the "three preceding sections," which say nothing concerning a semi-annual compounding of interest. Section 7182 does not purport to give a cause of action for a violation of Section 7185. A compounding of interest oftener than once a year, in violation of said Section 7185, is illegal, but is not, of itself, usury.

4. ———: ———: **In the Aggregate: Suit For Compound Interest.** A right of action under Section 7182 must be grounded on usury actually paid to the creditor, and the test of usury under the section is the payment of interest in excess of the applicable statutory rate; and though the six-months coupon interest notes provide for eight per cent interest from maturity, yet if a computation discloses that the amount paid on the notes does not aggregate a sum equal to the amount of the principal note with interest at eight per cent, compounded annually, there can be no recovery under Section 7182 of a supposed excess paid.

5. ———: **Compound Interest.** The payment of compound interest in excess of the written contract rate does not constitute usury, unless the total amount paid exceeds the amount which could lawfully be exacted under the written obligation.

Appeal from Jasper Circuit Court.—*Hon. Joseph D. Perkins,* Judge.

AFFIRMED.

Frank L. Farlow for appellants.

(1) Under the contract made on March 14, 1910, the amount due the defendant on April 1, 1911, would be the amount of the two first coupons, $724.76. But the plaintiffs were required to pay $739.90, or $15.14 usury. This $15.14 was the interest at eight per cent for six months on coupon one, and was compounding the interest oftener than once a year at the contract rate named in the note. Under the law the court should have allowed the defendant only six per cent per annum,

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instead of the eight per cent provided for in the usurious contract, and which the defendant had enforced by exacting and receiving such usurious interest from the plaintiffs. When no rate of interest is agreed upon, six per cent is allowed as legal interest. Sec. 7179, R. S. 1909. Parties may agree in writing for interest not exceeding eight per cent per annum, on money due or to become due on contract. Sec. 7180, R. S. 1909. Sec. 7182, R. S. 1909, prohibits the taking of more than the legal rate of interest. (2) The contract in this case, being the obligation and coupons, show on their face that a usurious contract for interest was made, and the payment under the evidence show that the interest was collected, demanded and exacted by the defendant, and if this is true, then under the law, the interest should not be figured at the contract rate, but at the legal rate of six per cent per annum payable annually. The rule for testing the question whether or not this contract was usurious, on its face, is whether if performed, it would result in securing a greater rate of profit on the subject-matter than is allowed by law. This contract in providing for interest on the coupons at eight per cent, which was enforced by the defendant, gave him $15.14 more the first year than he was entitled to and was usurious. Kreibohm v. Yancey, 154 Mo. 67; Coleman v. Cole, 158 Mo. 260; State ex rel. v. Boatman's Savings Institution 48 Mo. 189; Missouri R. E. S. v. Sims, 179 Mo. 686; Bank v. Donnell, 172 Mo. 385. The transaction itself, not the intention of the parties, determines the question of usury. Osborn v. Frederick, 134 Mo. App. 449. (3) The contract under consideration in this case, having been shown to be usurious, and the defendant having been shown to have exacted and received usury under it, that avoids the contract, as to interest, and the legal rate of six per cent applies, and the amount due the defendant for the use of the money must be estimated upon the basis of six per cent, the legal rate of interest. Arbuthnot v. Assn., 98 Mo. App. 382; Osborn v. Frederick, 134 Mo. App. 449; Seaver

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v. Ray, 137 Mo. App. 78; Holmes v. Building Association, 166 Mo. App. 719; Cowgill v. Jones, 99 Mo. App. 390. (4) Our statute forbids the taking of more than eight per cent per annum interest, and if the holder takes more than this amount it is usury, and avoids the contract, and he is only entitled to have and retain six per cent legal interest. Machine Co. v. Tomlin, 174 Mo. App. 512. (5) The effect of charging usury is that if it is charged or exacted upon a usurious contract, then the holder only recovers the principal actually loaned with legal interest; that is, six per cent. Western Storage Co. v. Glassner, 169 Mo. 38; Little v. Pump Co., 122 Mo. App. 620; Osborn v. Payne, 111 Mo. App. 29.

Paul N. Davey and *R. A. Mooneyham* for respondent.

(1) A contract tainted with usury is not void, and courts will enforce them, first stripping them of their usury. Adler & Sons Clo. Co. v. Corl, 155 Mo. 154; Cowgill v. Jones, 99 Mo. 390; Ferguson v. Soden, 111 Mo. 208; Farmers & T. Bank v. Harrison, 57 Mo. 503; Montany v. Rock, 10 Mo. 506; 1 Story, Eq. Jur. (12 Ed.), sec. 301; Webb v. Allington, 22 Mo. App. 559; Peter Shoe Co. v. Arnold, 82 Mo. App. 6. The principal Whitworth note was accompanied by six coupon notes, each being a separate instrument. Only the three semi-annual coupon notes were tainted with usury. The principal note and the three annual notes were valid promissory notes, containing no unlawful clause, upon either of which a suit could have been brought and a separate judgment obtained. The principal note bore interest at the rate of eight per cent per annum on its face, so also did the three annual notes. The contract as a whole was severable. (2) Contracts in writing for the payment of interest are governed by the same rules that apply to other written contracts as to their construction and operation. U. S. Mortgage Co. v. Sperry, 138 U. S. 313; Martin v. Murphy, 16 Ill. App. 283; Webb v. Balley, 89 Iowa, 247. (3) A contract clause

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to compound interest semi-annually has no other effect upon the contract than to render that particular clause void. Our Supreme Court in the case of Storage Co. v. Glasner, 169 Mo. 46. (4) A usurious clause in a contract does not constitute usury. It is only when the total amount actually paid exceeds the principal and lawful interest that anything can be recovered as usury, and then only the amount of such excess. Lawler v. Vette, 166 Mo. App. 349; Citizens' Nat. Bank v. Donnell, 172 Mo. 415. (5) It is only where no annual rate of interest was ever expressed in the contract, or where the rate expressed therein exceeded the rate prescribed by the lawful contractual rate, and purging the contract of the unlawful rate expressed would result in a failure of expression, that courts can or will presume and apply the legal presumptive rate of six per cent. Secs. 7179, 7181, 7182, R. S. 1909; Long v. Loan Co., 252 Mo. 167.

BLAIR, P. J.—This cause was heard in the Springfield Court of Appeals (185 S. W. 241), and was certified here because one of the judges deemed the opinion to be in conflict with decisions of this court.

On March 14, 1910, appellants executed a note for $8650, payable April 1, 1913, to L. N. Manley, with interest "from date at the rate of eight per cent per annum payable semi-annually according to the tenor and effect of the interest coupons hereto attached and bearing even date herewith." Six coupons notes were executed. The first was for $378.76 and represented the interest on the principal note from March 14, 1910, to October 1, 1910. Each of the five remaining coupons was for $346, six months' interest on the principal note. The five fell due, respectively, on April 1, 1911, October 1, 1911, April 1, 1912, October 1, 1912, and April 1, 1913. Each coupon note was expressed to bear interest at eight per cent from maturity. April 11, 1911, new notes were given to cover the interest to April 1, 1911. Each of these drew interest at eight per

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cent compounded annually. June 18, 1912, appellants made the first cash payment $1539.97. A second cash payment of $717.53 was made April 29, 1913. May 7, 1914, a final payment of $9413.79 was made. Of this sum $87.75 was for publication of trustee's notice of sale and trustee's commission, which was paid directly to the trustee, who had advertised a sale but did not actually make it because the debt was discharged by payment on the day set therefor. The sums paid respondent were, therefore, $1539.97, on June 18, 1912; $717.53, on April 29, 1913, and $9326.04, on May 7, 1914.

The petition alleges that the "bond or obligation and coupons . . . was and is usurious and unenforceable on its face in requiring the plaintiffs to pay more than eight per cent per annum, payable semi-annually for the money loaned to them; and in compounding interest oftener than once a year," and that by reason thereof respondent was entitled to no more than his principal and six per cent simple interest, whereas he demanded and was paid the sum of $718.91 in excess of that amount. Judgment for that amount and for costs, expenses and a reasonable attorney's fee is prayed. The trial court gave judgment for defendant.

Commissions.

I. We agree with the Court of Appeals (185 S. W. l. c. 247) that the sums paid the trustee for commissions and expense of publication of notice cannot be charged against respondent.

Usury.

II. The petition alleges and appellants' evidence shows that the overpayment, which they contend resulted from a usurious exaction, was made to cover semi-annual interest upon interest. As pointed out by the Court of Appeals, this is an action under Section 7182, Revised Statutes 1909. This section provides for the recovery by the payor of any sum *paid* in excess of the rates prescribed by the *"three preceding sections."* These sections provide that (1) in the

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absence of an agreed rate, six per cent shall be collectible on moneys due on written contracts and accounts and in other cases in which interest is agreed to be paid, but the rate is not fixed; (2) the parties may agree, in writing, for the payment of interest, not exceeding eight per cent, "on money due or to become due upon any contract," and (3) interest upon judgments upon contracts bearing more than six per cent shall bear the contract rate, and other judgments shall bear six per cent.

In 1845 (R. S. 1845, secs. 6 and 7, p. 615) provisions permitting the compounding of interest once a year were enacted. Section 7185, Revised Statutes 1909, reads as follows:

"Parties may contract, in writing, for the payment of interest upon interest; but the interest shall not be compounded oftener than once a year. Where a different rate is not expressed, interest upon interest shall be at the same rate as interest on the principal debt."

Under these sections it is lawful for parties to contract in writing for interest at the rate of eight per cent per annum, compounded annually. In this day and age, in the absence of a law limiting the rate of interest, there can be no usury. [Newton v. Wilson, 31 Ark. 484.] Further, unless the rate of interest exceeds the applicable statutory maximum, there is no usury in a particular case. [Black's Law Dictionary; Webster's International Dictionary; Parkham v. Pulliam, 45 Tenn. 497; Rosenstein v. Fox, 150 N. Y. 354; Kreibohm v. Yancey, 154 Mo. 67.] The interest contract in this case is in writing and it fixed an eight per cent rate, to be compounded semi-annually. The provision for compounding oftener than once a year was void. [Western Storage Co. v. Glasner, 169 Mo. l. c. 46, 47.] Section 7182, Revised Statutes 1909, under which this action is brought, gives a right of action, by specific reference, solely for violation of Sections 7179, 7180 and 7181. It does not purport to give a cause of action

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for a violation of Section 7185, which prohibits compounding interest oftener than once a year. Compounding interest in violation of Section 7185 is illegal but it is not, of itself, usury. Such is the necessary effect of the ruling in Western Storage Co. v. Glasner, supra, and that rule has the support of reason and the great weight of authority. [Webb on Usury, sec. 127; Tyler on Usury, p. 243; Mowry v. Bishop, 5 Paige's Ch. l. c. 103; Palm v. Fancher, 93 Miss. 785, 33 L. R. A. (N. S.) 295 and note.] The collection of compound interest is the sole basis of the charge of usury in this case. The right to compound interest is a creature of the statute. Courts denied it, not because it constituted usury, but on the ground that it was harsh and oppressive and "tended to usury." A computation discloses that the amounts paid on the notes do not aggregate a sum equal to the amount of the principal note with interest at eight per cent, compounded annually. In view of this fact and of the principles stated, there can be no recovery in this case under Section 7182, since every right of action under that section must be grounded on usury actually paid to the creditor, and the test of usury under that section is the payment of interest in excess of the applicable statutory rate.

III. With most of the opinion of the Court of Appeals we agree. In our opinion, it fell into error, when it held, as we understand its holding, that a payment of compound interest constitutes usury in every case in which it exceeds the written contract, although the total amount paid does not exceed the amount which could lawfully be exacted and paid on a written obligation. Other than the semi-annual compounding feature of the contract, there is no suggestion that there was any trick, fraud or intent to cover up or secure usurious interest. This disposes of the only question raised by appellants.

Compound Interest.

The judgment is affirmed. All concur.

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LILLIAN KRINARD v. CLARENCE M. WESTERMAN, Appellant.

Division One, December 1, 1919.

1. **NEGLIGENCE: Inferred from Facts.** If the legitimate inference which may be drawn from the facts establish the negligence alleged, the case of negligence is made.

2. ———: ———: **Malpractice: Operation By Surgeon.** Plaintiff was afflicted with a fibroid tumor of the uterus, and applied to defendant to remove it, and in the operation he cut a hole in her bladder, and tied off one of the ureters. Plaintiff alleged that these things were negligently done, and the defendant asserted that they were necessary because the parts were diseased and cancerous. The evidence shows that immediately after the operation he pronounced it a perfect success, and did not for a month inform plaintiff that he had made an incision in the bladder, and then when informed that there was a constant flow of urine he told her that he had done so in order to remove the diseased parts and that there would have to be a second operation, although he had all along told her and her friends that she was getting along nicely. When the necessity for a third operation arose, she suggested that a famous surgeon be called to assist, at which he became enraged. Both before and after this third operation she was examined by other physicians who found no evidence of diseased or cancerous conditions. The evidence showed that the tieing of the ureter would kill the kidney, and that prior to the operation the kidney was healthy and normal, and afterwards it had no life in it. *Held*, that negligence could be inferred from these facts, and the court committed no error in submitting the case to the jury.

3. ———: **Malpractice: Degree of Physician's Skill.** A physician or surgeon undertaking the treatment of a patient is required to possess and exercise that degree of skill and learning ordinarily possessed and exercised by the members of his profession in good standing, practicing in similar localities. It is not sufficient that he use the degree of skill possessed by reasonably skillful surgeons or physicians "in the community in which he is practicing."

4. ———: ———: **Degree of Specialist's Skill.** A physician holding himself out as having special knowledge and skill in the treatment of particular diseases, and sued as such, is bound to bring

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to the discharge of his duty as such specialist, not merely the average skill possessed by general practitioners, but that special degree of skill and knowledge possessed by physicians who are specialists in the treatment of such diseases, in the light of the present state of scientific knowledge.

5. ———: ———: **Measure of Damages: Future Operation.** Where there is evidence that the needless cutting of one of the ureters causes the corresponding kidney to die, that about fifty per cent of dead kidneys produce infection, and that such infection makes necessary a major operation, accompanied with pain and is expensive, it is not error, in instructing the jury on the measure of damages, that they may take into consideration what suffering plaintiff may endure in the future for operations she may hereafter be required to have performed.

6. ———: ———: ———: ———: **Use of Word "May."** The instruction should limit defendant's liability for future pain to reasonable certainty and not bare possibility, and consequently the use of the word "may" is liable to mislead the jury; but courts take an instruction as a whole, and if the word "may" as used with its context does not appear misleading, its use will not constitute reversible error.

7. ———: ———: ———: **Surgeon's Fees.** Evidence that plaintiff, as a result of her injuries, had paid definite sums of money and that she had stated accounts for other expenses incurred but not paid, is definite enough to support an instruction that the jury allow her the money she had expended for physicians, nurses and medicines, especially where the jury are definitely told that she had neither paid nor had a statement of the amount she owed other physicians and that those items were not included in the sum named as the aggregate of her expenses incurred.

Appeal from St. Louis City Circuit Court.—*Hon. William T. Jones,* Judge.

AFFIRMED.

Watts, Gentry & Lee for appellant.

(1) The court erred in overruling the demurrer to the evidence. There was no evidence offered from which the jury would have been justified in finding that the defendant negligently cut, punctured or tore the plaintiff's bladder, nor was there any evidence offered from which the jury would be justified in find-

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ing that the defendant either cut or tied off one of plaintiff's ureters, or that he negligently failed to promptly repair the bladder. The most that could be said of plaintiff's evidence is that it tends to show that she suffered from conditions which might possibly have been brought about by the doing of one of the aforesaid negligent acts, but, at the same time, the plaintiff's evidence clearly showed that there were other causes, not in any way resulting from any negligence of the defendant, which could equally well have produced the conditions shown. Where an injury may have resulted from one of two or more causes, for some of which the defendant would be liable, and for other of which he would not be liable, the jury should not be allowed to speculate and guess that it came from defendant's negligence. Goransson v. Ritter Co., 186 Mo. 300; Kane v. Railroad, 251 Mo. 1; Caenefelt v. Bush, 198 Mo. App. 491; Crawford v. O'Shea, 145 Pac. (Wash.) 579; Ewing v. Goode, 78 Fed. 442; Coombs v. James, 144 Pac. (Wash.) 536; Merriman v. Hamilton, 103 Pac. (Ore.) 406. All a physician or surgeon is required to do is to possess and use such skill and judgment and use such care as a reasonably skillful man of his profession in his community would have and use, and mere error in judgment does not make him liable. Spain v. Burch, 169 Mo. App. 106; Vanhooser v. Berghoff, 90 Mo. 487; Gore v. Brockman, 138 Mo. App. 231; Granger v. Still, 187 Mo. 216; Martin v. Courtney, 75 Minn. 255; Staloch v. Holm, 100 Minn. 276. (2) Instruction 1, given at plaintiff's request, was erronous because it permitted the jury to find the defendant guilty of negligence if he did not exercise the degree of care and skill exercised by physicians and surgeons anywhere in the world, whereas it should have been limited to the degree of skill and care exercised by physicians practicing in the same locality where the defendant resided. Vanhooser v. Berghoff, 90 Mo. 487; Cozine v. Moore, 141 N. W. (Iowa) 421. (3) The instruction on the measure of damages contains glaring

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errors, clearly entitling the defendant to a new trial, even if the plaintiff was entitled to go to the jury. First, The jury were authorized by the instruction to allow compensation to plaintiff for her suffering—not only suffering resulting from operations which had been performed before the trial, but also for suffering that might result from operations that she "may hereafter be required to have performed." The evidence showed that there was nothing like a reasonable probability that an operation for the removal of plaintiff's left kidney—which was the only further operation under discussion—would have to be performed. A plaintiff may recover such damages—in a case like this—as are reasonably certain to accrue in the future, and may not recover for a bare possibility. Wilbur v. Railroad Co., 110 Mo. App. 698; Bigelow v. Railroad, 48 Mo. App. 367; Chilton v. St. Joseph, 143 Mo. 192; Batten v. Transit Co., 102 Mo. App. 285; Albin v. Railroad, 103 Mo. App. 308; Ballard v. Kansas City, 110 Mo. App. 391; Schwend v. Transit Co., 105 Mo. App. 534; Barr v. The City of Kansas, 121 Mo. 30; 2 Shear. & Red. on Neb. (4 Ed.), sec. 743. Sutherland on Damages (3 Ed.), sec. 123, and sec. 944, vol. 3; Joyce on Damages, sec. 244; Voorheis on Measure of Damages, sec. 46, p. 75; Watson on Damages for Personal Injuries, secs. 302, 303, p. 385. Second. The other glaring error in that instruction is that, in its second subdivision, it permits a recovery on account of expenses incurred for surgeons' fees, when there was not a particle of evidence offered tending to show the value of such surgeons' fees. Plaintiff expressly stated that she had not received any bill from Dr. Ernest, Dr. Caulk or the Mayos for their services. Dr. Judd testified that he did not know what his charges were without looking them up. He did not look them up. This portion of plaintiff's instruction on the measure of damages permitted recovery of an item as to which there was no evidence to show what damage the plaintiff had suffered on account

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thereof. To include such an item in an instruction on the measure of damages is universally held to be reversible error. Morris v. Grand Ave. Ry. Co., 144 Mo. 500; Robertson v. Wabash Railroad, 152 Mo. 382; Moellman v. Lumber Co., 134 Mo. App. 485; Waldopfel v. Transit Co., 102 Mo. App. 529; Duke v. Railroad, 99 Mo. 347; Rhodes v. City of Nevada, 47 Mo. App. 499; Smith v. Railroad, 108 Mo. 251; Nixon v. Railroad, 141 Mo. 440; Davidson v. St. L. Transit Co., 211 Mo. 329; Gibler v. Ter. Assn., 203 Mo. 220.

O'Neill Ryan and *Gug A. Thompson* for respondent.

(1) (a) The case went to the jury on two (of the three) charges of negligence, to-wit, that defendant negligently cut, punctured, or tore the bladder, and that he negligently cut, or tied off, the ureter. Under all the facts and circumstances in evidence the jury was justified in concluding that one or the other of these charges had been established, and, as a proximate result, that the plaintiff had sustained the grave injuries complained of and proved beyond any question. It was not a matter of mere speculation or conjecture. The legitimate inferences from all the evidence warranted the deduction that there was the causal connection between one or the other of the acts of negligence charged and the injuries suffered. Fetter v. Casualty Co., 174 Mo. 266; Laesing v. Travelers Ins. Co., 169 Mo. 281; Kelly v. Railroad, 70 Mo. 607; Nevinger v. Haun, 197 Mo. App. 427; Fausette v. Grim, 193 Mo. App. 585; Coffey v. Tiffany, 192 Mo. App. 455. (b) On a demurrer to the evidence the most favorable construction should be given of which it is capable in favor of plaintiff and every reasonable inference therefrom taken as true. Hall v. Coal Co., 269 Mo. 365; Stauffer v. Railway Co., 243 Mo. 316. (c) Inferences of fact in favor of defendant cannot be allowed to overthrow inferences of fact in favor of plaintiff. Maginnis v. Railroad, 268 Mo. 675. (d) If men of reasonable intelligence would differ as to which of several causes, to be legitimately

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inferred from the evidence, caused the damage complained of, the case should go to the jury. Powers v. Transit Co., 202 Mo. 280; Dakan v. Mercantile Co., 197 Mo. 258; Hurlbut v. Railroad, 130 Mo. 667. (e) If the evidence—the legitimate inferences or deductions therefrom—tends to prove that the injuries complained of "might, could or would" have followed the act of negligence charged, that question is one for the jury. De Mae v. Storage Co., 231 Mo. 619; McDonald v. Railroad, 219 Mo. 477; Sharp v. Railroad, 213 Mo. 578; Glasgow v. Railroad, 191 Mo. 364; Taylor v. Railroad, 185 Mo. 256. (2) Instruction 1, telling the jury that in performing the operation it was the defendant's "duty" to exercise reasonable skill and care, that is, such skill and care as an ordinarily skillful and careful surgeon is accustomed to exercise and use in like surgical operations, under like circumstances," is proper. Ghere v. Zey, 128 Mo. App. 366; Wheeler v. Bowles, 163 Mo. 407; Vanhooser v. Berghoff, 90 Mo. 490; Logan v. Field, 75 Mo. App. 600; Robertson v. Wenger, 131 Mo. App. 224; Logan v. Field, 192 Mo. 54. (3) Appellant's first objection to instruction on the measure of damages is without merit. Dean v. Railroad, 199 Mo. 395; Sang v. St. Louis, 262 Mo. 454; King v. St. Louis, 250 Mo. 510; Whitworth v. Shurk, 197 Mo. App. 415; Brown v. Barr, 184 Mo. App. 456; Welborn v. Met. St. Ry. Co., 170 Mo. App. 351. (4) Likewise, appellant's second objection to said instruction because of its reference to surgeons' fees is without merit. Because (a) defendant expressly waived at the trial the necessity that plaintiff state the amount of such fees she had paid, and (b) plaintiff, having incurred such expenses, was entitled to recover therefor, and if defendant desired to limit the recovery to a nominal amount he should have tested out his right to do so by asking an instruction to that effect. State ex rel. v. Reynolds, 257 Mo. 19; King v. St. Louis, 250 Mo. 514; Sang v. St. Louis, 262 Mo. 454; Carter v. Wabash Railroad Co., 193 Mo. App. 234; Bell v.

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United Rys. Co., 183 Mo. App. 345. "The court will not sacrifice the ends of justice upon the sharp edge of technicality." Sherwood v. Grand Avenue Ry. Co., 132 Mo. 345.

GRAVES, J.—Action for alleged malpractice. Defendant is a physician and surgeon in the City of St. Louis, and plaintiff is also a resident of said city.

By the petition it is alleged that plaintiff was troubled with a fibroid tumor of the uterus, and went to defendant for an operation for its removal. It is averred that defendant had represented to plaintiff that he was specially skilled in the performance of such operations, having performed 500 operations of like character. The charge of negligence is thus stated:

"That on the 13th of November, 1915, pursuant to said employment, the defendant performed said operation upon the plaintiff, but that he performed the same negligently, carelessly and unskillfully in this, to-wit: first, that he cut, punctured or tore a large hole in plaintiff's bladder; second, that he failed and neglected to mend the bladder at once; third, that, either during said operation or during one of the operations thereafter performed by him and hereinafter referred to, he so cut or tied off or so damaged plaintiff's left ureter as to cause it entirely to lose its functions and to atrophy and to cause plaintiff's left kidney also to lose its functions, to atrophy and become lifeless."

The petition then alleges two succeeding operations, as indictated above, and their failure, and further alleges that plaintiff had to undergo three other painful operations by other surgeons in an attempt to remedy the trouble occasioned by the alleged negligence of defendant. The petition thus closes:

"Plaintiff says that immediately because and by reason of defendant's negligence, carelessness and unskillfulness, aforesaid, her blader has been permanently injured and in part destroyed so that the urine flows constantly and unnaturally from her bladder. That her

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left ureter and left kidney have been rendered useless and lifeless. That she has been compelled to undergo five serious and painful surgical operations since defendant's first operation upon her on November 13, 1915, and, as aforesaid, will be compelled to endure further operations. That she has suffered, still suffers and will continue throughout her life to suffer, most intense, excruciating and continuous mental and physical pain, anguish, torture and distress; that her nervous system has been wrecked; that she has been and will continue to be compelled to expend large sums of money for medicines, nurses, railroad fare, hotel, hospital and surgeons' fees. That she is permanently disabled, is an invalid and will continue to be an invalid the remainder of her life. That she has lost and will continue to lose the earning of her work and labor and will continue to suffer intense physical and mental pain."

Then follows a prayer for damages in the sum of $25,000.

The answer admitted that defendant was regularly licensed and practicing physician and surgeon, and held himself out as such; the answer also admits that he performed the operation first mentioned by plaintiff for the removal of a fibroid tumor; admits that he cut the hole in plaintiff's bladder, but was not negligently done, but that it became necessary for him to make such cut in removing the tumor. The answer also admits the two subsequent operations for the purpose of closing the hole, but avers that they were unsuccessful for the reason that the parts were diseased. All other matters were denied.

The reply specifically placed in issue all new matter contained in the answer. Upon a trial before a jury the plaintiff obtained a verdict for $15,000, and from a judgment entered thereon the defendant has appealed.

The assignments of error made here cover the refusal of the court to sustain a demurrer to the evidence of plaintiff, and the giving of instructions 1, 2, 3 and 4, for plaintiff.

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The further facts can be best detailed in connection with the several assignments of error.

I. The first assignment of error is the failure of the trial court to sustain defendant's demurrer to the evidence. This goes to the sufficiency of the facts. It should be stated at the outset, that, although the defendant's professional conduct was on trial and in the balance, he did not testify himself, nor did he offer other testimony in his behalf. The case went to the jury on the evidence adduced for plaintiff. Dr. Mansfield and two nurses, and other parties, were present at the operation.

Inference From Facts.

The case was submitted to the jury upon two of the alleged negligent acts, i. e. (1) the negligent cutting of the bladder, and (2) the negligent cutting or tying off of the ureter. Were there facts showing negligence as to either of these? Plaintiff in her instructions having abandoned the other charge of negligence, it is not here for review.

It stands admitted that defendant did cut a hole in plaintiff's bladder. Plaintiff says he negligently did it, and defendant says that he purposely did it, because the degenerated condition required it to be done. Negligence may be inferred from the facts. If the legitimate inferences which may be drawn from the facts established negligence, the case of negligence is made. Now for the facts, as to whether or not this hole in the bladder was intentionally and necessarily made, or negligently made.

At the solicitation of the plaintiff a Mrs. O. D. Rizer was in the operating room during the whole time of the operation. She was plaintiff's friend. Mrs. Rizer testifies that after the operation the defendant showed her the parts which had been removed. That she asked him if the operation was a success, and he replied: "That is a perfect operation, perfectly successful." Not a word was said about cutting the bladder at that time. Nor did the defendant tell the plaintiff

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about it for a long time thereafter, and then only when plaintiff complained about the constant flow of urine, and told him that she believed that he had injured her bladder. This was a month after the operation, and then for the first time the defendant said that he had cut the bladder, and taken out the diseased portion, and there would have to be a second operation. During all this month he was telling plaintiff and her friends that plaintiff was getting along nicely.

In addition to these facts, when the necessity arose for the third operation, and plaintiff wanted that eminent physician, Dr. Mudd, called in to assist, the defendant became enraged and mad, and used some rather forceful language, with the result that the third operation was performed without the presence of Dr. Mudd. The very conduct of the defendant tended to show his guilt. But this is not all. Plaintiff was examined both before and after these operations by different physicians. None of these found any evidence of a cancerous or diseased condition. The fact is that, as shown by the experts, a cut of this kind is hard to cure, and it took three operations at Mayo's Hospital to get the cut closed. But the surgeons there found no diseased or cancerous condition. The experts further say that if it had been cancerous, the condition would return, notwithstanding the cut. In our judgment the evidence justified the submission of this ground of negligence.

Now as to whether the evidence tended to show that defendant negligently cut or tied the left ureter. The left ureter connects the left kidney with the bladder. Upon this ground of negligence, the evidence shows that the cutting or tying of the ureter would kill the kidney. The evidence further tended to show that this woman had been normal in all these parts, but that now there was a left kidney, but no life in it. Before the operation plaintiff had not been bothered with kidney troubles. A fair inference from these facts would indicate that defendant had destroyed this left uterer in

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one of his operations. The operation he attempted to perform was a delicate one, and required skill. He proved not to be equal to the task.

We think the court committed no error in submitting the case to the jury by the overruling of the defendant's demurrer.

What is said above also disposes of appellant's third and fourth assignments of error. These assignments simply go to the effect that the court erred in giving instructions two and three for the plaintiff, because there was no sufficient evidence upon which to base them. The instructions are not otherwise criticized. Upon the demurrer, supra, we have held that there was evidence upon which each of these instructions could be predicated. These assignments of error must likewise fall.

II. It is next urged that there was error in giving plaintiff's instruction number 1. This instruction reads:

"The court instructs the jury that it is admitted that defendant as a surgeon undertook, on November 13, 1915, to operate on the plaintiff and remove a fibroid tumor and remove the uterus, and the court instructs you that in performing this operation it became and was his duty to exercise reasonable skill and care as an ordinarilly skillful and careful surgeon is accustomed to exercise and use in like surgical operations under like circumstances."

Skill.

The contention is that the instruction fixed the wrong standard of efficiency, in this, that the instruction covered the whole world's physicians, whilst the defendant's efficiency should have been guaged by "the degree of skill possessed by reasonably skillful surgeons *in the community in which he is practicing.*" We are cited to Vanhooser v. Berghoff, 90 Mo. 487, but that case does not cover the fine distinction urged by distinguished counsel in this case. On the other hand in that case, the opinion at pages 490-491, does say: "Under the law his contract is not one of warranty that a cure will

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be effected, but only that he possesses and will use reasonable skill, judgment and diligence, such as is ordinarily possessed and employed by members of the same profession."

Other cases (from other jurisdictions) cited by appellant do not discuss the doctrine contended for here at all. Why they should have been cited we do not understand. We find but three cases authorizing the doctrine contended for by appellant.

This doctrine limits the skill of the operating surgeon to that degree of skill possessed by reasonably skillful surgeons *"in the community in which he is practicing."* The cases we find are Nelson v. Harrington, 72 Wis. l. c. 597; Wurdermann v. Barnes, 92 Wis. l. c. 208, and Pike v. Honsinger, 155 N. Y. 201.

So far as we find the only other limit along the line contended for by appellant, is the rulings which limit the skill of the operating surgeon to that of reasonably skillful surgeons in similar communities. [22 Am. & Eng. Ency. Law (2 Ed.), p. 890.] This annotator says:

"The skill and care of physicians in the particular locality or neighborhood is not the standard, but that ordinarily possessed by physicians practicing in similar localities. [Gramm v. Boener, 56 Ind. 497; Whitesell v. Hill, 101 Iowa, 629; Pelky v. Palmer, 109 Mich. 561; McCracken v. Smathers, 122 N. C. 799.]"

Besides the cases cited by the writer of the above, as announcing the same doctrine, there might be added the following: Hawthorn v. Richmond, 48 Vt. l. c. 559; Small v. Howard, 128 Mass. l. c. 132 and 136; Dunbauld v. Thompson, 109 Iowa, 199; Dorris v. Warford, 9 L. R. A. (N. S.) p. 1090; Kelsey v. Hay, 84 Ind. l. c. 193; Reeves v. Lutz, 179 Mo. App. l. c. 64; Hales v. Raines, 146 Mo. App. l. c. 241.

Some of these cases urge as a reason for the rule that the operating surgeon or physician might have in his immediate vicinity only quacks, and his skill would be measured by theirs. Hence they say that he must

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possess the skill of the reasonably skillful surgeon in similar communities. This rule appears to be more reasonable than the one contended for by appellant in this case.

On the other hand, in Wheeler v. Bowles, 163 Mo. l. c. 406, we have a very similar instruction to the one given in the instant case, and it met with the approval of this court, when at page 410, we said: "Indeed, we may remark that we have rarely found a fairer set of instructions in a negligence case. Surely defendant has no right to complain of them."

In the very early case of West v. Martin, 31 Mo. 375, we find that this court approved of an instruction for the plaintiff which contained this language: "then he was bound by the law to use the ordinary skill of his profession in the treatment of said case." The defendant had been called to treat a broken thigh for the plaintiff. To see just what we did approve, I sent for the old files in the case. So that we have made the test "the ordinary skill of his profession" in that case. The approved instruction in the Wheeler case, supra, contains this clause: "or failed to exercise such care and skill, as is used by the average members of his profession under like conditions and circumstances." It is not far from the rule in West's case. In one it is the "ordinary skill of his profession," and in the other, "such care and skill as is used by the average members of his profession." There is also added in the last case the phrase "under like conditions and circumstances." These words, we take it, do not change the situation materially. In Longan v. Weltmer, 180 Mo. l. c. 328, where the instruction fixed the required skill as "ordinary care and skill," the instruction passed muster here and the plaintiffs' judgment was affirmed.

So far as we can find, up to the Longan case, supra, this court had never fixed any qualifications to what was said in the West and Wheeler cases, supra, but in Grainger v. Still, 187 Mo. l. c. 213, MARSHALL, J., quoted,

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with approval, the following from 22 Am. & Eng. Ency. Law (2 Ed.), p. 799:

"The standard by which the degree of care, skill, and diligence required of physicians and surgeons is to be determined is not the highest order of qualification obtainable, but is the care, skill, and diligence which are ordinarily possessed by the average of the members of the profession in good standing in similar localities, regard being also had to the state of medical science at the time."

The Springfield and St. Louis Courts of Appeals have followed this rule to the extent of including the phrase "in similar localities." Save and except what we find in the Grainger case, supra, this court has never adopted this particular phrase, although it is approved by several courts as indicated above. In 30 Cyc. 1570, the measure of skill required is thus stated:

"A physician or surgeon undertaking the treatment of a patient is not required to exercise the highest degree of skill possible. He is only required to possess and exercise that degree of skill and learning ordinarily possessed and exercised by the members of his profession in good standing, practising in similar localities, and it is his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning, and to act according to his best judgment."

From it all, we can safely say that the contention made by appellant's learned counsel cannot be sustained. There should be no limiting to the local vicinity of the practitioner. The weight of authority is against that doctrine.

The instruction criticized is a good one under the West and Wheeler cases, supra. In the Wheeler case the skill required is: "such care and skill as is used by the average members of his profession under like conditions and circumstances." It is likewise good under the Longan case, supra. But the point was not specially at issue in either of those three cases. It

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was not urged, as here. Nor was this point an issue in Grainger's case, supra. On the whole, we are disposed to adopt the rule as given in 30 Cyc., supra, which seems to have caught the judgment of our courts of appeals.

By this we do not mean to criticise the instruction in the Wheeler case, supra. The phrase "under like conditions and circumstances" is broad enough to cover "in similar communities." [Ghere v. Zey, 128 Mo. App. l. c. 366.] So that the instruction in the instant case is correct.

But even though the instruction was technically wrong this does not avail the defendant in this case. The plaintiff sued the defendant as a specialist in this line of operations. Her petition so avers, and her evidence so shows. The rule applicable to defendants' case is stated thus in 30 Cyc. at page 1571:

"A physician holding himself out as having special knowledge and skill in the treatment of particular diseases is bound to bring to the discharge of his duty to a patient employing him as such specialist, not merely the average degree of skill possessed by general practitioners, but that special degree of skill and knowledge possessed by physicians who are specialists in the treatment of such disease, in the light of the present state of scientific knowledge."

The instruction complained of imposed a lesser degree of skill than was required of him as a specialist in this class of operations. The petition avers: "That he represented to the plaintiff that he was specially skilled in the performance of such operations, having performed five hundred such operations."

The proof accorded with the averment of the petition. Having been given an instruction requiring a lesser degree of skill, the defendant is in no position to complain.

III. A more serious question is raised on the instruction as to the measure of damages. This instruction (in material parts) reads:

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"If you find for plaintiff under the other instructions given because of the hole cut, punctured or torn in the bladder (if you find that said bladder was so cut, punctured or torn), and the loss of the left ureter and left kidney (if you find that ureter and kidney were lost), or because of either, then you will assess the damages as follows:

Future Operations.

"First. In such sum as you find will be reasonable compensation to her for the mental and physical pain and suffering you find she has endured, if any, and that you believe she will in the future endure, if any, as a result thereof, including what suffering she endured, if any, *or may endure in the future,* if any, in necessary operations she has had performed, *or may hereafter be required to have performed,* as a result of the negligence of the defendant (if you find he was negligent under the other instructions given), and including any permanent impairment or disability, if any, to plaintiff that you may believe will follow, and directly caused thereby.

"Second. In such sum as you find from the evidence will compensate plaintiff for money, if any, she has reasonably and necessarily expended, or expenses, if any, she has reasonably and necessarily incurred for medicines, nurses, railroad fares, hotel, hospitals, *and surgeons' fees* in endeavoring to remedy her physical condition which you find resulted from the negligence of the defendant (if you find he was negligent under the other instructions given you), if you find defendant liable under the other instructions given."

The italicized portions are the portions criticized. Of these in order. A clear statement of the rule is made by BLACK, P. J. (who always expressed his ideas clearly), in Barr v. City of Kansas, 121 Mo. l. c. 30. Judge BLACK said:

"The plaintiff, in these personal injury cases, may recover damages suffered up to the date of the verdict, and also such damages as will be suffered in the future, but no allowance for future damages should be made,

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except for such as it is reasonably certain will result from the original injury. [2 Shear. & Red. on Neg. (4 Ed.) sec. 743.] The question whether future damages will, with reasonable certainty, flow from the injury is one for the jury. But it does not follow that the witness must be interrogated in language which would be proper and appropriate in an instruction. The object of the examination is to get the opinions of persons competent to express an opinion on the subject, and the different shades of opinion which the physicians may entertain, leaving it to the jury to say whether future damages are reasonably certain. Here there was evidence that the plaintiff received severe and permanent injuries to the spine and womb. In such cases the most that any physicians can say as to the effect of the injuries on the life of the injured person, however experienced or learned in his profession, is to give his opinion as to the probable consequences. An opinion being expressed, it becomes a proper subject for cross-examination, and in the end it is for the jury to determine the question as to the degree of certainty."

The reasonable certainty of future sufferings must be determined by the jury, is the rule here announced. Of course if there is no evidence upon which to submit this question to this jury, it should not have been submitted. So in this case the real matter for consideration is as to whether or not there was sufficient evidence to submit the question of future sufferings, and the question of future sufferings from a future operation. As to future sufferings from what had been done, up to the date of trial there is no question. There was sufficient evidence for the submission of that matter. But it is urged that the evidence was insufficient upon the proposition of there being a reasonable certainty of a future operation, to include the future sufferings upon the occurrence of that operation. Upon this question counsel for appellant quotes from one doctor, but omits a part of his testimony. He also omits material testimony of another. The future operation

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referred to in the instruction was the one for the removal of the dead kidney. As to this Dr. Caulk, among other things, said:

"Q. What might result from the present condition of that left kidney? A. Infection.

"Q. And if infection should result would it be necessary that she have an operation to have the kidney removed from the body? A. Chances are she would."

Upon the same question Dr. Judd, among other things, said:

"Q. The connection between the kidney and the bladder is called the ureter? A. Ureter; yes, sir.

"Q. If that connection is in any way destroyed, what is the result upon the kidney? A. The kidney dies.

"Q. It loses its function? A. Yes.

"Q. Is it necessary to have it removed if it is dead? A. Not necessarily.

"Q. A patient may live with a dead kidney? A. Yes, sir.

"Q. Would it be advisable to have it removed? A. Not unless it was making trouble.

"Q. Would it be liable to make trouble? A. I presume about fifty per cent of the dead kidneys make trouble.

"Q. That requires an operation? A. Yes, sir.

"Q. It is what you call a major operation, is it not? A. Yes, sir.

"Q. That would entail expense and pain and discomfort and all that to the patient?"

This evidence sufficed to allow the question to be submitted to the jury. For aught we know the jury may have made no award to plaintiff upon these matters. If there was sufficient evidence upon which to submit the matters, then it was a question for the jury. We rule that there was sufficient evidence.

But appellant urges that although there might be evidence upon which to submit to the jury the question of the "reasonable certainty" of the future operation

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and suffering consequent thereupon, yet this instruction as to "future sufferings" uses the word "may" throughout. Our courts have continuously criticism the use of this word, but have never made the criticism so strong as to base a revversal thereon. [See Reynolds v. Transit Co., 189 Mo. l. c. 421; Dean v. Railroad, 199 Mo. l. c. 395, and cases cited.] Personally I have thought these criticisms just. [Garard v. Coal & Coke Co., 207 Mo. l. c. 257.]

The trouble with the use of the word "may" in such connections is that the jury might give to it the meaning of "bare possibility" instead of "reasonably certain." But this court has never reversed for the use of that word. Instructions as to future sufferings and damages should, in some appropriate way carry the idea "reasonable certainty." However, we have usually taken the whole instruction, and if the word "may" as used in the context does not appear positively misleading, we have said that it was harmless.

The present instruction says: "In such sum as you find will be reasonable compensation to her for the mental and physical pain and suffering you find she has endured, if any, and that you believe she *will in the future* endure, if any, as a result thereof." Note the use of the word "will" as to future pain and sufferings. So that when the whole instruction is read, we do not feel that we should reverse the case on account thereof, in view of our previous rulings.

It is next insisted that the inclusion of the phrase "and surgeons' fees" in the second paragraph of the instruction was error. Appellant urges that this refers to the fees at Mayo's Sanitarium, Rochester, Minn., and that there was no evidence as to their value. It is true that there is no evidence as to the value of these services. It was openly stated by plaintiff that she had not paid for the operations at Mayo's and had not received their bills therefor. She also stated that she had not paid Dr. Ernst for the X-ray picture, nor Dr. Caulk for his services. The plaintiff had a list of items

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that she had paid, and receipts for most payments, as is indicated by the evidence. After she spoke of the doctors whose bills she did not have, she gave the following testimony:

"Q. Leaving out the bill of the Mayos and leaving out the bill of Dr. Caulk, which you say you have not received, and Dr. Ernst—that is for the X-ray? A. Yes, sir.

"Q. Just leaving those aside, tell the jury what your other items of expense were? A. Well, besides the Mayos bill—

"Q. Well, just leave the Mayos bill out of consideration, and leave Dr. Caulk's and Dr. Ernst's bills out. A. Well, these others are $1690.

"Q. Well, give the items there, Miss Krinard? Mr. Gentry wants you to give the items of that. A. Well, I am afraid I haven't those, Mr. Thompson.

"Q. Have you the items? A. I have not. These are all the receipts and these are things I have no receipts for. You see, I have no receipt for that (indicating papers). No, Mr. Thompson, I haven't those here.

"Q. Well, you have down here 'Drugs—prescriptions, $25.50.' A. That is just what is on that paper; I have no receipt for, you understand.

"Q. And you have 'Incidentals.' What do you mean by that? A. Those are expenses that came up during my illness that my people paid, don't you know.

"Q. You have that as $75? A. Yes.

Q. Well, can't you tell us what that is any more definitely than that? A. Well, it is very hard to say. They got me everything for my comfort. I had to buy cotton, I don't know how many dollars' worth of cotton that it was. I had fifteen or twenty dollars' worth of cotton. And besides I had to buy urinal vessels and many, many things that were necessary.

"Q. You have here, 'Nursing $90.' What was that for? A. I brought that in for this reason: My sister who waited upon me was losing her time at the

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office. Her time was worth twice more than that. She stayed with me, the only sister I had with me at the time that waited on me, and she did the nursing, saved a nurse, and so I put down $90 for nursing.

"Q. Over what period of time was that? A. For the four months.

"Q. 'Transportation, board and room at Rochester $374.95.' Is that correct? A. Yes, that is correct.

"Q. By 'transportation' you mean your railroad ticket? A. Yes. I kept track of every cent to have it just right.

"Q. 'St. Mary's Hospital.' What hospital is that? A. That is the hospital at Rochester.

"Q. '$66.' Is that what you paid them? A. Yes, sir, three weeks' board.

"Q. And you have here, 'Use of operating room $5. What was that? A. That was when I was taken there for one of the operations—the second operation—I was taken to the operating room.

"Q. That is just for that one operation? A. Yes, sir, just for that one operation.

"Mr. Gentry: "I don't believe I heard the details of that examination and I will waive further details of it. Just let her go on with her statement of the total amount she paid.

"Witness: Well, everything is there.

"Mr. Thompson: Q. You have kept an accurate account of your expenses? A. Yes, sir. I have receipts for all the others, but I simply put those down. Here are the receipts to show for everything except those, I haven't the receipts for those."

It clearly appears, from other testimony that Dr. Bartlett examined the plaintiff and Dr. Raines treated her, after defendant's operations, and before she went to Mayos' Sanitarium. She said that she had paid all her expenses, except Ernst, Caulk and Mayos. She had the items before her, and was being questioned in detail about each, when counsel for defendant waived the details and asked that she state it in a lump sum, which

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she did as $1690. In these items were at least two physicians and surgeons—Rains and Barlett. This was sufficient to justify the inclusion of the phrase objected to by defendant now.

In addition to this, it is clear that the counsel for the plaintiff made it clear to the jury that the bills of Ernst, Caulk and Mayos were not to be considered. The specific statement in the record makes it clear that no jury would consider those items, when plaintiff had been directed to omit them, because she did not have them.

On the whole this portion of the instruction is good, under the evidence. From it all, it follows that the judgment should be affirmed, and it is so ordered. All concur.

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ABANDONMENT.

Title to Land. The defense of abandonment, disassociated from other defenses, such as adverse possession or failure to pay taxes, has never been recognized at common law as affecting title to real property; for at common law title can neither be lost nor gained by abandonment operating alone. Powell v. Bowen, 280.

ACKNOWLEDGMENT. See **Conveyances, 3 and 9.**

ACTIONS.

1. **Joint Tortfeasors. Release of One: Effect at Common Law.** An instrument releasing one of several joint tortfeasors from liability for a tort, executed prior to the Act of March 23, 1915, Laws 1915, p. 269, is to be construed in the light of the common law as it existed in this State prior to the passage of said act. and under the common law a release of one joint tortfeasor operated to release all of them. Clark v. Union Electric Co., 69.

2. ———: ———: ———: **Covenant Not to Sue.** Where the plaintiff by written instrument does "hereby release and forever discharge" one joint tortfeasor "only from all suits, actions or causes of action which I have or might have against" said tortfeasor, a subsequent clause by which plaintiff "expressly refuses and declines to release" the other tortfeasor "from any claim for damages which I may have or might have against it" and whereby plaintiff "expressly reserves the right to enforce any and all claims that I may or might have against" said other tortfeasor did not destroy the release thus clearly made, but the instrument operated to release all the joint tortfeasors. Ib.

3. ———. ———: ———: ———: **Rule.** While the courts construe an instrument settling a claim for damages with one tortfeasor as a covenant not to sue wherever its language will permit, it cannot be so construed when it is clear from its unambiguous language that it was not intended as a covenant not to sue. Ib.

4. **Suit on Lost Instrument: Insurance Policy: Affidavit.** The statutes requiring that in a suit founded upon a written instrument, if "the debt or damages claimed may be ascertained" therefrom, such instrument "shall be filed with the justice, and no other statement or pleading shall be required," and if such instrument shall be lost an affidavit stating such loss or destruction and setting forth the substance of the instrument, do not apply to a life insurance policy, for an insurance policy is not such an instrument, since it cannot be ascertained from its face the debt or damages due; and hence, it cannot be ruled that the justice fails to obtain jurisdiction of the subject-matter of an action for an amount alleged to be due on an insurance policy, on the sole ground that neither the policy nor an affidavit that it was lost was filed with the justice. Graves v. Ins. Co., 240.

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ACTIONS—Continued.

5. **Drainage District: Suit for Taxes Pending an Appeal.** The pendency of an appeal from the judgment of the county court organizing a drainage district does not make premature a suit for taxes subsequently instituted. The appeal does not affect the benefits assessed, which are the basis of the tax suit. Under the statute (Sec. 5592, R. S. 1909) on an appeal to the circuit court only two questions can be considered, namely, compensation for property appropriated and damages to property prejudicially affected by the improvement. State ex rel. McBride v. Byrd, 481.

6. **Necessary Parties: Pledgor of Note Alone: Trustee of Express Trust: No Possession.** It is not enough to authorize the pledgor of a negotiable note, exceeding in amount the debt for which pledged, to maintain suit on the note in his name alone, that the pledgee loan it to him for purposes of protest, consent to and aid the pledgor in the suit, and through his counsel present the note in evidence at the trial; but in order to constitute the pledgor a trustee of an express trust, the pledgee must actually part with the physical possession of the note. If the original payee, after his assignment of the note, becomes possessed thereof, he can maintain the action in his name alone, notwithstanding his name is indorsed thereon in blank, for under the statute (Sec. 10018, R. S. 1909) he can strike out the indorsement and make a paper title in himself; but without actual possession, the right to strike out the indorsement, or to maintain an action on the note as the trustee of an express trust, does not exist. American Forest Co. v. Hall, 643.

7. ———: ———: ———: ———: **Pledged Note in Excess of Debt.** The fact that the notes, indorsed in blank, exceed the amount of the debt for whose payment they were pledged, does not authorize the pledgor alone, without actual physical possession of the notes, to maintain suit thereon, although the pledgee consents to such suit. By an indorsement in blank and delivery notes are fully negotiated, and the indorser loses all title thereto, even title to the excess of the amount thereof over the debt for which they are pledged, and for the title to pass back to the indorser or pledgor there must be an actual redelivery. Nor does the fact that the pledgee loaned the notes to the pledgor for purposes of protest, nor that the pledgor in his petition alleges that he is the owner and legal holder thereof, make him the trustee of an express trust, for he must prove such allegation. Ib.

APPEALS.

1. **Moot Case: Abatement: Costs.** An appeal from a judgment dismissing plaintiffs' bill for an injunction at their cost will not abate unless thereby they are given a full measure of relief. Before a defendant may abate a case by complying with the demands of the petition, he must comply with all its demands, including the payment of costs. Stegmann v. Weeke, 131.

2. ———.———: **Injunction: Threat to Continue Wrong.** An injunction to restrain a city officer from destroying the market boxes of plaintiffs, who are farmers and gardeners, will not abate an appeal on the ground that the objectionable sections of the ordinance under which defendant had destroyed their boxes had been repealed after the case was submitted and others enacted in lieu thereof, if the defendant has threatened to destroy, without a hearing, all boxes he believes to be of different dimensions from those prescribed by the ordinance as amended. In view of such

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APPEALS—Continued.

threat, the determination of the case does not turn upon a mere moot question. Ib.

3. ———: **No Assignment.** If appellant's brief in a civil case nowhere distinctly alleges the errors upon which he relies for a reversal of the judgment, either by assignments or points and authorities, Rules 15 and 16 of the Supreme Court require that his appeal be dismissed. Mere statements that "plaintiff is entitled to recover on the undisputed facts," and that "Instruction 2 should have been given," etc., do not "distinctly allege the errors committed by the trial court." Frick v. Ins. Co., 156.

4. **Assault and Battery: Verdict for Defendant: Nominal Damages.** Where the evidence is that the injury inflicted upon plaintiff was slight, and he presented no request for nominal damages, though in law entitled to nominal damages, a verdict for defendants, approved by the trial court, and there being no assignment in the motion for a new trial that he should have been allowed at least nominal damages, will not be disturbed on appeal on the theory that the provocation could not mitigate the actual damages unless it amounted to justification, and no actual damages were allowed. Bond v. Williams, 215.

5. **Verdict: Against Evidence: Motion for New Trial: Insufficient Assignment.** An assignment in the motion for a new trial that the verdict is "against the evidence" and "against the law," however often repeated therein, is insufficient to permit a review by the appellate court of the evidence to show that the verdict was excessive, or inadequate, or unsupported in any respect by evidence, or erroneous in any specific particular, and in his action for assault and battery does not assign as a ground therefor that plaintiff was at least entitled to nominal damages. Ib.

6. **Printing Evidence Omitted at Trial.** The printing in the abstract of a judgment rendered at a former trial of the case, which was not offered by either party at the trial which resulted in the judgment appealed from, does not put such judgment in the record, and all contentions based on such former judgment are eliminated from the case. Ammerman v. Linton, 439.

7. **Testimony: Competency: Abandoned Objection.** An objection to the competency of a witness as an expert, for whom the court stated a reason why he was competent, to which no objection was made, after which the witness testifies without further objection, must be considered as having been abandoned. Threadgill v. United Rys., 466.

8. ———: **General Objection.** A mere objection to certain testimony and a mere motion to strike it out, both in the most general terms, no reason being assigned for either the objection or the motion, will not save for review on appeal the court's ruling overruling the motion. Ib.

9. **Motion for New Trial: General Assignment.** A general assignment of error in the giving and refusing of instructions, in the motion for a new trial in a civil case, is sufficient to authorize a review of such instructions on appeal. [Following State ex rel. United Rys. Co. v. Reynolds, 278 Mo. 554.] And a refusal

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APPEALS—Continued.

by a court of appeals to rule on assigned errors in the instructions, on the ground that the assignments were general, is error, and necessitates the quashing of its opinion on *certiorari*. State ex rel. Const. Co. v. Reynolds, 493.

10. **Instruction: No Exception.** A failure of appellant to mention in its motion for a new trial an instruction given by the court of its own motion precludes a consideration of any error therein on appeal. Packet Co. v. Guaranty Co., 500.

11. **Appellate Jurisdiction: Proceeding to Open Road: Injunction.** The Supreme Court has jurisdiction of an appeal from a judgment of the circuit court dismissing the petition of a wife to enjoin the county court and highway engineer from establishing, by a proceeding to which she was not a party, a public road through lands in which she and her husband owned an estate by the entirety. Ripkey v. Gresham, 521.

12. **Bill of Exceptions: Withdrawn and Another Allowed.** The allowance of a bill of exceptions by the court in term time, like any other act or proceeding, is *in fieri* during the term and can be modified or set aside. So that where a bill of exceptions was allowed and filed on the 17th and then by leave and order of court withdrawn, another approved and ordered filed in open court and actually filed on the 18th and made a part of the record was regular. State ex rel. Peach Co. v. Bonding Co., 535.

13. **Not Perfected Within a Year: Dismissal.** An appeal from a judgment adjudging appellant guilty of murder in the second degree, which is not perfected within one year, must be dismissed upon the motion of the Attorney-General; and a filing in the Supreme Court of a certified copy of the bill of exceptions only, is not a perfecting of the appeal. State v. Cantrell, 569.

14. ———: ———: ———: **Supplying Lost Record.** The trial court has power, even after appeal taken, to supply a lost indictment or other lost record; and while it is the duty of the clerk to make up the transcript in a criminal case, it is the duty of appellant to see to it that the clerk acts in a timely way, and to take steps to supply a lost or destroyed document or record in the case; and where he files in the Supreme Court only a bill of exceptions, and does not, until after the Attorney-General has filed a motion to dismiss his appeal on the ground that he had not perfected it within one year, make any attempt to supply the lost indictment and other original files, and makes no showing and exhibits no diligence why he has not done so within the time prescribed by the statute, his appeal will be dismissed. Ib.

15. **New Trial: Sufficiency of Evidence: Appellate Practice.** If there was any evidence developed at the trial to uphold a verdict for plaintiff, the order granting to her a new trial must be affirmed on appeal; if there was none, the order will be set aside and the verdict for defendants reinstated. Baker v. Gates, 630.

16. **New Trial Granted: Weight of Evidence: Appellate Practice.** Where under the facts in evidence the rule of *res ipsa loquitur* required the case to go to the jury, and they returned a verdict for defendant, the action of the trial court, granting to plaintiff a new trial on the ground that the verdict was against the weight of the evidence, will not be disturbed on appeal. Newell v. Boatmans Bank, 663.

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ASSAULT AND BATTERY.

1. **Circumstances.** In an action for damages caused by assault and battery it is always permissible to show the circumstances under which the alleged assault was committed. Bond v. Williams, 215.

2. **Provocation: Punitive Damages: Mitigation: Malice.** In an action for damages for assault and battery, wherein punitive damages are asked, whether malice were present is an issue, and defendant may show the circumstances of provocation in mitigation of such damages, though such evidence is inadmissible in mitigation of actual damages. Ib.

3. ———: **Abusive Language: Recent Occurrence.** In order that evidence of provocation, such as abusive language, may be introduced in mitigation of punitive damages, the provocation must have occurred at the time of the assault, or so recently as to warrant an inference that the defendant was still laboring under the excitement caused by it. But no definite limits for a "cooling time" can be set. So that where plaintiff, in argument to a jury, violently abused two witnesses, characterizing them as liars and perjurers, and an hour and a half afterwards or less, as he was going from the court house to his hotel, they assaulted him, evidence of the violent language used by him was admissible, in mitigation of punitive damages, in his action against them for damages for assault and battery. Ib.

4. **Malice: Definition.** An instruction declaring "malice in its legal sense does not mean mere spite, ill-will or hatred, as it is ordinarily understood, but does mean that state of disposition which shows a heart regardless of social duty and fatally bent on mischief" is appropriate in an action for assault and battery, and does not materially differ in its meaning from one defining malice as "a wrongful act done intentionally without legal justification or excuse;" and if appellant asked an instruction defining malice in the latter words and respondent the former instruction, and both were given, appellant had the benefit of both definitions, and hence cannot complain that the court did not use only his to define the term. Ib.

5. **Verdict for Defendant: Nominal Damages.** Where the evidence is that the injury inflicted upon plaintiff was slight, and he presented no request for nominal damages, though in law entitled to nominal damages, a verdict for defendants, approved by the trial court, and there being no assignment in the motion for a new trial that he should have been allowed at least nominal damages, will not be disturbed on appeal on the theory that the provocation could not mitigate the actual damages unless it amounted to justification, and no actual damages were allowed. Ib.

6. **Verdict: Against Evidence: Motion for New Trial: Insufficient Assignment.** An assignment in the motion for a new trial that the verdict is "against the evidence" and "against the law," however often repeated therein, is insufficient to permit a review by the appellate court of the evidence to show that the verdict was excessive, or inadequate, or unsupported in any respect by evidence, or erroneous in any specific particular, and in his action for assault and battery does not assign as a ground therefor that plaintiff was at least entitled to nominal damages. Ib.

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ATTORNEYS.

1. **Champerty: Agreement to Pay Cost.** An agreement by an attorney with a married woman to pay the cost of a suit to recover her interest in land, in consideration of a one-half interest in the amount recovered, even if champertous between him and her, does not serve to deprive her of relief touching the land as against a stranger to the contract. Powell v. Bowen, 280.

2. **Remarks of Counsel: Interest of Unnamed Party.** Where insurance companies are not only interested in the result of the suit but are substantially parties to its prosecution, though not nominal parties, remarks of counsel indicating their interest in the issue of the trial, in keeping with the facts before the jury, are not unwarranted argument. Packet Co. v. Fidelity & Guaranty Co., 500.

ATTORNEY'S FEES. See **Bond, 2.**

AUTOMOBILES.

1. **Highest Care Required of All Drivers: Negligence Imputed to Owner.** The negligence of a seventeen-year-old son of plaintiff, who was the driver of the automobile owned by her and in which she was riding, is imputable to her, and the law imposes upon the driver, and consequently upon her, the duty of exercising the highest degree of care for the safety, not only of pedestrians and other travelers on the public street, but for herself as well; and if she is injured as the result of the collision of her automobile with a street car, she cannot recover unless her driver was at the time exercising the highest degree of care. Threadgill v. United Rys., 466.

2. ———: **Statute: Contributory Negligence:** The statute (Par. 9, sec. 12, p. 330, Laws 1911) requiring any person owning, operating or controlling an automobile running on or across public roads, streets or other public highways, to use the highest decree of care that a very careful person would use under like circumstances, to prevent injury to persons on such highways, and making an owner or driver failing to use such care liable for damages to any person injured, requires such driver or owner to exercise the highest degree of care to avoid collisions with street cars and other automobiles and thereby to avoid injuring himself, as well as pedestrians and travelers on the street. It supplants the common-law rule which requires such driver or owner to be in the exercise of only reasonable or ordinary care for his own safety, and makes his failure to exercise the highest degree of care contributory negligence. [Disapproving Advance Transfer Co. v. Railroad, 195 S. W. (Mo. App.) l. c. 568, and Hopkins v. Sweeney Automobile School Co., 196 S. W. (Mo. App.) 772.] Ib.

BENEFIT ASSESSMENTS. See **Cities, 9 to 21.**

BILL OF EXCEPTIONS.

Withdrawn and Another Allowed. The allowance of a bill of exceptions by the court in term time, like any other act or proceeding, is *in fieri* during the term and can be modified or set aside. So that where a bill of exceptions was allowed and filed on the 17th and then by leave and order of court withdrawn, another approved and ordered filed in open court and actually filed on the 18th and made a part of the record was regular. State ex rel. Peach Co. v. Bonding Co., 535.

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BOARD OF EQUALIZATION. See Certiorari.

BOND.

1. **Receiver: Suit for Funds Converted by Predecessor: Proper Relator.** A receiver appointed under Sec. 2018, R. S. 1909, cannot maintain a suit in his own name against the sureties on the bond of his predecessor; but where the order appointing the original receiver directs him to take possession of the property and with leave of court to bring such suits as shall be necessary to recover the assets, and the same power is given to the successor receiver, with nothing in the record showing an attempt to vest the legal title in either receiver, the suit to recover from the surety on the first receiver's bond for moneys converted or misappropriated, should be brought, not in the name of the successor receiver, but in the name of the company for whom the receiver was appointed. State ex rel. Peach Co. v. Bonding Co., 535.

2. **Liability for Funds Converted by Receiver: Deposit in Bank.** A bonding company cannot discharge its obligation as surety by pointing out some other person who is also legally liable for a loss. So where a receiver was appointed for an industrial company and authorized to take possession of its assets, including money on deposit to its credit, and defendant as surety executed its bond, obligating itself that the receiver would faithfully and truly account for all moneys, assets and other property that should come into his hands, and thereafter the receiver caused to be transferred on the bank's books to his credit as receiver a deposit previously made to the credit of the industrial company, and thereafter by checks signed by himself as receiver and payable to himself drew out the deposit and converted it to his own use, the bonding company is liable to the company for the amount so misappropriated, and cannot escape payment on the theory that the bank had actual knowledge that the deposit was a trust fund and that the company was the real owner thereof. The legal title of the fund was in the company, but the right to possession after its redeposit was in the receiver, and the bank was bound to pay his checks when in proper form, and therefore the surety must account for the money misappropriated; and although the industrial company, upon a showing that the bank knew that the receiver was converting the fund to his own use and with such knowledge aided him in so doing by honoring his checks, might in a proper proceeding recover from the bank, still the surety must respond upon its guaranty that the receiver would faithfully account for the money and other assets reduced to his possession. Ib.

3. **Vexatious Delay: Damages and Attorney's Fees: Suit on Guaranty Bond.** It is true that Section 7068, Revised Statutes 1909, authorizing the recovery of damages and an attorney's fee for vexatious refusal to pay applies only to actions against (1) an insurance company for loss on (2) a policy of insurance; but it embraces policies of "fidelity, indemnity . . . or other insurance," and those words are broad enough to include a company licensed to do "fidelity and surety insurance" for a consideration, and in an action on the judicial bond of such a company by which, for a consideration or premium paid, it guarantees that a receiver appointed by the court will faithfully and truly account for all moneys, assets and other property that may come into his hands, it is proper for the court or jury to allow damages and a reasonable attorney's fee for its vexatious refusal to pay the principal sum converted by the receiver to his own use. Ib.

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BURGLARY.

1. **Evidence: Other Burglaries: Conspiracy.** Where there is testimony that defendant, a policeman, entered into an agreement with a burglar and some women by which the moneys and goods stolen by the burglar from houses burglarized by him were to be divided among them, in return for protection to the others by defendant, testimony of other burglaries than the one specified in the indictment, which the burglar testifies were committed about the same time and in pursuance to the continuing conspiracy, is competent. State v. Cummins, 192.

2. ———: ———: **Committed Before Conspiracy Was Formed.** When a witness was testifying concerning the burglarizing of his house defendant objected because it did not then appear that defendant was connected with any burglary except the one specified in the indictment. At that time the witnesses by which the State subsequently attempted to prove that the defendant and one of them had entered into an agreement by which defendant, in consideration of police protection for the other, was to share in the goods stolen, had not testified, and consequently the court could not then tell whether the connection would be later established. It later developed that at the time the witness's house was burglarized defendant had never met his said accomplice, but the objection was not then renewed. *Held*, first, that since the objection was not renewed, the admission of the testimony was not error, and, second, since the accomplice testified that he divided the goods which he stole from said house with defendant, under said agreement, the testimony was competent. Ib.

3. **Election: Burglary and Larceny: Receiving Stolen Goods.** Where the evidence is comprehensive enough to sustain a conviction either for burglary and larceny, or for receiving stolen goods, knowing them to have been stolen, the court does not err in refusing to compel the State to elect upon which of the two counts of the indictment, charging both offenses in separative counts, it will stand. Ib.

4. **Instruction: Uncorroborated Testimony of Accomplice.** An instruction telling the jury that they are at liberty to convict the defendant upon the uncorroborated testimony of an accomplice alone, if they believe his statements are true and sufficient to establish defendant's guilt, but that such testimony, when not corroborated, ought to be received with great caution, is not error. Ib.

5. ———: **Assumption of Disputed Fact.** An instruction telling the jury that "evidence of other burglaries and larcenies were admitted by the court solely for the purpose of determining whether a conspiracy" existed between defendant and his accomplice to burglarize various dwellings in the city "and you are to consider this evidence for no other purpose," did not assume that other burglaries had been committed or that defendant had committed them. Ib.

6. **Sufficient Evidence: Larceny.** The evidence in this case, which is fully set out in the statement, was sufficient to sustain a conviction of burglary in the second degree and larceny, and assessing defendant's punishment at five years' imprisonment for the burglary and five years for the larceny, the evidence being that defendant, a policeman, entered into an agreement with a burglar and some women by which, in consideration of protection for them, the burglar was to burglarize dwelling houses in the community and divide the stolen goods among them. Ib.

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BUSHEL. See Measurements.

CERTIORARI.

1. **Taxation: Board of Equalization: Judicial Acts.** The State Board of Equalization in fixing the value of property in any county acts judicially, and its valuations have the force and effect of judgments of courts. Of course, if in making its valuations it exceeds its powers or statutory jurisdiction, and such fact appears upon its record, the courts can quash its judgment by *certiorari;* but the courts cannot nullify its judgment in a collateral proceeding. State ex rel. Johnson v. Bank, 228.

2. ———: ———: ———: **Collateral Attack.** The action of the State Board of Equalization being judicial in character its judgment cannot be attacked in a collateral proceeding. To be overthrown there must be a direct attack upon the judgment itself for the purpose of vacating, annulling and setting it aside. It cannot be annulled by a showing, when suit is brought on a tax bill against a bank, that the board valued and assessed defendant's property at one half its true value and all other personal property in the county at forty per cent of its true value. Such a defense would be a collateral attack on the judgment, and is therefore unavailable, and evidence to show such discrimination is incompetent. Ib.

3. **Board of Equalization: Constitution:** In a *certiorari* brought to quash the record of a county board of equalization, if the record shows on its face that the officers designated by the statute were named as composing the board and that they were present at its meetings, it cannot be held that such persons were not *de jure* members of the board, or that said board was illegally organized. State ex rel. McCune v. Carter, 304.

4. ———: **Jurisdiction: Insufficient Notice: Appearance.** Whether or not the notice to the taxpayer that an increase in the assessed valuation of his property was sufficient, if he actually appeared before the board of equalization and the matter was continued, and before such increase was made he appeared specially and filed his objections thereto, his appearance vested the board with jurisdiction. Ib.

5. ———: **Amending Record: Classification.** Amendments of the records of the board of equalization, made prior to its final adjournment by the direction of its presiding officer, which did not change the amount of the increase in the taxpayer's assessment, but simply specified the classes of property to which it was applicable, did not oust the board of jurisdiction, or impair the validity of the increase. Ib.

6. ———: **Trebling Assessment.** The County Board of Equalization, after increasing the taxpayer's assessment to equal the amount of property owned by him, is by statute given power to treble the assessment upon a finding that he has given a false list. Ib.

7. ———: **Increasing Assessment:** In reviewing the action of the County Board of Equalization by *certiorari* the courts cannot go beyond the face of its record; and since under the statute it had authority to increase the assessment of the property returned by the taxpayer, and to add that omitted, if it had knowledge of facts justifying such action, it will not be held on *certiorari* that it exceeded its statutory powers, if it heard evidence before it made the increases and it is not denied that the taxpayer owned property equal to the amount of the increased valuation. Ib.

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CHAMPERTY.

Agreement of Attorney to Pay Cost. An agreement by an attorney with a married woman to pay the cost of a suit to recover her interest in land, in consideration of a one-half interest in the amount recovered, even if champertous between him and her, does not serve to deprive her of relief touching the land as against a stranger to the contract. Powell v. Bowen, 280.

CITIES.

1. **Measurements: Unlawful Bushel: Prescribed by Ordinance.** An ordinance which prescribes that a bushel box shall be 23¼ inches long, 9¾ inches deep and 11 inches wide calls for a box whose cubical content is 2493.5 inches, and is contrary to the statute (Sec. 11961, R. S. 1909) which says the content of a bushel shall be 2150.4 cubic inches, and attempts to make unlawful the use of a box of any other dimensions, even though it contained the exact statutory content. Stegmann v. Weeke, 131.

2. **Weights and Measures: Legislative Power: Invasion of Right to Contract.** For the purpose of protecting the public and consumers from fraud and imposition in their purchase of commodities, the Legislature has the right, as a police regulation, to regulate weights and measures, and delegate that authority to municipal corporations, in so far as they exercise police powers; but the regulation must not be such as to invade the constitutional right to make contracts. Stegmann v. Weeke, 140.

3. ———: ———: ———: **Reasonable Restrictions.** A legislative exercise of the police power to fix weights and measures necessarily limits the freedom of contract that would otherwise exist; but so long as the restriction has a reasonable relation to the exercise of the power and is not so arbitrary or capricious as to be a deprivation of due process of law, freedom of contract in the constitutional sense is not interfered with. Ib.

4. ———: ———: ———: **Bushel Boxes According to Statute: Penalty for Use of Boxes of Different Dimensions.** An ordinance establishing standard bushel and half-bushel boxes to contain the same cubical content of the bushel and half-bushel prescribed by statute, to be used by truck gardeners and farmers in selling their fruits, vegetables and other produce in the city, and prescribing a penalty for the use of boxes of a different capacity and thereby sufficiently guaranteeing that boxes of a different capacity will not be used, is not unconstitutional as impairing the obligation of contracts, although it makes unlawful the use of boxes of a less capacity which have been in general use for many years. Ib.

5. ———: **Bushel Boxes of Given Dimension: No Penalty.** The court may determine whether an ordinance prescribing that bushel and half-bushel boxes to be used by farmers and truck gardeners in marketing their fruits and vegetables within the city shall be of certain dimensions, is unreasonably arbitrary, and may settle the question by inspecting the face of the ordinance, or may find it unreasonable by a state of facts which affects its operation; but an ordinance which prescribes that a bushel box shall have certain dimensions and a half-bushel box certain other dimensions, but prescribes no penalty for the use of boxes of different dimensions, but only a penalty for the use of boxes of a different capacity, is not unreasonable.
Held, by FARIS, J., concurring, that the ordinance is valid only because it prescribes no penalty for the use of boxes of dif-

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CITIES—Continued.

ferent dimensions, thus making the prescription that the bushel and half-bushel boxes shall have certain dimensions only advisory, and not mandatory. *Held*, also, that the city has no power to say that the boxes shall be of a required length, width and depth. Ib.

6. ———: **Sale by Weight.** Where the ordinance does not require the immediate purchaser from the gardeners to purchase by weight, although such purchasers are commission merchants and retail dealers who have not been deceived as to the contents of the "short" boxes long in use, yet if the commodities in the boxes can be passed on to the ultimate consumer, the city has the right, in order to provide against imposition by the use of the smaller boxes, to enact an ordinance requiring the use of boxes containing the statutory capacity of a bushel and half-bushel, and affixing a penalty for the use of boxes of different capacities. Ib.

7. **Ejectment: Ouster: Improvement of Street: Verbal Direction: Trespass.** In ejectment against a city for a strip of land, wherein the answer is a general denial, the burden is upon plaintiff to prove that the city was in the wrongful possession of the land at the time the action was brought; and the mere act of the street commissioner in going upon said strip and grading it for street purposes, in obedience to a verbal instruction of the city council, is not the act of the city, and is not sufficient to establish wrongful possession by the city or to maintain ejectment against it, but amounts to no more than a trespass by him. Bennett v. Nevada, 211.

8. ———: **Street Improvement: Ordinance Necessary.** In order to establish, open, extend or alter a street the mayor and city council must by ordinance provide that such improvement shall be made; a mere resolution or verbal motion by the council, instructing the street commissioner to improve a named strip of land, though unanimously adopted and made a matter of record, is void and does not bind the city, and if in obedience to it the street commissioner enters upon the land and grades it for street purposes, his act amounts to no more than a trespass, for which he and possibly those acting with him are liable in damages for the injury done the owner. Ib.

9. **Street Improvement: Elimination of Part of Ordinance Plan.** Under the charter of Kansas City, an ordinance may provide for the widening and grading of a street, and the grading of intersecting streets, as a part of a general scheme to establish one continuous trafficway, "all as one general improvement," and a circuit court cannot ignore or alter any material part of such ordinance; and where the ordinance provided that thirteen intersecting streets should be graded or regraded so as to constitute approaches to a trafficway, the court had no authority, in an attempt to ascertain the damages and benefits, to receive a verdict or render a judgment which eliminated four of the intersecting streets from consideration. In re 23rd Street v. Crutcher, 249.

10. ———: **General Improvement: Instruction for Separate Verdicts.** Where the charter and ordinance provide for one general improvement of a highway, crossed by thirteen streets, it is error to instruct the jury that the damages and benefits from the grading of the highway and each intersecting street are to "be considered and determined separately" and that thirteen separate verdicts are to be rendered. Ib.

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CITIES—Continued.

11. **Street Improvement: Instructions to Disregard Testimony.** In so far as an instruction attempts to direct a jury to exercise their own judgment as to the damages and benefits free from any connection with the testimony, it is error. In re 23rd Street v. Crutcher, 249.

12. ———: **General Improvement: Individual Benefit to Lot: Separate Assessment.** Where the charter and ordinance unite all elements of the street improvement into one general improvement, it is error to instruct the jury that they "have no right to assess any lot to pay for any of the proposed street improvements, except for such improvement as will actually benefit the particular lot," or that they "have no right to assess any greater sum against any lot than it will be actually benefited by the particular improvement." The improvement being a general one, no attempt should be made to accredit any one portion of the improvement with benefits apart from the others, except to separate the grading benefits from the condemnation benefits. Ib.

13. ———: ———: **Damages Exceeding Benefits: As to Particular Lots.** Where the court has told the jury that the proposed street improvement is necessary as a matter of law, and that if they find the entire damages exceed the benefits they should go no further, but so report, another instruction telling them that if they find that "the total benefits from the proposed grading of any intersecting street do not equal the amount of damages to lots on such street, then you need to proceed no further as to such intersecting street," is error, in that it conflicts with the other correct instruction, and besides is contrary to the law governing such cases. Ib.

14. ———: **Damages to Non-Abutting Property.** Where the charter and ordinances made 23rd Street and the intersecting streets one for the purpose of the improvement, an instruction telling the jury that only property abutting on 23rd Street is entitled to damages is error, the evidence tending to show that the deep cut in 23rd street deprives the owners of property abutting on the intersecting streets of vehicular access thereto. Ib.

15. **Practice: Judgment on Pleadings: Ascertainment of Cause of Action.** In an action brought by property owners for the cancellation of special tax bills, wherein the pleadings consist of the petition, an answer and a reply denying the allegations of the answer, the sole question, on the filing by defendant of a motion for judgment on the pleadings, is whether the petition states a cause of action entitling plaintiffs to the relief asked. Collins v. Jaicks Co., 404.

16. **Street Improvement: Maintenance and Repair: Benefit Assessments.** Under the present charter of Kansas City the city has power by ordinance to direct that the cost of repairing and maintaining an existing boulevard be paid by special assessments against the abutting property, or said cost may be paid out of the funds belonging to the park district in which the improvement is made or out of the general park fund; and the exercise by the city of its option to authorize the cost to be paid by special assessments will not be held to be illegal, unless the act is clearly unreasonable, oppressive and subversive of the rights of the property owners. Ib.

17. ———: **General Power of Cities: Conclusiveness of Exercise Upon Courts: Fraud.** The power of cities to grade and improve streets

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is legislative and continuing, subject to such restraints as may be imposed by valid charters; and the power being conferred by charter, and the charter provision being in harmony with constitutional and statutory authorization, the courts will not interfere, either directly or collaterally, with municipal action, in the absence of fraud. The governing body of the city, and not the courts, is the judge of the necessity and expediency of the exercise of the power conferred, and the fraud that will authorize the courts to interfere with municipal action is not that it has resulted in individual hardship, or that in working out a general scheme an individual burden without corresponding benefit is imposed, but only an act so unreasonable, oppressive and subversive of the rights of citizens in the general purpose declared, as to clearly indicate an attempted abuse rather than a legitimate use of the power conferred. Ib.

18. ———: **Part of Street: Inequality of Non-Uniformity.** A city having charter power to improve or repair streets, and to "pay for such improvement or any part thereof" out of its general funds or by special assessments against abutting property, may pay for repaving a portion of a boulevard out of its general fund, and at a later time provide that the cost of repaving another portion shall be paid by special assessments; and in the absence of fraud, it will not only be presumed that the city authorities had good and sufficient reasons for proceeding by different methods in the two proceedings, but there was no such inequality or lack of uniformity as denied to the abutting property owners the equal protection of the laws. Ib.

19. ———: **Exemption from Subsequent Taxation: Contractual Right.** The charter and ordinance under which a street was improved do not constitute a contract with abutting property owners who paid taxes therefor, that their property will not be burdened with taxes to pay for subsequent repairs or repaving. The statute, or a charter in harmony therewith, conferring upon a municipality power to provide for the construction, repair and maintenance of streets, may be changed, so as to provide a different method of paying for the improvement, or so as to repair an improvement already made, and such change in the law does not constitute an impairment of any supposed contract between the city and the abutters, who paid for an earlier improvement, that their property will not be sujected to taxes to pay for a later improvement or repairs. Ib.

20. ———: **Maintenance: Tax Bills Prima-Facie Regular. Special** tax bills issued for the improvement of a boulevard import prima-facie validity under the charter of Kansas City, and are evidence of the liability of the property for the amount thereof; and an allegation in the petition that the resolution authorizing the improvement provided that the boulevard shall "be paved the full width thereof with bituminous pavement macadam" does not justify the conclusion that the tax bills were issued for maintenance work. Besides, the charter provides for the maintenance of a boulevard by special assessments. Ib.

21. ———: **Change in Charter: Omission of Exemption Right: Impairment of Contract.** A provision in the city's charter at the time the boulevard was paved, to the effect that when a boulevard has been constructed at the expense of the adjoining property it shall thereafter be maintained at the expense of the park district in

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CITIES—Continued.

which it is situated or out of the general park fund, did not create a contract right with abutting owners that their property would be exempt from special assessment for improvements made after the charter provision was annulled, or inhibit the annullment of such provision; nor was such exemption kept alive by a clause in the subsequent charter that "the repeal of any law by the provisions of this charter shall not in any wise affect any right acquired or accrued thereunder, nor shall this charter in any wise affect the right acquired or accrued under the previous charter." The operative force of the provision in the original charter prevailed so long as that charter was in existence, but no longer, and "the right acquired thereunder" did not prohibit the city, by a new charter, to provide a different method for paying for street improvements. Collins v. Jaicks Co., 404.

CLEAN HANDS. See **Equity, 4.**

CLOUD ON TITLE. See **Trusts and Trustees, 1 to 4.**

CONFLICT OF OPINIONS.

1. **Motion for New Trial: General Assignment.** A general assignment of error in the giving and refusing of instructions, in the motion for a new trial in a civil case, is sufficient to authorize a review of such instructions on appeal. [Following State ex rel. United Rys. Co. v. Reynolds, 278 Mo. 554.] And a refusal by a court of appeals to rule on assigned errors in the instructions, on the ground that the assignments were general, is error, and necessitates the quashing of its opinion on *certiorari*. State ex rel. Const. Co. v. Reynolds, 493.

2. **Pleading: General Allegations: Common-law Negligence.** A ruling by the Court of Appeals that a petition charging that defendant was in exclusive control of the erection of a certain building and that plaintiff, in the employ of defendant, while doing carpenter work on the third floor, was, "by reason of the negligence of defendant, struck by a piece of building material, which fell from a floor above the third floor, by reason whereof plaintiff fell with great force and violence a distance of forty feet, and by reason of such falling, which was due to the negligence of defendant, plaintiff was injured," etc., charged general negligence at common law and stated a cause of action for damages, is not in conflict with any decision of the Supreme Court cited by relator. Ib.

3. ———: ———: ———: **Ordinance as Evidence.** If the petition states a cause of action of negligence at common law, an ordinance making the act of defendant negligence is evidentiary, and though not pleaded is competent evidence; and a decision of the Court of Appeals so ruling, is not in conflict with prior decisions of the Supreme Court, but in harmony therewith. Ib.

4. **Cases from Other Jurisdictions.** In deciding whether the rulings of a court of appeals conflict with the last previous decision of the Supreme Court, cases from other jurisdictions are not of much value. Ib.

5. **Common-Law Negligence: Liability Based on Ordinance.** A ruling by the Court of Appeals that, since the ordinance did not expressly give a cause of action for damages, but merely prescribed a duty to be performed, a common-law action of negligence would lie for a violation of the ordinance duty, is not in conflict with prior decisions of the Supreme Court. Ib.

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CONSTITUTIONAL LAW.

1. **Title: Leasing Railroad.** The title to an act passed in 1870, entitled, "An Act to amend chapter sixty-three of the General Statutes, entitled 'of railroad companies,' so as to authorize the consolidation, leasing and extension of railroads," was broad enough to authorize a designation in the body of the act of the terms and conditions upon which such leases should be made, and to include a provision that "a corporation in this State leasing its road to a corporation of another state shall remain liable as if it operated the road itself." Murrell v. Railroad, 92.

2. **Speed Ordinance: Six Miles an Hour: Unreasonableness.** An ordinance limiting the speed of railroad passenger trains to six miles an hour at a much-used public-street crossing, 1200 feet from the station, in a city of the fourth class containing 2700 inhabitants, is not unreasonable, nor an unlawful interference with interstate commerce, but a needed protection of the public at such crossing Ib.

3. **Weights and Measures: Legislative Power: Invasion of Right to Contract.** For the purpose of protecting the public and consumers from fraud and imposition in their purchase of commodities, the Legislature has the right, as a police regulation, to regulate weights and measures, and delegate that authority to municipal corporations, in so far as they exercise police powers; but the regulations must not be such as to invade the constitutional right to make contracts. Stegmann v. Weeke, 140.

4. ———: ———: ———: **Reasonable Restrictions.** A legislative exercise of the police power to fix weights and measures necessarily limits the freedom of contract that would otherwise exist; but so long as the restriction has a reasonable relation to the exercise of the power and is not so arbitrary or capricious as to be a deprivation of due process of law, freedom of contract in the constitutional sense is not interfered with. Ib.

5. ———: ———: ———: **Bushel Boxes According to Statute: Penalty for Use of Boxes of Different Dimensions.** An ordinance establishing standard bushel and half-bushel boxes to contain the same cubical content of the bushel and half-bushel prescribed by statute, to be used by truck gardners and farmers in selling their fruits, vegetables and other proudce in the city, and prescribing a penalty for the use of boxes of a different capacity and thereby sufficiently guaranteeing that boxes of a different capacity will not be used, is not unconstitutional as impairing the obligation of contracts, although it makes unlawful the use of boxes of a less capacity which have been in general use for many years. Ib.

6. **Jurisdiction: Venue: Corporation: Libel.** The Act of 1909 (Sec. 1755, R. S. 1909), declaring that "suits for libel against corporations shall be brought in the county in which the defendant is located, or in the county in which the plaintiff resides," in so far as it permits a plaintiff to bring a libel suit in the county in which he resides against a corporation whose place of business is in another county and whose newspaper in which the libel is published is printed in such other county, is invalid, in that it denies to said corporation the equal protection of the laws, since, were the libeler an individual, the plaintiff could not maintain his suit in his own county unless the libeler were found and served therein. A resident of Cole County cannot

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CONSTITUTIONAL LAW—Continued.

maintain a suit in the circuit court of said county against a corporation whose place of business is in the City of St. Louis and whose newspaper in which the libel is published is printed in said city, unless said corporation waives and lack of jurisdiction. [Per McBAINE, Special Judge; WALKER, FARIS and GRAVES, JJ., concurring; BOND, C. J., and BLAIR and WILLIAMS, JJ., dissenting; WOODSON, J., not sitting.] McClung v. Pub. Co., 370.

7. **Equal Protection: Corporations.** Corporations come within that provision of the Fourteenth Amendment declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws. Therefore the laws must extend to them the same protection they extend to individuals. Ib.

8. ———: **Corporations and Individuals: Venue: Classification.** It is an advantage to a plaintiff to sue in the county in which he lives, and to a defendant to defend in the county of his residence; and a statute which permits a plaintiff in a libel suit to sue a non-resident corporation libeler in his own county, and denies to him the right to sue a non-resident individual libeler in the same county, makes an unreasonable classification against the corporation, and is invalid, since the classification is not based upon a difference bearing a just and proper relation to the attempted classification. Ib.

9. **Railroad: Operated at Loss: Confiscation.** That an order of the Public Service Commission or a judgment of court concerning a particular facility or a portion of the line of a railroad company may result in some financial loss does not necessarily bring it in to conflict with the provisions of the Constitution relating to due process of law and equal protection of the laws. State ex rel. Pub. Serv. Comm. v. Mo. Southern, 455.

10. **Railroad: Short-Haul Rates: Reasonable Variation.** A freight rate unlawful because in conflict with a valid constitutional inhibition is unreasonable. The short-haul clause of the statute is constitutional and a freight rate violative of it cannot be upheld on the ground that it is reasonable. Mo. Southern v. Pub. Serv. Comm., 484.

11. **Private Road: Easement at Common Law.** The doctrine of private ways existed at common law, and was usually founded on a presumption of grant or reservation; as where one sold a close surrounded by his own estate he was presumed to grant the easement of access, or if he sold his surrounding estate and reserved the close a reservation of the same easement would be presumed. And it was this doctrine of presumed easement which the State recognized and perhaps enlarged in Section 20 of Article 2 of its Constitution. Wiese v. Thien, 524.

CONTRACTS.

1. **Insurance Policy: Acceptance.** Inconclusive negotiations concerning an insurance policy, which contains a clause that the insurance shall not take effect until the first premium is paid and the policy delivered to and accepted by the insured during lifetime and in good health, do not constitute an insurance contract. The facts of this case are reviewed, and it is held that the policy tendered by the company was never unconditionally accepted during the good health of the insured, or that the company understood that the policy sent and received was accepted, or was ac-

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ceptable except upon a condition which could not be met, and that therefore there was no completed contract. Ins. Co. v. Salisbury, 40.

2. ———: **Non-Payment of First Premium.** A stipulation in an insurance policy requiring the first premium to be paid in advance and during the good health of the insured as a condition upon which it is to take effect is enforcible, and if the first premium was neither paid nor tendered during the insured's good health the policy did not become effective, and there is no enforcible insurance contract. Ib.

3. **Joint Tortfeasors: Release of One: Covenant Not to Sue.** Where the plaintiff by written instrument does "hereby release and forever discharge" one joint tortfeasor "only from all suits, actions or causes of action which I have or might have against," said tortfeasor, a subsequent clause by which plaintiff "expressly refuses and declines to release" the other tortfeasor "from any claim for damages which I may have or might have against it" and whereby plaintiff "cxpressly reserves the right to enforce any and all claims that I may or might have against" said other tortfeasor did not destroy the release thus clearly made, but the instrument operated to release all the joint tortfeasors. Clark v. Union Electric Co., 69.

4. ———: ———: **Rule.** While the courts construe an instrument settling a claim for damages with one tortfeasor as a covenant not to sue wherever its language will permit, it cannot be so construed when it is clear from its unambiguous language that it was not intended as a covenant not to sue. Ib.

5. **Purchase of Land: Unilateral Contract: Mutuality Supplied.** A mere option agreement to sell land, though in its inception unilateral and lacking in mutuality, may, when bottomed on a valuable consideration and accepted by the promisee within the time limited by the promisor, form the basis of an action for specific performance. Starr v. Crenshaw, 344.

6. ———: ———: ———: **Consideration: Extension.** The word consideration is correctly defined as a benefit to the party promising, or a loss or detriment to the party to whom the promise was made. An extension by the vendor of the option agreement for thirty days, made on the last day of the option period and bottomed on a valid consideration, if accepted by the vendee on any day before the extension period expired, is enforcible and cannot be withdrawn before the expiration of such period; and if the vendor agreed to extend the option for thirty days upon condition (a) that the vendee give the vendor a certified copy of the report of his drillings for coal on the land and (b) pay interest on all deferred payments from the beginning of said thirty days in the event he should buy, and he unequivocally accepted the terms of purchase, and continued the drillings, though he did not furnish the certified report, which could be of no value to the vendor after the vendee's acceptance, there was a valuable consideration for the agreement, and the vendee is entitled to specific performance. Ib.

7. ———: **Breach of Contract for Other Reasons.** A breach of the option contract to purchase land, by the vendor before the expiration of the option period, for reasons other than the vendee's failure to perform, relieved the vendee from doing the vain and useless

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CONTRACTS—Continued.

thing of furnishing a certified report of his drillings for coal on the land, called for by the agreement before the vendee had accepted the terms of purchase, but no longer of practical utility after he had accepted, although the drillings themselves furnished the consideration for the agreement. Starr v. Crenshaw, 344.

8. **Street Improvement: Change in Charter: Omission of Exemption Right: Impairment.** A provision in the city's charter at the time the boulevard was paved, to the effect that when a boulevard has been constructed at the expense of the adjoining property it shall thereafter be maintained at the expense of the park district in which it is situated or out of the general park fund, did not create a contract right with abutting owners that their property would be exempt from special assessment for improvements made after the charter provision was annulled, or inhibit the annullment of such provision; nor was such exemption kept alive by a clause in the subsequent charter that "the repeal of any law by the provisions of this charter shall not in any wise affect any right acquired or accrued thereunder, nor shall this charter in any wise affect the right acquired or accrued under the previous charter." The operative force of the provision in the original charter prevailed so long as that charter was in existence, but no longer, and "the right acquired thereunder" did not prohibit the city, by a new charter, to provide a different method for paying for street improvements. Collins v. Jaicks Co., 404.

9. **Parol Contract: In Praesenti: Fire Insurance: For Future: Variance.** A parol contract for insurance to begin on a certain day in the future and to run for one year may be entered into by the parties, and where the premium is collected the courts enforce it; and the fact that the agreement was for the same amount of insurance as that named in an existing policy, but at an increased rate, does create a fatal variance between the proof and an allegation that "the contract so entered into was upon the same general terms and conditions as those embraced" in the previous written contract. Swift v. Fire Ins. Co., 606.

10. **Lease: Relation: Right of Lessor to Inspect.** If the written contract granted to the lessee an estate for years, and entitled him to possession during the term against the lessor, without any right to enter except to inspect the quarry work and ascertain whether or not it was being performed according to agreement, the relation was that of lessor and lessee. Baker v. Gates, 630.

CONVERSION.

Bond: Liability for Funds Converted by Receiver: Deposit in Bank. A bonding company cannot discharge its obligation as surety by pointing out some other person who is also legally liable for a loss. So where a receiver was appointed for an industrial company and authorized to take possession of its assets including money on deposit to its credit, and defendant as surety executed its bond, obligating itself that the receiver would faithfully and truly account for all moneys, assets and other property that should come into his hands, and thereafter the receiver caused to be transferred on the bank's books to his credit as receiver a deposit previously made to the credit of the industrial company, and thereafter by checks signed by himself as receiver and payable to himself drew out the deposit and converted it to his own use, the bonding company is liable to the company for the amount so misappropriated, and cannot escape payment on the

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CONVERSION—Continued.

theory that the bank had actual knowledge that the deposit was a trust fund and that the company was the real owner thereof. The legal title of the fund was in the company, but the right to possession after its redeposit was in the receiver, and the bank was bound to pay his checks when in proper form, and therefore the surety must account for the money misappropriated; and although the industrial company, upon a showing that the bank knew that the receiver was converting the fund to his own use and with such knowledge aided him in so doing by honoring his checks, might in a proper proceeding recover from the bank, still the surety must respond upon its guaranty that the receiver would faithfully account for the money and other assets reduced to his possession. State ex rel. Peach Co. v. Bonding Co., 535.

CONVEYANCES.

1. **Nominal Consideration: Voluntary: Correcting Mistake.** If no witness competent to testify is produced to show that a deed from the husband to his wife was supported by a valuable consideration, a recital therein that it was for a nominal consideration prevails, and it must be adjudged void as to his existing creditors, and neither the wife nor her grantees can maintain a suit in equity against them to correct a mistake in it. Edmonds v. Scharff, 78.

2. **Witness: Competency: Other Party Dead: Agent.** A woman, whose son-in-law is dead, cannot testify that he owed her notes to the amount of three hundred dollars and that she bought from him the lots in suit and had him deed them to his wife and that the notes were the actual consideration for the deed, which recited a consideration of one dollar. She was not the agent of the wife, but a party to the original contract, for the transaction is precisely the same as if she had purchased the lots, had the conveyance made to herself and subsequently conveyed to the wife; and under the statute (Sec. 6354, R. S. 1909), the son-in-law, "the other party to such contract," being dead, she is incompetent to testify in favor of the wife, or any person claiming under the wife. Ib.

3. **Deed of Married Woman: Defective Acknowledgment: Prior to 1883.** A deed made by a married woman, the certificate of acknowledgment of which simply recited that she and her husband "personally appeared before me, a notary public in and for said county, both being personally known to me, and acknowledged the execution of the annexed deed," made when the statute (Secs. 680, 681, R. S. 1879) requiring that any officer taking the acknowledgment of a married woman to any deed of conveyance of real estate must examine her separate and apart from her husband, and so certify in the certificate of acknowledgment, and further certify that she executed such conveyance freely and without compulsion of her husband, was in force, was void. Powell v. Bowen, 280.

4. ———: **Abandonment of Land.** The defense of abandonment, disassociated from other defenses, such as adverse possession or failure to pay taxes, has never been recognized at common law as affecting title to real property; for at common law title can neither be lost nor gained by abondonment operating alone. Ib.

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CONVEYANCES—Continued.

5. **Deed of Married Woman: Laches and Estoppel: Suit for Interest.** Neither *laches* nor estoppel *in pais* is as to her real estate imputable to a married woman who ever since the making of her void deed in 1882 has been under the legal disability of coverture, the reason being that prior to the Married Woman's Acts of 1889 the right of possession of a married woman's lands was in her husband and was a vested right which was not destroyed by those acts, and she could not before or since have maintained an action for possession. Since the Act of 1897 she could have maintained an action to determine interest, but was not compelled to do so, but that act did not divest the husband's existing right to possession, or permit her to sue for possession during his life.

Held by GRAVES, J., dissenting, that the Act of 1897 afforded to a married woman the right to assert her interest in land, and a remedy; and if she stood by for eighteen years after its enactment and saw valuable improvements made upon the land she is barred by estoppel *in pais* from asserting such interest; and estoppel *in pais* goes both to the remedy and the right, and may be set up as a defense in actions at law and suits in equity. Powell v. Bowen, 280.

6. ———: **Estoppel by Covenant in Void Deed.** A married woman is not estopped to assert her interest in land by a covenant in a deed which is void as to her because not acknowledged in the manner required by statute. The deed being void, any covenant in it cannot be efficacious to produce estoppel. Ib.

7. ———: **Limitations.** Neither the ten-year, nor the thirty-one-year, nor the twenty-four-year Statute of Limitations was a bar to a married woman's suit begun in 1915 to establish her interest in land attempted to be conveyed in 1882 by a deed void because it was not acknowledged in the manner prescribed by statute, she being at the time and ever since under the legal disability of coverture. There was no time when she was capable of maintaining an action for possession, and as no such action can accrue to her until her husband's death, the thirty-one-year and the ten-year statute has never begun to run as to her, and her suit to establish her interest is not barred by the twenty-four-year statute, because it was begun in less than twenty-four years after the Act of 1897 was passed.

Held, by GRAVES, J., dissenting, that Section 1881, Revised Statutes 1909, which antedated the Married Woman's Acts of 1889, should no longer be held to except married women from the provisions of the ten-year and other statutes of limitations, but the Married Woman's Acts having made her a *femme sole*, with power to sue for her interest in lands, she should be considered discovert, and said Section 1881 should not be held to prevent the statutes of limitations from running against her. Ib.

8. ———: ———: **Thirty-year Statute: Obligation to Pay Taxes.** As between a married woman, whose deed made in 1882, in which her husband joined, was void as to her because not acknowledged in the manner prescribed by statute, and who has since been under the disability of coverture, the obligation to pay taxes rests upon the latter, and her husband's grantee or grantees by *mesne* conveyances, as the holders of his lifetime right to possession; and hence the thirty-year Statute of Limitations does not apply to her in her suit to establish her interest in the land, she being at no time entitled to its possession. Ib.

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CONVEYANCES—Continued.

9. **Acknowledgment: Regular on Face: Hidden Defects: Record.** If a deed of trust contains a certificate of acknowledgment in proper and regular form, it is the duty of the recorder to receive the instrument and place it upon record, and if so recorded it imports constructive notice to all subsequent purchasers; and though, upon a trial in court, it is adjudged that the deed had not been acknowledged, because the notary's recitals in his certificate were false, its record nevertheless imported notice to such subsequent purchaser. Ammerman v. Linton, 439.

CORAM NON JUDICE. See **Courts, 1.**

CORPORATIONS.

1. **Sale of Properties: Annihilation: Injunction.** A corporation organized for the express purpose of buying and selling real estate will not be destroyed by a sale of a large tract of land belonging to it; and an injunction suit to enjoin the sale, brought by a minority of the directors against the majority, who in regular meeting assembled have authorized the sale, cannot be maintained on the ground that such sale will annihilate the corporation. Hendren v. Neeper, 125.

2. **Jurisdiction: Venue: Libel.** The Act of 1909 (Sec. 1755, R. S. 1909), declaring that "suits for libel against corporations shall be brought in the county in which the defendant is located, or in the county in which the plaintiff resides," in so far as it permits a plaintiff to bring a libel suit in the county in which he resides against a corporation whose place of business is in another county and whose newspaper in which the libel is published is printed in such other county, is invalid, in that it denies to said corporation the equal protection of the laws, since, were the libeler an individual, the plaintiff could not maintain his suit in his own county unless the libeler were found and served therein. A resident of Cole County cannot maintain a suit in the circuit court of said county against a corporation whose place of business is in the City of St. Louis and whose newspaper in which the libel is published is printed in said city, unless said corporation waives the lack of jurisdiction. [Per McBAINE, Special Judge; WALKER, FARIS and GRAVES, JJ., concurring; BOND, C. J., and BLAIR and WILLIAMS, JJ., dissenting; WOODSON, J., not sitting.] McClung v. Pub. Co., 370.

3. **Equal Protection.** Corporations come within that provision of the Fourteenth Amendment declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws. Therefore the laws must extend to them the same protection they extend to individuals. Ib.

4. **———: Corporations and Individuals: Venue: Classification.** It is an advantage to a plaintiff to sue in the county in which he lives, and to a defendant to defend in the county of his residence; and a statute which permits a plaintiff in a libel suit to sue a non-resident corporation libeler in his own county, and denies to him the right to sue a non-resident individual libeler in the same county, makes an unreasonable classification against the corporation, and is invalid, since the classification is not based upon a difference bearing a just and proper relation to the attempted classification. Ib.

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CORPORATIONS—Contnued.

5. **Drainage District: Organization: Collateral Attack.** The validity of the incorporation of a drainage district is not open to collateral attack; and where there has been a colorable effort, in good faith, under a valid law, to incorporate the district, and it has been and is exercising powers vested in such public corporations and the State has not attempted to inquire into the legality of its organization, the illegality of its organization cannot be shown as a defense in a suit for taxes levied by it. State ex rel. McBride v. Sheetz 429.

COURTS.

1. **Disqualification of Judge: Judgment of Dismissal: Void Execution.** A judgment rendered by a judge not authorized to hear or determine a case is subject to collateral attack; and where a cause was submitted to a special judge and by him taken under advisement, and one of the counsel in the case afterwards became the regular circuit judge, a subsequent judgment of dismissal rendered by such regular judge is void, and an execution for costs and a sale of lands thereunder are likewise void. Edmonds *v.* Scharff, 78.

2. **Police Regulation: Bushel Boxes of Given Dimension: No Penalty.** The court may determine whether an ordinance prescribing that bushel and half-bushel boxes to be used by farmers and truck gardeners in marketing their fruits and vegetables within the city shall be of certain dimensions, is unreasonably arbitrary, and may settle the question by inspecting the face of the ordinance, or may find it unreasonable by a state of facts which affects its operation; but an ordinance which prescribes that a bushel box shall have certain dimensions and a half-bushel box certain other dimensions, but prescribes no penalty for the use of boxes of different dimensions, but only a penalty for the use of boxes of a different capacity, is not unreasonable.
   Held, by FARIS, J., concurring, that the ordinance is valid only because it prescribes no penalty for the use of boxes of different dimensions, thus making the prescription that the bushel and half-bushel boxes shall have certain dimensions only advisory, and not mandatory. *Held*, also, that the city has no power to say that the boxes shall be of a required lenght, width and depth. Stegmann v. Weeke, 140.

3. **Street Improvement: Elimination of Part of Ordinance Plan.** Under the charter of Kansas City, an ordinance may provide for the widening and grading of a street, and the grading of intersecting streets, as a part of a general scheme to establish one continuous trafficway, "all as one general improvement," and a circuit court cannot ignore or alter any material part of such ordinance; and where the ordinance provided that thirteen intersecting streets should be graded or regraded so as to constitute approaches to a trafficway, the court had no authority, in an attempt to ascertain the damages and benefits, to receive a verdict or render a judgment which eliminated four of the intersecting streets from consideration. In re 23rd Street v. Crutcher, 249.

See, also, **Conflict of Opinions.**

CRIMINAL LAW.

1. **Evidence: Other Burglaries: Conspiracy.** Where there is testimony that defendant, a policeman, entered into an agreement with

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CRIMINAL LAW—Continued.

a burglar and some women by which the moneys and goods stolen by the burglar from houses burglarized by him were to be divided among them, in return for protection to the others by defendant, testimony of other burglaries than the one specified in the indictment, which the burglar testifies were committed about the same time and in pursuance to the continuing conspiracy, is competent. State v. Cummins, 192.

2. ———: ———: **Committed Before Conspiracy Was Formed.** When a witness was testifying concerning the burglarizing of his house defendant objected because it did not then appear that defendant was connected with any burglary except the one specified in the indictment. At that time the witnesses by which the State subsequently attempted to prove that the defendant and one of them had entered into an agreement by which defendant, in consideration of police protection for the other, was to share in the goods stolen, had not testified, and consequently the court could not then tell whether the connection would be later established. It later developed that at the time the witness's house was burglarized defendant had never met his said accomplice, but the objection was not then renewed. *Held*, first, that since the objection was not renewed, the admission of the testimony was not error, and, second, since the accomplice testified that he divided the goods which he stole from said house with defendant, under said agreement, the testimony was competent. Ib.

3. **Election: Burglary and Larceny: Receiving Stolen Goods.** Where the evidence is comprehensive enough to sustain a conviction either for burglary and larceny, or for receiving stolen goods, knowing them to have been stolen, the court does not err in refusing to compel the State to elect upon which of the two counts of the indictment, charging both offenses in separate counts, it will stand. Ib.

4. **Instruction: Uncorroborated Testimony of Accomplice.** An instruction telling the jury that they are at liberty to convict the defendant upon the uncorroborated testimony of an accomplice alone, if they believe his statements are true and sufficient to establish defendant's guilt, but that such testimony, when not corroborated, ought to be received with great caution, is not error. Ib.

5. ———: **Assumption of Disputed Fact.** An instruction telling the jury that "evidence of other burglaries and larcenies were admitted by the court solely for the purpose of determining whether a conspiracy" existed between defendant and his accomplice to burglarize various dwellings in the city "and you are to consider this evidence for no other purpose," did not assume that other burglaries had been committed or that defendant had committed them. Ib.

6. **Sufficient Evidence: Burglary and Larceny.** The evidence in this case, which is fully set out in the statement, was sufficient to sustain a conviction of burglary in the second degree and larceny, and assessing defendant's punishment at five years' imprisonment for the burglary and five years for the larceny, the evidence being that defendant, a policeman, entered into an agreement with a burglar and some women by which, in consideration of protection for them, the burglar was to burglarize dwelling houses in the community and divide the stolen goods among them. Ib.

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CRIMINAL LAW—Continued.

7. **Appeal: Not Perfected Within a Year: Dismissal.** An appeal from a judgment adjudging appellant guilty of murder in the second degree, which is not perfected within one year, must be dismissed upon the motion of the Attorney-General; and a filing in the Supreme Court of a certified copy of the bill of exceptions only, is not a perfecting of the appeal. State v. Cantrell, 569.

8. ———: ———: ———: **Supplying Lost Record.** The trial court has power, even after appeal taken, to supply a lost indictment or other lost record; and while it is the duty of the clerk to make up the transcript in a criminal case, it is the duty of appellant to see to it that the clerk acts in a timely way, and to take steps to supply a lost or destroyed document or record in the case; and where he files in the Supreme Court only a bill of exceptions, and does not, until after the Attorney-General has filed a motion to dismiss his appeal on the ground that he had not perfected it within one year, make any attempt to supply the lost indictment and other original files, and makes no showing and exhibits no diligence why he has not done so within the time prescribed by the statute, his appeal will be dismissed. Ib.

DAMAGES.

1. **Assault and Battery: Circumstances.** In an action for damages caused by assault and battery it is always permissible to show the circumstances under which the alleged assault was committed. Bond. v. Williams, 215.

2. ———: **Provocation: Punitive Damages: Mitigation: Malice.** In an action for damages for assault and battery, wherein punitive damages are asked, whether malice were present is an issue, and defendant may show the circumstances of provocation in mitigation of such damages, though such evidence is inadmissible in mitigation of actual damages. Ib.

3. ———: ———: **Abusive Language: Recent Occurrence.** In order that evidence of provocation, such as abusive language, may be introduced in mitigation of punitive damages, the provocation must have occurred at the time of the assault, or so recently as to warrant an inference that the defendant was still laboring under the excitement caused by it. But no definite limits for a "cooling time" can be set. So that where plaintiff, in argument to a jury, violently abused two witnesses, characterizing them as liars and perjurers, and an hour and a half afterwards or less, as he was going from the court house to his hotel, they assaulted him, evidence of the violent language used by him was admissible, in mitigation of punitive damages, in his action against them for damages for assault and battery. Ib.

4. ———: **Malice: Definition.** An instruction declaring "malice in its legal sense does not mean mere spite, ill-will or hatred, as it is ordinarily understood, but does mean that state of disposition which shows a heart regardless of social duty and fatally bent on mischief" is appropriate in an action for assault and battery, and does not materially differ in its meaning from one defining malice as "a wrongful act done intentionally without legal justification or excuse;" and if appellant asked an instruction defining malice in the latter words and respondent the former instruction, and both were given, appellant had the benefit of both definitions, and hence cannot complain that the court did not use only his to define the term. Ib.

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DAMAGES—Continued.

5. ———: **Verdict for Defendant: Nominal.** Where the evidence is that the injury inflicted upon plaintiff was slight, and he presented no request for nominal damages, though in law entitled to nominal damages, a verdict for defendants, approved by the trial court, and there being no assignment in the motion for a new trial that he should have been allowed at least nominal damages, will not be disturbed on appeal on the theory that the provocation could not mitigate the actual damages unless it amounted to justification, and no actual damages were allowed. Ib.

6. **Verdict: Against Evidence: Motion for New Trial: Insufficient Assignment.** An assignment in the motion for a new trial that the verdict is "against the evidence" and "against the law," however often repeated therein, is insufficient to permit a review by the appellate court of the evidence to show that the verdict was excessive, or inadequate, or unsupported in any respect by evidence, or erroneous in any specific particular, and in his action for assault and battery does not assign as a ground therefor that plaintiff was at least entitled to nominal damages. Ib.

7. **Steamboat: Rented: Losses Covered by Insurance.** The owner of a boat, having rented it to defendant and having assumed in the charter-party all losses covered by the insurance policies, can recover from the lessee, or from the surety on his bond, which included the charter-party, for no loss which was not covered by the insurance; and consequently the only question in a suit to recover from the lessee and his surety the value of the boat which sank is whether the losses were covered by the insurance. Packet Co. v. Guaranty Co., 500.

8. **Vexatious Delay: Attorney's Fees: Suit on Guaranty Bond.** It is true that Section 7068, Revised Statutes 1909, authorizing the recovery of damages and an attorney's fee for vexatious refusal to pay applies to actions against (1) an insurance company for loss on (2) a policy of insurance; but it embraces policies of "fidelity, indemnity . . . or other insurance," and those words are broad enough to include a company licensed to do "fidelity and surety insurance" for a consideration, and in an action on the judicial bond of such a company by which, for a consideration or premium paid, it guarantees that a receiver appointed by the court will faithfully and truly account for all moneys, assets and other property that may come into his hands, it is proper for the court or jury to allow damages and a reasonable attorney's fee for its vexatious refusal to pay the principal sum converted by the receiver to his own use. State ex rel. Peach Co. v. Bonding Co., 535.

DAMAGES IN CONVERSION. See **Bond, 1 and 2.**

DEFINITIONS.

1. **Dormitory.** The common and ordinary significance of the word "dormitory" is a place for sleeping; and the fifth floor of an athletic club, on which 93 rooms were distinctly reserved for sleeping quarters and accommodations of its members, with provision for increasing the number of such rooms to 130, was a dormitory within the meaning of the statute and ordinance which required that "all buildings of non-fireproof construction, three or more stories in height, used for manufacturing purposes, hotels, dormitories, schools, seminaries, hospitals or asylums, shall have not less than one fire escape for every fifty persons, or fraction thereof, for whom working, sleeping or

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DEFINITIONS—Continued.

living accommodations are provided above the second floor." And the evidence being that the building destroyed by fire did not have the requisite number of fire escapes, the question of whether the insufficient supply was the proximate cause of the death of a member of the club asleep in the dormitory was one for the jury. Ranus v. Boatmen's Bank, 332.

2. **Scaffold: Movable Platform.** It is a matter of common knowledge that a platform for the use of workmen in erecting a large and tall building is readjusted and moved either laterally or perpendicularly as the work on the walls progresses, but it is none the less a scaffold on that account. Where the entire wall of a building, sixty or eighty feet long and fifty or sixty feet high, was separated into sections called panels, and the platform on which the men worked in removing the forms was moved from panel to panel as the work progressed, the platform was a scaffold within the meaning of Section 7843, Revised Statutes 1909. Prapuolenis v. Const. Co., 358.

3. **Dormitory: Athletic Club.** A seven-story brick building, the west half of which was occupied by an athletic club, having a kitchen and dining room on the third floor, a banquet hall and ten sleeping rooms on the fourth floor, thirty-six sleeping rooms and a library on the fifth floor, thirty-nine bed rooms on the sixth floor, having in all sleeping accommodations for one hundred and twenty-five persons, in which seventy persons were sleeping at the time of the fire, was a dormitory within the meaning of Section 10668, Revised Statutes 1909, and was required to be equipped with fire escapes as provided by Sections 10666, 10667 and 10668. Newell v. Boatman's Bank, 663.

DEMURRER.

1. **To Evidence: Practice.** Where defendant, at the close of plaintiff's case in chief, offers a demurrer thereto, and upon its being overruled puts in its own evidence, the sufficiency of the evidence to sustain the verdict must be determined from all the evidence in the case; and the appellate court, in considering the demurrer, will indulge every inference in favor of the verdict which men of average intelligence and fairness might legitimately draw from the proven facts. Murrell v. Railroad, 92.

2. **Negligence: Contributory: Demurrer to Evidence.** If the evidence adduced by plaintiff proves his own contributory negligence as a matter of law, and there is no room in the case for the last-chance doctrine, defendant's demurrer to the evidence should be sustained, although the evidence also establishes defendant's prima-facie negligence. In such case plaintiff's evidence establishing his own contributory negligence destroys the prima-facie negligence of defendant. And a demurrer to his evidence in such case is certainly available where there is a defensive plea of contributory negligence, and on reason and authority it would be available without such plea. Tannehill v. Railroad, 158.

DEPOSITION.

1. **Testimony: Expert: Chiropractic: No Timely Objection.** The admission in evidence of the deposition of a chiropractic, who did not qualify so as to give an opinion regarding the effect of plaintiff's injuries upon his physical and mental functions, taken in May, defendant's counsel being present, and read in

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DEPOSITION—Continued.

chief, without objection, at the trial in October, and to which no objection was made until after the deponent's cross-examination was read at some length, and then for the first time counsel for defendant announced that he was going to move to strike out every portion of the testimony which attempted to give an expert opinion, but did not point out specifically the portions he expected to have striken out, was not error. There being no designation of what portion of the deposition was incompetent, and consequently no ruling as to the admissibility of any specific portion of it, and no timely objection to it, its admission cannot be held to be error. Smith v. K. C. Southern, 173.

2. ———: ———: ———: **Improper Question and Answer Withdrawn.** Plaintiff, in taking the deposition of a chiropractic, asked a question which called for an expert opinion. Defendant objected because deponent was not qualified as an expert. The answer was recorded, an exception saved, the question repeated, and the objection renewed, whereupon plaintiff withdrew both the question and the former question and answer. Deponent was not qualified as an expert, but throughout his deposition, which was read without objection, had in effect answered the same and similar questions in detail. *Held*, that, there being no other exception to the rulings as to the admissibility of deponent's testimony, it cannot be conceived how the question and answer, even if they had not been withdrawn, injured defendant, for they added nothing to what deponent already had testified. Ib.

DORMITORY. See **Negligence, 23 to 26, and 51 to 52.**

DOWER.

Mansion House: Limitations. Actions to establish the widow's dower in her husband's real estate, unless begun within ten years after his death, are barred by limitations, and the occupation by the widow of the mansion house thereon after her husband's death is no longer, since the Revision of 1889, an exception to the unqualified language of Section 391. Edmonds v. Scharff, 78.

DRAINAGE DISTRICT.

1. **Sufficiency of Petition.** It was unnecessary for the petition praying for the organization of a drainage district under the Act of 1905, to state whether the ditch was to be open or closed. State ex rel. McBride v. Sheetz, 429.

2. **Report of Viewers: Actual View.** The Act of 1905, did not require the report of the first board of viewers of a drainage district to show an actual view of the proposed improvement. However, the report in this case, when fairly construed, does show an actual view. Ib.

3. **Notice.** If the first notice to the landowners described the proposed ditch exactly as it was described in the report of the first viewers and in the petition, and gave notice that the report had been filed, it was sufficient. Ib.

4. ———: **Description of Lands.** The second notice to landowners, required by Section 5587, Revised Statutes 1909, is not required to describe the lands to be affected by the organization of the drainage district by the county court. The report mentioned in that section is that of the second board of viewers provided for by Section 5584, which requires the report to be ac-

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companied by a plat showing the separate tracts affected and the names of their owners, and if the plat correctly describes the lands a misdescription in the second notice of certain lands is immaterial, especially if the misdescription consisted of an error giving a township number as 56 instead of 57, which error, being clerical, was subject to correction upon the face of the report. McBride v. Sheetz, 429.

5. **Estimate of Costs.** The estimate of the costs of the improvement can be shown by the plat and profile filed with the viewers' report. Ib.

6. **Notice of Hearing Before Viewers: Due Process.** A special notice to the landowners of their right under Section 5585 to "appear before the viewers and freely express their opinions on all matters pertaining thereto" is not required, where the landowners are in court by proper notice when the viewers are appointed and notice is given of a hearing after their report is filed. Ib.

7. **Notice of Bond Issue.** The statute does not require specific notice that a bond issue is contemplated as a method of securing funds; and if the petition contained a prayer for the issuance of bonds in statutory form and notice of the pendency of the petition was given, that was all that was required. Besides, a lack of authority to issue bonds is no defense to a suit to collect an installment tax. Ib.

8. **Organization: Collateral Attack.** The validity of the incorporation of a drainage district is not open to collateral attack; and where there has been a colorable effort, in good faith, under a valid law, to incorporate the district, and it has been and is exercising powers vested in such public corporations and the State has not attempted to inquire into the legality of its organization, the illegality of its organization cannot be shown as a defense in a suit for taxes levied by it. Ib.

9. **Assessor's Book: Collection of Tax.** There can be no valid drainage district tax without a valid assessment; but the ditch assessment book required by Section 5602, R. S. 1909, has no relation to the assessment of drainage taxes. Under the Act of 1905 the assessment is made by the county court, and its basis is the report of the viewers and engineer confirmed by the court: and its validity is in no way dependent upon the ditch assessment book, which the clerk is required to make up, but his failure to perform that duty does not render the tax uncollectable. Ib.

10. **Taxes: Limitations.** The plea of the Statute of Limitations to a suit brought in October, 1914, for the drainage taxes of 1910, 1911, 1912 and 1913, is unavailing. Ib.

11. **Suit for Taxes Pending an Appeal.** The pendency of an appeal from the judgment of the county court organizing a drainage district does not make premature a suit for taxes subsequently instituted. The appeal does not affect the benefits assessed, which are the basis of the tax suit. Under the statute (Sec. 5592, R. S. 1909) on an appeal to the circuit court only two questions can be considered, namely, compensation for property appropriated and damages to property prejudicially affected by the improvement. State ex rel. McBride v. Byrd, 481.

12. **Estimates of Costs.** If the record shows that the viewers reported separate estimates of the costs of location and construc-

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DRAINAGE DISTRICT—Continued.

tion, and apportioned the same to each tract in proportion to benefits or damages received, and that the county court, with the parties before it, found as a fact that such required estimates and apportionment had been made, there is no basis for a claim on an appeal from the circuit court that the estimates were not made. Ib.

EJECTMENT.

1. **Res Adjudicata: Voluntary Conveyance: Former Appeal.** While a judgment in ejectment is not *res adjudicata* as to any issue determined therein, the doctrine announced on an appeal from such judgment is an authoritative statement upon the law as applied to the facts therein presented; but a finding by the trial court that a certain deed from a husband to his wife reciting a nominal consideration, was voluntary and void as to creditors, there being no showing that it was in fact supported by a valuable consideration, is not *res adjudicata* in a subsequent suit in equity in which a valuable consideration is asserted. Edmonds v. Scharff, 78.

2. **Ouster: Improvement of Street: Verbal Direction: Trespass.** In ejectment against a city for a strip of land, wherein the answer is a general denial, the burden is upon plaintiff to prove that the city was in the wrongful possession of the land at the time the action was brought; and the mere act of the street commissioner in going upon said strip and grading it for street purposes, in obedience to a verbal instruction of the city council, is not the act of the city, and is not sufficient to establish wrongful possession by the city or to maintain ejectment against it, but amounts to no more than a trespass by him. Bennett v. Nevada, 211.

3. **Street Improvement: Ordinance Necessary.** In order to establish, open, extend or alter a street the mayor and city council must by ordinance provide that such improvement shall be made; a mere resolution or verbal motion by the council, instructing the street commissioner to improve a named strip of land, though unanimously adopted and made a matter of record, is void and does not bind the city, and if in obedience to it the street commissioner enters upon the land and grades it for street purposes, his act amounts to no more than a trespass, for which he and possibly those acting with him are liable in damages for the injury done the owner. Ib.

EQUITY.

1. **Conveyance: Nominal Consideration: Voluntary: Correcting Mistake.** If no witness competent to testify is produced to show that a deed from the husband to his wife was supported by a valuable consideration, a recital therein that it was for a nominal consideration prevails, and it must be adjudged void as to his existing creditors, and neither the wife nor her grantees can maintain a suit in equity against them to correct a mistake in it. Edmonds v. Scharff, 78.

2. **———: Cancellation of Beneficiary's Mortgage: Discovery of Defect.** A "mind of legal acuteness" is generally, if not always, required to determine what rights of a beneficiary of a trust are alienable; and where the defect in the mortgage made by the beneficiary is of such character as to render it invalid but can only be dis-

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EQUITY—Continued.

covered by a mind of legal acuteness, a court of equity will remove it as a cloud upon the trustee's title. Maxwell v. Growney, 113.

3. **Conveyance: Cancellation of Beneficiary's Mortgage: Sufficient Facts.** Where the trustee is unable to carry out the powers conferred upon him by the trust instrument unless the suspicion cast upon his tit' by a mortgage made by the beneficiary is removed, and there is no adequate legal remedy open to the trustee, a court of equity will, at his suit, cancel the mortgage. Ib.

4. **Clean Hands: Limitations of Rule.** The rule that he who comes into equity must come with clean hands has its limitations. The particular iniquity which prevents the pursuit of an equitable remedy must relate to the particular matter in hand, and must arise out of the transaction which is the subject of the suit. If the plaintiffs, who by their petition ask that a city commissioner be restrained from destroying their market boxes, who has threatened to destroy them on the ground that they are not of the dimensions prescribed by ordinance, have used the boxes with the understanding that some persons would be deceived as to their contents, they come with unclean hands; but if the facts show that the boxes have long been in use, that the purchasers of their produce fully know their contents, and fail to show that some consumer or purchaser has been deceived, they do not come with unclean hands. Stegmann v. Weeke, 131.

ESTOPPEL.

1. **Laches: Suit for Interest.** Neither *laches* nor estoppel *in pais* is as to her real estate imputable to a married woman who ever since the making of her void deed in 1882 has been under the legal disability of coverture, the reason being that prior to the Married Woman's Acts of 1889 the right of possession of a married woman's lands was in her husband and was a vested right which was not destroyed by those acts, and she could not before or since have maintained an action for possession. Since the Act of 1897 she could have maintained an action to determine interest but was not compelled to do so, but that act did not divest the husband's existing right to possession, or permit her to sue for possession during his life.

   Held by GRAVES, J., dissenting, that the Act of 1897 afforded to a married woman the right to assert her interest in land, and a remedy; and if she stood by for eighteen years after its enactment and saw valuable improvements made upon the land she is barred by estoppel *in pais* from asserting such interest; and estoppel *in pais* goes both to the remedy and the right, and may be set up as a defense in actions at law and suits in equity. Powell v. Bowen, 280.

2. **By Covenant in Void Deed.** A married woman is not estopped to assert her interest in land by a covenant in a deed which is void as to her because not acknowledged in the manner required by statute. The deed being void, any covenant in it cannot be efficacious to produce estoppel. Ib.

3. **Railroads: Regulation of Rates: Agreement Upon Rates Charged.** A railroad company cannot rely upon estoppel under a contract void because in direct conflict with an express constitutional prohibition. Complaints are not estopped to ask the Public Service Commission to reduce within the maximum statutory

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ESTOPPEL—Continued.

charges the freight rates to be charged by a railroad company over its tram or spur lines, by the fact that, when the company was about to cease to operate the spur tracks, they entered into an agreement with it to pay charges in excess of the statutory maximum rates, and the company, in pursuance to the agreement, bought a special engine and expended five thousand dollars in putting the tracks in condition for hauling cars thereon. Mo. Southern v. Pub. Serv. Comm., 484.

EVIDENCE.

1. **Proof of Reputation for Truth: No Attack: Contradictory Statements.** Where there is no direct impeachment of a witness, that is, where no attempt is made to show that his reputation for truth and veracity is bad, evidence showing that his reputation is good is not admissible. Although he has made contradictory statements, either out of court, or in a former deposition, or upon a severe cross-examination at the trial, those things go to his credibility and not to his general reputation, and evidence to show his reputation for truth and veracity to be good is not admissible. [Disapproving a contrary rule announced in Miller v. Railroad, 5 Mo. App. l. c. 481; Walker v. Insurance Co., 62 Mo. App. l. c. 220, and other cases decided by the Courts of Appeals.] Orris v. Rock Island Ry. Co., 1.

2. **Jurisdiction: Collateral Attack: Return in Another Case.** In a partition suit a defendant, whose interest in the land was sold upon execution under a default judgment rendered in another circuit court, has the right to offer the sheriff's return in that case in evidence, for the purpose of showing that the court did not acquire jurisdiction over the persons of the defendants therein, because of insufficient service of the summons. Wells v. Wells, 57.

3. **Negligence: Duty of Engineer: Failure to Testify: Other Inferences.** Where the view was unobstructed for 500 feet before the train reached the public-street crossing where plaintiff's husband was struck, the jury have the right to take into consideration the fact that the engineer and fireman, who of all persons were best prepared to give the actual facts concerning deceased's movements, were not produced as witnesses. Murrell v. Railroad, 92.

4. **Expert: Chiropractic: Deposition: No Timely Objection.** The admission in evidence of the deposition of a chiropractic, who did not qualify so as to give an opinion regarding the effect of plaintiff's injuries upon his physical and mental functions, taken in May, defendant's counsel being present, and read in chief, without objection, at the trial in October, and to which no objection was made until after the deponent's cross-examination was read at some length, and then for the first time counsel for defendant announced that he was going to move to strike out every portion of the testimony which attempted to give an expert opinion, but did not point out specifically the portions he expected to have stricken out, was not error. There being no designation of what portion of the deposition was incompetent, and consequently no ruling as to the admissibility of any specific portion of it, and no timely objection to it, its admission cannot be held to be error. Smith v. K. C. Southern, 173.

5. ———: ———: ———: **Improper Question and Answer Withdrawn.** Plaintiff, in taking the deposition of a chiropractic, asked a question which called for an expert opinion. Defendant objected be-

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EVIDENCE—Continued.

cause deponent was not qualified as an expert. The answer was recorded, an exception saved, the question repeated, and the objection renewed, whereupon plaintiff withdrew both the question and the former question and answer. Deponent was not qualified as an expert, but throughout his deposition, which was read without objection, had in effect answered the same and similar questions in detail. *Held*, that, there being no other exception to the rulings as to the admissibility of deponent's testimony, it cannot be conceived how the question and answer, even if they had not been withdrawn, injured defendant, for they added nothing to what deponent already had testified. Smith v. K. C. Southern, 173.

6. **Res Gestae: Contradicting Witness.** Where the conductor of the train, of which plaintiff was a brakeman, had in his direct testimony for defendant, testified that no one had told him that the brakebeam of the car was down and that he did not know that the fireman or the plaintiff had gone under the car to adjust the beam, and on cross-examination was asked if he didn't come running up to the place where plaintiff was injured and say he had forgot the men were under the car, it was competent, for the purpose of contradiction, to prove by another witness, on rebuttal, that the conductor, at that time, was asked by the engineer why he turned the air on while the men were under the train and that he exclaimed, "My God, I forgot it; I didn't know what I was doing." [Following Gordon v. Railroad, 222 Mo. l. c. 531.] Ib.

7. **Other Burglaries: Conspiracy.** Where there is testimony that defendant, a policeman, entered into an agreement with a burgler and some women by which the moneys and goods stolen by the burglar from houses burglarized by him were to be divided among them, in return for protection to the others by defendant, testimony of other burglaries than the one specified in the indictment, which the burglar testifies were committed about the same time and in pursuance to the continuing conspiracy, is competent. State v. Cummins, 192.

8. ———: **Committed Before Conspiracy Was Formed.** When a witness was testifying concerning the burglarizing of his house defendant objected because it did not then appear that defendant was connected with any burglary except the one specified in the indictment. At that time the witnesses by which the State subsequently attempted to prove that the defendant and one of them had entered into an agreement by which defendant, in consideration of police protection for the other, was to share in the goods stolen, had not testified, and consequently the court could not then tell whether the connection would be later established. It later developed that at the time the witness's house was burglarized defendant had never met his said accomplice, but the objection was not then renewed. *Held*, first, that since the objection was not renewed, the admission of the testimony was not error, and, second, since the accomplice testified that he divided the goods which he stole from said house with defendant, under said agreement, the testimony was competent. Ib.

9. **Sufficient: Burglary and Larceny.** The evidence in this case, which is fully set out in the statement, was sufficient to sustain a conviction of burglary in the second degree and larceny, and assessing defendant's punishment at five years imprisonment for the burglary and five years for the larceny, the evidence being that

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defendant, a policeman, entered into an agreement with a burglar and some women by which, in consideration of protection for them, the burglar was to burglarize dwelling houses in the community and divide the stolen goods among them. Ib.

10. **Assault and Battery: Circumstances.** In an action for damages caused by assault and battery it is always permissible to show the circumstances under which the alleged assault was committed. Bond v. Williams, 215.

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12. ———: ———: **Abusive Language: Recent Occurrence.** In order that evidence of provocation, such as abusive language, may be introduced in mitigation of punitive damages, the provocation must have occurred at the time of the assault, or so recently as to warrant an inference that the defendant was still laboring under the excitement caused by it. But no definite limits for a "cooling time," can be set. So that where plaintiff, in argument to a jury, violently abused two witnesses, characterizing them as liars and perjurers, and an hour and a half afterwards or less, as he was going from the court house to his hotel, they assaulted him, evidence of the violent language used by him was admissible, in mitigation of punitive damages, in his action against them for damages for assault and battery. Ib.

13. **Use of Building for Dormitory: Owner's Konwledge of Use.** There is no necessity of further proof that the owner of the building had knowledge that its lessee, an athletic club, was using the fifth floor of the leased premises for "dormitory" or sleeping purposes prior to the fire which destroyed the building, than the undisputed fact that the building and such floor had been so used for eleven years, during all of which time the owner occupied a portion of it. Ranus v. Boatmen's Bank, 332.

14. **Scaffold: Negligence: Specific Acts: Fall: Burden of Proof.** Testimony that one of the chains supporting the scaffold had become unfastened will support an inference that it was insecurely fastened. But it is not necessary under the statute (Sec. 7843, R. S. 1909) to prove a specific act of negligence which caused the scaffold to fall. The statute requires that the structure "shall be well and safely supported" and "so secured as to insure the safety of persons working thereon," and this language means that the giving way of scaffold and the consequent injury of a workman raises a prima-facie presumption that his employer had failed of his duty and places the burden on him to show that it gave way without any negligence on his part. The statute would possess no force or effect if the injured workman were required to point out a specific defect in the scaffold furnished him, and which fell, causing his injury. Prapuolenis v. Const. Co., 358.

15. ———: ———: ———: **Res Ipsa Loquitur.** While the doctrine of *res ipsa loquitur* does not generally apply to a case arising between master and servant, it is so applied where the injury to the servant is caused by some appliance peculiarly within the master's knowledge and control, of which the servant is ignor-

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EVIDENCE—Continued.

ant and with whose construction or arrangement he has nothing to do. Prapuolenis v. Const. Co., 358.

16. **Libel: Malice: Proof: Other Articles.** The burden of establishing malice or improper motive is upon the plaintiff in a libel suit; and is not established by the introduction of other articles which only show that plaintiff's conduct as a public official was being discussed and censured for the purpose of bringing about needed reforms, as defendant viewed the matter, in the management of a public institution. McClung v. Pub. Co., 370.

17. **Street Improvement: Maintenance: Tax Bills Prima-Facie Regular.** Special tax bills issued for the improvement of a boulevard import prima-facie validity under the charter of Kansas City, and are evidence of the liability of the property for the amount thereof; and an allegation in the petition that the resolution authorizing the improvement provided that the boulevard shall "be paved the full width thereof with bituminous pavement macadam" does not justify the conclusion that the tax bills were issued for maintenance work. Besides, the charter provides for the maintenance of a boulevard by special assessments. Collins v. Jaicks Co., 404.

18. **Sheriff's Deed: Recitals: Judgment as Evidence.** The recitals in a sheriff's deed are prima-facie evidence of the facts therein set forth, and in ejectment the introduction in evidence of the judgment under which the execution sale was made is not necessary to establish title in the purchaser. Ammerman v. Linton, 439.

19. ———: **Recital of Levy.** A sheriff's deed is not required by the statute to recite a levy upon the lands sold. Ib.

20. **Appeal: Printing Evidence Omitted at Trial.** The printing in the abstract of a judgment rendered at a former trial of the case, which was not offered by either party at the trial which resulted in the judgment appealed from, does not put such judgment in the record, and all contentions based on such former judgment are eliminated from the case. Ib.

21. **Competency: Abandoned Objection.** An objection to the competency of a witness as an expert for whom the court stated a reason why he was competent, to which no objection was made, after which the witness testifies without further objection, must be considered as having been abandoned. Threadgill v. United Rys., 466.

22. **Harmless Conclusion.** Where plaintiff had testified that as her automobile turned east to cross the railway tracks she saw a north-bound street car "coming at a rapid rate of speed and at a distance of seven or eight feet from the machine," no harm was done by the statement of a witness for defendant who testified that the street car was not more than eight or ten feet distant when the automobile turned across the track and he "saw they could not help but get hit when they turned across there." Ib.

23. **General Objection.** A mere objection to certain testimony and a mere motion to strike it out, both in the most general terms, no reason being assigned for either the objection or the motion, will not save for review on appeal the court's ruling overruling the motion. Ib.

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EVIDENCE—Continued.

24. **Loss of Boat: Competent Employees.** Where the owner of the leased steamboat assumed all losses covered by insurance policies except those caused by the gross negligence, recklessness, or wilful misconduct of the master, officers or crew of the vessel, testimony of the lessee that the officers and crew selected by him as captain of the vessel were competent and careful and of good reputation in their nautical calling was competent for the purpose of meeting the issue of "wilful misconduct," although it might not have been competent in defense of a specific act of negligence. Packet Co. v. Guaranty Co., 500.

25. ———: **Marine Protest: Used by Protestants to Establish Defense: Self-Serving.** In a suit by the owner of a steamboat, prosecuted by insurance companies for themselves and said owner in the name of the owner, against the lessee and his surety for the value of the boat which sank and was lost, a marine protest, made by the master and other officers and members of the crew at the time of the accident, and made for the benefit of the owner and those interested in the cargo and of the officers and crew as well, and containing a statement under oath of all the circumstances of the voyage leading up to the accident and of the particular accident itself, and containing a statement of the notary that he protests in behalf of all persons interested against the winds, waves and perils of rivers as the cause of the disaster, and used by the insurance companies as a basis of settlement with the owner in whose behalf the insurance was made, is competent evidence on behalf of defendants, for what it is worth, as evidence of its truth against the owner, who, having used it to obtain a settlement from the insurance companies, nevertheless seeks to recover from the lessee and his surety by disputing the facts stated in it whose truth he asserted when he obtained the settlement. Ib.

26. **Opinion Growing Out of Experience.** An expression of an opinion by witnesses who have by actual experience obtained knowledge of the matters concerning which they testify is not incompetent or prejudicial. Ib.

27. **Damages: Life Expectancy of Plaintiff: Prior Contributions.** In a suit by a father for compensation by way of damages for the negligent killing of his adult son, the testimony should develop the exact number of months the son contributed to the support of his parents, and the amount contributed each month, or in some other way establish an exact basis for calculating what the son would have contributed to their support during their life expectancy had he lived. McCord v. Schaff, 558.

28. **Failure to Call Witness With Knowledge.** The failure of a party to call witnesses within his power who know vital facts affecting the issue on trial is to be taken as a strong circumstance against him. So where a locomotive engine exploded because of a lack of a proper amount of water in its boiler and such explosion caused the death of the fireman, and the main issue at the trial was whether it was the duty of the engineer to see to it that the boiler was properly supplied with water, the fact that the railroad company, when sued for damages by the fireman's father, did not call the engineer, or a student fireman who was on the engine, neither of whom was injured, or account for its failure to call them, is a strong circumstance against the

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EVIDENCE—Continued.

defendant, in the absence of any testimony that the fireman was directed or asked or assumed to pump water into the boiler. McCord v. Schaff, 558.

29. **Negligence: Defective Appliances: Irrelevant: Allegata et Probata.** If the action for damages was tried on allegations that it was the duty of the engineer in charge of the engine which exploded to see that it was properly supplied with water, that he negligently failed to perform that duty, that such failure was the proximate cause of the explosion of the boiler and that the death of the fireman resulted from such negligence, defective appliances could not affect the case, and expert testimony and speculation as to whether the appliances for supplying water to the boiler were defective were irrelevant; but, it being conceded that the explosion was due to an insufficient amount of water in the boiler, the whole issue, under such charge, was whether it was the duty of the engineer to see to it that the boiler was properly supplied. Ib.

30. **Negligence: Telephone Communication.** Where an electric light company had a telephone in its office with a given number and said number was published in the telephone directory, and a user of said telephone called said number and some one answered by giving the name of the company, a communication then imparted to the said company that its electric wires in a certain locality were crippled, to which the reply came, "All right; we will attend to it," is admissible evidence in a subsequent action for damages by a boy who was burned by one of said crippled wires, even though the witness did not know the name of the person who answered for the company. Meeker v. Elec. Co., 574.

31. **Taxes: Prima-Facie Case: Interstate Railway.** The record of the valuation and assessment of the property of an electric railway over an interstate bridge of the State Board of Equalization made in scrupulous conformity to the methods and plans prescribed by the statute, and certified by the State Auditor, together with an admitted correct copy of the tax bill containing complete itemizations of the kind of property and rate of taxation, makes a prima-facie case against such railway for such taxes. State ex rel. Hagerman v. Elec. Ry. Co., 616.

32. ———: ———: **Tax Bill.** The statute does not require that the tax bill be filed with the petition in a suit against railroads for delinquent taxes. It makes the record of the State Board of Equalization certified by its secretary prima-facie evidence of the facts therein recited in such suits. But a correct tax-bill can be offered as evidence. Ib.

33. **Death in Dormitory: Insufficient Fire Escapes: Proximate Cause: Res Ipsa Loquitur.** When fire safety-appliance laws are violated, and death, unexplained except by the physical facts, occurs as a result of fire in a building not equipped with the required appliances, but which is by law required to be so equipped, the case should go to the jury under the rule of *res ipsa loquitur*, although there is no positive evidence that the death was due to a lack of such appliances. Even though there was no physical obstruction between the room in which deceased was sleeping and a near-by exit to a fire escape unless the fire barred the way, yet if no person sleeping in other rooms opening on the corridor escape by said exit, and there is further evidence from which it may be inferred that had there been the required appliances at another part of the corridor he might

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EVIDENCE—Continued.

have escaped, the rule applies, and the jury must determine the proximate cause of his death. Newell v. Boatmen's Bank, 663.

34. **Negligence: Inferred from Facts.** If the legitimate inference which may be drawn from the facts establish the negligence alleged, the case of negligence is made. Krinard v. Westerman, 680.

35. ———: ———: **Malpractice: Operation by Surgeon.** Plaintiff was afflicted with a fibroid tumor of the uterus, and applied to defendant to remove it, and in the operation he cut a hole in her bladder, and tied off one of the ureters. Plaintiff alleged that these things were negligently done, and the defendant asserted that they were necessary because the parts were diseased and cancerous. The evidence shows that immediately after the operation he pronounced it a perfect success, and did not for a month inform plaintiff that he had made an incision in the bladder, and then when informed that there was a constant flow of urine he told her that he had done so in order to remove the diseased parts and that there would have to be a second operation, although he had all along told her and her friends that she was getting along nicely. When the necessity for a third operation arose, she suggested that a famous surgeon be called to assist, at which he became enraged. Both before and after this third operation she was examined by other physicians who found no evidence of diseased or cancerous conditions. The evidence showed that the tieing of the ureter would kill the kidney, and that prior to the operation the kidney was healthy and normal, and afterwards it had no life in it. *Held*, that negligence could be inferred from these facts, and the court committed no error in submitting the case to the jury. Ib.

EXECUTION.

1. **Sheriff's Sale: Pending Appeal: Subsisting Judgment Against Non-Appealing Defendant.** A sale upon special execution issued upon a judgment against a mortgagor who did not appeal and which was never disturbed as to him, made during the pendency of the appeal which resulted in reversing the judgment rendered in behalf of the other defendant, was a sale, as to such non-appealing defendant, under a subsisting judgment. Ammerman v. Linton, 439.

2. ———: **At Second Term: Written Stipulation.** A sheriff's sale is not invalid because made at the second term after the issuance of special execution, rather than at the first. Besides, it is in poor grace to urge any infirmity in the sale on the ground that it was made at the second term where the parties have entered into a written agreement postponing the sale to that term in order that defendants might have longer time to redeem under the mortgage which was the basis of the judgment. Ib.

FELLOW SERVANT.

1. **Negligence: Carpenter and Common Laborer.** A carpenter constructed the platform on which the men were to work in taking down the scaffolding, and a common laborer had nothing to do with its constructing and knew nothing about it. Later after the platform was completed, the carpenter and laborer stood on the platform and were working together in taking down and receiving the timbers of the scaffold when the platform fell, injuring the laborer. *Held*, that they were not fellow-servants in

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FELLOW SERVANT—Continued.

the work of constructing the platform, and as the laborer's action for damages is based on a violation of the statute requiring employers to furnish safe scaffolds or structures for such work, his action is not barred on the theory that his injuries were due to the negligence of a fellow-servant. Prapuolenis v. Const. Co., 358.

2. **Negligence: Carpenter and Common Laborer: Detached Employee.** When the master uses one servant to construct a place in which he and other servants are to work, and the place is made unsafe by that servant, and a fellow-servant who was not employed in that particular work is injured because of the defect, he is not the fellow-servant of the one who did that particular work so as to defeat recovery. Ib.

FIRE ESCAPE. See **Negligence, 23 to 26, and 51 and 52.**

FORFEITURE.

Abhorrence: The law abhors a forfeiture, and this aversion has resulted in the rule that it may be prevented by a construction as technical as that by which it is invoked. Barber v. Ins. Co., 316.

FORMER ADJUDICATION.

1. **Ejectment: Voluntary Conveyance: Former Appeal.** While a judgment in ejectment is not *res adjudicata* as to any issue determined therein, the doctrine announced on an appeal from such judgment is an authoritative statement upon the law as applied to the facts therein presented; but a finding by the trial court that a certain deed from a husband to his wife, reciting a nominal consideration, was voluntary and void as to creditors, there being no showing that it was in fact supported by a valuable consideration, is not *res adjudicata* in a subsequent suit in equity in which a valuable consideration is asserted. Edmonds v. Scharff, 78.

2. **Insurance: Decision of U. S. Supreme Court: Assessment: State Tax.** Only such questions as were before the court and were decided by it upon writ of error become the law of the case by force of its judgment therein. A decision of the Supreme Court of the United States holding that the Supreme Court of Missouri, in passing on the validity of certain assessments by an insurance company organized under the laws of Connecticut, had not given full faith and credit to certain public acts and judicial proceedings of the State of Connecticut, was not an adjudication of the validity of that portion of each assessment, including the one on which the alleged forfeiture was based, which included a state tax of two per cent of the amount thereof, nor of that portion of the unpaid assessment which contained a charge of quarterly expense dues not yet due; for the former judgment of the Supreme Court of Missouri was based on no such grounds, but was simply against the validity of the assessment and the forfeiture of the certificate for non-payment, and the question of the right of the company to include the state tax as a part of said assessment, and to declare a forfeiture for its non-payment, is one arising under a state statute, of which the Supreme Court of the United States could take no cognizance upon a writ of error, it being the rule of that court to leave to the state courts the duty of ascertaining and determining the contractual relations of parties dependent solely upon a state law; and, besides, that court did not attempt to determine the validity of assessments which included the state tax. Barber v. Ins. Co., 316.

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FORMER ADJUDICATION—Continued.

3. **Reversal of Judgment: Remand for Retrial: Further Procedure.** When a judgment is reversed by the Supreme Court and the cause is remanded for a new trial, the trial court has jurisdiction, not only to retry the issues of fact presented by the pleadings in the first trial in accordance with the principles announced in the judgment of reversal, but also to reframe those issues as provided by the Code of Civil Procedure; for a retrial does not mean a mere replica of the former trial, but is a trial in the light of the experience and knowledge acquired in the interval. Ib.

GUARANTY BOND. See **Receiver.**

HUSBAND AND WIFE.

Public Road: Estate by Entirety: Wife Not Party. A proceeding to establish a public road through lands owned by a wife and her husband as cotenants by the entirety, is void as to the wife who was not notified of the proceeding and did not appeal, although her husband was made a party and contested the establishment of the road. Ripkey v. Gresham, 521.

INJUNCTION.

1. **Corporation: Sale of Properties: Annihilation.** A corporation organized for the express purpose of buying and selling real estate will not be destroyed by a sale of a large tract of land belonging to it; and an injunction suit to enjoin the sale, brought by a minority of the directors against the majority, who in regular meeting assembled have authorized the sale, cannot be maintained on the ground that such sale will annihilate the corporation. Hendren v Neeper, 125.

2. **Dismissal Without Hearing.** In an injunction, if the bill states a cause of action entitling plaintiff to a hearing on the merits and he does not in any way waive his right to have the case proceed in due course, it would seem, though it is not decided, that, under Sec. 2532, R. S. 1909, the court is not authorized to dismiss the bill without a hearing on the merits and without having passed upon the matter of issuing a temporary restraining order. Stegmann v. Weeke, 131.

3. **Moot Case: Abatement: Costs.** An appeal from a judgment dismissing plaintiff's bill for an injunction at their cost will not abate unless thereby they are given a full measure of relief. Before a defendant may abate a case by complying with the demands of the petition, he must comply with all its demands, including the payment of costs. Ib.

4. ———: ———: **Threat to Continue Wrong.** An injunction to restrain a city officer from destroying the market boxes of plaintiff's, who are farmers and gardeners, will not abate an appeal on the ground that the objectionable sections of the ordinance under which defendant had destroyed their boxes had been repealed after the case was submitted and others enacted in lieu thereof, if the defendant has threatened to destroy, without a hearing, all boxes he believes to be of different dimensions from those prescribed by the ordinance as amended. In view of such threat, the determination of the case does not turn upon a mere moot question. Ib.

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INJUNCTION—Continued.

5. **Clean Hands: Determined Without Hearing.** The trial court is not empowered to decide, without a hearing on the merits, upon a mere preliminary consideration of the question whether upon the face of the petition a temporary restraining order should be issued, that the plaintiffs have not come into court with clean hands. Stegmann v. Weeke, 131.

6. ———: **Limitations of Rule.** The rule that he who comes into equity must come with clean hands has its limitations. The particular iniquity which prevents the pursuit of an equitable remedy must relate to the particular matter in hand, and must arise out of the transaction which is the subject of the suit. If the plaintiffs, who by their petition ask that a city commissioner be restrained from destroying their market boxes, who has threatened to destroy them on the ground that they are not of the dimensions prescribed by ordinance, have used the boxes with the understanding that some persons would be deceived as to their contents, they come with unclean hands; but if the facts show that the boxes have long been in use, that the purchasers of their produce fully know their contents, and fail to show that some consumer or purchaser has been deceived, they do not come with unclean hands. Ib.

7. **Measurements: Bushel Boxes of Given Dimensions: Oppressive Enforcement.** Plaintiffs cannot have an injunction to restrain the city from pursuing some unexpected and unthreatened prosecution. If the ordinance requires plaintiffs in marketing their vegetables and produce to use boxes having the number of cubic inches prescribed by statute for bushel and half-bushel containers, and fixes a penalty for the use of boxes of different capacity, and also goes further and prescribes that boxes of those capacities shall be of certain length, breadth and width but prescribes no penalty for the use of boxes of different dimensions, and their contention is that the ordinance interferes with their use of boxes of a smaller capacity which have long been in use, and they make no showing that they intend to use boxes of the prescribed capacity, the ordinance will not be held to be invalid on the theory that it will be interpreted to mean that they must use boxes of the specified dimensions and therefore will be oppressively and illegally enforced. Stegmann v. Weeke, 140.

INSTRUCTIONS.

1. **Not to Consider Character of Injury: Misleading.** In a case in which the character of the injury is a material link in the chain of circumstances tending to show negligence, an instruction which declares "the court instructs you that the mere fact that plaintiff was injured while employed by defendant is of itself no evidence whatever of defendant's negligence or liability, and there can be no recovery by the plaintiff unless the plaintiff has by a preponderance of the creditable evidence in the case established negligence on the part of the defendant, as described in other instructions herein," is misleading and harmful, in that it authorizes the jury to disregard the character of plaintiff's injury, and to conclude that "the creditable evidence" means evidence other than evidence as to the injury and character of the injury.
   Held, by BOND, C. J., dissenting, that injury does not of itself warrant an inference of negligence in cases in which the doctrine of *res ipsa loquitur* has no application. Orris v. Rock Island Ry. Co., 1.

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INSTRUCTIONS—Continued.

2. **Limiting Evidence to Circumstantial Evidence.** Where all the evidence pertaining to the particular issue submitted by the instruction is circumstantial, a statement therein that plaintiff seeks to prove such issue by circumstantial evidence is not error; but if there is positive and direct evidence on that particular issue an instruction restricting the proof to circumstantial evidence would be misleading. Ib.

3. **Assumption of Fact.** An instruction should not assume the existence of a disputed fact. Even when there is ample evidence from which the jury may find that the tool furnished the employee was in usual and ordinary repair, that fact does not justify an assumption in the instruction that the tool was in usual and ordinary repair. Ib.

4. **Conflicting: Omitting Element of Negligence: Safe Condition.** An instruction which directs a verdict for defendant if the spark-arrester of the engine on which plaintiff was fireman was in good condition, conflicts with one given for plaintiff which requires the flues also to be in good condition, the petition having charged that the injury to his eye by a burning cinder was due to a combination of defects in the flues and the spark-arrester. There being positive evidence that the flues were stopped up, and that their defective condition might have caused the injury even if the spark-arrester was in good condition, an instruction which omits all reference to the flues and directs a verdict for defendant if the spark-arrester was in good condition is error. Ib.

5. **Knowledge: Actual and Imputed.** Where the evidence tends to show that the conductor was told the brakebeam of a car was down and knew the plaintiff had gone under the car to adjust it, but did not necessarily know plaintiff was still under the car at the time he "cut in the air" which caused the floating lever to move and strike the plaintiff's head, and where there is also evidence tending to show that a "spot" signal was given, which required the conductor to know that something was wrong about the train concerning which it was his duty to obtain information, an instruction which tells the jury that if the conductor, at the time he cut in the air, knew, "or in the exercise of ordinary and reasonable care could and should have known," that the plaintiff was under the car, the defendant was guilty of negligence, is proper; the question, under such circumstances, is not solely one of actual knowledge. Smith v. K. C. Southern, 173.

6. ———: ———: **Theory of Trial.** Besides, instructions offered by defendant telling the jury that if the conductor did not know and "could not have known in the exercise of ordinary care" plaintiff's perilous position he could not recover, precludes defendant from insisting that plaintiff's instruction should have confined his right to recover to the conductor's actual knowledge. Ib.

7. **Uncorroborated Testimony of Accomplice.** An instruction telling the jury that they are at liberty to convict the defendant upon the uncorroborated testimony of an accomplice alone, if they believe his statements are true and sufficient to establish defendant's guilt, but that such testimony, when not corroborated, ought to be received with great caution, is not error. State v. Cummins, 192.

8. **Assumption of Disputed Fact.** An instruction telling the jury that "evidence of other burglaries and larcenies were admitted by the

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INSTRUCTIONS—Continued.

court solely for the purpose of determining whether a conspiracy" existed between defendant and his accomplice to burglarize various dwellings in the city "and you are to consider this evidence for no other purpose," did not assume that other burglaries had been committed or that defendant had committed them. State v. Cummins, 192.

9. **Malice: Definition.** An instruction declaring "malice in its legal sense does not mean mere spite, ill-will or hatred, as it is ordinarily understood, but does mean that state of disposition which shows a heart regardless of social duty and fatally bent on mischief" is appropriate in an action for assault and battery, and does not materially differ in its meaning from one defining malice as "a wrongful act done intentionally without legal justification or excuse;" and if appellant asked an instruction defining malice in the latter words and respondent the former instruction, and both were given, appellant had the benefit of both definitions, and hence cannot complain that the court did not use only his to define the term. Bond. v. Williams, 215.

10. **General Improvement: Separate Verdicts.** Where the charter and ordinance provide for one general improvement of a highway, crossed by thirteen streets, it is error to instruct the jury that the damages and benefits from the grading of the highway and each intersecting street are to "be considered and determined separately" and that thirteen separate verdicts are to be rendered. In re 23rd Street v. Crutcher, 249.

11. **To Disregard Testimony.** In so far as an instruction attempts to direct a jury to exercise their own judgment as to the damages and benefits free from any connection with the testimony, it is error. Ib.

12. **General Improvement: Individual Benefit to Lot: Separate Assessment.** Where the charter and ordinance unite all elements of the street improvement into one general improvement, it is error to instruct the jury that they "have no right to assess any lot to pay for any of the proposed street improvements, except for such improvement as will actually benefit the particular lot," or that they "have no right to assess any greater sum against any lot than it will be actually benefited by the particular improvement." The improvement being a general one, no attempt should be made to accredit any one portion of the improvement with benefits apart from the others, except to separate the grading benefits from the condemnation benefits. Ib.

13. ———: **Damages Exceeding Benefits: As to Particular Lots.** Where the court has told the jury that the proposed street improvement is necessary as a matter of law, and that if they find the entire damages exceed the benefits they should go no further, but so report, another instruction telling them that if they find that "the total benefits from the proposed grading of any intersecting street do not equal the amount of damages to lots on such street, then you need to proceed no further as to such intersecting street," is error, in that it conflicts with the other correct instruction, and besides is contrary to the law governing such cases. Ib.

14. **Damages to Non-Abutting Property.** Where the charter and ordinances made 23rd Street and the intersecting streets one for the purpose of the improvement, an instruction telling the jury that only property abutting on 23rd Street is entitled to damages

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INSTRUCTIONS—Continued.

is error, the evidence tending to show that the deep cut in 23rd street deprives the owners of property abutting on the intersecting streets of vehicular access therteo. Ib.

15. **No Exception.** A failure of appellant to mention in its motion for a new trial an instruction given by the court of its own motion precludes a consideration of any error therein on appeal. Packet Co. v. Guaranty Co., 500.

16. **Loss of Steamboat: Cause.** If the owner of a steamboat assumed all losses covered by insurance thereon except losses due to negligence or wilful conduct of the master, officers or crew or from overloading, it was not error to instruct the jury that such owner and surety were "not required to show definitely and certainly what caused the sinking of the steamer," for if they showed that the vessel was handled with care and skill and was not overladen, it became the duty of the owner, in suing for the value of the boat which sank, to show what the cause of the loss was to be found in some one of the exceptions mentioned in the contract. Ib.

17. **Damages: Compensation: Life Expectancy of Plaintiff.** An instruction on the amount of damages which a plaintiff may recover as compensation for the negligent death of another is erroneous which bases the damages solely on the life expectancy of the deceased and does not require the jury to take into consideration the plaintiff's expectancy in determining said amount; and where a father sues for the loss of his adult son, the instruction should take into consideration the life expectancy of the father alone. McCord v. Schaff, 558.

18. **Negligence: Separate Acts: Proof of One: Broadening Issues.** Where plaintiff's petition charges three separate acts of gross negligence, proof of any one of them which was the proximate cause of his injury will justify a verdict in his favor; and an instruction which submits the three charges alleged, does not broaden the issues. Meeker v. Elec. Co., 574.

19. ———: **Malpractice: Degree of Physician's Skill.** A physician or surgeon undertaking the treatment of a patient is required to possess and exercise that degree of skill and learning ordinarily possessed and exercised by the members of his profession in good standing, practicing in similar localities. It is not sufficient that he use the degree of skill possessed by reasonably skillful surgeons or physicians "in the community in which he is practicing." Krinard v. Westerman, 680.

20. ———: ———: **Degree of Specialist's Skill.** A physician holding himself out as having special knowledge and skill in the treatment of particular diseases, and sued as such, is bound to bring to the discharge of his duty as such specialist, not merely the average skill possessed by general practitioners, but that special degree of skill and knowledge possessed by physicians who are specialists in the treatment of such diseases, in the light of the present state of scientific knowledge. Ib.

21. ———: ———: **Measure of Damages: Future Operation.** Where there is evidence that the needless cutting of one of the ureters causes the corresponding kidney to die, that about fifty per cent of dead kidneys produce infection, and that such infection makes necessary a major operation, accompanied with pain and is expensive, it is not error, in instructing the jury on the measure of damages,

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INSTRUCTIONS—Continued.

that they may take into consideration what suffering plaintiff may endure in the future for operations she may hereafter be required to have performed. Krinard v. Westerman, 680.

22. **Negligence: Malpractice: Use of Word "May."** The instruction should limit defendant's liability for future pain to reasonable certainty and not bare possibility, and consequently the use of the word "may" is liable to mislead the jury; but courts take an instruction as a whole, and if the word "may" as used with its context does not appear misleading, its use will not constitute reversible error. Ib.

23. ———: ———: **Surgeon's Fees.** Evidence that plaintiff as a result of her injuries, had paid definite sums of money and that she had stated accounts for other expenses incurred but not paid, is definite enough to support an instruction that the jury allow her the money she had expended for physicians, nurses and medicines, especially where the jury are definitely told that she had neither paid nor had a statement of the amount she owed other physicians and that those items were not included in the sum named as the aggregate of her expenses incurred. Ib.

INSURANCE.

1. **Policy: Acceptance.** Inconclusive negotiations concerning an insurance policy, which contains a clause that the insurance shall not take effect until the first premium is paid and the policy delivered to and accepted by the insured during lifetime and in good health, do not constitute an insurance contract. The facts of this case are reviewed, and it is held that the policy tendered by the company was never unconditionally accepted during the good health of the insured, or that the company understood that the policy sent and received was accepted, or was acceptable except upon a condition which could not be met, and that therefore there was no completed contract. Ins. Co. v. Salisbury, 40.

2. ———: **Non-Payment of First Premium.** A stipulation in an insurance policy requiring the first premium to be paid in advance and during the good health of the insured as a condition upon which it is to take effect is enforcible, and if the first premium was neither paid nor tendered during the insured's good health the policy did not become effective, and there is no enforcible insurance contract. Ib.

3. ———: **Payment Recited in Policy.** The payment of the first premium, where the policy itself recites that such first premium was made, cannot be disputed for the purpose of invalidating the policy; but where the recital is that "the insurance is granted in consideration of the payment in advance" of a named sum of money, "being the premium for the first year's insurance under this policy," the recital is not a specific recital of payment, but a mere statement that the first payment shall be the consideration for the issuance of the policy. Ib.

4. **Suit on Lost Instrument: Policy: Affidavit.** The statutes requiring that in a suit founded upon a written instrument, if "the debt or damages claimed may be ascertained" therefrom, such instrument "shall be filed with the justice, and no other statement or pleading shall be required," and if such instrument shall be lost an affidavit stating such loss or destruction and setting forth the substance of the instrument, do not apply to a life insurance

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policy, for an insurance policy is not such an instrument, since it cannot be ascertained from its face the debt or damages due; and hence, it cannot be ruled that the justice fails to obtain jurisdiction of the subject-matter of an action for an amount alleged to be due on an insurance policy, on the sole ground that neither the policy nor an affidavit that it was lost was filed with the justice. Graves v. Ins. Co., 240.

5. **Extended Policy: Failure to Give Notice of Insured's Death: Bar to Recovery.** Sections 6946 and 6948, Revised Statutes 1909, providing that, in case of extended life insurance, notice of the claim and proof of death must be submitted to the company within ninety-days after insured's death, must be read and construed together, and a failure to give notice and make proof of death within such time, absent waiver or estoppel or other matter of avoidance, defeats recovery. A claim under the policy is not, by said statutes, strictly speaking, defeated by reason of forfeiture, but because failure to give notice and make proof of death constitutes a failure to perform a statutory requirement essential to the creation of a valid claim against the company. Ib.

6. **Res Adjudicata: Decision of U. S. Supreme Court: Assessment: State Tax.** Only such questions as were before the court and were decided by it upon writ of error become the law of the case by force of its judgment therein. A decision of the Supreme Court of the United States holding that the Supreme Court of Missouri, in passing on the validity of certain assessments by an insurance company organized under the laws of Connecticut, had not given full faith and credit to certain public acts and judicial proceedings of the State of Connecticut, was not an adjudication of the validity of that portion of each assessment, including the one on which the alleged forfeiture was based, which included a state tax of two per cent of the amount thereof, nor of that portion of the unpaid assessment which contained a charge of quarterly expense dues not yet due; for the former judgment of the Supreme Court of Missouri was based on no such grounds, but was simply against the validity of the assessment and the forfeiture of the certificate for non-payment, and the question of the right of the company to include the state tax as a part of said assessment, and to declare a forfeiture for its non-payment, is one arising under a state statute, of which the Supreme Court of the United States could take no cognizance upon a writ of error, it being the rule of that court to leave to the state courts the duty of ascertaining and determining the contractual relations of parties dependent solely upon a state law; and, besides, that court did not attempt to determine the validity of assessments which included the state tax. Barber v. Ins. Co., 316.

7. **Assessment: State Tax as Part.** An assessment which includes as a part thereof the two per cent tax mentioned in Section 7099, Revised Statues 1909, is void, and its non-payment constitutes no ground for a forfeiture of the certificate of insurance. Ib.

8. ———: ———: **Doing Business as Old-Line Company.** The fact that defendant, since it issued the certificate of insurance, has ceased to issue certificates on the assessment plan and is now doing its assessment business without a special license therefor, but is doing business simply as an old-line joint-stock company, does not affect the substantial rights of the parties to an action on

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INSURANCE—Continued.

the certificate, nor relieve it of the wrong of including the two per cent tax in the assessments. Barber v. Ins. Co., 316.

9. **Assessment: State Tax As Part: Smallness of Tax.**. The fact that the tax improperly included in the insured's assessment amounted to only fifteen cents on each assessment, and that the entire mortuary fund to which it accrues belongs to the certificate-holders, is no ground for upholding an attempted forfeiture of the certificate, where the insured, prior to the attempted cancellation, not only paid illegal exactions amounting to nearly, if not quite, the amount of his alleged delinquency, but also paid a considerable sum into a fund which is held for distribution among living certificate-holders when the amount thereof in force shall have been reduced to one million dollars. Ib.

10. **Forfeiture.** The law abhors a forfeiture, and this aversion has resulted in the rule that it may be prevented by a construction as technical as that by which it is invoked. Ib.

11. **Damages: Attorney's Fees.** The fact that when the case was before the court on a former appeal it committed error which caused a reversal of its judgment by the Supreme Court of the United States, did not affect the right of plaintiff to damages for vexatious delay and attorney's fees on a retrial. Ib.

12. **Steamboat: Rented: Losses Covered.** The owner of a boat, having rented it to defendant and having assumed in the charter-party all losses covered by the insurance policies, can recover from the lessee, or from the surety on his bond, which included the charter-party, for no loss which was not covered by the insurance. and consequently the only question in a suit to recover from the lessee and his surety the value of the boat which sank is whether the losses were covered by the insurance. Packet Co. v. Guaranty Co., 500.

13. **Loss of Steamboat: Cause.** If the owner of a steamboat assumed all losses covered by insurance thereon except losses due to negligence or wilful conduct of the master, officers or crew or from overloading, it was not error to instruct the jury that such owner and surety were "not required to show definitely and certainly what caused the sinking of the steamer;" for if they showed that the vessel was handled with care and skill and was not overladen, it became the duty of the owner, in suing for the value of the boat which sank, to show what the cause of the loss was to be found in some one of the exceptions mentioned in the contract. Ib.

14. **Evidence: Loss of Boat: Competent Employees.** Where the owner of the leased steamboat assumed all losses covered by insurance policies except those caused by the gross negligence, recklessness, or wilful misconduct of the master, officers or crew of the vessel, testimony of the lessee that the officers and crew selected by him as captain of the vessel were competent and careful and of good reputation in their nautical calling was competent for the purpose of meeting the issue of "wilful misconduct," although it might not have been competent in defense of a specific act of negligence. Ib.

15. **———: Marine Protest: Used by Protestants to Estabish Defense: Self-Serving Evidence.** In a suit by the owner of a steamboat, prosecuted by insurance companies for themselves and said owner in the name of the owner, against the lessee and his surety for

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INSURANCE—Continued.

the value of the boat which sank and was lost, a marine protest, made by the master and other officers and members of the crew at the time of the accident, and made for the benefit of the owner and those interested in the cargo and of the officers and crew as well, and containing a statement under oath of all the circumstances of the voyage leading up to the accident and of the particular accident itself, and containing a statement of the notary that he protests in behalf of all persons interested against the winds, waves and perils of rivers as the cause of the disaster, and used by the insurance companies as a basis of settlement with the owner in whose behalf the insurance was made, is competent evidence on behalf of defendants, for what it is worth, as evidence of its truth against the owner, who, having used it to obtain a settlement from the insurance companies, nevertheless seeks to recover from the lessee and his surety by disputing the facts stated in it whose truth he asserted when he obtained the settlement. Ib.

16. **Parol Contract: Consideration Must be Pleaded.** A petition based on a parol contract of insurance, which neither avers the payment of a premium nor a promise to pay, does not state a cause of action; for no consideration being alleged or implied, the petition is fatally defective. Swift v. Ins. Co., 606.

17. ———: ———: **Amendment After Judgment.** A petition which states no cause of action at all cannot be amended after judgment so as to state one. If the parol contract sued on was a mere *nudum pactum* and no consideration was pleaded, the petition cannot be amended after trial and judgment so as to allege a consideration. A petition which absolutely states no cause of action cannot be amended after judgment. Ib.

18. ———: **In Praesenti: Fire Insurance: For Future: Variance.** A parol contract for insurance to begin on a certain day in the future and to run for one year may be entered into by the parties, and where the premium is collected the courts enforce it; and the fact that the agreement was for the same amount of insurance as that named in an existing policy, but at an increased rate, does create a fatal variance between the proof and an allegation that "the contract so entered into was upon the same general terms and conditions as those embraced" in the previous written contract. Ib.

INTEREST. See **Usury.**

JUDGE DISQUALIFIED. See **Courts, 1.**

JUDGMENTS.

Disqualification of Judge: Judgment of Dismissal: Void Execution. A judgment rendered by a judge not authorized to hear or determine a case is subject to collateral attack; and where a cause was submitted to a special judge and by him taken under advisement, and one of the counsel in the case afterwards became the regular circuit judge, a subsequent judgment of dismissal rendered by such regular judge is void, and an execution for costs and sale of lands thereunder are likewise void. Edmonds v. Scharff, 78.

JUDICIAL SALES.

1. **Sheriff's Deed: Recitals: Judgment as Evidence.** The recitals in a sheriff's deed are prima-facie evidence of the facts therein set

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JUDICIAL SALES—Continued.

forth, and in ejectment the introduction in evidence of the judgment under which the execution sale was made is not necessary to establish title in the purchaser. Ammerman v. Linton, 439.

2. **Sheriff's Deed: Recital of Levey.** A sheriff's deed is not required by the statute to recite a levy upon the lands sold. Ib.

3. **Sheriff's Sale: Pending Appeal: Subsisting Judgment Against Non-Appealing Defendant.** A sale upon special execution issued upon a judgment against a mortgagor who did not appeal and which was never disturbed as to him, made during the pendency of the appeal which resulted in reversing the judgment rendered in behalf of the other defendant, was a sale, as to such non-appealing defendant, under a subsisting judgment. Ib.

4. ———: **At Second Term: Written Stipulation.** A sheriff's sale is not invalid because made at the second term after the issuance of special execution, rather than at the first. Besides, it is in poor grace to urge any infirmity in the sale on the ground that it was made at the second term where the parties have entered into a written agreement postponing the sale to that term in order that defendants might have longer time to redeem under the mortgage which was the basis of the judgment. Ib.

5. ———: **Collateral Attack: Misleading Notice.** A lack of proper notice of a judicial sale is an irregularity which renders the sale voidable, but not void; and being only voidable, the sheriff's deed, made under execution, cannot, because of an infirmity in the notice be attacked in a collateral proceeding such as an ejectment brought by the purchaser. So where the special execution recited that the debt and costs were declared a lien upon the land, and the sheriff's deed contained the same recitals, the deed cannot be attacked in ejectment on the ground that the notice of sale stated that one of the defendants owned all the lands as tenant by the entirety jointly with the other defendant and that it was the interest of such tenant that would be sold. Ib.

JURISDICTION.

1. **Collateral Attack: Return in Another Case.** In a partition suit a defendant, whose interest in the land was sold upon execution under a default judgment rendered in another circuit court, has the right to offer the sheriff's return in that case in evidence, for the purpose of showing that the court did not acquire jurisdiction over the persons of the defendants therein, because of insufficient service of the summons. Wells v. Wells, 57.

2. **Sheriff's Return: Words Understood.** If the sheriff's return recites that he left a copy of the writ and petition "with a person family" of said defendants, the words "of the" will be understood between "person" and "family." so that it would read "with a person of the family" of defendants. Ib.

3. ———: **Service Upon Husband and Wife.** If the defendants are husband and wife, and cannot be found in the county, it is proper for the sheriff to leave a copy of the petition and writ, and a copy of the writ, "with a person of the family" of said defendants, at their usual place of abode, over fifteen years of age. One such person, in contemplation of the statute, represents both defendants. Ib.

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JURISDICTION—Continued.

4. ———: ———: **Copies for Each.** Where the defendants are husband and wife and cannot be found, the leaving of copies of the petition and writ for one, and a copy of the writ for the other, with some person of the family of said defendants, over fifteen years of age, at their usual place of abode, is all that the statute requires. If it could be construed to require such person to deliver a copy of the petition and writ to the first party served, and a copy of the writ to the other, still, in the absence of evidence to the contrary, it will be presumed that both the sheriff and said person did their duty. Ib.

5. **The Return Adjudicated.** The sheriff's return recited: "I hereby certify that I expected the within writ in Lincoln County, Missouri, on 26th day of September, 1907, by leaving a copy of the writ and petition and a copy of the writ with a person family of said Emeline M. Wells and James B. Wells at their usual place of abode over the age of fifteen years." *Held*, sufficient to uphold a default judgment. Ib.

6. **Disqualification of Judge: Judgment of Dismissal: Void Execution.** A judgment rendered by a judge not authorized to hear or determine a case is subject to collateral attack; and where a cause was submitted to a special judge and by him taken under advisement, and one of the counsel in the case afterwards became the regular circuit judge, a subsequent judgment of dismissal rendered by such regular judge is void, and an execution for costs and a sale of lands thereunder are likewise void. Edmonds v. Scharff, 78.

7. **Suit on Lost Instrument: Insurance Policy: Affidavit.** The statutes requiring that in a suit founded upon a written instrument, if "the debt or damages claimed may be ascertained" therefrom, such instrument "shall be filed with the justice, and no other statement or pleading shall be required," and if such instrument shall be lost an affidavit stating such loss or destruction and setting forth the substance of the instrument, do not apply to a life insurance policy, for an insurance policy is not such an instrument, since it cannot be ascertained from its face the debt or damages due; and hence, it cannot be ruled that the justice fails to obtain jurisdiction of the subject-matter of an action for an amount alleged to be due on an insurance policy, on the sole ground that neither the policy nor an affidavit that it was lost was filed with the justice. Graves v. Ins. Co., 240.

8. **Venue: Corporation: Libel.** The Act of 1909 (Sec. 1755, R. S. 1909), declaring that "suits for libel against corporations shall be brought in the county in which the defendant is located, or in the county in which the plaintiff resides," in so far as it permits a plaintiff to bring a libel suit in the county in which he resides against a corporation whose place of business is in another county and whose newspaper in which the libel is published is printed in such other county, is invalid, in that it denies to said corporation the equal protection of the laws, since, were the libeler an individual, the plaintiff could not maintain his suit in his own county unless the libeler were found and served therein. A resident of Cole County cannot maintain a suit in the circuit court of said county against a corporation whose place of business is in the City of St. Louis and whose newspaper in which the libel is published is printed in said city, unless said corporation waives the lack of jurisdiction. [Per McBAINE, Special Judge; WALKER, FARIS and GRAVES, JJ., concurring; BOND, C. J., and BLAIR and WIL-

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JURISDICTION—Continued.

LIAMS, JJ., dissenting; WOODSON, J., not sitting.] McClung v. Pub. Co., 370.

9. **Equal Protection: Corporations.** Corporations come within that provision of the Fourteenth Amendment declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws. Therefore the laws must extend to them the same protection they extend to individuals. Ib.

10. ———: **Corporations and Individuals: Venue: Classification.** It is an advantage to a plaintiff to sue in the county in which he lives, and to a defendant to defend in the county of his residence; and a statute which permits a plaintiff in a libel suit to sue a non-resident corporation libeler in his own county, and denies to him the right to sue a non-resident individual libeler in the same county, makes an unreasonable classification against the corporation, and is invalid, since the classification is not based upon a difference bearing a just and proper relation to the attempted classification. Ib.

LACHES. See **Estoppel.**

LANDS AND LAND TITLES.

1. **Express Trust: Power of Beneficiary to Mortgage.** A deed giving to the trustee power to sell, convey, pledge, mortgage or otherwise dispose of land, and to invest, re-invest or use the money derived from any such sale, mortgage or pledge, or any income arising from said property, for the use, benefit, support and maintenance of another, creates an express, active trust in the land, and gives to the beneficiary no power to sell or mortgage the same. Maxwell v. Growney, 113.

2. ———: **Pleading: Cause of Action: Present Interest.** An allegation that it is now necessary that plaintiff, in the exercise of the powers conferred upon him as trustee by a certain trust instrument, either lease, sell or mortgage the lands for the purposes of the trust, and that a mortgage executed by the beneficiary constitutes a cloud upon the plaintiff's title and has heretofore and does now prevent the plaintiff from carrying out the provisions of said trust, states that plaintiff had an interest in the land at the time his suit was brought. Ib.

3. ———: **Cancellation of Beneficiary's Mortgage: Discovery of Defect.** A "mind of legal acuteness" is generally, if not always, required to determine what rights of a beneficiary of a trust are alienable; and where the defect in the mortgage made by the beneficiary is of such a character as to render it invalid but can only be discovered by a mind of legal acuteness, a court of equity will remove it as a cloud upon the trustee's title. Ib.

4. ———: ———: **Sufficient Facts.** Where the trustee is unable to carry out the powers conferred upon him by the trust instrument unless the suspicion cast upon his title by a mortgage made by the beneficiary is removed, and there is no adequate legal remedy open to the trustee, a court of equity will, at his suit, cancel the mortgage. Ib.

5. **Foreign Will: Effect in This State.** The will of a resident of Illinois, executed and probated there, when a copy duly authenticated is filed for record in this State, will take effect and be

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LANDS AND LAND TITLES—Continued.

interpreted according to the laws of this State, exactly as if it had been originally proved here. Dobschutz v. Dobschutz, 120.

6. ———: ———: **Partition.** Children, residents of Illinois, not mentioned in their father's will, by which he attempted to devise all his property, wherever situate, to his widow, may maintain a partition proceeding in the courts of this State and assert the same rights to land in this State, belonging to testator at the time of his death, that they could have done had he left no will. Ib.

7. ———: ———: **Contrary to Will and Statute.** Children "not named or provided for" in their father's will, by bringing suit for the partition of lands belonging to him at the time of his death, do not seek partition contrary to any will which affects them, and consequently Section 2569. Revised Statutes 1909, which provides that no partition of lands devised by any last will shall be made contrary to the intention of the testator as expressed in the will, has no application to them. Ib.

8. **Deed of Married Woman: Defective Acknowledgment: Prior to 1883.** A deed made by a married woman, the certificate of acknowledgment of which simply recited that she and her husband "personally appeared before me, a notary public in and for said county, both being personally known to me and acknowledged the execution of the annexed deed," made when the statute (Secs. 680, 681, R. S. 1879) requiring that any officer taking the acknowledgment of a married woman to any deed of conveyance of real estate must examine her separate and apart from her husband, and so certify in the certificate of acknowledgment, and further certify that she executed such conveyance freely and without compulsion of her husband, was in force, was void. Powell v. Bowen, 280.

9. ———: **Abandonment of Land.** The defense of abandonment, disassociated from other defenses, such as adverse possession or failure to pay taxes, has never been recognized at common law as affecting title to real property; for at common law title can neither be lost nor gained by abandonment operating alone. Ib.

10. ———: **Laches and Estoppel: Suit for Interest.** Neither *laches* nor estoppel *in pais* is as to her real estate imputable to a married woman who ever since the making of her void deed in 1882 has been under the legal disability of coverture, the reason being that prior to the Married Woman's Acts of 1889 the right of possession of a married woman's lands was in her husband and was a vested right which was not destroyed by those acts, and she could not before or since have maintained an action for possession. Since the Act of 1897 she could have maintained an action to determine interest, but was not compelled to do so, but that act did not divest the husband's existing right to possession, or permit her to sue for possession during his life.

Held by GRAVES, J., dissenting, that the Act of 1897 afforded to a married woman the right to assert her interest in land, and a remedy; and if she stood by for eighteen years after its enactment and saw valuable improvements made upon the land she is barred by estoppel *in pais* from asserting such interest; and estoppel *in pais* goes both to the remedy and the right, and may be set up as a defense in actions at law and suits in equity. Ib.

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LANDS AND LAND TITLES—Continued.

11. **Deed of Married Woman: Estoppel by Covenant in Void Deed.** A married woman is not estopped to assert her interest in land by a covenant in a deed which is void as to her because not acknowledged in the manner required by statute. The deed being void, any covenant in it cannot be efficacious to produce estoppel. Powell v. Bowen, 280.

12. ———: **Limitations.** Neither the ten-year, nor the thirty-one-year, nor the twenty-four-year Statute of Limitations was a bar to a married woman's suit begun in 1915 to establish her interest in land attempted to be conveyed in 1882 by a deed void because it was not acknowledged in the manner prescribed by statute, she being at the time and ever since under the legal disability of coverture. There was no time when she was capable of maintaining an action for possession, and as no such action can accrue to her until her husband's death, the thirty-one-year and the ten-year statute has never begun to run as to her, and her suit to establish her interest is not barred by the twenty-four-year statute, because it was begun in less than twenty-four years after the Act of 1897 was passed.
Held, by GRAVES, J., dissenting, that Section 1881, Revised Statutes 1909, which antedated the Married Woman's Acts of 1889, should no longer be held to except married woman from the provisions of the ten-year and other statutes of limitations, but the Married Woman's Acts having made her a *femme sole*, with power to sue for her interest in lands, she should be considered discovert, and said Section 1881 should not be held to prevent the statutes of limitations from running against her. Ib.

13. ———: ———: **Thirty-year Statute: Obligation to Pay Taxes.** As between a married woman, whose deed made in 1882, in which her husband joined, was void as to her because not acknowledged in the manner prescribed by statute, and who has since been under the disability of coverture, the obligation to pay taxes rests upon the latter, and her husband's grantee or grantees by *mesne* conveyances, as the holders of his lifetime right to possession; and hence the thirty-year Statute of Limitations does not apply to her in her suit to establish her interest in the land, she being at no time entitled to its possession. Ib.

14. **Champerty: Agreement of Attorney to Pay Cost.** An agreement by an attorney with a married woman to pay the cost of a suit to recover her interest in land, in consideration of a one-half interest in the amount recovered, even if champertous between him and her, does not serve to deprive her of relief touching the land as against a stranger to the contract. Ib.

15. **Purchase of Land: Unilateral Contract: Mutuality Supplied.** A mere option agreement to sell land, though in its inception unilateral and lacking in mutuality, may, when bottomed on a valuable consideration and accepted by the promisee within the time limited by the promisor, form the basis of an action for specific performance. Starr v. Crenshaw, 344.

16. ———: ———: ———: **Consideration: Extension.** The word consideration is correctly defined as a benefit to the party promising, or a loss or detriment to the party to whom the promise was made. An extension by the vendor of the option agreement for thirty days, made on the last day of the option period and bottomed on a valid consideration, if accepted by the vendee on

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LANDS AND LAND TITLES—Continued.

any day before the extension period expired, is enforcible and cannot be withdrawn before the expiration of such period; and if the vendor agreed to extend the option for thirty days upon condition (a) that the vendee give the vendor a certified copy of the report of his drillings for coal on the land and (b) pay interest on all deferred payments from the beginning of said thirty days in the event he should buy, and he unequivocally accepted the terms of purchase, and continued the drillings, though he did not furnish the certified report, which could be of no value to the vendor after the vendee's acceptance, there was a valuable consideration for the agreement, and the vendee is entitled to specific performance. Ib.

17. ———: **Breach of Contract for Other Reasons.** A breach of the option contract to purchase land, by the vendor before the expiration of the option period, for reasons other than the vendee's failure to perform, relieved the vendee from doing the vain and useless thing of funishing a certified report of his drillings for coal on the land, called for by the agreement before the vendee had accepted the terms of purchase, but no longer of practical utility after he had accepted, although the drillings themselves furnished the consideration for the agreement. Ib.

18. **Public Road: Estate by Entirety: Wife not Party.** A proceeding to establish a public road through lands owned by a wife and her husband as cotenants by the entirety, is void as to the wife who was not notified of the proceeding and did not appeal, although her husband was made a party and contested the establishment of the road. Ripkey v. Gresham, 521.

LARCENY. See **Burglary.**

LEASE.

1. **Relation: Right of Lessor to Inspect.** If the written contract granted to the lessee an estate for years, and entitled him to possession during the term against the lessor, without any right to enter except to inspect the quarry work and ascertain whether or not it was being performed according to agreement, the relation was that of lessor and lessee. Baker v. Gates, 630.

2. **Creation of Nuisance: Liability of Lessor.** If the intended use of leased premises by the lessee would, of necessity, create a nuisance, the lessor must be held to have authorized the nuisance and to be answerable for consequent damage; for no one may use, or agree that some one else may use, his property so as to harm others. Ib.

3. **Nuisance: Quarry Operated by Receiver and Not by Lessee.** Where the leased quarry was not being operated by the lessee at the time a flying stone struck a passenger on a street car, or by any one else for whose conduct the lessor was responsible, but, without the consent of either, by a receiver in bankruptcy of a construction company under an order of court, neither the lessor nor the lessee is liable in damages for the injury to the passenger, the lessee's only connection with the work at the time being at most that of an employee or agent of the receiver. Ib.

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LEVEE DISTRICTS.

1. **Organized in 1903: Rights under Amended Act of 1913: Condemnation: Reorganization.** Notwithstanding a levee district organized in 1903 under Art. 7, Chap. 122, R. S. 1909, has never reorganized under the Act of 1913, Laws 1913, p. 290, it may proceed under that act to condemn land for rights-of-way necessary for ditches, because Section 53 of the Act of 1913 provides that "all rights, powers, liens and remedies" then existent might be enforced by the mode provided by the existing law or under the provisions of the act. State ex rel. Hill v. Pettingill, 31.

2. ———: **Amended Section 5703: Reorganization: Condemnation.** The Act of 1911, repealing Sec. 5703, R. S. 1909, and substituting amended Section 5703 (Laws 1911, p. 231), did not destroy the power of a levee district organized in 1903 to adopt a plan for the reclamation of swamp and wet lands within its boundaries and to condemn rights-of-way for drains and ditches necessary to accomplish such reclamation. As to districts already organized amended Section 5703 merely carried forward the power already conferred by old Section 5703 to drain swamp and wet lands and to secure rights-of-way for ditches, and Section 5713 authorized such a district to "proceed under the article as amended herein," which means that it was not necessary that the district reorganize under the Act of 1911. Ib.

3. ———: **Reorganization Under Act of 1913.** Section 47 of the Levee Act of 1913 was not intended to repeal all previous acts, and leave a levee district previously organized without legal authority to proceed further in the exercise of the powers conferred on it by said previous acts. Ib.

LIBEL.

1. **Public Officials.** Citizens, through newspapers and otherwise, have the right to criticise the official acts of public officers. Rules relating to defamation of an individual in private life do not apply to the official conduct of a public official. A qualified privilege of free discussion and free criticism of the public acts of public officials is essential to free government. McClung v. Pub. Co., 370.

2. ———: **Matter for Court.** It is the duty and province of the court to determine whether the spoken or written published matter complained of relates to the public acts of the plaintiff and is of public interest, and to further determine whether the comments upon the facts and the criticism are qualifiedly privileged; and if the alleged libelous matter pertains solely to plaintiff's public conduct as a public official, and all the substantial facts are admitted to be true or established without substantial controversy, and the comments upon them are qualifiedly privileged, the court should not submit the case to the jury. Ib.

3. **Inference.** A newspaper has a right to draw inferences from established facts as to the motives of a public official, whether such inferences are right or wrong, reasonable or unreasonable, provided they are made in good faith. Ib.

4. **Qualified Privilege: Malice.** A defendant has a qualified privilege to criticise and censure the public acts of a public official, but the privilege does not exist where defendant is actuated by malice, by which is meant the presence of an improper motive. Ib.

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LIBEL—Continued.

5. **Malice: Proof: Other Articles.** The burden of establishing malice or improper motive is upon the plaintiff in a libel suit; and is not established by the introduction of other articles which only show that plaintiff's conduct as a public official was being discussed and censured for the purpose of bringing about needed reforms, as defendant viewed the matter, in the management of a public institution. Ib.

LIMITATIONS.

1. **Dower: Mansion House.** Actions to establish the widow's dower in her husband's real estate, unless begun within ten years after his death, are barred by limitations; and the occupation by the widow of the mansion house thereon after her husband's death is no longer, since the Revision of 1889, an exception to the unqualified language of Section 391. Edmonds v. Scharff, 78.

2. ———: **Deed of Married Woman: Defective Acknowledgment.** Neither the ten-year, nor the thirty-one-year, nor the twenty-four-year Statute of Limitations was a bar to a married woman's suit begun in 1915 to establish her interest in land attempted to be conveyed in 1882 by a deed void because it was not acknowledged in the manner prescribed by statute, she being at the time and ever since under the legal disability of coverture. There was no time when she was capable of maintaining an action for possession, and as no such action can accrue to her until her husband's death, the thirty-one-year and the ten-year statute has never begun to run as to her, and her suit to establish her interest is not barred by the twenty-four-year statute, because it was begun in less than twenty-four years after the Act of 1897 was passed.

   Held, by GRAVES, J., dissenting, that Section 1881, Revised Statutes 1909, which antedated the Married Woman's Acts of 1889, should no longer be held to except married women from the provisions of the ten-year and other statutes of limitations, but the Married Woman's Acts having made her a *femme sole*, with power to sue for her interest in lands, she should be considered discovert, and said Section 1881 should not be held to prevent the statutes of limitations from running against her. Powell v. Bowen, 280.

3. ———: ———: **Thirty-year Statute: Obligation to Pay Taxes.** As between a married woman, whose deed made in 1882, in which her husband joined, was void as to her because not acknowledged in the manner prescribed by statute, and who has since been under the disability of coverture, the obligation to pay taxes rests upon the latter, and her husband's grantee or grantees by *mesne* conveyances, as the holders of his lifetime right to possession; and hence the thirty-year Statute of Limitations does not apply to her in her suit to establish her interest in the land, she being at no time entitled to its possession. Ib.

LOSS OF STEAMBOAT. See **Insurance, 12 to 15.**

LOST INSTRUMENT. See **Actions, 4.**

MALPRACTICE.

1. **Negligence: Inferred from Facts.** If the legitimate inference which may be drawn from the facts establish the negligence alleged, the case of negligence is made. Krinard v. Westerman, 680.

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MALPRACTICE—Continued.

2. **Negligence Inferred from Facts: Operation by Surgeon.** Plaintiff was afflicted with a fibroid tumor of the uterus, and applied to defendant to remove it, and in the operation he cut a hole in her bladder, and tied off one of the ureters. Plaintiff alleged that these things were negligently done, and the defendant asserted that they were necessary because the parts were diseased and cancerous. The evidence shows that immediately after the operation he pronounced it a perfect success, and did not for a month inform plaintiff that he had made an incision in the bladder, and then when informed that there was a constant flow of urine he told her that he had done so in order to remove the diseased parts and that there would have to be a second operation, although he had all along told her and her friends that she was getting along nicely. When the necessity for a third operation arose, she suggested that a famous surgeon be called to assist, at which he became enraged. Both before and after this third operation she was examined by other physicians who found no evidence of diseased or cancerous conditions. The evidence showed that the tieing of the ureter would kill the kidney, and that prior to the operation the kidney was healthy and normal, and afterwards it had no life in it. *Held*, that negligence could be inferred from these facts, and the court committed no error in submitting the case to the jury. Krinard v. Westerman, 680.

3. ———: **Degree of Physician's Skill.** A physician or surgeon undertaking the treatment of a patient is required to possess and exercise that degree of skill and learning ordinarily possessed and exercised by the members of his profession in good standing, practicing in similar localities. It is not sufficient that he use the degree of skill possessed by reasonably skillful surgeons or physicians "in the community in which he is practicing." Ib.

4. ———: **Degree of Specialist's Skill.** A physician holding himself out as having special knowledge and skill in the treatment of particular diseases, and sued as such, is bound to bring to the discharge of his duty as such specialist, not merely the average skill possessed by general practitioners, but that special degree of skill and knowledge possessed by physicians who are specialists in the treatment of such diseases, in the light of the present state of scientific knowledge. Ib.

5. ———: **Measure of Damages: Future Operation.** Where there is evidence that the needless cutting of one of the ureters causes the corresponding kidney to die, that about fifty per cent of dead kidneys produce infection, and that such infection makes necessary a major operation, accompanied with pain and is expensive, it is not error, in instructing the jury on the measure of damages, that they may take into consideration what suffering plaintiff may endure in the future for operations she may hereafter be required to have performed. Ib.

6. ———: ———: ———: **Use of Word "May."** The instruction should limit defendant's liability for future pain to reasonable certainty and not bare possibility, and consequently the use of the word "may" is liable to mislead the jury; but courts take an instruction as a whole, and if the word "may" as used with its context does not appear misleading, its use will not constitute reversible error. Ib.

7. ———: ———: **Surgeon's Fees.** Evidence that plaintiff, as a result of her injuries, had paid definite sums of money and that she

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MALPRACTICE—Continued.

had stated accounts for other expenses incurred but not paid, is definite enought to support an instruction that the jury allow her the money she had expended for physicians, nurses and medicines, especially where the jury are definitely told that she had neither paid nor had a statement of the amount she owed other physicians and that those items were not included in the sum named as the aggregate of her expenses incurred. Ib.

MANDAMUS.

1. **Railroad: Compelled Operation.** A railroad company in possession of its road may be compelled by mandamus to operate its road in accordance with the positive requirements of its charter, and mandamus is the proper remedy to compel a railroad to perform a definite duty to the public. State ex rel. Pub. Serv. Com. v. Mo. Southern, 455.

2. ———: **Abandonment of Spur Track: Without Permission.** Since the enactment of the Public Service Commission Act of 1913 a railroad company, engaged in operating a spur or branch line, cannot determine for itself the question of its right to abandon such line, but it must apply to the Public Service Commission for leave to abandon, and may be compelled by mandamus to continue operating such spurs or branches until the Commission has acted and its order has become final. Ib.

3. ———: ———: **Confiscation: Raised in Mandamus.** In a mandamus brought by the Public Service Commission against a railroad company to compel it to operate certain spur tracks which it has abandoned without permission, the question of whether the order to operate, if obeyed, may result in financial loss to the company and therefore be in conflict with the Constitution, has no place. Ib.

MARINE PROTEST AS EVIDENCE. See **Insurance, 15.**

MARRIED WOMEN.

Deed of: Defective Acknowledgment: Prior to 1883. A deed made by a married woman, the certificate of acknowledgment of which simply recited that she and her husband "personally appeared before me, a notary public in and for said county, both being personally known to me and acknowledged the execution of the annexed deed," made when the statute (Secs. 680, 681, R. S. 1879) requiring that any officer taking the acknowledgment of a married woman to any deed of conveyance of real estate must examine her separate and apart from her husband, and so certify in the certificate of acknowledgment, and further certify that she executed such conveyance freely and without compulsion of her husband, was in force, was void. Powell v. Bowen, 280.

MASTER AND SERVANT.

1. **Negligence: Fellow-Servants: Carpenter and Common Laborer.** A carpenter constructed the platform on which the men were to work in taking down the scaffolding, and a common laborer had nothing to do with its constructing and knew nothing about it. Later after the platform was completed, the carpenter and laborer stood on the platform and were working together in taking down and receiving the timbers of the scaffold when the platform fell, injuring the laborer. *Held*, that they were not fellow-servants in the work of constructing the platform, and as the laborer's ac-

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MASTER AND SERVANT—Continued.

tion for damages is based on a violation of the statute requiring employers to furnish safe scaffolds or structures for such work, his action is not barred on the theory that his injuries were due to the negligence of a fellow-servant. Prapuolenis v. Const. Co., 358.

2. **Negligence: Fellow-Servants: Detached Employee.** When the master uses one servant to construct a place in which he and the other servants are to work, and the place is made unsafe by that servant, and a fellow-servant who was not employed in that particular work is injured because of the defect, he is not the fellow-servant of the one who did that particular work so as to defeat recovery. Ib.

MEASUREMENTS.

1. **Unlawful Bushel: Prescribed by Ordinance.** An ordinance which prescribes that a bushel box shall be 23¼ inches long, 9¾ inches deep and 11 inches wide calls for a box whose cubical content is 2493.5 inches and is contrary to the statute (Sec. 11961, R. S. 1909) which says the content of a bushel shall be 2150.4 cubic inches, and attemps to make unlawful the use of a box of any other dimensions, even though it contained the exact statutory content. Stegmann v. Weeke, 131.

2. **Weights and Measures: Legislative Power: Invasion of Right to Contract.** For the purpose of protecting the public and consumers from fraud and imposition in their purchase of commodities, the Legislature has the right, as a police regulation, to regulate weights and measures, and delegate that authority to municipal corporations, in so far as they exercise police powers; but the regulation must not be such as to invade the constitutional right to make contracts. Stegmann v. Weeke, 140.

3. ———: ———: ———: **Reasonable Restrictions.** A legislative exercise of the police power to fix weights and measures necessarily limits the freedom of contract that would otherwise exist; but so long as the restriction has a reasonable relation to the exercise of the power and is not so arbitrary or capricious as to be a deprivation of due process of law, freedom of contract in the constitutional sense is not interfered with. Ib.

4. ———: ———: ———: **Bushel Boxes According to Statute: Penalty for Use of Boxes of Different Dimensions.** An ordinance establishing standard bushel and half-bushel boxes to contain the same cubical content of the bushel and half-bushel prescribed by statute, to be used by truck gardeners and farmers in selling their fruits, vegetabes and other produce in the city, and prescribing a penalty for the use of boxes of a different capacity and thereby sufficiently guaranteeing that boxes of a different capacity will not be used, is not unconstitutional as impairing the obligation of contracts, although it makes unlawful the use of boxes of a less capacity which have been in general use for many years. Ib.

5. ———: **Bushel Boxes of Given Dimension: No Penalty.** The court may determine whether an ordinance prescribing that bushel and half-bushel boxes to be used by farmers and truck gardeners in marketing their fruits and vegetables within the city shall be of certain dimensions, is unreasonably arbitrary, and may settle the question by inspecting the face of the ordinance, or may find it unreasonable by a state of facts which affects its operation;

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MEASUREMENTS—Continued.

but an ordinance which prescribes that a bushel box shall have certain dimensions and a half-bushel box certain other dimensions, but prescribes no penalty for the use of boxes of different dimensions, but only a penalty for the use of boxes of a different capacity, is not unreasonable.

Held, by FARIS, J., concurring, that the ordinance is valid only because it prescribes no penalty for the use of boxes of different dimensions, thus making the prescription that the bushel and half-bushel boxes shall have certain dimensions only advisory, and not mandatory. *Held*, also, that the city has no power to say that the boxes shall be of a required length, width and depth. Ib.

6. ———: ———: ———: **Oppressive Enforcement: Injunction.** Plaintiffs cannot have an injunction to restrain the city from pursuing some unexpected and unthreatened prosecution. If the ordinance requires plaintiffs in marketing their vegetables and produce to use boxes having the number of cubic inches prescribed by statute for bushel and half-bushel containers, and fixes a penalty for the use of boxes of different capacity, and also goes further and prescribes that boxes of those capacities shall be of certain length, breadth and width but prescribes no penalty for the use of boxes of different dimensions, and their contention is that the ordinance interferes with their use of boxes of a smaller capacity which have long been in use, and they make no showing that they intend to use boxes of the prescribed capacity, the ordinance will not be held to be invalid on the theory that it will be interpreted to mean that they must use boxes of the specified dimensions and therefore will be oppressively and illegally enforced. Ib.

7. ———: **Sale by Weight.** Where the ordinance does not require the immediate purchaser from the gardeners to purchase by weight, although such purchasers are commission merchants and retail dealers who have not been deceived as to the contents of the "short" boxes long in use, yet if the commodities in the boxes can be passed on to the ultimate consumer, the city has the right, in order to provide against imposition by the use of the smaller boxes, to enact an ordinance requiring the use of boxes containing the statutory capacity of a bushel and half-bushel, and affixing a penalty for the use of boxes of different capacities. Ib.

MORTGAGES AND DEEDS OF TRUST.

Acknowledgment: Regular on Face: Hidden Defects: Record. If a deed of trust contains a certificate of acknowledgment in proper and regular form, it is the duty of the recorder to receive the instrument and place it upon record, and if so recorded it imports constructive notice to all subsequent purchasers; and though, upon a trial in court, it is adjudged that the deed had not been acknowledged, because the notary's recitals in his certificate were false, its record nevertheless imported notice to such subsequent purchaser. Ammerman v. Linton, 439.

MOTION FOR NEW TRIAL.

General Assignment. A general assignment of error in the giving and refusing of instructions, in the motion for a new trial in a civil case, is sufficient to authorize a review of such instructions on appeal. [Following State ex rel. United Rys. Co. v. Reynolds, 278

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MOTION OF NEW TRIAL—Continued.

Mo. 554.] And a refusal by a court of appeals to rule on assigned errors in the instructions, on the ground that the assignments were general, is error, and necessitates the quashing of its opinion on *certiorari*. State ex rel. Const. Co. v. Reynolds, 493.

NEGLIGENCE.

1. **Instruction: Not to Consider Character of Injury: Misleading.** In a case in which the character of the injury is a material link in the chain of circumstances tending to show negligence, an instruction which declares "the court instructs you that the mere fact that plaintiff was injured while employed by defendant is of itself no evidence whatever of defendant's negligence or liability, and there can be no recovery by the plaintiff unless the plaintiff has by a preponderance of the creditable evidence in the case established negligence, on the part of the defendant, as described in other instructions herein," is misleading and harmful, in that it authorizes the jury to disregard the character of plaintiff's injury, and to conclude that "the creditable evidence" means evidence other than evidence as to the injury and character of the injury.
Held, by BOND, C. J., dissenting, that injury does not of itself warrant an inference of negligence in cases in which the doctrine of *res ipsa loquitur* has no application. Orris v. Rock Island Ry. Co., 1.

2. ———: **Limiting Evidence to Circumstantial Evidence.** Where all the evidence pertaining to the particular issue submitted by the instruction is circumstantial, a statement therein that plaintiff seeks to prove such issue by circumstantial evidence is not error; but if there is positive and direct evidence on that particular issue an instruction restricting the proof to circumstantial evidence would be misleading. Ib.

3. ———: **Assumption of Fact.** An instruction should not assume the existence of a disputed fact. Even when there is ample evidence from which the jury may find that the tool furnished the employee was in usual and ordinary repair, that fact does not justify an assumption in the instruction that the tool was in usual and ordinary repair. Ib.

4. ———: **Conflicting: Omitting Element: Safe Condition.** An instruction which directs a verdict for defendant if the spark-arrester of the engine on which plaintiff was fireman was in good condition, conflicts with one given for plaintiff which requires the flues also to be in good condition, the petition having charged that the injury to his eye by a burning cinder was due to a combination of defects in the flues and the spark-arrester. There being positive evidence that the flues were stopped up, and that their defective condition might have caused the injury even if the spark-arrester was in good condition, an instruction which omits all reference to the flues and directs a verdict for defendant if the spark-arrester was in good condition is error. Ib.

5. **Evidence: Proof of Reputation for Truth: No Attack: Contradictory Statements.** Where there is no direct impeachment of a witness, that is, where no attempt is made to show that his reputation for truth and veracity is bad, evidence showing that his reputation is good is not admissible. Although he has made contradictory statements, either out of court, or in a former deposition, or upon a severe cross-examination at the trial, those things go to his

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NEGLIGENCE—Continued.

credibility and not to his general reputation, and evidence to show his reputation for truth and veracity to be good is not admissible. [Disapproving a contrary rule announced in Miller v. Railroad, 5 Mo. App. l. c. 481; Walker v. Insurance Co., 62 Mo. App. l. c. 220, and other cases decided by the Courts of Appeals.] Ib.

6. **Joint Tortfeasors: Release of One: Effect at Common Law.** An instrument releasing one of several joint tortfeasors from liability for a tort, executed prior to the Act of March 23, 1915, Laws 1915, p. 269, is to be constructed in the light of the common law as it existed in this State prior to the passage of said act, and under the common law a release of one joint tortfeasor operated to release all of them. Clark v. Union Elec. Co., 69.

7. **Contributory: Demurrer to Evidence: Proven Facts: Humanitarian Rule.** Where there was substantial evidence tending to prove (1) that the servants in charge of the train were negligent in failing to ring the bell, and keep it ringing, as required by statute, as it approached the public-street crossing where plaintiff's husband was killed, (2) that they were guilty of negligence in failing to give proper and timely danger signals after he was known to be in peril, (3) that they were guilty of negligence in violating the six-mile speed ordinance and which they continued to violate until he was struck by the train, (4) that they were guilty of common-law negligence in running the train, at the time and place of the accident, at a dangerous and unsafe rate of speed, (5) that the engineer was negligent in failing to reduce the rate of speed after seeing deceased in peril and apparently oblivious to the approaching train, and (6) that said servants were likewise negligent in failing to give danger signals with a whistle, so as to arouse in deceased a realization of the danger into which he was moving, no demurrer to the evidence can be sustained, although it be conceded that deceased, at the time and place of the accident, was guilty of negligence that directly contributed to his own death. Murrell v. Railroad, 92.

8. **Duty of Engineer: Inference.** In the absence of evidence to the contrary, the jury have the right to draw the inference that the engineer of a passenger train entering a town was at his place in the cab, looking towards the station, since he owed that duty to his passengers, as well as to members of the public who might be upon the track at a public-street crossing. Ib.

9. ———: **Inference from Sounding Whistle.** Where defendant offers evidence tending to show that the station whistle was sounded and the bell was rung before the train reached the public-street crossing, the jury have the right to infer that the engineer and fireman were at their respective places in the engine cab; and hence they have the right to infer, the view being clear and the track straight, that the engineer saw deceased in peril when the train was 500 feet away and that he was moving to a place of danger on the track at the street crossing, apparently oblivious to the approach of the train. Ib.

10. ———: **Failure to Testify: Other Inferences.** Where the view was unobstructed for 500 feet before the train reached the public-street crossing where plaintiff's husband was struck, the jury have the right to take into consideration the fact that the engineer and fireman, who of all persons were best prepared to give the actual facts concerning deceased's movements, were not produced as witnesses. Ib.

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NEGLIGENCE—Continued.

11. **Contributory: Demurrer to Evidence.** If the evidence adduced by plaintiff proves his own contributory negligence as a matter of law, and there is no room in the case for the last-chance doctrine, defendant's demurrer to the evidence should be sustained, although the evidence also establishes defendant's prima-facie negligence. In such case plaintiff's evidence establishing his own contributory negligence destroys the prima-facie negligence of defendant. And a demurrer to his evidence in such case is certainly available where there is a defensive plea of contributory negligence, and on reason and authority it would be available without such plea. Tannehill v. Railroad, 158.

12. ———: ———: **Bad Weather Conditions: Ringing Bell.** Conceding that the failure of the trainmen to ring the bell or sound the whistle as the train approached a public-street crossing constituted prima-facie negligence on the part of defendant, and conceding further that bad weather conditions were prevailing, yet as plaintiff's own evidence is to the effect that under ordinary conditions the driver of the automobile could have seen the train a quarter of a mile away from a place 400 feet from the crossing, and that the automobile was forty or fifty feet from the crossing when the driver last looked, and he went ahead, traveling up-grade at the rate of five or six miles per hour and could have stopped in a space of eight or ten feet, and without looking again, attempted to cross the track and the automobile was struck by the train, it must be held as a matter of law that the driver was guilty of contributory negligence, which, under the other facts, bars a right to recover damages for the death of the driver's brother, sitting in the automobile. Ib.

13. ———: **Imputed to Joint Owner.** The contributory negligence of the driver is to be attributed to his brother who was a joint owner of the automobile, was engaged with him in a joint enterprise and was riding with him in the automobile at the time of its collision with a railroad train. Ib.

14. ———: **Humanitarian Rule.** If the driver of the automobile could see the railroad train for the first time when it was 200 feet from the crossing, it must be assumed that the trainmen could not see the automobile at a greater distance, and, if the uncontradicted evidence is that the train could have been stopped only in from 400 to 600 feet, there is no place in the case for the humanitarian doctrine that the trainmen could have stopped the train, after they saw the driver's peril, in time to have avoided striking his automobile. Ib.

15. **Res Gestae: Contradicting Witness.** Where the conductor of the train, of which plaintiff was a brakeman, had in his direct testimony for defendant, testified that no one had told him that the brakebeam of the car was down and that he did not know that the fireman or the plaintiff had gone under the car to adjust the beam, and on cross-examination was asked if he didn't come running up to the place where plaintiff was injured and say he had forgot the men were under the car, it was competent, for the purpose of contradiction, to prove by another witness, on rebuttal, that the conductor, at that time, was asked by the engineer why he turned the air on while the men were under the train and that he exclaimed, "My God I forgot it; I didn't know what I was doing." [Following Gordon v. Railroad, 222 Mo. l. c. 531.] Smith v. K. C. Southern, 173.

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NEGLIGENCE—Continued.

16. **Instruction: Knowledge: Actual and Imputed.** Where the evidence tends to show that the conductor was told the brakebeam of a car was down and knew the plaintiff had gone under the car to adjust it, but did not necessarily know plaintiff was still under the car at the time he "cut in the air" which caused the floating lever to move and strike the plaintiff's head, and where there is also evidence tending to show that a "spot" signal was given, which required the conductor to know that something was wrong about the train concerning which it was his duty to obtain information, an instruction which tells the jury that if the conductor, at the time he cut in the air, knew, "or in the exercise of ordinary and reasonable care could and should have known," that the plaintiff was under the car, the defendant was guilty of negligence, is proper; the question, under such circumstances, is not solely one of actual knowledge. Ib.

17. ———: ———: ———: **Theory of Trial.** Besides, instruction offered by defendant telling the jury that if the conductor did not know and "could not have known in the exercise of ordinary care" plaintiff's perilous position he could not recover, precludes defendant from insisting that plaintiff's instruction should have confined his right to recover to the conductor's actual knowledge. Ib.

18. **Verdict: Presumption: Finding of Every Fact.** The court must presume that the jury found every fact of which there was evidence on the issues properly submitted tending to support the verdict. Ib.

19. ———: **Deduction for Contributory Negligence: Award for Actual Damages Only: Rem'ttitur.** Where the petition demanded $75,000 as damages, and there was some evidence of contributory negligence, and the instruction, under the provisions of the Federal Employers' Liability Act, directed the jury to make a proportionate deduction from the actual damages suffered, if they should find there was such contributory negligence, and they returned their verdict for $37,500, it cannot be held that they found the actual damages were $37,500; for the court cannot assume that the jury found any fact, where the evidence was contradictory, that would impair their verdict, and there being positive evidence that plaintiff was not guilty of contributory negligence, the excess may be corrected by *remittitur* if the court finds the verdict excessive as to the actual damages. Ib.

20. ———: **Excessive: $25,000.** Plaintiff's head was crushed between two beams of a car; his nose was mashed over to one side; the bones of the skull were broken into pieces, and some of them taken out, leaving a space unprotected by bone, an inch and a half long and an inch wide; he suffered with convulsions until an operation was performed, indicating pressure upon and injury to the brain; two years later the evidence indicates injury to the brain; his vision is impaired, he cannot turn his eyes laterally, can only focus them on objects directly in front, and is unable to read except for a few moments at a time; there is a suppurative discharge from his nose, accompanied by a disagreeable odor; he has an ataxic walk, and fibrillary tremors, involuntary and incapable of simulation, run over his body, and in walking he lifts his legs much higher than a normal man, indicating ataxia, and in stooping over has a sensation that his brain is dropping out through the hole in the forehead. Prior to his injury he was in perfect physical condition, was an athlete, possessed an un-

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usually quick mind, learned easily and took interest in literary pursuits; his mind is now impaired, especially his memory, and scientific tests indicate his mind is about equal to that of a child ten years of age. At the time of his injury he was 24 years of age and receiving a hundred dollars a month, and since has been unable to earn anything. The jury returned a verdict for $37,500, and that was reduced by the trial court to $25,000, which, on appeal, is *held*, not excessive. Smith v. K. C. Southern, 173.

21. **Verdict Excessive: Rule.** The court has never ruled that any verdict for personal injuries in excess of $25,000 is excessive. Every case must be determined on its own individual facts. Ib.

22. ———: ———: **Value of Money.** Twenty-five thousand dollars in 1904 was a much larger sum in purchasing power than the same sum in 1914. Ib.

23. **Insufficient Fire Escapes: Death in Dormitory.** Section 10663, Revised Statutes 1909, relating to fires escapes, is applicable to the City of St. Louis, and the death of a member of an atheletic club while asleep on the fifth floor when the building was destroyed by fire affords a basis for a legitimate inference that his death was caused by the negligence of the owner in failing to comply with the statutes and ordinances relating to furnishing fire escapes. Ranus v. Boatmen's Bank, 332.

24. ———: **Question for Jury.** If the building which deceased occupied at the time it was destroyed by fire, which caused his death, falls within the classification designated in the statutes and ordinances, and was not supplied with the fire escapes required by them, the question of whether insufficient fire escapes was the proximate cause of his death is one for the jury. Ib.

25. ———: **Dormitory: Definition.** The common and ordinary significance of the word "dormitory" is a place for sleeping; and the fifth floor of an atheletic club, on which 93 rooms were distinctly reserved for sleeping quarters and accommodation of its members, with provision for increasing the number of such rooms to 130, was a dormitory within the meaning of the statute and ordinance, which required that "all buildings of non-fire-proof construction, three or more stories in height, used for manufacturing purposes, hotels, dormitories, schools, seminaries, hospitals or asylums, shall have not less than one fire escape for every fifty persons, or fraction thereof, for whom working, sleeping or living accommodations are provided above the second floor." And the evidence being that the building destroyed by fire did not have the requisite number of fire escapes, the question of whether the insufficient supply was the proximate cause of the death of a member of the club asleep in the dormitory was one for the jury. Ib.

26. ———: ———: **Owner's Knowledge of Use.** There is no necessity of further proof that the owner of the building had knowledge that its lessee, an atheletic club, was using the fifth floor of the leased premises for "dormitory" or sleeping purposes prior to the fire which destroyed the building, than the undisputed fact that the building and such floor had been so used for eleven years, during all of which time the owner occupied a portion of it. Ib.

27. **Scaffold: Movable Platform.** It is a matter of common knowledge that a platform for the use of workmen in erecting a large and tall building is readjusted and moved either laterally or per-

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pendicularly as the work on the walls progresses, but it is none the less a scaffold on that account. Where the entire wall of a building, sixty or eighty feet long and fifty or sixty feet high, was separated into sections called panels, and the platform on which the men worked in removing the forms was moved from panel to panel as the work progressed, the platform was a scaffold within the meaning of Section 7843, Revised Statutes 1909. Prapuolenis v. Const. Co., 358.

28. ———: **Specific Acts: Fall: Burden of Proof.** Testimony that one of the chains supporting the scaffold had become unfastened will support an inference that it was insecurely fastened. But it is not necessary under the statute (Sec. 7843, R. S. 1909) to prove a specific act of negligence which caused the scaffold to fall. The statute requires that the structure "shall be well and safely supported" and "so secured as to insure the safety of persons working thereon," and this language means that the giving way of scaffold and the consequent injury of a workman raises a prima-facie presumption that his employer had failed of his duty and places the burden on him to show that it gave way without any negligence on his part. The statute would possess no force or effect if the injured workman were required to point out a specific defect in the scaffold furnished him, and which fell, causing his injury. Ib.

29. ———: ———: ———: **Res Ipsa Loquitur.** While the doctrine of *res ipsa loquitur* does not generally apply to a case arising between master and servant, it is so applied where the injury to the servant, is caused by some appliance peculiarly within the master's knowledge and control, of which the servant is ignorant and with whose construction or arrangement he has nothing to do. Ib.

30. **Fellow-Servants: Carpenter and Common Laborer.** A carpenter constructed the platform on which the men were to work in taking down the scaffolding, and a common laborer had nothing to do with its constructing and knew nothing about it. Later after the platform was completed, the carpenter and laborer stood on the platform and were working together in taking down and receiving the timbers of the scaffold when the platform fell, injuring the laborer. *Held*, that they were not fellow-servants in the work of constructing the platform, and as the laborer's action for damages is based on a violation of the statute requiring employers to furnish safe scaffolds or structures for such work, his action is not barred on the theory that his injuries were due to the negligence of a fellow-servant. Ib.

31. ———: ———: **Detached Employee.** When the master uses one servant to construct a place in which he and the other servants are to work, and the place is made unsafe by that servant, and a fellow-servant who was not employed in that particular work is injured because of the defect, he is not the fellow-servant of the one who did that particular work so as to defeat recovery. Ib.

32. **Testimony: Competency: Abandoned Objection.** An objection to the competency of a witness as an expert, for whom the court stated a reason why he was competent, to which no objection was made, after which the witness testifies without further objection, must be considered as having been abandoned. Threadgill v. United Rys., 466.

33. ———: **Harmless Conclusion.** Where plaintiff had testified that as her automobile turned east to cross the railway tracks she

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saw a north-bound street car "coming at a rapid rate of speed and at a distance of seven or eight feet from the machine," no harm was done by the statement of a witness for defendant who testified that the street car was not more than eight or ten feet distant when the automobile turned across the track and he "saw they could not help but get hit when they turned across there." Threadgill v. United Rys., 466.

34. **Testimony: General Objection.** A mere objection to certain testimony and a mere motion to strike it out, both in the most general terms, no reason being assigned for either the objection or the motion, will not save for review on appeal the court's ruling overruling the motion. Ib.

35. **Automobile: Highest Care Required of All Drivers: Imputed to Owner.** The negligence of a seventeen-year-old son of plaintiff, who was the driver of the automobile owned by her and in which she was riding, is imputable to her, and the law imposes upon the driver, and consequently upon her, the duty of exercising the highest degree of care for the safety, not only of pedestrians and other travelers on the public street, but for herself as well; and if she is injured as the result of the collision of her automobile with a street car, she cannot recover unless her driver was at the time exercising the highest degree of care. Ib.

36. ———: ———: **Statute: Contributory.** The statute (Par. 9, sec. 12, p. 330, Laws 1911) requiring any person owning, operating or controlling an automobile running on or across public roads, streets or other public highways, to use the highest degree of care that a very careful person would use under like circumstances, to prevent injury to persons on such highways, and making an owner or driver failing to use such care liable for damages to any person injured, requires such driver or owner to execise the highest degree of care to avoid collisions with street cars and other automobiles and thereby to avoid injuring himself, as well as pedestrians and travelers on the street. It supplants the common-law rule which requires such driver or owner to be in the exercise of only reasonable or ordinary care for his own safety, and makes his failure to exercise the highest degree of care contributory negligence. [Disapproving Advance Transfer Co. v. Railroad, 195 S. W. (Mo. App.) l. c. 568, and Hopkins v. Sweeney Automobile School Co., 196 S. W. (Mo. App.) 772.] Ib.

37. **Pleading: General Allegations: Common-law Negligence.** A ruling by the Court of Appeals that a petition charging that defendant was in exclusive control of the erection of a certain building and that plaintiff, in the employ of defendant, while doing carpenter work on the third floor, was, "by reason of the negligence of defendant, struck by a piece of building material, which fell from a floor above the third floor, by reason whereof plaintiff fell with great force and violence a distance of forty feet, and by reason of such falling, which was due to the negligence of defendant plaintiff was injured," etc., charged general negligence at common law and stated a cause of action for damages, is not in conflict with any decision of the Supreme Court cited by relator. State ex rel. Const. Co. v. Reynolds, 493.

38. ———: ———: ———: **Ordinance as Evidence.** If the petition states a cause of action of negligence at common law, an ordinance making the act of defendant negligence is evidentiary, and though

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not pleaded is competent evidence; and a decision of the Court of Appeals so ruling, is not in conflict with prior decisions of the Supreme Court, but in harmony therewith. Ib.

39. **Common-law Negligence: Liability Based on Ordinance.** A ruling by the Court of Appeals that, since the ordinance did not expressly give a cause of action for damages, but merely prescribed a duty to be performed, a common-law action of negligence would lie for a violation of the ordinance duty, is not in conflict with prior decisions of the Supreme Court. Ib.

40. **Engineer: Vice-Principal.** The engineer operating a locomotive engine on defendant's railroad is a vice-principal of defendant, and if his conduct in failing to supply with sufficient water the boiler of the engine which exploded amounted to negligence, contributing in whole or in part to the death of the fireman, the defendant is liable in damages, because the engineer's negligence was the defendant's negligence. McCord v. Schaff, 558.

41. ———: **Defective Appliances: Irrelevant: Allegata et Probata.** If the action for damages was tried on allegations that it was the duty of the engineer in charge of the engine which exploded to see that it was properly supplied with water, that he negligently failed to perform that duty, that such failure was the proximate cause of the explosion of the boiler and that the death of the fireman resulted from such negligence, defective appliances could not affect the case, and expert testimony and speculation as to whether the appliance for supplying water to the boiler were defective were irrelevant; but, it being conceded that the explosion was due to an insufficient amount of water in the boiler, the whole issue, under such charge, was whether it was the duty of the engineer to see to it that the boiler was properly supplied. Ib.

42. ———: **Supplying Boiler With Water.** There being no evidence beyond the merest speculation that the fireman who was killed when the engine exploded for lack of water had made any attempt to pump water into its boiler, or had asked or been directed to do so, and it being the unquestioned duty of the engineer to pump it, the engineer's failure to do so, thereby causing the explosion and the death of the fireman, was a negligent act, for which the railroad company must respond in damages. Ib.

43. ———: ———: **Failure to Call Witness With Knowledge.** The failure of a party to call witnesses within his power who know vital facts affecting the issue on trial is to be taken as a strong circumstance against him. So where a locomotive engine exploded because of a lack of a proper amount of water in its boiler and such explosion caused the death of the fireman, and the main issue at the trial was whether it was the duty of the engineer to see to it that the boiler was properly supplied with water, the fact that the railroad company, when sued for damages by the fireman's father, did not call the engineer or a student fireman who was on the engine, neither of whom was injured, or account for its failure to call them, is a strong circumstance against the defendant, in the absence of any testimony that the fireman was directed or asked or assumed to pump water into the boiler. Ib.

44. **Damages: Compensation: Life Expectancy of Plaintiff.** An instruction on the amount of damages which a plaintiff may recover as compensation for the negligent death of another is erroneous

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which bases the damages solely on the life expectancy of the deceased and does not require the jury to take into consideration the plaintiff's expectancy in determining said amount; and where a father sues for the loss of his adult son, the instruction should take into consideration the life expectancy of the father alone. McCord v. Cchaff, 558.

45. **Damages: Compensation: Prior Contributions.** In a suit by a father for compensation by way of damages for the negligent killing of his adult son, the testimony should develop the exact number of months the son contributed to the support of his parents, and the amount contributed each month, or in some other way establish an exact basis for calculating what the son would have contributed to their support during their life expectancy had he lived. Ib.

46. **Separate Acts: Allegations: Proof of One: Electric Wire.** A petition alleging that "defendant negligently and carelessly permitted one or more of its said wires charged with electricity, to become uninsulated and broken in two, and to fall to the surface of said alley and to remain broken in two and down while fully charged with electricity, when it knew, or ought by the exercise of the highest degree of care and caution to have known, that they were so uninsulated and broken and down," charges three acts of negligence, namely, negligently permitting said wires (1) to become uninsulated, (2) to break in two and (3) to fall to the ground; and plaintiff was not required to prove all three charges, but if he proved that the wire became uninsulated or broken in two, and remained in that condition for such a length of time as to have enabled defendant to discover the defect by the use of proper care, then defendant is liable to a pedestrian who stepped upon the wire, even though it was not down for more than a moment. Meeker v. Elec. Co., 574.

47. **Uninsulated Electric Wire in Alley: Notice: Proximate Cause.** Substantial evidence that defendant was repeatedly notified that its electric wire was defective, spluttering and making blue light, and had ample time to have repaired it before it broke in two and fell in the alley and neglected to do so, is sufficient to charge defendant with gross negligence; and if after such notice, and the breaking and falling of the wire, a boy, running through the alley, came in contact with it and was injured, defendant is liable in damages for his injuries, even though the wire had fallen only a few moments before he came in contact with it and defendant had no notice that it was actually down; for in such case, neglect to repair the defective wire after repeated notice or after ample time to have discovered its defective and dangerous condition, was the proximate cause of the boy's injury. Under such circumstances the length of time the wire was down was wholly immaterial. Ib.

48. **Separate Acts: Proof of One: Instructions: Broadening Issues.** Where plaintiff's petition charges three separate acts of gross negligence, proof of any one of them which was the proximate cause of his injury will justify a verdict in his favor, and an instruction which submits the three charges alleged, does not broaden the issues. Ib.

49. **Evidence: Telephone Communication.** Where an electric light company had a telephone in its office with a given number and said number was published in the telephone directory, and a user of said telephone called said number and some one answered by giving the name of the company, a communication then imparted

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to the said company that its electric wires in a certain locality were crippled, to which the reply came, "All right; we will attend to it," is admissible evidence in a subsequent action for damages by a boy who was burned by one of said crippled wires, even though the witness did not know the name of the person who answered for the company. Ib.

50. **Verdict: Excessive:** $35,000. Plaintiff came in contact with one of defendant's electric wires, and was badly burned in his hands, arms, chest, abdomen, back and upper legs; one hand was amputated at the wrist; he has very imperfect use of the fingers of the other hand, but the upper part of the arm is dead, and the constrictions are such that it has become fastened to the skin of the body, and that condition can never be remedied; the burns about the chest and abdomen were so severe that the cavity of one lung and the abdominal cavity are permanently constricted; he can never use his remaining hand for any kind of work; he suffered indescribable nervous agony for several months, and all his life he must be a broken, helpless and suffering cripple. The jury returned a verdict for $50,000, which was by the trial court reduced to $35,000. *Held*, that the judgment for $35,000 will not be disturbed. Ib.

51. **Dormitory: Athletic Club.** A seven-story brick building, the west half of which was occupied by an athletic club, having a kitchen and dining room on the third floor, a banquet hall and ten sleeping rooms on the fourth floor, thirty-six sleeping rooms and a library on the fifth floor, thirty-nine bed rooms on the sixth floor, having in all sleeping accommodations for one hundred and twenty-five persons, in which seventy persons were sleeping at the time of the fire, was a dormitory within the meaning of Section 10668, Revised Statutes 1909, and was required to be equipped with fire escapes as provided by Sections 10666, 10667 and 10668. Newell v. Boatmans Bank, 663.

52. **Death in Dormitory: Insufficient Fire Escapes: Proximate Cause: Res Ipsa Loquitur.** When fire safety-appliance laws are violated, and death, unexplained except by the physical facts, occurs as a result of fire in a building not equipped with the required appliances, but which is by law required to be so equipped, the case should go to the jury under the rule of *res ipsa loquitur*, although there is no positive evidence that the death was due to a lack of such appliances. Even though there was no physical obstruction between the room in which deceased was sleeping and a near-by exit to a fire escape, unless the fire barred the way, yet if no person sleeping in other rooms opening on the corridor escape by said exit, and there is further evidence from which it may be inferred that had there been the required appliances at another part of the corridor he might have escaped, the rule applies, and the jury must determine the proximate cause of his death. Ib.

53. **Inferred from Facts.** If the legitimate inference which may be drawn from the facts establish the negligence alleged, the case of negligence is made. Krinard v. Westerman, 680.

54. **———: Malpractice: Operation by Surgeon.** Plaintiff was afflicted with a fibroid tumor of the uterus, and applied to defendant to remove it, and in the operation he cut a hole in her bladder, and tied off one of the ureters. Plaintiff alleged that these things were negligently done, and the defendant asserted that they were necessary because the parts were diseased and cancerous. The

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evidence shows that immediately after the operation he pronounced it a perfect success, and did not for a month inform plaintiff that he had made an incision in the bladder, and then when informed that there was a constant flow of urine he told her that he had done so in order to remove the diseased parts and that there would have to be a second operation, although he had all along told her and her friends that she was getting along nicely. When the necessity for a third operation arose, she suggested that a famous surgeon be called to assist, at which he became enraged. Both before and after this third operation she was examined by other physicians who found no evidence of diseased or cancerous conditions. The evidence showed that the tieing of the ureter would kill the kidney, and that prior to the operation the kidney was healthy and normal, and afterwards it had no life in it. *Held*, that negligence could be inferred from these facts, and the court committed no error in submitting the case to the jury. Krinard v. Westerman, 680.

55: **Malpractice: Degree of Physician's Skill.** A physician or surgeon undertaking the treatment of a patient is required to possess and exercise that degree of skill and learning ordinarily possessed and exercised by the members by his profession in good standing, practicing in similar localities. It is not sufficient that he use the degree of skill possessed by reasonably skillful surgeons or physicians "in the community in which he is practicing." Ib.

56. ———: **Degree of Specialist's Skill.** A physician holding himself out as having special knowledge and skill in the treatment of particular diseases, and sued as such, is bound to bring to the discharge of his duty as such specialist, not merely the average skill possessed by general practitioners, but that special degree of skill and knowledge possessed by physicians who are specialists in the treatment of such diseases, in the light of the present state of scientific knowledge. Ib.

57. ———: **Measure of Damages: Future Operation.** Where there is evidence that the needless cutting of one of the ureters causes the corresponding kidney to die, that about fifty per cent of dead kidneys produce infection, and that such infection makes necessary a major operation, accompanied with pain and is expensive, it is not error, in instructing the jury on the measure of damages, that they may take into consideration what suffering plaintiff may endure in the future for operations she may hereafter be required to have performed. Ib.

58. ———: ———: ———: **Use of Word "May."** The instruction should limit defendant's liability for future pain to reasonable certainty and not bare possibility, and consequently the use of the word "may" is liable to mislead the jury; but courts take an instruction as a whole, and if the word "may" as used with its context does not appear misleading, its use will not constitute reversible error. Ib.

59. ———: ———: **Surgeon's Fees.** Evidence that plaintiff as a result of her injuries, had paid definite sums of money and that she had stated accounts for other expenses incurred but not paid, is definite enough to support an instruction that the jury allow her the money she had expended for physicians, nurses and medicines, especially where the jury are definitely told that she had neither paid nor had a statement of the amount she owed other physicians and that those items were not included in the sum named as the aggregate of her expenses incurred. Ib.

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NEGOTIABLE INSTRUMENTS.

1. **Necessary Parties: Pledgor of Note Alone: Trustee of Express Trust: No Possession.** It is not enough to authorize the pledgor of a negotiable note, exceeding in amount the debt for which pledged to maintain suit on the note in his name alone, that the pledgee loan it to him for purposes of protest, consent to and aid the pledgor in the suit, and through his counsel present the note in evidence at the trial; but in order to constitute the pledgor a trustee of an express trust, the pledgee must actually part with the physical possession of the note. If the original payee, after his assignment of the note, becomes possessed thereof, he can maintain the action in his name alone, notwithstanding his name is indorsed thereon in blank, for under the statute (Sec. 10018, R. S. 1909) he can strike out the indorsement and make a paper title in himself; but without actual possession, the right to strike out the indorsement, or to maintain an action on the note as the trustee of an express trust, does not exist. American Forest Co. v. Hall, 643.

2. ———: ———: ———: ———: **Pledged Note in Excess of Debt.** The fact that the notes, indorsed in blank, exceed the amount of the debt for whose payment they were pledged, does not authorize the pledgor alone, without actual physical possession of the notes, to maintain suit thereon, although the pledgee consents to such suit. By an indorsement in blank and delivery notes are fully negotiated and the indorser loses all title thereto, even title to the excess of the amount thereof over the debt for which they are pledged, and for the title to pass back to the indorser or pledgor there must be an actual redelivery. Nor does the fact that the pledgee loaned the notes to the pledgor for purposes of protest, nor that the pledgor in his petition alleges that he is the owner and legal holder thereof, make him the trustee of an express trust, for he must prove such allegation. Ib.

NEW TRIAL.

1. **Sufficiency of Evidence: Appellate Practice.** If there was any evidence developed at the trial to uphold a verdict for plaintiff, the order granting to her a new trial must be affirmed on appeal; if there was none, the order will be set aside and the verdict for defendants reinstated. Baker v. Gates, 630.

2. **Granted: Weight of Evidence: Appellate Practice.** Where under the facts in evidence the rule of *res ipsa loquitur* required the case to go to the jury, and they returned a verdict for defendant, the action of the trial court, granting to plaintiff a new trial on the ground that the verdict was against the weight of the evidence, will not be disturbed on appeal. Newell v. Boatmans Bank, 663.

NOTICE.

1. **Life Insurance: Extended Policy: Failure to Give Notice of Insured's Death: Bar to Recovery.** Sections 6946 and 6948, Revised Statutes 1909, providing that, in case of extended life insurance, notice of the claim and proof of death must be submitted to the company within ninety days after insured's death, must be read and construed together, and a failure to give notice and make proof of death within such time, absent waiver or estoppel or other matter of avoidance, defeats recovery. A claim under the policy is not, by said statutes, strictly speaking, defeated by rea-

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NOTICE—Continued.

son of forfeiture, but because failure to give notice and make proof of death constitutes a failure to perform a statutory requirement essential to the creation of a valid claim against the company. Graves v. Ins. Co., 240.

2. **Drainage District.** If the first notice to the landowners described the proposed ditch exactly as it was described in the report of the first viewers and in the petition, and gave notice that the report had been filed, it was sufficient. State ex rel. McBride v. Sheetz, 429.

3. ———: **Hearing Before Viewers: Due Process.** A special notice to the landowners of their right under Section 5585 to "appear before the viewers and freely express their opinions on all matters pertaining thereto" is not required, where the landowners are in court by proper notice when the viewers are appointed and notice is given of a hearing after their report is filed. Ib.

4. ———: **Bond Issue.** The statute does not require specific notice that a bond issue is contemplated as a method of securing funds; and if the petition contained a prayer for the issuance of bonds in statutory form and notice of the pendency of the petition was given, that was all that was required. Besides, a lack of authority to issue bonds is no defense to a suit to collect an installment tax. Ib.

5. **Sheriff's Sale: Collateral Attack: Misleading Notice.** A lack of proper notice of a judicial sale is an irregularity which renders the sale voidable, but not void; and being only voidable, the sheriff's deed, made under execution, cannot, because of an infirmity in the notice, be attacked in a collateral proceeding, such as an ejectment brought by the purchaser. So where the special execution recited that the debt and costs were declared a lien upon the land, and the sheriff's deed contained the same recitals, the deed cannot be attacked in ejectment on the ground that the notice of sale stated that one of the defendants owned all the lands as tenant by the entirety jointly with the other defendant and that it was the interest of such tenant that would be sold. Ammerman v. Linton, 439.

6. **Negligence: Uninsulated Electric Wire in Alley: Notice: Proximate Cause.** Substantial evidence that defendant was repeatedly notified that its electric wire was defective, spluttering and making blue light, and had ample time to have repaired it before it broke in two and fell in the alley and neglected to do so, is sufficient to charge defendant with gross negligence; and if after such notice, and the breaking and falling of the wire, a boy, running through the alley, came in contact with it and was injured, defendant is liable in damages for his injuries, even though the wire had fallen only a few moments before he came in contact with it and defendant had no notice that it was actually down; for in such case, neglect to repair the defective wire after repeated notice or after ample time to have discovered its defective and dangerous condition, was the proximate cause of the boy's injury. Under such circumstances the length of time the wire was down was wholly immaterial. Meeker v. Elec. Co., 574.

NUISANCE.

1. **Creation of: Liability of Lessor.** If the intended use of leased premises by the lessee would, of necessity, create a nuisance,

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the lessor must be held to have authoried the nuisance and to be answerable for consequent damage; for no one may use, or agree that some one else may use, his property so as to harm others. Baker v. Gates, 630.

2. ———: ———: **Explosions in Stone Quarry: Question for Jury.** That a hill, leased for a stone quarry, could not be worked without danger to persons and property 400 or 450 feet from the place of blasting, and that therefore the blasting constituted a nuisance, is deducible from testimony showing that the danger was continuous, or at least occurred at intervals for a considerable period, and that it disturbed dwellers within the range of the blast, and persons exercising the common right of travel on street cars on a boulevard 400 to 450 feet from the point of blasting; and that a nuisance did not necessarily arise from the work may be inferred from evidence that the quarry could be worked without risk to the neighborhood and that before the day of the injury to plaintiff as she was riding on a street car no debris had been thrown as far as the boulevard; and hence, whether, under such circumstances, a nuisance would necessarily arise from the work, was a jury matter. Ib.

3. ———: ———: **Quarry Operated by Receiver and Not by Lessee.** Where the leased quarry was not being operated by the lessee at the time a flying stone struck a passenger on a street car, or by any one else for whose conduct the lessor was responsible, but, without the consent of either, by a receiver in bankruptcy of a construction company under an order of court, neither the lessor nor the lessee is liable in damages for the injury to the passenger, the lessee's only connection with the work at the time being at most that of an employee or agent of the receiver. Ib.

PARTIES TO ACTION.

1. **Public Road: Estate by Entirety: Wife Not Party.** A proceeding to establish a public road through lands owned by a wife and her husband as cotenants by the entirety, is void as to the wife who was not notified of the proceeding and did not appeal, although her husband was made a party and contested the establishment of the road. Ripkey v. Gresham, 521.

2. **Receiver: Suit for Funds Converted by Predecessor: Proper Relator.** A receiver appointed under Sec. 2018, R. S. 1909, cannot maintain a suit in his own name against the sureties on the bond of his predecessor; but where the order appointing the original receiver directs him to take possession of the property and with leave of court to bring such suits as shall be necessary to recover the assets, and the same power is given to the successor receiver, with nothing in the record showing an attempt to vest the legal title in either receiver, the suit to recover from the surety on the first receiver's bond for moneys converted or misappropriated, should be brought, not in the name of the successor receiver, but in the name of the company for whom the receiver was appointed. State ex rel. Peach Co. v. Bonding Co., 535.

3. **Necessary Parties: Pledgor of Note Alone: Trustee of Express Trust: No Possession.** It is not enough to authorize the pledgor of a negotiable note, exceeding in amount the debt for which pledged, to maintain suit on the note in his name alone, that the pledgee loan it to him for purposes of protest, consent to and aid the pledgor in the suit, and through his counsel present the

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PARTIES AND ACTION—Continuen.

note in evidence at the trial; but in order to constitute the pledgor a trustee of an express trust, the pledgee must actually part with the physical possession of the note. If the original payee, after his assignment of the note, becomes possessed thereof, he can maintain the action in his name alone, notwithstanding his name is indorsed thereon in blank, for under the statute (Sec. 10018, R. S. 1909) he can strike out the indorsement and make a paper title in himself; but without actual possession, the right to strike out the indorsement, or to maintain an action on the note as the trustee of an express trust, does not exist. American Forest Co. v. Hall, 643.

4. ———: ———: ———: ———: **Pledged Note in Excess of Debt.** The fact that the notes, indorsed in blank, exceed the amount of the debt for whose payment they were pledged, does not authorize the pledgor alone without actual physical possession of the notes, to maintain suit thereon, although the pledgee consents to such suit. By an indorsement in blank and delivery notes are fully negotiated, and the indorser loses all title thereto, even title to the excess of the amount thereof over the debt for which they are pledged, and for the title to pass back to the indorser or pledgor there must be an actual redelivery. Nor does the fact that the pledgee loaned the notes to the pledgor for purposes of protest, nor that the pledgor in his petition alleges that he is the owner and legal holder thereof, make him the trustee of an express trust, for he must prove such allegation. Ib.

PARTITION.

1. **Foreign Will: Effect in This State.** The will of a resident of Illinois, executed and probated there, when a copy duly authenticated is filed for record in this State, will take effect and be interpreted according to the laws of this State, exactly as if it had been originally proved here. Dobschutz v. Dobschutz, 120.

2. ———: ———: **Right of Children to Maintain.** Children, residents of Illinois, not mentioned in their father's will, by which he attempted to devise all his property, wherever situate, to his widow, may maintain a partition proceeding in the courts of this State and assert the same rights to land in this State, belonging to testator at the time of his death, that they could have done had he left no will. Ib.

3. ———: ———: **Contrary to Will and Statute.** Children "not named or provided for" in their father's will, by bringing suit for the partition of lands belonging to him at the time of his death, do not seek partition contrary to any will which affects them, and consequently Section 2569, Revised Statutes 1909, which provides that no partition of lands devised by any last will shall be made contrary to the intention of the testator as expressed in the will, has no application to them. Ib.

PAYMENT.

Recited in Insurance Policy. The payment of the first premium, where the policy itself recites that such first premium was made, cannot be disputed for the purpose of invalidating the policy; but where the recital is that "the insurance is granted in consideration of the payment in advance" of a named sum of money, "being the premium for the first year's insurance under this policy," the recital is not a specific recital of payment, but a mere statement

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that the first payment shall be the consideration for the issuance of the policy. Ins. Co. v. Salisbury, 40.

PHYSICIAN. See **Malpractice.**

PLEADING.

1. **Express Trust: Cause of Action: Present Interest.** An allegation that it is now necessary that plaintiff, in the exercise of the powers conferred upon him as trustee by a certain trust instrument, either lease, sell or mortgage the lands for the purposes of the trust, and that a mortgage executed by the beneficiary constitutes a cloud upon the plaintiff's title and has heretofore and does now prevent the plaintiff from carrying out the provisions of said trust, states that plaintiff had an interest in the land at the time his suit was brought. Maxwell v. Growney, 113.

2. **General Allegations: Common-law Negligence.** A ruling by the Court of Appeals that a petition charging that defendant was in exclusive control of the erection of a certain building and that plaintiff, in the employ of defendant, while doing carpenter work on the third floor, was, "by reason of the negligence of defendant, struck by a piece of building material, which fell from a floor above the third floor, by reason whereof plaintiff fell with great force and violence a distance of forty feet, and by reason of such falling, which was due to the negligence of defendant, plaintiff was injured," etc., charged general negligence at common law and stated a cause of action for damages, is not in conflict with any decision of the Supreme Court cited by relator. State ex rel. Const. Co. v. Reynolds, 493.

3. ———: ———: **Ordinance As Evidence.** If the petition states a cause of action of negligence at common law, an ordinance making the act of defendant negligence is evidentiary, and though not pleaded is competent evidence; and a decision of the Court of Appeals so ruling, is not in conflict with prior decisions of the Supreme Court, but in harmony therewith. Ib.

4. **Private Road: Accessible.** The statute (Sec. 10447, R. S. 1909), prescribing the manner in which an easement of access by a private road may be acquired, prescribes no formula of words in which the petition must set forth that the petitioner is the owner of the tract of land for which the easement is desired and that no public road passes through it or touches it. Any words that expressed these facts in plain and unmistakable terms are sufficient; and if it uses such words, the petition is not defective or insufficient for that it does not employ the word "accessible" used in the statute. Wiese v. Thien, 524.

5. ———: **Showing Present Access.** And the mere fact that the petitioner in his petition has described that part of his tract on the side of the impassable stream, which at one corner is touched by a public road, does not preclude him from presenting his claim to a private way to the part of the tract on the opposite side. Ib.

6. **Negligence: Separate Acts: Allegations: Proof of One: Electric Wire.** A petition alleging that "defendant negligently and carelessly permitted one or more of its said wires charged with electricity, to become uninsulated and broken in two, and to fall to the surface of said alley and to remain broken in two and down while fully charged with electricity, when it knew, or ought by

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PLEADING—Continued.

the exercise of the highest degree of care and caution to have known, that they were so uninsulated and broken and down," charges three acts of negligence, namely, negligently permitting said wires (1) to become uninsulated, (2) to break in two, and (3) to fall to the ground; and plaintiff was not required to prove all three charges, but if he proved that the wire became uninsulated or broken in two, and remained in that condition for such a length of time as to have enabled defendant to discover the defect by the use of proper care, then defendant is liable to a pedestrian who stepped upon the wire, even though it was not down for more than a moment. Meeker v. Elec. Co., 574.

7. **Parol Contract: Consideration Must Be Pleaded.** A petition based on a parol contract of insurance, which neither avers the payment of a premium nor a promise to pay, does not state a cause of action; for no consideration being alleged or implied, the petition is fatally defective. Swift v. Fire Ins. Co., 606.

8. ———: ———: **Amendment After Judgment.** A petition which states no cause of action at all cannot be amended after judgment so as to state one. If the parol contract sued on was a mere *nudum pactum* and no consideration was pleaded, the petition cannot be amended after trial and judgment so as to allege a consideration. A petition which absolutely states no cause of action cannot be amended after judgment. Ib.

PLEDGOR AND PLEDGEE. See **Negotiable Instruments.**

POLICE REGULATION.

1. **Weights and Measures: Legislative Power: Invasion of Right to Contract.** For the purpose of protecting the public and consumers from fraud and imposition in their purchase of commodities, the Legislature has the right, as a police regulation, to regulate weights and measures, and delegate that authority to municipal corporations, in so far as they exercise police powers; but the regulation must not be such as to invade the constitutional right to make contracts. Stegmann v. Weeke, 140.

2. ———: ———: ———: **Reasonable Restrictions.** A legislative exercise of the police power to fix weights and measures necessarily limits the freedom of contract that would otherwise exist; but so long as the restriction has a reasonable relation to the exercise of the power and is not so arbitrary or capricious as to be a deprivation of due process of law, freedom of contract in the constitutional sense is not interfered with. Ib.

3. ———: ———: ———: **Bushel Boxes According to Statute: Penalty for Use of Boxes of Different Dimensions.** An ordinance establishing standard bushel and half-bushel boxes to contain the same cubical content of the bushel and half-bushel prescribed by statute, to be used by truck gardeners and farmers in selling their fruits, vegetables and other produce in the city, and prescribing a penalty for the use of boxes of a different capacity and thereby sufficiently guaranteeing that boxes of a different capacity will not be used, is not unconstitutional as impairing the obligation of contracts, although it makes unlawful the use of boxes of a less capacity which have been in general use for many years. Ib.

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POLICE REGULATION—Continued.

4. ———: **Bushel Boxes of Given Dimension: No Penalty.** The court may determine whether an ordinance prescribing that bushel and half-bushel boxes to be used by farmers and truck gardeners in marketing their fruits and vegetables within the city shall be of certain dimensions, is unreasonably arbitrary, and may settle the question by inspecting the face of the ordinance, or may find it unreasonable by a state of facts which affects its operation; but an ordinance which prescribes that a bushel box shall have certain dimensions and a half-bushel box certain other dimensions, but prescribes no penalty for the use of boxes of different dimensions, but only a penalty for the use of boxes of a different capacity, is not unreasonable.
Held, by FARIS, J., concurring, that the ordinance is valid only because it prescribes no penalty for the use of boxes of different dimensions, thus making the prescription that the bushel and half-bushel boxes shall have certain dimensions only advisory, and not mandatory. *Held*, also, that the city has no power to say that the boxes shall be of a required length, width and depth. Ib.

POWERS.

Express Trust: Power of Beneficiary to Mortgage. A deed giving to the trustee power to sell, convey, pledge, mortgage or otherwise dispose of land, and to invest, re-invest or use the money derived from any such sale, mortgage or pledge, or any income arising from said property, for the use, benefit, support and maintenance of another, creates an express, active trust in the land, and gives to the beneficiary no power to sell or mortgage the same. Maxwell v. Growney, 113.

PRACTICE.

1. **Demurrer to Evidence.** Where defendant, at the close of plaintiff's case in chief, offers a demurrer thereto, and upon its being overruled puts in its own evidence, the sufficiency of the evidence to sustain the verdict must be determined from all the evidence in the case; and the appellate court, in considering the demurrer, will indulge every inference in favor of the verdict which men of average intelligence and fairness might legitimately draw from the proven facts. Murrell v. Railroad, 92.

2. **Negligence: Contributory: Demurrer to Evidence: Proven Facts: Humanitarian Rule.** Where there was substantial evidence tending to prove (1) that the servants in charge of the train were negligent in failing to ring the bell, and keep it ringing, as required by statute, as it approached the public-street crossing where plaintiff's husband was killed, (2) that they were guilty of negligence in failing to give proper and timely danger signals after he was known to be in peril, (3) that they were guilty of negligence in violating the six-mile speed ordinance and which they continued to violate until he was struck by the train, (4) that they were guilty of common-law negligence in running the train, at the time and place of the accident, at a dangerous and unsafe rate of speed, (5) that the engineer was negligent in failing to reduce the rate of speed after seeing deceased in peril and apparently oblivious to the approaching train, and (6) that said servants were likewise negligent in failing to give danger signals with a whistle, so as to arouse in deceased a realization of the danger into which he was moving, no demurrer to the evidence

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PRACTICE—Continued.

can be sustained, although it be conceded that deceased, at the time and place of the accident, was guilty of negligence that directly contributed to his own death. Murrell v. Railroad, 92.

3. **Injunction: Dismissal Without Hearing.** In an injunction, if the bill states a cause of action entitling plaintiff to a hearing on the merits and he does not in any way waive his right to have the case proceed in due course, it would seem, though it is not decided, that, under Sec. 2532, R. S. 1909, the court is not authorized to dismiss the bill without a hearing on the merits and without having passed upon the matter of issuing a temporary restraining order. Stegmann v. Weeke, 131.

4. ———: **Clean Hands: Determined Without Hearing.** The trial court is not empowered to decide, without a hearing on the merits, upon a mere preliminary consideration of the question whether upon the face of the petition a temporary restraining order should be issued, that the plaintiffs have not come into court with clean hands. Ib.

5. **Negligence: Contributory: Demurrer to Evidence.** If the evidence adduced by plaintiff proves his own contributory negligence as a matter of law, and there is no room in the case for the last-chance doctrine, defendant's demurrer to the evidence should be sustained, although the evidence also establishes defendant's prima-facie negligence. In such case plaintiff's evidence establishing his own contributory negligence destroys the prima-facie negligence of defendant. And a demurrer to his evidence in such case is certainly available where there is a defensive plea of contributory negligence, and on reason and authority it would be available without such plea. Tannehill v. Railroad, 158.

6. **Election: Burglary and Larceny: Receiving Stolen Goods.** Where the evidence is comprehensive enough to sustain a conviction either for burglary and larceny, or for receiving stolen goods, knowing them to have been stolen, the court does not err in refusing to compel the State to elect upon which of the two counts of the indictment, charging both offenses in separate counts, it will stand. State v. Cummins, 192.

7. **Reversal of Judgment: Remand for Retrial: Further Procedure.** When a judgment is reversed by the Supreme Court and the cause is remanded for a new trial, the court has jurisdiction, not only to retry the issues of fact presented by the pleadings in the first trial in accordance with the principles announced in the judgment of reversal, but also to reframe those issues as provided by the Code of Civil Procedure; for a retrial does not mean a mere replica of the former trial, but is a trial in the light of the experience and knowledge acquired in the interval. Barber v. Ins. Co., 316.

8. **Libel: Public Officials: Matter for Court.** It is the duty and province of the court to determine whether the spoken or written published matter complained of relates to the public acts of the plaintiff and is of public interest, and to further determine whether the comments upon the facts and the criticism are qualifiedly privileged; and if the alleged libelous matter pertains solely to plaintiff's public conduct as a public official, and all the substantial facts are admitted to be true or established without substantial controversy, and the comments upon them are qualifiedly privi-

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PRACTICE—Continued

leged, the court should not submit the case to the jury. McClung v. Pub. Co., 370.

9. **Judgment on Pleadings: Ascertainment of Cause of Action.** In an action brought by property owners for the cancellation of special tax bills, wherein the pleadings consist of the petition, an answer and a reply denying the allegations of the answer, the sole question, on the filing by defendant of a motion for judgment on the pleadings, is whether the petition states a cause of action entitling plaintiffs to the relief asked. Collins v. Jaicks Co., 404.

10. **Nuisance: Damages: Explosions in Stone Quarry: Question for Jury.** That a hill, leased for a stone quarry, could not be worked without danger to persons and property 400 or 450 feet from the place of blasting, and that therefore the blasting constitpted a nuisance, is deducible from testimony showing that the danger was continuous, or at least occurred at intervals for a considerable period, and that it disturbed dwellers within the range of the blast, and persons exercising the common right of travel on street cars on a boulevard 400 to 450 feet from the point of blasting; and that a nuisance did not necessarily arise from the work may be inferred from evidence that the quarry could be worked without risk to the neighborhood and that before the day of the injury to plaintiff as she was riding on a street car no debris had been thrown as far as the boulevard; and hence, whether, under such circumstances, a nuisance would necessarily arise from the work, was a jury matter. Baker v. Gates, 630.

PROCESS, SERVICE. See **Jurisdiction.**

PROXIMATE CAUSE. See **Res Ipsa Loquitur.**

PUBLIC SERVICE COMMISSION.

1. **Excessive Rates: Judicial Question.** The statute expressly gives the Public Service Commission authority to fix railroad rates, and in determining whether a proposed rate is lawful for the future the Commission does not act judicially, but simply ascertains what are the existing law and facts and applies to the particular utility the previously declared will of the Legislature. Mo. Southern v. Pub. Serv. Comm., 484.

2. **Railroad: Spur Tracks: Regulation of Rates by Commission.** As long as a railroad company operates spur or tram tracks in the public service it must do so subject to the regulatory powers of the Public Service Commission; and the fact that it operated them under tariff rates filed with the Commission is sufficient to warrant a finding by the Commission that it was using the two industrial spur or tram tracks, four or five miles long and connecting with its main line, in the public service; and that subjects them to regulation by the Commission. Ib.

3. ———: ———: **Included in Charter: Operation.** Whether the tariff rates to be charged by a railroad company for the carriage of freight over its spur or tram tracks are subject to reguiation by the Public Service Commission is not to be made to depend on whether such tracks are included in its charter. The power of the Commission to regulate the freight charges of a railroad company is to be determined by what it does rather than by what its charter says. The Commission's supervision is not limited to

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PUBLIC SERVICE COMMISSION—Continued.

lines constructed or owned by a railroad company, but is expressly by statute (Sec 43, p. 580, Laws 1913) extended to lines operated by it; and the railroad company cannot escape lawful regulation by denying its right to operate a line which it in fact is operating in the public service under regularly published tariffs. Mo. Southern v. Pub. Serv. Comm., 484.

RAILROADS.

1. **Constitutional Law: Title: Leasing.** The title to an act passed in 1870, entitled, "An Act to amend chapter sixty-three of the General Statutes, entitled 'of railroad companies,' so as to authorize the consolidation, leasing and extension of railroads," was broad enough to authorize a designation in the body of the act of the terms and conditions upon which such leases should be made, and to include a provision that "a corporation in this State leasing its road to a corporation of another state shall remain liable as if it operated the road itself." Murrell v. Railroad, 92.

2. ———: **Speed Ordinance: Six Miles an Hour: Unreasonableness.** An ordinance limiting the speed of railroad passenger trains to six miles an hour at a much-used public-street crossing, 1200 feet from the station, in a city of the fourth class containing 2700 inhabitants, is not unreasonable, nor an unlawful interference with interstate commerce, but a needed protection of the public at such crossing. Ib.

3. **Mandamus: Compelled Operation.** A railroad company in possession of its road may be compelled by mandamus to operate its road in accordance with the positive requirements of its charter, and mandamus is the proper remedy to compel a railroad to perform a definite duty to the public. State ex rel. Pub. Serv. Com. v. Mo. South. Ry. Co., 455.

4. **Abandonment of Spur Track: Without Permission.** Since the enactment of the Public Service Commission Act of 1913 a railroad company, engaged in operating a spur or branch line, cannot determine for itself the question of its right to abandon such line, but it must apply to the public service Commission for leave to abandon, and may be compelled by mandamus to continue operating such spurs or branches until the Commission has acted and its order has become final. Ib.

5. ———: ———: **Decrease in Freight Rates.** And notwithstanding the Public Service Commission refused to permit the railroad company to charge increased freight rates asked for over the spur tracks it was operating in submission to the Commission, it cannot, without the permission of the Commission, abandon the operation of such tracks on the ground that they cannot be operated profitably at the rates permitted, but its duty is to apply to the Commision for such permission or for such adjustment of the rates over its entire line as will not work a hardship. Ib.

6. ———: **Operated at Loss: Confiscation.** That an order of the Public Service Commission or a judgment of court concerning a particular facility or a portion of the line of a railroad company may result in some financial loss does not necessarily bring it into conflict with the provisions of the Constitution relating to due process of law and equal protection of the laws. Ib.

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RAILROADS—Continued.

7. ———: **Confiscation: Raised in Mandamus.** In a mandamus brought by the Public Service Commission against a railroad company to compel it to operate certain spur tracks which it has abandoned without permission, the question of whether the order to operate, if obeyed, may result in financial loss to the company and therefore be in conflict with the Constitution, has no place. Ib.

8. **Public Service Commission: Excessive Rates: Judicial Question.** The statute expressly gives the Public Service Commission authority to fix railroad rates, and in determining whether a proposed rate is lawful for the future the Commission does not act judicially, but simply ascertains what are the existing law and facts and applies to the particular utility the previously declared will of the Legislature. Mo. Southern v. Pub. Serv. Com., 484.

9. **Spur Tracks: Regulation of Rates by Commission.** As long as a railroad company operates spur or tram tracks in the public service it must do so subject to the regulatory powers of the Public Service Commission; and the fact that it operated them under tariff rates filed with the commission is sufficient to warrant a finding by the Commission that it was using the two industrial spur or tram tracks, four or five miles long and connecting with its main line, in the public service; and that subjects them to regulation by the Commission. Ib.

10. ———: **Included in Charter: Operation.** Whether the tariff rates to be charged by a railroad company for the carriage of freight over its spur or tram tracks are subject to regulation by the Public Service Commission is not to be made to depend on whether such tracks are included in its charter. The power of the Commission to regulate the freight charges of a railroad company is to be determined by what it does rather than by what its charter says. The Commission's supervision is not limited to lines constructed or owned by a railroad company, but is expressly by statute (Sec. 43, p. 580, Laws 1913) extended to lines operated by it; and the railroad company cannot escape lawful regulation by denying its right to operate a line which it in fact is operating in the public service under regularly published tariffs. Ib.

11. **Short-Haul Rates: Reasonable Variation.** A freight rate unlawful because in conflict with a valid constitutional inhibition is unreasonable. The short-haul clause of the statute is constitutional and a freight rate violative of it cannot be upheld on the ground that it is reasonable. Ib.

12. **Regulation of Rates: Estoppel: Agreement Upon Rates Charged.** A railroad company cannot rely upon estoppel under a contract void because in direct conflict with an express constitutional prohibition. Complainants are not estopped to ask the Public Service Commission to reduce within the maximum statutory charges the freight rates to be charged by a railroad company over its tram or spur lines, by the fact that, when the company was about to cease to operate the spur tracks, they entered into an agreement with it to pay charges in excess of the statutory maximum rates, and the company, in pursuance to the agreement, bought a special engine and expended five thousand dollars in putting the tracks in condition for hauling cars thereon. Ib.

13. **Taxes: Prima-Facie Case: Interstate.** The record of the valuation and assessment of the property of an electric railway over an interstate bridge of the State Board of Equalization made in scrupu-

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RAILROADS—Continued.

lous conformity to the methods and plans prescribed by the statute, and certified by the State Auditor, together with an admitted correct copy of the tax bill containing complete itemizations of the kind of property and rate of taxation, makes a prima-facie case against such railway for such taxes. State ex rel. Hagerman v. Elec. Ry. Co., 616.

14. **Taxes: Prima-Facie Case: Tax Bill.** The statute does not require that the tax bill be filed with the petition in a suit against railroads for delinquent taxes. It makes the record of the State Board of Equalization certified by its secretary prima-facie evidence of the facts therein recited in such suits. But a correct tax-bill can be offered as evidence. Ib.

15. ———: **Double: Electric Railway Over Interstate Bridge.** Where an electric railway by contract is given the right to operate its trolley lines over an interstate bridge belonging to other corporations, in consideration of a payment to them of a certain portion of the passenger fares received by it, its trolley wires, poles, cars, rails and other property owned and used by it in operating an electric railway are subject to taxation, and if such properties are separately assessed, and the other companies are assessed with taxes for the value of the bridge itself and its other structural elements, there is no double taxation. The corporate grantee of a right of user of the bridge can be separately assessed for taxes according to the value of its trolley lines and other distinct property used in operating its electric railway over the bridge. [Distinguishing State ex rel. v. Railroad, 196 Mo. 523.] Ib.

16. ———: **Discrimination: Neglect to Assess Other Property.** The neglect of the State Board of Equalization to assess other railroads liable to assessment under the same valid statutes under which defendant's railway properties were assessed, was not such a discrimination as invalidated the assessment against defendant. Ib.

17. ———: **Franchise.** A railway company which by the terms of its charter possesses the right to construct and operate a railroad, and has obtained permission from the city to operate its street railway over an interstate bridge for a period of fifty years, has a railroad franchise other than a franchise to be a corporation; and when the franchise to operate a railroad, which rested primarily in legislative grant, became consummate when it obtained permission of the city to occupy the bridge, its said franchise became taxable, upon a mileage basis, and could be assessed under the designation of "all other property." Ib.

18. ———: **Property Outside State: Railway Over Interstate Bridge.** The State Board of Equalization does not exceed its authority by taxing the tangible and intangible property of an electric railway, operated over an interstate bridge, within the territorial limits of this State. Ib.

RECEIPT. See **Insurance, 1 to 3.**

RECEIVER.

1. **Suit for Funds Converted by Predecessor: Proper Relator.** A receiver appointed under Sec. 2018, R. S. 1909, cannot maintain a suit in his own name against the sureties on the bond of his predecessor, but where the order appointing the original receiver directs him to take possession of the property and with leave of court to bring such suits as shall be necessary to recover the

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RECEIVER—Continued.

assets, and the same power is given to the successor receiver, with nothing in the record showing an attempt to vest the legal title in either receiver, the suit to recover from the surety on the first receiver's bond for moneys converted or misappropriated, should be brought, not in the name of the successor receiver, but in the name of the company for whom the receiver was appointed. State ex rel. Peach Co. v. Bonding Co., 535.

2. **Bond: Liability for Funds Converted by Receiver: Deposit in Bank.** A bonding company cannot discharge its obligation as surety by pointing out some other person who is also legally liable for a loss. So where a receiver was appointed for an industrial company and authorized to take possession of its assets, including money on deposit to its credit, and defendant as surety executed its bond, obligating itself that the receiver would faithfully and truly account for all moneys, assets and other property that should come into his hands, and thereafter the receiver caused to be transferred on the bank's books to his credit as receiver a deposit previously made to the credit of the industrial company, and thereafter by checks signed by himself as receiver and payable to himself drew out the deposit and converted it to his own use, the bonding company is liable to the company for the amount so misappropriated, and cannot escape payment on the theory that the bank had actual knowledge that the deposit was a trust fund and that the company was the real owner thereof. The legal title of the fund was in the company, but the right to possession after its redeposit was in the receiver, and the bank was bound to pay his checks when in proper form, and therefore the surety must account for the money misappropriated; and although the industrial company, upon a showing that the bank knew that the receiver was converting the fund to his own use and with such knowledge aided him in so doing by honoring his checks, might in a proper proceeding recover from the bank, still the surety must respond upon its guaranty that the receiver would faithfully account for the money and other assets reduced to his possession. Ib.

RELEASE.

1. **Joint Tortfeasors: Release of One: Effect at Common Law.** An instrument releasing one of several joint tortfeasors from liability for a tort, executed prior to the Act of March 23, 1915, Laws 1915, p. 269, is to be construed in the light of the common law as it existed in this State prior to the passage of said act, and under the common law a release of one joint tortfeasor operated to release all of them. Clark v. Union Elec. Co., 69.

2. ———: ———: ———: **Covenant Not to Sue.** Where the plaintiff by written instrument does "hereby release and forever discharge" one joint tortfeasor "only from all suits, actions or causes of action which I have or might have against" said tortfeasor, a subsequent clause by which plaintiff "expressly refuses and declines to release" the other tortfeasor "from any claim for damages which I may have or might have against it" and whereby plaintiff "expressly reserves the right to enforce any and all claims that I may or might have against" said other tortfeasor did not destroy the release thus clearly made, but the instrument operated to release all the joint tortfeasors. Ib.

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RELEASE—Continued.

3. **Joint Tortfeasors: Release of One: Covenant Not To Sue: Rule.** While the courts construe an instrument settling a claim for damages with one tortfeasor as a covenant not to sue wherever its language will permit, it cannot be so construed when it is clear from its unambiguous language that it was not intended as a covenant not to sue. Clark v. Union Elec. Co., 69.

RES ADJUDICATA. See **Former Adjudication.**

RES IPSA LOQUITUR.

1. **Application of Doctrine.** While the doctrine of *res ipsa loquitur* does not generally apply to a case arising between master and servant, it is so applied where the injury to the servant is caused by some appliances peculiarly within the master's knowledge and control, of which the servant is ignorant and with whose construction or arrangement he has nothing to do. Prapuolenis v. Const. Co., 358.

2. **Death in Dormitory: Insufficient Fire Escapes: Proximate Cause.** When fire safety-appliance laws are violated, and death, unexplained except by the physical facts, occurs as a result of fire in a building not equipped with the required appliances, but which is by law required to be so equipped, the case should go to the jury under the rule of *res ipsa loquitur*, although there is no positive evidence that the death was due to a lack of such appliances. Even though there was no physical obstruction between the room in which deceased was sleeping and a near-by exit to a fire escape, unless the fire barred the way, yet if no person sleeping in other rooms opening on the corridor escape by said exit, and there is further evidence from which it may be inferred that had there been the required appliances at another part of the corridor he might have escaped, the rule applies, and the jury must determine the proximate cause of his death. Newell v. Boatmans Bank, 663.

RETURN.

1. **Jurisdiction: Collateral Attack: Return in Another Case.** In a partition suit a defendant, whose interest in the land was sold upon execution under a default judgment rendered in another circuit court, has the right to offer the sheriff's return in that case in evidence, for the purpose of showing that the court did not acquire jurisdiction over the persons of the defendants therein, because of insufficient service of the summons. Wells v Wells, 57.

2. ———: **Sheriff's Return: Words Understood.** If the sheriff's return recites that he left a copy of the writ and petition "with a person family" of said defendants, the words "of the" will be understood between "person" and "family," so that it would read "with a person of the family" of defendants. Ib.

3. ———: ———: **Service Upon Husband and Wife.** If the defendants are husband and wife, and cannot be found in the county, it is proper for the sheriff to leave a copy of the petition and writ, and a copy of the writ, "with a person of the family" of said defendants, at their usual place of abode, over fifteen years of age. One such person, in contemplation of the statute, represents both defendants. Ib.

4. ———: ———: ———: **Copies for Each.** Where the defendants are husband and wife and cannot be found, the leaving of copies of the petition and writ for one, and a copy of the writ for the

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RETURN—Continued.

other, with some person of the family of said defendants, over fifteen years of age, at their usual place of abode, is all that the statute requires. If it could be construed to require such person to deliver a copy of the petition and writ to the first party served, and a copy of the writ to the other, still, in the absence of evidence to the contrary, it will be presumed that both the sheriff and said person did their duty. Ib.

5. ———: **The Return Adjudicated.** The sheriff's return recited: "I hereby certify that I executed the within writ in Lincoln County, Missouri, on 26th day of September, 1907, by leaving a copy of the writ and petition and a copy of the writ with a person family of said Emeline M. Wells and James B. Wells at their usual place of abode over the age of fifteen years." *Held*, sufficient to uphold a default judgment. Ib.

ROADS AND HIGHWAYS.

1. **Appellate Jurisdiction: Proceeding to Open: Injunction.** The Supreme Court has jurisdiction of an appeal from a judgment of the circuit court dismissing the petition of a wife to enjoin the county court and highway engineer from establishing, by a proceeding to which she was not a party, a public road through lands in which she and her husband owned an estate by the entirety. Ripkey v. Gresham, 521.

2. **Estate by Entirety: Wife not Party.** A proceeding to establish a public road through lands owned by a wife and her husband as cotenants by the entirety, is void as to the wife who was not notified of the proceeding and did not appeal, although her husband was made a party and contested the establishment of the road. Ib.

3. **Private Road: Easement at Common Law.** The doctrine of private ways existed at common law, and was usually founded on a presumption of grant or reservation, as where one sold a close surrounded by his own estate he was presumed to grant the easement of access, or if he sold his surrounding estate and reserved the close a reservation of the same easement would be presumed. And it was this doctrine of presumed easement which the State recognized and perhaps enlarged in Section 20 of Article 2 of its Constitution. Wiese v. Thien, 524.

4. ———: **Pleading: Accessible.** The statute (Sec. 10447, R. S. 1909), prescribing the manner in which an easement of access by a private road may be acquired, prescribes no formula of words in which the petition must set forth that the petitioner is the owner of the tract of land for which the easement is desired and that no public road passes through it or touches it. Any words that express these facts in plain and unmistakable terms are sufficient; and if it uses such words, the petition is not defective or insufficient for that it does not employ the word "accessible" used in the statute. Ib.

5. ———: **Character of Easement and Lands.** The right to an easement of access to private lands is not personal, but pertains to the land to which it becomes appurtenant; and the right does not depend upon the extent of the tract, nor the number of acres owned by petitioner, nor upon the lines of Government subdivisions, but it may be invoked where the petitioner owns lands on both sides of an impassable stream, and for the benefit of that part of the tract which lies on the opposite side of the stream from a public road which touches the part on that side at one corner. Ib.

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ROADS AND HIGHWAYS—Continued.

6. **Private Road: High Bluffs: Prohibitive Expense.** The fact that the part of petitioner's tract on the side of an impassible stream, which part is touched at one corner by a public road, consists of high bluffs and craigs, and that the expense of constructing a road on that side would be prohibitive, is a strong reason for creating a private way of access to the part of the tract on the opposite side. Wiese v. Thien, 524.

7. ———: **Pleading: Showing Present Access.** And the mere fact that the petitioner in his petition has described that part of his tract on the side of the impassable stream, which at one corner is touched by a public road, does not preclude him from presenting his claim to a private way to the part of the tract on the opposite side. Ib.

SALES.

Police Regulation: Sale by Weight. Where the ordinance does not require the immediate purchaser from the gardeners to purchase by weight, although such purchasers are commission merchants and retail dealers who have not been deceived as to the contents of the "short" boxes long in use, yet if the commodities in the boxes can be passed on to the ultimate consumer, the city has the right in order to provide against imposition by the use of the smaller boxes, to enact an ordinance requiring the use of boxes containing the statutory capacity of a bushel and half-bushel, and affixing a penalty for the use of boxes of different capacities. Stegmann v. Weeke. 140.

SCAFFOLD.

1. **Movable Platform.** It is a matter of common knowledge that a platform for the use of workmen in erecting a large and tall building is readjusted and moved either laterally or perpendicularly as the work on the walls progresses, but it is none the less a scaffold on that account. Where the entire wall of a building, sixty or eighty feet long and fifty or sixty feet high, was separated into sections called panels, and the platform on which the men worked in removing the forms was moved from panel to panel as the work progressed, the platform was a scaffold within the meaning of Section 7843, Revised Statutes 1909. Prapuolenis v. Const. Co., 358.

2. **Negligence: Specific Acts: Fall: Burden of Proof.** Testimony that one of the chains supporting the scaffold had become unfastened will support an inference that it was insecurely fastened. But it is not necessary under the statute (Sec. 7843, R. S. 1909) to prove a specific act of negligence which caused the scaffold to fall. The statute requires that the structure "shall be well and safely supported" and "so secured as to insure the safety of persons working thereon," and this language means that the giving way of scaffold and the consequent injury of a workman raises a prima-facie presumption that his employer had failed of his duty and places the burden on him to show that it gave way without any negligence on his part. The statute would possess no force or effect if the injured workman were required to point out a specific defect in the scaffold furnished him, and which fell, causing his injury. Ib.

SERVICE OF SUMMONS. See **Return.**

SHERIFF'S RETURN. See **Jurisdiction.**

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SHERIFF'S SALE. See Judicial Sales.

SPECIFIC PERFORMANCE.

1. **Purchase of Land: Unilateral Contract: Mutuality Supplied.** A mere option agreement to sell land, though in its inception unilateral and lacking in mutuality, may, when bottomed on a valuable consideration and accepted by the promisee within the time limited by the promisor, form the basis of an action for specific performance. Starr v. Crenshaw, 344.

2. ———: ———: ———: **Consideration: Extension.** The word consideration is correctly defined as a benefit to the party promising, or a loss or detriment to the party to whom the promise was made. An extension by the vendor of the option agreement for thirty days, made on the last day of the option period and bottomed on a valid consideration, if accepted by the vendee on any day before the extension period expired, is enforcible and cannot be withdrawn before the expiration of such period; and if the vendor agreed to extend the option for thirty days upon condition (a) that the vendee give the vendor a certified copy of the report of his drillings for coal on the land and (b) pay interest on all deferred payments from the beginning of said thirty days in the event he should buy, and he unequivocally accepted the terms of purchase, and continued the drillings, though he did not furnish the certified report, which could be of no value to the vendor after the vendee's acceptance, there was a valuable consideration for the agreement, and the vendee is entitled to specific performance. Ib.

3. ———: **Breach of Contract for Other Reasons.** A breach of the option contract to purchase land, by the vendor before the expiration of the option period, for reasons other than the vendee's failure to perform, relieved the vendee from doing the vain and useless thing of furnishing a certified report of his drillings for coal on the land, called for by the agreement before the vendee had accepted the terms of purchase, but no longer of practical utility after he had accepted, although the drillings themselves furnished the consideration for the agreement. Ib.

STATUTES AND STATUTORY CONSTRUCTION.

1. **Levee District: Organized in 1903: Rights Under Amended Act of 1913: Condemnation: Reorganization.** Notwithstanding a levee district organized in 1903 under Art. 7, Chap. 122, R. S. 1909, has never reorganized under the Act of 1913, Laws 1913, p. 290, it may proceed under that act to condemn land for rights-of-way necessary for ditches, because Section 53 of the Act of 1913 provides that "all rights, powers, liens and remedies" then existent might be enforced by the mode provided by the existing law or under the provisions of the act. State ex rel. Hill v. Pettingill, 31.

2. ———: ———: **Amended Section 5703: Reorganization: Condemnation.** The Act of 1911, repealing Sec. 5703, R. S. 1909, and substituting amended Section 5703 (Laws 1911, p. 231), did not destroy the power of a levee district organized in 1903 to adopt a plan for the reclamation of swamp and wet lands within its boundaries and to condemn rights-of-way for drains and ditches necessary to accomplish such reclamation. As to districts already organized amended Section 5703 merely carried forward the power already conferred by old Section 5703, to drain swamp and wet lands and to secure rights-of-ways of ditches, and Section 5713 authorized such a district to "proceed under the article as amended

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STATUTES AND STATUTORY CONSTRUCTION—Continued.

herein," which means that it was not necessary that the district reorganize under the Act of 1911. State ex rel. Hill v. Pettingill, 31.

3. **Levee District: Organized in 1903: Reorganization Under Act of 1913.** Section 47 of the Levee Act of 1913 was not intended to repeal all previous acts and leave a levee district previously organized without legal authority to proceed further in the exercise of the powers conferred on it by said previous acts. Ib.

4. **Life Insurance: Extended Policy: Failure to Give Notice of Insured's Death: Bar to Recovery.** Sections 6946 and 6948, Revised Statutes 1909, providing that, in case of extended life insurance, notice of the claim and proof of death must be submitted to the company within ninety days after insured's death, must be read and construed together, and a failure to give notice and make proof of death within such time, absence waiver or estoppel or other matter of avoidance, defeats recovery. A claim under the policy is not, by said statutes, strictly speaking, defeated by reason of forfeiture, but because failure to give notice and make proof of death constitutes a failure to perform a statutory requirement essential to the creation of a valid claim against the company. Graves v. Ins. Co. 240.

5. **Negligence: Insufficient Fire Escapes: Death in Dormitory.** Section 10663, Revised Statutes 1909, relating to fires escapes, is applicable to the City of St. Louis, and the death of a member of an athletic club while asleep in the fifth floor when the building was destroyed by fire affords a basis for a legitimate inference that his death was caused by the negligence of the owner in failing to comply with the statutes and ordinances relating to furnishing fire escapes. Ranus v. Boatmen's Bank, 332.

6. **Automobile: Highest Care Required of All Drivers: Contributory Negligence.** The statute (Par. 9, sec. 12, p. 330, Laws 1911) requiring any person owning, operating or controlling an automobile running on or across public roads, streets or other public highways, to use the highest degree of care that a very careful person would use under like circumstances, to prevent injury to persons on such highways, and making an owner or driver failing to use such care liable for damages to any person injured, requires such driver or owner to exercise the highest degree of care to avoid collisions with street cars and other automobiles and thereby to avoid injuring himself, as well as pedestrians and travelers on the street. It supplants the common-law rule which requires such driver or owner to be in the exercise of only reasonable or ordinary care for his own safety, and makes his failure to exercise the highest degree of care contributory negligence. [Disapproving Advance Transfer Co. v. Railroad, 195 S. W. (Mo. App.) l. c. 568, and Hopkins v. Sweeney Automobile School Co., 196 S. W. (Mo. App.) 772.] Threadgill v. United Rys., 466.

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SURGEON. See **Malpractice.**

TAXES AND TAXATION.

1. **Board of Equalization: Judicial Acts: Certiorari.** The State Board of Equalization in fixing the value of property in any county acts judicially, and its valuations have the force and effect of judgments of courts. Of course, if in making its valuations it exceeds its powers or statutory jurisdiction, and such fact appears upon its record, the courts can quash its judgment by *certiorari;* but the courts cannot nullify its judgment in a collateral proceeding. State ex rel. Johnson v. Bank, 228.

2. ———: ———: **Collateral Attack.** The action of the State Board of Equalization being judicial in character its judgment cannot be attacked in a collateral proceeding. To be overthrown there must be a direct attack upon the judgment itself for the purpose of vacating, annulling and setting it aside. It cannot be annulled by a showing, when suit is brought on a tax bill against a bank, that the board valued and assessed defendant's property at one half its true value and all other personal property in the county at forty per cent of its true value. Such a defense would be a collateral attack on the judgment, and is therefore unavailable. and evidence to show such discrimination is incompetent. Ib.

3. **Board of Equalization: Constitution: Certiorari.** In a *certiorari* brought to quash the record of a county board of equalization, if the record shows on its face that the officers designated by the statute were named as composing the board and that they were present at its meetings, it cannot be held that such persons were not *de jure* members of the board, or that said board was illegally organized. State ex rel. McCune v. Carter, 304.

4. ———: **Jurisdiction: Insufficient Notice: Appearance.** Whether or not the notice to the taxpayer that an increase in the assessed val-

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uation of his property was sufficient, if he actually appeared before the board of equalization and the matter was continued, and before such increase was made he appeared specially and filed his objections thereto, his appearance vested the board with jurisdiction. State ex rel. McCune v. Carter, 304.

5. **Board of Equalization: Amending Record: Classification.** Amendments of the records of the board of equalization, made prior to its final adjournment by the direction of its presiding officer, which did not change the amount of the increase in the taxpayer's assessment, but simply specified the classes of property to which it was applicable, did not oust the board of jurisdiction, or impair the validity of the increase. Ib.

6. ———: **Trebling Assessment.** The County Board of Equalization, after increasing the taxpayer's assessment to equal the amount of property owned by him, is by statute given power to treble the assessment upon a finding that he has given a false list. Ib.

7. ———: **Increasing Assessment: Certiorari.** In reviewing the action of the County Board of Equalization by *certiorari* the courts cannot go beyond the face of its record; and since under the statute it had authority to increase the assessment of the property returned by the taxpayer, and to add that omitted, if it had knowledge of facts justifying such action, it will not be held on *certiorari* that it exceeded its statutory powers, if it heard evidence before it made the increases and it is not denied that the taxpayer owned property equal to the amount of the increased valuation. Ib.

8. **Street Improvement: Part of Street: Inequality of Non-Uniformity.** A city having charter power to improve or repair streets, and to "pay for such improvement or any part thereof" out of its general funds or by special assessments against abutting property, may pay for repaving a portion of a boulevard out of its general fund, and at a later time provide that the cost of repaving another portion shall be paid by special assessments; and in the absence of fraud, it will not only be presumed that the city authorities had good and sufficient reasons for proceeding by different methods in the two proceedings, but there was no such inequality or lack of uniformity as denied to the abutting property owners the equal protection of the laws. Collins v. Jaicks Co., 404.

9. ———: **Exemption from Subsequent Taxation: Contractual Right.** The charter and ordinance under which a street was improved do not constitute a contract with abutting property owners who paid taxes therefor, that their property will not be burdened with taxes to pay for subsequent repairs or repaving. The statute, or a charter in harmony therewith, conferring upon a municipality power to provide for the construction, repair and maintenance of streets, may be changed, so as to provide a different method of paying for the improvement, or so as to repair an improvement already made, and such change in the law does not constitute an impairment of any supposed contract between the city and the abutters, who paid for an earlier improvement, that their property will not be subjected to taxes to pay for a later improvement or repairs. Ib.

10. **Drainage District: Assessor's Book: Collection of Tax.** There can be no valid drainage district tax without a valid assessment; but the ditch assessment book required by Sec. 5602, R. S. 1909, has no

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TAXES AND TAXATION—Continued.

relation to the assessment of drainage taxes. Under the Act of 1905 the assessment is made by the county court, and its basis is the report of the viewers and engineer confirmed by the court; and its validity is in no way dependent upon the ditch assessment book, which the clerk is required to make up, but his failure to perform that duty does not render the tax uncollectable. State ex rel. McBride v. Steetz, 429.

11. ———: **Limitations.** The plea of the Statute of Limitations to a suit brought in October, 1914, for the drainage taxes of 1910, 1911, 1912 and 1913, is unavailing. Ib.

12. **Drainage District: Suit for Taxes Pending an Appeal.** The pendency of an appeal from the judgment of the county court organizing a drainage district does not make premature a suit for taxes subsequently instituted. The appeal does not affect the benefits assessed, which are the basis of the tax suit. Under the statute (Sec. 5592, R. S. 1909) on an appeal to the circuit court only two questions can be considered, namely, compensation for property appropriated and damages to property prejudicially affected by the improvement. State ex rel. McBride v. Byrd, 481.

13. **Prima-Facie Case: Interstate Railway.** The record of the valuation and assessment of the property of an electric railway over an interstate bridge of the State Board of Equalization made in scrupulous conformity to the methods and plans prescribed by the statute, and certified by the State Auditor, together with an admitted correct copy of the tax bill containing complete itemizations of the kind of property and rate of taxation, makes a prima-facie case against such railway for such taxes. State ex rel. Hagerman v. Elec. Ry. Co., 616.

14. ———: ———: **Tax Bill.** The statute does not require that the tax bill be filed with the petition in a suit against railroads for delinquent taxes. It makes the record of the State Board of Equalization certified by its secretary prima-facie evidence of the facts therein recited in such suits. But a correct tax-bill can be offered as evidence. Ib.

15. **Double: Electric Railway Over Interstate Bridge.** Where an electric railway by contract is given the right to operate its trolly lines over an interstate bridge belonging to other corporations, in consideration of a payment to them of a certain portion of the passenger fares received by it, its trolley wires, poles, cars, rails and other property owned and used by it in operating an electric railway are subject to taxation, and if such properties are separately assessed, and the other companies are assessed with taxes for the value of the bridge itself and its other structural elements, there is no double taxation. The corporate grantee of a right of user of the bridge can be separately assessed for taxes according to the value of its trolley lines and other distinct property used in operating its electric railway over the bridge. [Distinguishing State ex rel. v. Railroad, 196 Mo. 523.] Ib.

16. **Discrimination: Neglect to Assess Other Property.** The neglect of the State Board of Equalization to assess other railroads liable to assessment under the same valid statutes under which defendant's railway properties were assessed, was not such a discrimination as invalidated the assessment against defendant. Ib.

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TAXES AND TAXATION—Continued.

17. **Franchise.** A railway company which by the terms of its charter possesses the right to construct and operate a railroad, and has obtained permission from the city to operate its street railway over an interstate bridge for a period of fifty years, has a railroad franchise other than a franchise to be a corporation; and when the franchise to operate a railroad, which rested primarily in legislative grant, became consummate when it obtained permission of the city to occupy the bridge, its said franchise became taxable, upon a mileage basis, and could be assessed under the designation of "all other property." State ex rel. Hagerman v. Elec. Ry. Co., 616.

18. **Property Outside State: Railway Over Interstate Bridge.** The State Board of Equalization does not exceed its authority by taxing the tangible and intangible property of an electric railway, operated over an interstate bridge, within the territorial limits of this State. Ib.

TORTFEASORS. See **Release.**

TRIAL.

Reversal of Judgment: Remand for Retrial: Further Procedure. When a judgment is reversed by the Supreme Court and the cause is remanded for a new trial, the trial court has jurisdiction, not only to retry the issues of fact presented by the pleadings in the first trial in accordance with the principles announced in the judgment of reversal, but also to reframe those issues as provided by the Code of Civil Procedure; for a retrial does not mean a mere replica of the former trial, but is a trial in the light of the experience and knowledge acquired in the interval. Barber v. Ins. Co., 316.

TRUSTS AND TRUSTEES.

1. **Express Trust: Power of Beneficiary to Mortgage.** A deed giving to the trustee power to sell, convey, pledge, mortgage or otherwise dispose of land, and to invest, re-invest or use the money derived from any such sale, mortgage or pledge, or any income arising from said property, for the use, benefit, support and maintenance of another, creates an express, active trust in the land, and gives to the beneficiary no power to sell or mortgage the same. Maxwell v. Growney, 113.

2. ———: **Pleading: Cause of Action: Present Interest.** An allegation that it is now necessary that plaintiff, in the exercise of the powers conferred upon him as trustee by a certain trust instrument, either lease, sell or mortgage the lands for the purposes of the trust, and that a mortgage executed by the beneficiary constitutes a cloud upon the plaintiff's title and has heretofore and does now prevent the plaintiff from carrying out the provisions of said trust, states that plaintiff had an interest in the land at the time his suit was brought. Ib.

3. ———: **Cancellation of Beneficiary's Mortgage: Discovery of Defect.** A "mind of legal acuteness" is generally, if not always, required to determine what rights of a beneficiary of a trust are alienable; and where the defect in the mortgage made by the beneficiary is of such a character as to render it invalid but can only be discovered by a mind of legal acuteness, a court of equity will remove it as a cloud upon the trustee's title. Ib.

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TRUSTS AND TRUSTEES—Continued.

4. ———: ———: **Sufficient Facts.** Where the trustee is unable to carry out the powers conferred upon him by the trust instrument unless the suspicion cast upon his title by a mortgage made by the beneficiary is removed, and there is no adequate legal remedy open to the trustee, a court of equity will, at his suit, cancel the mortgage. Ib.

5. **Necessary Parties: Pledgor of Note Alone: Trustee of Express Trust: No Possession.** It is not enough to authorize the pledgor of a negotiable note, exceeding in amount the debt for which pledged, to maintain suit on the note in his name alone, that the pledgee loan it to him for purposes of protest, consent to and aid the pledgor in the suit, and through his counsel present the note in evidence at the trial; but in order to constitute the pledgor a trustee of an express trust, the pledgee must actually part with the physical possession of the note. If the original payee, after his assignment of the note, becomes possessed thereof, he can maintain the action in his name alone, notwithstanding his name is indorsed thereon in blank, for under the statute (Sec. 10018, R. S. 1909) he can strike out the indorsement and make a paper title in himself; but without actual possession, the right to strike out the indorsement, or to maintain an action on the note as the trustee of an express trust, does not exist. American Forest Co. v. Hall, 643.

6. ———: ———: ———: ———: **Pledged Note in Excess of Debt.** The fact that the notes, indorsed in blank, exceed the amount of the debt for whose payment they were pledged, does not authorize the pledgor alone, without actual physical possession of the notes, to maintain suit thereon, although the pledgee consents to such suit. By an indorsement in blank and delivery, notes are fully negotiated, and the indorser loses all title thereto, even title to the excess of the amount thereof over the debt for which they are pledged, and for the title to pass back to the indorser or pledgor there must be an actual redelivery. Nor does the fact that the pledgee loaned the notes to the pledgor for purposes of protest, nor that the pledgor in his petition alleges that he is the owner and legal holder thereof, make him the trustee of an express trust, for he must prove such allegation. Ib.

USURY.

1. **Commissions Paid Trustee.** In determining whether the money demanded and paid to the holder of notes secured by deed of trust, the commissions paid to the trustee, who had advertised the property for sale, but did not sell it because of the payment of the notes, cannot be charged against the payee. Whitworth v. Davey, 672.

2. **Fixed by Statute.** In the absence of a law limiting the rate of interest, there can be no usury; and unless the rate exceeds the applicatory statutory maximum, there is no usury in a particular case. Ib.

3. **Eight Per Cent Compounded Semi-Annually: Recovery: Applicatory Statutes.** A stipulation in the written contract that interest shall be compounded semi-annually is void, under Section 7185, Revised Statutes 1909, which says that "interest shall not be compounded oftener than once a year;" but though the contract calls for eight per cent interest, to be compounded semi-annually, the payor of the note cannot under Section 7182 recover back the excess paid, for that section in express terms applies

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USURY—Continued.

only to the "three preceding sections," which say nothing concerning a semi-annual compounding of interest. Section 7182 does not purport to give a cause of action for a violation of Section 7185. A compounding of interest oftener than once a year, in violation of said Section 7185, is illegal, but is not, of itself, usury. Whitworth v. Davey, 672.

4. ———: **In the Aggregate: Suit for Compound Interest.** A right of action under Section 7182 must be grounded on usury actually paid to the creditor, and the test of usury under the section is the payment of interest in excess of the applicable statutory rate; and though the six-months coupon interest notes provide for eight per cent interest from maturity, yet if a computation discloses that the amount paid on the notes does not aggregate a sum equal to the amount of the principal note with interest at eight per cent, compounded annually, there can be no recovery under Section 7182 of a supposed excess paid. Ib.

5. **Compound Interest.** The payment of compound interest in excess of the written contract rate does not constitite usury, unless the total amount paid exceeds the amount which could lawfully be exacted under the written obligation. Ib.

VENUE.

1. **Jurisdiction: Corporation: Libel.** The Act of 1909 (Sec. 1755, R. S. 1909), declaring that "suits for libel against corporations shall be brought in the county in which the defendant is located, or in the county in which the plaintiff resides," in so far as it permits a plaintiff to bring a libel suit in the county in which he resides against a corporation whose place of business is in another county and whose newspaper in which the libel is published is printed in such other county, is invalid, in that it denies to said corporation the equal protection of the laws, since, were the libeler an individual, the plaintiff could not maintain his suit in his own county unless the libeler were found and served therein. A resident of Cole County cannot maintain a suit in the circuit court of said county against a corporation whose place of business is in the City of St. Louis and whose newspaper in which the libel is published is printed in said city, unless said corporation waives the lack of jurisdiction. [Per McBaine, Special Judge; WALKER, FARIS and GRAVES, JJ., concurring; BOND, C. J., and BLAIR and WILLIAMS, JJ., dissenting; WOODSON, J., not sitting.] McClung v. Pub. Co., 370.

2. **Equal Protection: Corporations.** Corporations come within that provision of the Fourteenth Amendment declaring that no State shall deny to any person with its jurisdiction the equal protection of the laws. Therefore the laws must extend to them the same protection they extend to individuals. Ib.

3. ———: **Corporations and Individuals: Classification.** It is an advantage to a plaintiff to sue in the county in which he lives, and to a defendant to defend in the county of his residence; and a statute which permits a plaintiff in a libel suit to sue a non-resident corporation libeler in his own county, and denies to him the right to sue a non-resident individual libeler in the same county, makes an unreasonable classification against the corporation, and is invalid, since the classification is not based upon a difference bearing a just and proper relation to the attempted classification. Ib.

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VERDICT.

1. **Presumption: Finding of Every Fact.** The court must presume that the jury found every fact of which there was evidence on the issues properly submitted tending to support the verdict. Smith v. K. C. Southern, 173.

2. **Deduction for Contributory Negligence: Award for Actual Damages Only: Remittitur.** Where the petition demanded $75,000 as damages, and there was some evidence of contributory negligence, and the instruction, under the provisions of the Federal Employer's Liability Act, directed the jury to make a proportionate deduction from the actual damages suffered, if they should find there was such contributory negligence, and they returned their verdict for $37,500, it cannot be held that they found the actual damages were $37,500; for the court cannot assume that the jury found any fact, where the evidence was contradictory, that would impair their verdict, and there being positive evidence that plaintiff was not guilty of contributory negligence, the excess may be corrected by *remittitur* if the court finds the verdict excessive as to the actual damages. Ib.

3. **Excessive: $25,000.** Plaintiff's head was crushed between two beams of a car; his nose was mashed over to one side; the bones of the skull were broken into pieces, and some of them taken out, leaving a space unprotected by bone, an inch and a half long and an inch wide; he suffered with convulsions until an operation was performed, indicating pressure upon and injury to the brain; two years later the evidence indicates injury to the brain; his vision is impaired, he cannot turn his eyes laterally, can only focus them on objects directly in front, and is unable to read except for a few moments at a time; there is a suppurative discharge from his nose, accompanied by a disagreeable odor; he has an ataxic walk, and fibrillary tremors, involuntary and incapable of simulation, run over his body, and in walking he lifts his legs much higher than a normal man, indicating ataxia, and in stooping over has a sensation that his brain is dropping out through the hole in the forehead. Prior to his injury he was in perfect physical condition, was an athlete, possessed an unusually quick mind, learned easily and took interest in literary pursuits; his mind is now impaired, especially his memory, and scientific tests indicate his mind is about equal to that of a child ten years of age. At the time of his injury he was 24 years of age and receiving a hundred dollars a month, and since has been unable to earn anything. The jury returned a verdict for $37,500, and that was reduced by the trial court to $25,000, which on appeal is, *held*, not excessive. Ib.

4. ———: **Rule.** The court has never ruled that any verdict for personal injuries in excess of $25,000 is excessive. Every case must be determined on its own individual facts. Ib.

5. ———: **Value of Money.** Twenty-five thousand dollars in 1904 was a much larger sum in purchasing power than the same sum in 1914. Ib.

6. **General Improvement: Instruction for Separate Verdicts.** Where the charter and ordinance provide for one general improvement of a highway, crossed by thirteen streets, it is error to instruct the jury that the damages and benefits from the grading of the highway and each intersecting street are to "be considered and determined separately" and that thirteen separate verdicts are to be rendered. In re 23rd Street v. Crutcher, 249.

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VERDICT—Continued.

7. **General Improvement: Individual Benefit to Lot: Separate Assessment.** Where the charter and ordinance unite all elements of the street improvement into one general improvement, it is error to instruct the jury that they "have no right to assess any lot to pay for any of the proposed street improvements, except for such improvement as will actually benefit the particular lot," or that they "have no right to assess any greater sum against any lot than it will be actually benefited by the particular improvement." The improvement being a general one, no attempt should be made to accredit any one portion of the improvement with benefits apart from the others, except to separate the grading benefits from the condemnation benefits. In re 23rd Street v. Crutcher, 249.

8. **Excessive:** $35,000. Plaintiff came in contact with one of defendant's electric wires, and was badly burned in his hands, arms, chest, abdomen, back and upper legs; one hand was amputated at the wrist; he has very imperfect use of the fingers of the other hand, but the upper part of the arm is dead, and the constrictions are such that it has become fastened to the skin of the body, and that condition can never be remedied; the burns about the chest and abdomen were so severe that the cavity of one lung and the abdominal cavity are permanently constricted; he can never use his remaining hand for any kind of work; he suffered indescribable nervous agony for several months, and all his life he must be a broken, helpless and suffering cripple. The jury returned a verdict for $50,000, which was by the trial court reduced to $35,000. *Held*, that the judgment for $35,000 will not be disturbed. Meeker v. Union Elec. Co., 574.

VEXATIOUS DELAY.

Damages and Attorney's Fees: Suit on Guaranty Bond. It is true that Section 7068, Revised Statutes 1909, authorizing the recovery of damages and an attorney's fee for vexatious refusal to pay applies only to actions against (1) an insurance company for loss on (2) a policy of insurance; but it embraces policies of "fidelity, indemnity . . . or other insurance," and those words are broad enough to include a company licensed to do "fidelity and surety insurance" for a consideration, and in an action on the judicial bond of such a company by which, for a consideration or premium paid, it guarantees that a receiver appointed by the court will faithfully and truly account for all moneys, assets and other property that may come into his hands, it is proper for the court or jury to allow damages and a reasonable attorney's fee for its vexatious refusal to pay the principal sum converted by the receiver to his own use. State ex rel. Peach Co. v. Bonding Co., 535.

WEIGHTS AND MEASURES. See **Measurements.**

WILLS.

1. **Foreign: Effect in This State.** The will of a resident of Illinois, executed and probated there, when a copy duly authenticated is filed for record in this State, will take effect and be interpreted according to the laws of this State, exactly as if it had been originally proved here. Dobschutz v. Dobschutz, 120.

2. ———: ———: **Partition.** Children, residents of Illinois, not mentioned in their father's will, by which he attempted to devise all his property, wherever situate, to his widow, may maintain a partition proceeding in the courts of this State and assert the same

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WILLS—Continued.

rights to land in this State, belonging to testator at the time of his death, that they could have done had he left no will. Ib.

3. ———: ———: **Contrary to Will and Statute.** Children "not named or provided for" in their father's will, by bringing suit for the partition of lands belonging to him at the time of his death, do not seek partition contrary to any will which affects them, and consequently Section 2569, Revised Statutes 1909, which provides that no partition of lands devised by any last will shall be made contrary to the intention of the testator as expressed in the will, has no application to them. Ib.

WITNESSES.

Competency: Other Party Dead: Agent. A woman, whose son-in-law is dead, cannot testify that he owed her notes to the amount of three hundred dollars and that she bought from him the lots in suit and had him deed them to his wife and that the notes were the actual consideration for the deed, which recited a consideration of one dollar. She was not the agent of the wife, but a party to the original contract, for the transaction is precisely the same as if she had purchased the lots, had the conveyance made to herself and subsequently conveyed to the wife; and under the statute (Sec. 6534, R. S. 1909), the son-in-law, "the other party to such contract," being dead, she is incompetent to testify in favor of the wife, or any person claiming under the wife. Edmonds v. Scharff, 78.

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Rules for the Government of the Supreme Court of Missouri.

REVISED AND ADOPTED APRIL 10, 1916.

Rule 1.—Chief Justice, Duty. The Chief Justice shall be elected for a term of one and three-sevenths years, and shall superintend matters of order in the courtroom.

Rule 2.—Motions to be Written, etc. All motions shall be in writing, signed by counsel and filed of record. At least twenty-four hours notice of the filing of same, unless herein otherwise provided, shall be given to the adverse party, or his attorney.

Rule 3.—Argument of Motions. No motion shall be argued unless by the direction of the court.

Rule 4.—Diminution of Record, Suggestion after Joinder in Error. No suggestion of diminution of record in civil cases will be entertained after joinder in error, except by consent of the parties.

Rule 5.—Application for Certiorari. Whenever *certiorari* is applied for to correct a record, an affidavit shall be made thereto of the defect in the transcript sought to be supplied and at least twenty-four hours notice of such application shall be given to the adverse party or his attorney.

Rule 6.—Reviewing Instructions. To enable this court to review the action of the trial court in giving and refusing instructions it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the testimony of the witnesses shall be stated in narrative form, avoiding repetition and omitting immaterial matter.

Rule 7.—Bills of Exceptions in Equity Cases. In equity cases the entire evidence shall be embodied in the bill of exceptions; provided it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to its admissibility or legal effect; and provided further that parole evidence shall be reduced to a narrative form where this can be done and its full force and effect be preserved.

Rule 8.—Presumptions in Support of Bills of Exceptions. In the absence of a showing to the contrary, it will be presumed as a matter of fact that bills of exceptons contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 9.—Making up Transcripts. Clerks of courts in making out transcripts of the record for the Supreme Court, unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause, shall not set out the original or any subsequent writ or the return thereof, but in lieu of same shall simply note the dates respectively of the issuance and execution of the summons.

If any pleading be amended, the clerk in making out the transcript will only insert therein the last amended pleading and will set out no abandoned pleading or part of the record not called for by the bill of exceptions; nor shall any clerk insert in the transcript any matter touching the organization of the court or any continuance, motion or affidavit not made a part of the bill of exceptions.

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Rule 10.—"Appellant" and "Respondent:" What They Include. Whenever the words appellant and respondent appear in these rules they shall be taken to mean and include plaintiff in error and defendant in error and other parties occupying like positions in a case.

Rule 11.—Abstracts in Lieu of Transcript, When Filed and Served. Where the appellant shall, under the provisions of Section 2044 Revised Statutes 1909, file a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstracts at least thirty days before the cause is set for hearing, and in a like time file ten copies thereof with our clerk. If the respondent is not satisfied with such abstract, he shall deliver to the appellant an additional abstract at least fifteen days before the cause is set for hearing, and within like time file ten copies thereof with our clerk. Objections to such additional abstract shall be filed with our clerk within ten days after service of such abstracts upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

Rule 12.—Abstracts: When Filed and Served. Where a complete transcript is brought to this court in the first instance, the appellant shall deliver to the respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file ten copies thereof with our clerk not later than the day preceding the one on which the cause is set for hearing. If the respondent desires to file an additional abstract he shall deliver to the appellant a copy of same at least five days before the cause is set for hearing and file ten copies thereof with our clerk on the day preceding that on which the cause is to be heard.

Rule 13.—Abstracts: What They Shall Contain. The abstracts mentioned in Rules 11 and 12 shall be printed in fair type, be paged and have a complete index at the end thereof, which index shall specifically identify exhibits where there are more than one, and said abstracts shall set forth so much of the record as is necessary to a complete understanding of all the questions presented for decision. Where there is no controversy as to the pleadings or as to deeds or other documentary evidence it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be in narrative form except when the questions and answers are necessary to a complete understanding of the testimony. Pleadings and documentary evidence shall be set forth in full when there is any question as to the former or as to the admissibility or legal effect of the latter; in all other respects the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the assigned errors.

Rule 14.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases printed, indexed and uncertified copies of the entire record, filed and served within the time prescribed by the rules for serving abstracts, shall be deemed a full compliance with said rules and dispense with the necessity of any further abstracts.

Rule 15.—Briefs: What to Contain and When Served. The appellant shall deliver to the respondent a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the appellant at least five days before the last named date, and the appellant shall deliver a copy of his reply brief to the respondent not later than the day preceding that on which the cause is set for hearing, and ten copies of each brief shall be filed with the clerk on or before the last named date.

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All briefs shall be printed. The brief for appellant shall distinctly allege the errors committed by the trial court, and shall contain in addition thereto: (1) a fair and concise statement of the facts of the case without reiteration, statements of law, or argument; (2) a statement, in numerical order, of the points relied on, with citation of authorities thereunder, and no reference will be permitted at the argument to errors not specified; and (3) a printed argument, if desired. The respondent in his brief may adopt the statement of appellant; or, if not satisfied therewith, he shall in a concise statement correct any errors therein. In other respects the brief of respondent shall follow the order of that required of appellant. No brief or statement which violates this rule will be considered by the court.

In citing authorities counsel shall give the names of the parties in any case cited and the number of the volume and page where the case may be found; and when reference is made to any elementary work or treatise the number of the edition, the volume, section and page where the matter referred to may be found shall be set forth. [As amended and adopted October 23, 1917.]

Rule 16.—Failure to Comply with Rules 11, 12, 13 and 15. If any appellant in any civil case fail to comply with the rules numbered 11, 12, 13, and 15, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error; or, at the option of the respondent continue the cause at the cost of the party in default.

Rule 17.—Costs: When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstract filed in lieu of a complete transcript under Section 2048, R. S. 1909, which fails to make a full presentation of the record necessary to be considered in disposing of all the questions arising in the cause. But in cases brought to this court by a copy of the judgment, order or decree instead of a complete transcript, and in which the appellant shall file a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same.

Where a manuscript record has been or may be filed in this court, a reasonable fee for printing an abstract of the record or the entire record in lieu of an abstract may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in cases where costs may properly be taxed for printing, as prima-facie evidence of the reasonableness thereof; and objections thereto may be filed within ten days after service of notice of the amount of such charge.

Rule 18.—Service of Abstracts and Briefs. Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgement of such opposing party or his attorney or the affidavit of the person making the service, and such evidence of service must be filed with the abstract or brief.

Rule 19.—Service of Abstracts and Briefs in Criminal Cases. Attorneys for appellants in criminal cases in which transcripts have been filed in the office of the clerk sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement containing apt references to the pages of the transcript, with an assignment of errors and brief of points and an argument, and serve a copy thereof upon the Attorney-General, and thereupon the Attorney-General shall, fifteen days before the day of hearing, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket the court shall designate the time for filing statements and briefs.

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When such transcript has been filed in this court fifteen days before the first day of the term at which such case is set for hearing, the appellant or plaintiff in error shall file his statement, brief and assignments of error five days before the first day of such term, and the Attorney-General shall, on or before the first day of the term, file his brief and statement.

Hereafter no statement or brief shall be filed in a criminal case out of time, nor will counsel who violate this rule be heard in oral argument unless for a good cause shown on motion theretofore filed and ruled on before the day set for the hearing of the case.

When appellants have been allowed to prosecute their appeal as poor persons by the trial court, counsel will be permitted to file typewritten statements and briefs. In cases where the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the Attorney-General his brief and statement five days before the hearing.

Rule 20.—Taking Record from Clerk's Office. No member of the bar shall be permitted to take a record from the clerk's office.

Rule 21.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard and the motion for rehearing overruled either in division or *En Banc* no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk.

Rule 22.—Extension of Time. Hereafter in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

Rule 23.—Notice to Adverse Party. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall on filing such motion, satisfy the court that such notice has been given.

Rule 24.—Transfers to Court En Banc. A motion to transfer a cause under the provisions of the Constitution from either division to court *En Banc* must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 23.

Rule 25.—Return of Original Writs. Original writs or other process issued by either division of the court, or by any judge in vacation, may be made returnable to and disposed of by such division, or the Court *En Banc*, as such division or judge in vacation may order.

Rule 26.—Assignment of Motions in Civil Causes. All motions and matters in civil causes which have not been assigned by the Court *En Banc* to a division for final determination, upon the record, shall

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be presented to, heard and determined by the Court *En Banc*. All matters in civil causes which have been assigned to a division shall be presented to and heard and determined by such division.

Rule 27.—Assignment of Criminal Causes. All criminal causes, and matters pertaining thereto, shall be heard and determined by Division Number Two.

Rule. 28.—When Appeal is Returnable: Certificate of Judgment: Transcript.. Where appeals shall be taken or writs of error sued out, the appellant shall file a complete transcript or in lieu thereof a certificate of judgment as provided by Section 2048, Revised Statutes 1909, within the time provided by said section and the date of the allowance of the appeal and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file within the time allowed by said Section 2048 a certificate of judgment and may thereafter file a complete transcript and an abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term, shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as when required by said Section 2048, Revised Statutes 1909.

Rule 29.—Oral Arguments. The time allowed for oral argument and statement shall be an hour and ten minutes for appellant or plaintiff in error, or relator, in original proceedings, and fifty minutes for respondent or defendant in error or respondent in original proceedings.

Rule 30.—Letters, etc., to Court. All motions, briefs, letters or communications in any wise relating to a matter pending in this court must be addressed to the clerk, who will lay them before the court in due course. Hereafter any letter or communication relating directly or indirectly to any pending matter, addressed personally or officially to any judge of this court, will be filed with the case and be open to the inspection of the public and opposing parties.

Rule 31.—Record Matters on Appeal. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or the filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Rule 32.—Granting Original Writs. No original remedial writ, except *habeas corpus*. will be issued by this court in any case wherein adequate relief can be afforded by an appeal or writ of error, or by application for such writ to a court having in that behalf concurrent jurisdiction.

Rule 33.—Procedure as to Original Writs. Oral arguments will not be granted on applications for original remedial writs; and before such writs shall issue, the applicant therefor shall give not less than five days' notice thereof to the adverse party, or his attorney. Such notice shall be in writing, accompanied by a copy of the application for the writ, and the suggestions in support of same. The adverse party may file in this court suggestions in opposition to the issuance of the writ, a copy of which he shall, before filing, serve on

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the applicant. Whenever the required notice would, in the judgment of the court, defeat the purpose of the writ, it may be dispensed with. On final hearing printed abstracts and briefs shall be filed in all respects as is required in appeals and writs of error in ordinary cases. Motions for reconsideration of the court's action in refusing applications for original writs shall not be filed.

Rule 34.—Certiorari to Courts of Appeals. No writ of *certiorari* shall be granted to quash the judgment of a Court of Appeals on the ground that such court has failed or refused to follow the last controlling decision of the Supreme Court, unless the applicant for such writ shall give all parties to be adversely affected, or their attorneys of record, at least five days' notice of such application; and the applicant shall, in a petition of not exceeding five pages, concisely set out the issue presented to the Court of Appeals and show wherein and in what manner the alleged conflicting ruling arose, and shall designate the precise place in our official reports where the controlling decision will be found. Said petition shall be accompanied by a true copy of the opinion of the Court of Appeals complained of, a copy of the motion for rehearing or to transfer the cause to this court, a copy of the ruling of the Court of Appeals on said motion, and suggestions in support of the petition not to exceed six printed typewritten pages.

The notice to the party to be adversely affected shall be printed or typewritten, accompanied by a true copy of the petition and all exhibits and suggestions in regard thereto. The party to be adversely affected may file, on or before the date fixed by the notice, suggestions of not more than five printed or typewritten pages stating the reasons why such writ should not issue.

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