WISCONSIN REPORTS

162

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

JANUARY 11 — APRIL 15, 1916

FREDERIC K. CONOVER
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CHICAGO
CALLAGHAN AND COMPANY
1916

JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

JOHN B. WINSLOW
Ex officio CHIEF JUSTICE
ROUJET D. MARSHALL
ROBERT G. SIEBECKER
JAMES C. KERWIN
WILLIAM H. TIMLIN
JOHN BARNES
(Until February 22, 1916)
AAD J. VINJE
MARVIN B. ROSENBERRY
(From February 23, 1916)

Attorney General - - WALTER C. OWEN

Clerk - - - - ARTHUR A. MCLEOD

MEMORANDA.

Mr. Justice MARSHALL took no part in the decision of the cases reported in this volume on pages 421–506, 533–608.

Mr. Justice TIMLIN took no part in the decision of the cases reported on pages 539–564, 568–602.

Mr. Justice ROSENBERRY took no part in the decision of those cases which were argued or submitted prior to February 23, 1916.

ERRATA.

VOL. 156.

Page 580, lines 3, 4 in syllabus. For employee, read employer.

VOL. 161.

Page 59, line 14. For *R. L. Wilcox*, read *R. P. Wilcox*.

TABLE

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TEXT-BOOKS CITED.

IN MEMORIAM.

JOSEPH GORDEN DONNELLY.

On the 14th day of March, 1916, Mr. Walter D. Corrigan of Milwaukee addressed the court:

May it please the Court:—As the representative of the Milwaukee Bar Association and its committee, composed of Honorable Christian Doerfler, Honorable Andrew D. Agnew, and myself, I submit for record in this court the following, as a memorial of Judge JOSEPH G. DONNELLY.

Memorial of the Milwaukee Bar Association.

JOSEPH GORDEN DONNELLY was born in Ireland January 4, 1856. He died at his home in Milwaukee May 10, 1915. He entered that profound silence which we all so soon must enter.

Such is a part of the story of every life—for life is but a span between the cradle and the grave. His life was cut short of man's allotted time. Human reason falls short of understanding why so excellent a spirit, a man of so much usefulness, should be cut down in the glory of his life, in the richest prime of his royal manhood. God alone can tell. Religion teaches us this—and affords us the sole consolation that can come at such a time.

May his soul rest amidst the "unspeakable peace of the stars."

Every member of this memorial committee was proud to count himself one of that little inner circle of precious friends of JOSEPH G. DONNELLY. We find ourselves too full of emotion to pay half-fitting tribute. In performing this sad duty we have to fortify ourselves against despair. When we were weary from the toils of professional life, or otherwise, we could meet with JOE. His joyous view of things would drive away fatigue or the clouds of melancholy. We loved him—and we know that each of us had a full share of that feeling reciprocated. Our own loss makes us understand the profoundness of the loss to his family and the state.

He was one of the most gentle, noble, and lovable men in every relation of life. From the byways of the sorrowing there will be sobbing hearts over his grave.

Such is the end of a noble life—the end of its hopes and ambitions, its sweetness and its raptures.

On September 21, 1865, JOSEPH came, with his parents, from the "Isle of Destiny" to his new home in this great American republic. That home was made in Milwaukee.

In his early life he attended the Third ward school and St. Gall's school, and from the latter he was graduated in a thorough classical

Joseph Gorden Donnelly.

course. Thomas Shaughnessy, now "Baron Shaughnessy of Montreal, Canada, and of Ashford, County Limerick, Ireland," was a classmate and they had ever been close friends.

JOE won the valedictorian honors in the first Milwaukee high school, from which he was graduated in 1871. He then taught school for about five years. He won early distinction as an orator, which brought to him an opportunity to take a conspicuous part in the famous Hayes-Tilden campaign. Shortly thereafter he was appointed register of probate, in which position he served until 1892. He was admitted to the bar in the spring of 1879.

In 1893 he was appointed United States consul general to Mexico by President Cleveland. He held this until 1899, serving with distinction to himself and with honor to his country. While in Mexico he wrote the novel "Jesus Delaney," a story entitled to rare distinction for its analysis of the Mexican character and of the reasons for the prevailing conditions in that unhappy land. Numerous publishers so recognized his ability and talents as an author that he was frequently urged to enter that field, and alluring inducements were held out to him, but his devotion to his profession caused him to turn a deaf ear.

Upon his return to Milwaukee he entered the practice of the law, continuing until he became chief judge of the civil court April 1, 1910. He served several years as a court commissioner, and for one year was president of the Milwaukee Bar Association.

Until his elevation to the bench he held a prominent place in politics, serving his party and country as duty called.

His services were in great demand upon the lecture platform, and had he consented he might readily have devoted his entire time to the platform, but he chose to sacrifice the financial advantage this would have afforded for the sake of being at home with his family and friends.

He was a commanding figure in all things involving the welfare of his city. He was, without doubt, the most distinguished after-dinner speaker in the state and equal to any in the country. His keen wit and rich humor was the life of our own and state bar banquets for many years, and JOE will be missed on all such occasions, as he will be everywhere where those who knew him best gather together.

For many years prior to his death he devoted considerable time to the study of different judicial systems and of courts, and finally came to the conclusion that the systems in vogue in this country were radically wrong; that there should be no distinction between trial courts with reference to their jurisdiction, and that the poorest litigant should be afforded a court with a judge presiding of as high a grade as any. The idea finally worked out by him in concrete form was based upon what is known as the "one court system," with gen-

eral jurisdiction over all matters, with a chief or presiding judge having the executive management and control of the court, with power to supervise and direct the activities of the various judges thereof. This system, according to Judge DONNELLY'S idea, would result in a more just and equitable distribution of the labors of the various judges and would tend to raise the standard and dignity of the courts, and would relieve the courts from the charge commonly made that the litigation of the wealthy receives special favor by reason of the higher character and grade of judges presiding over the courts of higher jurisdiction. This idea was presented in concrete form in an address prepared by Judge DONNELLY and delivered before the State Bar Association in 1913. This address was the subject of considerable favorable comment among lawyers throughout the state. At the request of Pearson's Mazagine his views were published therein. This article attracted nation-wide attention. He received numerous communications from judges, lawyers, and laymen from all over the country favorably commenting upon and approving his views.

Long before a legislative committee was appointed for the purpose of recommending changes in courts and court procedure and the advisability of a court of conciliation, Judge DONNELLY, as chief judge of the civil court, put into practical execution the ideas connected with a conciliation court. He was master of the power of persuasion, and in a large percentage of causes before him he was instrumental in bringing about an equitable adjustment, avoiding the expense and feeling engendered by litigation conducted to final judgment. His clear and quick perception enabled him to comprehend the most difficult and complicated questions of fact and law almost instantly, and his decisions were quite generally affirmed by the circuit and supreme courts. In determining questions of fact he was guided almost exclusively by his ideas of justice and equity.

The happiest period of Judge DONNELLY s life and the one in which he took greatest pride, and during which he felt he was accomplishing the greatest good, was during his incumbency of the office of chief judge of the civil court. He commanded and maintained due respect for his high office, and it can truly be said that in his election to, and his career as, chief judge of the civil court, he realized the high ambition of his youth to become a great judge.

Judge DONNELLY was married to Lois Smith, daughter of a prominent Milwaukee pioneer, on August 13, 1878. Mrs. Donnelly and their six children survive him.

In all his life, full of rich accomplishments as an American citizen, he never forgot his native land. His heart was with it in its struggle for home rule. As a result of a local movement in which he was the recognized leader, more money was raised in Milwaukee to aid the Irish cause than in any other city of the United States. Among the personal gratifications of his life was the fact that the great cause was triumphant in his time.

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Irish history tells us that the motto of the "Donnelly" family was "Strong and faithful." JOSEPH GORDEN DONNELLY always lived up to that standard. He was ever "strong and faithful," and for those virtues we all hold him in affectionate and loving remembrance.

On behalf of the court Mr. Chief Justice WINSLOW responded as follows:

The memorial fully and justly portrays the many admirable qualities of our deceased friend and brother. This court receives it gladly and directs that it be spread upon its records in perpetual remembrance.

I may add a personal tribute and with that the record will be closed. I first made the acquaintance of Judge DONNELLY in 1876 when, at the age of twenty, he made a political speech at Racine in the Presidential campaign of that year. His audience was large and by no means easy to handle; he was little more than a boy in appearance, but he carried his hearers all with him in a way that I have seldom seen equaled by the most finished orators.

Logic, satire, and flashing humor combined made his appeal irresistible. It seemed to me then that he must be destined for a brilliant political career, but I think there was much in practical politics that was distasteful to his nature. His was a sentimental or perhaps I should say an idealistic rather than a practical nature. Not that he was a mere dreamer but rather one who loved the true and the good; one to whom home and friends and calm thoughts meant more than preferment or wealth; one who loved his fellowmen and fain would be of service to them.

I am quite sure that, as the memorial says, he felt his work on the bench of the civil court to be the most important and satisfactory work of his life. Here his legal abilities had full scope and here also he had the opportunity to so administer the law that it should be a help to the small litigant rather than an inflexible machine in the operation of which justice and humanity cut no figure. I can well imagine that in his court conciliation, kindness, and wise counsel ended many a petty quarrel whose only result would otherwise have been a legacy of hatred and ill will.

A friend whose sincerity and loyalty held no flaw, a comrade whose comradeship was a perpetual delight, a citizen broad minded and devoted to the highest ideals of citizenship, has gone from our midst. The ranks close up, the procession moves steadily on, the world's work cannot wait; but there are many who, in their quiet hours of reverie, will realize full well that life can never mean so much to them again now that he is gone.

CASES DETERMINED

AT THE

January Term, 1916.

WHINFIELD, Respondent, vs. MASSACHUSETTS BONDING & INSURANCE COMPANY, Appellant.

September 15, 1915—January 11, 1916.

Surety or fidelity bonds are contracts of insurance: Construction: Warranties: Untrue statements in application: Avoidance of bonds.

1. A bond issued by a surety company to indemnify an employer for loss sustained through dishonesty of an employee or agent has all the essential features of an insurance contract and is to be construed accordingly.
2. Statements or answers by the employer in the written application for such a bond are not to be deemed express warranties, even though the bond itself declares them to be such, where that declaration is qualified by other stipulations showing that the intent of the parties was merely that the employer should in such application state the facts honestly and correctly to the best of his knowledge.
3. Such an indemnity bond is a "contract of insurance" within the meaning of sec. 4202*m*, Stats. 1913, and under that statute statements of the employer in the application could not defeat the bond unless they were "false and made with actual intent to deceive, or unless the matter misrepresented or made a warranty increased the risk or contributed to the loss."
4. Where the surety company did not rely upon a statement made by the employer in the application for the bond, but relied upon the report of its own agent who made a special inquiry into the matter, such statement, having been made in good faith by the employer, although untrue, cannot be considered a misrepresentation or warranty which increased the risk or contributed to the loss, so as to defeat or avoid the bond.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The plaintiff is the executrix and the beneficiary of a large estate left by her deceased husband. On November 20, 1909, she appointed N. W. Sallade to act for her as attorney in fact to manage for her the personal property located in Wisconsin and which had come to his possession from her deceased husband, giving him full power to deposit and invest it for her and reinvest it whenever required, and to execute, hold, and deliver all necessary papers and do every act in her place and stead in regard thereto. Mr. Sallade received into his possession personal property of the plaintiff amounting to about $150,000, consisting largely of moneys, notes, mortgages, and other securities. While acting as plaintiff's attorney in fact in this matter Mr. Sallade was the treasurer of the Diocese of Fond du Lac, handling its funds and securities, and active manager of the Fond du Lac Church Furniture Company.

Mr. Sallade made monthly statements in writing to plaintiff of his accounts as her attorney in fact. During the summer of 1910 the plaintiff, by letter, suggested to Sallade the propriety of furnishing her a fidelity bond. In September, 1910, when plaintiff returned to Fond du Lac after an absence from the state from the time she appointed him, he furnished her a list of the securities which he stated were her property and that they were deposited in a safety deposit box at the Fond du Lac National Bank. Plaintiff and Sallade went to the bank, took the securities from the safety deposit box and compared and checked them with the monthly statement he had recently furnished her, and the securities produced from the box agreed with this monthly statement of his account. Some of these securities kept in the deposit box, which he represented as having been purchased for her and which appeared in his monthly reports, were in fact the property of the Diocese of Fond du Lac. The plaintiff in fact believed they were securities he had aequired and held for her.

Sallade had in his possession a private account in the form of a loose-leaf memorandum book. The trial court found as facts concerning it:

"That said Sallade also kept in his desk, at the Church Furniture Company's office, certain loose-leaf memoranda, not bound or fastened in any book, but merely tied together with thumb fasteners, the several sheets whereof were headed 'F. D. L. Furn. Co.,' except one headed 'N. W. Sallade and M. O. Pillsbury,' which indicated the sums taken from the plaintiff and by Sallade converted to the use of the Church Furniture Company, but said leaves had no notation thereon indicating that they referred in any way to the plaintiff's estate, and the plaintiff had no knowledge of the existence of said leaves or of the facts shown thereby."

On November 19, 1910, Sallade made application in writing to defendant for a surety bond. The defendant requested an "employer's statement" from plaintiff, and she, on December 22, 1910, made and signed such a statement, and attached thereto the list of securities which Sallade had furnished and checked with her in September, 1910. The application recites that her answers to the propounded printed questions of the statement were "to be taken as conditions precedent, and as the basis for the said bond applied for. . . ." By question 12 plaintiff answered that the means used to ascertain the correctness of Sallade's account were "a personal examination" and that they would be examined "yearly." The application also contains these questions and answers:

"13. When were his accounts last examined?" Answer. "Last of September in 1910. Amount of securities, $159,831.61, as per list examined and checked at that time, a copy of which is hereto attached." "14. Were they at that time in every respect correct, and proper securities and funds on hand to balance? Yes." "15. Is there now, or has there been, any shortage due you by applicant? No." "16. (a) Is he now indebted to you? No. (b) If so, state amount and nature of indebtedness. No." "17. Have you any reason to know of or suspect any previous defalcation or

shortage by the applicant or any circumstances tending to indicate that he is not a proper person to bond? If so, give particulars." Answer. "No."

The trial court found and the evidence sustains the conclusion of fact:

"That the defendant, in executing said bond, did not rely on the statement of the plaintiff, contained in said employer's statement, as to the securities in the hands of Sallade owned by her, but required the said list to be submitted to its local agent at Fond du Lac, and required such agent to examine the securities referred to in said list and compare them with the descriptions therein, to assure itself that they were in fact in Sallade's possession at the time the bond went into effect. That said local agent did cursorily examine the identical securities described in said list, and all of them, which were produced and exhibited by Sallade to him. That none of said securities ran to or had upon or with them assignments running to the plaintiff or the said estate, nor did assignments thereof exist. That the said local agent did not call for any evidence of title to said securities, but relied on the oral representations of Sallade, made at the time he examined the same, that they belonged to the plaintiff and were held by him for her."

After the examination of the securities by defendant's local agent at Fond du Lac and upon entering into an arrangement with Sallade for a joint control with Sallade over the safety deposit box containing the mortgages he held as securities for her, the defendant on January 10, 1911, delivered to plaintiff, upon payment of $175 to it as premium, its bond of indemnity against loss through larceny or embezzlement by Sallade as attorney in fact of the plaintiff. This bond covered the period of one year from January 10, 1911. Sallade died in August, 1911.

It appears that $14,119.41 of plaintiff's money was embezzled by Sallade after the bond was given and while it was in force. There is no dispute of the claim that Sallade had in fact dishonestly appropriated and embezzled a considerable amount of plaintiff's property before September, 1910,

and that the lists of her securities he had made were false and included therein securities which did not belong to her estate, and a part of the securities he exhibited to her in September, 1910, and to defendant's agent before the issuance of the bond, as her property, were the property of the Diocese of Fond du Lac.

The bond contains the provisions that "upon the faith of said statement [employer's statement] . . . which employer hereby warrants to be true, it is hereby agreed and declared that subject to the provisions and conditions herein contained, which shall be conditions precedent to the right on the part of the employer to recover under this bond, . . . If the employer's written statement, hereinbefore referred to, shall be found in any respect untrue, this bond shall be void. . . . This bond is issued on the express understanding that the employee has not within the knowledge of the employer at any former period been a defaulter. . . ."

The trial court held that the bond is a binding obligation and that there were no breaches thereof on the part of the plaintiff on account of any misstatements of fact in her written statement upon which the bond issued and which was made a part thereof.

This is an appeal from a judgment awarding plaintiff recovery against defendant for the amount of Sallade's defalcation to her during the time the bond was in force.

For the appellant there was a brief by *Quarles, Spence & Quarles,* counsel, and *Irving A. Fish,* of counsel, and oral argument by *Mr. Fish* and *Mr. T. L. Doyle.*

For the respondent there was a brief signed by *Thompson, Thompson & Jackson,* and oral argument by *J. C. Thompson.*

The following opinion was filed October 26, 1915:

SIEBECKER, J. The circuit court awarded recovery on the bond upon the ground that it was a binding contract made by the parties; that its conditions and stipulations had not been

breached by the plaintiff; and that plaintiff was entitled to be indemnified for the losses she sustained on account of Sallade's defalcations during the period of time it was in force.

It is the contention of the defendant that it is not liable because the bond recites that the "employer's statement" in her written application for the bond is a part thereof; that the bond was issued in consideration of the premium paid and "upon the faith of the said statements as aforesaid, by the employer, which employer hereby warrants to be true," and that if these written statements of the plaintiff "shall be found in any respect untrue, this bond shall be void." The question resolves itself to the proposition, Were the answers in the written statement, to the effect that Sallade's accounts were last examined by her personally the "last of September in 1910. Amount of securities, $159,831.61, as per list examined and checked at that time, a copy of which is hereto attached," and that they were ". . . at that time in every respect correct, and proper securities and funds on hand to balance," and that there was not nor had there been at the time of the application any shortage in his accounts with her, and that he was not then in debt to her, express warranties? If these written statements which were made a part of the bond were agreed by the parties to be express warranties, then there can be no doubt, under the facts shown, that they were breached and plaintiff is barred of any recovery on the bond. We are of the opinion that the circuit court correctly held that these statements are not express warranties in this contract. In the law the contract is an insurance contract and its provisions must be construed in the light that provisions in insurance contracts are interpreted. As stated in the opinion of the court in *American S. Co. v. Pauly,* 170 U. S. 133, 144, 18 Sup. Ct. 552:

"If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the

bank and the other favorable to the Surety Company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers, or agents of the Surety Company. This is a well established rule in the law of insurance. (Citing.) . . . There is no sound reason why this rule should not be applied in the present case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty. . . . That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company, if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank."

This court, in dealing with a similar bond in the case of *United Am. F. Ins. Co. v. American B. Co.* 146 Wis. 573, 131 N. W. 994, in speaking of the nature of the contract states:

"It has all the essential features of an insurance contract and should be subject to the rules of construction applicable to such contracts. (Citing.) It being apparent that the bond sued on was prepared by the defendant, as to any ambiguity therein the provisions, conditions, and exceptions of the bond which tend to work a forfeiture should be construed most strongly against the party preparing the contract." Citing *French v. Fidelity & C. Co.* 135 Wis. 259, 265, 115 N. W. 869, and *American S. Co. v. Pauly, supra.*

In the case of *First Nat. Bank v. U. S. F. & G. Co.* 150 Wis. 601, 137 N. W. 742, it is repeated that such a bond "has all the essential features of an insurance contract, and that it is not to be construed according to the rules of law applicable to the ordinary accommodation surety." (Citing.) In *Redman v. Hartford F. Ins. Co.* 47 Wis. 89, 1 N. W. 393, it is held that the use of the word "warranty" in stipulations does not control the construction, for the reason that parties may make representations without employing the word "warrant"

which amount to warranties in law, and on the other hand the use of the word "warrant" may be no more than an agreement against false and fraudulent statements.

The written statement furnished plaintiff by the company informed her that "The company desired to have answers to the following questions and that the answers will be taken as the basis of the bond if issued," and "it is agreed that the above answers are to be taken as conditions precedent and as the basis of the bond applied for. . . ." After having answered questions 13 and 14 that Sallade's accounts in September, 1910, were in every respect correct as to amount and proper securities as per schedule attached, she is asked by question 17, "Have you any reason to know of or suspect any previous defalcation or shortage by the applicant, or any circumstances tending to indicate that he is not a proper person to bond? If so, give particulars," which plaintiff answered "No." The reasonable and natural inference from these questions is that the company demanded and plaintiff understood that she was undertaking to give to the company true and correct statements of fact to the best of her knowledge on the matters embraced in the questions. Looking at the contents of these written statements in connection with the provisions of the bond to the effect that any defaults of Sallade committed prior to the giving of the bond were not to be indemnified, and the provision "This bond is issued on the express understanding that the employee has not, within the knowledge of the employer, at any former period been a defaulter," the inference is reasonably clear and certain that the plaintiff understood that the company required of her as a condition precedent to the giving of the bond that she in good faith answer all the questions honestly and without concealment. These provisions of the statement and bond are out of harmony with the other provisions declaring that the statements of plaintiff are warranted by her to be true. Under these conditions of the transaction it is the well established

rule that the statements in the application will not be treated as warranties if the writings do not clearly show that such was the intent of the parties. *Hart v. Niagara F. Ins. Co.* 9 Wash. 620, 38 Pac. 213; *Wheaton v. North British & M. Ins. Co.* 76 Cal. 415, 13 Pac. 758; *Ætna Ins. Co. v. Simmons,* 49 Neb. 811, 69 N. W. 125; *Legler v. U. S. F. & G. Co.* 88 Ohio St. 336, 103 N. E. 897. The rule deduced from the authorities is stated as follows in vol. 2 of Cooley's Briefs on the Law of Insurance, on page 1147: "From these principles we may deduce the rule that statements will not be regarded as strict warranties, if qualified by other stipulations which by fair inference show a contrary intent." We consider that the provisions of the bond declaring plaintiff's answers in the written statement to be warranties are qualified by the above stipulations in the bond and written statement, and hence her answers are not to be held to be warranties but are to be regarded as representations. The circuit court found that the answers in the statement were truthfully and honestly made by the plaintiff and that she was not guilty of any fraudulent misrepresentation.

We are of the opinion that the plaintiff is entitled to recover under the provisions of sec. 4202*m,* Stats. 1913, which provides:

"1. No oral or written statement, representation, or warranty made by the insured or in his behalf in the negotiation of a contract of insurance shall be deemed material or defeat or avoid the policy, or prevent its attaching unless such statement, representation, or warranty was false and made with actual intent to deceive or unless the matter misrepresented or made a warranty, increased the risk or contributed to the loss.

"2. No warranty incorporated in a contract of insurance relating to any fact prior to a loss shall defeat or avoid such policy unless the breach of such warranty increased the risk at the time of the loss, or contributed to the loss, or unless such breach existed at the time of the loss."

This is a general law, and by section number the legislature made it a part of ch. 176 of the statutes dealing with evidence, under the title "Provisions common to actions and proceedings in all courts." This indicates a legislative intent that the act is to apply to all contracts of insurance. We have shown that the bond in question is, by adjudications of this and other courts, regarded as an insurance contract, and hence this statute applies to the contract here in question. Similar statutes of Kentucky and Tennessee have been held to apply to fidelity contracts. *Warren D. Bank v. Fidelity & D. Co.* 25 Ky. L. Rep. 289, 74 S. W 1111, and *First Nat. Bank v. Fidelity & G. Co.* 110 Tenn. 70, 75 S. W. 1076. Under the provisions of sec. 4202*m*, Stats. 1913, the statements of plaintiff made by her to the written questions could not defeat the bond unless they were "false and made with actual intent to deceive." The trial court has found that, though the answers were not in fact true, the plaintiff honestly believed them to be true and she was not guilty of fraudulent misrepresentation. An examination of the record has led us to the conclusion that the evidence supports these findings of fact.

The fact that some of the securities enumerated in the list attached to plaintiff's answer to question 13 were not in fact plaintiff's, and the answer was in fact untrue, did not, under the facts shown and found, increase the risk or contribute to the loss and avoid the contract, because the defendant did not rely on the written statement as to the correctness of the list of securities and Sallade's having them in his possession for the plaintiff. The court found that defendant refused to issue the bond on plaintiff's statement and required of its local agent, Boreham, to check up the list and securities inventoried in the list, and that it issued the bond to plaintiff upon its agent's report that the list of securities held by Sallade as plaintiff's property were in fact in Sallade's possession, and that the list was correct, and that an arrangement for joint control of the safety deposit box and the securities

therein had been made by defendant's local agent and Sallade. It appears that defendant's agent had the same information as the plaintiff as to the correctness and ownership of the listed securities exhibited by Sallade as plaintiff's property, and that defendant relied on its agent's information as the inducement of issuing the bond. Under the facts shown it is clear that the plaintiff's written statements did not form the basis of issuing the bond, and hence cannot be considered as misrepresentations or warranties which increased the risk, or as being relied on and therefore contributing to the loss. Under such circumstances the defendant cannot assert that the untrue statements, innocently made by plaintiff, constitute a forfeiture, because it acted on its own knowledge, and plaintiff's statements did not contribute to the loss as contemplated by the statute governing the rights of the parties as to the alleged breaches of the contract. We are of the opinion that the trial court properly awarded judgment for the plaintiff.

By the Court.—The judgment appealed from is affirmed.

WINSLOW, C. J., and TIMLIN and BARNES, JJ., dissent.

A motion for a rehearing was submitted for the appellant on a brief by *Quarles, Spence & Quarles,* attorneys, and *I. A. Fish,* of counsel, and for the respondent on a brief by *Thompson, Thompson, Allen & Gruenewald,* of counsel.

The motion was denied, with $25 costs, on January 11, 1916.

FISCHBECK, Appellant, vs. MIELENZ and others, Respondents.

October 5, 1915—January 11, 1916.

Judgments: Setting aside after term: "Surprise:" Delay in entry: Mistakes: Correction: Jurisdiction: Validity of judgment: Construction: Interest.

1. A valid judgment cannot be set aside after the term at which it is entered, except under sec. 2832, Stats., and the motion and order under that section must be made within one year after the moving party had notice of the judgment.
2. A judgment entered by the clerk in pursuance of an order of court made on the same day must be regarded as a judgment of the court in session, and a motion to set it aside for irregularity must be made at the same term.
3. The circuit court has no jurisdiction to review a judgment rendered at a former term, for the purpose of correcting errors in law or fact committed by the court in rendering it or in the proceedings prior thereto.
4. Where judgment is entered after a full trial on the merits and pursuant to an order of the court, surprise at the decision of the court on the facts before it is not the kind of surprise for which sec. 2832, Stats., provides a remedy.
5. A court is not authorized to set aside a final judgment more than three years after it was entered merely because there was a long delay in entering it.
6. After the lapse of the term at which judgment is entered and the expiration of one year thereafter, the circuit court may correct a mistake in the entry of the judgment so as to make it conform to the judgment actually pronounced by the court, but it cannot modify or amend the judgment to make it conform to what the court ought to have adjudged or even intended to adjudge.
7. No power exists to set aside the whole of a judgment for the purpose of correcting a clerical error therein.
8. An order of the circuit court setting aside the whole of a judgment entered three years before, for the purpose of correcting a clerical error therein, was a nullity, and a new judgment entered in lieu of the former one was absolutely void.
9. Where by a judgment the amount of plaintiff's recovery was adjudged to be a certain sum with interest from December 19, 1898, and it was further adjudged that plaintiff have a lien on certain property to the extent of said sum and interest thereon from December 19, 1896, the lien could not be enforced for interest accruing before December 19, 1898.

APPEAL from a judgment and an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Dismissed.*

This case was before this court on a former appeal and is reported in 119 Wis. 27 (96 N. W. 426). The facts are quite fully stated in the report of the case, and it is only necessary here to state what occurred after the cause was remanded. The circuit court ordered a reference to hear, try, and determine the issues which this court decided should be again tried. The referee filed his findings of fact and conclusions of law October 31, 1904. On December 3, 1904, appellant moved to amend such findings and conclusions in various particulars and for judgment on the report as amended. The court permitted the respondent to offer additional evidence in the circuit court.

The referee found that the amount due and unpaid on the judgment was $1,209.33, with interest from December 19, 1898. The court, on the evidence produced, reduced this sum to $1,155.73, and ordered that judgment be entered accordingly with costs. This order was made December 31, 1904. On April 5, 1905, another and more formal order for judgment was entered in the case. It differed from the first one in that it directed that the amount found due was a lien on the amount derived from the sale of the interest in the real estate referred to and formerly owned by Roth, and denied costs. It also allowed interest on the balance found due from August 28, 1896, when the original judgments were entered. Judgment was not entered, and on November 22, 1906, appellant moved to dismiss respondent's claim for want of diligence and unreasonable neglect in failing to take judgment. This motion was denied and the court ordered that judgment be entered on the findings forthwith. No further proceedings seem to have been taken until July 12, 1911, when respondent caused judgment to be entered on the orders referred to, without notice to the appellant, for $1,155.73

with interest, which sum was declared to be a lien on the fund derived from the sale on partition. Up to this point the proceedings were carried on before Judge HALSEY, although the judgment was signed by the clerk. On July 25, 1914, the appellant moved that the judgment be vacated and set aside for various reasons. This motion was made before Judge WILLIAMS, who held that a clerical error had been made in drawing the judgment, the error consisting in allowing interest from December 19, 1896, instead of from December 19, 1898. This correction, if material, benefited the appellant. The court further directed the clerk to enter *nunc pro tunc* as of the 5th day of April, 1905, a final judgment on the issues raised in the cross-complaint of the defendant *Olga Fischbeck* against the defendant *Albert E. Mielenz,* in accordance with the findings and conclusions of the referee as modified by Judge HALSEY. Judgment was accordingly entered on December 5, 1914, in respondent's favor for $1,155.73, with interest from December 19, 1898, and decreeing that respondent was entitled to receive said sum out of the proceeds of the partition sale of the one-quarter interest in the real estate referred to, then in the hands of the clerk. The judgment of July 12, 1911, adjudged that on June 28, 1897, there was still due on the bank judgments $1,155.73 "and interest thereon from December 19, 1898." It was further adjudged that judgment of the bank, numbered 16,048, stand and remain in force for $1,155.73, with interest thereon from December 19, 1898, and that said judgment be ordered satisfied except as to said sum. It was further adjudged that said sum with interest from December 19, *1896,* constituted a lien on the money derived from the sale or partition of the Roth one-quarter interest in the real estate referred to in the former statement of facts. All of the other bank judgments were adjudged to be satisfied. This appeal is taken from the judgment entered December 5, 1914, and from the order permitting said judgment to be entered *nunc pro tunc* as of April 5, 1905.

For the appellant there were briefs by *Fred'k W. v. Cotzhausen,* attorney, and *Jas. L. O'Connor,* of counsel, and oral argument by *Mr. O'Connor.*

For the respondents there was a brief signed by *Lyman G. Wheeler,* attorney for *Mielenz,* and *Doerfler, Green & Bender,* attorneys for the executors, and oral argument by *Mr. Wheeler* and *Mr. W. H. Bender.*

The following opinion was filed October 26, 1915:

BARNES, J. It is the settled law of this state that a valid judgment cannot be set aside after the term at which it is entered, except under provisions of sec. 2832, Stats. And where relief is asked under this section, not only the motion but the order itself must be made within one year after the moving party has notice of the judgment. *Whitney v. Karner,* 44 Wis. 563; *Edwards v. Janesville,* 14 Wis. 26; *Spafford v. Janesville,* 15 Wis. 474; *Flanders v. Sherman,* 18 Wis. 575, 593; *Ætna L. Ins. Co. v. McCormick,* 20 Wis. 265; *Hartshorn v. M. & St. P. R. Co.* 23 Wis. 692; *Scheer v. Keown,* 34 Wis. 349; *Quaw v. Lameraux,* 36 Wis. 626; *Knox v. Clifford,* 41 Wis. 458; *Hogan v. State,* 36 Wis. 226; *Black v. Hurlbut,* 73 Wis. 126, 40 N. W. 673; *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 138, 79 N. W. 229; *Challoner v. Howard,* 41 Wis. 355.

In this latter case it is said that the rule does not militate against the power of a court to prevent the inequitable use of a judgment or to restrain the enforcement of a judgment obtained by fraud.

A judgment of the clerk entered in pursuance of an order of court made on the same day must be regarded as a judgment of the court in session, and a motion to set it aside for irregularity must be made at the same term. *Pormann v. Frede,* 72 Wis. 226, 39 N. W. 385.

The circuit court has no jurisdiction to review a judgment rendered at a former term, for the purpose of correcting errors in law or fact committed by the court in rendering it or

in the proceedings prior thereto. *Van Dresar v. Coyle,* 38 Wis. 672; *Pinger v. Vanclick,* 36 Wis. 141; *Ætna L. Ins. Co. v. McCormick,* 20 Wis. 265; *Durning v. Burkhardt,* 34 Wis. 585; *Bonnell v. Gray,* 36 Wis. 574; *Quaw v. Lameraux,* 36 Wis. 626; *Emerson v. Huss,* 127 Wis. 215, 223, 106 N. W. 518.

In substance sec. 2832, Stats., provides that the court may in its discretion, at any time within one year after notice thereof, relieve any party from a judgment against him through his mistake, inadvertence, surprise, or excusable neglect and may supply any omission in any proceedings; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of law, the court may in like manner permit an amendment to such proceeding so as to make it conformable thereto.

Manifestly the appellant's motion was not made, and in any event was not maintainable, under sec. 2832. The judgment was not entered because of any mistake, inadvertence, or neglect of the appellant. It was entered after a full trial on the merits and pursuant to an order of the court. She may have been surprised at the decision of the court on the facts before it, but this is a surprise that falls to the lot of many litigants, and is not the kind of a surprise that the statute provides a remedy for. The remedy, if there be one, is to appeal, and often the surprise is only augmented by the final decision. We know of no rule of law that would authorize a court to set aside a final judgment more than three years after it was entered simply because there was a long delay in entering it. Either party might have caused judgment to be entered promptly and have taken an appeal from such judgment. While respondent secured some relief, he obtained only a small part of what he asked, and the decision was at least a partial victory for the appellant. Aside from the question of laches, the appellant sought to have the judgment set aside for errors of fact and law alleged to have oc-

curred during the trial and disposition of the case. This could not be done.

After the lapse of the term at which judgment is entered and the expiration of one year thereafter, the circuit court may correct a mistake in the entry of the judgment so as to make it conform to the judgment actually pronounced by the court. It cannot modify or amend the judgment to make it conform to what the court ought to have adjudged or even intended to adjudge. *Williams v. Hayes,* 68 Wis. 248, 32 N. W. 44; *Hoffman v. State,* 88 Wis. 166, 174, 59 N. W. 588; *Packard v. Kinzie Ave. H. Co.* 105 Wis. 323, 325, 81 N. W. 488; *Ætna L. Ins. Co. v. McCormick,* 20 Wis. 265, 268; *Will of Cole,* 52 Wis. 591, 9 N. W. 664; *State ex rel. Taylor v. Town Board,* 69 Wis. 264, 34 N. W. 123; probably *Wyman v. Buckstaff,* 24 Wis. 477, 479, although the statement of facts does not show the length of time that actually elapsed. The same is true of *Durning v. Burkhardt,* 34 Wis. 585, 588.

The rule does not permit the setting aside of the judgment first entered and the entry of a new one, but only the correction of it. No power exists to set aside the whole judgment for the purpose of correcting a clerical error. The power to amend does not include the power to wipe out. It follows that Judge WILLIAMS had no power to set aside the 1911 judgment or to enter a new one in lieu thereof, and that the order setting aside the former judgment is a nullity and the judgment entered in 1914 was absolutely void. Speaking of the effect to be given to a void judgment Mr. Freeman says:

"A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress. The first and most material inquiry in relation to a judgment

or decree, then, is in reference to its validity. For if it be null, no action upon the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government, can invest it with any of the elements of power or of vitality. It does not terminate or discontinue the action in which it is entered, nor merge the cause of action; and it therefore cannot prevent the plaintiff from proceeding to obtain a valid judgment upon the same cause, either in the action in which the void judgment was entered or in some other action." 1 Freeman, Judgments, § 117.

And again: "A judgment pronounced by a tribunal having no authority to determine the matter in issue is necessarily and incurably void, and may be shown to be so in any collateral or other proceeding in which it is drawn in question." 1 Freeman, Judgments, § 120.

The rule has been stated just as strongly by this court:

"If the court exceeded its jurisdiction of the subject matter, then the judgment is no protection whatever. It may be ignored altogether. *Peck v. School Dist.* 21 Wis. 516; *Blodgett v. Hitt,* 29 Wis. 169; *Damp v. Dane,* 29 Wis. 419; *Mathie v. McIntosh,* 40 Wis. 120; *O'Malley v. Fricke,* 104 Wis. 280, 80 N. W. 436; *Harrigan v. Gilchrist,* 121 Wis. 127, 228, 99 N. W. 909; *Hughes v. Cuming,* 165 N. Y. 91, 58 N. E. 794; *Cooper v. Reynolds,* 77 U. S. 308. The rule is elementary, that if the matter dealt with by the judgment in this case was entirely outside of the court's jurisdiction, then, as said in the last case cited, the result was not merely erroneous and so, binding on all parties which the court had jurisdiction of, and their privies, till set aside in some of the ways appointed by law, not including collateral attack, but was a usurpation and, as said in *Damp v. Dane, supra,* the proceedings void in the broadest sense of the term." *Will of Rice,* 150 Wis. 401, 440, 441, 136 N. W. 956, 137 N. W. 778.

The judgment and order appealed from being mere nullities, there is nothing to affirm or reverse.

Judge WILLIAMS might have made an order correcting the

clerical error in the 1911 judgment, and appellant no doubt could have such an order reviewed if aggrieved by it. But the appellant would not be aggrieved by such an order, because it would operate in her favor. There was no necessity for such an order, because respondent had filed a disclaimer in court of any interest prior to December 19, 1898, and under the recitals in the judgment it could only be enforced as to interest accruing after this date. *Ciscel v. Wheatley,* 27 Wis. 618. The amount of respondent's recovery was adjudged to be $1,155.73, with interest from December 19, 1898. The judgment then adjudges that respondent have a lien on the proceeds of the sale of the land "to the extent of said sum of $1,155.73 and interest on said amount from the 19th day of December, *1896.*" It is quite obvious that, under these two apparently conflicting clauses, the lien of the judgment could not be enforced for a greater sum than was adjudged to be due.

By the Court.—Appeal dismissed.

A motion for a rehearing was denied, with $25 costs, on January 11, 1916.

HILLER, Respondent, vs. JOHNSON and others, Receivers, etc., Appellants.

October 26, 1915—January 11, 1916.

Street railways: Injury to passenger boarding car: Degree of care required: Instructions to jury: Experiments before jury as to extent of injury: Husband and wife: Competency as witnesses after divorce judgment: Excessive damages.

1. The degree of care which those operating an interurban railway are bound to exercise towards passengers about to board a car is the utmost or highest degree of care that the ordinarily prudent man would exercise under similar circumstances, consistent with such mode of transportation.

2. In an action for personal injuries alleged to have been sustained through the negligent starting of an interurban car as plaintiff was attempting to board it, an instruction as to the care which defendants were bound to exercise towards passengers about to board a car was not erroneous on the ground that it assumed that plaintiff was a passenger, where it was given with reference to a question in the special verdict which the jury were to answer only in case they found, in answer to previous questions, facts which constituted plaintiff a passenger, viz. that the car was standing still when he attempted to board it, and that defendants' servants started it while he was in the act of boarding it.
3. Jurors may use their ears as well as their eyes in ascertaining the extent or nature of alleged injuries when no expert knowledge is necessary to do so; and trial courts must be given a wide discretion in determining just how far experiments before a jury may be carried.
4. Thus, where plaintiff alleged an injury to his shoulder joint, it was not error to permit him to move his arm up and down before the jury for the purpose of demonstrating to them that crepitation resulted, evidencing an injured and imperfect joint; nor for his counsel to ask the jury if they heard the sound.
5. Under sec. 2374, Stats., providing in substance that a judgment of divorce shall not affect the status of the parties until one year after its entry, a divorced wife is not a competent witness to testify for or against her husband until after the expiration of the year.
6. An award of $960 for injuries to the knee, shoulder, and side of the face of a man, caused by the negligent starting of an interurban car as he attempted to board it, is *held* not so large as to evidence prejudice or passion on the part of the jury.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action to recover damages for personal injuries sustained May 10, 1914, while attempting to board one of defendants' cars at the intersection of Fifth and Clybourn streets in the city of Milwaukee. Plaintiff claims that the car stopped at the usual stopping place; that one or more persons boarded it before he attempted to do so; that the car was standing still and the door was open when he attempted to get on. He says he took hold of both handles, put his left foot on the

step of the car, and was in that position when the car suddenly started; that he could not get his right foot on the step; that the speed of the car hurt his foot in the position he was, and that after it had run about forty feet he was compelled to let go; fell and hurt his right knee, left shoulder, and the right side of the face. The negligence charged in the complaint and sought to be sustained by proof was that the car was suddenly started without warning while plaintiff was in the act of boarding it as a passenger.

The action was begun and tried in the civil court and the jury found (1) that the plaintiff was injured while attempting to board one of defendants' cars (answered by the court); (2) that the door of defendants' car was open at the time he attempted to board it; (3) that it was then standing still; (4) that defendants' servants in charge of the car started it while he was in the act of boarding it; (5) that defendants were guilty of a want of ordinary care in so starting the car; (6) that such starting was the proximate cause of plaintiff's injury; (7) that plaintiff was not guilty of any want of ordinary care that proximately contributed to his injury; and (8) damages in the sum of $960. Judgment for plaintiff was entered and the defendants appealed to the circuit court, where the judgment of the civil court was affirmed. From such judgment of affirmance the defendants appealed.

For the appellants there was a brief by *Edgar L. Wood,* attorney, and *Bull & Johnson,* of counsel, and oral argument by *Mr. Wood.*

For the respondent there was a brief by *Tibbs, Foster & Schroeder,* attorneys, and *A. W. Foster,* of counsel, and oral argument by *A. W. Foster* and *H. B. Walmsley.*

The following opinion was filed November 16, 1915:

VINJE, J. It is claimed that the instruction under the fifth question to the effect that the care imposed upon defendants towards passengers about to board a car was the utmost

or highest degree of care that the ordinarily prudent man would exercise under similar circumstances, consistent with such mode of transportation, was erroneous because it assumed that plaintiff was a passenger. Question number 5 read: "If you answer question 4 'Yes,' then you may answer question 5. Was the defendant guilty of a want of ordinary care in so starting the car?" By its terms question 4 required an answer only in event question 3 was answered in the affirmative. Question 3 read: "Was the car standing still when plaintiff attempted to board it?" Hence the jury were told to answer question 5 only in the event they found the car was standing still while plaintiff attempted to board it and that defendants' servants in charge of the car started it while he was in the act of boarding it. In other words, they were to answer question 5, relative to the duty of defendants to passengers, only in the event they found facts which constituted plaintiff a passenger. There was no assumption of that fact by the court. The jury were required to find it, and in the event they found it the duty of defendants to plaintiff as a passenger was stated to them.

The argument that this court should follow the rule laid down by the New York court in *McGrell v. Buffalo O. B. Co.* 153 N. Y. 265, 47 N. E. 305, and *Stierle v. Union R. Co.* 156 N. Y. 70, 50 N. E. 419, to the effect that the carrier owes passengers the highest degree of care only in respect to roadbed, appliances, and cars and not as to operation, is neutralized by the fact that the first case did not so hold, and the second case, though lending color to the claim, was expressly stated in the opinion for a rehearing not to so hold (*Id.* 684); and in *Koehne v. N. Y. & Q. C. R. Co.* 165 N. Y. 603, 58 N. E. 1089; *S. C.* 32 App. Div. 419, 52 N. Y. Supp. 1085, it was again reiterated that no such doctrine was laid down in the *Stierle Case.*

Plaintiff claimed an injury to his shoulder joint, and he was permitted over the objections of defendants to raise his

arm up and down before the jury for the purpose of demonstrating to them that crepitation resulted, evidencing an injured or imperfect joint. While so doing the following occurred: Plaintiff's counsel to a juror: "Do you hear that?" Juror: "There is a slight noise there." Plaintiff's counsel to another juror: "Put your ear to his arm." Juror: "Yes." Plaintiff's counsel to the jury: "Do you hear it?" Jury: "Yes." This, in view of the amount of damages assessed, is claimed to have been prejudicial error. We see no reason why jurors may not use their ears as well as their eyes in ascertaining the extent or nature of alleged injuries where, as here, no expert knowledge is necessary to do so. Trial courts must be given a wide discretion in determining just how far experiments before a jury may be carried. Where they do not border upon the unseemly or are not palpably misleading or otherwise improper, this court will not criticise them, much less pronounce them prejudicially erroneous. Justice will be promoted rather than thwarted by a little loosening of the strait-jacket in which trial courts have found themselves in the past. That they will meet the added freedom with commensurate care and wisdom may be confidently expected.

It appears that a couple of weeks before the trial a divorce was granted by a court of this state between plaintiff and his wife. The defendants called her to testify to the circumstances of plaintiff's returning to Kenosha, his home, upon the day of the accident. Plaintiff objected on the ground that the witness was still his wife and therefore incompetent to testify for or against him. The objection was sustained because under sec. 2374, Stats. 1913, in force at the time the decree was entered, the decree of divorce did not, for one year following its entry, affect the status of the parties. The ruling was correct. Sec. 2374 provides: "When a judgment of divorce from the bonds of matrimony is granted in this state by a court, such judgment, so far as it determines

the status of the parties, shall not be effective, except for the purpose of an appeal to review the same, until the expiration of one year from the date of the entry of such judgment," and it is made the duty of the court to so inform the parties appearing in court. Mrs. Hiller at the time of the trial for all purposes of giving testimony was still the wife of the plaintiff notwithstanding the decree of divorce had been entered a few weeks previously. Cases decided under former statutes where the judgment became absolute from the date of its entry can have no bearing upon the question here presented. Nor does the fact that this court in *Rogers v. Hollister,* 156 Wis. 517, 146 N. W. 488, held that the word "husband" as used in a will did not mean a husband from whom the testatrix had been divorced under this statute within a year, militate against the conclusion here reached. In that case the court sought to reach the meaning given the word in a will where the testatrix made a bequest to him if he was her husband at the time of her decease. The question there was not to ascertain the technical legal meaning of the word, but the meaning in which the testatrix used it.

The damages awarded do not appear to be so great as to evince prejudice or passion on the part of the jury. They have been approved by the trial court and we cannot say that such approval was error.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on January 11, 1916.

FOLEY, Respondent, vs. MARSCH, Appellant.

October 29, 1915—January 11, 1916.

Contracts: Statute of frauds: Possible performance within a year: Modification by oral agreement: Prior breach: Counterclaim: Mutuality: Rental value of appliances: Special verdict: Certainty in finding: Instructions to jury: Appeal: Harmless errors.

1. An agreement is not within sub. (1), sec. 2307, Stats. 1913, if by its terms it may be performed within one year from the making thereof.
2. Where a written contract was not required by the statute of frauds to be in writing, its terms might be modified, after it had taken effect, by oral agreement, without any new consideration.
3. Where by oral modification of a written contract for the performance of certain work defendant had agreed to pay plaintiff the full reasonable value of all work done by the latter, there remained no basis for a counterclaim for breach by plaintiff of the original contract, and the question whether that contract was so lacking in mutuality that there could be no counterclaim thereon is immaterial.
4. Under the evidence in this case, tending to show, among other things, that the parties did not contemplate that full rental value should be charged for a steam shovel and other appliances furnished by defendant for use by plaintiff in doing railroad construction work as a subcontractor of defendant, that the shovel was old and worn, and that some of the other appliances could not be used for the work, it is *held* that the jury were properly instructed that the reasonable value of the use plaintiff had of the appliances in doing the work might be allowed to defendant, and that defendant was not entitled to a peremptory instruction directing the jury to allow the rental value of the appliances at the amount fixed by defendant's opinion evidence.
5. Where the evidence permitted only the inference that a contract was modified, if at all, on July 5th, a finding in a special verdict that it was modified "on or about July 5th" was not fatally indefinite or uncertain. It must be presumed that the jury agreed on their answer and based it on the evidence.
6. Where the answers to certain questions in a special verdict entitle plaintiff to judgment without regard to the answer to another question, any alleged error in the instruction with respect to such other question is wholly immaterial.

APPEAL from a judgment of the circuit court for Milwaukee county: CHESTER A. FOWLER, Judge. *Affirmed.*

This is an action to recover on an alleged agreement made by an oral modification of a written contract entered into between the defendant, as the principal grading contractor for the Milwaukee, Sparta & Northwestern Railroad, and the plaintiff as a subcontractor.

The defendant, *Marsch,* is a general railroad contractor and in December, 1909, contracted with the Milwaukee, Sparta & Northwestern Railroad to construct about fifty-three miles of new railroad between the city of Milwaukee and Clyman Junction in this state. The contract was for the complete construction of the road from grading to track laying and ballasting. In March, 1910, the plaintiff negotiated with defendant to subcontract for some of the construction work covered by defendant's contract with the railroad company. In company with defendant's superintendent plaintiff drove along roads parallel to the proposed railroad right of way, and at various places walked over and examined the character of the ground and material in connection with the engineer's profile of the proposed road, showing cuts and fills and engineers' estimates of quantities of material to be moved and classification of the material in earth, rock, and loose rock, etc., and the estimated quantities of each. About March 21, 1910, plaintiff and defendant made a preliminary agreement by which plaintiff was to undertake as defendant's subcontractor to do a part of the work, stating the amount of work by station numbers specified in *Marsch's* contract with the railroad company and fixing the price of the work. On April 5, 1910, plaintiff and defendant signed a written contract containing the terms and conditions on which plaintiff undertook the work, a description thereof, together with the prices plaintiff was to receive for the different parts of the work, and referring to the principal contract between defendant and the railroad company. It was required by the plaintiff's contract that the work of construction assumed by

him be done in accordance with the specifications of the railroad company under the principal contract with *Marsch* and to the satisfaction of the railroad company's chief engineer, whose classification, measurements, and calculations respecting boundaries of excavations were to be final and conclusive. The contract also provided "that the said work shall be begun by the said contractor on or before the 10th of April, 1910, and shall be completed as follows: Sta. 1914 to Sta. 1990, July 31, 1911, and Sta. 1990 to Sta. 2300 and 'Y's' on or before November 1, 1910, time of commencement, completion, and rate of progress being of the essence of this contract." The contract also contains the following:

"It is further agreed that the said principal shall have the right to cancel and terminate this contract at any time with or without notice to the contractor, without liability by the principal for damages therefor, and thereupon any amount, then unpaid for work theretofore done by said contractor at the prices herein provided, shall be paid upon the estimate of said chief engineer, showing quantity of work done to the date of such canceling of this agreement, and upon such payment being made or tendered, all liability of the principal under this contract shall cease and determine, and in no case shall the principal be held further nor otherwise than herein stated, nor shall any claim for prospective profits on the work not done be made, allowed, or paid for. Upon the cancellation of this contract for any cause, the said contractor hereby agrees to immediately relinquish possession of such work and of the materials procured therefor by the contractor and place the same in the hands of the said principal, in such a manner as will enable him to complete the work without hindrance or delay, and said principal shall have the right to re-enter, expel, and remove therefrom the said second party or any person or persons acting in his behalf, using such force and means as may be considered by him necessary for the purpose, without any claim on the part of the contractor for damages therefor in any way."

Plaintiff moved onto the work in April and began the grading work in May. He secured Dugan & Naylon as sub-

contractors to do a part of the work. During the months of May and June the work progressed slowly. The plaintiff testified that in the latter part of June he discovered that he could not perform the work at the contract price, and on July 5, 1910, called on the defendant at his office in the city of Milwaukee and stated to him that he could not perform his contract in view of the material he encountered which required removal and for want of financial means and a proper outfit to do the work, and that according to the engineer's estimate of the work done he had lost $2,500 and that he wanted to give it up and stand his losses to date. He also testified that the defendant then and there told him that if he would complete the work he and Dugan & Naylon had started defendant would supply him with a steam shovel, ties, cars, and rails free of charge and would pay him what this work was worth and would guarantee plaintiff against loss; and that relying on this promise of defendant he went back to Clyman and continued the work that he had begun and the work that Dugan & Naylon had begun; that *Marsch* sent him a steam shovel to use in his work July 25th and later the ties, rails, and cars. Plaintiff continued on the job and completed this work by June 1, 1911. The defendant denies that the plaintiff had this alleged interview with him or any conversation at any time to this effect as claimed by plaintiff, and denies every alleged modification of the original written contract with the plaintiff.

The court submitted this issue between the parties to a jury, who found by special verdict that plaintiff and defendant on or about July 5, 1910, agreed that plaintiff was to complete the work he and his subcontractors were then on and that defendant would pay plaintiff what such work was reasonably worth, and that defendant guarantied plaintiff against loss in doing this work, and that this modified agreement applied to the entire work that plaintiff did on the job. The jury also found that the reasonable value of plaintiff's

work was forty cents per yard; that the entire amount of plaintiff's work amounted to $47,608; and that the reasonable value of the use to plaintiff in doing his work of the steam shovel and other equipment furnished by defendant amounted to $1,220.

The court directed judgment in plaintiff's favor for the balance due plaintiff for the work done after allowing defendant credit for payments made on account and the $1,220, the value of the use of defendant's implements by the plaintiff, amounting to $18,531.73, with interest from October 26, 1911, and plaintiff's costs and disbursements, making a total of $22,129.26. From such judgment this appeal is taken.

For the appellant there was a brief by *Miller, Mack & Fairchild,* attorneys, and *Louis E. Hart,* of counsel, and oral argument by *Mr. James B. Blake* and *Mr. Hart.*

For the respondent there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *C. F. Fawsett.*

The following opinion was filed November 16, 1915:

SIEBECKER, J. 1. It is contended that the court erred in admitting parol evidence tending to show that the original written agreement between plaintiff and defendant had been modified by an oral contract on July 5, 1910, as alleged by the plaintiff. It is claimed that the original agreement was one within the statute of frauds, sec. 2307, Stats. 1913, providing that "Every agreement that by its terms is not to be performed within one year from the making thereof" shall be void unless in writing. In the early case of *White v. Hanchett,* 21 Wis. 415, 416, it was declared, "The contract to be within the statute must be such that it cannot be performed within a year." In *Conway v. Mitchell,* 97 Wis. 290, 298, 72 N. W. 752, this court refers to the adjudications on this subject and declares: "Of course, it is well settled that if an agreement, by its terms, may be performed within a year from the time it is made, then it is not within the stat-

ute." The trial court held that under the terms of the original contract the entire work might have been completed before the expiration of a year from the making thereof. We find nothing in the contract at variance with this interpretation of the contract. The understanding and intention of the parties as shown by its contents clearly harmonize with the idea that the contract could be fully executed within a year from its date. The contract must therefore be treated as not within the statute of frauds. Under these facts of the case the trial court properly received parol evidence tending to show that the parties at the time alleged made an agreement which modified the written contract. The parties to the contract could by mutual agreement modify it without any new consideration. *Schoblasky v. Rayworth,* 139 Wis. 115, 120 N. W. 822, and cases cited.

2. It is claimed that the evidence does not permit of the inference that the plaintiff and defendant agreed to a modification of the original contract, as found by the jury in response to questions 1 and 2 of the special verdict. An examination of the record satisfactorily shows that the favorable inferences from plaintiff's evidence sustain the findings of the jury. The evidence being in conflict on the subject, the court properly submitted the issue to the jury and their finding cannot be disturbed.

3. In the light of these findings and that the original contract is not one within the statute of frauds, the question whether or not the contract lacks mutuality need not be considered. Under the findings of the jury that by the modified oral agreement defendant agreed to pay plaintiff the full reasonable value of all the work done on the job, there remained no basis for any counterclaim for breach of the original contract and hence no error was committed in refusing to receive evidence on this subject.

4. It is argued that the court erred in its instruction in connection with question No. 5, finding the reasonable value of

the use by plaintiff of defendant's steam shovel and other appliances. There is evidence by the plaintiff that defendant offered him the use of his implements free of charge, and that the shovel was somewhat old, and that the wagons could not be used in doing the work. Defendant offered evidence to the effect that the rental value of his appliances was the proper and only basis of the reasonable value of their use and gave the amounts thereof based on the property value of the articles furnished, and claimed the rental value for the time he asserts the articles were in plaintiff's possession. The court held that the jury was not bound by the defendant's opinion evidence as to rental value and that they might reject it in view of plaintiff's evidence that defendant agreed to furnish part of them free of charge and of the worn condition of the shovel, and that under the facts and circumstances the jury was justified in believing that the parties did not contemplate a rental value charge should be made, but that the reasonable value of the use the plaintiff had of them in doing his work might be allowed, and instructed the jury accordingly. We consider that the court's conclusion and instruction to this effect were proper and correct under the facts and circumstances of the case, and that the defendant was not entitled to a peremptory instruction directing the jury to allow defendant the rental value of the appliances furnished plaintiff and that they must allow the amount fixed by the defendant's evidence.

5. It is argued that the phrase "on or about July 5th" in questions 1 and 2 of the verdict renders the verdict so indefinite and uncertain that it cannot be said that the jury have to a certainty determined the issue involved in these questions. We do not find this form of framing the questions ambiguous or indefinite. The questions and answers give a clear and certain finding that the parties made the alleged modification agreement on or about July 5th. It must be presumed that the jury agreed on their answers and that they

based their answers on the evidence, which permitted only of the inference that the contract was modified July 5th or not at all. The jury found it was so modified.

6. An exception to the instruction given in connection with the sixth question of the verdict is urged upon our attention. The judgment rests upon the first, third, fourth, and fifth findings of the verdict. The answers to these questions entitle the plaintiff to recover without regard to the finding made in response to question 6. The result is that the issue covered by the sixth question and answer is wholly immaterial in determining the rights of the parties and any alleged error in respect thereto could not operate to defendant's prejudice, and hence the exception need not be considered.

7. We have examined the exceptions to the rulings of the court in permitting amendments of the complaint and to the rulings upon rejection of evidence offered by defendant and are satisfied that no prejudicial error was committed by the court in making these rulings.

There is no reversible error in the record, and the court properly awarded judgment on the verdict.

By the Court.—The judgment appealed from is affirmed.

A motion for a rehearing was denied, with $25 costs, on January 11, 1916.

WESTON, Respondent, vs. DAHL and others, Appellants.

November 17, 1915—January 11, 1916.

Corporations: Stock subscriptions: Cancellation: Evidence: Increase of capital stock: Insufficient subscriptions: Personal liability for debts: Amendment of articles: Record: Certificate of register of deeds: Authentication: Oral promise not a subscription: Assignability of claims: Lost note: Bond of indemnity.

1. The three organizers of a corporation subscribed for all of its capital stock—100 shares. Stock certificates were made out accordingly, but were never severed from the book, and across the

face of each certificate and its stub the words "Void, reissued," were written in red ink. There was no other corporate record of such cancellation. The following stubs showed that on the day of the subscription above mentioned fifty-one shares were issued to two of said subscribers. Afterwards other shares were issued, so that, prior to an increase of the capital stock to 250 shares, ninety-six shares in all had been issued. After such increase fourteen more shares were issued, making 110 in all. In an action under sec. 1774*n*, Stats. 1913, to enforce a personal liability of the officers and stockholders for debts incurred by the corporation, the evidence, including the uncontradicted testimony of the secretary—one of the original incorporators—that only 110 shares in all were ever subscribed for in writing, is *held* to sustain a finding by the trial court that the original subscriptions of 100 shares were in fact canceled and that, to the knowledge of the defendants, less than one half of the increased stock of the corporation had been subscribed for at the time the debts in question were incurred.

2. A copy, certified by the secretary of state, of his record of an amendment increasing the capital stock of a corporation duly authenticates for admission in evidence the attached certificate of the register of deeds which, by sec. 1774, Stats., must be filed with the secretary of state before he can issue the certificate of amendment.

3. Oral promises to take shares of stock in a corporation are not subscriptions and, under sec. 2308, Stats., cannot be enforced where the value of the stock exceeds $50.

4. Sec. 1774*n*, Stats.,—making the officers and stockholders of a corporation personally liable for debts contracted by it with their consent, while having knowledge that less than one half of the authorized capital stock has been subscribed or less than twenty per cent. thereof paid in,—creates a primary absolute liability at the time the debts are incurred, thereby imposing a contractual relation upon the stockholders instead of a penalty; and claims arising under it are assignable. *Killen v. Barnes*, 106 Wis. 546, distinguished.

5. Where a note given by a corporation for goods purchased was lost, recovery of the amount due thereon could not be had under sec. 1774*n*, Stats., against officers or stockholders of the corporation, unless plaintiff gave a bond of indemnity as provided by secs. 4190, 4191, Stats. 1913.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Modified and affirmed.*

Action under sec. 1774*n*, Stats. 1913, to enforce liability against defendants as officers and stockholders of the Ideal Light Company, a bankrupt corporation, for debts incurred by it with their consent and with the knowledge of the fact that less than one half of the increased capital stock of the corporation had been subscribed. Sixteen claims aggregating $1,472.11, upon which there had been paid as a dividend $224.04, had been assigned to plaintiff. The action was begun in the civil court and by consent tried without a jury. The court found the statutory facts showing liability on the part of the defendants and rendered judgment against them in the sum of $1,381.94 damages and costs. The circuit court upon an appeal by the defendants affirmed the judgment of the civil court, and from such judgment of affirmance the defendants appealed to this court.

For the appellants there was a brief by *Stuart H. Markham* and *Morris & Canright,* and oral argument by *Charles M. Morris.*

For the respondent there was a brief by *Alexander & Burke,* and oral argument by *Fred W. Barton.*

VINJE, J. The contentions of defendants that the capital stock of the corporation had not been increased from $10,000 to $25,000; that if it had, then more than fifty per cent. thereof had been subscribed; and that the guilty knowledge on their part requisite to their liability is wanting, were found against them by the trial court upon sufficient evidence to sustain the findings.

Only one or two claims relative thereto need be briefly treated. On December 15, 1910, *Albert S. Dahl* subscribed for 75 shares, *Erwin J. Spaar* for 24 shares, and *Fred W. Mueller* for 1 share. These three men were the organizers and president, secretary, and vice-president, respectively, of the corporation. Its capital stock at that time was $10,000, divided into 100 shares of $100 each. The whole stock was

subscribed for by these three officers. The stock certificate book shows the certificates made out as per subscriptions, but they were never severed from the book. Across the face of each as well as on each stub of the book appear the words, written in red ink, "Void, reissued." Then follow stubs of certificates showing that on December 15, 1910, *Dahl* had 29 shares issued to him, *Spaar* 22, and later certificates of stock were issued as follows: December 30, 1910, *Dahl* 3; January 9, 1911, *Spaar* 5; January 30, 1911, *Dahl* 2; March 4, 1911, *Dahl* 1; March 14, 1911, *Dahl* 3; March 20, 1911, *Dahl* 1; March 27, 1911, *Dahl* 2; April 8, 1911, *Dahl* 1; February 6, 1911, *Spaar* 2; February 11, 1911, *Mueller* 5; August 3, 1911, Anna Rupp 4; August 14, 1911, Oscar Fleischer 10; December 8, 1911, *Mueller* 5; March 4, 1912, *Dahl* 1. These are all the certificates issued up to April 3, 1912, when an increase in capital stock to $25,000, consisting of 250 shares of $100 each, was voted. On that date stock had been issued as follows: *Dahl* 43 shares; *Spaar* 29 shares; *Mueller* 10 shares; Rupp 4 shares; and Fleischer 10 shares, making 96 shares in all out of the 100 shares. Later, after the increase of the capital stock, 10 shares were issued to *Dahl* and 4 shares to *Spaar,* making 110 shares in all, the number the trial court found had been subscribed for.

Defendants claim that their subscriptions of 75 shares, 24 shares, and 1 share, respectively, made by them on December 15, 1910, should be counted. This claim is negatived (1) by the fact that the certificates therefor are marked void and were never issued; (2) by the fact that if such original subscriptions were not canceled there was an oversubscription of twenty-eight shares long before the capital stock was increased or before there was any idea of increasing it, so far as the record discloses; and (3) by the fact that the secretary, *Mr. Spaar,* testified that only 110 shares in all were ever subscribed for in writing, including the 14 shares issued after the increase of capital stock; that a list for fur-

ther subscriptions was started but nobody signed it. It seems quite evident that the trial court was justified in finding that the original subscriptions of 100 shares were in fact canceled, though there is no corporate action to that effect shown upon the records of the corporation except the recital in the certificate book. There is nothing to contradict such recital. On the contrary, subsequent corporate acts confirm its accuracy. It must be borne in mind that at the time of this cancellation the three defendants were the officers and only stockholders of the corporation, and they therefore did not proceed with the formality they otherwise would have done.

Plaintiff's right to recover was predicated upon the fact that one half of the stock was not subscribed for at the time the indebtedness was incurred. Notwithstanding this was the issue, *Spaar,* the secretary, testified that only 110 shares in all were subscribed for. This would be true only in case the first subscription of 100 shares was canceled. If it were not in fact canceled it would have been easy for the three defendants to so testify. They were all witnesses upon the trial, and yet neither claims that the certificates for 100 shares, duly made out and marked void, did not correctly indicate a cancellation of the first subscription; and neither *Dahl,* the president, nor *Mueller,* the vice-president, contradicts *Spaar's* testimony to the effect that only 110 shares in all were ever subscribed for. Upon the trial it was sought to show that valid oral subscriptions were made which, together with the amount of stock issued, satisfied the statutory requirement as to subscriptions. It was also sought to show that the capital stock had not been increased from $10,000 to $25,000 before the indebtedness was incurred, but proof failed as to both. The contention that the original subscription of 100 shares was not canceled is made, it is true, upon some evidence tending to sustain it; but if correct it could have rested upon actual proof of the fact by the testimony of the three defend-

ants to the effect that their subscriptions were not canceled. Their failure to so testify, taken in connection with the issue made and the other evidence tending to negative the validity of their original subscription, is, we think, a sufficient basis for the court's finding that one half of the stock of the corporation was, to the knowledge of the defendants, not subscribed for at the time the indebtedness was incurred.

Some objection was made to the competency in evidence of the certificate of the register of deeds attached to the certified copy of the record of the amendment of the articles of incorporation increasing the capital stock of the corporation, furnished by the secretary of state. Sec. 1774 requires such certificate to be filed in the office of the secretary of state before a certificate of amendment can issue. It was therefore a part of the record of the secretary of state and duly authenticated by his certificate attached to the record.

Dahl, the president of the corporation, testified that one Wilde orally promised to take ten shares of stock, and one Burwitz, by a like promise, agreed to take twenty shares. The trial court properly excluded such oral promises in determining the amount of stock subscribed. Oral promises such as were made to take stock are not subscriptions for stock within the meaning of the statute. They rested in parol, and by virtue of sec. 2308, Stats. 1913, could not be enforced.

The most important legal question raised by the assignment of errors is that plaintiff has no title to the claims assigned to him because, since the statute is a highly penal one, claims under it are not assignable. The section (sec. 1774*n*) reads:

"No amendment to the articles of any corporation, increasing the capital stock, shall be filed unless accompanied by the affidavit of the president and secretary that at least one half of the capital stock, including the proposed increase, has been duly subscribed and at least twenty per centum thereof actually paid in. The aforesaid officers and any other officer or stockholder consenting to the incurring of any debt or

liability by such corporation, while having knowledge that less than one half of the authorized capital stock has been subscribed or that less than twenty per centum thereof has been actually paid in, shall be personally liable upon the same."

It is argued that this section is as penal in its nature as is sec. 1765, Stats., under which claims were held nonassignable in *Killen v. Barnes,* 106 Wis. 546, 82 N. W. 536. That section provides in substance that if directors of a corporation shall pay an unlawful dividend they shall be jointly and severally liable to the creditors of the corporation at the time of declaring such dividend to the amount of their claims. The two sections are radically different in their penalties, if sec. 1774*n* can be said to be penal in its nature. Sec. 1765 gives creditors of a corporation relief far in excess of that occasioned by the wrong. An unlawful dividend of but a few hundred dollars may be paid resulting in obligations that may amount to thousands of dollars. Its violation transfers indebtedness of the corporation to the offending officers. Its purpose is to punish an unlawful act. On the contrary, sec. 1774*n* does not give creditors of a corporation damages in excess of that occasioned by the wrong, but only equal to it. The wrong is the creating of the indebtedness for which the offenders are held liable. Hence their liability is measured by their wrongful act. It creates a primary obligation upon them at the time the debt is incurred. Its purpose is to give creditors of a corporation transacting business before it is by law authorized to do so primary recourse to those who wrongfully create the indebtedness on the part of the corporation. A violation of sec. 1773, Stats. 1913, which is quite similar in its provisions, has been construed to create a primary absolute liability on the part of the stockholders. *Flour City Nat. Bank v. Wechselberg,* 45 Fed. 547. The statute here imposes a contractual relation upon the officers and not a penalty in the strict sense of the term. For that reason claims arising under it are assignable, and plaintiff was properly

permitted to maintain the action as owner of the assigned claims.

Among the claims assigned was a note for $152.80 given the Standard Metal Spinning Company for goods bought from it. The complaint as to this was for goods furnished the corporation. But it was admitted that a note had been given for the account and that the note was unpaid. It was not produced upon the trial and was claimed by plaintiff to have been lost. Defendants objected to the inclusion in the judgment of the amount of such note, but the trial court included it therein without requiring plaintiff to give a bond of indemnity as provided by secs. 4190, 4191, Stats. 1913. In this the court erred, and the judgment is directed to be modified by deducting this item unless the plaintiff shall within thirty days after filing the *remittitur* execute and file the statutory bond, in which event the judgment is affirmed. The defendants are entitled to their costs upon this appeal.

By the Court.—Ordered accordingly.

KERWIN and TIMLIN, JJ., dissent.

WISCONSIN ZINC COMPANY, Respondent, vs. FIDELITY & DEPOSIT COMPANY OF MARYLAND, Appellant.

November 19, 1915—January 11, 1916.

Insurance: Indemnity: Employer's liability: Construction of contract: Settlement of claims: Exclusive right of insurer: Agency: Failure to make settlement: Recovery of larger amount: Liability to assured: Negligence: Bad faith: Pleading: Complaint: Sufficiency.

1. When the language used in an insurance contract is unambiguous, its usual and ordinary meaning should be attributed to it.
2. The parties to an insurance contract for indemnity against loss by reason of injuries to employees have a right to insert such

provisions therein as they see fit, so long as those provisions do not contravene public policy; and the courts have no power to add or subtract anything from the contract actually made, but must so interpret it as to carry out the intention of the parties.

3. Where in such a contract the insurer reserves the exclusive right to settle any claim or suit against the assured, but does not expressly assume any duty to make settlements or to exercise ordinary care in negotiating them, the right so reserved is a mere option which may be exercised to its full extent by the insurer for its own benefit and advantage, provided it acts in good faith.
4. Such a contract creates no agency of the insurer for the assured in respect to the making of settlements, in any sense that would make it the duty of the insurer to act for the interest of the assured rather than for its own interest.
5. Under such a contract, limiting to $5,000 the insurer's liability on account of injury or death of a single employee, the insurer was not bound to settle a claim which could have been settled for $5,000 or less; and although the claimant afterwards recovered a much larger judgment against the assured, the insurer was not liable to the assured for more than $5,000 either on the contract or on the ground that it had not exercised ordinary care, prudence, and judgment in respect to the making of a settlement.
6. But in such a case, while the insurer may consult what it deems to be its own interest in respect to making a settlement, if it acts in bad faith and thereby perpetrates a fraud upon the assured it will be liable for the loss caused thereby.
7. Construed with great liberality the complaint in this case is *held*, on demurrer, to state a cause of action based on bad faith and fraud of the insurer in failing to settle for $5,000 or less the claim of an injured employee who afterwards recovered judgment for $12,500.

APPEAL from an order of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed in part; reversed in part.*

The complaint in this case sets out three causes of action arising out of the same transaction: one on contract, one in tort, and one based on fraud. The defendant demurred to each of said causes of action, on the ground that the complaint did not state facts sufficient to constitute a cause of action. A demurrer was also interposed on the ground that

several causes of action were improperly united. The court, in deciding the demurrer, stated: "I have specially considered the cause of action set forth in the third count of the complaint, and as to that I am satisfied that the demurrer is not well taken." An order was accordingly entered overruling the demurrer, from which order the defendant appeals.

The first cause of action alleges the corporate capacity of plaintiff and defendant, and that plaintiff is in the mining business and that defendant is engaged in the business of writing casualty and indemnity insurance and duly licensed to transact business in the state of Wisconsin. The complaint then sets forth that in March, 1912, the plaintiff and defendant entered into a contract of indemnity insurance, whereby for value received the defendant agreed to indemnify the plaintiff against loss for one year from liability imposed by law upon the plaintiff for damages on account of bodily injuries or death suffered by its employees, subject to the limitation of $5,000 for loss from an accident resulting in bodily injuries to or in the death of one person; that defendant undertook to settle or defend in the name and on behalf of plaintiff any suit brought against it to enforce a claim, whether groundless or not, for damages on account of bodily injuries or death suffered by any of its employees within the period covered by the policy; that in October, 1912, one Clyde Mayhew, an employee of the plaintiff, suffered a severe bodily injury which resulted in the loss of his right arm; that such injury was caused by said Mayhew coming in contact with an insufficiently guarded belt and was one for which liability was imposed by law upon the plaintiff and was covered by the policy of insurance; that under the terms of said policy settlement of all claims and the defense of all suits brought thereon was left exclusively in charge or under the control of the defendant; that said Mayhew made claim against the said plaintiff for the sum of $5,000 and offered to settle with the plaintiff and release all his claim for dam-

ages upon payment of said sum, which sum was a fair and reasonable amount for said injury; that the defendant was so informed, and plaintiff performed all the conditions of the contract on its part to be performed; that notwithstanding the fact that it was an injury for which liability was imposed by law, and the defendant had undertaken on plaintiff's behalf the exclusive control and management of said claim and negotiations for settlement thereof, the defendant refused and failed to settle with said Mayhew; that thereafter suit was brought by said Mayhew against the plaintiff to recover damages in the sum of $25,000; that before trial said Mayhew offered to settle his claim and dismiss the suit and release all claim for damages against the plaintiff herein upon payment of the sum of $4,000, and that such offer was made to a duly authorized representative of the defendant; that said defendant failed and refused to carry out its contract and permitted the said suit to go to judgment, and that judgment was rendered therein against the plaintiff for the sum of $12,500 and taxable costs; that thereafter said suit was appealed to the supreme court of the state of Wisconsin and the judgment rendered therein was affirmed; that thereafter plaintiff was compelled to pay said Mayhew in satisfaction of said judgment the sum of $7,500 in addition to the $5,000 and interest contributed by the defendant, and that defendant has refused to reimburse the plaintiff to the extent of $7,500; that notwithstanding the defendant by its contract had agreed to indemnify the plaintiff to the amount of $5,000 in addition to all interest on the verdict and all costs, against all damage from liability imposed by law as alleged herein, and to defend or settle all suits brought on said claims, the said defendant, although it had an opportunity to do so, wholly failed and refused to make settlement and thus indemnify said plaintiff, and thereby occasioned said plaintiff damage to the amount of $7,500, and that payment of said sum has been demanded and refused.

The second cause of action reiterates substantially all of the allegations found in the first cause of action, and in addition thereto alleges that the defendant negligently and carelessly failed and refused to settle with Mayhew, although it knew, or could have known by the exercise of reasonable care, that any suit brought upon said claim was attended with great danger, as the accident was one for which liability was imposed by law; that before trial said Mayhew offered to settle for $4,000, but that the defendant negligently and carelessly failed and refused to carry out the contract in reference to making a settlement and negligently permitted said suit to go to judgment, and that it was defendant's duty, having undertaken in the plaintiff's behalf the exclusive control and management of the claim and negotiations for settlement and the defense of the suit, to conduct itself in respect to said negotiations for compromise and management of the defense of said suit with a reasonable degree of care, skill, and diligence for the protection of plaintiff's interest; that the defendant was negligent in the performance of the duties which it assumed and wholly failed in the diligent performance thereof, in that it entirely failed to conduct said negotiations for settlement by way of compromise with reasonable skill and diligence and negligently failed and refused to make a reasonable offer of compromise or settlement with said Mayhew and negligently failed and refused to settle the claim before suit was brought, knowing, in the exercise of due care, that said injury was one for which liability was imposed by law, and failed and refused to cause said suit to be settled and adjusted for the sum of $4,000, which could have been done with the exercise of reasonable skill and diligence on the part of the said defendant; that notwithstanding the defendant had agreed to indemnify plaintiff from all damage from liability imposed by law and had undertaken for a valuable consideration to settle or defend said suit, said defendant failed to use due and proper care and skill in adjusting said

claim and in performing the terms and conditions of said contract of insurance so as to save the plaintiff harmless as the defendant had contracted to do, and that by its unskilful and negligent conduct in the premises the plaintiff suffered damages in the sum of $7,500.

The third cause of action sets forth substantially all of the facts contained in the first cause of action and contains the following additional averments: That at the time of entering into the said contract and thereafter the defendant well knew the hazards attending litigation of the character in which it became involved with Mayhew, and knew, or in the exercise of reasonable care should have known, the hazards attending the Mayhew claim and the danger of a large judgment being obtained by said Mayhew against the plaintiff; that under the circumstances and under its obligation to act in the settlement and defense of such claims in the name and on behalf of the plaintiff, it was the duty of the defendant to have settled said claim for $5,000, but that defendant, instead of acting on behalf of plaintiff in the matter, assumed a position hostile to plaintiff and plaintiff's interest, and, acting, not in behalf of plaintiff, but in its own interest and behalf, and in bad faith and fraudulently towards plaintiff, failed and refused to take advantage of the offer of settlement and refused to make said settlement, despite the fact that plaintiff, realizing the seriousness of the case and believing it was one in which it was liable, offered to pay one third of any amount necessary to be paid in order to effect a settlement; that said defendant in bad faith refused to act in behalf of the plaintiff in the matter of the settlement of the Mayhew suit and refused to make any offer of settlement or compromise with Mayhew, although frequently requested so to do; that after suit was commenced said Mayhew offered to settle for $4,000, but that said defendant in bad faith toward plaintiff, acting not on behalf of plaintiff, but in its own behalf and interest, and wholly disregarding and in hostility to the interest of the

plaintiff, refused to accept the offer of compromise last aforesaid, despite the fact that it was a reasonable amount for the compromise of said suit, considering the nature and circumstances of the injury and the law of the state of Wisconsin relating thereto and the danger of a much larger judgment being obtained by Mayhew, and despite the fact that the plaintiff herein informed the defendant of the dangers attending the suit of said Mayhew and requested that said settlement be made and offered to contribute one third of the amount demanded; that defendant, acting wrongfully toward plaintiff, permitted said suit to go to judgment, to the plaintiff's damage in the sum of $7,500.

The insurance policy was made a part of the complaint. The provisions of the same material to a consideration of the questions raised on the appeal are the following:

"*Fidelity and Deposit Company of Maryland* . . . herein called the company . . . does hereby agree

"(1) To indemnify *Wisconsin Zinc Company* of Platteville, . . . herein called the assured, against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered—(a) by any employee . . . of the assured while engaged in the occupation and at the places named in statement numbered 4 of said schedule during the prosecution of the work described in said schedule.

"(2) To defend in the name and on behalf of the assured any suit brought against the assured, to enforce a claim, whether groundless or not, for damages on account of bodily injuries or death suffered, or alleged to have been suffered, by any person described in subsections (a) [employee of the assured]. . . .

"A. The company's liability for loss from an accident resulting in bodily injuries to or in death of one person is limited to five thousand dollars, and, subject to the same limit for each person, the company's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to ten thousand dollars. The expenses incurred by the company in defending

any suit, including the interest on any verdict or judgment and any costs taxed against the assured, will be paid by the company irrespective of the limit expressed above.

"B. Upon the occurrence of an accident the assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the company, at its home office in Baltimore, Maryland, or to its authorized representative. If a claim is made on account of such an accident the assured shall give like notice thereof with full particulars. If thereafter any suit is brought against the assured to enforce such a claim, the assured shall immediately forward to the company at its home office every summons or other process as soon as the same shall have been served upon him. The company reserves the right to settle any claim or suit. Whenever requested by the company, the assured shall aid in securing information, evidence and the attendance of witnesses; in effecting settlements; and in prosecuting appeals. The assured shall at all times render to the company all cooperation and assistance within his power."

"E. The assured shall not voluntarily assume any liability; nor interfere in any negotiations or legal proceedings conducted by the company on account of any claim; nor, except at his own cost, settle any claim; nor, without the written consent of the company previously given, incur any expense; except that he may provide at the time of the accident, and at the cost of the company, such immediate surgical relief as is imperative."

"K. No action shall be brought against the company under or by reason of this policy unless it shall be brought by the assured for a loss, defined hereunder, after final judgment has been rendered in a suit, described hereunder, and within two years from the date of such judgment, to wit, for a loss that the assured has actually sustained by the assured's payment in money—(a) of a final judgment rendered after a trial in a suit against the assured for damages on account of the negligence of the assured; (b) of the expenses (excluding any payment in settlement of a suit or judgment) incurred by the assured in the defense of a suit against the assured for damages on account of the negligence or alleged negligence of the assured. The company does not prejudice by

this condition any defenses against such action that it may be entitled to make under this policy."

For the appellant there was a brief by *Williams & Stern,* and oral argument by *Burdette F. Williams.*

For the respondent there was a brief signed by *Kopp & Brunckhorst,* attorneys, and *A. P. Hebard,* of counsel, and oral argument by *Arthur W. Kopp.*

BARNES, J. The rights of the parties to this litigation rest upon the insurance contract which existed between them. A determination of the true intent and meaning of that contract is therefore essential. When the language used is unambiguous, its usual and ordinary meaning should be attributed to it. *Imperial F. Ins. Co. v. Coos Co.* 151 U. S. 452, 14 Sup. Ct. 379; *Rumford Falls P. Co. v. Fidelity & C. Co.* 92 Me. 574, 43 Atl. 503. There are four provisions of the policy which should be particularly considered in deciding the case. Two relate to positive undertakings of the defendant; one to a like undertaking of the plaintiff; and one to a right reserved by the defendant. The defendant agreed to indemnify the plaintiff for injury to a single employee to an amount not exceeding $5,000 and to pay the expenses incurred in defending any suit which might be brought, interest on the verdict, and taxable costs. But no action could be maintained against defendant by the insured under or by reason of the policy unless begun to recover a loss defined thereunder after final judgment had been rendered in an action brought by the injured employee against the employer. The defendant further agreed to defend in the name and on behalf of the insured any suit brought against it for damages on account of bodily injuries to its employees. The insured agreed not to voluntarily assume any liability nor interfere in any negotiations or legal proceedings conducted by the insurer; nor, except at its own cost and expense, to settle any claim; nor to incur any expense without the consent of the

company except for such immediate surgical relief as might be imperative. The insurer reserved the right to settle any claim or suit. In short, the defendant agreed to defend at its own cost any suit that might be brought, and to reimburse plaintiff to the extent of $5,000 on account of the damages that might be recovered and paid, together with interest and costs, and reserved the right to settle any claim or suit; and plaintiff on its part agreed not to make any settlement except at its own expense.

While the vast majority of claims for personal injuries to a single individual would not involve the payment of $5,000, still this limitation on liability is an important one to the insurer and one which presumably affects the amount of premium to be paid for indemnity. Responsibility on the part of the insured beyond the amount of the premium paid has also a tendency to induce caution in providing safety appliances and devices. The provision prohibiting the insured from making settlements is of even greater importance to the insurer. The matter is left with the party who pays all the indemnity in most cases and who pays a large part of it in the rest of them. It is pretty evident that if the insurer intrusted the matter of making settlements to its numerous policy-holders its existence would be precarious. We are all apt to be generous when it comes to spending the money of others. So long as the law countenances and to some extent encourages insurance of this character, the right of making voluntary settlements must, almost as a matter of necessity, rest with the insurer rather than with the insured. An insurance company could hardly be expected to do business on any other basis, because it furnishes the only safeguard available against the payment of excessive damages.

When the defendant assumed the defense of the action and paid the cost of the litigation and interest on the verdict and contributed $5,000 toward the payment of damages, it complied with all the obligations which it expressly assumed, un-

less it be held that the defendant was bound to protect the plaintiff by settling every claim where settlement could be made for $5,000 or less. This latter suggested construction of the contract we deem to be entirely untenable. There is no agreement on the part of the defendant to settle any claim and no duty imposed upon it to do so, unless such agreement or duty is implied or is to be inferred from the provisions which prevented the plaintiff from settling and reserved the right in the defendant to make settlement.

The plaintiff seeks to sustain its first cause of action on the theory that defendant by its contract obligated itself to settle the claim in question because settlement could be made for $5,000 or less and the plaintiff thus relieved of liability. As to the second cause of action, it is urged that defendant, having obligated the plaintiff not to settle and having reserved to itself the right to do so, was bound to exercise ordinary care, prudence, and judgment in making a settlement, and if it failed to do so it was guilty of a wrong for which recovery might be had. In this connection it is further urged that by the insurance contract the plaintiff constituted the defendant its agent for the purpose of making settlements, and that for a breach of duty in failing and refusing to make a settlement advantageous to the plaintiff in this case it is liable to its principal.

There is no liability on the insurance contract under its provisions until a judgment is recovered by an employee and is paid by the insured. *Stenbom v. Brown-Corliss E. Co.* 137 Wis. 564, 119 N. W. 308; *Cornell v. Travelers Ins. Co.* 175 N. Y. 239, 67 N. E. 578; *Carter v. Ætna L. Ins. Co.* 76 Kan. 275, 278, 91 Pac. 178, and cases cited; *Allen v. Ætna L. Ins. Co.* 145 Fed. 881, 76 C. C. A. 265, and cases cited. There is no language in the policy that can fairly be construed to mean that defendant obligated itself to settle any and all claims that might be settled for $5,000 or less. No case is called to our attention where any such construction

has been placed on similar contracts, and we doubt if any can be found. One or two cases are cited as so holding, but they do not do so. The courts which have passed upon questions akin to those arising on the first and second causes of action in cases involving similar contracts, correctly hold that the parties to the contract have a right to insert such provisions therein as they see fit, so long as those provisions do not contravene public policy, and that the courts have no power to add to or subtract anything from the contract actually made, but must so interpret it as to carry out the intention of the parties. They further hold that the parties may agree, and that under such contracts they do agree, that the insurer shall have the exclusive right to settle claims and that this right may be exercised to its full extent by the insurer for its own benefit and advantage, subject to the qualification that it acts in good faith. *Rumford Falls P. Co. v. Fidelity & C. Co.* 92 Me. 574, 43 Atl. 503; *Schmidt v. Travelers Ins. Co.* 244 Pa. St. 286, 288, 289, 90 Atl. 653; *Munro v. Maryland C. Co.* 48 Misc. 183, 96 N. Y. Supp. 705; *New Orleans & C. R. Co. v. Maryland C. Co.* 114 La. 153, 38 South. 89 (see note to this case, 6 L. R. A. N. S. 562–564); *Schencke P. Co. v. Philadelphia C. Co.* 142 N. Y. Supp. 1143. This case was affirmed without opinion, and was again affirmed without opinion in the court of appeals on October 26, 1915. We have been favored with the briefs in that court, and from them it appears that the action was one brought to recover for failure to exercise proper care and diligence in making a settlement which would have proved advantageous to both the insured and the insurer had it been made.

The parties here might, if they so willed, agree that the defendant should settle whenever settlement would prove advantageous to the assured, or that it would exercise ordinary care in negotiating settlements. The reservation of a right to settle is a mere option, which, however, cannot be used for fraudulent purposes. We can find nothing in the contract

by which defendant agreed to make any settlement, nor whereby it agreed to exercise ordinary care in the matter of negotiating settlements. It would be an arbitrary assumption to say that the parties intended that their contract should contain such important provisions and still omitted any express mention of them. The first two causes of action are based on these propositions.

There are two classes of cases relied on by the plaintiff, neither of which affects the questions before us. One of them has arisen where the insurer in violation of its contract obligation refuses to assume the defense of an action. There it is held that the insurance company by breaching its contract releases the assured from its obligation not to settle, and that upon such breach the assured may make any reasonable settlement that prudence and good judgment would dictate and that the insurer becomes liable for the amount paid, not exceeding the limit of the indemnity which it agreed to furnish. *St. Louis D. B. & P. Co. v. Maryland C. Co.* 201 U. S. 173, 26 Sup. Ct. 400; *Butler Bros. v. American F. Co.* 120 Minn. 157, 139 N. W. 355; *Interstate C. Co. v. Wallins Creek C. Co.* (Ky.) 176 S. W. 217. In the other class of cases it is held that the insurer, having agreed to assume and conduct the defense of actions brought to recover damages for injuries, assumes the obligation of conducting such defense with ordinary care, skill, and prudence, and that if it fails to do so it is guilty of actionable negligence for which there may be a recovery. These cases are based on the unquestionably sound doctrine that where there is a negligent breach of a legal duty the injured party has a remedy. *Attleboro Mfg. Co. v. Frankfort M. A. & P. G. Ins. Co.* 171 Fed. 495, and cases cited. There is a legal duty to defend. Here there is a right reserved to settle, but no legal duty is assumed to exercise ordinary care in making a settlement.

The question of agency is relied on and is discussed at some length. The language of the contract does not war-

rant the conclusion that the defendant was intended to be made the agent of the insured for the purpose of making a settlement. The relation which the parties occupied to one another forbids such a construction. If defendant was the agent of the plaintiff, then it would be its duty as such to use its best efforts to further the interests of the plaintiff. Such duty would obligate it to settle all claims that might be compromised for $5,000 or less, where there was any probability of a larger recovery in the event of suit. It would require the defendant in every case where its interest came in contact with that of the insured to disregard its own interest. It is plain enough that under a contract of insurance like the one under consideration the interests of the insured and insurer may at times be hostile and adverse. This is such a case. It was clearly to the advantage of the plaintiff that settlement be made. If defendant believed that there was a meritorious defense to the action and that the case was one where recovery was doubtful or improbable, it was for its interest to contest the case. It might avoid liability altogether, and in the event of defeat would not be called upon to pay much more than if it settled. It either had the right to consider its own interests as being paramount or it had not. Under the language of the policy we think it had such right. If it had, there was no agency, at least in the sense claimed, because if defendant had the right to decide whether its interests would be best subserved by settling or contesting the claim, then in the nature of things it could not be the agent of some one else for the purpose of making a settlement and charged with the duty of doing so if settlement was desirable from the standpoint of the principal. The two ideas are entirely incompatible.

We hold as to the first cause of action that the contract, fairly construed, did not obligate the defendant to settle claims where settlement could be made for $5,000 or less. We hold as to the second cause of action that there was no

legal duty on the part of the defendant to settle and hence there could be no breach of such a duty and that no foundation is laid for an action in tort.

This brings us to a consideration of the third cause of action. The insurance contract in question places the insured at a serious disadvantage in the matter of settling claims in cases where only partial indemnity is afforded. The policyholder is unable to protect himself from heavy loss unless he is able to settle his liability over and above the amount for which he is indemnified, and there may be some question about his even having this right under his contract. The power of settlement given the insurer cannot be used for the purposes of fraud or oppression, and the courts, in so far as they have passed upon the question, hold that the power conferred must not be exercised in bad faith. Some of the decisions heretofore cited imply that for such there may be a recovery, and we entertain no doubt that this is the true rule. Indeed the defendant does not claim otherwise. The difficulty with the complaint in this particular is its paucity of allegation of specific facts tending to show bad faith. It is argued by the appellant that this count in the complaint does nothing more than charge that there was a legal duty on the part of the defendant to consider the interests of both parties in making the settlement, and that it considered its own interests only and ignored those of the plaintiff and that such action constituted bad faith. If we were convinced that this construction is correct, then we would have to sustain the demurrer, because such a conclusion would be drawn from an interpretation of the contract not warranted in law. But we think such a construction would be rather narrow and technical. Pleadings are now construed on demurrer with exceeding liberality. No motion has been made to make the complaint more definite and certain. In deciding on whether a good cause of action is stated in the third count we are not at liberty to look into the record on the appeal in the *Mayhew*

Case [*Mayhew v. Wis. Z. Co.* 158 Wis. 112, 147 N. W. 1035] to determine whether or not the plaintiff may be able to prove a case of bad faith. We are of the opinion that the allegations are broad enough to enable the plaintiff to prove such a case if the necessary facts to make it out exist. While the defendant had the right to consult what it deemed to be its own interest in making a settlement, it could not abuse the power vested in it and recklessly and contumaciously refuse to settle if it was apparent that in all reasonable probability its conduct would not only result in damage to the plaintiff but also in loss to itself. Neither could it exercise the right conferred for the purpose of perpetrating a fraud on the plaintiff. Inasmuch as plaintiff is entitled to submit its proofs under this count of the complaint, we forbear any extended discussion of the evidence essential to establish a cause of action. The order of the court in effect overrules the demurrer to all three of the causes of action alleged in the complaint.

By the Court.—That part of the order overruling the separate demurrers to the first and second causes of action is reversed and the remainder of the order is affirmed, and the cause remanded with directions to sustain the demurrers to the first and second causes of action. No costs are allowed either party, except that respondent is required to pay the clerk's fees.

STATE EX REL. SCHUMACHER, Appellant, vs. MARKHAM, Respondent.

November 20, 1915—January 11, 1916.

Appealable orders: Pleading: Corrupt Practices Act: Penalties: Ouster from office: Party as witness: Privilege: Self-incrimination: Adverse examination.

1. **An order requiring a complaint to be made more definite and certain is not appealable.**
2. **The ouster from office which may be adjudged in an action for violation of the Corrupt Practices Act is a penalty or forfeiture equally with a forfeiture of money or property.**
3. **Such an action being one to enforce a penalty or forfeiture for criminal misconduct, the defendant cannot be compelled to be a witness against himself therein.**
4. **A proceeding for the examination, under sec. 4096, Stats., of a defendant in such an action, the purpose of which was to prove by himself that he was guilty of a criminal violation of the primary law which would forfeit his right to hold an office to which he had been elected, was properly dismissed.**

APPEAL from orders of the circuit court for Dodge county: GEORGE GRIMM, Circuit Judge. *Dismissed as to one order; the others affirmed.*

This is an action brought under the Corrupt Practices Act (secs. 94—1 to 94—35, Stats. 1913) to try the title to the office of district attorney, it being alleged that the defendant violated the act during the primary campaign of 1913 by purchasing intoxicating liquors for voters and in other ways. The complaint was before this court on a former appeal (160 Wis. 431, 152 N. W. 161) and was sustained.

Three orders are now appealed from, viz.: (1) an order requiring the complaint to be made more definite and certain, and (2) an order limiting the examination of defendant as an adverse witness under sec. 4096, Stats., and (3) an order dismissing the last named proceeding.

For the appellant there was a brief by the *Attorney Gen-*

eral and *Royal F. Clark,* special counsel, and oral argument by *Mr. Clark.*

For the respondent the cause was submitted on the brief of *Sawyer & Sawyer.*

WINSLOW, C. J. In this case it is held:

1. An order requiring a complaint to be made more definite and certain is not appealable under the present appeal statute. *O'Connell v. Smith,* 101 Wis. 68, 76 N. W. 1116.

2. The object of this statutory action is to oust the defendant from his office because of alleged criminal misconduct in the primary campaign and such ouster is manifestly a penalty or forfeiture equally with a forfeiture of money or property. See opinions upon former appeal. 160 Wis. 431, 152 N. W. 161.

3. Being an action to enforce a penalty or forfeiture for criminal misconduct, the defendant cannot be compelled to be a witness against himself therein. Sec. 8, art. I, Const.; *Boyd v. U. S.* 116 U. S. 616, 6 Sup. Ct. 524; *Karel v. Conlan,* 155 Wis. 221, 144 N. W. 266, and cases cited therein.

4. The purpose of the adverse examination in the present case being confessedly to prove by defendant himself that he was guilty of criminal violation of the primary law which would forfeit his right to hold the office of district attorney, the court properly held that he could not be compelled to answer, hence the order dismissing the proceeding was correct.

By the Court.—The appeal from the order requiring the complaint to be made more definite and certain is dismissed, and the remaining orders appealed from are affirmed; the respondent to tax but one bill of costs.

VILLAGE OF WEST SALEM, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents. SAME, Respondent, vs. SAME, Appellants.

November 20, 1915—January 11, 1916.

Workmen's compensation: "Employee" of village: Person killed while assisting village marshal: Basis of award.

1. Where a man, though technically under arrest by a deputy sheriff, was not under his control and, in defiance of such deputy and the village marshal, was disturbing the peace and violating the law, the marshal had authority, under sec. 884, Stats., to call upon other persons for assistance; and one who while responding to such call was shot and killed by the prisoner was at the time in the service of the village as a temporary policeman under an authorized appointment, and hence under sec. 2394—7, Stats., was an employee of the village within the meaning of the Workmen's Compensation Act.
2. The compensation to be awarded for the death in such a case should be based on the earnings of one doing policeman's service in the same or a neighboring locality, as provided in sec. 2394—10, Stats. 1913; and not upon the earnings of the deceased in his employment (in this case as a plumber) prior to the time he was called to the assistance of the marshal.

APPEALS from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an action to set aside an award of the *Industrial Commission* requiring the plaintiff village to pay to *Alice Voeck* $3,000 on account of the death of her husband, William Voeck, caused by an accidental injury while in the employ of the plaintiff village. The circuit court set aside the award of the *Industrial Commission* and remanded the cause to the *Commission* for further proceedings. Both parties appeal from this judgment of the circuit court.

William Voeck was a resident of the village of *West Salem* at the time of his death. One William Jones had left the village to escape criminal prosecution. He returned in about a year. On or about May 2, 1914, a warrant, which had

been previously issued by a justice of the peace and made returnable before the county court of La Crosse county, was put into the hands of the deputy sheriff, Weingarten, who attempted to take William Jones into custody. Mr. Wilcox, the village marshal of *West Salem,* met Jones and Weingarten immediately after Weingarten took Jones into custody and was informed by Weingarten that Jones did not wish to go to the village lock-up. Wilcox suggested that Jones might give bail for his appearance and they applied to Justice Nelson for release of Jones on his bond, but the justice disclaimed any authority to release Jones from custody. The parties then applied to Justice Phillip, who also refused to take any steps to release Jones. Jones became angered at this refusal and drawing a gun threatened Mr. Phillip. The deputy sheriff prevailed upon Jones not to shoot and to leave Justice Phillip's house, but when Phillip closed the house door Jones made angry threats and broke the glass in the door and again threatened Phillip. Weingarten did not succeed in restraining Jones in this disturbance of the peace, whereupon Wilcox stated to Weingarten that they must do something and that he would get help and started to get assistance. Wilcox met Voeck and told him that Jones had a gun and that Weingarten needed his help and proceeded to call others to assist in suppressing Jones's disturbance and violation of the criminal law. When Voeck got within a few feet of Jones and Weingarten, Jones suddenly drew his revolver and shot Voeck, who died a short time thereafter.

Voeck was employed as a plumber in the village of *West Salem* and earned about $18 per week. The *Industrial Commission* based the award of $3,000 upon Voeck's earnings as a plumber. The circuit court upon appeal held the village to be liable under the Compensation Act, but held that the award as fixed by the *Industrial Commission* was erroneously based upon Voeck's average earnings as a plumber, and held that compensation must be based upon earnings

in "the same or a similar" or the "most similar employment" to that in which the deceased was engaged at the time of the injury, namely, that of a policeman of the village, and remanded the cause to the *Commission* for further proceedings. From such judgment both of the parties appeal.

For the plaintiff there was a brief by *Baldwin & Bosshard*, and oral argument by *C. L. Baldwin*.

For the defendant *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman*, assistant attorney general, and oral argument by *Mr. Gilman*.

For the defendant *Voeck* the cause was submitted on the brief of *Grotophorst, Evans & Thomas*.

SIEBECKER, J. The inquiries are, Was the deceased, Voeck, at the time in question, assisting the village marshal in the execution of his duties in suppressing a disturbance of the peace and aiding the marshal and the deputy sheriff, Weingarten, in arresting Jones for violating the law of the state? and Was he, if so engaged, employed as a policeman of the village within the provisions of the Workmen's Compensation Act?

The trial court correctly and clearly states the situation of affairs at the time Jones created the trouble at Justice Phillip's home which caused the village marshal to call on Voeck to assist him and Weingarten at this place. The circuit court concluded that, "While Jones was technically under arrest by the deputy sheriff, it is apparent that he was not under the control of the deputy and that the deputy sheriff did not have either the courage or the ability to perform his duty as a peace officer. After his arrest Jones was both disturbing the peace and violating the law and the deputy sheriff did not prevent farther continuance of such conduct. Under such circumstances it was the duty of the marshal to take such action as would prevent further continuance of this lawless conduct on the part of Jones." The

facts and circumstances of the case show that Jones defied Weingarten and the marshal in their efforts to execute the law, and that an occasion was presented to the village marshal for calling upon citizens to aid them. It is clearly shown that the marshal called on Voeck for aid and that Voeck responded to the call and proceeded to the place where he was needed. While approaching Jones and Weingarten, Jones shot him.

The marshal's acts constituted in the law a command to Voeck to assist in the execution of the criminal law under the provisions of sec. 884, Stats. 1913, and refusal to comply therewith would have subjected him to the penalties of sec. 4488, Stats. 1913. By command of the village marshal Voeck was required to perform duties of the same kind as those of the marshal, namely, police duties to suppress a breach of the peace and to enforce the criminal law. The transaction in fact conferred on Voeck the powers and duties of a police officer for the purposes and the exigencies of the occasion. From this it logically follows that Voeck was engaged with the marshal in performing police duties in the village at the marshal's command. The duties and powers thus imposed on him under authority of the village marshal, by force of the statutes, constituted an appointment of Voeck to perform police service for the village. *State ex rel. Brown v. Appleby,* 139 Wis. 195, 120 N. W. 861; *McCumber v. Waukesha Co.* 91 Wis. 442, 65 N. W. 51; 3 Cyc. 877; 2 Ruling Case Law, p. 491, § 52. The result is that Voeck acquired the status of a police officer of the village and was engaged in the execution of the criminal law at the time of his death.

The Compensation Act (sec. 2394—7, Stats.) provides that the term "employee" as used in the act shall be construed to mean: "(1) Every person in the service of the state, or of any county, city, town, village, or school district therein

under any appointment, or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, town, village, or school district therein. . . . Policemen and firemen shall be deemed employees within the meaning of subdivision (1)" of this section, and any compensation awarded a policeman or fireman shall be reduced by any sum he received from any pension or benefit fund to which his municipality contributed. It is considered that Voeck, as we have shown, was in fact rendering services under an authorized appointment of the village within the power conferred by statute upon the marshal; that he acted in the capacity of a temporary policeman for the village by authority of law; and that the deceased was performing policeman's service within the contemplation of the Workmen's Compensation Act.

The service which he was performing did not entitle him to any specified fee or remuneration and hence it furnishes no wage basis upon which to compute compensation. The circuit court held that the *Commission* erred in basing their award on decedent's average wage as a plumber, which was his employment up to that time. We consider that the court properly held that decedent's employment as a plumber is not the correct basis of computation under sec. 2394—10, Stats. 1913, which provides that where the specified methods for ascertaining the average annual earnings cannot reasonably and fairly be applied, then the average annual earnings for basis of compensation shall be fixed, in the light of decedent's previous earnings, at the sum received by other employees of the same or most similar class engaged in the same or similar employment in the same or a neighboring locality. The decedent not having been employed nor earning a salary as policeman during the year preceding his death, the award must be based on the earnings of one doing policeman's service in his or the neighboring locality as pro-

vided by sec. 2394—10, Stats. 1913. The circuit court rendered a correct judgment and properly remanded the cause to the *Industrial Commission* for further proceedings according to law.

By the Court.—The judgment appealed from is affirmed. No costs are allowed to either party.

HEMPTON, Appellant, vs. GREEN BAY & WESTERN RAILWAY COMPANY, Respondent.

December 7, 1915—January 11, 1916.

Railroads: Injury to person taking short cut to depot: Unlighted way: Negligence: Proximate cause.

1. A railway company having provided a safe and suitable way by which its station platform and trains could be reached, no duty rested upon it to light or guard a back driveway which the public had not been, either expressly or impliedly, invited to use and which, though occasionally used in the daytime as a short cut, had not been used or traveled at night.
2. Even if the agent at such station negligently misinformed an intending passenger as to the time when a train would arrive, there was no causal connection between such negligence and an injury sustained by such passenger in attempting to reach the train in the nighttime by an unlighted back way which had not been used for that purpose.

APPEAL from a judgment of the circuit court for Wood county: BYRON B. PARK, Circuit Judge. *Affirmed.*

This action was brought to recover for personal injuries sustained by the plaintiff through the alleged negligence of the defendant in failing to provide suitable and proper approaches and passageways leading to its depot and trains in the village of Arnott, Wisconsin. After the evidence was all in the court directed a verdict for the defendant, and judgment was entered accordingly, from which this appeal was taken.

D. W. McNamara, for the appellant.

For the respondent there was a brief by *Greene, Fairchild, North, Parker & McGillan,* and oral argument by *H. O. Fairchild.*

KERWIN, J. The evidence shows that defendant is a common carrier and that its road extends from Green Bay west through the village of Arnott to the city of Grand Rapids and beyond; that on August 21, 1913, defendant maintained a depot at said village of Arnott; that plaintiff, a traveling salesman, arrived at Arnott about 8 p. m. on said date, bought a ticket for Grand Rapids, and was informed that the train was late; that after plaintiff was so informed he went about a block south of the depot to a saloon run by one Ryan for the purpose of collecting a bill; that after he had been in the saloon a short time he was notified that the train was coming, when he left the saloon and started for the train, it being at the depot and across the main thoroughfare running north and south by the depot. The depot is on the east side of the main thoroughfare, the main track just south of it, there being also a sidetrack south of and about thirty-five feet distant from the main track. These two tracks intersect the main thoroughfare running on the west side of the depot and the Ryan saloon.

At the time of the injury there was a driveway from a point about three fourths of a block south from the railroad tracks, extending easterly and at right angles with the main thoroughfare a distance of about fifty feet, thence turning on a curve to the north and extending to the railroad tracks, where there was a cut of about three or three and one-half feet through which the tracks ran. This driveway had been used by teams in receiving and delivering freight and express, and was to some extent traveled by passengers in the daytime as a short cut in going to and from trains. Arnott was at the time in question a small village of about 200 inhabitants and had no public lighting system. The defend-

ant's station and station platform were lighted by kerosene lamps. On the evening in question the train going west stopped so that the rear car was nearly opposite this back way, and the plaintiff, when he came from the saloon, took this way to reach the train, got off the traveled track, fell down the embankment, and received the injuries complained of. This back way was not the passageway provided by the defendant to reach the depot or trains. It was not lighted and not traveled in the nighttime by passengers in going to or from trains, but occasionally was used in the daytime by passengers as a short cut when the train was in and across the street. The regular passageway used by passengers was along the street on the west side of the depot; and when the train was in there was a level road between the main track and the switch track extending from the main thoroughfare east to the rear end of the train.

There is no evidence sufficient to support a finding that there was any invitation, express or implied, by the defendant to passengers or others to use this way which the plaintiff traveled over on the night in question, hence no duty rested upon the defendant to maintain lights or guard the way.

The evidence shows that no record was maintained in the depot showing the time of arrival of trains. The evidence is also conflicting as to whether the station agent correctly reported the lateness of the train.

The principal points of error argued by counsel for appellant are (1) that there was an invitation extended to the public to use the way which the plaintiff adopted in getting to the train; and (2) that the failure of the defendant to keep a record of the time of arrival of trains in the depot and the negligence of defendant's agent in incorrectly reporting the time of arrival of the train must work a reversal.

The court below in its decision in directing a verdict said:

"On the defendant's motion to direct a verdict: There is to my mind no evidence to sustain a finding that there was any express or implied invitation to the public—which includes this plaintiff—to cross this sidetrack and intervening space between the sidetrack and the main track to board a train standing on the main track. The plaintiff was therefore, at most, a mere licensee at the time he attempted to go from the front door of the Ryan place east and then north across the defendant's property to take the train standing at the depot. The company was therefore in no wise liable to maintain a light or a guard at the place where the plaintiff stepped off down into the cut made for the track of the defendant company.

"As to the negligence of the company's agent in incorrectly reporting the time the train would arrive, assuming he did negligently report it, I hold that, the company having provided a means by which its passengers could reach the depot platform, and also having provided a roadway from the main highway eastward between the switch track and the main track of the railroad, by which a passenger could—though the road was not provided for that purpose—reach a train standing on the main track, there is no causal connection between the fault of the agent and the injury which came to the plaintiff while proceeding from Ryan's place eastward and then northerly to cross the sidetrack to the cars. No one ever had in the nighttime attempted to cross at that place before, so far as the evidence discloses; and it cannot be held that the agent ought reasonably to have foreseen that such an accident as befell the plaintiff would probably follow from his negligence." . . .

We think the court below was right in its conclusions. We find no prejudicial error in the record.

By the Court.—The judgment is affirmed.

NELSON, Respondent, vs. GODDARD & COMPANY, INCORPORATED, Appellant.

December 7, 1915—January 11, 1916.

Landlord and tenant: Lease with option to buy is not a sale: Parol evidence affecting writings: Agreement to give up leased premises if sold: False statement of sale: Voluntary surrender: Measure of damages for breach: Prospective profits: Excessive damages.

1. A lease giving the lessee an option to purchase the premises at a specified price within a prescribed time and to apply the sum paid for rent as a payment on the purchase price, is not a contract of sale.

[2. Whether as between the lessor and a third person parol testimony was admissible to show that the lease did not express the true intent of the parties thereto and that there was in fact a sale, is not decided.]

3. The finding of a jury in such a case that there was no sale was supported by evidence that the lessee wished to buy and that the lessor wished to sell and that they agreed upon the price, but that the lessee could pay only a small sum down and, the lessor being unwilling to make a binding contract of sale on so small a payment, a lease with an option to purchase was decided upon, under which the lessee might buy if he could raise the necessary money and if he could not his rights in the premises would terminate at the expiration of the lease.

4. A lessee who is obligated by the lease to vacate and give up the premises in case of a sale thereof has a right to rely upon the lessor's representation and notification that a sale has been made, and his delivery of the premises to the alleged purchaser should not be deemed a voluntary surrender thereof.

5. The lease of a cranberry marsh having provided that the lessee should vacate the premises in case of a sale and that if called upon to do so after a certain date he should be paid as compensation for his loss a sum equal to the net profits that would have accrued if he had been allowed to complete his term, and the lessee having been induced to surrender the premises by the lessor's false statement that they had been sold, and it appearing that the net profits which would have accrued to the lessee were shown with reasonable certainty, such profits were the proper measure of his damages, it being reasonable to suppose

that both parties contemplated that damages for a breach would be so measured.

6. An award by the jury of $1,362 as damages in such case, reduced by the trial court to $1,000, is further reduced by this court, on appeal, to $600, that being deemed as large a sum as in any reasonable probability a fair jury properly instructed would have awarded.

APPEAL from a judgment of the circuit court for Wood county: BYRON B. PARK, Circuit Judge. *Reversed.*

On April 14, 1913, the plaintiff and defendant entered into a written agreement whereby the defendant leased its cranberry marsh to the plaintiff. Among other things the agreement provided:

"That said second party [plaintiff] will, at the expiration of this agreement, or upon receiving notice of sale of the premises, promptly vacate and give up said premises. . . .

"In consideration of all the above, said first party [defendant] hereby agrees to lease or rent to said second party the above described premises and all personal property thereon from the date hereof to December 1, 1913, unless this agreement shall be previously terminated by sale, with the privilege of using for the proper care and operation of the marsh all buildings, fixtures, grounds, machinery, implements, fuel, and lumber now on the premises.

"However, it is expressly understood and agreed that nothing in this agreement shall hinder, prevent, or interfere with the sale of the premises, and in case of sale during the life of this contract the said first party agrees to use their best efforts to prevail upon the purchaser to allow the second party thereto to enjoy all the conditions of this contract the same as if no sale had been made; but if this is not agreeable to the purchaser, said first party hereby agrees to pay to the second party the sum of forty dollars per month from date hereof to the day of sale, or if sale is made after July 15, 1913, then said first party is to pay said second party a sum equal to the net profits that would have accrued to said second party if no sale had been made, such sum to be agreed upon by the parties to this contract, or in case of disagreement, to be estimated by Andrew Bissig."

The complaint alleged that on or about May 13, 1913, defendant notified the plaintiff that said marsh had been sold and instructed plaintiff to deliver the possession thereof to one A. J. Amundson, to whom the sale had been made; that relying upon such representations plaintiff delivered possession of the marsh to said Amundson and received from the defendant $33 for his damages under the terms of the agreement; that later plaintiff discovered that in truth and in fact the marsh had not been sold and that Amundson took possession merely as a lessee with an option to purchase in the future if he so desired; that thereafter plaintiff demanded compensation of the defendant according to the terms of the agreement, which compensation defendant refused to pay. Plaintiff further alleges that the net profits that would have accrued to him if no sale had been made would amount under the contract to $1,500, and this action is brought to recover the sum alleged to have been lost. The answer put in issue all the material allegations of the complaint. The jury returned the following special verdict:

"(1) Was there a sale of the Hancock marsh made to Albert J. Amundson in May, 1913? *A.* No.

"(2) What were the net profits that would have accrued to the plaintiff from the possession of the Hancock marsh to the end of his lease in December, 1913? *A.* $1,362.

"(3) Did the defendant make any misrepresentations of material facts upon which the plaintiff did rightly rely which induced the plaintiff to surrender of the Hancock marsh? *A.* Yes."

The court held that the damages awarded by the jury were excessive and should be reduced to $1,000 or the verdict set aside and a new trial ordered, and plaintiff accepted judgment for $1,000. From such judgment defendant appeals.

J. E. Higbee, for the appellant.

For the respondent there was a brief by *Goggins & Brazeau,* and oral argument by *Theo. W. Brazeau.*

BARNES, J. Four questions are involved on this appeal: (1) Was there a sale to Amundson? (2) Did plaintiff voluntarily surrender the possession of the premises? (3) Did the court properly instruct the jury as to the rule of damages that should be applied? and (4) Are the damages recovered excessive?

In form the contract between Amundson and the defendant is a lease, containing an option under which the lessee may purchase the premises at a specified price within a prescribed period of time. If the option was taken advantage of, the sum paid for rent was to apply as a payment on the purchase price. It is not seriously contended that this written instrument was a contract of sale, and we are satisfied that it was not. The appellant does earnestly contend, however, that this instrument does not express the true intent and meaning of the parties and that it might and did show by parol the facts and circumstances surrounding the transaction and what actually transpired between the parties before and after the document was signed, and that the real question in the case is, Was there in fact a sale? The respondent claims that the parol evidence offered was incompetent, and that if properly admitted it tended to show that the written agreement embodied the intention of the parties. The weight of authority seems to be to the effect that, where a controversy arises between a party to a contract and a third person, neither is concluded by the contract, but may show what the actual transaction was. In the view we take of the case the matter of the admissibility of the parol testimony is not important, and hence we do not pass upon the question. As we read the testimony of Gaynor, the attorney who drew the lease, and of Amundson, the lessee, the writing expressed the intention finally arrived at by the parties, and, if so, there was abundant evidence to support the answer of the jury to the first question in the special verdict. There is no doubt that Amundson desired to buy and that de-

fendant desired to sell. The price was also agreed upon at $10,000. But Amundson could pay down only $500, and defendant was unwilling to make a binding contract of sale on so small a payment, evidently desiring to avoid the loss and expense of foreclosure in case of default. So a lease with an option to purchase was decided upon. By this arrangement Amundson might buy if he could raise the necessary money, and, if he could not, his rights in the premises would terminate at the expiration of the lease and defendant would not be obliged to foreclose.

There was also evidence from which the jury might have found that defendant represented to plaintiff that it had sold the property when in fact it had not, and that it notified plaintiff of such alleged sale and requested him to deliver possession to the purchaser, and that plaintiff, relying on the representation that there was a sale, did surrender possession to the alleged purchaser. The plaintiff was obligated by his lease to surrender possession in case of a sale, and he had a right to rely on defendant's representations that a sale had been made.

The court charged the jury in substance that plaintiff was entitled to recover as damages the profits which he would have realized from the use of the premises during the term of the lease. Defendant urges that such damages are remote and speculative, and that the true measure was the difference between the reasonable rental of the premises and the sum which plaintiff agreed to pay.

Profits are often an elusive phantom. They are easy to anticipate and hard to realize. Nevertheless in many cases profits can be arrived at with a reasonable degree of certainty, and it frequently happens that they furnish the only fair and adequate basis of compensation for the breach of a contract. The plaintiff and defendant here were apparently satisfied that profits could be ascertained to a reasonable certainty and that they furnished a fair basis of compensa-

tion in case plaintiff was required to vacate during his term. The lease expressly provided that if plaintiff was called upon to vacate after July 15, 1913, he should be paid as compensation for his loss a sum equal to the net profits that would have accrued if he had been allowed to complete his term.

The plaintiff, we think, was entitled to recover such sum as would compensate him for loss arising according to the usual course of things from the wrong done, or such as may reasonably be supposed to have been in the contemplation of both parties at the time the contract was made, as the probable result of the breach. *Cockburn v. Ashland L. Co.* 54 Wis. 619, 12 N. W. 49; *Foss v. Heineman,* 144 Wis. 146, 128 N. W. 881; *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119.

It must be said here that the plaintiff's loss could be fairly and adequately measured by ascertaining net profits, if such profits could be arrived at to a reasonable certainty, and that the parties contemplated that damages for a breach would be so measured. The profits would largely depend on the amount of production, the labor and other cost of production, and the market value of the crop. The testimony quite satisfactorily established these items, and we conclude that the rule submitted was correct. *Salvo v. Duncan,* 49 Wis. 151, 4 N. W. 1074; *Nilson v. Morse,* 52 Wis. 240, 9 N. W. 1; *Nash v. Hoxie,* 59 Wis. 384, 18 N. W. 408; *Poposkey v. Munkwitz,* 68 Wis. 322, 32 N. W. 35; *Corbett v. Anderson,* 85 Wis. 218, 54 N. W. 727; *Allen v. Murray,* 87 Wis. 41, 57 N. W. 979; *Stumm v. Western Union Tel. Co.* 140 Wis. 528, 531, 122 N. W. 1032; *Treat v. Hiles,* 81 Wis. 280, 50 N. W. 896; *Raynor v. Valentin Blatz B. Co.* 100 Wis. 414, 76 N. W. 343.

Some cases are called to our attention where a different rule of damages was applied in the cases of breaches of covenants contained in leases. See *Shaft v. Carey,* 115 Wis.

155, 90 N. W. 427; *Kellogg v. Malick,* 125 Wis. 239, 103 N. W. 1116; and *Pewaukee M. Co. v. Howitt,* 86 Wis. 270, 56 N. W. 784. In the last two of these cases profits were not allowed because it was held that the profits claimed were too remote and it was not contemplated by the parties that they would measure the lessee's damages in the event of a breach. In the first case the damages allowed furnished adequate compensation and there was no way in which profits could be ascertained with any degree of certainty. These cases were decided on the facts before the court. They do not assume to lay down any hard-and-fast rule applicable to all cases involving breaches of covenants contained in leases.

The jury awarded $1,362 damages. The court reduced the award to $1,000, giving plaintiff the option to remit $362 or take a new trial. In its opinion the court stated:

"The damages in this case are much more than the jury should have allowed. If every contingency had been successfully met and every possible obstacle overcome, the plaintiff could possibly have realized the full amount of the damages awarded him by the jury. If I were awarding the damages, I would not have put them over five or six hundred dollars.

"The answer to the question is, however, all an estimate, and necessarily unsatisfactory in its results, no matter what sum is fixed upon. Reading over my notes of the testimony leads me to think that certain allowances should certainly be made which would reduce more or less the plaintiff's figures."

The court was justified in concluding that the damages assessed were excessive. Judgment should have been permitted for only such a sum as in any reasonable probability a fair jury properly instructed would return. *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *Rueping v. C. & N. W. R. Co.* 116 Wis. 625, 641, 93 N. W. 843; *Willette v. Rhinelander P. Co.* 145 Wis. 537, 558, 130 N. W. 853. It is apparent that the court overlooked this rule. It is not to be supposed that a fair jury properly instructed

would not place the damages as low as the court would have placed them had it been trying the case without a jury. Much less is it to be supposed that a fair jury would award nearly twice as much damages as the court deemed to be fairly compensatory. For this reason the judgment must be reversed.

By the Court.—Judgment reversed, and cause remanded for new trial unless the plaintiff elects within thirty days after filing the *remittitur* in the trial court to take judgment for $600 and costs, which he may do if he so elects, on motion therefor and on due notice in said court.

COHEN, Respondent, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

December 7, 1915—January 11, 1916.

Carriers: Live stock killed in transit: Right to damages: Condition precedent: Notice: Contract: Validity: Duty to wait for car not ready when train arrives.

1. A contract by which the shipper of live stock agrees that, as a condition precedent to his right to recover for loss of or injury to any of said stock, he will give notice of his claim before removal of the stock from place of destination or mingling with other stock, is valid. It does not limit the carrier's common-law liability, but merely prescribes a condition precedent to the right to enforce it.
2. Unless restricted by the context, the word "injury" in such a contract includes injury resulting in death, and the provision for notice applies where stock is killed in transit.
3. Where a scheduled stock train running from Minneapolis to Chicago and obliged, in order to reach its destination in time for the early morning market, to run between thirty-five and forty miles per hour between stations, arrived five minutes late at a station, it was not the duty of the carrier to wait there for a car which, through no fault of the carrier, was not then ready for shipment.
4. Where in such case, at the shipper's request, the conductor wired to the train dispatcher for orders and was directed not to wait,

the fact that the car was ready before the train actually left does not show a breach of duty in proceeding without it, since to take it then would have involved additional delay.

[5. Whether, in such a case, waiting for the car would be the giving of a preference to the shipper in violation of the Interstate Commerce Act, is not decided.]

APPEAL from a judgment of the circuit court for Waupaca county: BYRON B. PARK, Circuit Judge. *Reversed.*

Action to recover damages to stock alleged to have been sustained in two interstate shipments from Weyauwega, Wisconsin, to Chicago, Illinois, one made July 1, 1913, resulting in the death of a hog of the stipulated value of $10 in the contract of shipment and upon which there was a salvage of $4.25, leaving a net loss of $5.75; the other made August 19, 1913, or one day later than plaintiff claims it should have been made, the delay causing him extra expense, shrinkage, etc., to the amount of $40 as found by the jury. Both shipments were made on a regularly scheduled fast freight train of the defendant. As to the shipment of August 19th the jury found (1) that on the 18th day of August, in addition to plaintiff not having signed the contract of shipment, his stock was not loaded and ready to be taken on the arrival of the train at Weyauwega; (2) that after the car was loaded it was the fault of defendant's employees that the car was not taken by the train on August 18th; and (3) damages in the sum of $40. The court entered a judgment in favor of plaintiff on both causes of action and the defendant appealed.

For the appellant there were briefs by *W. A. Hayes,* attorney, and *John L. Erdall,* of counsel, and oral argument by *Mr. Hayes.*

C. F. Crane, for the respondent.

VINJE, J. The shipping contract of July 1st contained the following provision:

"The said shipper further agrees that, as a condition precedent to his right to recover damages or loss of or injury to

any of said stock, he will give notice in writing of his claim therefor to some officer of said railroad company, or its nearest station agent, before said stock has been removed from said place of destination, and before such stock has been mingled with other stock."

In this case no such notice was given as to injury to shipment of July 1st. The notice was not given till July 7th, when presumably the dead hog, which was sold on the 2d, had been removed. The trial court held that this provision for notice did not apply to a case where injury to stock resulted in death before arriving at its final destination. The contract was evidently intended to read "damages for loss of or injury to" instead of "damages *or* loss of or injury to." But, be that as it may, it provides that notice of claim of loss or injury to stock shall be given before removal from place of destination or mingling with other stock. The word "injury" also, unless restricted by the context, includes injury resulting in death.

The validity of contracts limiting the shipper's right of recovery to cases where notice of loss or injury is given pursuant to reasonable terms of contract is sustained by the great weight of authority in this country. 1 Hutchinson, Carriers (3d ed.) sec. 442 *et seq.* See, also, 9 Am. & Eng. Ann. Cas. 20, note, and 14 Am. & Eng. Ann. Cas. 416, note. Such contract is held not to limit the carrier's common-law liability, but only to prescribe a reasonable condition precedent to the right to enforce it. The courts of Iowa, Kentucky, and Nebraska holding the contrary under their laws regard the stipulations as to notice to be a limitation upon the common-law liability of the carrier. 9 Am. & Eng. Ann. Cas. 24, note. The basis for the majority doctrine is thus summarized in 4 Ruling Case Law, p. 988:

"The theory of the courts on which such stipulations are sustained, as in the case of stipulations generally limiting the time within which shippers must present claims against a carrier, is that the requirement is a reasonable one, and that the object and purpose of the stipulation is to give the

railway company an opportunity to inquire into the alleged loss or damage, without expense and inconvenience, so that unjust claims may be thwarted and the company enabled to protect itself against fictitious and fraudulent claims."

While the reasons for giving notice in case of death of stock may not be as great as in the case of other injury, still there are good grounds for requiring it, especially in cases of shipments of carload lots to Chicago stockyards, where the cars are delivered to the consignees to be unloaded. The carrier is entitled to notice so that he can ascertain for himself that death has in fact occurred and can inspect the condition of the carcass both as bearing upon the cause of death and the question of salvage. There may be other reasons. Whatever they are it is proper and lawful to provide for notice of death as well as of lesser injuries.

Statements may be found in digests and headnotes to the effect that the obligation to give notice does not apply where stock is killed in transit. The cases of *Missouri, K. & T. R. Co. v. Frogley,* 75 Kan. 440, 89 Pac. 903; *Wichita & W. R. Co. v. Koch,* 8 Kan. App. 642, 56 Pac. 538; and *Kansas & A. V. R. Co. v. Ayers,* 63 Ark. 331, 38 S. W. 515, have been cited by annotators to sustain such a rule. In the first case the dead animal was removed by the carrier from the car. And the court said that since by such removal it had all the opportunity to ascertain the cause and extent of loss there was no need of any further notice. In the second case the dead animals were reloaded by the carrier during transit, and it was held that it had opportunity to ascertain both the fact of death and extent of loss. In the last case it appears that the agent of the railway company was present when the dead cattle were taken from the car by the owner, and the court said: "The company had all the opportunity it could have had to examine them." It will thus be seen that these cases were disposed of not on the ground that no notice of death was necessary, but because the carrier had

already received such notice either by its own removal or view of the dead animals. In the case at bar the owner cared for the stock in transit, the consignee unloaded the car upon its destination at the Chicago stockyards, and there is nothing to show that the carrier ever knew the hog was dead till it received the notice on the 7th, five days after the hog was removed.

Where a reasonable notice is made a condition precedent to the right to recover there can be no recovery unless the required notice is given. 4 Ruling Case Law, 988 *et seq.; Clegg v. St. L. & S. F. R. Co.* 203 Fed. 971; *Hudson v. C., St. P., M. & O. R. Co.* 226 Fed. 38; *St. Louis & S. F. R. Co. v. Phillips,* 17 Okla. 264, 87 Pac. 470; *Missouri, K. & T. R. Co. v. Kirkham,* 63 Kan. 255, 65 Pac. 261. In the latter case the bill of lading provided that "the shipper further expressly agrees that, as a condition precedent to his right to recover any damages for any loss or injury to said cattle," etc., notice should be given, and it was held that the bill of lading required notice of the death of cattle which occurred during the shipment. In *Hudson v. C., St. P., M. & O. R. Co., supra,* it was held that a sale of the stock within a day or two of its arrival constituted a removal of the same from the place of destination, since the court would take judicial notice of the way business is handled in the stockyards in Chicago. Since plaintiff failed to give the required notice he cannot recover for the damages sustained to the shipment of July 1st.

As to the shipment of August 19th the jury found upon competent testimony that plaintiff's car was not ready when the train arrived at Weyauwega on the 18th. It appears the train arrived there five minutes late. The conductor, after a conversation with plaintiff in which the latter requested him to wait, wired the train dispatcher for orders and was directed not to wait. The train was a scheduled stock train running from Minneapolis to Chicago, a distance

of 473 miles, and in order to make its schedule and arrive in time for the early morning market it had to make between thirty-five and forty miles per hour between stations. Considerable testimony was received by the court over the objection of the defendant to the effect that trains often waited for cars when not ready upon the arrival of the train, and it was no doubt upon the strength of such testimony that the jury found in answer to the second question that after the car was loaded it was the fault of defendant's employees that it was not taken. There is testimony to the effect that the car was loaded before the train left. The findings of the jury raise the question, Is it the duty of a carrier of stock to wait for a car not ready for shipment when the train arrives? We think the question must be answered in the negative as applied to the facts in this case. The evidence shows that between Minneapolis and Chicago there are between sixty and seventy stops, that usually the first stock is picked up at New Richmond, Wisconsin, forty-seven miles from the starting point, and that the bulk of the stock is picked up between Fond du Lac and Chicago in a distance of 159 miles. It is quite obvious that a train usually composed of twenty-five to thirty-five cars upon its arrival at Chicago, if required to wait for cars not ready upon its arrival at stations, could not run on schedule time and could not arrive in Chicago in time for the early morning market. The latter requirement is a very important one to shippers, both as to expense and the choice of an early market. When a carrier publishes a schedule time of a train it is notice to shippers that if they wish to avail themselves of shipments on that train they must have their cars ready upon its arrival. The fact that it may be ready before the train leaves does not answer if it would cause additional delay to take it then. So here, the plaintiff cannot avail himself of the fact that he caused the train to wait for orders from the train dispatcher and then say the car should be taken because it was ready be-

fore the train left. Carriers owe duties to all shippers and their business must be so conducted that it will best serve the general public. No shipper has a right to insist that his shipment must be taken though it delay the train and so cause inconvenience if not loss to the carrier and to other shippers. The operation of both freight and passenger trains on a long line of single track is attended with many difficulties; especially in the case of scheduled trains. An unusual delay in one train may affect many other trains. Different passing points may have to be provided for or else other trains may have to wait an unreasonable time for the delayed one at the usual meeting point. When the train dispatcher decided that this train, already five minutes late, should proceed without plaintiff's car, he must have determined that the interests of the carrier and other shippers required that there should be no further delay. Such decision violated no duty which the carrier owed to the plaintiff. Under the law the carrier was required to exercise due diligence to run the train on schedule time. Were it required to wait at the pleasure of individual shippers it could not perform its legal duty. In order to predicate negligence upon the refusal to ship a car by a certain train it must appear that the car was ready for shipment when the train, on or after its schedule time, is ready to take it, or that the failure to have it ready was due to a fault of the carrier.

We have no such case here. Considerable search for authorities upon this question has been made, but without success. Whether the lack of a precedent is due to the obviousness of the fact that no duty devolves upon a carrier to hold its train beyond schedule time for passengers or goods or to the fact that no one has ever thought it worth while to raise the question we cannot say. It must, however, be safe to assume that many cases of refusal to wait have arisen both as to passengers and goods. Defendant also claims that if it had waited for plaintiff's car it would have violated the In-

terstate Commerce Act, which forbids the giving of preferences to any shipper. Since we have arrived at the conclusion that it was not defendant's duty to wait for the car, we need not pass upon the question whether the federal act would have been violated by waiting.

As to the shipment of August 19th the court should not have submitted the second question because immaterial. Judgment should have gone for defendant upon the answer to the first question.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment dismissing the action.

ARAPAHOE STATE BANK, Appellant, vs. HOUSER, Respondent.

December 8, 1915—January 11, 1916.

Service of summons: Return of officer: Impeachment.

1. An officer's return showing service of a summons can be overcome only by the most clear and satisfactory evidence to the contrary.
2. Mere denial of service by the interested party is not ordinarily sufficient to overcome the officer's return, especially when that return is supported by the officer's testimony.
3. In this case the return being supported by the officer's positive, consistent testimony as to the circumstances thereof and corroborated by many other circumstances, and impeached only by the denial of the interested defendant, a finding of the trial court that the summons was not served on such defendant is *held* to be contrary to the clear preponderance of the evidence.

APPEAL from a judgment of the circuit court for Buffalo county: GEORGE THOMPSON, Circuit Judge. *Reversed.*

Action to recover on a judgment of a court of competent jurisdiction in the state of Nebraska.

The claim of the plaintiff is this: March 12, 1912, it commenced an action against defendant in a court of general jurisdiction in Lancaster county, state of Nebraska. Serv-

ice of the summons was duly made on, and the court obtained jurisdiction of, said defendant according to the laws of said state of Nebraska, and he appeared by attorneys, in due course, in said action. Such proceedings were thereafter duly had therein that, February 20, 1913, judgment was duly rendered against the defendant for $774.95 which has not been paid, set aside, or stayed and remains in full force. Judgment for the amount due thereon with costs was demanded.

The defendant answered to this effect: The alleged Nebraska action arose on a pretended contract. When it is said to have been commenced, he was a nonresident of the state of Nebraska. He was neither personally served with the summons in said action, nor appeared therein. The alleged appearance was wholly without his authority.

Repeating the foregoing, defendant further answered to this effect: Before the Nebraska judgment was rendered, the attorneys who had, in form, appeared for defendant, by leave of the court, withdrew their appearance, which, under the laws of that state, left the court without jurisdiction of the person of defendant.

Upon the evidence, the court found as facts, among others, these: When the attempt was made to commence the Nebraska action, defendant was, and had been for many years, a resident of Wisconsin. The law of the state of Nebraska provided that service of a summons to commence an action should be made by delivering a copy thereof to the defendant, or leaving it at his usual place of business before the return day. No attempt was made to make service on defendant, personally, and he had no usual place of residence in Nebraska. He was advised by a reputable firm of practicing attorneys in Lancaster county, Nebraska, that no jurisdiction had been obtained to render judgment against him and he then directed them to protect his interests. Without further directions, such firm appeared, in form, in defendant's

behalf, demanded security for costs, which was duly given, and demurred to the complaint. The demurrer was overruled. Thereafter Mr. Whedon, the attorney who had charge of the action for defendant, died. His surviving partner, Mr. Peterson, February 20, 1913, was granted leave by the court to withdraw the appearance, which was done, and, without any new appearance on the part of defendant, judgment was rendered against him. Under the law of the state of Nebraska, such withdrawal left the case the same as if no appearance had been made therein.

Upon such facts the trial court concluded that the Nebraska court had no jurisdiction to render the judgment sued on, and directed a dismissal with costs. Judgment was rendered accordingly.

For the appellant there was a brief by *Frank C. Richmond,* attorney, and *Morning & Ledwith,* of counsel, and oral argument by *Mr. Richmond.*

For the respondent there was a brief by *Richmond, Jackman & Swansen,* and oral argument by *Sam T. Swansen.*

MARSHALL, J. This appeal, primarily, must turn on whether the Nebraska court obtained jurisdiction of the person of respondent by the officer, charged with the duty of serving the summons having done so "by delivering a copy of such summons to him, personally." Appellant contends that the finding in respondent's favor in respect to that matter is contrary to the clear preponderance of the evidence. If such contention have sufficient support in the record, none of the other matters, discussed in the briefs of counsel, need be considered.

We must view the evidence in respect to the challenged finding in the light of the well settled principle that the return of an officer as to his having made service of a summons on the defendant therein named, is evidence of more than ordinary dignity, and cannot be overcome except by most

clear and satisfactory proof. In general, the mere denial under oath by the defendant claimed to have been served, is not sufficient to defeat the officer's return. This court spoke decisively on that in *Ill. S. Co. v. Dettlaff,* 116 Wis. 319, 93 N. W. 14.

In the case cited, the court said that the showing must be "most satisfactory" in order to overcome an officer's return. Without going so far as to hold that a mere denial under oath by the defendant of the service will not satisfy the call for such "most satisfactory showing," it was, in effect, held that any circumstantial evidence worthy of consideration in support of the return, is sufficient to preclude such mere denial from prevailing.

Here, in support of the return, the officer testified, stating all the circumstances of the service, which agree, in many respects, with the evidence of respondent. The evidence of the officer seems to have been very fairly given on his direct examination and not to have been weakened at all by cross-examination. He said, substantially, this: I made personal service of the summons upon *Mr. Houser* on the 27th day of March, 1912, in his room at the Lindel Hotel in the city of Lincoln, Lancaster county, Nebraska. I went to the door of his room, accompanied by the bellboy, who called him to unlock the door. I stepped into the room and handed him a certified copy of the summons. He had just gotten out of bed and was in his night clothes. He took the copy of the summons and was quite angry at being called out at that time in the morning. If he says he did not receive a copy of the summons from my hands, but that I left it outside the door, or on the door knob, he states a falsehood, because I was in his room and handed him a copy in person.

Respondent testified substantially like this: Quite early in the morning, while I was at the Lindel Hotel in Lincoln, Nebraska, before I got up, a rap came at my door. I asked who was there and did not get a satisfactory answer. They

rapped again and I was just out of bed—not out of bed—and I am not clear what I said. Anyway, he said a man wanted to see me. I asked again what he wanted and he said he had a paper for me, or a summons—I don't know which—and I replied something like this: "Well wait until I am up" or "Wait awhile,"—something of that kind,—and, finally, the man said he would leave the paper there for me,—told me it was a summons, and he left it outside the door, sticking under the door or between the knob and the casing. When I got up, I found it there. I picked up the paper, read it, and took it to Mr. Whedon, an attorney, with whom I was acquainted, and told him the facts. I employed him to help me in the suit. He advised me that the service was not good for the reason I told him, and for other reasons, and I said "Mr. Whedon, I have got to leave. I want you to take charge of it and represent my interests in the case."

The points of agreement between the evidence of *Mr. Houser* and that of the officer are many. The former's language "they rapped again" corroborated the latter's that he did not make his visit to *Mr. Houser's* room alone. The two agreed as to the time of the visit, as to the officer making plainly known what his visit was for, as to the summons actually reaching the hands of *Mr. Houser,* and as to his being very indignant because of the early call and the reason therefor. The only disagreement is as to whether the officer entered *Mr. Houser's* room and handed him the paper, or left it at or sticking in the door after he showed a disposition not to afford a present opportunity to hand it to him.

The circumstance that *Mr. Houser* told his attorney to help him in the suit, to take charge of it and represent his interests in the case, rather suggests the existence of a case wherein service of the summons had been made. A somewhat similar circumstance was regarded as quite significant in *Ill. S. Co. v. Dettlaff, supra.* The further circumstance that *Mr. Houser's* attorney, after having been "told the facts"

and given the directions before indicated, appeared, generally, in the case, and was active in proceedings therein in all respects as if service had been regularly made, is quite significant. The evidence indicates that he was a reputable attorney, a friend of *Mr. Houser's,* and understood his business. If the facts told to him were to the effect that no personal service had been made, he, naturally, would have appeared, specially, and moved to dismiss for want of jurisdiction of the person of defendant. The course he did pursue is consistent only with the theory that, from "the facts told him," he understood that service had been made according to the return of the officer.

The further circumstance that no attempt was made to withdraw the appearance made by Mr. Whedon until after he died, and that it remained effective on the record for nearly a year, and the additional circumstance that no attempt was made, at any time, in the Nebraska court to question its jurisdiction, tends to weaken the evidence of *Mr. Houser* and corroborate that of the officer.

In view of the whole situation as above detailed, and the fact that the burden of proof was on respondent to prove that the summons was not served on him as indicated in the officer's return,—to overcome such return so completely as to leave little or no doubt as to its falsity,—we are inclined to hold that the evidence of *Mr. Houser* cannot fairly be regarded as of sufficient weight to satisfy such requirement. If an officer's return of service, supported by his positive, consistent evidence of the circumstances thereof, and supported by many other circumstances, and not impeached by any evidence except the mere denial under oath of the service by the interested defendant, could be defeated, judgments, especially those rendered in foreign jurisdictions and required to be enforced, as in this case, would be subject to very serious infirmity.

The only safe way is to adhere, pretty strongly, to the rule

that an officer's return of service must prevail until shown to be false by the most clear and satisfactory evidence, and that, ordinarily, the mere denial of service by the interested party is not sufficient therefor, especially so when the return is supported by the officer's evidence, as in this case. That is the general rule as stated by text-writers. In 18 Ency. Pl. & Pr. 984, it is thus given: "In whatever form the impeachment of a return is presented, it requires the clearest and most satisfactory evidence to overcome the statements thus made under the sanction of official oath and responsibility." To that cases are cited from many jurisdictions including *Wilson v. Shipman,* 34 Neb. 373, 52 N. W. 576, where the officer's return was corroborated by his evidence very much as in this case, and it was held that the evidence of the defendant was not sufficient to defeat it.

After careful review of the record, it is considered that the trial court's finding as to the summons not having been served upon respondent, is contrary to the clear preponderance of the evidence.

By the Court.—The judgment is reversed, and the cause remanded for judgment according to the prayer of the complaint.

BARNES, J. (*concurring*). I concur in the result, but on the ground that the general appearance made by *Mr. Houser's* attorney waived all questions concerning the regularity of the service. The court having obtained jurisdiction of *Mr. Houser's* person by this appearance, I do not think it divested itself of jurisdiction by permitting the appearance to be withdrawn long after it was made.

BANKS, Appellant, vs. BANKS, Respondent.

December 8, 1915—January 11, 1916.

Divorce: Cruel and inhuman treatment.

1. The grievous mental suffering which may be inflicted by one spouse upon the other by means of words and conduct causing wounded feelings may result in the most serious cruel and inhuman treatment and render cohabitation intolerable and unsafe and wholly prevent the discharge of the marital duties by the innocent party.
2. Upon the evidence in this case a finding by the trial court that the treatment of the plaintiff husband by the defendant had not been cruel and inhuman is *held* to be erroneous; and a divorce should have been granted to him.

APPEAL from a judgment of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Reversed.*

Plaintiff brought this action for divorce from the defendant, alleging cruel and inhuman treatment of him by defendant and that such treatment made it dangerous and impracticable for him to live with her, and that he had faithfully discharged his marital obligations throughout their married life. The defendant by verified answer denied all of the allegations of the complaint, including the allegations of marriage and that two children were born as the fruit thereof. Upon the witness stand she testified to her marriage and the birth of the two children as alleged in the complaint, showing that she did not understand the effect of a general denial of all the allegations of the complaint. The case was tried to the court. Upon the evidence the court found as fact, " . . . that both parties are at fault, and that under the circumstances of the case the treatment of the plaintiff by the defendant has not been cruel and inhuman. From such evidence I am fully convinced that this is a case where the parties should forget and forgive their past differences and again live together as husband and wife, each resolving

and endeavoring to do better than before." The court awarded judgment dismissing plaintiff's complaint. From this judgment plaintiff appeals.

For the appellant there was a brief by *White & Skogmo,* and oral argument by *F. M. White.*

For the respondent there was a brief signed by *Warren P. Knowles,* attorney, and *W. T. Doar,* of counsel, and oral argument by *Mr. Doar.*

SIEBECKER, J. The plaintiff contends that the court erred in finding that the evidence fails to establish that defendant's treatment of him has been cruel and inhuman. The narrative abstract of the evidence covers 125 pages of the printed case and is too voluminous to repeat here in condensed form. A thorough study of it has convinced us that the court's conclusion that the evidential facts fail to show that defendant's treatment of the plaintiff had been cruel and inhuman is clearly wrong. It is without question that grave and serious troubles have existed between the parties, which began shortly after their marriage in July, 1902, and continued to the time of their separation in the month of May, 1914. The evidence of both the plaintiff and defendant shows that on frequent occasions the differences were accompanied by physical violence. It also appears that the course of misconduct on the part of the defendant grew in seriousness and frequency in recent years. The grievous mental suffering which may be inflicted by one spouse upon the other by means of words and conduct causing wounded feelings may result in the most serious cruel and inhuman treatment and render cohabitation intolerable and unsafe and wholly prevent the discharge of the marital duties by the innocent party. A careful and attentive study of the evidence in this case shows that the defendant's treatment of the plaintiff has been well calculated to inflict pain and suffering in body and mind. The evidence shows that defendant without cause or provocation ap-

plied to plaintiff epithets of insult, that she was guilty of studied acts of contempt and ridicule toward him, and that she constantly accused him unjustifiably, when at home, of omitting his parental and marital duties and of neglecting his professional and business affairs. It appears that she in fits of anger and rage repeatedly prevented plaintiff from securing the necessary rest and sleep incident to his prolonged services in caring for his patients and that she almost daily interfered with his professional duties at his office by calling him to the telephone and applying to him opprobrious and insulting epithets and wrongfully accusing him of neglecting her and his family. The course of defendant's conduct toward the plaintiff clearly shows that she is subject to uncontrollable fits of anger and that she has ill-treated the plaintiff in cruel ways by abusive and degrading epithets while under the influence of her angry and vindictive passions. The evidence shows that this course of treatment has destroyed plaintiff's peace of mind and has injuriously affected his mental and bodily health to a degree which renders it impracticable to properly discharge the duties imposed by the marriage relation.

The court declares that both of the parties are at fault for this deplorable state of domestic affairs. We have searched the record for evidence in support of this declaration, and it shows that plaintiff did not indulge in the use of abusive and opprobrious epithets in his intercourse with the defendant; that he did not seek to retaliate by word or act in his treatment of defendant except at occasional instances under extreme provocation; that he was reticent in speech concerning their domestic trouble either in or out of defendant's presence. It also appears that he provided for defendant, their children, and their household affairs to the highest measure of his financial ability. In arriving at these conclusions of fact upon the evidence adduced it should be observed that the defendant is not corroborated by any witness and that the

plaintiff is corroborated by the five witnesses who were maids in the service of the parties, the four witnesses who were clerks in plaintiff's drug store and office, all of whom testified to matters within their personal knowledge, and six others who had witnessed trouble between plaintiff and defendant in their home. The medical evidence supports the plaintiff in his claim that he was not in good health for a considerable period immediately preceding his separation from defendant.

We are persuaded that the record amply sustains the cause of action alleged by the plaintiff in his complaint and that plaintiff is entitled to the relief asked. *Freeman v. Freeman,* 31 Wis. 235. The evidence fails to show any recriminatory matter upon which the court would be justified to deny plaintiff relief upon his cause of action, within the rule of the adjudications in *Skinner v. Skinner,* 5 Wis. 449; *Pease v. Pease,* 72 Wis. 136, 39 N. W. 133, and other cases in this court. In our judgment the court clearly erred in finding that the evidence failed to show that the treatment of plaintiff by defendant was cruel and inhuman and in erroneously awarding judgment dismissing plaintiff's complaint.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court with direction to render judgment in plaintiff's favor according to law.

TIMLIN, J., dissents.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent, vs. RAILROAD COMMISSION, Appellant.

December 8, 1915—January 11, 1916.

Statutes: Construction: Ditches, etc., to permit natural drainage: Duty of railway company: Enforcement: Jurisdiction of railroad commission.

1. All the words in a statute should be given effect if possible; but they should be given effect according to recognized legal rules.
2. When in a statute words relating to a particular person or specific subject are followed by general words, the latter should be restrained to persons or subjects of the same genus or family to which the particular person or subject belongs.
3. Thus, in sec. 1797—31, Stats. 1913 (providing that the railroad commission shall have power "to enforce the provisions of sections 1797—1 to 1797—38, inclusive, as well as all other laws relating to railroads"), the words "all other laws relating to railroads" are to be restrained in accordance with the rule last above stated, and do not include sec. 1388*b*, Stats. 1913 (relating to the maintenance of ditches, culverts, or other outlets to permit the natural drainage of low lands over which any highway or road grade shall be constructed by a municipality or railway company).
4. The railroad commission cannot exercise judicial or legislative power, within the legal meaning of those terms.
5. Sec. 1388*b*, Stats. 1913, having conferred a new right upon the owners of lands therein mentioned and having provided a remedy for its enforcement, which remedy is not enforcement by the railroad commission, the remedy so provided is exclusive.
6. Sec. 1388*b*, Stats. 1913, not having come into existence until eight years after sec. 1797—31 was enacted, it follows that the legislature never intended by the last mentioned section to confer upon the railroad commission jurisdiction to enforce the provisions of sec. 1388*b*. [Whether the legislature could confer such power upon the railroad commission, is not decided.]

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

For the appellant there was a brief by the *Attorney General* and *Walter Drew,* deputy attorney general, and oral argument by *Mr. Drew.*

Edward M. Smart, for the respondent.

TIMLIN, J. The appellant demurred to the respondent's complaint in a statutory action to set aside an order of the appellant purporting to enforce compliance with sec. 1388*b*, Stats. 1913. The demurrer was overruled, appellant declined to answer, whereupon respondent had judgment vacating the order on the ground that said order went beyond the requirements of sec. 1388*b*, but assuming that appellant had jurisdiction to enforce the duty specified in said section. The learned circuit court concluded that the general words, "as well as all other laws relating to railroads," found in sec. 1797—31, Stats. 1913, must, under the rule of interpretation which requires that effect be given to all words in a statute, confer power on the *Railroad Commission* to enforce the requirements of sec. 1388*b* as against railroads because the latter is a law relating to railroads. He therefore, in effect, ruled that these general words covered not only all laws relative to railroads regardless of other characteristics of such laws in force in 1905, when sec. 1797—31 was enacted, but also all laws relating to railroads which might ever afterwards be enacted. This is quite an ambitious program for an administrative tribunal without legislative or judicial power within the historical and legal meaning of the words, judicial and legislative. In this connection legislative power does not include rules, regulations, by-laws, or ordinances; and judicial power does not include those decisions of administrative officers or tribunals known as *quasi*-judicial. In the doings, rather than in the sayings, of courts will this necessary distinction be observed. *Butfield v. Stranahan,* 192 U. S. 470, 24 Sup. Ct. 429, and cases in Rose's Notes; 4 Dec. Dig., Const. Law, §§ 59–75.

This court has shown no disposition to curtail the jurisdiction of the appellant, but has as far as possible upheld such jurisdiction and exalted the dignity and importance of that tribunal. *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 116 N. W. 905, and subsequent cita-

tions. The *Commission* is not, so far as we have observed, suffering from restriction on its jurisdiction. We should but illy uphold the trust confided to us if we upheld the *Commission* in the exercise of judicial or legislative power within the legal meaning of these terms. The enforcement of laws, in the sense of ascertaining their meaning and application to the case in hand and pronouncing judgment therein, is a judicial function; the making of laws which are of a higher grade than mere regulations, rules, or by-laws, or administrative aids to the more general provisions of statute, is a strictly legislative function. It is no impeachment of the rule that all the words of a statute should be given effect whenever possible, to give such words effect according to recognized legal rules. These rules require us, when we find in a statute words relating to a particular person or specific subject followed by general words, to restrain these general words to persons or subjects of the same genus or family to which the particular person or subject belongs. *Jensen v. State,* 60 Wis. 577, 19 N. W. 374; *State v. Goodrich,* 84 Wis. 359, 54 N. W. 577; *State ex rel. Lederer v. Inter-National Inv. Co.* 88 Wis. 512, 60 N. W. 796; *O'Sullivan v. J. S. Stearns L. Co.* 154 Wis. 467, 143 N. W. 160; *Lusk v. Stoughton State Bank,* 135 Wis. 311, 317, 115 N. W. 813.

The statutes, sec. 1797—1 to 1797—37*n,* relate to rates and services, to duties, in which the public are also interested, imposed upon railroads by general statutes which require or permit administrative investigation and orders supplementary to their enforcement by the courts. *Chicago, B. & Q. R. Co. v. Railroad Comm.* 152 Wis. 654, 140 N. W. 296, reversed in 237 U. S. 220, 35 Sup. Ct. 560, cited by the learned circuit judge, at least related to services in which the public were interested. Sec. 1388*b* is no such statute. It is therefore not within the sweep of the general words mentioned.

Again, and independent of the foregoing but leading to the same conclusion so far as this case is concerned, is the rule

that when a new right is given by statute and at the same time a remedy provided for its enforcement, such remedy is exclusive. *Saxville v. Bartlett,* 126 Wis. 655, 105 N. W. 1052; *Hall v. Hinckley,* 32 Wis. 362; *State ex rel. Cook v. Houser,* 122 Wis. 534, 595, 100 N. W. 964, and cases there cited; *Knapp v. Deer Creek, post,* p. 168, 155 N. W. 940.

It is obvious that sec. 1388*b* confers a new right on the owner of adjacent land and provides a remedy for its enforcement, which remedy is not enforcement by the *Railroad Commission.*

Again, ancillary to the two foregoing tending to the same result, is the consideration that sec. 1797—31 was enacted in 1905, while sec. 1388*b* did not come into existence until 1913. Hence it follows that the legislature never intended to confer on the *Railroad Commission* jurisdiction to enforce the provisions of sec. 1388*b*.

We do not reach the constitutional question whether the legislature could confer on the *Railroad Commission* power to enforce the provisions of sec. 1388*b*, because we are satisfied it has not attempted to do so. The demurrer should have been overruled on the ground that the *Commission* had no jurisdiction of the matter of enforcing sec. 1388*b*.

By the Court.—Judgment affirmed.

READ, Respondent, vs. CITY OF MADISON, Appellant.

December 8, 1915—January 11, 1916.

Municipal corporations: Claims: Verification: Waiver: Appeal from disallowance: Jurisdiction of circuit court: Waiver of defects: Statute simplifying procedure: Construction: Retroactive effect.

1. Where a city charter provides that claims against the city shall be verified and shall be presented to the common council for allowance, and that the sole remedy of the claimant in case of a disallowance shall be by appeal therefrom to the circuit court,

the council has no right to waive the requirement and take action upon an unverified claim, nor can the circuit court on appeal exercise jurisdiction in respect thereto.

[2. How far the situation with respect to jurisdiction upon an appeal from the disallowance of an unverified claim may be affected by sec. 1, ch. 219, Laws 1915 (sec. 2836*a*, Stats.), or whether that statute affects cases which were pending at the time of its enactment, not decided.]

3. Statutes conferring new rights are generally held not to have a retroactive effect unless such intention is fairly expressed or clearly implied, but this strict rule does not apply to statutes relating to remedies.

4. Where, upon an appeal from the disallowance of an unverified claim against a city, the circuit court, although it had no legal authority to consider the cause, made an order therein overruling a demurrer, and an appeal from such order was perfected before ch. 219, Laws 1915, took effect, that statute could not vitalize the order.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

William Ryan, city attorney, for the appellant.

For the respondent there was a brief by *Hill & Spohn,* and oral argument by *W. H. Spohn.*

BARNES, J. Plaintiff presented an unverified claim to the common council of the city of *Madison* for $510.75. The council passed a resolution appropriating $50 in full payment thereof. From the decision of the council plaintiff appealed to the circuit court. In that court he filed a formal complaint, to which the defendant demurred on the ground that the court had no jurisdiction of the persons of the litigants or of the subject matter of the action and on the further ground that the complaint did not state a cause of action. From an order overruling the demurrer the defendant appeals.

The charter of the city of *Madison* (ch. 36, Laws 1882) provides that all accounts and demands against the city, before the same shall be allowed, shall be verified by affidavit, except claims for salaries and amounts previously fixed or de-

termined by law; that no action shall be maintained by any person against the city upon any claim or demand until such person shall have presented his claim or demand to the common council; that the disallowance in whole or in part of any claim shall be final and conclusive and a perpetual bar to any action in any court founded on such claim, except that an appeal may be taken to the circuit court as otherwise provided; and that in case of a total or partial disallowance of a claim the council shall not thereafter entertain such claim again, but the claimant may, if he desires, prosecute the same by appeal to the circuit court and not otherwise. Secs. 23, 25, 26, and 27, ch. VII, City Charter.

The appellant takes the position that the council had no jurisdiction to act on an unverified claim and that the action taken on the claim presently involved was void and that the circuit court could obtain no jurisdiction by appeal unless the common council had taken lawful action on the claim. The circuit court held that the matter of verification was not jurisdictional, but the want of it was an objection which the common council could waive and which it did waive here by acting on the claim, and hence it decided that the demurrer was not well taken. As will be seen from a statement of these contentions, the question before us is, Did the circuit court have legal authority to determine the rights of the plaintiff on the appeal?

Some of our city charters have provisions requiring the service of a notice or the presentation of a claim to a city council as a condition precedent to the maintenance of an action, but also provide that when action is brought it may or must be brought in court in the manner in which original actions are ordinarily commenced. Others provide that the sole remedy of the claimant in case of disallowance is by appeal from the decision of the common council. The distinction between the two classes is pointed out in *Bunker v. Hudson,* 122 Wis. 43, 99 N. W. 448. As to the first class of

cases it is held that the requirement of presentation as a condition precedent to bringing the action is in the nature of a statute of limitations which may be waived. *Hill v. Fond du Lac,* 56 Wis. 242, 14 N. W. 25; *O'Connor v. Fond du Lac,* 109 Wis. 253, 85 N. W. 327; *Bunker v. Hudson, supra.*

As to the second class of cases it is held that, unless the preliminary requisites are substantially complied with, the court on appeal gets no jurisdiction of the subject matter of the action. *Telford v. Ashland,* 100 Wis. 238, 75 N. W. 1006; *Seegar v. Ashland,* 101 Wis. 515, 77 N. W. 880; *State ex rel. Ashland W. Co. v. Bardon,* 103 Wis. 297, 79 N. W. 226; *Morgan v. Rhinelander,* 105 Wis. 138, 81 N. W. 132; *Oshkosh W. W. Co. v. Oshkosh,* 106 Wis. 83, 81 N. W. 1040; *S. C.* 109 Wis. 208, 85 N. W. 376; *O'Donnell v. New London,* 113 Wis. 292, 89 N. W. 511; *Morrison v. Eau Claire,* 115 Wis. 538, 92 N. W. 280. Some of the cases cited go to greater extremes than the court would be inclined to go at the present time if the questions were before us as original ones. The statement found in some of the cases, that the circuit court has no jurisdiction over the subject matter of the action, is hardly accurate. It seems anomalous to say that the circuit court has not jurisdiction of the subject matter of an action brought to recover an ordinary account against a city. It is a court of general jurisdiction of law and equity cases, and it is difficult to see how jurisdiction over subject matter is affected by the irregularity of preliminary proceedings.

The legislature has the undoubted right to require claimants against municipal corporations to file their claims for audit and allowance before suit is commenced and the municipality is subjected to cost and expense. In the interest of the public and to prevent fraud it has the right to say that these claims must be verified and that no action can be taken thereon until they are, and to make the presentment of a claim the commencement of an action, and to make the remedy by ap-

peal from the action taken thereon exclusive, and further to provide that the appellate court shall not act on an appeal unless the claim was presented in such form that the municipal officers might properly consider it, nor unless they did consider it or refused to do so within the time limited by law.

It would be more correct to speak of the restriction against court action as a prohibition against the exercise of jurisdiction which inheres in the court over the subject matter of the suit, than to say that it is a denial of such jurisdiction. Certain conditions precedent must exist before the court is permitted to exercise its jurisdiction. In practice the distinction is not very material, but it is suggested in the interest of accuracy.

The immediate question before us is, Had the city council the right to act on the claim filed? If the failure to verify was an irregularity which it might waive by taking action on the claim, then the decision of the circuit court was right. If, on the contrary, the action was a mere nullity, then under the construction placed on similar statutes in the cases cited the court had no power to proceed, because there never was any presentation to the council and without presentation the court might not exercise jurisdiction.

In passing upon this question it might be said that the statutes dealing with the verification and presentation of claims against counties and the powers and duties of county boards in reference thereto and the matter of appealing from the action taken are not materially different from the provisions of the *Madison* charter in so far as this question is involved. Secs. 677, 678, 682, 683, 684, 685, Stats.

The similarity of statutes dealing with claims against counties and those found in the charter of the city of *Madison* being conceded, the case of *Meyer v. Outagamie Co.* 134 Wis. 86, 114 N. W. 94, would seem to be directly in point. There Meyer filed a claim against the county, which was verified by his son. The verification, however, did not state that

the son was acting as the agent or attorney for the claimant, as the statute requires. The county board acted upon the claim, allowing part of it and disallowing the remainder. No appeal was taken from this action within the time limited by law. Subsequently Meyer filed another claim, which he himself verified. The county board refused to entertain it on the ground that it had already been acted upon and no appeal having been taken from this action the claimant was concluded thereby. Such was the view taken by the circuit court. On appeal to this court the judgment was reversed on the ground that the county board had no jurisdiction to entertain the claim first filed because the verification was defective in not stating that the party who made it acted as the agent or attorney for the claimant. It was further held that the presentation of the first claim was a mere nullity which the board could not consider and that it was its duty to take up and consider the second claim, which was legally presented. Other cases holding that the statute must be strictly complied with as to the manner of presenting claims against counties in order to give the county board jurisdiction are *Birdsall v. Kewaunee Co.* 124 Wis. 576, 103 N. W. 1; *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460; and *Miller v. Crawford Co.* 106 Wis. 210, 82 N. W. 175.

The same rule has been applied against cities having charter provisions similar to those found in the charter of the city of *Madison.* The charter of the city of Green Bay contained the following provision: "No claim or demand whatever shall be allowed by the common council unless the same is verified by the owner thereof or some person in his behalf." Speaking of this provision this court said:

"The negative form of the last provision, following the preceding affirmative grant of power to deal with claims and demands, shows that a claim against the city, such as one for interest in the nature of damages, cannot be entertained by the common council unless it is properly verified as required by these provisions. The negative words, coupled with an

affirmative grant of power, to admit and allow claims and demands, import that the provisions of the grant are mandatory and not directory merely." *Wilcox v. Porth,* 154 Wis. 422, 428, 143 N. W. 165.

And it was held in this case that an action by a taxpayer would lie to recover money paid out on the claim under consideration. It is true that in that case no formal claim was presented to the city council, but the language of the court is that the claim could not in any event be entertained unless it was properly verified.

In *Hutchinson v. Oshkosh,* 151 Wis. 573, 139 N. W. 446, it was held under statutes substantially like those here involved that it was not proper for the city council to consider a claim which was not verified, and that on an appeal taken because the city council failed to act within the time prescribed by law upon such claim the court obtained no jurisdiction. It is proper to remark in reference to this case that the council refused to take any action on the claim.

Where a statute provides that the exclusive remedy of a claimant against a city is by appeal from the action or nonaction of the common council thereon, there must be a legal presentation of the claim to the council in order to confer jurisdiction by appeal on the court. *O'Donnell v. New London,* 113 Wis. 292, 89 N. W. 511; *Morrison v. Eau Claire,* 115 Wis. 538, 92 N. W. 280.

The order appealed from was entered and this appeal was perfected before ch. 219, Laws 1915, went into effect. We do not decide whether sec. 1 of that act, if applicable to the case, would affect the situation. Neither do we decide that such act may not affect cases that were pending when it was passed. Statutes conferring new rights are generally held not to have a retroactive effect unless such intention is fairly expressed or clearly implied. *Seamans v. Carter,* 15 Wis. 548; *Finney v. Ackerman,* 21 Wis. 268; *Vanderpool v. La C. & M. R. Co.* 44 Wis. 652, 663; *Jochem v. Dutcher,* 104 Wis. 611, 80 N. W. 949; *Lanz-Owen & Co. v. Garage E. M. Co.*

151 Wis. 555, 560, 139 N. W. 393; *Clemons v. C., St. P., M. & O. R. Co.* 137 Wis. 387, 400, 119 N. W. 102; *Keeley v. G. N. R. Co.* 139 Wis. 448, 454, 121 N. W. 167; *Quinn v. C., M. & St. P. R. Co.* 141 Wis. 497, 500, 124 N. W. 653. As to statutes relating to remedies, however, this strict rule does not apply. *State ex rel. Davis & S. L. Co. v. Pors,* 107 Wis. 420, 427, 428, 83 N. W. 706; *Stone v. Little Yellow D. Dist.* 118 Wis. 388, 396, 95 N. W. 405. The circuit court not having legal authority to consider the cause when the order appealed from was made, we do not think that in any event the statute referred to could vitalize such order.

By the Court.—The order appealed from is reversed, and the cause is remanded with directions to sustain the demurrer.

GREEN, Appellant, vs. CITY OF REEDSBURG, Respondent.

December 8, 1915—January 11, 1916.

Municipal corporations: Injury from broken guy wire: Defect in sidewalk: When city chargeable with notice: Negligence in maintaining lighting plant: Defective construction: Inspection: Evidence.

1. In an action against a city for injuries to a pedestrian who tripped over a guy wire which had broken and fallen across the sidewalk, it being undisputed that the wire was not broken about fifteen minutes before the accident it may be said as matter of law that the defect in the sidewalk caused by the wire being there had not existed long enough to charge the city with notice thereof.
2. Where in such case the guy wire was part of a commercial electric lighting plant maintained by the city, but the evidence did not show any defect in its original construction or any negligence in the matter of inspecting it, no liability based on breach of the city's duty to keep said plant in reasonably safe condition was established.
3. The mere fact that the wire broke, without evidence as to what caused it to break, does not show negligent inspection.
4. Evidence that the guy wire had been there eight years, that it

was not as heavy as is customarily used, and that it was attached to an anchor a short distance beneath the surface of the ground, but conflicting as to whether it broke above, below, or at the surface, fell short of proof of defective original construction.

5. If such an appliance is fairly adequate for the service required of it for a reasonable length of time it cannot be condemned as insufficient in original construction merely because it would not last as long as a more substantial appliance.

APPEAL from a judgment of the circuit court for Sauk county: JAMES O'NEILL, Judge. *Affirmed.*

Action to recover damages for personal injury. On November 17, 1913, at about 6:15 in the afternoon, plaintiff sustained an injury by reason of tripping over a guy wire, attached to an electric light pole, that had broken and fallen across the sidewalk on the north side of Main street at its intersection with the east line of Pine street in the city of *Reedsburg.* The city operated a commercial electric lighting plant and had installed and maintained the guy wire in question.

Notice of the injury was filed with the city clerk on November 19, 1913; a claim filed with the council on March 3, 1914; summons and complaint served July 27, 1914; and the action tried September 22, 1914.

At the close of plaintiff's testimony the court granted defendant's motion for nonsuit. From a judgment entered accordingly the plaintiff appealed.

James A. Stone, for the appellant.

For the respondent there was a brief signed by *Henry J. Bohn,* attorney, and *Grotophorst, Evans & Thomas,* of counsel, and oral argument by *Evan A. Evans.*

VINJE, J. The questions whether this is an action under sec. 1339, Stats. 1913, to recover damages sustained by reason of an insufficient sidewalk or an action founded upon the negligent construction and maintenance of the commercial

electric plant of the defendant; whether the precise claim now relied upon for a recovery was ever presented to the city council; and whether the evidence shows that the council failed to act upon the claim presented so as to authorize the maintenance of the action, need not be determined. For the purpose of the decision we shall assume that the action may be either one under sec. 1339 or one for negligent construction and maintenance of the defendant's commercial electric lighting plant; that the proper claim was filed; and that the council neglected to pass upon it within the time required by the charter.

It seems the circuit court held the action was one under sec. 1339, and that there was no evidence from which it could be found that such an injury as plaintiff sustained could reasonably be anticipated from the manner in which the guy wire was constructed and maintained, and hence the insufficiency of the sidewalk, if it was insufficient, was not the proximate cause of plaintiff's injury. We need not now inquire into the soundness of this view because we prefer to sustain the nonsuit upon the ground that the evidence showed no defect in the original construction of the guy wire, and it failed to show that defendant had not met the legal requirements as to inspection. It is undisputed that the wire was not broken about fifteen minutes prior to the accident. That being so, it can be said as a matter of law that the defect in the sidewalk caused by the wire being there had not existed long enough to charge defendant with notice thereof. If it be urged that the broken wire was evidence of failure of inspection and so proof of negligence in an action based upon the duty of the city to keep its commercial electric lighting plant in a reasonably safe condition, the answer is that it does not appear what caused the wire to break. There is evidence that it had rusted some, but it is not shown that the break was the result of such rusting only. For aught that appears the wire may have broken because subjected to some

unusual strain by a boy trying to swing on it, or a vehicle backing into it or against the pole to which it was attached, or in some other way. Were it the case of a rotten sidewalk or of some other structure of considerable size readily seen, or were the defect one apparent to the view, its condition might spell negligent inspection. But in the absence of all proof on the subject we cannot say that the condition of the wire evidenced negligent inspection.

Hence, there being no evidence of failure to inspect, the only ground upon which plaintiff could recover, whether the action is one under sec. 1339 or not, would be because of defective construction. There is some evidence that the wire was not as heavy as is customarily used and that it was partly buried in the ground where attached to the anchor. It seems earth had been filled in around the anchor some considerable time after it was set and that it covered the wire a short distance. The evidence is in dispute as to whether the wire broke above, below, or at the surface of the ground. It had been there eight years. Conceding that a heavier wire would have lasted longer before rusting out, still it cannot be said to be negligence to use a wire lasting not more than eight years. There is no evidence that in a fairly sound condition the wire used was not sufficient to bear any strain that it could be reasonably anticipated would be put upon it.

A person is not bound to use the heaviest kind of appliances or those that will last the longest. If the appliance used is fairly adequate for the service required of it for a reasonable length of time it cannot be condemned as insufficient in original construction because it has to be replaced sooner than another more substantial appliance. Therefore plaintiff's evidence tending to show that the wire put in would not sustain as great a strain and would not last as long as a heavier wire, in view of the fact that the wire had served efficiently for eight years, fell short of proof of defective construction. A heavier wire, owing to the action of the elements, would at some time have to be replaced.

It is elementary that in any action to recover damages for a personal injury it is essential to a recovery that negligence on the part of the defendant proximately causing the injury be established. Plaintiff has failed to produce proof from which a jury could find such negligence and hence the nonsuit was properly granted.

By the Court.—Judgment affirmed.

SIEBECKER and BARNES, JJ., dissent.

BALLARD, by guardian *ad litem*, Respondent, vs. BELLEVUE APARTMENT COMPANY, Appellant.

December 9, 1915—January 11, 1916.

Elevators: Injury to child: Contributory negligence: Questions for jury.

1. A minor suing for a personal injury may be *held* to have been guilty of contributory negligence as a matter of law.
2. A girl eleven years old, above the average in intelligence, education, and experience, who knew and appreciated that for their own safety children of her age were forbidden to use the automatic elevator in the apartment building in which she lived, and had been frequently admonished by her parents and others not to use it, and who on the occasion in question, though warned not to transgress the posted rule (prohibiting the use of the elevator by children under fourteen years of age unless accompanied by parent or guardian), and fully conscious that she was doing wrong, persisted in using the elevator for the purpose of reaching an upper floor ahead of other persons, is *held*, as a matter of law, to have been guilty of negligence which proximately contributed to an injury sustained when her foot, which projected beyond the edge of the car floor, was caught by the under side of a floor which she was passing.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action to recover compensation for a personal injury.

Plaintiff was injured, March 17, 1914. She was then eleven years of age. The accident occurred while she was riding in and operating an automatic elevator which was maintained by defendant in its apartment building for the use of its tenants residing in such building. Plaintiff was a member of a family which so resided. The circumstances were such that a child of plaintiff's age could readily open the door of the elevator shaft opposite the elevator cage, at whatever floor it might be, step upon the elevator platform, and by pressing an electric button, cause the cage to ascend or descend as desired. The negligence complained of was that defendant maintained the elevator shaft with such projections into it that, in case of one riding in the cage with some part of his person extending beyond the side thereof; it was liable to collide with some such projection and a serious personal injury result; that ch. 588, Laws 1913, required such elevators as the one in question to be so constructed and maintained as to be safe, and according to rules for safeguarding prescribed by the state industrial commission; that such commission, by such rules, ordered all projections into elevator shafts, such as floors, sills, and bolts, unless guarded against by the car inclosure, to be provided with a guard under such projections so as to prevent any projecting portion of a passenger's body from being caught and injured thereby; that defendant wholly failed to comply with such order.

The claim of the defendant was that due care was used in the construction and maintenance of the elevator, and that plaintiff was injured by reason of her own negligence, and that of her parents.

The statutes of the state empower the industrial commission to make rules in respect to the construction and maintenance of elevators in public buildings, and make any owner of such a building, who fails to comply therewith, liable to a forfeiture of not less than $10 nor more than $100 for each offense. The industrial commission made an order as claimed by plaintiff. The apartment building in question

had several floors besides a basement and sub-basement floor. The elevator was operated in an elevator shaft extending from such sub-basement floor to those above, and with a door opening at each level. A person at one floor desiring to use the elevator, could, by means of a push-button, conveniently located for that purpose, cause the car to come to his floor, when he could unlatch the door of the shaft, enter the car, close the door, and by pushing a button inside the car corresponding to the floor desired to be reached, cause the car to proceed to such floor. There was no door in the side of the car. There was an opening which could be used when the car was in proper position at a door in the side of the elevator shaft. No such door could be opened without the car being in such position, nor could the car be moved therefrom until the door was closed again. The basement floor and the elevator floor, when the car was in position for entrance thereto from the former, were separated at the door opening by a space about seven eighths of an inch wide. After the car descended below the basement floor, the space increased to four and one-quarter inches wide by reason of there being a recess area under such floor of that depth. There was an angle-iron fitted to the bottom of the basement floor at the top of the recess and to the side of the floor next to the elevator shaft, extending up such side and flush with it sufficiently to make an iron guarded corner to such floor at the lower side of the elevator opening. Such construction permitted one, in riding in the elevator car from the sub-basement to the basement floor, to project a foot beyond the edge of the car floor into the recess under the basement floor, so that when the car floor was about to reach such basement floor, where the four and one-quarter inch wide recess was sharply narrowed to the seven-eighths inch space through such floor, the foot would be caught. That was what happened to the plaintiff.

In addition to the foregoing, there was evidence to this further effect: The elevator was of the ordinary type. It was installed by persons experienced in such business. The dan-

ger caused by the unguarded recess mentioned was such as the order of the industrial commission was intended to remedy. The plaintiff was a very lively child, and well educated for one of her years. She knew how to operate the elevator. By a notice, conspicuously posted on the elevator shaft, children under fourteen years of age were prohibited from using the elevator except when accompanied by a parent or guardian. Plaintiff's father, mother, and brother knew of such prohibitions. The notice in regard to the matter could readily have been read by plaintiff. If she had not read it, she was perfectly familiar therewith. She had been repeatedly notified by her father, mother, and brother to keep out of the elevator or she would be liable to get hurt. She had been likewise notified by others. On the evening of the accident, she was in the sub-basement observing a woman who was hanging out clothes to dry. Several other persons, including her brother, were present. When the woman was through with her work, she started up the stairs, and, as the others, except plaintiff, were about to follow, the latter asked one of them to go up in the elevator with her. He declined, saying to her that it was dangerous and calling her attention, particularly, to the prohibition of such children as herself using the elevator alone. However, she persisted for the purpose of reaching the floor above ahead of the rest. The car was at the sub-basement floor or she caused it to come there. She hurriedly unlatched the door leading into the car, entered therein, and caused the car to ascend. All her movements were made in a hurry to accomplish her purpose of reaching the floor above ahead of her associates or some one of them. After the car started, her right foot slipped, or, in some way, was partly projected beyond the edge of the car floor into the recess area under the basement floor, so that it was caught at the top of such recess and severely injured. She knew very well that she was doing wrong in using the elevator. She had used it alone before, but not to the knowledge of the owners or managers of the building.

The jury found, specially, in plaintiff's favor to this effect: The elevator was naturally calculated to attract children to play therewith and defendant, in the exercise of ordinary care, should have known of that fact. Defendant failed to exercise ordinary care in not guarding, covering, or inclosing the space between the basement floor and the track of the sub-basement elevator door. Neither the plaintiff nor her parents were guilty of any want of ordinary care proximately contributing to the injury. Her failure to heed the warnings given her did not proximately contribute to the injury. She was damaged to the extent of $500.

A motion on behalf of defendant to change the answers given by the jury on the subject of contributory negligence, and to render judgment for it on the verdict, so corrected, was denied. Judgment was rendered for plaintiff.

For the appellant there were briefs by *Richmond, Jackman & Swansen,* and oral argument by *Sam T. Swansen.*

For the respondent there was a brief by *Gilbert & Ela,* and oral argument by *F. L. Gilbert.*

MARSHALL, J. The main question presented for consideration on this appeal is whether plaintiff was guilty of contributory negligence as a matter of law, and as we view the evidence bearing thereon, the solution thereof is decisive of the case, rendering unnecessary consideration of other matters discussed in the briefs of counsel.

Notwithstanding the liberal rule in cases of this sort in favor of children, respecting responsibility for their acts imperiling their personal safety, as indicated in *Secard v. Rhinelander L. Co.* 147 Wis. 614, 133 N. W. 45, and *Kelly v. Southern Wis. R. Co.* 152 Wis. 328, 140 N. W. 60, which we will say, in passing, are quite distinguishable from this case, circumstances may be such as to conclusively show want of ordinary care on the part of a minor, as a matter of law, proximately contributing to its injury, as indicated in *Ewen v. C. & N. W. R. Co.* 38 Wis. 613; *Strong v. Stevens Point,*

62 Wis. 255, 22 N. W. 425; *Reed v. Madison,* 83 Wis. 171, 53 N. W. 547; *Ryan v. La Crosse City R. Co.* 108 Wis. 122, 83 N. W. 770. That has been held as to children much younger than the respondent was when she was injured.

The respondent, according to the evidence, was rather above the average of children of her age, as to intelligence, education, and experience. She knew just as well as an adult could have known that she had no business meddling with the elevator. She knew and appreciated that children of her age had been prohibited by the proprietor of the building from doing so. She knew she was so prohibited in order to safeguard her from being injured. The proprietor had done everything which reason required to prevent such children from using the elevator without being with adult persons. She had been admonished, again and again, by her parents and others, not to do so. Just before the particular occasion, her attention was directed to the posted rule in respect to the matter, and she was warned not to transgress it. Nevertheless, she persisted, fully conscious that she was doing wrong, and accepted whatever danger there was involved in her transgression. If the law, as heretofore administered, is to be maintained, that a minor of the age plaintiff was can be guilty of contributory negligence as a matter of law, it seems that this case involves such an instance. We are not prepared to change the long line of decisions on the subject. Therefore we have reached the conclusion that respondent was guilty of such negligence and that the case should have been disposed of below accordingly.

By the Court.—The judgment is reversed, and the cause remanded with directions to change the answers in the special verdict so as to favor appellant on the subject of contributory negligence of the plaintiff and render judgment thereon dismissing the action with costs.

TIMLIN, J., dissents.

COOMBS, Respondent, vs. SOUTHERN WISCONSIN RAILWAY COMPANY, Appellant.

December 9, 1915—January 11, 1916.

Street railways: Reasonable rules: Passenger on rear platform: Refusal to enter car: Right to eject: Questions for jury.

1. A rule of a street railway company that "the conductor shall request passengers to enter the car and move forward, endeavoring to keep the rear platform clear at all times," is a proper and reasonable regulation which the conductor is authorized to enforce and with which passengers must comply if they can reasonably do so.
2. There being ample standing room in the aisle of a car for a passenger who was on the rear platform, his wilful refusal, when requested by the conductor, either to step in or leave the car justified the conductor in attempting to remove him from the car; and in an action for an alleged wrongful attempt to eject him it was error to submit to the jury the question whether the plaintiff "ought, as a reasonably careful and prudent person, to have entered the car" when the conductor requested him to do so.
3. Where in such case the conductor aided by the motorman wholly failed to use sufficient force to overcome the passenger's resistance, no cause of action for a wanton or reckless assault was shown.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This is an action to recover damages for injuries alleged to have been caused by an attempted wrongful ejection of plaintiff by one of defendant's conductors from a street car. Plaintiff alleges that his hand was cut and torn and that he suffered great mortification and injury to his feelings by reason of such unlawful assault and battery.

The defendant operates a street-car system in the city of Madison. The plaintiff, a man about forty-four years of age, boarded one of defendant company's pay-as-you-enter street cars at the corner of Ingersoll and Jenifer streets of the city. Five other persons boarded the car at this point.

The plaintiff was the last of this group of persons to step into the vestibule of the car. The other passengers paid their fares and passed from the vestibule into the car. The plaintiff after paying his fare stepped back into the left-hand portion of the rear vestibule and remained standing there. The conductor asked the plaintiff to step into the car, but the plaintiff indicated that there was no room in the car and stated that he would remain where he was. The conductor then told plaintiff to step into the car or get off, and that if plaintiff did neither he would stop the car and eject plaintiff. The plaintiff made no response to this remark of the conductor, but declined to step into the car. The evidence is not clear as to whether the conductor attempted to eject plaintiff at the next crossing (Brearly street) or at the third crossing (Livingston street). The testimony as to the number of people standing in the aisle of the car varies widely; one witness estimates it as high as from twelve to fifteen, while other witnesses estimate it at a less number. The conductor stopped the car at one of these crossings and told the plaintiff to get inside or he would put him off. Plaintiff refused to step into the car, whereupon the conductor signaled for the motorman to come to the rear platform and then took hold of plaintiff and attempted to eject him from the car. He did not succeed because of the resistance offered by the plaintiff. The motorman advised letting the matter rest for the present and reporting it to the inspector upon reaching the business district of the city. The conductor then desisted in his effort and the plaintiff rode about a mile to his destination in the rear vestibule, where the conductor reported the entire matter to the inspector. The evidence tends to show that several passengers got on the car within the next two or three blocks after the plaintiff had boarded the car, while only a possible two left the car, and that all of these passengers found standing room inside of the car. It also appears that there was standing room in the aisle of the car for at least

eight to ten more passengers when plaintiff was requested to step into the car, though the aisle appeared to be filled near the entrance where the plaintiff stood.

The court submitted the case to the jury, who rendered a special verdict finding (1) that *Mr. Coombs,* under the circumstances, was not, as a reasonably prudent man, required to step into the car when asked to do so by the conductor; (2) that the conductor used more force than was reasonably necessary to eject plaintiff from the car; (3) that the conductor was actuated by malice and vindictiveness in attempting to eject the plaintiff; (4) that the defendant company ratified such malicious and vindictive action; (5) that such malicious or vindictive action on the part of the conductor was not within the scope of his employment; (6) assessed plaintiff's compensatory damages at $350; and (7) assessed plaintiff's punitory damages at $50. The court denied the right to punitory damages and judgment was entered for the plaintiff in the sum of $350 compensatory damages, together with the costs and disbursements of this action. From such judgment this appeal is taken.

For the appellant there was a brief by *Jones & Schubring,* and oral argument by *E. J. B. Schubring.*

For the respondent there was a brief by *Olin, Butler, Stebbins & Stroud,* and oral argument by *Ray M. Stroud.*

SIEBECKER, J. The defendant company had adopted the following as one of its regulations for the conduct of its business: "The conductor shall request passengers to enter the car and move forward, endeavoring to keep the rear platform clear at all times." Mr. Montgomery, vice-president and superintendent, testified that this rule was promulgated and enforced to promote safety of passengers and efficiency in service in the conduct of the business. An orderly and expeditious management is essential to carry on a street-car business and the requirements imposed on passengers by this

rule tend to promote these objects. *Yorton v. M., L. S. & W. R. Co.* 54 Wis. 234, 11 N. W. 482; *Bass v. C. & N. W. R. Co.* 36 Wis. 450. The provisions of the regulation are therefore proper and reasonable and passengers must conform therewith under all circumstances and conditions when its requirements can be reasonably enforced. The question arises, Was the plaintiff justified in refusing to comply with the conductor's attempted enforcement of the rule at the time here in question? It was held in the *Yorton Case* that the conductor in charge of a railroad passenger train has the right to eject a passenger from the car when such passenger refuses to comply with a reasonable regulation that is sought to be enforced for the proper, safe, and efficient conduct of the business. Responsibility for the enforcement of such regulation must rest with those who are in control of the business. In this case such duty was imposed on the conductor who was in charge of the car, and it devolves upon passengers to comply with the conductor's enforcement of the rule if they can reasonably do so. "In such cases, as in others, it would not comport with the comfort and convenience of the passengers, nor always with their safety, for some of them to assert their rights with a strong hand. And the safety and comfort of the passengers generally are not to give way to the safety or convenience of one or of a few." *Bass v. C. & N. W. R. Co.* 36 Wis. 450, 462. It is plain that the conductor of the street car in question was vested with the authority of the company to enforce the provisions of this regulation and that it was incumbent on plaintiff to comply with the conductor's request to step into the car, unless the facts and circumstances of the case show that he could not do so. The trial court submitted the inquiry to the jury whether the plaintiff "ought, as a reasonably careful and prudent person, to have entered the car" when the conductor requested him to do so. This direction to the jury is the equivalent of vesting the plaintiff with the right to determine whether or not ordi-

nary care and prudence required him to comply with the regulation under the facts and circumstances, and runs counter to the right and authority of the conductor to enforce the regulation. The facts and circumstances shown by the record did not justify plaintiff in refusing to comply with the request of the conductor to step into the car. It appears without contradiction that the car in question had an inside aisle capacity of standing room for at least thirty passengers and that at the most not to exceed fifteen passengers occupied this space when plaintiff refused to comply with the regulation. It also appears that the four passengers who entered the car with the plaintiff readily passed into the aisle and that other passengers entered the aisle immediately after plaintiff refused to comply with the conductor's request and occupied room which had not been occupied by passengers leaving the car. It is obvious that there was standing room for plaintiff in the aisle of the car when the conductor requested him to step in. Under the conditions it was his duty to comply with the conductor's request or leave the car, and his wilful refusal to do either authorized the conductor to remove him from the car, and the attempted ejection under the circumstances was not an unlawful act on the part of the conductor. It is manifest that the conductor wholly failed to use sufficient force to overcome plaintiff's resistance and that plaintiff made no case for a wanton and reckless assault upon him. It is considered that the evidence fails to establish a cause of action and that the complaint must be dismissed.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court with direction to award judgment dismissing plaintiff's complaint.

HAYCOCK, Appellant, vs. SOVEREIGN CAMP, WOODMEN OF THE WORLD, Respondent.

December 9, 1915—January 11, 1916.

Life insurance: Benefit associations: Assessments: Default in payment: Advances by clerk: Suspension: Avoiding certificate: Agency of clerk: What by-laws may provide.

1. A member of a benefit association had several times defaulted on monthly assessments, but the amounts were advanced by the local clerk, whom he repaid. He defaulted on assessment No. 260 for May, 1912, and the clerk advanced it for him. He also defaulted on assessment No. 261 for June, but this was not advanced, and on July 12th the clerk reported him for suspension. Two days later the clerk collected from him the amount of assessments Nos. 260 and 261, including the latter by mistake, being under the impression that he had advanced two assessments since the last payment by the assured. The clerk did not remit assessment No. 261, nor report payment thereof, nor report the assured for reinstatement. The assured also defaulted in July and August, and died in September, having made no attempt to pay the last mentioned assessments. Under a by-law providing that failure to pay an assessment results *ipso facto* in suspension of the member and renders his certificate void, subject to reinstatement on payment within ten days, *held*, that the default for July and August avoided his certificate, even if the association were estopped to take advantage of the June default.
2. A benefit association may provide, as to the local clerk who is authorized to collect from members, that notice to him of matters not necessarily involved in, or part of, his duty of collection and remittance shall not be notice to the supreme lodge; but whether it may limit the scope of his agency so that in making and remitting such collection he does not act as the agent of the association, is not decided.
3. A benefit association may also provide for a death benefit covering only such period as is covered by each successive payment and terminating at the end of such period, to be revived for a like period by a new payment and reinstatement of the member.

APPEAL from a judgment of the circuit court for Sauk county: JAMES O'NEILL, Judge. *Affirmed.*

For the appellant there was a brief by *Bentley, Kelley & Hill,* and oral argument by *Frank R. Bentley.*

For the respondent there was a brief by *V. H. Cady,* attorney, and *Grotophorst, Evans & Thomas,* of counsel, and oral argument by *Mr. Evan A. Evans* and *Mr. Cady.*

TIMLIN, J. This action is by the beneficiary named in a death benefit certificate issued by a Nebraska corporation called "Sovereign Camp of the Woodmen of the World." The defendant is organized on the plan of having one principal or head lodge or camp with numerous local or subordinate camps, to each of which it issues what is called a charter. In the certificate and in the by-laws each member is called a sovereign and he is also entitled, in case he has complied with all the conditions of the beneficiary certificate and by-laws, to a death benefit ranging from $1,000 to $3,000. The certificate in this case was dated August 26, 1911, and the husband of the plaintiff, "Sovereign Harry C. Haycock," died September 21, 1912. Local lodges or camps apparently attend to the business of collecting and remitting assessments to the defendant and also securing members, largely through their social and fraternal features. Assessments are made monthly. Among the by-laws is one which provides that the suspension of a member for nonpayment of assessments occurs on the first day of the month following default. No notice of assessment is given by the principal lodge to the member and the local camps have no power of suspension of members. The mere failure to pay an assessment *ipso facto* causes suspension and thereupon the certificate becomes void until the member is reinstated. A suspended member may, if he is in good health, be reinstated on payment within ten days. After that time only on certain proof being made, etc. The by-laws also provide that no officer or employee or agent of the sovereign camp nor of any camp has the power, right, or authority to waive any of the conditions upon which the beneficiary certificates are issued or to change, vary, or waive any of the provisions of the constitution or by-laws. "The clerk of a camp shall not by acts, representations, waivers, or by

vote of his camp, have any power or authority not delegated to him or to the camp by the constitution and laws of the order to bind the sovereign camp or his camp." The organization is quite similar to that noticed in *Jones v. Modern B. of A.* 153 Wis. 223, 140 N. W. 1059; *Knoebel v. North Am. Acc. Ins. Co.* 135 Wis. 424, 115 N. W. 1094. The controversy here must be disposed of under the rules of law established by these cases and other complementary cases. We find no statute of this state, and we are cited to none, prohibiting the enactment of such laws or the making of such a contract by fraternal or mutual benefit corporations.

Deceased defaulted nearly every month from the date of the certificate, but payments were for a time advanced for him by the clerk of the local camp, whom he repaid. Assessment No. 260 for May, 1912, was unpaid and the local clerk advanced this for deceased. Deceased also defaulted on the June assessment, No. 261, and this was not advanced. On July 12, 1912, deceased was by the local clerk reported for suspension on this last default. Two days after the local clerk collected from deceased the amount of assessments Nos. 260 and 261, including the latter by mistake. The secretary thought he had since last payment by assured advanced two assessments for deceased, but he had in fact advanced only the May assessment, No. 260. The secretary did not remit to the chief lodge assessment No. 261, nor report any payment, nor report deceased for reinstatement. But deceased also defaulted in July and August and made no attempt to pay and no inquiry concerning his membership after July 14, 1912.

We need not in this case decide how far the defendant might go in authorizing the local clerk to collect from members and at the same time limit the scope of his agency so that in making and remitting such collection he did not act as agent of the defendant. In the state of defendant's domicile, *Henton v. Sovereign Camp, W. O. W.* 87 Neb. 552, 127

N. W. 869; and elsewhere, *Murphy v. Independent Order, etc.* 77 Miss. 830, 27 South. 624, 50 L. R. A. 111; *Modern Woodmen v. Tevis,* 117 Fed. 369; *Knights of Columbus v. Burroughs' Beneficiary,* 107 Va. 671, 60 S. E. 40, with notes in 17 L. R. A. N. S. 246 *et seq.,*—all seem to considerably limit the power. The defendant could at least provide that notice to the local clerk of matters not necessarily involved in, or part of, his duty of collection and remittance would not be notice to the supreme lodge. *Jones v. Modern B. of A.* 153 Wis. 223, 140 N. W. 1059. It could also provide for a death benefit covering only such period as was covered by each successive payment and terminating at the end of such period, to be revived for a like period by a new payment and reinstatement of the member. This it seems to have done.

When the local secretary advanced the assessments for deceased he did so as the agent of the deceased. He was not bound to continue making such advances. He failed to advance for June and the plaintiff became suspended July 1st. On July 14th, more than ten days after default, he paid the June assessment to the local secretary, and the latter by mistake failed to bring this to the notice of the defendant. The suspension therefore continued. Had the member paid for July and August the continuation of this suspension might perhaps be challenged; but the *ipso facto* provisions above alluded to would make default for July and August conclusive even if the defendant were estopped to take advantage of the June default. This makes it unnecessary to consider rulings on evidence, for the foregoing facts are undisputed.

By the Court.—Judgment affirmed.

SMITH, Respondent, vs. ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

December 9, 1915—January 11, 1916.

Railroads: Highway crossing: Insufficiency: Injury to driver of vehicle: Contributory negligence: Questions for jury.

1. A highway east of and parallel with a railroad crossed the track diagonally to the southwest at an angle of about twenty-three degrees. On each side of each rail was a plank to raise the road to the level of the rail, and the space between the inner planks was filled with cinders. Plaintiff with a companion was driving southward in a light automobile. They testified that at this crossing their car was driven in the traveled track, but that the left front wheel struck the inner side of the west rail, which deflected the car along the railroad track to the south, and that plaintiff having lost control of the car it ran into a ditch and she was injured. The evidence as to the condition of the plank inside of the west rail was conflicting, but that for plaintiff was to the effect that the south end of that plank was worn and splintered and that the traveled track of the highway extended beyond and to the south of it. *Held*, that the jury were warranted in finding that the crossing was unsafe and insufficient.
2. In view of the acute angle at which the highway crossed the track, and the defect being one which might be overlooked or its dangerous character not appreciated by a person exercising ordinary care, and there being evidence that although plaintiff was familiar with the crossing she had theretofore always crossed in the other direction, and that a strong south wind was raising a dust which made it difficult to see the ground at that point, a finding that plaintiff was not guilty of contributory negligence was also warranted.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to recover damages for personal injury. On June 27, 1914, plaintiff sustained an injury while driving her Ford automobile across the intersection of the *Illinois Central Railroad* tracks and a public highway in the town of Fitchburg. The railroad runs nearly north and south and

the highway for some distance is parallel to it on the east side; it then crosses the railroad diagonally at an angle of about twenty-three degrees and parallels it on the west side. There is a slight up grade in the highway to make the crossing. On both sides of each rail there was a plank to raise the road to the level of the rail. The space between the planks was filled with cinders. Plaintiff claims that the traveled track extended some six or eight inches beyond or south of the end of the plank just east of the west rail; and that the end of the plank was rotten, worn, and splintered in such a manner that it tapered almost to a point. She testified that she approached the crossing at a speed of not to exceed ten miles per hour, and that as she came to the grade she slightly increased her speed, but not to over twelve miles per hour. She claims she followed the main traveled track and that the right front wheel of her car crossed both rails, but the left front wheel struck the west rail at or just beyond the end of the splintered plank, and instead of going over was deflected by the rail and turned the car to the south. She lost control of her car and it ran for about thirty feet to the south along the railroad with the right wheels on the west side of the west rail and the left wheels between the rails. It then turned to the left, ran off the railroad track and into a ditch, causing injuries to plaintiff.

The jury found (1) that the crossing was unsafe and insufficient for public travel; (2) that such unsafe condition had existed long enough to give notice thereof to defendant in time to repair it before the injury to plaintiff occurred; (3) that the unsafe and insufficient condition of the crossing was the proximate cause of plaintiff's injury; (4) that plaintiff had no knowledge of the unsafe condition of the crossing before she was hurt; (5) that she was free from contributory negligence; and (6) that she sustained damages in the sum of $3,500. Judgment for plaintiff was entered upon the verdict and the defendant appealed.

For the appellant there was a brief by *Jones & Schubring,* and oral argument by *E. J. B. Schubring.*

For the respondent there was a brief by *Hill & Spohn,* and oral argument by *Carl N. Hill.*

VINJE, J. The acuteness of the angle, about twenty-three degrees, at which the highway crossed the railroad is an important factor in the consideration of the questions presented by the appeal, as it bears upon the sufficiency of the crossing, the reasonableness of plaintiff's claim as to how the injury occurred, and the question of contributory negligence. As to the former it is claimed that since the planks were thirty-two feet in length and the traveled track was not to exceed ten feet in width, there must have been a considerable length of plank at each end extending beyond the traveled track, or if the plank was defective at one end there was ample space to cross nearer the other end. If a plank is laid across a traveled track ten feet wide at an angle of twenty-three degrees, it will take nearly twenty-six feet to extend across it. Assuming the traveled track to be exactly in the center, the thirty-two foot plank would at each end extend three feet beyond it. But owing to the acute angle, only a relatively slight variation in the direction of the traveled track would throw it beyond the ends of the planks. Defendant also argues that it is highly improbable that plaintiff's car was deflected by the rail as she claims. This would be so if the crossing were at right angles or nearly so, as most crossings are. But she was attempting to cross at an angle of twenty-three degrees. A rail only four or five inches high might well deflect a light Ford machine going at the slow speed of only about twelve miles per hour under such conditions. The right front wheel had crossed the west rail and was presumably on relatively smooth ground. The left front wheel struck the rail when approaching it at an angle of twenty-three degrees, and, the speed being slow and the car light,

the momentum was not enough to carry the wheel over the rail. On the contrary the rail deflected the car to the left and it ran down the track as plaintiff claims. Unfortunately she then lost control of it. Otherwise she might have escaped without injury. We therefore conclude there is nothing inherently improbable in plaintiff's claim as to how the accident happened. Defendant's theory that she drove the car entirely across both rails and in making the turn to the left to follow the highway she turned so far as to recross the track, is plausible enough also. It might have happened that way. But plaintiff and the woman who was with her say it did not and the jury evidently believed them. Since the physical facts sustain rather than contradict them we cannot say the jury was not warranted in finding that the accident occurred as plaintiff claims it did.

As to the sufficiency of the crossing, a number of apparently credible witnesses testified that the plank just east of the west rail was sound, nearly level with the rail, and extended beyond the edge of the traveled track. On the other hand at least four witnesses testified to the contrary. Mr. Reynolds, an electrician and nephew of plaintiff, who together with Dr. Ganser, in answer to a phone message from her, came to the place of the accident in a short time after it occurred and took her and Mrs. Reynolds, the plaintiff's companion at the time she was hurt, home, and who examined the crossing carefully, said the south end of the plank was badly worn, split, and slivered, and that the traveled track extended from six to eight inches south of it. Dr. Ganser, who examined the crossing at the same time that Mr. Reynolds did, testified:

"The south end of the plank . . . was worn to a wedge both on the flat surface and also on the width of it; in fact the corner was worn off. I should say that two or three inches or more of the corner was completely worn off, and the rest of it was very thin and came to a point like a sliver. It appeared as though a part of the plank had already been

worn away; and it was splintered and seemed to have been partly filled with dust, and the end of the plank showed that it had been worn off. The traveled portion of the road extended considerably beyond the end of the plank, so that the south end of this plank terminated in the traveled track, while the track extended beyond the end of the plank for a distance of a foot or better."

Mrs. Reynolds testified:

"I was with *Mrs. Smith* from the time she started on this trip until I went into the ditch, and we were not exceeding eight miles an hour at the time she came to the crossing in question. The speed was increased a little as we came to the crossing on account of taking that grade. As we came to the crossing I was looking both ways for the train and listening and we were following the road straight ahead of me. We were driving right in the road as we came up on to the crossing and I am sure of that. It was right in the road as we were crossing the crossing that all at once we hit something hard, and the next thing I knew I was rigid and we were in a bank down in a hole. The auto turned very suddenly to the left. We bounded and I was rigid with fright until we landed in the ditch, and all I can remember is closing my eyes and waiting for the crash."

Plaintiff testified:

"Before I left that day I made an observation of the track and road there. I walked up there with Dr. and Mr. Reynolds and I saw that I was in the beaten track. While I made this observation I could see my left front wheel track in the dust and where it struck the rail.

"*Q.* Did you make any observation of the plank that was on the north side of the south rail? *A.* Yes, sir.

"*Q.* That's the plank on the inner side of the rail that you struck? *A.* Yes, sir.

"*Q.* Just tell the jury what you observed. *A.* I seen a very worn out rotted plank, with a big bolt sticking up through it, and it was too short to reach the middle of the track.

"When I speak of the traveled track I am referring to the entire track where the wheels run on the left side of the road. The left wheels on the vehicles that passed there traveled

over a space of two and one-half to three feet. I was right in the traveled track when I struck the rail. The left end of the plank, that is on the north side of the south rail, was about six to eight inches, I believe, from the outer edge of the traveled wheel track, and the condition of it was slivered and broken and sort of rotten where the wheels had struck it and slipped off and wore it down to a point. The rail on the roadbed which I struck had no filling at all beyond the end of the plank, as the filling was in the middle of the roadbed."

Mr. Penfield, a farmer living about a mile from the crossing and apparently a disinterested witness, who had driven over it about once a week and had made an examination of it shortly after hearing of the accident, thus describes the condition and location of the plank:

"The south end of the plank appeared worn off and split where the travel had worn it down, and where the wheels would strike it it was cracked and splintered up. This condition was caused from traffic, dragging, and the wheels also caused it to wear off. It was worn off at the end of the plank, tapered down, and this condition existed about two and one-half feet from the end of the plank, where it tapered off. The south end of the plank terminated six or eight inches inside of the travel where the wheel would strike in relation to this left traveled wheel-track."

It thus appears that there was a sharp conflict in the testimony as to the sufficiency of the crossing. The jury resolved such conflict in favor of the plaintiff and the trial court refused to disturb the conclusion they reached. There being nothing inherently incredible or impossible in the testimony supporting the judgment in this respect, the finding of the jury and the action of the trial court thereon are conclusive upon the parties.

Plaintiff was a married woman fifty-nine years old and had acted as substitute rural mail carrier for from fourteen to sixteen years prior to her injury and was accustomed to drive horses and her Ford automobile. She had substituted on seven different rural routes and was quite familiar with the crossing in question, though she had invariably up to the

day of the injury driven north over it instead of south. Defendant urges that in view of plaintiff's familiarity with the crossing, the ease with which the alleged defect could be observed by one driving a car on approaching the track, and the ample room on the west to cross safely, she should be held guilty of contributory negligence as a matter of law. Plaintiff claims that on the day in question there was quite a strong south wind blowing which would raise the dust in the road and make it difficult to see the ground ahead of the car; and that it was particularly so just at the crossing owing to the dust from fine cinders that had been placed over and beyond it on both sides. Be this as it may, we think the defect itself was one that a person exercising ordinary care might overlook, or if seen he might not at once appreciate the dangerous character thereof. With a crossing at right angles or nearly so, the condition of the plank might not even constitute a defect. But in a crossing at an acute angle of twenty-three degrees, any material depression next to the rail would become quite a serious defect because of the difficulty of getting the wheel over the rail. Any one who has driven a vehicle nearly parallel to a street-car track, even where the rails project but an inch or two, and attempted to cross will appreciate the trouble caused by a slight depression next to the rail. The wheel of the vehicle drops into it and the rail tends to deflect the wheel and make it parallel the track. In view of all the conditions existing at the crossing as shown by plaintiff's evidence it cannot be said that the jury had no basis upon which to predicate absence of contributory negligence.

A number of alleged errors in the exclusion of evidence, instructions given, refusal to instruct, remarks of plaintiff's counsel to jury, and excessive damages have been carefully considered. None of them justify a reversal or modification of the judgment and none appear of sufficient importance to require treatment.

By the Court.—Judgment affirmed.

CITY OF MILWAUKEE, Appellant, vs. RAILROAD COMMISSION OF WISCONSIN, Respondent.

December 10, 1915—January 11, 1916.

Railroad commission: Abolishing grade crossings: Apportionment of cost: Constitutional law: Police power: Delegation of legislative power: Police regulations in railroad charters may be changed: Statutes: Construction: Effect on city charters, etc.

1. Sec. 1797—12*e*, Stats. 1913,—authorizing the railroad commission to order alterations made in any railroad crossing over a highway, or the substitution of a crossing not at grade when public safety requires such alteration or substitution, and to apportion the cost between the railway company and the municipality in interest,—is a valid exercise of the police power of the state and does not unlawfully delegate legislative power to an administrative body. *Polk v. Railroad Comm.* 154 Wis. 523, followed.
2. A provision in the original charter under which a railroad was built that the road should be so constructed as not to impede or obstruct the free use and passage of any public roads which may cross the same, "and in all places where said railroad may cross or in any way interfere with any public road, it shall be the duty of said company to make, or cause to be made, a sufficient causeway or passageway, to enable all persons passing or traveling such public road to pass over or under such railroad," did not by acceptance of the charter become a contract, but was a mere police regulation imposed by the state in the interest of public safety, which the state might at any time change.
3. The intent of the legislature in the enactment of ch. 540, Laws 1909 (relating to railroad crossings), of which sec. 1797—12*e* formed a part, was to make a uniform and exclusive system applicable to all cities and other municipalities, and to amend all previous provisions on the subject, whether contained in city charters, railroad charters, or the general statutes of the state.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Upon the petition of the city of *Milwaukee* the *Railroad Commission* ordered the Chicago, Milwaukee & St. Paul Railway Company to depress its main track, switch tracks, and sidetracks at and between certain street crossings in said city, being a distance of nearly two miles, so that the grade

of the tracks should be separated from the grade of the streets, the tracks being carried in a subway and the streets being carried on bridges across said subway, and further ordered the city to pay twenty-five per cent. of the cost of the work, the railway company seventy per cent., and the Milwaukee Electric Railway & Light Company five per cent. The order was made because, in the judgment of the *Commission,* public safety required the abolition of grade crossings. The city brings this action to set aside that part of the order assessing twenty-five per cent. of the cost of the work against the city of *Milwaukee,* and from an order sustaining a general demurrer to the complaint the city appeals.

Daniel W. Hoan, city attorney, for the appellant.

For the respondent there was a brief by the *Attorney General* and *Walter Drew,* deputy attorney general, and oral argument by *Mr. Drew.*

C. H. Van Alstine, as a friend of the court.

WINSLOW, C. J. The order of the *Railroad Commission* in question here was made pursuant to the provisions of sec. 1797—12*e,* Stats. 1913, which authorizes that *Commission,* upon the petition of the governing body of any city, town, or village, to order alterations made in any railroad crossings over a highway, or the substitution of a crossing not at grade, where public safety requires such alteration or substitution, and to fix the proportions of the cost thereof to be paid by the railroad company or companies and the municipality or municipalities in interest. This is the same statute which was sustained and enforced in the case of *Polk v. Railroad Comm.* 154 Wis. 523, 143 N. W. 191, and we regard the decision there made as decisive of the present case.

The cases are alike in all essential particulars. While no constitutional objection was urged by counsel in that case, the question was carefully considered by the court, and, after hearing the argument in the present case, we see no reason

to retract or qualify in any way the statement there made that "the legislature in the exercise of its police power had a perfect right to enact the law."

The time has gone by when it can be successfully claimed that such a law unlawfully delegates legislative power to an administrative body. The legislature has exercised the legislative function by declaring that unsafe crossings shall be made safe; it can properly delegate to an administrative board the power to ascertain the crossings which are in fact unsafe, and to prescribe the manner of making them safe. If this could not be done the police power would be unable to cope with many of the most serious problems of modern life. *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 116 N. W. 905; *State ex rel. N. P. R. Co. v. Railroad Comm.* 140 Wis. 145, 166, 169, 121 N. W. 919.

It is argued that the present case is essentially different from the *Polk Case* by reason of the fact that the original charter of the Milwaukee and Waukesha Railroad (Terr. Laws 1847, p. 194), under which the railroad in question was built, provided that the road should be so constructed as not to impede or obstruct the free use and passage of any public roads which may cross the same, "and in all places where said railroad may cross or in any way interfere with any public road, it shall be the duty of said company to make, or cause to be made, a sufficient causeway or passageway, to enable all persons passing or traveling such public road to pass over or under such railroad." The claim is that by the acceptance of the charter this provision became a contract which cannot be impaired by any subsequent law. This position is untenable. If a contract at all, it was a contract with the state and not the city; but it was not in fact a contract, but a police regulation imposed by the state in the interest of public safety, which the state might at any time change. The state could not contract away its power to

make such regulations, nor incapacitate itself from making such changes in them from time to time as the public necessities require. *Chicago, M. & St. P. R. Co. v. Milwaukee,* 97 Wis. 418, 72 N. W. 1118.

We entertain no doubt that the intent of the legislature in passing the act of which the section in question forms a part (ch. 540, Laws 1909) was to make a uniform and exclusive system applicable to all cities and other municipalities and to amend all previous provisions on the subject, whether contained in city charters, railroad charters, or the general statutes of the state.

The law seems to be the fruit of an honest and enlightened attempt on the part of the legislature to deal equitably and fairly with a great municipal problem.

Milwaukee has during the last half century become a great and prosperous city. Its greatness and prosperity have come because of its commerce, and its commerce has come largely because of its railroads. Without them *Milwaukee* as we know it today would not exist. The growth of the city and of the railroads has been coincident, interdependent, inseparable, and from this growth has arisen the great danger of the grade crossing. Why should not the expense of removing that danger be equitably shared by the different agencies whose joint growth has brought it about?

There are no further contentions which seem to us of sufficient importance to require treatment.

By the Court.—Order affirmed.

FERGEN, Respondent, vs. LYONS and others, Appellants.

December 10, 1915—January 11, 1916.

Landlord and tenant: Covenant for renewal: Specific enforcement: Certainty: Construction: Tender of payment: Waiver: Failure to pay rent, when defeats covenant to renew.

1. A covenant to renew a lease, if the terms are definitely fixed, or means are provided whereby they may be made certain by construction, is enforceable.
2. In a lease of a farm for one year, a clause providing that the lessee "has the first privilege of renting the farm if not sold at the end of the year" is *held* susceptible of being made certain by the application of settled rules for construction.
3. Reading such clause in the light of all the terms of the lease and the circumstances characterizing its making, and applying the rule that a meaning should be ascribed thereto which will sustain it as a binding promise for a renewal if that can reasonably be done, it is *held* to have the effect of a general promise to renew, at the lessee's option, in case of the farm not being sold before the end of the first term, if the lessor concluded to lease it for the succeeding year.
4. Such a general promise, subject to the contingencies mentioned, would call for a new lease for a year on the same terms as the original lease, but without any covenant for further renewal.
5. Tender of the down payment required for a renewal lease was not necessary, before bringing an equitable action on the covenant to renew, where the lessors had voluntarily disabled themselves from keeping the covenant before the renewal lease was demandable, thus in effect waiving the tender.
6. Failure of the lessee to pay the rent when due under the original lease does not work a defeasance of a covenant to renew which is not in any way made conditional or dependent upon such payment.

BARNES, SIEBECKER, and KERWIN, JJ., dissent.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action for specific performance. There was a general demurrer to the complaint which was overruled.

The plaintiff, with some other matters not material to be stated, pleaded the following for a cause of action:

Defendants *Nellie Lyons, George, J. S., Nettie, Frank, Edward,* and *Charles Grady,* April 1, 1914, rented their farm to the plaintiff for the term of one year. The lease was in writing, the body thereof being as follows:

"The said party of the first part doth lease, demise and let unto the said party of the second part the following described premises:

"A certain farm lying in the towns of Fitchburg and Madison, consisting of about 278 acres of land, and familiarly known as the Grady farm, in the towns of Fitchburg and Madison, county of Dane, and state of Wisconsin. The farm is rented for one year from date, for six hundred ($600) dollars, one hundred ($100) dollars cash, three hundred ($300) dollars about November 1st, and the other two hundred ($200) dollars before the time is up.

"All grass seed to be sowed to be furnished by the said first party. Fence repairing to be done by the party of the second part, and material furnished by the party of the first part.

"The party of the second part has the first privilege of renting the farm if not sold at the end of the year."

Immediately after the lease was executed, plaintiff took possession of the leased premises and has since occupied the same. He has carried on the farm and expended money in respect thereto with a view of a second term, particularly by seeding sixty-five acres to grass. Relying on the privilege of a renewal, he has not put his own farm into proper condition for occupancy for the season of 1915. Failure of the lessors to keep their covenant for a renewal term will work irreparable injury to plaintiff. By reason of the farm not having been occupied for some time prior to plaintiff's term, the sum of $600 was a higher rental than would ordinarily be demanded for a single-year lease, which was the reason why the plaintiff was given the right to renew the lease, providing the farm was not sold.

Some time in February, 1915, or at some later date, the

lessors, by their duly authorized agent, leased the farm, on terms unknown to the plaintiff, to *John* and *Sadolf Swenson,* and on the 6th day of March thereafter, plaintiff received notice to vacate the premises. When the *Swensons* took their lease, they had notice of plaintiff's rights. He had paid and tendered to the agent of the lessors all the rent agreed upon according to the terms of the lease, except $400 which he tendered to the lessor's agent on condition of his receiving a renewal lease. On the 1st day of April, 1915, he duly demanded such renewal lease for one year from that date, and the same was refused. Plaintiff is now ready and at all times has been ready to pay the $400, provided he secures a renewal of the lease according to its terms.

For the appellants there was a brief by *Aylward & Olbrich,* and oral argument by *M. B. Olbrich.*

For the respondent there was a brief by *Hill & Spohn,* and oral argument by *W. H. Spohn.*

MARSHALL, J. A covenant to renew a lease, if the terms are definitely fixed, or means are provided whereby they may be made certain by construction, is enforceable. This court considered that subject at length in *Kollock v. Scribner,* 98 Wis. 104, 73 N. W. 776, where the following rules were deduced from the authorities: A covenant to renew a lease calls for a new lease,—not an extension of an old one. An unqualified covenant to renew a lease calls for a new lease for the same period and upon the same terms as the original lease, except the agreement to renew. "When the agreement for a renewal contains language other than that appropriate to a general promise, so that, by resort to the settled rules for construction, the language of the covenant to renew and conditions of the renewal cannot be made certain, then such covenant fails for want of certainty."

The promise to renew in this case is in language, not strictly appropriate to a general agreement to renew. It is

ambiguous. Therefore the question arises whether it can be made certain by settled rules for construction.

One of the best known rules for construction is that it must be presumed parties, in making a contract, intended to use language effectively in all parts of it. Therefore, the instrument should be so construed as, if possible, to carry out such purpose. *Jacobs v. Spalding,* 71 Wis. 177, 36 N. W. 608; *Hicks P. Co. v. Wis. Cent. R. Co.* 138 Wis. 584, 120 N. W. 512; *Burgess v. Dane Co.* 148 Wis. 427, 134 N. W. 841. So if the agreement to give the respondent the first privilege of renting the farm, if not sold at the end of the year, can reasonably be read as an agreement upon the contingency mentioned to give a renewal for another year on the same terms as those of the original lease, that must be preferred to any meaning which would involve fatal uncertainty.

Another well known rule for construction is that a clause of a contract which is ambiguous by itself, must be read in connection with the rest of the instrument so as to clear up the uncertainty, if possible. *Chicago, M. & St. P. R. Co. v. H. W. Wright L. Co.* 123 Wis. 46, 100 N. W. 1034; *Jacobs v. Spalding, supra.* Applying that, our attention is attracted to those portions of the lease which indicate that it was contemplated respondent should incur expense which could not be beneficial to him without his carrying on the farm for a second term, and the broad discretion given him in respect to farming the land with reference to a future season. He agreed to do all the work of repairing the fences and was allowed free hand as to seeding the land to grass.

Another rule for construction is that a contract may be read in the light of the circumstances characterizing its making for the purpose of clearing up ambiguities. Within that rule, the allegation of the complaint falls that the rent stipulated in the lease was disproportionate to the advantages of a one-year lease.

The way the parties understood the lease in performance

of its terms is another consideration. Respondent prepared sixty-five acres of the plow land for the next year's work by seeding the same to grass and appellants co-operated with him in the matter. It was argued that this was a trifling matter, but we do not so regard it. In seeding down the land to grass, respondent may well have been to considerable expense in properly preparing it so as to secure a good catch and put the surface in proper condition for a good hay crop and for advantageously harvesting the same.

Another and very important rule in such cases as this is that, in case of any ambiguity in the provision of a lease in respect to a renewal, the construction should be adopted which will favor the tenant rather than one which will favor the landlord. 24 Cyc. 990, 991.

There is very little use of citing precedents as controlling in a case of this sort. The principles must govern. Language which would be involved in fatal ambiguity under some circumstances would not under others. A good illustration of that is *Holloway v. Schmidt,* 67 N. Y. Supp. 169, where a lease for five years contained an agreement that the lessee should have "the first privilege of a renewal" and it was held, in view of the circumstances characterizing the making of the instrument, that "first privilege of a renewal" should be construed to mean that a renewal lease for five years on the same terms as those of the original lease would be made to the lessee, provided the lessor made a lease.

Reading the renewal clause in question in the light of all the terms of the lease, and the circumstances pleaded and which may be proved, characterizing the making of the instrument, and applying thereto the rule that a meaning should be ascribed thereto which will sustain it, if that can reasonably be done, it is considered that such clause is susceptible of being made certain by application thereto of settled rules for construction. Assuming, as we must, that the parties intended to make a binding promise for a renewal of

the lease, and, looking to all the circumstances which have been mentioned, it seems that the renewal clause will reasonably admit of a construction to the effect of a general promise to renew, at the lessee's option, in case of the farm not being sold before the end of the first term, and the lessor's concluding to lease the place for the succeeding year. Such a general promise, subject to the contingencies mentioned, would call for a new lease for a year on the same terms as the original lease; but without any covenant to again renew. That was the view of the trial court and sustains the decision that the complaint states a good cause of action for specific performance so far as the character of the renewal covenant is concerned.

It is thought that the covenant to renew here, in view of all the circumstances appearing by the complaint, expressly or inferably, is distinguishable from the cases cited on behalf of appellants where fatal uncertainty was found, but if that be not so, it must be remembered that some courts treat ambiguous renewal clauses in leases with much less favor than others and are more inclined to follow precedent than principle. Our purpose is to test the renewal clause by the principles stated in *Kollock v. Scribner,* 98 Wis. 104, 73 N. W. 776, and not to vary therefrom in order to square the decision with the multitude of existing adjudications dealing with such covenants, or to write extensively to point out wherein the instant case differs from those relied upon by counsel for appellants. It is plain to be seen, however, that "with the privilege of longer" as in *Howard v. Tomicich,* 81 Miss. 703, 33 South. 493; "preference of renting said property so long thereafter as it shall be rented for a store" as in *Delashmutt v. Thomas,* 45 Md. 140; "privilege of five years longer, he paying additional rent on revaluation," no provision being made as to time or manner of revaluation, as in *Streit v. Fay,* 230 Ill. 319, 82 N. E. 648,—are quite different from "first privilege of renting the farm if not sold at the end of the year," as in this case. In neither of the former

could it be found by construction that the covenant to renew contained a general promise on a contingency or otherwise for a new lease on the same terms as the old one. The same is true of all the other cases cited to our attention, though it is shown that in some jurisdictions language of a renewal covenant has been held fatally uncertain which has been otherwise held elsewhere. 2 Tiffany, Landl. & T. 1521.

It is contended on behalf of respondent that there was no sufficient tender of the down payment required for a renewal lease. That is answered by the pleaded fact that appellants had disabled themselves from keeping their covenant long before the renewal lease was demandable. A tender is not necessary, especially in support of an equitable action, where the facts show that it would not be accepted or has been practicably waived by voluntary disability to do the thing which the tender would require to be done. That is equivalent to a refusal in advance, of a tender and waives it. *Potter v. Taggart,* 54 Wis. 395, 11 N. W. 678. "A tender is waived where the tenderee makes any declaration which amounts to a repudiation of the contract, or takes any position which would render a tender, so long as the position taken by him is maintained, a vain and idle ceremony." 38 Cyc. 134, C. A clearer case of uselessness to make a tender could hardly be stated than the one appearing by the complaint.

The further contention is made that the failure to pay the rent under the original lease, when due, worked a defeasance of the renewal covenant. That does not seem so. The covenant to renew was not made conditional upon anything except the decision of respondent to take a new term, and the farm not being sold at the end of the first year. Appellants had until the close of the last day of such term to defeat the renewal covenant. Therefore respondent's offer to take the new term was in ample time in any view of the case.

Whether the respondent had a right to retain rent due on the original contract to secure himself for damages for breach of the covenant to renew does not seem to be material. Ap-

pellants had their remedy to recover the rent and respondent his for a breach of the covenant for a new lease. The two matters seem to be independent of each other. In such a case, failure of the lessee to keep some covenant in the original lease is not a defense to an action to compel the lessor to perform his covenant to renew. 1 McAdam, Landl. & T. (4th ed.) 572.

The foregoing covers all contentions made on behalf of appellants which impress us as requiring discussion. We reach the conclusion that the demurrer to the complaint was properly overruled.

By the Court.—The order is affirmed.

SIEBECKER and KERWIN, JJ., dissent.

BARNES, J. (*dissenting*). I think there is no ambiguity in the clause of the lease giving the lessee "the first privilege of renting the farm if not sold at the end of the year." As I view it, it gave the lessee the privilege of renting, provided he was willing to enter into as favorable a lease as any one else. This is the plain and obvious meaning of the language used. The court construes the language as an agreement to renew the existing lease if no sale was made. If this was what was intended, it would have been an easy matter to have said so. Arbitrary rules of construction are more honored by being breached than by being observed, where they serve to defeat the intention of parties to a written contract.

MURPHY, Respondent, vs. INTERLAKE PULP & PAPER COMPANY, Appellant.

December 10, 1915—January 11, 1916.

Master and servant: Injury: Unsafe working place: Icy platform of crane car: Contributory negligence: Evidence: Sufficiency: Special verdict: Answers by the court: Immaterial questions: Harmless error: Sufficiency of finding: Proximate cause.

1. In an action by a member of a crane crew for injuries alleged to have been sustained when, as he was passing in the usual way from a flat car to the crane car, he slipped and fell by reason of the defective and icy condition of the platform or floor of the crane car, the evidence is *held* to sustain findings by the jury that defendant negligently failed to maintain plaintiff's working place in as safe a condition as the nature of the employment would reasonably permit, and that plaintiff was not guilty of contributory negligence.
2. The court may properly answer a question in the special verdict as to which there is practically no conflict in the evidence.
3. In an action based upon the defendant's statutory duty to furnish a safe place of employment (secs. 2394—48, 2394—49, Stats.) a question in the special verdict as to whether defendant in the exercise of ordinary care ought to have known before the accident that the place was not safe, was immaterial; but, the verdict being complete without it, neither its submission nor the correction of a clerical error in its wording after the verdict was returned was prejudicial to defendant.
4. The jury having found that plaintiff's place of employment, furnished by defendant, was not safe, and also (an immaterial finding) that defendant ought to have known before the accident that it was not safe, a further finding that the facts so found were the proximate cause of plaintiff's injury was a sufficient finding of proximate cause.

APPEAL from a judgment of the municipal court of Outagamie county: THOMAS H. RYAN, Judge. *Affirmed.*

This action was brought to recover damages for personal injuries sustained by plaintiff while in the employ of the defendant and while working about a locomotive crane in the performance of his duties in the yards of the defendant in

the city of Appleton. The claim of the plaintiff is based upon the alleged failure of the defendant to furnish a safe working place.

The defendant denied negligence and also set up contributory negligence on the part of the plaintiff. The jury returned the following verdict:

"(1) Was the plaintiff injured at the time alleged while passing over the crane car, on his way to the water tank in the performance of his duties? *A.* Yes.

"(2) Did employees of defendant's crane car generally in the performance of their duties, and to the knowledge of defendant's superintendent, use, and pass over the crane car on their way to the tank when necessity required the taking on of water? *A.* (answered by the court). Yes.

"(3) Did defendant at the time plaintiff was injured negligently fail to maintain that part of the crane car over which plaintiff passed in as safe a condition as the nature of the employment would reasonably permit? *A.* Yes.

"(4) Ought defendant in the exercise of ordinary care to have known before the accident that the platform of said crane car was not as free from danger to the safety of employees in the performance of their duties or the circumstances of employment would reasonably permit and have remedied the same? *A.* Yes.

"(5) If you answer either or both of questions numbered 3 and 4 'Yes,' then were the facts so found the proximate cause of plaintiff's injury? *A.* Yes.

"(6) Did want of ordinary care on the part of the plaintiff contribute to produce his injury? *A.* No.

"(7) What sum in money will reasonably compensate the plaintiff for the injury by him sustained? *A.* Three thousand dollars ($3,000)."

The defendant moved for nonsuit and directed verdict, also made the usual motions after verdict, all of which motions were denied and judgment was rendered in favor of the plaintiff upon the verdict, from which this appeal was taken.

C. G. Cannon, attorney, and *William Ruger,* of counsel, for the appellant.

For the respondent there was a brief by *Bouck, Hilton, Kluwin & Dempsey,* and oral argument by *John F. Kluwin.*

KERWIN, J. When this case was here on appeal from an order overruling a demurrer to the complaint this court held that the complaint stated a good cause of action and did not show contributory negligence of plaintiff. *Murphy v. Interlake P. & P. Co.* 156 Wis. 9, 145 N. W. 193. The main question before us now is whether there is sufficient evidence to support the findings of the jury. It is insisted that no negligence of defendant was shown and that the evidence shows as matter of law that the plaintiff was guilty of contributory negligence.

Under the express provisions of the statute the defendant was bound to furnish a safe place to work, as free from danger as the nature of the employment would reasonably permit. Secs. 2394—48, 2394—49, Stats.; *Sparrow v. Menasha P. Co.* 154 Wis. 459, 143 N. W. 317; *Tallman v. Chippewa S. Co.* 155 Wis. 36, 143 N. W. 1054. The negligence charged in the complaint is that the defendant permitted the platform or floor of the car upon which the employees were required to work to be and remain in a defective condition by reason of the floor of said car being uneven and containing depressions and holes which were at the time of the injury filled with ice and thereby dangerous; and that defendant negligently permitted water used on said crane and platform of said car to run over and upon the floor of said car and platform thereof and freeze thereon; that while plaintiff was passing onto said crane car in the discharge of his duties, and because of the defects and unsafe condition of the car, he lost his footing and fell, receiving the injuries complained of. The allegations of the complaint are sufficient to charge the defendant under the statute and authorities referred to. *Murphy v. Interlake P. & P. Co., supra.* But it is contended that the evidence does not support the al-

legations of negligence set out in the complaint. There is direct and positive evidence that while the plaintiff was in the discharge of his duties and passing onto the crane car from the flat car attached to the crane car, he slipped and fell between the cars because of the accumulation of ice and defective condition of the floor. We cannot say that this evidence is incredible or that the jury and court below were wrong in holding that the allegations of the complaint were supported by sufficient evidence. There also is evidence tending to show that the ice and slippery condition of the floor or platform of the crane car were due to the defects in the tank and appliance which allowed the water from the crane car to escape and flow over the platform, causing the ice and slippery condition. The evidence also tends to show that the construction of the platform, by reason of a large portion thereof being uncovered and only an eighteen-inch space extending on either side and a similar space in the middle prepared for use by employees in travel over it, rendered the working place unsafe or not as free from danger as the nature of the employment would reasonably permit. There is evidence that it was practicable to cover the openings in the floor or platform of the crane car.

It is also strenuously insisted by counsel for appellant that the evidence shows as matter of law that plaintiff was guilty of contributory negligence. The jury found against the contention of counsel on this point and the court below sustained the finding. We think the finding of the jury is supported by sufficient evidence, therefore cannot be disturbed. The evidence shows that the plaintiff went the usual and customary way in passing from the flat car onto the crane car. It is argued by appellant that the distance between the flat car and crane car was four feet and that it is unbelievable that a man could step over a four-foot space. But there is evidence that the space was much less than four feet, viz. between two and one-half and three feet.

It is also said that the evidence shows that plaintiff said he was taking a chance when he stepped onto the crane car. The evidence as to whether plaintiff made such statement is also in conflict. Great stress is laid upon the point that plaintiff was guilty of contributory negligence as matter of law in crossing from the flat car to the crane car at the point where he did and in putting his foot on the four-inch rim under the coupling iron. There were two holes on the rear end of the crane car some six or eight inches deep, each about four feet long and three feet wide and partially filled with sand and ice, leaving a runway on either side and one in the middle each eighteen inches wide. These runways were in a depression about one-half inch deep, inclosed by a four-inch rim which extended back of the hole on the rear end of the crane car and under the brake rod, the brake rod extending a few inches back of and about six inches above the rim. There is evidence that plaintiff in passing from the flat car onto the crane car placed his foot on this rim opposite the hole, slipped into the hole, lost his balance, and fell. It is claimed by appellant that plaintiff could not have fallen in the manner described by him, because the brake rod would have prevented his foot going forward into the hole, and that he must either have stepped on the rod or tried to place his foot on the rim beyond the rod, and that in either case he was guilty of contributory negligence. There is evidence that the depression in the runways was covered with ice as well as the rim and that it was customary for employees, with the knowledge of the foreman, to cross from the flat car to the crane car in the discharge of their duties in the manner which plaintiff testified he attempted to cross. It is said the evidence of plaintiff as to how he fell is absolutely incredible because the coupling rod would have prevented his foot from slipping into the hole, his right leg from the knee down being at the time he fell in a perpendicular position. The evidence tends to show that when the plaintiff placed his

right foot on the rim just before he fell his right leg was projected forward at an angle much less than ninety degrees, his left foot resting on the flat car about three feet back of his right foot, so that when he transferred the weight of his body from his left to his right leg the right foot resting on the icy rim could have slipped under the brake rod and into the hole while the right leg was extended forward. Plaintiff testified that when he lifted his left foot his right foot let go and that threw his body around between the cars. Upon all the evidence it was clearly a question for the jury whether the plaintiff was guilty of contributory negligence.

The defense of assumption of risk was abolished by the statute. Sec. 2394—1, Stats.; *Murphy v. Interlake P. & P. Co.* 156 Wis. 9, 145 N. W. 193.

It is also contended that the court erred in answering question No. 2. It is said that there was sufficient conflict in the evidence on the point to require submission to the jury. We think the evidence is practically undisputed that it was the custom of employees in the discharge of their duties to pass over the crane car on their way to the tank when necessity required the taking on of water. We cannot say that the court below was wrong in answering the second question.

It is also assigned as error that question No. 4 should not have been submitted, and that it was error to amend it. It seems that after the verdict was returned the court changed the word "or" to "as" in the fifth line of the question so as to make it read "as the circumstances of employment would reasonably permit" instead of "or the circumstances of employment would reasonably permit." The question was immaterial and need not have been submitted. But neither the submission nor the change was prejudicial. The verdict was complete without this question. The cause of action is based upon a breach of statutory duty. *Sparrow v. Menasha P. Co.* 154 Wis. 459, 143 N. W. 317; *Murphy v. Interlake P. & P. Co.* 156 Wis. 9, 145 N. W. 193.

Counsel for appellant complains of the fifth question submitted to the jury. They say that the third question is framed upon a statement of facts that does not exist, and that the fourth question is double, meaningless, and contrary to law. The criticism is more technical than substantial. As we have seen, the fourth question was not material, but the jury found the facts covered by it in favor of plaintiff, and also found upon sufficient evidence the third question in favor of plaintiff. By the fifth question the jury were asked whether the facts found were the proximate cause of the injury, if they answered either or both questions 3 and 4 "Yes." They answered the fifth question "Yes." There can be no doubt that there was a sufficient finding of proximate cause.

Some other errors are assigned and discussed by counsel for appellant, but we do not regard them of sufficient importance to call for treatment. We have examined with care the record and find no prejudicial error.

By the Court.—The judgment is affirmed.

GREEN, by guardian *ad litem,* Respondent, vs. APPLETON WOOLEN MILLS, Appellant.

December 10, 1915—January 11, 1916.

Infants: Guardians ad litem: *Appointment: Master and servant: Injury: When Compensation Act applicable: Minors: Prohibited employment: Dangerous machinery: Constitutional law: Obligation of contracts: Police power: Evidence: Competency: Special verdict: Issues: Instructions to jury: Excessive damages.*

1. Sec. 2613, Stats., providing that a guardian *ad litem* for an infant may be appointed by the court in which the action is prosecuted or by a judge thereof, does not require that such guardian *must* be so appointed.
2. Where at the trial of an action in circuit court objection was

made that plaintiff's guardian *ad litem* had been appointed by the county court, the circuit court might cure the irregularity, if any, by appointing the same person and proceed with the trial.

3. Where an employee whose contract of employment was made before his employer became subject to the Workmen's Compensation Act (ch. 50, Laws 1911) was injured after the employer came under that act but before he himself had made an election and within the thirty days during which he might do so, the act did not apply.
4. Sub. 2, sec. 1728*a*, Stats. 1911, prohibiting the employment of minors under the age of sixteen years in operating certain dangerous machinery, including carding machines having live rolls into which the hands of the operator might be drawn, is a valid exercise of the police power.
5. In an action for injuries sustained by a minor while employed, in violation of said statute, in operating a carding machine, evidence that the machine was not dangerous was properly excluded.
6. Such a statute cannot be said to impair the obligation of an existing contract of employment of a minor which was not made for any definite term; but even if the contract had been made for a term extending beyond the time of an accident which occurred after the passage of the law, its abrogation by the law was a legitimate exercise of the police power.
7. There being no dispute as to the fact of injury while operating the carding machine; the defendant employer being liable because it violated the statute; contributory negligence not being a defense; and it being obvious that if plaintiff had not been employed on the machine he would not have been injured while operating it, so that there was no issue as to proximate cause,—the trial court properly submitted to the jury only the question of damages.
8. Where the charge, read as a whole, was fair and correct and not at all calculated to mislead the jury or prejudice the appellant, criticism of detached sentences therein is not of consequence.
9. An award of $4,500 for a severe injury to the arm of a boy under sixteen years of age who was employed in operating a carding machine in violation of law, is *held* not so excessive that this court should interfere.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

On October 13, 1911, plaintiff was employed by the defendant and was fifteen years old. He was injured while

engaged in the operation of a carding machine, and brings this action to recover damages for such injury. The machine at which he was employed consisted of a large middle or center roller, around which revolved a number of smaller rollers, the surface of the smaller rollers being coated with a wire mesh, brush-like with very small teeth, and by means of this combination of rollers the wool was drawn into the machine and combed or carded. In front of the carding machine there was a rack upon which there were a number of revolving spools, and from these spools strands or roves of wool were fed into the machine. It was the duty of the plaintiff to take care of the wool as it traveled from the spools to the machine and when the roves broke to feed them in between the fingers or guides near the bottom of the machine, from which place the strands of wool were again picked up by the rollers. While engaged in this work his left arm came in contact with the rollers and was drawn in and injured.

The amended complaint charged the defendant with liability by reason of its failure to warn plaintiff of the danger incident to his employment, alleged that the machine was defective and unsafe and not properly guarded, and that the carelessness and negligence of the defendant in this respect was the proximate cause of plaintiff's injury. The complaint also alleged that defendant had not come under the provisions of ch. 50, Laws 1911, and that plaintiff had not accepted the provisions of said act. The amended answer denied liability on the part of the defendant and alleged contributory negligence on the part of plaintiff, alleged that the defendant had elected to come under the provisions of ch. 50 of the Laws of 1911, and that plaintiff had come under said act, and that ch. 479, Laws 1911, was unconstitutional.

The following special verdict was returned, all of the questions being answered by the court except the question of damages:

"(1) Did the plaintiff on October 3, 1911, receive an in-

jury to his left arm while in the defendant's employ? *A.* (by the court). Yes.

"(2) Was the plaintiff at the time of the injury a boy under the age of sixteen years? *A.* (by the court). Yes.

"(3) Was the plaintiff at the time of the injury assisting in operating a carding machine in the mill of the defendant? *A.* (by the court). Yes.

"(4) Was the plaintiff at the time of the injury employed, suffered, and permitted by the defendant to assist in operating a carding machine? *A.* (by the court). Yes.

"(5) At what sum do you assess the damages of the plaintiff? *A.* Four thousand five hundred dollars ($4,500)."

From a judgment entered on such verdict defendant appeals.

For the appellant the cause was submitted on the brief of *Francis S. Bradford.*

For the respondent there was a brief by *Rooney & Grogan,* attorneys, and *Greene, Fairchild, North, Parker & McGillan,* of counsel, and oral argument by *J. H. McGillan.*

BARNES, J. The appellant argues that the judgment is erroneous (1) because no guardian *ad litem* was properly appointed; (2) because the case falls within the Workmen's Compensation Act; (3) because so much of sub. 2, sec. 1728*a*, Stats. 1911 (ch. 479, Laws 1911), as prohibited the employment of minors under the age of sixteen years in operating carding machines is void as to defendant, in that it impaired the obligation of a contract; (4) because such portion of said act denies due process of law, in that it is arbitrary and not the result of a legitimate exercise of the police power, and is therefore void; (5) because defendant was not permitted to offer evidence to show that carding machines like the one in question were not dangerous; (6) because the special verdict is incomplete, in that it fails to find negligence, proximate cause, or that the machine was a dangerous one, or one on which a minor under the age of sixteen years might not be

employed under the statute; (7) because the court erred in charging the jury; and (8) because the damages are excessive.

The guardian *ad litem* was appointed by the county court, and it is claimed that under sec. 2613, Stats., the appointment should have been made by the court or a judge of the court in which the action was to be prosecuted. On objection being made on the trial, the circuit court named the appointee of the county court as guardian and ordered the trial to proceed.

Sec. 2613 provides that the guardian *may* be appointed by the court in which the action is prosecuted or by a judge thereof. It does not require that a guardian *must* be so appointed. But if there was any irregularity about the appointment it did not affect the cause of action, but amounted to a disability to bring it, and the court clearly had the right to appoint a guardian on the trial and proceed to try the action. *Hepp v. Huefner,* 61 Wis. 148, 20 N. W. 923; *Sabine v. Fisher,* 37 Wis. 376; *Redlin v. Wagner,* 160 Wis. 447, 152 N. W. 160; *Hafern v. Davis,* 10 Wis. 501; *Smith v. Peckham,* 39 Wis. 414, 418; *Webber v. Ward,* 94 Wis. 605, 69 N. W. 349.

On October 2, 1911, the defendant elected to come under the provisions of the Workmen's Compensation Act. The accident happened on the day following. The plaintiff had not exercised his right of election. It is obvious that the act did not apply to him, because his contract of employment was made before the employer became subject to the terms of the act, and the thirty days within which he might make an election under sub. (2) of sec. 2394—8 had not expired when he was injured.

We shall spend little time in discussing the constitutional questions. The right of the legislature to prohibit the employment of minors around dangerous machinery, who have not reached the age of sound discretion, is recognized by the

courts generally, if not universally. It has been recognized by this court at all times and in numerous cases. Primarily it is for the legislature to say when the youthful mind and judgment become sufficiently mature so that a minor may properly be permitted to engage in a hazardous occupation. The limit here has been fixed at the age of sixteen, and the lawmaking power was acting clearly within its discretion in placing it there. So, too, the legislature were justified in putting a machine having live rolls into which the hands of the operator might be drawn, such as the carding machine in question, on the prohibited list, and the court properly rejected testimony tending to show that the machine was not dangerous. The fact of injury would seem, in a measure at least, to demonstrate the necessity for and wisdom of the law. Perhaps as many cases of injuries caused by live rolls have come before this court as can be charged up to any other one cause, and in many of the cases the argument has been advanced in good faith that the machine was absolutely safe. If the statute had simply forbidden the employment of the minor at a dangerous machine, the question whether the machine was dangerous would ordinarily be for the jury. But legislators, bringing to bear their knowledge and experience, may very properly place machines having power-driven rolls so located that the operator may get caught in a class of machines which those under sixteen years of age may not operate.

We do not find any evidence that the contract of employment was for any definite period of time, and hence do not see where the matter of violating any contract arises. The extent to which a minor may bind himself by contract is peculiarly within the field of legislative discretion. If the contract was made before the 1911 law was passed and extended beyond the time of the accident, the legislature might in the legitimate exercise of the police power abrogate it. *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925.

The only question the jury was asked to pass upon was the amount of damages. This was right. Under our former decisions defendant was liable because it violated the statute, and contributory negligence on the part of the plaintiff would not defeat his action. It is obvious that if plaintiff had not been employed on the machine he would not have been hurt while operating it; so there was no issue raised on proximate cause. *Pinoza v. Northern C. Co.* 152 Wis. 473, 140 N. W. 84; *Kowalski v. American C. Co.* 160 Wis. 341, 151 N. W. 805; *Sharon v. Winnebago F. M. Co.* 141 Wis. 185, 124 N. W. 299.

Four sentences found in the charge are excepted to and error is assigned as to each of them. The charge read as a whole was fair and correct and was not at all calculated to mislead the jury or to prejudice the defendant. It would serve no useful purpose to discuss these assignments of error in detail.

The damages assessed are high. The injury, however, was severe, and inasmuch as the trial court did not see fit to reduce the damages we cannot say that they are excessive to the extent that this court should interfere.

Complaint is also made about the offer in evidence of a photograph and the remarks of plaintiff's counsel in arguing the case to the jury. The photograph is not in the record, and, as we understand it, was withdrawn from evidence without having been shown to the jury. In any event there is no showing that defendant's rights were prejudiced by what transpired in reference to the photograph. Counsel for plaintiff do not seem to have gone outside of the usual latitude permitted in arguing cases to juries.

By the Court.—Judgment affirmed.

GAGEN, Appellant, vs. DAWLEY and another, Respondents. SAME, Respondent, vs. SAME, Appellants.

December 10, 1915—January 11, 1916.

Libel: Newspaper article: Punitory damages: Evidence: Harmless error: Justification: Instructions to jury: Liability of owner of newspaper: Excessive damages: Reduction.

1. A newspaper article referring to a candidate for county treasurer as a man "who is liable to leave for Texas on short notice and leave a lot of unpaid bills behind," "who pays no bills," "a first-class dead-beat," "a scamp," "a crook," etc., is libelous.
2. In an action for libel the admission of evidence as to the financial condition of one of the defendants as bearing upon the question of punitory damages should not work a reversal of a judgment against that defendant for compensatory damages, where plaintiff's counsel told the jury to disregard any such evidence, the court charged that no punitory damages could be assessed against that defendant, and the compensatory damages assessed were very moderate.
3. Where statements in libelous newspaper articles to the effect that plaintiff did not pay his bills purported to be made upon positive knowledge, current opinion or general rumor to that effect could not be shown in justification.
4. A charge or a portion of a charge correct as a whole cannot be successfully challenged by showing that a part of a sentence thereof standing by itself would be incorrect.
5. The owner and publisher of a newspaper who exercised supervision over it and gave instructions as to its policy, was liable for libelous articles printed therein, even though he had turned it over to his son-in-law to edit, had cautioned him against inserting libelous articles, and had given him the earnings of the paper for some time.
6. A verdict for $500 as compensatory damages for publication of scurrilous newspaper articles was not in this case excessive, and it was error for the trial court to reduce the amount.

APPEALS from an order of the municipal court of Langlade county: T. W. HOGAN, Judge. *Reversed on plaintiff's appeal; defendants take nothing on their appeal.*

Action for libel. Plaintiff, *James Gagen,* of Indian blood on his mother's side, was a candidate for the office of county

treasurer of Langlade county. On July 24, 1914, the defendants in the Weekly News Item, a paper published in Antigo, published of and concerning him the following:

"A man who won't pay a back subscription of several years' standing due to his home paper, doesn't look to us like a very safe man to put in as county treasurer. Further particulars next week."

July 31st they published this item:

"The right man should be elected for county treasurer, and no man should be given a vote at the primaries whose past record will not bear close investigation. We want no man for treasurer who is liable to leave for Texas on short notice and leave a lot of unpaid bills behind."

On August 14th they published on the editorial page the following article:

"Nonpolitical Notice.

"(The following has not been ordered nor will not be paid for by Heapjim-Afraid-of His-Face, as he pays no bills any where or at any time.)"

[Here follows an inch and a half cut of an Indian head and shoulders bedecked with feathers, beads, and earrings.]

"I hereby announce myself as a candidate for election to office that I may get my lunch hooks onto the county money bag. I never did anything for the county but would like to get votes just the same. Can refer voters to any of those who I owe old debts of several years' standing, and I believe myself to be a first-class dead-beat, and I would perhaps be able to pay some of those who I have defrauded in the past years if I can con the voters to let me get away with the office.

"Yours for Graft,

"HEAPJIM-AFRAID-OF-HIS-FACE."

The front page of the same issue contained this item:

"Look Out for Him.

"We don't object to Indians or any other kind of a cigar sign running for office, they may be Turks or Zulus for all we care, but we do like to see them be men and not crooks as some Indians who seek office are. Men who are elected to

public office should have a record that can stand investigation, and one that is without reproach. One who goes foreflushing around, and owes a lot of old unpaid bills, should not receive the votes of any voter who has the welfare of the county at heart. There are plenty of good men running for office so it will not be necessary to vote for a scamp. When a crook of this stamp comes up to you with a sickly grin on his face and hands you a card which announces that he has the gall to run for office, ask him if you look like an easy mark."

The jury found for plaintiff and assessed $500 compensatory damages against both defendants and the sum of $250 punitory damages against the defendant *Fessenden.* The court entered an order giving defendants the option to consent to a judgment against them of $300 compensatory damages, and $250 punitory damages against the defendant *Fessenden,* and in case they did not exercise such option within ten days then the plaintiff was given the option of entering judgment against the defendants for $250 compensatory damages and $250 punitory damages against the defendant *Fessenden.* In case neither party exercised the option given a new trial would be ordered. Neither party exercised the option given and a new trial was ordered. Plaintiff appealed because the damages were reduced, and the defendants on the ground of alleged errors committed in the trial of the case.

For the plaintiff there were briefs by *Goodrick & Goodrick,* and oral argument by *Arthur B. Goodrick.*

For the defendants the cause was submitted on the brief of *Geo. W. Latta.*

VINJE, J. Upon defendants' appeal no new questions are presented. The published articles were clearly libelous. *Williams v. Hicks P. Co.* 159 Wis. 90, 150 N. W. 183; *Leuch v. Berger,* 161 Wis. 564, 155 N. W. 148, and cases cited. And, as the jury found, they unmistakably referred to plaintiff.

Evidence of *Dawley's* financial condition was received as bearing upon the question of punitory damages. The court charged the jury that none could be assessed against him. The admission of such evidence is alleged as reversible error. There are two reasons why it is not. In the first place the court states that counsel for plaintiff told the jury that since they would be instructed not to assess punitory damages against *Dawley* they must disregard all evidence received as to his financial condition. In the second place, in view of the character of the articles published and of the very modest sum assessed as compensatory damages the evidence could not have prejudiced the defendants.

The court properly refused to permit defendants to justify by proof of current opinion or general rumor that plaintiff did not pay his bills. *Haskins v. Lumsden,* 10 Wis. 359; *Earley v. Winn,* 129 Wis. 291, 302, 109 N. W. 633. The statements in the articles to that effect did not purport to be made upon information, opinion, or rumor, but upon positive knowledge.

The charge was full and fair and correctly stated the law of the case. The defendants have excepted to a portion of a sentence and claim such portion is erroneous. The court charged:

"The paper's function is to guide, educate, and inform its readers, to stand for truth and to condemn error, and never to maliciously accuse falsely, or blacken one's character, or expose him to public hatred, disgrace, contempt, or ridicule, (nor produce injury to him in his business, trade, or profession. Those published articles here in evidence have done some of those things if not all.)"

The part in parentheses is excepted to and it is said to be erroneous because it tells the jury that plaintiff was injured in his business, trade, or profession when it is claimed the evidence showed he had none. It is obvious that the whole charge quoted does not so tell the jury. It tells them that the articles in question have done some of the things men-

tioned, if not all, and that was true. A charge or a portion of a charge correct as a whole cannot be successfully challenged by showing that a part of a sentence thereof standing by itself would be incorrect.

The evidence shows that the defendant *Dawley* was the owner and publisher of the paper, but that he had turned it over to *Fessenden;* his son-in-law, to edit and had given him the earnings of the paper for some time. It appears, however, by *Dawley's* own testimony that he exercised supervision over the paper and was in the office nearly every day or so; that he gave instructions as to its policy and cautioned *Fessenden* against inserting libelous articles. Under the rule announced in *Smith v. Utley,* 92 Wis. 133, 65 N. W. 744, and *Leuch v. Berger,* 161 Wis. 564, 155 N. W. 148, he was properly held liable. The defendants will take nothing upon their appeal.

There is some basis for the claim that the trial court reduced the compensatory damages from $500 to $250 on the theory that since, as he understood, the jury believed that each defendant would be required to pay only one half of $500, and since *Dawley* alone was financially responsible, he should be required to pay only what the jury is claimed to have intended. There is nothing, however, in the record to show the jury entertained such an idea, and even if they did it would have been an erroneous one. The question they were called upon to decide was, how much damage had plaintiff sustained, not which of the defendants was able to pay it nor how much they or either of them were able to pay. But whatever may have been the reason the reduction was unjustified. Plaintiff was a married man forty-six years old and had lived with his wife in the community for ten years and was engaged at the time of the trial in the abstract and insurance business. He had been municipal court reporter, and had been a member of the Democratic county committee, acting as secretary for twelve years. No justification of any

of the charges made was established—hardly any attempted. Under such circumstances, bearing in mind the scurrilous nature of the publications, the jury assessed a very small sum for compensatory damages. The court should have permitted the verdict to stand.

By the Court.—The defendants will take nothing upon their appeal. Upon plaintiff's appeal the order is reversed, and the cause remanded with directions to enter judgment for plaintiff upon the verdict. Plaintiff is entitled to his costs in this court upon both appeals, but only one attorney's fee of $25 will be taxed.

JILEK, Respondent, vs. ZAHL, Appellant.

December 10, 1915—January 11, 1916.

Reformation of contracts: Action at law: Change by amendment to equitable action: Statute regulating procedure, when applicable to pending litigation: Evidence: Sufficiency.

1. No recovery of the balance alleged to be due upon a land contract can be had in an action at law where it is necessary first to reform the contract; but under sec. 2669*a*, Stats. (ch. 353, Laws 1911), and sec. 2, ch. 219, Laws 1915 (sec. 2836*b*, Stats. 1915), an amendment may be allowed changing the action to one in equity, and it may then be tried and determined as if so brought.
2. Although in such a case plaintiff had judgment in the action at law before said law of 1915 took effect, upon reversal of the judgment there is no vested right in the procedure in force at the time it was rendered, and subsequent proceedings may be directed in accordance with the law of 1915.
3. Even though the only direct testimony is that of the two parties, who flatly contradict each other, there may be corroborating circumstances proven which will satisfy the rule that the evidence must be clear and convincing in order to justify reformation of a written contract.

APPEAL from a judgment of the municipal court of Langlade county: T. W. HOGAN, Judge. *Reversed.*

Action to recover $500, being the balance due on the purchase price of an equitable interest in twelve forties of timber land alleged to have been sold by the plaintiff to the defendant by written contract December 8, 1911. The defendant by answer denied any contract with himself, but alleged that the plaintiff executed to Adelaide Zahl (defendant's wife) a land contract to convey three forties of the lands in question for $650 (of which $150 was paid down), and that plaintiff has refused to execute or deliver a conveyance of the same though said Adelaide has offered and now offers to pay the balance when good title is furnished.

On the trial before a jury it appeared that on October 12, 1909, the plaintiff received a land contract from the trustees of the estate of George Baldwin, deceased, for the conveyance of the twelve forties of land in question for the sum of $4,500; that he went into possession, cut considerable quantities of cedar, paid about $2,500 on the purchase price, and in April, 1911, proposed to one Hayssen, agent of said trustees, that he would assign back his interest in the contract so far as nine of the forties were concerned if the trustees would deed to him the remaining three forties and thus close the transaction; that in pursuance of this idea he executed and gave to Hayssen, April 5, 1911, an assignment of the contract as to the nine forties with the name of the grantee in blank; that nothing came of this offer, but Hayssen did not return the assignment to the plaintiff, and on the contrary and without *Jilek's* knowledge sold and transferred it to defendant's wife, Adelaide Zahl, acting through her husband, and received in payment the discharge of a debt of $150 which he owed *Zahl;* that no written assignment was made out, but that Hayssen simply filled in the name of Adelaide Zahl as grantee in the assignment made by the plaintiff and delivered it to *Zahl;* that in December, 1911, the parties negotiated together concerning the lands, the plaintiff not be-

ing aware, as he claims, that *Zahl* had obtained the Hayssen assignment. Here the stories of the plaintiff and the defendant radically differ. A written contract was made out by *Zahl* December 8, 1911, by the terms of which *Jilek,* in consideration of the sum of $650, of which $150 was paid down and the balance was to be paid in two years, agreed to convey three specified forties of the twelve to Adelaide Zahl. The plaintiff claims that the real transaction at this time was that he sold his interest in the entire twelve forties to *Zahl* himself, for which *Zahl* agreed orally to pay him $650 ($150 being paid down) and to pay the trustees of the Baldwin estate the balance due on the original contract, which was nearly $2,000; that he, the plaintiff, knew nothing of Adelaide Zahl; that *Zahl* drew the written contract, which he, plaintiff, supposing it agreed with the oral agreement, signed and returned to *Zahl,* and which now turns out to be a contract to convey three forties for $650 to Adelaide Zahl. On the other hand the defendant claims that he was acting in the transaction as the agent of his wife; that he never talked with plaintiff until December, 1911; that he did not try to buy the twelve forties from *Jilek,* but only the three forties (he having already in his possession the Hayssen assignment covering the other nine forties); that *Jilek* understood about this assignment; that it was understood that he, *Zahl,* was to pay three fourths and *Jilek* one fourth of the amount due the Baldwin estate; that he drew the land contract covering the three forties in *Jilek's* presence, read it to him, and *Jilek* signed it and took it away with him, and when he returned said that Hayssen had read it to him and witnessed it. On the contract the names of *Zahl* and Hayssen appear as witnesses.

The trial judge charged the jury in effect that if they believed the plaintiff's version of the last named transaction they should find for the plaintiff, and if they believed the

defendant's version they should find for the defendant. A verdict for plaintiff was returned, and from judgment thereon the defendant appeals.

H. F. Morson, for the appellant.

For the respondent there was a brief by *Goodrick & Goodrick,* and oral argument by *Arthur B. Goodrick.*

WINSLOW, C. J. It may well be that the result reached in this case is not inequitable, but it is very clear that there has been misconception of the real nature of the controversy. A written contract to convey three forties of land appears to have been made by *Jilek* running to Adelaide Zahl. On its face it is a perfectly good contract and under familiar rules it excludes evidence of a parol contract contradicting or varying its terms. It may be reformed for mistake and enforced as reformed, but until reformed its provisions are controlling. The only way to reform it is by action in equity brought for the purpose of reforming it and enforcing it as reformed. *Casgrain v. Milwaukee Co.* 81 Wis. 113, 51 N. W. 88; *Garage E. M. Co. v. Danielson,* 156 Wis. 90, 144 N. W. 284. So it is apparent that this action should have been brought in equity, and it is equally apparent that when brought at law no recovery should have been had. Until quite recently the plaintiff would have been thrown out of court and compelled to commence a new action because of the ironclad rule that an amendment could not be allowed which would change the action from one at law to one in equity. *Charmley v. Charmley,* 125 Wis. 297 (103 N. W. 1106) and cases cited at page 302. This rule has been changed, however, by sec. 2669*a,* Stats. (ch. 353, Laws 1911), and no miscarriages of justice of this nature need now occur. Further progress along the same line has been made by sec. 2 of ch. 219 of the Laws of 1915 (sec. 2836*b,* Stats. 1915), which went into effect after the trial in the present case, and which provides in the most comprehensive way for amendments in cases like the

present and for the continuance of the action or proceeding in the proper court and under the proper form of action in case of mistake in the form or substance of the remedy originally sought.

The beneficent effect of this provision can hardly be overestimated. It means that it will no longer be necessary to kick the plaintiff out of the back door of the courtroom (with costs) in order that he may re-enter by the front door in a different garb. It means that we are losing interest in the mere niceties of procedure and gaining interest in the accomplishment of justice "completely and without denial, promptly and without delay" (Const. art. I, sec. 9).

Being an act regulating procedure, this act affects pending litigation except so far as rights may have become vested, and in case of the reversal of a judgment there is no vested right in the procedure in force at the time the judgment was rendered.

As we have seen, the action should have been brought in equity. Whatever be our conclusion as to the action which the trial court should have taken under the law existing at the time of the rendition of the judgment, there can be no doubt as to the proper course now. The action must be continued as an action in equity to reform and enforce the land contract; Adelaide Zahl and the trustees of the Baldwin estate must be brought in by order of court as necessary parties to a complete determination of the matters in controversy; the plaintiff must be required to amend his complaint in accordance with the facts as he claims them to be, and the defendants should be allowed to make answer thereto as they may be advised, and the action should proceed to trial before the court with all convenient speed at such time as the trial court shall designate. It is undoubtedly the rule that the evidence must be clear and convincing in order to justify reformation of a written contract, and it is equally true that so far as direct testimony is concerned there is in the present

case the oath of the plaintiff against the oath of the defendant, but no reason is perceived why there may not be corroborating circumstances proven which will satisfy the rule even though the number of direct witnesses be equal.

It should be the aim of the trial court and of all parties to expedite the second trial of the case so that the delay will be for as brief a period as possible.

By the Court.—Judgment reversed, with costs, and action remanded for further proceedings in accordance with this opinion.

ECCLES, Respondent, vs. FREE HIGH SCHOOL DISTRICT OF THE CITY OF KAUKAUNA, imp., Appellant.

December 10, 1915—January 11, 1916.

Judges: "Disability:" Disqualification by prejudice: Statute construed.

The word "disability," as used in sec. 9, ch. 23, Laws 1907, as amended by sec. 1, ch. 54, Laws 1913,—providing in substance that "in case of sickness, temporary absence or disability" of the municipal judge of Outagamie county he may appoint the county judge to discharge his duties,—includes a disqualification of the municipal judge by reason of prejudice. The maxim *noscitur a sociis* does not apply.

APPEAL from a judgment of the municipal court of Outagamie county: HENRY KREISS, Acting Municipal Judge. *Affirmed.*

The plaintiff brought this action to recover wages alleged to be due her on a written contract with the board of education of the city of Kaukauna, Wisconsin.

The action was commenced by the service of a circuit court summons and was brought to trial on the 21st day of January, 1915, before Judge THOMAS H. RYAN of the municipal court of Outagamie county. When the case was called for trial the defendant filed an affidavit of prejudice

against Judge THOMAS H. RYAN. Judge RYAN then made a written order requesting Judge KREISS of the Outagamie county court to try the case. Defendant took no further part in the trial, and upon the evidence adduced by the plaintiff in support of her complaint the court, presided over by the county judge, made its findings of fact and conclusions of law and entered judgment that the plaintiff recover from the defendant $332.50 damages and $59 interest, together with the costs and disbursements of the action. The judgment was signed HENRY KREISS, County Judge, Acting Municipal Judge. From such judgment this appeal is taken.

George H. Kelly, for the appellant, cited, among other cases, *Western D. & I. Co. v. Heldmaier,* 111 Fed. 123; *Turnipseed v. Hudson,* 50 Miss. 429, 19 Am. Rep. 15.

For the respondent the cause was submitted on the brief of *Mark Catlin.*

SIEBECKER, J. The record shows that the judge of the county court, pursuant to a written order of the municipal judge, acted as judge of the municipal court, tried and determined the issues between the parties, and rendered judgment in plaintiff's favor. This judgment is assailed on appeal as void upon the ground that the municipal judge, under the facts of the case, had no power to appoint the county judge to discharge the duties of the municipal judge, and hence the county judge acted without jurisdiction in rendering the judgment appealed from. The statute conferring power on the municipal judge to appoint the county judge to discharge his duties is sec. 9, ch. 23, Laws 1907, as amended by sec. 1, ch. 54, Laws 1913. It provides:

" . . . In case of sickness, temporary absence or disability of said judge he may, by order in writing filed and recorded in said court, appoint the county judge of said county to discharge the duties of such judge during such sickness, temporary absence or disability, who shall have all the powers of such judge while administering such office. In all

cases any circuit judge may hold court as the judge of the municipal court in the event of the absence, sickness or other disability of the municipal judge or upon his special request. . . ."

It is contended by the appellant that the phrase "In case of sickness, temporary absence or disability of said judge," when considered in connection with the other parts of the statute, does not include the disqualification of the municipal judge on account of his prejudice in the case. The argument is that the "disability" contemplated by this statute is one like the sickness or absence of the judge and that it does not include a disability arising from prejudice of the judge. The legislature evidently intended to make provision for the discharge of the municipal judge's duties when he was unable to discharge his judicial duties, and when so interpreted and applied to the subject matter of the statute the language employed includes in its general meaning all disqualifications of the municipal judge, and the word "disability" aptly expresses such intent as inclusive of all disqualifications in addition to sickness and absence. In ordinary language the condition of a judge who cannot act because he is not indifferent in the case is spoken of as a disqualification which legally disables him to perform the judicial function. Bias or prejudice of a judge as to the parties constitutes in the law a disability of such judge for the discharge of his duties. This interpretation is corroborated by the provision of sec. 35, ch. 23, Laws 1907, as amended by sec. 1, ch. 54, Laws 1913, which provides that in case the municipal judge is disqualified to act in the instances there enumerated, including the one of his prejudice in the cause, he is authorized to "call in the circuit judge or county judge" to perform his duties, and under such conditions "the provisions of said section 9 of this act shall apply in all their force and effect." This indicates that the legislature understood that a disqualification from prejudice was included in sec. 9, and is necessarily ref-

erable to the word "disability" as the only term thereof which comprehends this idea. The terms of the statute indicate that it was intended by the legislature that the word "disability" as used here was not to be restricted in meaning by the words preceding it. We are of the opinion that the municipal judge gave a correct interpretation to the act and that the county judge had jurisdiction to try and determine the issue in the case.

By the Court.—The judgment appealed from is affirmed.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Appellant, vs. LAUBENSTEIN, Respondent.

December 10, 1915—January 11, 1916.

Principal and agent: Negligence or bad faith of agent: Questions for jury.

1. An agent is bound to exercise good faith and diligence in his relations with his principal and in following his instructions.
2. For failure to exercise ordinary care in the discharge of his duties, an agent will be liable to his principal.
3. In an action by an insurance company for an alleged breach of duty by an agent, there being evidence which would warrant the jury in finding that defendant made certain false representations to plaintiff either negligently or in bad faith and that plaintiff relied thereon in issuing a policy upon which it afterwards had to pay the amount of loss, it was error to direct a verdict for defendant.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This action was brought to recover damages growing out of an alleged breach of duty by the defendant as agent of the plaintiff. The plaintiff is an insurance company and the defendant acted as its agent in the vicinity of Gresham, Wisconsin, and as such agent issued a policy of insurance upon

certain property, and it is the claim of the plaintiff that said defendant made certain representations respecting the property to the company which induced the issuance of the policy and which representations were untrue, in consequence of which the plaintiff sustained damages, which it seeks in this action to recover from the defendant.

After the evidence was all in the court directed a verdict for the defendant and judgment was entered accordingly, from which this appeal was taken.

Daniel H. Grady, for the appellant.

For the respondent there was a brief by *Dillett & Winter,* and oral argument by *P. J. Winter.*

KERWIN, J. The plaintiff through the defendant, its agent, issued a policy of insurance upon certain property of one Anna Huntington. The property was destroyed by fire, suit brought to recover, the case settled, and amount of loss paid. The present action was then brought to recover the damage alleged to have been sustained by plaintiff on account of the alleged breach of duty of defendant in procuring the insurance.

It is contended on the part of appellant that the court erred in refusing to direct a verdict for plaintiff and in directing a verdict for defendant.

In procuring the insurance it is claimed by plaintiff that the following false representations were made by defendant: (1) That the applicant owned forty-one acres of land; (2) that the cash value of the land was from $600 to $800; (3) that the appearances indicated applicant to be a good, thrifty farmer; (4) that there was a stone and post foundation under the building; (5) that a steam sawmill ninety-five feet from the risk ran only six or eight weeks each season; (6) that such mill would not operate after that season; and (7) that boarders were kept only while the sawmill was in operation.

A written application was taken by defendant and signed by the applicant. Some of the above representations, notably that the foundation under the building was of stone and posts and that applicant owned forty-one acres, were contained in such written application. The evidence showed that the applicant owned at the time the application was signed only one acre of land, but had been negotiating for forty acres more. There is evidence that defendant asked the questions contained in the written application and wrote in the answers given by the applicant. There is also evidence that a few days before defendant obtained the application from Anna Huntington he attempted to procure insurance on the Huntington property in another company, representing the property to be a boarding house.

The basis of the claim of plaintiff to recover in the present action is the false representations of the defendant, relied upon by plaintiff, and from which it is alleged damages resulted to plaintiff.

The claim of the defendant is that the representations were true, made in good faith, and if any thereof were not true the defendant is not liable because as agent of plaintiff he acted in good faith in the line of his duty and was guilty of no negligence.

We think the question of liability of the defendant was for the jury, therefore the court below was in error in directing a verdict.

There was evidence which would warrant the jury in finding that some at least of the representations were not true and that the defendant was either guilty of negligence or bad faith in making them. There is also evidence which would entitle the jury to find that the plaintiff relied upon the representations made in issuing the policy.

An agent is bound to exercise good faith and diligence in his relations with his principal and in following the instructions of his principal. *Sicklesteel v. Edmonds,* 158 Wis.

122, 147 N. W. 1042; *Hall v. Storrs,* 7 Wis. 253; *Phœnix Ins. Co. v. Frissell,* 142 Mass. 513, 8 N. E. 348; *Continental Ins. Co. v. Clark,* 126 Iowa, 274, 100 N. W. 524.

An agent in the discharge of his duties as such must exercise ordinary care, and for negligence in failing to do so he will be liable to his principal. 2 Corp. Jur. tit. Agency, §§ 381, 382.

It was clearly for the jury to say whether some at least of the representations were true, and whether if false the defendant acted in good faith or was guilty of negligence in making them. We shall not undertake to specify what questions should have been submitted to the jury, since the evidence may be different upon another trial. Error was committed in directing a verdict for the defendant, and the judgment must therefore be reversed.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

KNAPP, Appellant, vs. TOWN OF DEER CREEK, Respondent.

December 11, 1915—January 11, 1916.

Ditches to permit natural drainage: Duty of towns, etc.: Enforcement in equity: Exclusive remedy: Action for damages: Filing of claim.

1. Sec. 1388*b*, Stats. 1913 (relating to ditches, culverts, or other outlets to permit the natural drainage of low lands over which a highway or road grade shall be constructed), gives a new right to the landowner and declares the remedy for failure of the municipality or railway company to perform the duty thereby imposed; and the remedy so provided (viz. the recovery of damages) excludes any right of the landowner to resort to equity to compel the construction and maintenance of the ditches.
2. Failure of a town to perform the duty imposed upon it by said sec. 1388*b* does not constitute a nuisance against which equity will grant relief.

3. A claim for damages caused by failure to construct and maintain ditches, etc., as required by sec. 1388*b*, must be filed as provided in sec. 824, before an action thereon can be maintained against a town.

APPEAL from an order of the municipal court of Outagamie county: ALBERT M. SPENCER, Judge. *Affirmed.*

The appeal is from an order sustaining a demurrer to the complaint.

For the appellant there were briefs by *A. H. Krugmeier* and *Morgan & Benton,* and oral argument by *John Morgan.*

For the respondent there was a brief by *Olen & Olen,* attorneys, and *P. H. Martin,* of counsel, and oral argument by *Mr. Martin* and *Mr. O. L. Olen.*

TIMLIN, J. The plaintiff brought this action against the town to compel the latter by mandatory injunction to "construct, provide and maintain the ditches, culverts or other outlets" required by ch. 159, Laws 1913 (sec. 1388*b*, Stats. 1913). Demurrer was sustained because the complaint contained no averment that the claim sued on had been presented to the town board as required by sec. 824, Stats. 1913. The plaintiff contends that the suit was properly planted in equity to abate a nuisance under sec. 3180, Stats. 1913, and that sec. 824 has therefore no application. Respondent meets this with argument (1) there is nothing in the nature of a nuisance; (2) the statute (sec. 1388*b*) confers a new right and prescribes the remedy of an action for damages and this remedy is therefore exclusive; (3) the statute is unconstitutional in any event, (a) because it takes private property for private purposes, (b) it takes property without due process of law, (c) because it denies the equal protection of the law. The statute is as follows:

"Section 1388*b*. 1. Whenever any town, city, village or railway company shall . . . construct and maintain any public highway or road grade through, over and across any marsh, lowland or other natural depression over or through which surface water naturally flows and percolates, and the

stopping of the said flow and percolation of said water by said highway or road grade causes any crop or land to be flooded, watersoaked or otherwise damaged, such town, city, village or railway company shall construct, provide and at all times maintain a sufficient ditch or ditches, culverts or other outlets to allow the free and unobstructed flow and percolation of said water from said lands, and to prevent said lands from becoming flooded, watersoaked or otherwise damaged by said water. Provided, however, that the foregoing shall not apply to public highways or road grades now or hereafter used to hold and retain water for cranberry purposes.

"2. Any town, city, village or railway company which shall fail to provide such necessary ditches or culverts or other outlets shall be liable for all damages caused by reason of such failure or neglect."

It is very apparent that this statute creates a duty to refrain from obstructing by a roadbed the flow or percolation of surface water and that in the absence of this statute no such duty existed. Some such duty did exist at common law where there was a defined watercourse. It is also apparent that such duty is due to the owner of the adjacent lands flooded, watersoaked, or otherwise damaged by failure to perform the duty. The statute also provides that in case of failure to conform to it the municipality shall be liable for all damages caused by such failure. We have therefore the case of a statute giving a new right to the adjacent landowner and declaring the remedy.

In *Saxville v. Bartlett,* 126 Wis. 655, 105 N. W. 1052, a statute imposing upon a son the duty to support his pauper parent and providing a remedy for failure so to do was held to lawfully take away the right of trial by jury on disputed questions of fact, no jury being permitted in the statute creating the obligation and prescribing the remedy. In *Hall v. Hinckley,* 32 Wis. 362, a similar statute was held to exclude the jurisdiction of equity. Chief Justice DIXON there said:

"It is a cardinal rule in the construction of statutes, that, where a new right has been given and a specific remedy pro-

vided by statute, the right can be vindicated in no other way than that prescribed by the statute. *Arnet v. Milwaukee M. Mut. Ins. Co.* 22 Wis. 516, and authorities cited. The statute under consideration gives a new right, and does prescribe a specific remedy for the enforcement of such right, and that remedy is wholly inconsistent with the supposition of jurisdiction in equity, or that the legislature intended any application of the equitable doctrine of equality among the lienholders. The remedy prescribed is by action at law, denominated in the statute 'personal action against the debtor, his executors or administrators.' "

This rule is recognized in 1 Pom. Eq. Jur. (3d ed.) § 281, as follows: "Whenever a legal right is wholly created by statute, and a legal remedy for its violation is also given by the same statute, a court of equity has no authority to interfere with its reliefs, even though the statutory remedy is difficult, uncertain, and incomplete," citing cases. See, also, Wisconsin cases collected in *State ex rel. Cook v. Houser,* 122 Wis. 534, 595, 100 N. W. 964. Perhaps the generality of the language in the foregoing quotations should be in some measure limited, but not to such a degree as to affect this case or as to permit the plaintiff to go into equity to vindicate the new right given by sec. 1388*b,* Stats., when the legal remedy there provided is so plain and sufficient. There is nothing to suggest that all the damages may not be recovered in one action, nor, with reference to pre-existing embankments, that damages should exceed the difference in market value of the area directly affected, with, and that area without, a practicable culvert or drain.

The failure of the defendant to perform the duty cast upon it by the statute in question cannot be said to be a nuisance unless every breach of legal duty constitutes a nuisance. The defendant has committed no unlawful act, and is charged with nonfeasance only. It has merely failed to do. Its failure damaged the adjacent proprietor, but created nothing threatening him or the public with personal discomfort or ill health. The statute looks only to the injury to the adjacent lands, and

the duty is cast upon the town "to prevent said lands from becoming flooded, watersoaked or otherwise damaged by said water." As was said in *Chicago & A. R. Co. v. Tranbarger*, 238 U. S. 67, 77, 35 Sup. Ct. 678, with reference to a similar statute: "The present regulation is for the prevention of damage attributable to the railroad embankment itself, and amounts merely to an application of the maxim *sic utere tuo ut alienum non lædas.*"

The case is one, therefore, in which a claim should have been presented under sec. 824, Stats. 1913. We do not find it necessary to pass upon the constitutionality of this act.

By the Court.—Order affirmed.

CONWAY, Respondent, vs. TOWN OF GRAND CHUTE, Appellant.

December 11, 1915—January 11, 1916.

Money paid under unconstitutional law: Recovery: Subscriptions: Failure to comply with conditions: Highways: Improvement: Towns: Liability to repay moneys subscribed.

1. The rule that relief will not be granted against a mistake of law is not without limitation; and the rule that money paid under an unconstitutional law without any circumstances of compulsion is paid under a mistake of law and is not recoverable, is not applicable to all situations.
2. A gift, donation, or subscription may be made on condition that the donee do some act before the donation will become available, and if there is a refusal to accept the condition the donation may be withdrawn.
3. If in such case payment is made but the condition has not been fulfilled, the amount paid may be recovered.
4. Where, pursuant to sub. 3, sec. 1317*m*—4, Stats. 1913, and assuming it to be valid, freeholders subscribed and paid into the treasury of a town a certain sum and presented a petition designating the parts of the system of prospective state highways which they wished to have improved, but the town refused to

raise a like amount for that purpose by taxation, and in an action to compel it to do so it was held that said subsection was unconstitutional, the condition upon which the subscriptions were made was never fulfilled, and the money might be recovered.

5. The electors at a town meeting having voted to expend the moneys so subscribed upon the highways designated, the town thereby assumed ownership and control over the fund and rendered itself liable to an action to recover it.

APPEAL from an order of the circuit court for Outagamie county: CHESTER A. FOWLER, Judge. *Affirmed.*

For the appellant there was a brief by *Morgan & Benton,* and oral argument by *John Morgan.*

For the respondent there was a brief by *Julius P. Frank,* attorney, and *Ryan, Cary & Frank,* of counsel, and oral argument by *Julius P. Frank.*

BARNES, J. This is an appeal from an order sustaining a demurrer to an answer as not stating a defense.

Most of the facts necessary to an understanding of the question involved are detailed in *State ex rel. Carey v. Ballard,* 158 Wis. 251 (148 N. W. 1090), at pages 251 to 253 inclusive. In that case, sub. 3 of sec. 1317*m*—4, Stats. 1913, was held unconstitutional. The plaintiff and others, assuming the statute to be valid, had paid into the town treasury the sum of $4,800 and filed petitions stating the parts of the county system of highways which they desired improved. The town refused to levy a tax to cover its share of the proposed improvements and they were not made. This court held that it was acting within its rights. The various contributors assigned their claims against the town to the plaintiff. The latter filed a claim against the town on March 29, 1915, which was not allowed. On the contrary, the electors at the April, 1915, town meeting voted to expend the moneys on the highways designated in the petitions under the supervision of the town board.

The defendant argues that no cause of action was stated in the complaint (1) because the money was voluntarily paid into the town treasury and hence there can be no recovery, and (2) because no recovery can be had of money paid under an unconstitutional law, and that inasmuch as the demurrer goes back to the first defective pleading, it should have been sustained as a demurrer to the complaint or else the action should have been dismissed.

It is correct as a general proposition to say that relief will not be granted against a mistake of law. This rule, however, is not without limitation. *Green Bay & M. C. Co. v. Hewitt,* 62 Wis. 316, 21 N. W. 216, 22 N. W. 588; *Wis. M. & F. Ins. Co. Bank v. Mann,* 100 Wis. 596, 619, 76 N. W. 777; *Rowell v. Smith,* 123 Wis. 510, 102 N. W. 1. It is also held that under some circumstances money paid under an unconstitutional law without any circumstances of compulsion is paid under a mistake of law and is not recoverable. *Van Buren v. Downing,* 41 Wis. 122. But this rule is not applicable to all situations. *Milwaukee v. Milwaukee Co.* 114 Wis. 374, 90 N. W. 447. Neither of the rules of law relied on affects the right of the plaintiff here. It is well settled that a person desiring to make a gift, donation, or subscription may make it on condition that the donee do some act before the donation becomes available, and that if there is a refusal to accept the condition the donation may be withdrawn. Numerous cases to this effect are collected in a note in 37 Cyc. 496, and in 45 Cent. Dig. tit. Subscriptions, § 14. And if payment is made but the condition has not been fulfilled the amount paid may be recovered back. 37 Cyc. 501 and cases cited. Here the subscribers donated $4,800 for certain specific purposes on condition that the town raise a like amount by taxation. This the town refused to do, and it was decided by this court that it could not be compelled to raise the money because the so-called "force clause" of the 1911 law was void. The condition on which the subscriptions were based was never ful-

filled, hence the right to recall them existed. If the town desired to retain the money it should have complied with the condition. There are other grounds on which the decision of the lower court might well be sustained, but the one stated is deemed sufficient.

Were it not for the action of the electors at the annual town meeting in April, 1915, we should seriously doubt the right of the plaintiff to bring any action against the town, because up to that point there was nothing to show that the town accepted the subscription or made any claim to the money and no reason is apparent why plaintiff should not pursue his remedy against the custodian of the fund. By its action taken at the town meeting, however, the town assumed ownership of and control over the fund by voting to spend it for town purposes and thus rendered itself liable to an action to recover it.

By the Court.—Order affirmed.

SCHABOW, Respondent, vs. WISCONSIN TRACTION, LIGHT, HEAT & POWER COMPANY, Appellant.

December 11, 1915—January 11, 1916.

Negligence: Proximate cause: Anticipation of injury: Instructions to jury: Harmless error: Contributory negligence: Questions for jury: Excessive damages: New trial: Newly discovered evidence: Discretion.

1. Negligence is the proximate cause of a personal injury which is the natural and probable result thereof, where an ordinarily prudent man ought reasonably to have anticipated that some injury (not necessarily the precise injury) to another person might probably be caused by the negligent act.
2. In an action for an injury to one who, while delivering goods at defendant's barn, fell through an open trap door in the floor, the jury were correctly instructed in accordance with the rule above stated upon the question whether defendant's negligence

was the proximate cause of the injury, but upon the question of plaintiff's contributory negligence they were told that "negligence is a proximate cause of an injury only when the injury is the natural and probable result of it, and in the light of attending circumstances it ought to have been foreseen by a person exercising ordinary care." *Held*, that the jury must have understood, by the words *the injury* and the word *it* referring back to them, *an* injury and not the precise injury which resulted; hence the error in the wording of the instruction was not material.

3. The leaving open of a trap door in a floor upon which people walk raises in the ordinary mind a reasonable anticipation that some one may fall into it and be injured.
4. The trap door being very near the door of the barn and having been closed when plaintiff went into the barn to get help in carrying a heavy can of soap and also when he came out, but having been opened before, carrying one side of the can, he necessarily backed through the narrow door of the barn and in so doing fell into the open trap, the question of his contributory negligence was for the jury.
5. An award of $1,000 for injury to a man twenty-three years of age, who sustained a rupture in falling through a trap door, was not excessive where the evidence showed a direct financial loss of $264, pain and suffering, and a reasonable certainty of suffering and disability in the future.
6. It was not an abuse of discretion to deny a motion for a new trial on the ground of newly discovered evidence, where such evidence was merely cumulative and not very persuasive.

APPEAL from a judgment of the municipal court of Outagamie county: ALBERT M. SPENCER, Judge. *Affirmed.*

Action for damages for personal injury. Plaintiff, *Herbert Schabow*, was injured April 7, 1914, by falling through a trap door in defendant's car barn while assisting in delivering a can of soft soap weighing 100 pounds. Upon arriving at the barn he tied his team and entered to get help. Both on entering and leaving he passed over the trap door, which was then closed. Though he had made deliveries there for about a year past he claimed he had never seen it open. The trap door consisted of an iron plate hinged flush to the cement floor, and it covered a stairway leading to the basement. The stairs led down from the end nearest the outside door of the

barn. The latter was a sliding door with a narrow swinging door set in it. The trap door was directly opposite to and at a distance of forty-one inches from the small swinging door. Plaintiff and one of defendant's employees, John Steger, carried the can of soap by the handles, walking side by side till the door was reached. Plaintiff then swung backwards and opened the door with his right hand, backed through and beyond it, and fell down the open stairway, the trap door having been opened by an employee of defendant while plaintiff and Steger were out to get the soap. The jury found negligence on the part of the defendant; that it was the proximate cause of the injury; that plaintiff was free from contributory negligence; and damages $1,000. From a judgment in favor of plaintiff entered upon the verdict the defendant appealed.

Lawrence A. Olwell, for the appellant.

For the respondent there was a brief by *Martin, Martin & Martin,* and oral argument by *P. H. Martin.*

VINJE, J. Error is assigned upon this instruction of the court given relative to the question of contributory negligence:

"Negligence is a proximate cause of an injury only when the injury is the natural and probable result of it, and in the light of attending circumstances it ought to have been foreseen by a person exercising ordinary care."

It is argued that this instruction required an anticipation of the *precise injury* that did in fact result, and that under the rule laid down in *Meyer v. Milwaukee E. R. & L. Co.* 116 Wis. 336, 93 N. W. 6; *Schmeckpepper v. C. & N. W. R. Co.* 116 Wis. 592, 93 N. W. 533; *Feldschneider v. C., M. & St. P. R. Co.* 122 Wis. 423, 99 N. W. 1034; *Morey v. Lake Superior T. & T. Co.* 125 Wis. 148, 103 N. W. 271; *Owen v. Portage T. Co.* 126 Wis. 412, 105 N. W. 924; *Sparks v. Wis. Cent. R. Co.* 139 Wis. 108, 120 N. W. 858; *Coel v. Green Bay T. Co.* 147 Wis. 229, 133 N. W. 23; *Dodge v. Kaufman,*

152 Wis. 171, 139 N. W. 741; and *Luebben v. Wis. T., L., H. & P. Co.* 154 Wis. 378, 141 N. W. 214, it is only necessary that an injury or some injury to a person may reasonably be anticipated from the negligent act. The correctness of the rule stated in the cases cited is not open to question. And its correct statement in a case where claim is properly made that the resulting injury, either in the manner in which it is inflicted or the result thereof, could not be reasonably anticipated is essential to a correct submission of the question to the jury. But in the instant case no one can question the fact that an open trap door in a floor upon which people walk raises in the ordinary mind a reasonable anticipation that some one may fall into it, and that a person falling into it and down stairs may sustain a rupture, which was the serious injury to plaintiff. In its instruction under the question of whether defendant's negligence was the proximate cause of plaintiff's injury the correct language was used and they were told that the requirements of reasonable anticipation were met when a person of ordinary intelligence and prudence ought reasonably to foresee that a personal injury to another may probably follow the negligent act. In view of that instruction we must conclude that the jury understood, by the words *the injury* and the word *it* referring back to them, *an* injury and not the precise injury which resulted. Similar language was so construed in *Coolidge v. Hallauer,* 126 Wis. 244, 105 N. W. 568, where the words *such* injury were held to mean an injury or some similar injury and not the precise injury to which the word *such* grammatically related.

We fail to see why plaintiff's contributory negligence was not a jury question. Assume even that plaintiff was aware of the existence of the trap door. It is undisputed that it was closed when he first went in and when he came out, and that it was opened during the short time that he and the other employee were outside to get the soap. In coming

through the narrow swing door it was necessary for him to back in, as they could not go side by side. The open trap door was only forty-one inches back of the swing door. Surely it cannot be held as a matter of law that he was guilty of negligence in backing into it. The case of *Lehman v. Amsterdam C. Co.* 146 Wis. 213, 131 N. W. 362, is a much stronger one showing contributory negligence and yet it was held the question was for the jury.

Plaintiff, a young man twenty-three years of age, sustained a rupture as a result of falling through the trap door April 7, 1914. Two weeks thereafter he was operated upon. He remained in the hospital from ten to fourteen days, and was unable to work for four months. His earnings were $9 per week; his hospital bill $20, and the doctor's services for the operation were worth $100, all resulting in a financial loss of $264. At the time of the trial in May, 1915, he still felt a soreness and weakness about the wound, and when he lifted hard or did very heavy manual labor he felt pain there in addition to the weakness and soreness. The results of the operation were pronounced good by both doctors who testified. It was entirely problematical whether or not there would be a recurrence of the rupture. But he would not for some time to come, if ever, be as immune from rupture under strain as he had been before. The court instructed the jury that they might assess damages "for such pain, suffering, and disability as you are reasonably certain that he will suffer in the future as a result of the injury." The evidence furnished a sufficient basis for the instruction, not on the ground that it showed a reasonable certainty of a recurrence of the rupture, but because it did show that by reason of his injury he was reasonably certain to sustain suffering and disability in future. The jury by assessing only $1,000 damages in a case of actual financial loss of nearly one third of that amount, not to speak of some compensation for pain and suffering endured up to the time of the trial, seems to have exercised a

well balanced judgment in the assessment of damages for future pain and disability.

Defendant asked for a new trial on the ground of newly discovered evidence to the effect that plaintiff had previous to the accident been down-stairs and knew of the trap door. The motion was denied. There was evidence on the trial to the effect that he knew of the existence of the trap door. The newly discovered evidence would therefore be merely cumulative, and, for reasons given in discussing plaintiff's contributory negligence, not very persuasive. It is not probable that a different result would be reached by a jury because of the newly discovered evidence. For these reasons we cannot disturb the discretion exercised in denying the motion for a new trial.

By the Court.—Judgment affirmed.

BYSTROM BROTHERS, Appellant, vs. JACOBSON and another, Respondents.

December 11, 1915—January 11, 1916.

Workmen's compensation: Statute construed: "Accident."

The word "accident" in sub. (3), sec. 2394—3, Stats.,—providing for compensation to employees for injuries "proximately caused by accident,"—should be taken in a broad sense and as including a violent or undue straining of the muscles, resulting in a bodily hurt—in this case a muscular spasm, without external evidence of injury—to an employee from physical overexertion in performing his work.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The action was to test an award made by the *Wisconsin Industrial Commission* in favor of defendant *Eric Jacobson.* The award was sustained.

The *Commission* made the award and it was confirmed on this state of facts, as indicated in a memorandum which such *Commission* filed in the proceeding as a basis for its conclusion:

"May 16, 1914," *Eric Jacobson* "was in the employ of" *Bystrom Brothers* "laying cement blocks. He was at work under the porch of a residence, and in attempting to lift a block weighing approximately eighty pounds, on the foundation of the wall, while in a sitting position, he strained the muscles of his right side. The accident occurred during the forenoon. . . . He . . . consulted a physician, who pronounced the injury as a muscular spasm. There was no external evidence of injury, but he suffered pain and was disabled until July 6, 1914."

For the appellant there was a brief by *Robert R. Freeman* and *Timothy Brown,* attorneys, and *Russell B. James,* of counsel, and oral argument by *Mr. Brown.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

MARSHALL, J. The question raised in this case is whether the injury for which compensation was granted was "proximately caused by accident" within the meaning of those words, in sub. (3), sec. 2394—3, of the Workmen's Compensation Law. On behalf of appellant, it is contended that the statute calls for an accident in the sense of the application of some violence or external force to the person of the workman, that a physical ill caused by the labor the workman is engaged in is not sufficient.

It is considered that the term "accident" as used in the Workmen's Compensation Act has a much broader signification than that contended for by counsel for appellant. It is susceptible of being given such scope that one would hardly venture to define its boundaries. Courts have indulged in very general statements in regard to it, but have not worked

out any very definite guide. True, as stated by a text-writer, such term has been more discussed, probably, in adjudications, "than any other word in the whole English language." What the meaning of it is, in the technical sense, is quite different from what it is in the popular sense. The latter sense was adopted in *Fenton v. Thorley,* 89 L. T. Rep. 314, the leading English case on the subject in regard to such situations as the one we have to deal with. There a workman, in straining to turn a wheel to open a lid, ruptured himself, and it was held that he was injured by accident. The logic of the decision is thus stated in Dawbarn, Employers' Liability (4th ed.) 100:

"The essential principle and foundation of their judgment was that no arbitrary, legal, technical, or contractual meaning was to be given to the word 'accident,' but that it was to be regarded as used in its popular or ordinary sense. . . . Accident might mean an accident external to, distinct from, or in addition to, the injury to the man, or the accident might mean . . . nothing wrong or no mishap apart from the actual injury sustained by the man himself. The accident was not the lid sticking; the accident was the man rupturing himself."

That was approved in *Clover v. Hughes* (1910) 3 Butterworth's Workm. C. C. 275, as applied to the English workmen's compensation act, where a person was ruptured by overexerting himself about his work.

From numerous authorities such as those cited, Dawbarn, at page 100, deduced this rule:

"Roughly speaking, accidents divide into two great classes—(a) Accidents popularly known as such, such as railway accidents, breakdown of machinery, explosions, collisions, etc., where persons injured by them are spoken of as injured by accident; and (b) accidents where there is no such external mishap, but where the man injures himself, as he would say, by accident, when he either strains a muscle, or ricks his back, or ruptures himself, or otherwise hurts himself in an unexpected manner."

These further English cases are cited in support of that conclusion and illustrating it: *Timmins v. Leeds F. Co.* 83 L. T. Rep. 120, where a man strained his back in lifting a plank which unexpectedly stuck owing to frost; *Boardman v. Scott,* [1902] 1 K. B. 43, where a man strained himself in adjusting a beam he was carrying; *Stewart v. Wilsons & C. C. Co.* 5 Session Cas. (1902–3) 120, where a minor injured himself trying to replace a derailed hutch; and *M'Innes v. Dunsmuir,* 45 Scot. L. Rep. 804, where a man brought on a cerebral hemorrhage by overexerting himself.

Like conclusions as those above are drawn from the authorities in Boyd, Workmen's Compensation, sec. 458, and 1 Bradbury, Workm. Comp. Law (2d ed.) 367, cited to our attention. From the former we quote:

"With good reason, strains sustained by employees of normal health in raising unusual weights in the course of employment are generally regarded as accidental injuries." "Ruptures resulting from lifting heavy objects are generally held fortuitous and unexpected events, in other words, accidents."

Quite commonly these words from *Fenton v. Thorley,* 89 L. T. Rep. 314, are quoted with approval: "If a man, in lifting a weight, or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap, in ordinary parlance, would be described as accidental."

There are several American authorities to the same effect as the foregoing, to which we are referred, and among them are the following: *Fisher's Case,* 220 Mass. 581, 108 N. E. 361; *Zappala v. Industrial Ins. Comm.* 82 Wash. 314, 144 Pac. 54; *Voorhees v. Smith Schoonmaker Co.* 86 N. J. Law, 500, 92 Atl. 280; *Poccardi v. Public Service Comm.* (W. Va.) 84 S. E. 242.

The broad meaning attributable to the word "accident," as above indicated, and which is called for by the spirit of the

Workmen's Compensation Act, was adopted by this court in *Vennen v. New Dells L. Co.* 161 Wis. 370, 154 N. W. 640. There the court said:

"The term 'accidental,' as used in compensation laws, denotes something unusual, unexpected, and undesigned. The nature of it implies that there was an external act or occurrence which caused the personal injury. . . . It contemplates an event not within one's foresight and expectation, resulting in a mishap causing injury to the employee."

The contracting of typhoid fever by an employee by his drinking impure water furnished by the employer, was held to satisfy all the calls of that definition. It seems, as counsel for respondents contend, that such calls are quite as well satisfied by the circumstances here. The thing which occurred was somewhat unusual. It was unexpected and undesigned. There was an external occurrence. The lifting of the heavy block while the workman was not in an advantageous position to do so, required him to unduly strain the muscles of his right side. The undue strain was not foreseen or expected. A mishap resulted,—a muscular spasm and consequent disability. There was, plainly, the physical causation spoken of in *Milwaukee v. Industrial Comm.* 160 Wis. 238, 246, 151 N. W. 247,—the effort to handle the block while the workman was so circumstanced as to cause a perilous strain on the muscles of his right side.

We cannot well add anything of value by further discussion. As we have seen, authorities, English and American, generally agree that the term "accident" when used in workmen's compensation laws, should be taken in the broad sense above indicated,—as including a violent straining of the muscles, resulting in a rupture or other bodily hurt to an employee from over-physical exertion in performing his work. It is considered that it was so used by the legislature in sub. (3), sec. 2394—3, of the Statutes, and that the trial court in this case reached the correct conclusion.

By the Court.—The judgment is affirmed.

J. I. CASE PLOW WORKS, Respondent, vs. J. I. CASE THRESHING MACHINE COMPANY, Appellant, and others, Respondents.

September 18, 1915—February 1, 1916.

Trade-marks and trade-names: Unfair competition: Use of similar corporate names: Distinguishing between products: Injunction: Delivery of imperfectly addressed mail: Constitutional law: What name may be taken by new corporation: Costs: Limiting amount: When disbursements not included.

1. A man may manufacture and sell unpatented articles and use his own name in doing so, but if another has previously and rightfully made that name valuable as a trade-name descriptive of the same kind of goods he has created a property right therein which may not be appropriated by a subsequent manufacturer, even though he bear the same name; and, if necessary to prevent that result, conditions and limitations upon the use of the name will be enforced by the courts, which will preserve to the first manufacturer the fruits of his industry and prevent the public from being misled. The extent of these conditions and limitations varies according to the circumstances of the case and is limited only by their sufficiency to accomplish the result named.
2. Plaintiff, the J. I. Case Plow Works (founded by J. I. Case), which for many years has manufactured plows and sold them under the trade-name "Case" or "J. I. Case," is *held* to be entitled to the exclusive use of that trade-name on plows and in advertisements thereof, as against defendant the J. I. Case Threshing Machine Company (also founded by J. I. Case), which for many years manufactured and sold threshing machines and only recently began the manufacture and sale of plows.
3. The fact that some part of the public had no exact knowledge as to what company manufactured the "Case" plow, and many supposed it to be made by the same institution, or a branch thereof, which made the threshing machines, did not affect plaintiff's right to the exclusive use of that trade-name on plows.
4. Neither the said trade-name nor the trade-mark of said defendant (which embodies the name "J. I. Case" prominently displayed) may be used upon plows made by defendant; and this applies equally to plows sold singly or in gangs or as part of an engine-drawn plowing outfit.
5. A complete denial of the right of said defendant to affix its corporate name to its plows not being deemed necessary, however,

there may be placed on the plow or beam a statement that it is made by or for said company, provided there shall also be placed thereon and conspicuously displayed the words "NOT the original Case plow," or "NOT the Case plow made by J. I. Case Plow Works."

6. In its advertisements, catalogs, or other printed matter said defendant must not use in immediate connection with matter relating to plows or plowing machinery its trade-mark nor the trade-name "Case" or "J. I. Case" alone or in combination with other words. It may state directly or inferentially that it manufactures the plows; but there must be conspicuously inserted or displayed in and as part of each such advertisement, catalog, or collection of printed matter the words "Our plows are not the original Case plows" or "Our plows are not the Case plows made by the J. I. Case Plow Works."

7. Defendant having, before plaintiff did so, made and sold a triangular platform or attachment used as a connecting device with engine-drawn gang plows, and plaintiff having acquired no right to use the said trade-name thereon, defendant may sell such attachment with or without the plows: if sold without plows attached it may have the trade-name "Case" or "J. I. Case" or defendant's trade-mark or corporate name thereon, but must have conspicuously displayed thereon the words "NOT made by the J. I. Case Plow Works;" if it is sold with plows attached as a plowing unit defendant must not place thereon said trade-name, trade-mark, or corporate name but may state thereon that it is made by the J. I. Case Threshing Machine Company in immediate connection with a conspicuous statement that the "Plows attached are not the original Case plows," or, at its option, the words "Plows attached are not the Case plows made by the J. I. Case Plow Works."

8. J. I. Case founded the defendant J. I. Case Threshing Machine Company and later the plaintiff, J. I. Case Plow Works, in the same city. The two concerns became competitors and confusion arose as to the delivery of mail matter imperfectly addressed, as to Case & Co., or to J. I. Case Company, or to J. I. Case & Co., etc. Afterwards a subsidiary corporation, the J. I. Case Company, was organized to act as selling agent for the Plow Works. The postoffice department, after a hearing, ordered that all mail addressed to J. I. Case Company or J. I. Case Co. without other designation of street number or address be delivered to the Threshing Machine Company. The trial court directed all defectively addressed mail matter should be delivered to the Threshing Machine Company, but should be opened and its distribution determined by a representative of the Threshing Ma-

chine Company in the presence of a representative of the Plow Works, who should have full opportunity to examine and take notes from any disputed mail matter so that the court might be applied to for an order as to its disposition. *Held*, that such direction was proper, that it did not conflict with the determination of the postoffice department, did not interfere with personal liberty or with the right of privacy, and did not violate the constitutional provision against unreasonable searches.

9. The new corporation, J. I. Case Company, which was organized hurriedly as an expedient to prevent the Threshing Machine Company from assuming that name and also as a means of adding greater confusion to the mail situation and of reaping benefit from the confusion in the public mind as to the identity of the two senior corporations, was properly enjoined from selling, as agent of the Plow Works or on its own account, tractors or tractor-drawn plows—it appearing that the Plow Works had never made tractors and that the Threshing Machine Company had done so and had a right to make and sell them under its corporate name and trade-mark and even under the trade-name "Case," so that it would be unfair for the Plow Works to embark in the tractor business through a corporation bearing the name J. I. Case Company.

10. *Quære*, whether under sub. (2), sec. 1772, Stats.,—providing that the name assumed by a corporation "shall be such as to distinguish it from any other corporation organized under the laws of this state,"—the new corporation could lawfully take the name J. I. Case Company.

11. The word "costs" in an order for judgment limiting the recovery of costs to a certain sum, is *held* to have been used by the trial court and understood by all parties in the sense of attorneys' fees, as distinguished from disbursements; and the clerk's taxation of costs including disbursements at a larger sum was not improper.

APPEAL from a judgment of the circuit court for Racine county: W. J. TURNER, Judge. *Modified and affirmed.*

This is a case of alleged unfair competition in trade. The plaintiff and respondent (hereinafter called the *Plow Works*) brought the action to enjoin the appellant (hereinafter called the *T. M. Company*) from using the name "Case" or "J. I. Case," either alone or in combination with other words, upon plows or plow machinery sold by it, as well as in advertising such plows and plow machinery, on the ground that these

names had become valuable trade-names to the use of which upon plows the *Plow Works* had acquired the exclusive right.

A subsidiary controversy arising upon a cross-complaint filed by the *T. M. Company* will be set forth later in this statement.

The testimony was voluminous and superficially contradictory, but there was really little dispute as to the fundamental and material facts. These facts will be briefly summarized, using as a basis either uncontradicted evidence or findings of fact made by the trial court based on sufficient evidence.

The *Plow Works* is a corporation located at Racine which for many years has manufactured plows and tillage machinery. The *T. M. Company* is also a corporation which has for many years manufactured threshing machines at Racine and during recent years has extended its activities into other lines, among which are engine-drawn gang plows. Both corporations were founded by Jerome I. Case, who began the manufacture of threshing machines at Racine in 1842. He built up a great and profitable business and made the name "Case" well and favorably known among farmers and agricultural implement dealers. In 1863 he associated with himself three equal partners. The business continued and grew under the name J. I. Case & Company. In 1876 Case, with three others not interested in the firm of J. I. Case & Company, organized the Case-Whiting Company, a corporation, for the purpose of making plows at Racine. Case owned a large amount of the stock. This company immediately began manufacturing plows on a large scale, both common walking plows and sulky plows, as well as harrows, cultivators, and tillage machinery of similar nature. In 1880 the name of the corporation was changed to J. I. Case Plow Company. In 1884 it failed and its property and good will were sold to Mr. Case, who in 1885 organized the plaintiff company and conveyed to it the property of the former company including its good will. The business of making plows continued without material interruption and has continued

ever since and the plows soon became generally known in the trade and among farmers as the "Case" or "J. I. Case" plows. J. I. Case owned practically all the stock of the plaintiff from the time of its organization until he transferred it in 1890, just before his death, to his daughter and her husband, the latter being the defendant *H. M. Wallis,* now president of the *Plow Works.* The plows have acquired their reputation under the name "Case," and the right to use the name on plows is unquestionably a valuable asset.

The *T. M. Company* was incorporated in 1880 by the partners in the firm of J. I. Case & Company and succeeded to the property, business, and good will of that firm, Case owning one quarter of the stock. The corporation continued the threshing-machine business of the firm and enlarged it greatly. There was entire harmony between the two corporations for many years. Mr. Case was president of both companies up to his death in 1891. The *T. M. Company* made the "Case" threshing machines, and the *Plow Works* made the "Case" plows, and neither sought to invade the field of the other.

The *T. M. Company* has placed upon its products for many years a trade-mark composed of the picture of an eagle upon a globe with the corporate name and business address upon the globe thus:

J. I. Case
Threshing Machine Co.
Incorporated
Racine, Wis.
U. S. A.

The trade-mark of the plaintiff, which has been used upon its products for many years, consists of the picture of a plowshare held up by the hand against an illuminated background with the corporate name and address underneath, thus:

J. I. Case
Plow Works
Racine, Wis.
U. S. A.

As before stated the Case-Whiting Company commenced the manufacture of plows in 1876. That manufacture has continued to the present time, and the plaintiff has succeeded to all the rights of the original company. The output at first consisted largely of ordinary walking plows, but horse-drawn sulky plows were also made, and some time prior to 1886 these sulky plows began to be made with gangs of two or three plow bottoms. The sulky plows were arranged with lifting levers, the handles of such levers projecting upward and backward just behind the seat of the driver so that he could conveniently grasp them if necessary to lift one or all of the plows over an obstruction. In the early nineties the question of the practicability of operating gangs of plows by means of a traction engine or "tractor" instead of horses was extensively considered by the manufacturers and dealers in plows, and much experimenting done, with more or less satisfactory results. While the change from horse-drawn to engine-drawn plows was not rapid, some progress was made, and in 1893 the *Plow Company* began to make changes in some of its horse-drawn gang plows which would enable them to be attached to tractors; these changes consisting in altering the position of the lifting levers so that they projected forward instead of backward in order that the operator standing on the footboard of the tractor might easily reach them. These gangs were sold to some extent during the years 1893 to 1903 inclusive, but how largely sold does not appear. They were in fact horse gangs converted into engine gangs by change in the position of the levers. Gangs made specially for tractor purposes came several years later. About the year 1903 the demand for engine-drawn gangs seems to have died down for a time, to be revived a few years later with the development of the gasoline engine. About the year 1908 numerous experiments were being made by plow manufacturers with new forms of tractors and improvements of various kinds in the mechanism of the gangs and their attachments.

In 1909 the plaintiff endeavored to perfect a successful engine-drawn gang plow, and in November of that year sold two gang plows of that type which were successful, and since the spring of 1910 it has offered and sold said engine-drawn gang plow throughout the United States and Canada and marked the same with the words "Case" and "J. I. Case" as it marks its other products. The plaintiff has not itself entered on the manufacture of tractors, but in the fall of 1912 an associate company called the Wallis Company was organized by *Mr. Wallis* to manufacture tractors which could be sold with the plaintiff's engine gang plows as a complete plowing outfit, and the plaintiff since that time has advertised and sold the Wallis tractor and its own gang plows together as one outfit. This tractor has never been marked with the name "Case" or any compound of that name.

In 1889 the *T. M. Company* made a steam traction engine for an inventor named Price which was intended to pull a gang of plows. Price bought plow bottoms of the plaintiff and attached the same to a triangular frame which was itself attached to the engine. This was experimental work and continued for some years, the defendant advancing Price money to carry on his attempt to produce a successful tractor. In 1893 Price had become indebted to the *T. M. Company* in the sum of $11,000, and, being unable to pay, he transferred to the *T. M. Company* all his rights in the engine, plow, and patterns, both finished and unfinished. The *T. M. Company* manufactured some of the Price plowing outfits (purchasing the plow bottoms from the plaintiff) and sold a few outfits, but the number of sales does not appear. They were advertised for two years as the "Jacob Price steam plowing outfit." In 1894 the *T. M. Company* issued a catalog devoted to the "Jacob Price field locomotive, manufactured at the works of *J. I. Case T. M. Company,* Racine, for Jacob Price." In 1893 the *Plow Works* also advertised this outfit for sale as the "Jacob Price field locomotive and steam plow." It does

not appear how many of these outfits were sold by either party, but the machine was unsuccessful and the manufacture and sale seems to have ceased in 1897, having resulted in a loss to the *T. M. Company.* During all this time the defendant made no plows, but purchased such as it needed to complete the Jacob Price outfits from the plaintiff. In 1900 it assembled a heavy tractor engine plow, made up entirely of parts conveyed to it by Price in 1893, and used it in connection with a new type of tractor engines at several exhibitions in the West. On the engine and gang of plows the name "Case" appeared in large letters together with the defendant's corporate name and the trade-mark. The entire outfit was sold two years later to a farmer near Winnipeg. In 1902 the defendant constructed an attachment in the shape of a triangular platform on wheels to be attached to the rear of their engine or tractor as a connecting link between the tractor and the plows, and having on the lower beam hooks for the purpose of attaching plow beams thereto. This attachment carried a coal bunker and water tank and was made and sold by the defendant from 1902 to the present time. It had stenciled on the side in large letters the word "Case" as well as the corporate name of the *T. M. Company.* It was sold without plows and was constructed so that gang plows of any standard make could be attached to it, and during the years from 1902 to 1912 373 of these attachments were sold by the *T. M. Company.* Still it made no plows.

In 1909 the *T. M. Company* built and experimented with an engine gang plow with individual beams, but sold none and abandoned the experiment. Nothing further was done by the defendant till the spring of 1910, when it manufactured what was called a "steam lift engine gang plow," which embodied a new invention and of which it sold during 1910 and 1911 sixty-three outfits, of which twenty-seven were returned as unsatisfactory, and the sale practically ceased in 1911. In these outfits the plows themselves appear to have

been manufactured by or expressly for the *T. M. Company* and were marked with the word "Case" in large letters and were so advertised. The advertising of these outfits as the "Case" plowing outfits in trade journals began in January, 1911. Up to that time (with the exception of the plows advertised with the Jacob Price plowing machinery) the *T. M. Company* had never advertised any plows in trade journals nor had it made any plows. In fact it advertised in its catalogs up to 1909 that it did not manufacture or furnish plows.

In January, 1912, the *T. M. Company* contracted with the Racine-Sattley Company of Springfield, Illinois, for a large number of engine gang plow bottoms. They were made, marked "Case-Sattley engine gang plows," and sold by defendant through that season in connection with its engine made by itself at Racine. In 1913 another contract of the same kind was made, but the plows were marked "Case-Racine," and they were sold in large numbers by defendant. In the fall of 1914 the *T. M. Company* began making a light engine gang plow for use with a light tractor, the word "Case" being stenciled in large letters on the plow beams. This gang plow was very similar to the light engine gang plow manufactured and sold by the plaintiff for the same purpose in the latter part of the year 1914, and it has attained a considerable sale. There was also a small walking plow, designed for grading and breaking, marketed by the defendant beginning in the fall of 1910, which plow was made for the *T. M. Company* by a concern at Sidney, Ohio, and had on the beam the word "Case" in large letters. This plow is quite similar to two or three plows designed for similar uses made by plaintiff. It was sold and advertised as a "Case" plow. In 1912 the *Plow Works* and the *T. M. Company,* on the advice of counsel, jointly purchased a Canadian patent for steam-lift gang plows in order to protect themselves, each contributing one half of the expense, and they still own said patent in undivided shares.

The principal product of the *T. M. Company* has always been threshing machines, and these machines have been known as the "Case" or "J. I. Case" threshing machines for more than sixty years. During the last quarter of a century the *T. M. Company* has added other lines of manufacture, such as road machinery, traction engines, and automobiles. All this machinery has been known to the trade as the "Case" machinery, and in 1903 the defendant began and has since continued to brand its machinery of all kinds with the word "Case" in large letters, and to advertise it as the "Case" machinery in trade journals.

Up to about the time of the making of the contract between the *T. M. Company* and the Racine-Sattley Company in January, 1912, the *Plow Works* had no knowledge that the *T. M. Company* had offered any plows for sale under the name "Case" or "J. I. Case" or intended to do so. It learned of the Sattley contract in March following, and immediately protested to the *T. M. Company* both verbally and in writing against the use of the name. Among purchasers of farm machinery it has been generally supposed that the *Plow Works* and the *Threshing Machine Works* were simply branches of one concern. Since entering on the sale of engine gang plows and breaker plows in 1910 the *T. M. Company* has continuously and extensively advertised them as "Case" plows and plowing machinery or outfits, just as it advertised its other articles of manufacture, without notification of any kind that the plows were not the original Case plows. Both the engine gang plows and the breaker plows are quite similar in appearance and finish to the plaintiff's plows and are likely to be mistaken therefor by the ordinary observer. The evidence shows also that they have been mistaken therefor and that purchasers have, to a greater or less extent, actually been misled and have purchased the *T. M. Company's* product in the belief that it was the product of the manufacturer and vendor of the original "Case" plows. The different sten-

cilings now used on plows by the two parties do not differentiate the plows to the ordinary observer, and some trade-name other than "Case" or "J. I. Case" must be used to make the purchasing public understand that the plows offered for sale by the *T. M. Company* are not those made by the plaintiff.

For many years there has been some confusion in the delivery of postal matter to the two corporations. Letters are continually being addressed to "Case & Co." or to "J. I. Case Company" or to "J. I. Case," and these letters so imperfectly addressed have generally been delivered to the *T. M. Company,* and if upon examination they appeared to be intended for the *Plow Works* they were immediately sent to the latter concern. This was a satisfactory method until the two concerns became business competitors in the manufacture and sale of plows, at which time friction began to appear. In December, 1911, the *T. M. Company* took the preliminary steps toward changing its name to the J. I. Case Company, and the officers of the *Plow Works,* learning of this action, at once caused to be organized a new corporation called the *J. I. Case Company* with $100,000 capital stock, and completed the organization before the *T. M. Company* could complete the proceedings which it had commenced for change of name, whereupon said proceedings were dropped. The incorporators of the new corporation were three grandsons of the original Jerome I. Case, one of whom bears the name of his grandfather. The purposes of this new organization were stated in its articles to be "the buying, selling, and dealing in real estate, securities, and merchandise within the state of Wisconsin and elsewhere," and it was organized to act as sales agent for the products of the *Plow Works,* but has as yet done no business. Its postoffice address is Station A, Racine, Wisconsin.

Upon the organization of this new corporation in January, 1912, it demanded of the postmaster at Racine that all mail arriving there directed to *J. I. Case Company* or *J. I. Case*

Co. be delivered to it, and the postmaster referred the demand to the postoffice department, where, after a hearing at which both sides appeared and were heard by counsel, an order was made May 21, 1912, directing that all mail directed as last aforesaid without other designation of street number or address be delivered to the *T. M. Company.*

The court found as a fact that the names "Case" and "J. I. Case" have become associated in the public mind as the names of plows made by the plaintiff at its factory at Racine, and have acquired a secondary significance indicating the particular make of plows sold by the plaintiff, which names are of great value; and that the reputation and good will of the "Case" plow, however drawn, was created by and belongs to the plaintiff. The court further found as a fact that the light engine-drawn gang plow manufactured and sold by both parties has been gradually evolved from the horse-drawn gang plow for many years manufactured by the plaintiff and from the engine-drawn gang plow designed by Jacob Price. It seems that a number of manufacturers make and sell plows performing the same service as the gang plows drawn by light gasoline tractors which are now marketed by both the *Plow Works* and the *T. M. Company* and that there is no patent on such plows.

The plaintiff in its original complaint joined the new corporation aforesaid (the *J. I. Case Company*) as a codefendant with the *T. M. Company* on the ground that it also claimed the right to have mail addressed to *J. I. Case Co.* or *J. I. Case Company* delivered to it, and hence that its presence was necessary to settle the entire controversy. The defendant *T. M. Company* by way of cross-complaint alleged that the creation of said new corporation was a sham and a fraud perpetrated by *H. M. Wallis, H. M. Wallis, Jr.* (his son), and *Jerome I. Case* (second) for the purpose of appropriating to themselves and to the *Plow Works* the trade-name "Case" and the good will of the *T. M. Company,* also for the

purpose of intercepting the *T. M. Company's* mail and diverting to the *Plow Works* orders sent by mail and intended for the *T. M. Company.* Thereupon the three last named gentlemen were made parties to the action. Upon the subsidiary questions raised by this cross-complaint the court found that it would be inequitable for the recently organized *J. I. Case Company* to act as selling agent of the *Plow Works* and that equity required that the mail addressed by the short or imperfect names before set forth should be delivered to the *T. M. Company,* except such as may be so addressed that the postal authorities can determine that it is intended for the plaintiff.

The court found as conclusions of law:

(1) That both parties are entitled to make and sell plows such as are now commonly in use, including engine-drawn plows.

(2) That the plaintiff is entitled to the exclusive use, upon plows, tillage implements, and engine-drawn plows, also in its catalogs and advertisements, of the words "Case" and "J. I. Case" as the trade-name or designation of any description of plows made and offered for sale by it.

(3) That the defendant *J. I. Case T. M. Co.* be perpetually enjoined and restrained from selling or offering for sale any plows, walking plows, sulky plows, horse gang plows, engine gang plows, traction gang plows, whether drawn by animal or power propelled, with the name "Case" or "J. I. Case" thereon, or the word "Case" thereon as part of its corporate name, or the word "Case" in connection with other words, as "Case-Sattley" and "Case-Racine" thereon.

(4) That the said defendant *J. I. Case T. M. Co.* shall be enjoined and restrained from using the name "Case" or "J. I. Case," in connection with any other words or letters, upon its plows, or in its catalogs or advertising matter, so as to carry the meaning to the purchaser or reader that it is manufacturing and selling, or selling, plows, the product of the plaintiff, and, to that end, it shall be restrained and enjoined from using any of the marks, either "Case," "J. I. Case," or its trade-mark or corporate name, upon any plows

manufactured or sold by it, except that it may sell and advertise its product under another name so that it will be distinctly understood by persons exercising ordinary care, when they buy plows from the defendant *T. M. Company,* that they are not acquiring a Case or J. I. Case plow.

(5) That the defendant *T. M. Company* is entitled to manufacture and vend the so-called "plow attachment," being the triangular platform and levers thereon, together with its other accessories, but not with plows attached thereto, with the name "Case" or "J. I. Case" thereon, and its trade-mark, in addition thereto placing thereon words clearly indicating that it is not manufactured by the plaintiff. If, however, the same is sold by said defendant, together with the plow beams and bottoms, as a unit, then it is subject to the prohibition as to marking provided in the fourth conclusion of law herein.

(6) That the plaintiff is entitled to judgment restraining the defendant, its officers, agents, and servants, from representing, or holding out, or giving out, in any manner, that the plows sold and offered for sale by it are the product of the plaintiff *Plow Works,* or that they are original Case plows.

(7) That judgment shall be entered herein that the mail addressed "J. I. Case Company," "J. I. Case Co.," "Case Co.," "Case Company," "J. I. Case & Company," "J. I. Case & Co.," shall be delivered to the defendant the *J. I. Case T. M. Company,* unless addressed by street or number, or by some other designation, to the plaintiff.

That all mail received by the defendant *J. I. Case T. M. Company,* addressed "J. I. Case Company," "J. I. Case Co.," "Case Company," "Case Co.," "J. I. Case & Company," "J. I. Case & Co.," be retained by the defendant *J. I. Case T. M. Company* until 11 o'clock in the forenoon of each secular day, at its office, and then be opened and distributed by it, that intended for the plaintiff being forthwith transmitted to it; that at such time and place the plaintiff may have a representative to observe the opening of said mail and the distribution thereof.

That the mail received between the hours of 11 o'clock a. m. and 5 o'clock p. m. be handled and disposed of in the same manner, with the same right to the plaintiff as just hereinbefore described, it being the intention of the court to

provide the manner of opening and disposing of the mail so that each of the parties, the plaintiff and the defendant *T. M. Company,* shall have an equal opportunity to examine the same at such time.

That all mail, if any, received from the postoffice by the plaintiff, addressed "J. I. Case Company," "J. I. Case Co.," "Case Company," "Case Co.," "J. I. Case & Company," "J. I. Case & Co.," shall be delivered by said plaintiff, unopened, to the said defendant *J. I. Case T. M. Company* at 11 o'clock in the forenoon of each secular day at its office, the same to be there opened and distributed in the same manner and with the same rights to each of the parties hereto therein as is hereinabove more particularly defined in relation to mail so addressed delivered by the postoffice to said defendant *J. I. Case T. M. Company.*

That the distribution of said mail shall be determined upon and made by an officer or representative of the defendant *T. M. Company,* but full opportunity shall be allowed the representative of the plaintiff to take notes from any disputed mail matter so that application can be made to the court for its order as to the disposition to be made thereof.

Let judgment be entered in accordance with these findings, reserving therein the right to the court to make such further order or judgment with reference to the mail as the court may hereafter deem proper and equitable.

Judgment was entered granting injunctive relief to the plaintiff practically in the words of the foregoing conclusions of law, and in addition thereto dismissing the cross-complaint, except that the *J. I. Case Company* was perpetually enjoined from acting as selling agent of the *Plow Works* in selling tractors or engine-drawn plows or from selling the same on its own account.

The *T. M. Company* appeals from the entire judgment except that part which adjudges that both parties are entitled to make and sell plows such as are now commonly in use, including engine-drawn plows.

For the appellant there were briefs signed by *Upham, Black, Russell & Richardson,* attorneys, and *Thomas M. Kear-*

ney and *William D. Thompson,* of counsel, and oral argument by *Mr. Kearney* and *Mr. W. E. Black.*

For the respondent *J. I. Case Plow Works* there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Wm. C. Quarles, Geo. P. Miller,* and *Mackey Wells,* of counsel, and oral argument by *Mr. Wm. C. Quarles, Mr. Miller,* and *Mr. Wells.*

For the respondent *J. I. Case Company* the cause was submitted on the brief of *Palmer & Gittings.*

The following opinion was filed December 7, 1915:

WINSLOW, C. J. This is a contest over the right to use a proper name as a trade-name. It is unique in that it is a struggle between two corporations for the exclusive right to use the name of their common founder upon certain products which both make. It is not the too frequent case of barefaced trade piracy, where one who happens to bear the same name as that borne by a successful manufacturer goes into the same business and endeavors to appropriate to himself that which he has done nothing to create, namely, the business good will attached to the name as the result of the ability and efforts of the first manufacturer. In a word, it is not the case of the business parasite.

Each of the great corporations engaged in this struggle possesses the name of Jerome I. Case as a part of its own corporate name and rightfully so, because Mr. Case long ago endowed them with that name with the full consent of all who were then interested in either corporation. The idea doubtless was to give each corporation all the prestige which that name had acquired in farming and industrial circles as the result of the successful manufacture of threshing machines for many years. It was not then supposed that there would ever be business rivalry between the two corporations. Each had its own field, and the thought unquestionably was that each would reap no small degree of profit from the use of the founder's name.

Undoubtedly, also, both of these corporations have contributed, each in its own field, to increase the value of the name as a business asset; both are honest in their claims, and it is certain that both are very much in earnest.

The fundamental principles which govern a case of this nature are not numerous nor are they difficult of abstract statement; the principal difficulty consists in applying them to a concrete case. That difficulty is greater in the present case than it ordinarily is because of the fact that each party has an undoubted right to the advantages of the name in its own special sphere of business activity and that these spheres seem to impinge upon each other. This exceptional difficulty can hardly be said to be the fault of either party, yet it is a difficulty resulting from deliberate and voluntary action of the founder of the two corporations and his business colleagues, through whom both of the parties here must trace their rights. None could have reasonably anticipated this difficulty at the time the foundation for it was laid, but it has come naturally and almost inevitably as the result of the development of the tractor as a motive power.

The solution of the difficulty should be sought by both parties, not with ill-feeling or rancor, but in good temper with that broad vision and desire to deal fairly and honestly with each other which ought always to characterize the acts of men of large affairs who are intrusted with the management of great business interests and who aspire to lead in the industrial world.

The legal principles which are controlling here are simply the principles of old-fashioned honesty. One man may not reap where another has sown nor gather where another has strewn. A man may manufacture and sell unpatented articles and use his own name in doing so, but if another has previously and rightfully made that name valuable as a trade-name descriptive of the same kind of goods he has created a property right therein which may not be appropriated by a subsequent manufacturer, even though he bear the same

name; and, if necessary to prevent that result, conditions and limitations upon the use of the name will be enforced by the courts, which will preserve to the first manufacturer the fruits of his industry and prevent the public from being misled. The extent of these conditions and limitations varies according to the circumstances of the case and is limited only by their sufficiency to accomplish the result named. Much more might be said, but little would be gained thereby which would be helpful in the present case. *Fish Bros. W. Co. v. La Belle W. Works,* 82 Wis. 546, 52 N. W. 595; *Phœnix Mfg. Co. v. White,* 149 Wis. 287, 135 N. W. 891; *Russia C. Co. v. Le Page,* 147 Mass. 206, 17 N. E. 304; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 16 Sup. Ct. 1002; *Herring-Hall-Marvin S. Co. v. Hall's S. Co.* 208 U. S. 554, 28 Sup. Ct. 350; *Waterman Co. v. Modern Pen Co.* 235 U. S. 88, 35 Sup. Ct. 91; *Guth C. Co. v. Guth,* 215 Fed. 750.

There can be no doubt here that the plaintiff has a right to the use of the name "Case" or "J. I. Case" as a trade-name descriptive of plows, and that such right is a valuable right which it is the duty of the court to protect.

The plaintiff and its predecessor (to whose rights it has succeeded) commenced to make plows in 1876, has been making them ever since, and has built up a large business. These plows have become favorably known to the trade and to farmers generally as the "Case" plows. Beginning with the simple walking plow, the plaintiff soon began to manufacture single sulky plows and sulky gang plows, and still later to manufacture gang plows to be drawn by tractors or engines. These engine-drawn gang plows presented some differences in details of construction and in arrangement of levers. They were just as truly plows, however, as was the walking horse plow which the plaintiff first made, or as was the simple tool laboriously hammered out by the village blacksmith two centuries ago. The claim that the engine-drawn plow outfit is a separate and distinct composite tool and hence cannot be said

to be in competition with plows, cannot be entertained for a moment. A plow is a plow however drawn.

The contention is further made that because some part of the public had no exact knowledge as to what institution or company manufactured the "Case" plow, and because many supposed it to be made by the same institution or a branch of the same institution which made the threshing machines, therefore the *Plow Works* have no property right in the trade-name "Case." This claim is very plainly untenable. The important fact is that the name "Case," as applied to plows, has become a valuable thing, *i. e.* that it is well known that some institution has been making the "Case" plow for many years and has made it a success, and hence that the purchasing public is inclined to buy it rather than a plow which has no such history behind it.

The institution which has stood behind the plow and, by its energy and business sagacity, has endowed it with its history and its success is the institution which is entitled to profit by that history now, even though its identity has not always been understood by its patrons.

No claim can be successfully made that the defendant *T. M. Company* ever made or attempted to make plows and put them upon the market until the experiment with the so-called "steam-lift" plow in the spring of 1910, which experiment proved a failure and was abandoned the following year. The first real plow competition began with the making of the "Case-Sattley" contract in January, 1912, and as soon as this step was brought to the plaintiff's attention protest was made, followed a few months later by the commencement of this action. Even should the experiment of 1910 be considered as an entry by the *T. M. Company* into the plow business using the trade-name "Case," there can be no claim made that the *T. M. Company* has acquired any additional rights thereby. There is no showing of laches after that date, and the fact remains that even then the right to use the name "Case" as a

trade-name for plows had been the property of the plaintiff for many years.

It is clear, therefore, that the defendant *T. M. Company* cannot be allowed to use the name, either alone or in combination with other words, as a trade-name upon any plows or in advertising any plows which it sells, whether such plows be walking plows, or sulky plows, or gang plows to be drawn by horse or engine power; and the word "plows" as used in this sentence covers plow bottoms, beams, levers, and any other incidental parts necessary to the operation of the implement which do not form a part of the attachment next to be spoken of. Whether they should be allowed to use their corporate name or their corporate trade-mark thereon is to be considered later.

It appears that in order successfully to operate engine-drawn gang plows there must be a connecting structure or platform of triangular shape which may be utilized for carriage of fuel as well as for the furnishing of the necessary diagonal beam with hooks to which the plows themselves are attached. This so-called attachment has been made and sold by the *T. M. Company* since 1902 and has had the name "Case" as a trade-name stenciled in large letters on its side in addition to the corporate name of the company. The plaintiff does not claim to have made any such device, at least until very recently, or to have acquired any right to use the word "Case" as a trade-name thereon.

The plaintiff claims, however, that, because this attachment is generally, if not universally, sold with the plows as a part of a single complete outfit or tool, the use of the name "Case" as a trade-name thereon is fully as misleading as the use of that name upon the plows themselves; and this seems entirely reasonable and accords with the conclusions reached by the trial court. If the attachment is sold with plows attached thereto, we are satisfied that it should not bear the name "Case" as a trade-name or any combination of words contain-

ing that name. The ordinary purchaser would certainly not be apt to differentiate between the attachment and the plows themselves, and the name "Case" blazoned on the side of the attachment would be quite as likely to carry to his mind the idea that the plows attached were the original Case plows as if it were placed on the plows themselves. It follows that the prohibition against the use of the trade-name on the attachment should be just as sweeping when it is sold with plows attached as the prohibition against its use on the plows themselves. As to the use of the corporate name or trade-mark thereon, that subject will be considered a little later.

The foregoing propositions concerning the use of the trade-name as such upon the plows and the attachments seem clear and simple. Complications arise, however, when the question as to the use of the corporate name and trade-mark upon these articles is considered. On the part of the plaintiff it is claimed that inasmuch as the name "J. I. Case" occurs in the defendant's name and mark as well as in the corporate name and mark of the plaintiff, the same misleading and prejudicial consequences will result if the *T. M. Company* be allowed to use its name and mark, or either of them, upon the plows or attachments as would result from the use of the single word as a trade-name. On the other hand it is claimed that the defendant cannot be deprived of the use of its lawful name or trade-mark upon its products which it has the right to manufacture and sell.

It seems fairly clear from the wording of the findings and judgment that the trial court agreed with the plaintiff's contention so far as the plows themselves are concerned and prohibited the *T. M. Company* entirely from placing its corporate name or trade-mark thereon, but as to the attachment the conclusion seems to be that trade-name, corporate name, and trade-mark might be used if plows were not sold with it, being accompanied by a clear statement that it is not manufactured by the plaintiff. We confess to some difficulty in

understanding just what conclusion the court reached with reference to the marking of the attachment when sold with plows attached as well as with reference to the advertising of plowing machinery. Subdivision (4) of the findings has been specially difficult of interpretation and we are not sure that we fully understand it now. The fault may well be ours. Our difficulty suggests, however, that others may be troubled in the same way, and as it is of the utmost importance that the judgment should be so clear and unequivocal in its terms that no two constructions are possible, it seems that it would be well to modify the judgment and recast a number of the provisions so that there may be no possible doubt as to the meaning.

As we construe the judgment it holds (1) that both parties are entitled to make plows; (2) that plaintiff is entitled to the exclusive use on plows and in advertisements thereof of the name "Case" or "J. I. Case;" (3) that the defendant *T. M. Company* is forbidden to use the said trade-name alone or in combination with other words or its corporate name or trade-mark on plows; (4) that it is also forbidden to use the trade-name, corporate name, or trade-mark in advertising plows, *except* that it may advertise them under a trade-name so different that persons of ordinary care will understand when they buy plows of the *T. M. Company* that they are not acquiring a Case or J. I. Case plow (*Query.* Does this mean that the defendant may use its corporate name and trade-mark in plow advertisements provided it gives the plow itself a different name, such as "Badger" or other arbitrary name?); (5) that the *T. M. Company* may sell the attachment without plows and put the trade-name "Case" thereon as well as its trade-mark, attaching also words clearly showing that it is not manufactured by the plaintiff, but if it sells the same with plows, then it is subject to the prohibitory provisions of the fourth clause; (6) that the defendant *T. M. Company* is prohibited from representing in any way that

the plows which it sells are the plaintiff's product or are the original Case plows.

The first clause of the judgment is unappealed from, hence it is the law of the case so far as it goes and need not be considered.

The second clause agrees entirely with the conclusions already reached and stated in this opinion and needs no further discussion.

Consideration of the third clause brings us squarely to the question whether the defendant ought to be prohibited from placing its corporate name or its trade-mark on the plows themselves.

On this question the defendant *T. M. Company* urges that it rightfully bears the name "Case" as a part of its corporate name and that it has rightfully acquired a property right in a trade-mark which embodies its corporate name, and it claims that it cannot be deprived of the use of its name or trade-mark upon its goods whatever the consequences may be to the plaintiff. There may be found many cases which say in substance that a man cannot be deprived of the right to use his name in a lawful business by reason of the fact that the same name has become a trade-name owned by another, and this is undoubtedly true, but this does not mean that it may be used at all times or on all surfaces or in all possible ways; in a word, it does not mean that the use may not be subjected to such conditions as are adequate to protect the public against deception and business competitors against unfair competition. It does mean, of course, that the right to use a proper name is not to be interfered with except so far as it may be necessary to accomplish the purposes mentioned.

Is it necessary here? The plaintiff answers in the affirmative because of the special circumstances which make confusion more than probable, namely, the fact that both the corporate name and the trade-mark of the defendant embody the name "J. I. Case" prominently displayed, and thus in a meas-

ure perform the same function and are to all intents and purposes as misleading to the average person as the trade-name alone. This argument is certainly forceful; nevertheless we are not convinced that there should be a complete denial of the right of the defendant to affix its corporate name to its product. We do not say that this might not be done if there were no other way to prevent unfair competition and fraud, but we do say that it seems that it should be done only as a last resort.

We do not deem it necessary in this case. We think that the third clause of the judgment should be modified by adding at the end thereof an exception to the effect that there may be placed at some place on the plow or beam a statement that it is manufactured by the *J. I. Case T. M. Company* of Racine, but if this be done there shall also be placed in plainly legible letters on the beam or other equally noticeable place on the plow, and so conspicuously displayed as to readily attract the attention of the ordinary observer, the words "NOT the original Case plow," or, at defendant's option, the words "NOT the Case plow made by *J. I. Case Plow Works,*" the word "NOT" in either case to be in capitals.

It seems to us that this plan will afford very complete protection to the plaintiff. It means that neither the trade-name nor the trade-mark are to be used on plows, and only the corporate name in connection with a statement of manufacture; but if this be done, one of the above warnings must accompany it. This applies equally to plows sold singly or in gangs or as part of an engine-drawn plowing outfit.

The fourth clause, as before remarked, is the one which has impressed us as being likely to be misunderstood or construed differently by different minds. This we think should be recast and devoted to the advertising feature alone, because the matter of the marking of the plows themselves will be fully covered by the third clause as modified. It is very evident that in the matter of advertising there are some con-

siderations applicable to that feature alone. The *T. M. Company* makes many and varied articles of machinery, and upon most if not all of them (excepting plows) it apparently is entitled to use the name "Case" as a trade-name as well as to use its corporate name and trade-mark as it may choose. It would not be reasonable to hold that it may not advertise and catalog its plows and plow machinery (which it rightfully makes and sells) in connection with its other products, and if it does so it follows that the trade-name, corporate name, and trade-mark will necessarily be capable of being used in more or less close proximity thereto. The better method here is doubtless to amend and modify the fourth clause so as to provide that whenever and wherever the defendant *T. M. Company* advertises or catalogs or makes public other printed matter relating to plows, plowing outfits, or plowing machinery, it must not use in immediate connection with the printed matter relating to plows or plowing machinery the trade-name "Case" or "J. I. Case" alone or in combination with other words nor the trade-mark. It may state directly or inferentially that it manufactures the plows, but there must be conspicuously inserted in and as a part of each such advertisement or catalog or collection of printed matter, in conspicuous type and style which will necessarily arrest the attention of the ordinary person interested in the subject, the words "Our plows are not the original Case plows," or, at its option, "Our plows are not the Case plows made by the *J. I. Case Plow Works.*" It may, of course, give its plows an arbitrary name which has not already been appropriated by another plow maker, and may catalog and advertise them under that name, but even in that event the warning above given must be displayed in connection with the advertisement or descriptive matter in the catalog.

The fifth clause relates to the triangular attachment before spoken of. This clause also seems to us to be liable to be misunderstood, and we therefore think it should be modified

and recast entirely so as to provide that the defendant *T. M. Company* is authorized to make and sell the attachment either alone or with the tractor or with the tractor and plows as a complete outfit. If sold without plows attached, whether with or without tractor, it may be sold with the trade-name "Case" or "J. I. Case" thereon or its corporate name or trade-mark or with all of them, but in either event there must be placed thereon, in close proximity and in conspicuous lettering so as to attract the attention of the ordinary observer, the words "Not made by the *J. I. Case Plow Works.*" In case, however, it is sold with plows attached as a plowing unit, the said defendant is prohibited from placing said trade-name, corporate name, or trade-mark thereon, but may state only thereon that the same is manufactured by the *J. I. Case T. M. Company,* and in immediate connection therewith, conspicuously displayed so as to be noticed by the ordinary observer, the words "Plows attached are not the original Case plows," or, at its option, the words "Plows attached are not the Case plows made by the *J. I. Case Plow Works.*"

The sixth clause is a general clause which does not require modification or attention.

The seventh division of the judgment, embracing several clauses, relates entirely to the matter of the reception and disposal of the imperfectly addressed mail. The difficulty here is unquestionably a real one, but one for which no one now in the active management of either concern can be held to be responsible. Its foundation was laid by Mr. Case when he gave his name to the corporations located in the same city and engaged in manufacturing articles closely allied in their uses and appealing to the same general body of consumers. This difficulty also should be met by the men who have thus inherited it with fairness and an earnest attempt to solve it in a manner just to both companies. In a word, they should meet it like gentlemen, not like angry boys.

The judgment of the court below provides in substance that

all defectively addressed mail shall go from the postoffice to the *T. M. Company* and be opened by a representative of that company at 11 o'clock a. m. and at 5 o'clock p. m. in the presence of a representative of the *Plow Works,* that the distribution of the mail shall be determined by the representative of the *T. M. Company,* but that the representative of the *Plow Works* shall have full opportunity to examine and take notes from any disputed mail matter so that the court may be applied to for an order as to its disposition.

We see no valid legal objection to this portion of the judgment. Whether it will prove satisfactory in practical operation may be a more serious question. It does not conflict in any way with the determination of the postoffice department, but grasps the situation after the postal authorities have completed their work. At this point the court exerts its authority over the persons of the parties and directs what shall be done by each to insure to the other equitable and fair treatment of a troublesome and doubtful question. There is no interference with personal liberty or with the right of privacy, nor is there any violation of the constitutional provision against unreasonable searches. These ideas are mere hobgoblins conjured up by an overwrought imagination.

The case is this: The name of the addressee upon a piece of mail is a name not borne by any person or corporation. Two corporations, however, rightfully bear names very much like it. No one can tell which one the writer intended to name. The postoffice department directs that it shall be delivered to the elder institution and it is so delivered. The court, having both parties before it, now directs that after such delivery it shall be opened by the representative of the elder institution in the presence of the representative of the younger institution in order that both parties may be advised at once of the contents, and that application may be made to the court for relief in case the letter is assigned to the firm for which it was not intended. If a court of equity

cannot deal effectively with such a situation when it is involved in and is really a part of an equitable controversy of which it already has jurisdiction, it would seem to be impotent indeed. We hold that it can, and so holding we arrive at the conclusion that this subdivision of the judgment needs no modification.

After thus providing for the treatment of defectively addressed mail the court dismissed the cross-complaint of the *T. M. Company* except that it perpetually enjoined the newly organized corporation (the *J. I. Case Company*) from acting as selling agent of the *Plow Works* in the sale of tractors and tractor-drawn plows, and from selling the same on its own account. This latter provision is complained of by the said *J. I. Case Company* in a brief filed in its behalf although that company took no appeal. This right is claimed under sec. 3049*a*, Stats. (sec. 8, ch. 219, Laws 1915), by which it is provided that any respondent may have a review of rulings of which he complains by serving on the appellant, before the case is set down for argument, a notice stating in what respect he asks for review, reversal, or modification. This act went into effect September 1st of the present year and the respondent served its notice September 10, 1915, while the case had been set down for argument in the preceding August. It seems, therefore, that we might well refuse to consider the question, but we have deemed it best to give it examination to the end that there may be no ground for saying that consideration has not been given to all phases of the controversy. The contention of the *J. I. Case Company*, so called, does not make a strong appeal to the mind which is striving to look at the whole matter fairly and impartially. The company was organized hurriedly as an expedient to prevent the *T. M. Company* from changing its name and assuming the name of the *J. I. Case Company*. It was evidently intended also to serve as a means of adding still greater confusion to the mail

situation and reaping, if possible, the benefit of the confusion in the public mind as to the identity of the two senior corporations.

These objects can hardly be approved of or held to be consistent with anything like a high code of business ethics.

In view of our statute (sub. (2), sec. 1772, Stats.), which provides that the name assumed by a corporation "shall be such as to distinguish it from any other corporation organized under the laws of this state," it may well be considered as doubtful whether, under the circumstances of confusion in the public mind here present, the name *J. I. Case Company* could lawfully be adopted by any corporation. Is it such a name as will distinguish the corporation adopting it from any other corporation? Is it not, on the other hand, a name that will inevitably confuse the corporation adopting it with one, if not two, existing corporations?

These questions are not presented so that they can be authoritatively answered in this case, but we suggest them as questions for the serious consideration of all parties to this litigation.

The court was evidently of opinion that it would be unfair competition in trade for the newly organized subsidiary company, called the *J. I. Case Company,* to act as selling agent for the plaintiff in selling tractors and engine-drawn plows, and in this conclusion we concur. So far as the tractor itself is concerned, the *T. M. Company* had a perfect right to make and sell it under its corporate name and trade-mark and even under its trade-name "Case." The plaintiff company never made a tractor, and it is clear that it had no right in equity to launch a subsidiary corporation bearing a name which would at once be mistaken by the public for the defendant's name, and embark it in the tractor business as the plaintiff's agent in direct competition with the defendant. This is doing, by indirect means, just what the plaintiff claims that the

T. M. Company has done with reference to plows. "He who seeks equity must do equity" is just as good a rule now as it ever was.

There are a number of lesser contentions made which we do not deem it necessary to treat specifically. They are overruled without comment but not without having received attention.

The trial court directed in the findings that the plaintiff should recover costs against the *T. M. Company* in a sum not exceeding $500. In the judgment, signed by the trial judge himself a few days later, it was adjudged that the plaintiff recover of the *T. M. Company* "its costs which are limited to five hundred dollars ($500) and its legal disbursements made or incurred herein, amounting together to —— dollars." Three weeks later costs were taxed by the clerk at the sum of $290.88 for attorneys' fees and $858.87 for disbursements, amounting to $1,149.75 in all, and these sums inserted in the judgment. No appeal was taken from the taxation of costs.

It is now claimed that the entry of the judgment, being a ministerial act, must follow the order for judgment, which, as it is claimed, limited the costs, including disbursements, to the sum of $500.

"Costs" in its exact sense includes disbursements (sec. 2921, Stats.; *Emerick v. Krause,* 52 Wis. 358, 9 N. W. 16), but the word is not infrequently used as meaning attorneys' fees in contradistinction with disbursements, and it is very clear by the wording of the judgment in this case, signed by the judge himself, that he understood that he had used the word in this latter sense in the order for judgment. It is quite certain that the parties so understood it, for we are not informed by the appellant that any objection was made to the taxation or any review thereof asked in the trial court. When it is evident that the court used the word in this inexact but colloquial sense and that all parties understood that it was so used, we see no objection to so construing it.

By the Court.—Judgment modified as indicated in this opinion and as so modified affirmed, without costs, except that appellant is to pay the fees of the clerk of this court to be taxed.

The following opinion was filed February 1, 1916:

PER CURIAM. A motion in the nature of a motion for rehearing is made by the appellant asking that the language of the opinion be slightly changed in one particular. The opinion provides in effect that when the appellant sells or offers for sale a plow it may, under certain conditions, place at some place on the plow or on its beam a statement that it is manufactured *by* the *J. I. Case Threshing Machine Company.* The appellant calls attention to the fact that it has on hand a stock of plows manufactured for it by the Racine-Sattley Company and is under contract to purchase more plows of the same company, and that it cannot truthfully mark such plows as manufactured *"by"* it, and hence that, unless it be permitted to mark them "manufactured *for*" it, there can be no marking placed upon them at all.

It seems clear that the appellant should have the privilege suggested. The opinion is therefore amended so as to provide that the statement of manufacture above referred to may read "manufactured *for* the *J. I. Case Threshing Machine Company*" in case such be the fact. In no other respect is any change made in the opinion.

CITIZENS SAVINGS & TRUST COMPANY and another, Appellants, vs. ROGERS, Trustee, and others, Respondents.

November 16, 1915—February 1, 1916.

Banks and banking: Liquidation by commissioner of banking: Liability for rent: Offsets: Waiver: Bankruptcy: Rights of trustee: Possession of property: Surrender: Mortgagee in possession: Right to rents: Courts: Enforcing liability of commissioner of banking: Jurisdiction.

1. Where, pursuant to sec. 2022, Stats., the commissioner of banking takes possession of the property and business of a banking corporation and while liquidating its affairs occupies and uses premises of which such corporation was lessee, he is liable to pay for such use out of the funds of the corporation in his hands; and the rent stipulated in the lease fixes the measure of such liability.
2. Where at the time the commissioner took charge of an insolvent trust company a certain sum was due to the company on open account from its lessor, and thereafter the lessor became bankrupt and the commissioner and the trust company filed their claim on open account against such lessor in the bankruptcy proceedings, stating in the proof of claim that the said sum was due over and above all setoffs, they thereby waived their right to offset said sum against rent due the lessor.
3. Amounts due to the trust company as interest on a mortgage given to it by its lessor and not included in said open account might be offset against rentals up to the time the lessor became a bankrupt; but as to rents thereafter accruing the right of offset did not exist.
4. The trustee in bankruptcy of the lessor, having become vested with the title and right to possession of the building, a part of which was leased to the trust company, was entitled to the rents so long as he elected to retain possession of the building in the interest of the creditors whom he represented.
5. Where such trustee in bankruptcy afterwards elected to surrender the building to the trustee for the holders of the bonds secured by the mortgage on the building given by the bankrupt lessor, and the bankruptcy court so ordered and said trustee for the bondholders took peaceable possession without any protest from the mortgagor or its creditors, such possession entitled the trustee to collect the rents from the lessees, including the commis-

sioner of banking and the trust company whose business was being liquidated.

6. Where a mortgagee obtains peaceable possession of the mortgaged property he may retain it until his mortgage debt is paid and may collect the rentals although the rentals themselves were not specifically mortgaged.
7. The bankrupt lessor and mortgagor having had only a ninety-nine-year leasehold interest in a part of the mortgaged building, and the trustee under the mortgage, after receiving possession from the trustee in bankruptcy, having in turn surrendered said part of the building to the owners, such owners became entitled either to their share of the rent thereafter accruing under the lease to the trust company or to the reasonable value of the use and occupancy of their premises by the commissioner of banking.
8. Even assuming that the liquidation of the business of a banking corporation under sec. 2022, Stats., is not a proceeding in or under the direction of a court, but is an administrative proceeding carried on by the commissioner of banking, a court may nevertheless entertain jurisdiction of an action against the commissioner to recover a debt for which he is legally liable and which he refuses to pay.
9. Where in such a case no action was brought, but creditors proceeded by petitions in the liquidation proceeding in the circuit court and the banking corporation and the commissioner voluntarily answered and the issues raised were without objection tried on the merits, the court had jurisdiction both of the subject matter and of the parties.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Modified and affirmed.*

The Pereles Block in the city of Milwaukee is a five-story building with a frontage of sixty feet on Market Square and a depth of 120 feet on Oneida street. The *Markwells* are the owners of the north twenty feet covered by said block. The remaining portion of the block was formerly owned by the N. Pereles & Sons Company. In November, 1892, the *Markwells* leased the portion of the block owned by them to the Pereles Company and James M. Pereles for the period of ninety-nine years. In January, 1907, the Pereles Company leased to the *Citizens Trust Company* [which afterwards be-

came the *Citizens Savings & Trust Company*] the basement and first two stories of the easterly forty feet of said block for a period of twenty years. On May 1, 1909, the Pereles Company conveyed the entire block by warranty deed to the Clark Realty Company, a corporation. On May 1, 1909, the Clark Realty Company issued a trust mortgage to the *Citizens Trust Company* to secure an issue of bonds amounting to $140,000. This mortgage is now in process of foreclosure. On October 2, 1913, the commissioner of banking took charge of the property and assets of the *Citizens Savings & Trust Company* for the purpose of conserving the rights of the creditors of that institution. On February 22, 1914, the First Trust Company was appointed receiver for the Clark Realty Company, and on April 3, 1914, *Julius J. Goetz* was appointed trustee in bankruptcy for such corporation. The trustee named in the trust mortgage having become insolvent, *Fred W. Rogers* was by order of the court substituted in its stead. On March 14, 1914, the bank commissioner and the insolvent filed a claim on open account against the Clark Realty Company in the bankruptcy court for $2,186.14. *Goetz* took possession of the Pereles Block and retained the same until June 30, 1914, when he abandoned or attempted to abandon the possession of it to *Rogers*. Thereafter *Rogers* attempted to take possession of the mortgaged premises and to exercise the rights in reference to the same that might have been exercised by the Clark Realty Company had it remained solvent. In the proceeding brought to foreclose the mortgage the appointment of a receiver was asked for to collect the rents and profits, but the application was denied on the ground that the trustee was already in possession and that there was no necessity for the appointment of a receiver to protect the interests of the bondholders. On July 24, 1914, *Rogers* abandoned all claim under the mortgage to the portion of the block owned by the *Markwells*. While the deed to the Clark Realty Company and the mortgage from the Clark Realty

Company covered the entire block, the grantors in the deed had no title or interest in the north twenty feet of it except the ninety-nine-year lease referred to. After the banking commissioner took over the *Citizens Savings & Trust Company* he continued to occupy the portion of the block held under lease by that company and to use the same for the purpose of carrying on the business of liquidation down to the time of the trial. The commissioner refused to pay any rent for the use of the part of the building occupied, either to *Goetz,* the trustee in bankruptcy for the Clark Realty Company, or to *Rogers,* the substituted trustee for the bondholders. The respondent *Goetz* applied to the court for an order requiring the commissioner of banking to pay to him, for the use and benefit of the creditors of the Clark Realty Company, rental from October 2, 1913, when the trust company became insolvent, to June 30, 1914, when he elected not to treat the building in question as an asset of any value for the general creditors whom he represented. It might be said that the position of the trustee was that the property was mortgaged for very much more than it was worth and that the expenses of upkeep and looking after the building amounted to substantially as much as did the revenue derived therefrom.

The respondent *Rogers* petitioned the court for an order directing the commissioner of banking to pay him the rent accruing from and after June 30, 1914. The *Markwells* united with him in this position, claiming to be entitled to a portion of the rents accruing on the outstanding leases. *Rogers* and the *Markwells* agreed between themselves upon the division which should be made of such rents. The court made the orders prayed for, and the bankrupt trust company and the bank commissioner appeal therefrom to this court.

For the appellants there were briefs by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *C. F. Fawsett.*

For the respondents *Fred W. Rogers, Nathan M. Markwell,* and *Fannie Pereles Markwell* there was a brief by

Glicksman, Gold & Corrigan, attorneys, and *George B. Luhman,* of counsel, and oral argument by *Nathan Glicksman.*

Lawrence A. Olwell, for the respondent *Julius J. Goetz.*

The following opinion was filed December 7, 1915:

BARNES, J. The appellants insist that the court erred in holding that the commissioner of banking or the trust company was liable for rent to *Goetz* or *Rogers* or the *Markwells,* and, as subsidiary to this, in deciding (1) that the leasehold estate of the trust company became the property of the bank commissioner; (2) that the commissioner occupied the premises under the lease; (3) that *Goetz* had authority to deliver the possession of the leased premises to *Rogers;* (4) that *Rogers* succeeded to the rights of the trustee in bankruptcy; (5) that *Rogers* ever had been in possession of the premises; (6) that the right to offset indebtedness due from the Clark Realty Company to the trust company against the rent claimed did not exist; and (7) that $2,500 per year was a reasonable and fair rental for the premises occupied by the commissioner.

The commissioner of banking took possession of the property and assets of the *Citizens Savings & Trust Company* pursuant to the provisions of sec. 2022, Stats. Among other things, sub. 1 of that section authorizes the commissioner, whenever it shall appear that any bank is conducting its business in an unsafe or unauthorized manner or that its capital is impaired or that it is unsafe or inexpedient for it to continue business, to forthwith take possession of the property and business of such bank and retain such possession until the corporation shall resume business or its affairs be finally liquidated. Sub. 2 requires the commissioner to give notice of the fact that he has taken possession of the assets of the bank. Sub. 3 provides that, upon taking possession of the assets and business of the bank, the commissioner is authorized to collect moneys due to such bank and to do such other things

as are necessary to conserve its assets and business, and that he shall proceed to liquidate the affairs thereof in the manner provided. It is made the duty of the commissioner to collect debts due and claims belonging to the bank, and upon the order of the circuit court to sell or compound all bad or doubtful debts, and on like order to sell all real estate and personal property of such bank on such terms as the court shall direct. The commissioner is also authorized, when it is necessary to pay the debts of the corporation, to enforce the individual liability of stockholders. Sub. 4 provides that the commissioner may appoint one or more special deputy commissioners as agents to assist him in the duties of liquidation and distribution. And a special deputy so appointed is authorized to perform such duties connected with the liquidation and distribution as the commissioner may deem proper. The commissioner is also authorized to employ such counsel and procure such expert assistants as may be necessary in the liquidation and distribution of the assets of the bank, and may retain such of the officers or employees of the bank as he may deem necessary. Sub. 5 provides for a notice to creditors, and makes it the duty of the commissioner to object to the allowance of any claim which he deems to be unjust. Sub. 6 requires the commissioner to take an inventory of the assets of the bank and to file the same as therein directed, together with a list of all claims presented against the bank. Sub. 7 provides that compensation of the special deputy commissioners, counsel, and other employees and assistants, and all expenses of supervision and liquidation, shall be fixed by the commissioner, subject to the approval of the circuit court for the county in which the bank is located, on a notice to the bank, and shall, upon the certificate of the commissioner, be paid out of the funds of such bank in the hands of the commissioner. Sub. 8 deals with the payment of dividends. The other subdivisions of this section are not material to a consideration of the questions raised on this appeal.

It appears pretty clearly to be the intent and purpose of the statutory provisions referred to, to vest the title and right of possession to the assets and property of an insolvent bank in the banking commissioner for the benefit, primarily at least, of creditors when a situation arises which warrants the commissioner in taking action under the law and he does act under it. The commissioner is authorized to take possession of the bank assets and to collect all indebtedness due it. If recourse to a suit became necessary it would be his duty to bring it, and, we think, to bring it in his representative capacity. The statute (sub. 7) recognizes the fact that expenses must be incurred in connection with the winding up of the affairs of an insolvent bank, and so provides that the commissioner shall fix the wages of employees and all "expenses of supervision and liquidation," subject to the approval of the circuit court on notice to the insolvent bank, which expenses must be paid out of the funds of the bank in the hands of the commissioner.

The abstract question of the liability of the commissioner for rent of the premises held by him, or for use and occupancy thereof, is not involved in much doubt. The lease may have been either an asset or a liability of the trust company. It was its property in any event and nominally an asset which the commissioner took with the other property. He might repudiate it or treat it as an asset. There was no repudiation. He was obliged to have some place in which to transact the large volume of business necessarily incident to the liquidation of the affairs of the insolvent. It was just as necessary that he should have space in which to transact that business as it was that he should have employees to assist him in transacting it. He could not do the work on the street corners nor on the housetops. For reasons satisfactory to himself he elected to occupy the former quarters of the trust company, and just why he should not be compelled to pay for the use of the premises as part of the expense of administration

is not apparent to us. Rent of premises necessarily occupied is an administration expense. 34 Cyc. 352. We are speaking now of the broad proposition made by appellants' counsel that the commissioner is not liable for rent in any case where he simply makes use of the property which the insolvent bank holds under a lease. In the case of a solvent landlord this would mean that, while the commissioner could take all of the property and assets of the insolvent and use it to pay debts and expenses aside from rent, the landlord would have to look to the insolvent for his rent while the commissioner was carrying on the liquidation proceedings, or at least until he could be evicted for nonpayment. This would be an easy method of relief against the payment of rent where the commissioner was permitted to hold possession, but it is not one that would appeal to the conscience of a court of equity or find favor in a court of law unless it was found that the law as it existed was pretty clearly in harmony with the claim made. On the point under discussion the great weight of authority is to the effect that there is liability. *Nelson v. Kalkhoff,* 60 Minn. 305, 62 N. W. 335; Loveland, Bankruptcy (4th ed.) § 313, p. 647; *Woodruff v. Erie R. Co.* 93 N. Y. 609; *Cameron v. Nash,* 41 App. Div. 532, 58 N. Y. Supp. 643; *Smith v. Wagner,* 9 Misc. 122, 29 N. Y. Supp. 284; *Smith v. Ingram,* 90 Ala. 529, 8 South. 144; *Farmers' L. & T. Co. v. N. P. R. Co.* 58 Fed. 257; *Bray v. Cobb,* 100 Fed. 270; *In re Frazin,* 174 Fed. 713; *Dayton H. Co. v. Felsenthal,* 116 Fed. 961, 965, 968; *Link Belt M. Co. v. Hughes,* 174 Ill. 155, 51 N. E. 179; *Atchison, T. & S. F. R. Co. v. Hurley,* 153 Fed. 503; *U. S. T. Co. v. Wabash R. Co.* 150 U. S. 287, 14 Sup. Ct. 86; *DeWolf v. Royal T. Co.* 173 Ill. 435, 50 N. E. 549; *Spencer v. World's C. Expo.* 163 Ill. 117, 45 N. E. 250.

There are cases which hold that the officer in charge is liable for the reasonable value of the use of the property, and not the sum stipulated in the lease. *Stoepel v. Union T. Co.*

121 Mich. 281, 80 N. W. 13; *Bell v. American P. League,* 163 Mass. 558, 40 N. E. 857; *In re Grignard L. Co.* 155 Fed. 699; *In re Sherwoods,* 210 Fed. 754; *In re J. Frank Stanton Co.* 162 Fed. 169; *In re Adams C., S. & F. House,* 199 Fed. 337; *Carswell v. Farmers' L. & T. Co.* 74 Fed. 88.

The decided weight of authority, however, is to the effect that the rent stipulated in the lease fixes the measure of liability, and we deem this to be the correct rule.

The cases cited did not involve bank commissioners acting under statutes like ours, but dealt with the liability of receivers of insolvent corporations, trustees in bankruptcy, and the like. Appellants argue that the obligations of such are different from those of the bank commissioner, who is a state officer performing statutory duties and subject to statutory liabilities only. We neither accept nor reject this somewhat narrow view of the duties and functions of the commissioner. Conceding them to be correct, he has under the statute the power, and it is, we think, his duty, to provide a place in which to transact his business where the insolvent does not own one, and it necessarily follows that the expense thereof is one of administration for which the commissioner is just as much liable as would be a receiver or trustee in bankruptcy. Whether the cases be strictly on all-fours with the one before us or not, they deal with analogous situations. The law implies a promise to pay for the use of room which was necessary for the transaction of the business which the commissioner was called upon to transact.

Taking up the other contentions of the appellants, the time for which rent was allowed should be divided into three periods: first, from October 2, 1913, when the commissioner took over the property of the trust company, to February 2, 1914, when the landlord, the Clark Realty Company, was adjudged a bankrupt; second, the period from February 2, 1914, to June 30, 1914, at which latter date the trustee in bankruptcy of the lessor elected to surrender possession of the

Pereles Block to the trustee of the bondholders; and third, the period of nine months from and after June 30th, for which the trustee of the bondholders was permitted to recover rent.

When the banking commissioner took charge of the insolvent trust company there was due the latter on open account from its landlord $2,186.14. There was also a mortgage indebtedness amounting to $73,500, falling due in 1915, on which interest had been paid to May 1, 1913. Thereafter the semi-annual instalments of interest were not paid. There became due on account of interest the sum of $1,837.50 on November 1, 1913, and a like sum every six months thereafter, as we understand the testimony.

The appellants insist that they had a right to offset these sums against any rent that might be due the lessor or its successors in interest, and that this right of setoff is superior to the right of all of the parties who are seeking to compel the payment of rents. The commissioner and the insolvent trust company filed their claim on open account against the Clark Realty Company in the bankruptcy proceedings involving that company. The proof of claim which was verified by the joint claimants stated that the amount claimed was due over and above all setoffs. The trial court was of the opinion that the claimants elected to claim the entire indebtedness in the bankruptcy court and had therefore waived their right to make the offset now claimed. Conceding this to be true as to the claim on open account, we do not see how it can affect the right of offset against the sums due for interest. The Clark Realty Company was entitled to the rent which accrued up to February 2, 1914, when it went into bankruptcy. At this time it was owing the trust company over $1,800 interest money. If the trust company was solvent there would be no doubt about the right to make the offset. *Jones v. Piening,* 85 Wis. 264, 55 N. W. 413; *Pendleton v. Beyer,* 94 Wis. 31, 68 N. W. 415; *Merchants' Exch. Bank v. Fuldner,* 92 Wis.

415, 66 N. W. 691. We do not see how this right has been lost because of the insolvency of the trust company, and we hold that the appellants had the right to offset amounts due for interest against rentals up to the time the Clark Realty Company became a bankrupt.

As to rents accruing after the Clark Realty Company went into bankruptcy, it would seem clear that the right of offset did not exist. The rights of its creditors then became fixed, and they were entitled to have the rents accruing thereafter impounded by the trustee in bankruptcy so that the same might be applied in settlement of their claims. *Johnston v. Humphrey,* 91 Wis. 76, 80, 64 N. W. 317; *Oatman v. Batavian Bank,* 77 Wis. 501, 503, 46 N. W. 881; *Jones v. Piening, supra; McLaughlin v. Winner,* 63 Wis. 120, 23 N. W. 402; 1 Loveland, Bankruptcy (4th ed.) § 320. The trustee of the bankrupt became vested with its title and right of possession in the Pereles Block. Sub. 5, sec. 70, Bankruptcy Act; Collier, Bankruptcy (10th ed.) pp. 1004, 1005. The trustee had a reasonable time in which to decide whether this block was an asset or a liability. It was his duty to take it over with the other assets of the bankrupt. If satisfied, after a full investigation, that the interests of the creditors whom he represented would best be subserved by abandoning the property, he might, with the consent and approval of the court, do so. In the meantime he was obliged to supply fuel, provide janitor service, make necessary repairs, and to assume a part of the obligations incidental to ownership, and it is pretty clear that he was entitled to the rents so long as he elected to take and retain possession of the property in the interest of the creditors whom he represented. To hold that his surrender of possession related back to the time he took it would cast upon the bankrupt estate the burdens of maintenance while possession was held without participation in the benefits, which would be manifestly unfair to the creditors of the Realty Company. *Equitable L. & S. Co. v. R. L. Moss & Co.* 125 Fed. 609; *In re Frazin,* 183 Fed. 28.

The sum of $1,875 was allowed on the petition of *Rogers*, trustee for the bondholders. He predicates his claim on the fact that he was a mortgagee in possession of the premises. When *Goetz* abandoned the premises with the consent of the bankruptcy court, that court made an order directing that the possession of the premises be surrendered to *Rogers* as trustee. Thereafter *Rogers* exercised the dominion and control over the property that is usually and ordinarily exercised by a landlord. He employed janitors, provided fuel and elevator service, and performed the duties of landlord toward the various lessees who occupied the building. He collected rents from the tenants of the building, excepting the commissioner of banking and the *Citizens Savings & Trust Company*, and all this was done without any protest on the part of the Clark Realty Company or any of its creditors. Neither the Clark Realty Company nor its representatives made any claim to the rents after possession was surrendered by their trustee, and they are not now making any claim to the rents involved in this proceeding. We cannot agree with counsel for the appellants in the contention that *Rogers* was not in possession of the premises after July 1, 1914. It is also claimed that the bankruptcy court had no power to order the trustee, *Goetz*, to deliver possession of the premises to *Rogers*. The important fact perhaps is that *Rogers* got peaceable possession, if not with the express consent of the mortgagor, at least without the slightest protest on its part. Neither do we see how this order can be treated as a mere nullity and subject to a collateral attack. Counsel further argue quite strenuously that a mortgagee in possession is not entitled to the rents of a property which he has possession of, and that such rents belong to the mortgagor and that he can be deprived of them through foreclosure proceedings only and by the appointment of a receiver in such proceedings who is directed by the court to collect the rents and apply them in payment of the mortgage indebtedness. It might be here remarked that it is not the mortgagor who is making this claim,

but a third party whose duty it is to pay rent, and it might well be said, under the circumstances here existing, there having been assent and acquiescence on the part of the mortgagor and its representatives in the action taken by the trustee named in the mortgage, that a tenant could not successfully contest the payment of rent to the trustee in possession. However this may be, we think that the mortgagee in possession is entitled to collect the rents accruing on the mortgaged property and to apply them in settlement and satisfaction of the mortgage debt. This was the conclusion reached by the trial court, and it was because of this conclusion the appointment of a receiver was refused. Some authorities hold that a receiver will not be appointed where a mortgagee is in possession of mortgaged property and caring for it and receiving rents. 27 Cyc. 1626; *Sleeper v. Iselin & Co.* 59 Iowa, 379, 13 N. W. 341; *Cummings v. Cummings,* 75 Cal. 434, 17 Pac. 442. The facts in the case show that the mortgage security is worth very much less than the amount due on the outstanding bonds secured by the mortgage.

This court has frequently held that when a mortgagee obtains peaceable possession of mortgaged property he may retain such possession until his mortgage debt is paid. *Hennesy v. Farrell,* 20 Wis. 42; *Stark v. Brown,* 12 Wis. 572; *Gillett v. Eaton,* 6 Wis. 30; *Tallman v. Ely,* 6 Wis. 244; *Brinkman v. Jones,* 44 Wis. 498, 512. If this right of possession does not carry with it the beneficial use of the mortgaged property it is a barren right indeed, and we hold that peaceable possession carries with it the right to collect rentals although the rentals themselves are not specifically mortgaged.

It was said in *Schreiber v. Carey,* 48 Wis. 208, 214, 215, 4 N. W. 124, although not essential to a decision in the case, that a mortgagee in possession was entitled to apply the rents and profits which can be derived from such possession to the discharge of his debt. The cases are generally to the effect

that where a mortgagee in possession does collect rent he is entitled to apply it on the mortgage debt. 27 Cyc. 1250. The fact that a tenant may refuse to pay cannot change this rule, and it has been held that under the general doctrine of equity the right to rents is vested in the mortgagee in possession. *Huguley Mfg. Co. v. Galeton C. Mills,* 94 Fed. 269, 36 C. C. A. 236.

As to the *Markwells* the situation is this: The Pereles Company had a ninety-nine-year lease of this interest, which passed to the Clark Realty Company by a warranty deed covering the leased premises. The Clark Realty Company becoming insolvent, its interest in the leased premises became vested in its trustee in bankruptcy. Such trustee, not considering the interest of the insolvent in this property to be an asset, abandoned it and turned the possession of it over to the trustee of the mortgage. The trustee in the mortgage, acting in behalf of the bondholders whom he represents, has elected to claim no interest in that part of the mortgaged premises covered by the ninety-nine-year lease, and in turn surrendered the possession of the property covered by this lease to the owners on August 1, 1914. So there is no one in existence from whom the *Markwells* can collect anything for the use and occupancy of their premises except those who are actually occupying them, unless it be the *Citizens Savings & Trust Company,* now bankrupt, who is the assignee of their lessee, the Pereles Company. If this latter is their only remedy, then they may have no remedy at all except foreclosure and eviction. The *Markwells,* however, are the owners of the premises and have all the possession and right of possession which inheres in a landlord, and we think they are entitled to either the rent stipulated in the existing lease to the trust company or to the reasonable value of the use and occupancy of the premises, which in this case, under the findings of the court, amounts to the same thing. The finding that the premises occupied by the commissioner were worth

the rent stipulated in the lease under which the trust company held is sustained by the evidence.

A question of jurisdiction is also raised. It is said that the liquidation of the business of an insolvent bank under sec. 2022 is not a proceeding in or under the direction of a court, but an administrative proceeding carried on by a state officer who is empowered and directed to refer certain legal questions arising in the course of administration to the courts. This contention, if correct, does not prevent the courts from entertaining jurisdiction of an action against the commissioner to recover a debt for which he is legally liable and which he refused to pay. No action was brought in the present instance, the respondents having proceeded by petitions in the liquidation proceedings in the circuit court. The appellants answered such petitions, and the issues raised were without objection tried on the merits. The court certainly had jurisdiction of the subject matter of this controversy over rent, and the parties by their voluntary appearance conferred jurisdiction over their persons. However broad the powers of the banking commissioner may be, his decision that he does not owe a just claim made against him is not final.

As to the respondents *Rogers* and the *Markwells* the order appealed from is affirmed. As to the respondent *Goetz* the order appealed from is modified by reducing the recovery from $1,868.13 to $1,027.77, and as so modified the order is affirmed. Costs are allowed to the respondents *Rogers* and the *Markwells*. Costs are allowed in favor of the appellants and against the respondent *Goetz* for one half of the taxable disbursements on the appeals and $25 attorneys' fees.

By the Court.—It is so ordered.

A motion for a rehearing was denied, with $25 costs, on February 1, 1916.

ZAREMBA, Respondent, vs. INTERNATIONAL HARVESTER CORPORATION, Appellant.

November 17, 1915—February 1, 1916.

Life insurance: Employees' benefit association: Contract barring remedy in courts: Validity: Public policy.

1. Provisions in an insurance contract made with an employees' benefit association whereby the beneficiary is debarred from any remedy in the courts and must accept as final the settlement or decision made by the superintendent of the association, or by the board of trustees upon appeal, are void as against public policy.
2. A controversy as to contract rights between the association and a beneficiary under a benefit certificate cannot be considered as one of the internal affairs of the association as to which the decision of the tribunals of the association may be made conclusive upon the members.
3. A beneficiary who, upon the death of a member, made claim to the superintendent in order to prevent the benefit from lapsing, might decline to appeal from his adverse decision to the board of trustees and might lawfully resort to the courts, disregarding the provisions of the contract which attempted to take away that remedy.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

The action is to recover death benefits upon a certificate of membership in an unincorporated employees' benefit association composed of employees of the defendant corporation. The plaintiff is the beneficiary named in the certificate and is the widow of Frank Zaremba, a member of the association in good standing, who died July 16, 1912. The defendant, for the purposes of the action, admits that it has assumed liability to pay any sum which may be legally due on the certificate. The action was brought and tried in the civil court of Milwaukee county. Two defenses were relied on, viz.: (1) that the death of the insured resulted from the immoderate use of intoxicating liquors, and (2) that by the terms of

the contract the plaintiff should have exhausted her remedy before the tribunals of the association. The jury found against the defendant on the first issue and the court held against it on the second issue, and judgment was rendered by the civil court for the plaintiff for the amount of the death benefits, viz. $939.31 and costs, which judgment was affirmed upon appeal to the circuit court, and the defendant appeals.

For the appellant there was a brief by *Flanders, Bottum, Fawsett & Bottum* and *David A. Orebaugh,* attorneys, and *Edgar A. Bancroft* and *Philip S. Post,* of counsel, and oral argument by *C. F. Fawsett.*

Charles E. Hammersley, for the respondent.

The following opinion was filed December 7, 1915:

WINSLOW, C. J. The judgment must be affirmed under the principles laid down by this court in *Fox v. Masons' F. A. Asso.* 96 Wis. 390, 71 N. W. 363.

In the present case the application for insurance provided that if proper claim were not made to the superintendent of the association within one year after the death of the insured the death benefit should lapse, and, further, that both the insured and the beneficiaries should be governed by the rules of the association providing for a *final and conclusive* settlement of all claims for benefits by reference to the superintendent of the association and an appeal from his decision to the board of trustees of the association. The rules referred to provided that all controversies as to any claim for benefits should be submitted to the said superintendent, whose decision should be final and conclusive unless a written appeal be taken therefrom to the board of trustees, whose decision should be final and conclusive.

It is very plain that the result of the foregoing provisions taken together is to oust the courts of jurisdiction over the whole subject matter of disputed claims for death benefits. If no claim is presented to the superintendent the benefit

lapses; if the claim be presented to the superintendent the claimant must accept the decision of the superintendent (or of the board of trustees upon appeal) as final and conclusive. In either event the beneficiary is, by the terms of his contract, debarred from any remedy in the courts. This court has held that such a contract is void as against public policy. *Fox v. Masons' F. A. Asso., supra.*

This principle is not in the least affected or shaken by the companion principle that in the administration of the internal affairs of a corporation the decisions of the tribunals of the association within their own proper sphere, if not violative of law, may be made conclusive as to the members of the corporation. *Loeffler v. Modern Woodmen,* 100 Wis. 79, 75 N. W. 1012; *Bartlett v. L. Bartlett & Son Co.* 116 Wis. 450, 93 N. W. 473. A controversy as to contract rights between the association and a beneficiary under a benefit certificate cannot be considered as one of the internal affairs of the corporation.

Nor does it matter that the beneficiary made application for payment of the claim to the superintendent and, upon his adverse decision, declined to go further. She was obliged to make the claim to the superintendent or the death benefit would lapse. Having done this, she might lawfully resort to the courts and disregard the provisions which attempt to take away that remedy.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on February 1, 1916.

STATE EX REL. WISCONSIN TRACTION, LIGHT, HEAT & POWER COMPANY, Plaintiff in error, vs. CIRCUIT COURT FOR WINNEBAGO COUNTY, Defendant in error.

November 18, 1915—February 1, 1916.

Certiorari: *Jurisdiction: Public utilities: Indeterminate permits: Condemnation of "existing plant" operated in conjunction with utilities in other cities.*

1. Absence of legal right on the part of a city to condemn the plant of a public utility therein goes to the jurisdiction of the circuit court to entertain an action brought by the city for that purpose under sec. 1797*m*—80, Stats. 1913, and *certiorari* will lie to review the court's proceeding.
2. Under sec. 1797*m*—77, Stats. (by which licenses, permits, and franchises granted to public utilities before the Public Utility Law took effect were converted into indeterminate permits), and sec. 1797*m*—80 (prescribing the method to be pursued by a municipality in acquiring by condemnation an existing plant operated under an indeterminate permit provided in sec. 1797*m*—77), municipalities have, by necessary implication, the power to condemn such existing plants, although that power is not expressly granted.
3. Where, before the Public Utility Law took effect, a city had granted to a corporation a franchise to furnish light and power to its residents, such grant constituted the corporation a public utility and a separate entity in that city, even though the operating power was procured from a source outside of the city which also furnished power to other utilities owned by the same corporation in other cities.
4. The franchise in such case having become an indeterminate permit under sec. 1797*m*—77, Stats., the city might, under sec. 1797*m*—80, condemn the existing plant therein, irrespective of the fact that it was owned or operated in conjunction with other utilities.

CERTIORARI to review a judgment of the circuit court for Winnebago county: BYRON B. PARK, Judge. *Writ quashed.*

Pursuant to sec. 1797*m*—80, Stats. 1913, the city of Menasha brought an action in the circuit court to determine the necessity of taking the public utility plant of the *Wisconsin*

Traction, Light, Heat & Power Company located in said city. The jury found that public necessity required the taking and a judgment in accordance with the verdict was entered. To review such judgment the defendant obtained a writ of *certiorari.*

For the plaintiff in error there were briefs by *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *James D. Shaw.*

For the defendant in error there was a brief by *D. K. Allen,* attorney, and *Silas Bullard* and *John C. Thompson,* of counsel, and oral argument by *Mr. Allen* and *Mr. Thompson.*

The following opinion was filed December 7, 1915:

VINJE, J. The defendant owns an electric power plant at Appleton which furnishes that city with street lighting and the residents thereof with light and power. It provides the same service for Neenah. In Menasha it furnishes the residents with light and power. Its franchise for so doing was granted it by the city in 1904. In 1911 by force of sec. 1797*m*—77, Stats., such franchise became an indeterminate permit. The power plant at Appleton is ample to furnish all the electric power needed for the purposes above specified. The city of Menasha is seeking to condemn the property of the defendant located within its corporate limits actually used and useful for the convenience of the public. It does not contemplate taking power from the Appleton plant as it has a power plant of its own. The defendant claims that the city cannot dismember its plant and take only a portion thereof; that under the Public Utility Law, and especially by force of secs. 1797*m*—76 and 1797*m*—78, only the municipality in which the major part of the property of the utility lies can purchase or condemn, and since the major portion of defendant's property lies in Appleton, only about one fifth of it being in Menasha, Appleton is the only city that can condemn. If

this be true the contentions go to the right of the city to condemn and to the jurisdiction of the court to entertain the action, and *certiorari* will lie to review the court's proceeding.

Sec. 1797*m*—76 provides that every license, permit, or franchise thereafter granted shall have the effect of an indeterminate permit and shall be "subject to the provision that the municipality in which the major part of its property is situate may purchase the property of such public utility."

Sec. 1797*m*—78 provides that every public utility accepting an indeterminate permit thereafter granted shall "be deemed to have consented to a future purchase of its property actually used and useful for the convenience of the public by the municipality in which the major part of it is situate."

Sub. 4, sec. 1797*m*—79, gives any municipality the power to acquire by purchase the property of any public utility operating under any voluntary indeterminate permit. It does not cover the case of a utility operating under an indeterminate permit created by sec. 1797*m*—77. This subdivision and the two previous sections mentioned relate to what may be termed sales of the properties of public utilities to which they consented upon accepting an indeterminate permit and which they are compelled to make.

Sub. 2, sec. 1797*m*—79, gives any municipality the power to purchase, by agreement with any public utility, any part of any plant. This refers to a voluntary sale which the utility is not required by law to make. The subsection merely empowers a municipality to make such a purchase if the utility is willing to sell. These statutes were all a part of the original Public Utility Law, ch. 499, Laws of 1907, and they are the only ones that confer upon municipalities the power to purchase.

Under the original law owners of franchises were not compelled to surrender them for an indeterminate permit. The legislature, therefore, contemplating that municipalities might desire to acquire the property of a utility operating

under an original franchise, or without permit, granted to them, by sub. 3 of sec. 1797*m*—79, the power of condemning such utilities. And in secs. 1797*m*—80 *et seq.* they prescribed the method of so doing.

Sub. 1, sec. 1797*m*—79, gave municipalities the power to construct and operate a plant or any part thereof.

These provisions of the original Public Utility Law empowered municipalities (1) to construct and operate a plant or any part thereof, (2) to purchase by agreement with a public utility any part of its property, (3) to purchase the plant of any public utility operating under an indeterminate permit, and (4) to condemn the property of a public utility not operating under an indeterminate permit, or operating without a permit. The scheme of acquisition as the law then stood was apparently complete. But in 1911 the legislature by ch. 596, now sec. 1797*m*—77, *in invitum,* converted every license, permit, or franchise granted prior to July 11, 1907, into an indeterminate permit with all its powers and limitations except as provided by sec. 1797*m*—80. The first sentence of this section was amended by striking out the words "a license, permit or franchise existing at the time this act took effect" and substituting in their place the words "an indeterminate permit provided in section 1797*m*—77," making the section read, "If the municipality shall have determined to acquire an existing plant then operated under an indeterminate permit provided in section 1797*m*—77, . . . such municipality shall bring an action," etc. It is evident that upon all franchises becoming indeterminate permits by force of sec. 1797*m*—77 there remained nothing upon which sub. 3, sec. 1797*m*—79, could act except public utilities operating without a permit or franchise. That the legislature so understood is evidenced by the fact that they struck out of sec. 1797*m*—80 the words above referred to, which obviously related to sub. 3, sec. 1797*m*—79, and substituted in their place apt words referring to sec. 1797*m*—77. The latter section

as it appears in the Statutes of 1913 was first enacted in 1911. But in amending sec. 1797*m*—80 to correspond with the provisions of sec. 1797*m*—77 they apparently overlooked the fact that the express power of condemnation granted to municipalities by sub. 3, sec. 1797*m*—79, no longer had anything to act upon except public utilities without any permit or franchise whatsoever. But that the legislature considered that municipalities had the power to condemn the property of public utilities having indeterminate permits forced upon them by sec. 1797*m*—77 is evident from the language of that section taken in connection with sec. 1797*m*—80. The latter section specifically provides the method to be pursued in condemning the property of a utility acquiring an indeterminate permit by force of sec. 1797*m*—77. To say that they provided the procedure to be followed and withheld the power would be absurd. The two sections by necessary implication grant the power. Singularly enough sec. 1797*m*—80 as it stood originally and as now amended does not in terms provide the procedure for condemning a utility operating without any permit or franchise.

Since this proceeding does not come under sub. 4 of sec. 1797*m*—79 or under any part of the statute dealing with a purchase by consent under a voluntary indeterminate permit, secs. 1797*m*—76 and 1797*m*—78, so much relied upon by defendant, do not appear to throw much light upon the question to be determined, namely, Can the plaintiff condemn the property of the Menasha public utility located within the corporate limits of that city? Sec. 1797*m*—80 provides for the condemnation of an existing plant then operated under an indeterminate permit provided in sec. 1797*m*—77. The existing plant here spoken of is the existing plant of a public utility operating under a compulsory indeterminate permit. Sec. 1797*m*—1 defines a public utility as used in the statute to "mean and embrace every corporation, company, individual, association of individuals, their lessees, trustees, or re-

ceivers appointed by any court whatsoever, and every town, village, or city that now or hereafter may own, operate, manage, or control any plant or equipment or any part of a plant or equipment within the state, for the conveyance of telephone messages or for the production, transmission, delivery, or furnishing of heat, light, water, or power either directly or indirectly to or for the public, or that now or hereafter may own, operate, manage, or control any toll bridge wholly within the state." It follows from this definition that the property or plant of a public utility may consist of a part of a plant as the word "plant" is used when meaning a physical operating unit consisting of one or more parts. When in 1904 the city of Menasha granted a franchise to defendant to furnish commercial lighting and power to its residents, such grant constituted the defendant a public utility in Menasha. The fact that it was already one elsewhere or became one later is immaterial. The Menasha public utility thus created was an entity though owned and operated in connection with other public utilities. The change of its franchise to a compulsory indeterminate permit did not affect its separate entity. It is still a public utility in Menasha, and it is the property of that utility the city is seeking to condemn. The fact that the defendant operated another utility in Appleton and another in Neenah does not affect the separate entity of the Menasha utility. Nor does the fact that the Menasha utility gets its current from the Appleton utility, though the owner of both is the same, change the situation. So far as the record discloses, the plaintiff is seeking to condemn all the property belonging to the Menasha utility, but it does not propose to secure its current from the same source. It intends to generate its own current instead of buying it from the Appleton utility as the Menasha utility has heretofore done. For whatever may be the terms and conditions upon which the current has heretofore been supplied to the Menasha utility, the transaction amounts to a purchase by the latter and must

be so considered in rate-making for the Menasha utility. Defendant fails to distinguish between the property belonging to several utilities and that belonging to one. The distinction is as vital when there is one owner of all as it is when there are separate ownerships. The statute deals with the property of a utility as an entity, and such property is subject to condemnation separately though used and owned in connection with that of other utilities. The construction placed upon the statutes by defendant would render it impossible for a municipality to condemn a utility serving it if the owner thereof owned or operated utilities in other cities in the aggregate larger than that sought to be condemned, which were connected with such utility by a common power plant or otherwise. Under such a construction public utilities in a dozen or more cities served by a power station located in the country could never be condemned by the municipalities which they serve because the major portion of their property would not be situate therein. At the time the Public Utility Law was passed it was common knowledge that a central power plant often supplied two or more utilities in different municipalities. The law did not intend to and did not put such utilities upon a different basis as to condemnation than those having their own power plants, and hence it provided that the existing plant of any utility may be separately condemned irrespective of its physical connection with other utilities. Under the old law utilities were granted franchises by municipalities; under the present law they are granted certificates of convenience and necessity by the railroad commission. Each when operating under its grant or the substituted indeterminate permit constitutes a complete separate public utility subject to condemnation by the municipality originally granting the franchise or for which the certificate of convenience and necessity was granted, irrespective of the fact that it may be owned or operated in conjunction with other utilities. Any other construction would nullify the statutory definition of a public utility. It follows that the city of

Menasha, herein called the plaintiff, has the power to condemn as proposed and that the writ of *certiorari* must be quashed. Plaintiff is entitled to costs against the relator, herein called the defendant.

By the Court.—Writ quashed.

A motion by the plaintiff in error for a rehearing was denied February 1, 1916, and the following opinion was filed February 4, 1916:

PER CURIAM. Upon the motion for a rehearing our attention is called to the use of the word "franchise" in the sentence of the opinion stating that "When in 1904 the city of Menasha granted a franchise to defendant to furnish commercial lighting and power to its residents, such grant constituted the defendant a public utility in Menasha," and it is pointed out that such use is incorrect because the franchise is granted by the state and not by the city. No question as to the source of the franchise was in the case and hence the use of the term could not mislead in that respect. Moreover, sub. 7 of sec. 1778, Stats., says, "No corporation to build and operate electric light system or systems for the transmission of steam or hot water for heat, shall have any right hereunder in any city or village until it has obtained a franchise from such city or village, as now provided by law." The word was used to denote this grant from the city called a franchise in the statute itself. It was not intended to indicate that the original source of defendant's franchise was the grant from the city and not that from the state.

The defendant came under the provisions of the indeterminate permit by operation of law. A question is suggested as to its right to recover damages due to a severance of its property heretofore operated together. It is claimed that a denial of such right deprives defendant of its property without due process of law. The opinion was purposely silent upon this question because it was not before us for adjudication.

The motion for a rehearing is denied with $25 costs.

RHEINSCHMIDT, Appellant, vs. CITY OF TOMAH, Respondent.

November 19, 1915—February 1, 1916.

Municipal corporations: Injury from defect in footpath: Duty to keep in repair: Questions for jury: Sufficiency of pathway: Contributory negligence: Momentary forgetfulness of known defect.

1. Although the sidewalk area along a public street has not been prepared by the city for public travel, long-continued use of it for such travel imposes upon the city a responsibility in respect thereto practically the same as if it were a prepared way.
2. In an action for injuries sustained by falling into a depression in what had been a footpath along a public street, the evidence as to the size and shape of the depression and its relation to a new pathway which had been made around it is *held* to make it a jury question whether the traveled way was reasonably suitable for public use.
3. Although plaintiff knew of the depression or hole into which he fell, his contributory negligence was also a question for the jury, it appearing that the accident happened at night when he suddenly met a person coming from the opposite direction, and his testimony being that he momentarily took his mind off the subject of the defect and stepped to the right to give the oncoming person the right of way, and that in doing so he went into the hole.
4. The presumption of contributory negligence arising in case of an injury sustained through failure to avoid a known defect in a street is rebuttable, and a showing of any reasonable excuse for forgetfulness is sufficient to make the question one for the jury.

APPEAL from a judgment of the circuit court for Monroe county: E. C. HIGBEE, Circuit Judge. *Reversed.*

Action to recover compensation for a personal injury.

The claim of the plaintiff was that in the defendant city a public street, known as Williams street, near its intersection with Clark street, for more than a year prior to October 20, 1913, on the south side thereof, used by pedestrians, had been unsafe for persons in the exercise of ordinary care by reason of there being a depression in the footway from eight to fourteen inches deep and twelve to eighteen inches wide; that

such condition had been known to the defendant's officers for a long time before the occurrence complained of; that on such day, plaintiff, while traveling along the footway in the exercise of due care, stepped into such depression, causing him to fall and fracture his right leg. The facts so claimed were duly pleaded with all the conditions precedent to the right to maintain an action to recover compensation for the injury.

The claim of the defendant was that there was no depression in the footway where plaintiff was injured, rendering it unsafe for use by travelers in the exercise of ordinary care; that plaintiff did not exercise such care, and that his fault resulted in the injury.

The evidence established the claim that plaintiff fell by stepping into a depression in the footway at the place alleged and was thereby seriously injured in his right leg, and that the accident occurred in the nighttime when it was too dark to enable one to observe the defect with reasonable distinctness. He testified that there was a "dug-out" in the footway several feet long with a couple of drops in it, making a hole at the deepest place eight, nine, or ten inches deep, and that people were accustomed to walk around it to the south; that he did so on the occasion in question; that he was familiar with the defect and was looking for it, but, upon meeting a person coming from the opposite direction, he momentarily took his mind off the subject in stepping aside to give way for such person to pass, and, in doing so, he went into the hole, fell upon his knee and received the injury. The person who was present when the accident occurred testified that the defect had existed for more than a year; that he stepped into the depression once himself and received an injury; that he measured the depth of the depression on the side plaintiff traveled and found it to be six inches at the first step down, increasing to nine and then to twelve inches; that the width was twenty inches, and that the "dug-out" was caused by travel and washing. There was other evidence to the same

effect. There was a photograph of the premises indicating that the depression was, as testified to by the witnesses, several feet long with a slope on the south side. There was evidence by a surveyor that he examined and platted the premises some time after the accident. The result of his work was allowed in evidence against objection. Whether the conditions were the same when he did his work as when the accident occurred was disputed. He claimed that the bottom of the pathway was smooth through the depression; that it was well tracked and was used, in the main, for travel; that the south side sloped, and that there was some evidence of travel around the depression on such side. The evidence indicated that the sidewalk area had never been improved; that travelers had made for themselves a pathway, and that when it became worn by travel or washing they diverged around the place.

The cause was submitted to the jury with the following result: The traveled foot-path was insufficient for public use by persons in the exercise of ordinary care. Such conditions had existed for such length of time prior to the accident that defendant's officers, in the exercise of reasonable diligence, should have discovered and remedied the same. Such defective condition was the proximate cause of the injury. Plaintiff was not wanting in ordinary care which contributed to the injury. It will require $1,000 to compensate plaintiff for the injury.

On motion the answers were changed so as to find the pathway free from actionable defect and the plaintiff guilty of contributory negligence. The motion was granted and on the first point upon this theory: All the evidence, when rightly understood, is in substantial harmony as regards the condition of the place where the accident occurred. The street was not much used. No sidewalks had ever been constructed. The pathway along the south side of the street sloped for a distance of some eighteen feet to the intersecting street. The

bottom of the old path was substantially uniform. The width of it varied from seventeen inches to two feet. The greatest depth of the center of the path below the side on the south was 11.64 inches and the drop at that part was on a slope of one foot and a half. If the plaintiff stepped off into the depression where it was the deepest, he must have taken a long side-step. If it occurred within four feet of the intersection of the pathway with the cross street, the drop was less than two inches. Such condition under such circumstances, the court thought, does not warrant a finding that the street was actionably defective.

Judgment was rendered, dismissing the action with costs.

For the appellant there was a brief by *Donovan & Gleiss,* attorneys, and *Grady, Farnsworth & Kenney,* of counsel, and oral argument by *W. H. Farnsworth* and *Timothy J. Donovan.*

For the respondent there was a brief by *Naylor & McCaul,* and oral argument by *W. B. Naylor.*

The following opinion was filed December 7, 1915:

MARSHALL, J. Was the trial court clearly wrong in holding that a jury could not justly find that the traveled way in question was not reasonably suitable for public use?

It is not often that a decision by the trial court that the evidence does not present a jury question is disturbed on appeal, and that is so, in the main, because of the superior facilities possessed by such judge for understanding the exact situation required to be dealt with. That advantage is more or less helpful according to circumstances. In this case it is not particularly significant since there is no considerable conflict in the evidence, as the trial court held, and the pictorial representation of the place of the accident, affords us about as good an opportunity as such judge had for understanding the evidence.

It must be conceded that there was ample evidence tend-

ing to prove that the sidewalk area which had been used for years was defective, in that the old pathway had been excavated by wear and washing so that, at one point, the track was eleven inches or more below the surface of the ground on the south side, and the depth varied each way from the deepest place until at a few feet therefrom it coincided with the general level. Whether the bottom of the depression was smooth or there were steps in it caused by washing, was disputed, though there was evidence tending to prove the latter and it was corroborated by evidence that the conditions was such that a new pathway had been made around the depression which had been used for a long time and was so close thereto that a side-step by one traveling thereon was liable to cause him to stumble or step into it. Let it be conceded that the side of the depression sloped from the brink to the bottom, as the trial court suggested, and the photographs introduced in evidence support, yet, it is not at all unlikely that, in case of a person using the diverging pathway in the nighttime and being required to step aside to allow another coming from the opposite direction to pass him, he would naturally reach so far down the side of the slope as to momentarily lose control of his movements and fall. The plaintiff did so, and received the injury complained of. Other persons had previously met with somewhat similar difficulties and the condition which caused the same had existed for a long time.

The trial judge appears to have given rather too much significance to evidence that the bottom of the old pathway was smooth and some eighteen inches aside from the traveled way around it, so that one walking on the latter, would have to take quite a wide side-step to reach the former. A moderate side-step, seemingly, would be sufficient, in the nighttime, as before suggested, to start one, uncontrollably, into the depression, as there is evidence to indicate, was what happened in the particular case.

Now, in view of the fact that it was the duty of the re-

spondent to keep the traveled way reasonably safe for use by night as well as by day, and the peculiar situation rendering it probable that, in the nighttime, a person might fall into the depression in the old pathway, as appellant did, it seems quite clear that the trial court was wrong in holding that there was no foundation in the evidence for the jury finding that the way was not reasonably safe for public use. The judge seems to have given too much significance to the circumstance that the sidewalk area had not been prepared by the municipality for public travel, and was not used to any great extent. It was a proper place for such travel and had been used therefor a long time. Therefore the responsibility in respect thereto was practically the same as if it had been a prepared way. *James v. Portage,* 48 Wis. 677, 5 N. W. 31. It was there held that customary use of one side of a street as a footway imposes on the municipality in which it is situated the duty to keep it in a proper state of repair and that, if the same becomes "so defective as to render travel over the same unsafe, and the city takes no measures to warn the public against using the footway, the city becomes liable to any traveler who may suffer an injury from such defective footway without his fault." In view of that well settled principle, we are inclined to the view that the trial court may have applied a wrong rule of law to the evidence. In any event, we are constrained to hold that there was a jury question in respect to whether the traveled way was suitable for use or not, and that the finding made by the jury should not have been disturbed.

The next and only other question is: Did the trial court err in holding that appellant, as a matter of law, was guilty of contributory negligence from the fact that he was familiar with the defect?

In respect to the last question, it seems a wrong rule was applied to the evidence. It has often been held that a person in using a public traveled way is not bound, at his peril, to

remember and avoid danger from a defect in such way with which he is familiar. In the absence of any reasonable excuse for not avoiding the danger, and a personal injury resulting, there is a presumption of negligence, but, in case of such excuse, a jury question is presented as to whether ordinary care was exercised or not. *Wheeler v. Westport,* 30 Wis. 392; *Crites v. New Richmond,* 98 Wis. 55, 73 N. W. 322; *Collins v. Janesville,* 111 Wis. 348, 356, 87 N. W. 241, 1087. In the last case cited it was said: "The presumption [of negligence from knowledge of the defect] is rebuttable and gives way so readily to explanatory circumstances that any reasonable excuse for the forgetfulness is sufficient to carry the case to the jury on the question of the plaintiff's contributory negligence." Here there was an excuse which a jury might reasonably say was reasonable. The accident happened in the nighttime. The appellant, probably, did not see the exact location of the dangerous part of the depression. He suddenly met a person coming from the opposite direction, and his mind was immediately occupied with the idea of giving way so such person could pass. He testified that he, momentarily, took his mind off the subject of the defect and stepped to the right to give the oncoming person the right of way, and that, in doing so, he went into the hole. In view of that evidence, whether his conduct was consistent with ordinary care was a fair jury question.

It follows that the judgment appealed from must be reversed, and the cause be remanded with directions to reinstate the answers which were set aside and to render judgment on the verdict in plaintiff's favor.

By the Court.—So ordered.

A motion for a rehearing was denied, with $25 costs, on February 1, 1916.

ELLIOTT, Administratrix, Respondent, vs. FISK, Appellant.

November 20, 1915—February 1, 1916.

Wills: Validity: Undue influence: Evidence: Sufficiency.

1. **To justify the setting aside of a will on the ground of undue influence there must be clear and satisfactory evidence establishing the susceptibility of the testator to such influence, an opportunity for the exercise thereof, a disposition to exercise it, and a result indicating its exercise; but the clear establishment of three of these essential elements may with slight additional evidence as to the fourth compel the inference of its existence, especially where the will is not a natural one such as relationship usually dictates.**
2. **Thus, in this case, the finding of the trial court that a will executed four hours before the testator's death, when he was in an extremely feeble condition, was the result of undue influence exerted by the beneficiaries, who were not related to him and to whom he gave all his property to the exclusion of an aged father and other near relatives with whom he was on good terms, is *held* not clearly erroneous, three of the elements above mentioned being pretty clearly established, although as to the disposition of the beneficiaries to exercise undue influence the proof is meager.**

APPEAL from a judgment of the circuit court for Monroe county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action to probate a will. July 25, 1913, John H. Elliott died. Four hours previous to his death he executed a will leaving $500 to *C. W. Fisk,* the proponent, and the remainder of his property, of the value of about $1,500, to one Jess McCullough. Phillip Elliott, the father of the deceased, contested the probate of the will on the ground of lack of testamentary capacity on the part of the testator and undue influence on the part of the legatees. The contestant has died since this appeal was taken and the administratrix of his estate has been substituted in his place. The county court refused to probate the will because of lack of testamentary capacity and the proponent appealed to the circuit

court. The latter found testamentary capacity, but refused probate on the ground of the exercise of undue influence on the part of the legatees. From a judgment entered accordingly the proponent appealed.

For the appellant there was a brief by *Naylor & McCaul,* attorneys, and *Graham & Graham,* of counsel, and oral argument by *W. B. Naylor.*

John F. Doherty, for the respondent.

The following opinion was filed December 7, 1915:

VINJE, J. The testator was a bachelor sixty-four years of age at the time of his death. His mother died in 1868 leaving a farm of the present value of about $15,000. His father married again and was living on the farm as tenant by the curtesy. He has died since this action began and an administratrix of his estate has been duly appointed and substituted in his place as contestant. The testator had a one-seventh interest in his mother's farm subject to his father's estate by the curtesy, and it appears that at various times he expressed dissatisfaction with his father and brothers because he could not obtain his share of his mother's estate. Otherwise he seems to have been on good terms with his relatives. Though of fair health up to within a few years of his death he never acquired any property of his own. His life was spent in various kinds of common work at different places. Part of the time he would work for his board only and part of the time visit with his relatives, including his father, his brother in Montana, and his sister in Nebraska. But he never stayed long with his father and had expressed dissatisfaction with his "hanging onto life" so long. He spent two winters doing chores for his board with a friend by the name of Hackett in Valley Junction, and he also stayed there five weeks in the spring of 1913. Some six or seven years before he died he made his home for a time with Jess McCullough,

the residuary legatee. For six months at least he paid him board. After that he came and went as he pleased. *Fisk,* the other legatee, was an old friend of his, but there is no evidence that he felt any more friendship for him or for McCullough than he felt for a number of other friends. For some time before his death he lived alone in a house near Valley Junction. A farmer by the name of Christenson was his nearest neighbor, and towards the end he and his family took care of him night and day. The Tuesday previous to his death, which occurred on Friday, he was taken from his house by McCullough on a cot and brought to the boarding house of *Fisk* at Tomah. He died from tuberculosis of the lungs, and for a week before he was removed to Tomah he was so weak and sick that he had been unable to take any nourishment except lemonade. His hands and feet were cold and showed discoloration, and he had to be turned in bed.

In May, 1913, he borrowed from a crippled brother $500, giving a mortgage on his share of his mother's estate as security. Of this money he had $325 left. The Saturday before he died he asked Christenson to take care of this money for him, but he refused. The next day he sent for Christenson, and when he came he asked him to make out a check for the money to McCullough, who was there. This Christenson did, dating the check as of Saturday, and the testator signed it. The next day McCullough drew the money from the bank and had *Fisk* draw an agreement to the effect that McCullough should make such arrangements and take such care of testator as he saw fit. McCullough took him to *Fisk's* house as stated and agreed to pay $20 per week for his board and nursing—Mrs. Fisk being a nurse.

From Tuesday until Friday at the time the will was executed the evidence is silent as to what took place. The testator, however, was continually growing weaker. When the will was being drawn his legs were rubbed to assist circula-

tion and to keep them warm. The beneficiaries were present when the lawyer, called by *Fisk,* inquired of him how he wished to dispose of his property and they were present at all times thereafter till the will was executed. He was then so weak that his hand had to be assisted in holding the pen and guided in making his mark, though he had been a fair penman during his life and had written a very friendly letter to his brother in May preceding when he obtained the $500. The will was read to him by the lawyer who drew it clause by clause and he assented to each. Mrs. Fisk, the witnesses to the will, and the beneficiaries were then present.

Such, in brief, are the main facts touching the testator's life and condition immediately preceding the execution of the will as disclosed by the record. The trial court found that the beneficiaries exerted undue influence upon him. Can we say that such a finding is clearly contrary to the legitimate inferences that may be drawn from the evidence?

It is quite clear that the testator was a man susceptible to undue influence, especially at the time the will was made, owing to his then extremely enfeebled condition. There was what may be termed only a spark of life left in him. He no longer had much vitality to assert a will of his own. Even in his usual health he must have been a man of rather feeble will power—lacking in initiative and push, for he never acquired any property of his own. His motto seems to have been, Sufficient unto the day is enough. In all these respects he differs from the testator in *Ball v. Boston,* 153 Wis. 27, 141 N. W. 8, who had been an active business man and had evidently possessed a strong mind. Neither was his will made in such an enfeebled condition, for he lived a month after it was executed. So it must be deemed that the evidence establishes quite clearly and satisfactorily that the testator was susceptible to undue influence. There is like proof that an opportunity to exercise undue influence existed, for

he was in the house of the proponent, *Fisk,* three days before he died, when both *Fisk* and McCullough had access to and visited with him. On the question of their disposition to exercise undue influence, however, the proof is quite meager. There is no direct evidence of it farther than that one of them had received from him for safe-keeping and disbursement all the cash that he had and the other was to receive $20 per week for caring for him. Neither fact is very persuasive, and both are consonant with disinterestedness and friendship or legitimate business only. Perhaps the strongest inference that such disposition existed may be drawn from the fact that they now seek to retain what was gratuitously given as against an aged father who would otherwise have been entitled thereto, and from the fact that the result appears to have been the effect of such influence. The deceased had never expressed any intention of making a will, a fact of no great value because he considered he had little if anything to leave. The trial court was satisfied from the evidence that testator was on good terms with his nearest relatives and that he entertained no greater friendship for the legatees than he did for his relatives and for a number of other friends, or felt himself under any greater obligations to them. And such conclusion finds support in the evidence. Hence the result indicated pretty clearly the existence of undue influence. While it is true that a testator susceptible to undue influence; an opportunity for the exercise thereof; a disposition to exercise it; and a result indicating its exercise must be established by clear and satisfactory evidence before a court is justified in setting aside a will, yet the clear establishment of three of these essential elements may with slight additional evidence as to the fourth compel the inference of its existence. This is especially true where the will is not what may be termed a natural one, such as relationship usually dictates. In *Gunderson v. Rogers,* 160 Wis. 468, 152 N. W. 157, it was said

that strong evidence of lack of testamentary capacity or of undue influence was required to nullify a will made according to the dictates of natural justice. Where it is not so made less proof may suffice, for legitimate inferences of infirmity may be drawn from its departure from natural justice. Here at least some such departure occurs. In this respect also the case differs from the *Ball Case*. Here the property is left to entire strangers by blood or marriage; there it was left to the testator's second wife—his adult children by his former marriage having been to some extent previously assisted by him and having shared a $1,000 insurance policy, while the property left by the will to the wife did not exceed $3,000 in value.

The result reached is that, while the case is a close one, the judgment of the trial court must be affirmed because we cannot say it is clearly erroneous. As bearing upon the questions discussed recourse may be had to the following late cases in this court: *Ball v. Boston,* 153 Wis. 27, 141 N. W. 8; *Duncan v. Metcalf,* 154 Wis. 39, 141 N. W. 1002; *Skrinsrud v. Schwenn,* 158 Wis. 142, 147 N. W. 370; and *Gunderson v. Rogers,* 160 Wis. 468, 152 N. W. 157.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on February 1, 1916.

OCEAN ACCIDENT & GUARANTEE CORPORATION, LIMITED, OF LONDON, ENGLAND, Appellant, vs. COMBINED LOCKS PAPER COMPANY and another, Respondents.

December 10, 1915—February 1, 1916.

Employer's liability insurance: Increase in rate: New contract: Policy issued by nonresident agent in violation of law: Validating statute: Construction: Obligation to pay premiums: Cancellation when assured retires from business: What premiums to be retained.

1. Where an employer's liability insurance policy running for three years was modified, with the consent of the assured, by a written stipulation annexed increasing the rate, the transaction was equivalent to making, at the date of such modification, a new contract of insurance for a new premium but otherwise on the terms of the original policy.
2. A policy of indemnity insurance issued in violation of sub. 1, sec. 1919*a*, Stats. (providing that no policy of insurance shall be issued or delivered in this state except through a resident agent holding a certificate of authority under sec. 1976), by unlicensed nonresident agents of a company licensed to do business in this state, was validated by sub. 4, sec. 1919*a* (which provides "This section shall not prevent any insurance placed in violation thereof from taking effect"), and such validation included the obligation of the assured to pay the premium.
3. The retirement from business of one only of two corporations jointly insured by an indemnity policy was not within the meaning of a stipulation therein that if the policy should be canceled by the insured when retiring from business the earned premium only should be retained by the insurer.

APPEAL from a judgment of the municipal court of Outagamie county: THOMAS H. RYAN, Judge. *Reversed.*

For the appellant there was a brief by *C. G. Cannon,* attorney, and *R. F. Potter,* of counsel, and a separate reply brief and oral argument by *Mr. Cannon.*

For the respondents the cause was submitted on the brief of *Francis S. Bradford.*

TIMLIN, J. The action is to recover the unpaid remainder of premium alleged to be due upon an employer's liability policy running for three years and executed December 16, 1910, modified by a written stipulation annexed increasing the rate August 31, 1911, and canceled at request of insured to take effect December 16, 1912. The trial court found that the policy was issued by Illinois representatives of the plaintiff not licensed to do insurance business in Wisconsin, who then sent the policy to the plaintiff's resident agent at Milwaukee to be countersigned, with the intent of evading the insurance laws of this state. That the premiums were collected by the Illinois representatives and the plaintiff's resident agent at Milwaukee was sent a commission to satisfy him for the loss of the business, and that no report or accounting was ever made to the officers of Wisconsin of this insurance. On August 31, 1911, the plaintiff raised the rates of insurance on the policy from seventy-two cents per $100 to $2 per $100, and issued a writing from its Chicago office by officers not authorized to do such business in Wisconsin and without countersign or sanction of any officer or agent of the plaintiff in Wisconsin. These unlicensed persons thereby added a certain stipulation to the policy, with the consent of the assured, making such change of rate, and this was also done with design to evade the laws of Wisconsin. The policy was issued with the intent to evade an accounting to the state for the percentage due to the state upon insurance written within this state. Upon these findings the trial court declined to pass on the validity of the policy as first issued, it appearing that the whole balance of premium unpaid, computed either according to plaintiff's theory or defendants' theory, rested upon the validity of the transaction of August, 1911, increasing the rate. He held this transaction void and gave judgment for defendants.

It is contended that those findings which say there was at any stage of the transaction an intent to evade the laws of

Wisconsin are not supported by evidence. We do not find it necessary to pass upon this point, because, even assuming that such intention was shown to exist when the policy first issued, there is no evidence of such intention with reference to the transaction of August 31, 1911. This transaction was equivalent to making a new contract of insurance at that date for a new premium, but otherwise on the former terms. Secs. 1976, 1978, and 1919*a*, Stats. 1911, form a system of insurance regulation for this state intended to require insurance policies to be issued from the offices of and by licensed agents residents of this state. Sec. 1955*o*—5 imposes a penalty on any person or corporation violating any law of this state relating to insurance. By an amendment to sec. 1919*a* which went into effect after the policy was issued but before the transaction of August 31, 1911, sub. 4 of sec. 1919*a* was added to this statutory system of regulation. That subdivision reads as follows: "This section shall not prevent any insurance placed in violation thereof taking effect." Aside from this sub. 4, sec. 1919*a* provides that no policy of insurance shall be issued or delivered in this state except through an agent resident of this state holding a certificate of authority under sec. 1976.

This case turns on the effect of the enactment of sub. 4, *supra*. Such effect must be deduced from a consideration of this and other statutes on the same subject. *Laun v. Pacific Mut. L. Ins. Co.* 131 Wis. 555, 111 N. W. 660. There can be no doubt that sub. 4 validates the policy of insurance issued in violation of that section. Does it also, by so doing, validate the promise to pay the premium for that policy? This very point was passed upon in *Union Ins. Co. v. Smart*, 60 N. H. 458, from which we quote:

"To give the policy-holder the protection intended by statute, it is necessary to hold the premium note given for a policy declared by the statute valid against the company also valid; otherwise there would be no consideration for the policy."

This case was followed in *Conn. River Mut. F. Ins. Co. v. Whipple,* 61 N. H. 61. See, also, *Provincial Ins. Co. v. Lapsley,* 81 Mass. (15 Gray) 262, where the language of the statute is somewhat different; also *Hartford L. S. Ins. Co. v. Matthews,* 102 Mass. 221; *Reliance Mut. Ins. Co. v. Sawyer,* 160 Mass. 413, 36 N. E. 59.

We do not go to the extent of holding that the legislature could not validate the policy without validating the obligation to pay the premium agreed upon. See cases in Wis. Annotations to sub. 10, sec. 1770*b*, Stats. We do, however, think that the cases first above quoted and cited go to show that a provision making the "insurance effective" notwithstanding the policy was issued contrary to statute is sufficient to indicate legislative intent that the insurance would be effective in every detail; as an obligation to pay loss in case of loss and also as an obligation to pay premium; leaving the violator of the statute subject solely to the penalties by way of fine or imprisonment or forfeiture of license found in other statutes on this subject. *Union Ins. Co. v. Smart, supra,* seems to go further than this and to hold that a necessary effect of validating the policy is to validate the promise to pay premium. Be that as it may, within the rule of this court set forth in *Laun v. Pacific Mut. L. Ins. Co., supra,* the provisions of sub. 4 must be taken as a controlling indication of the intention of the legislature to enforce compliance with the statutes forbidding insurance by nonresident agents, by other penalties than that of holding either the insurance policy or the obligation to pay a premium therefor invalid. It can be fairly said that this leaves the system of statutory regulation unenforceable, wherever the offender is beyond the jurisdiction of the courts to fine or imprison, except by a revocation of its license to do business in this state. This consequence is not sufficient to overcome the deductions to be made from the express language of the statute. *Laun v. Pacific Mut. L. Ins. Co., supra.*

It must be remembered that in the instant case the plaintiff was licensed to do business in Wisconsin and that this decision in no way asserts the right of an unlicensed company to do insurance business in this state.

Having arrived at the conclusion that the obligation to pay premium is enforceable, it seems to us quite apparent from the words of the policy that the rate of premium is not that provided in the policy where the insured intends to discontinue business, but that provided for cases where the policy is canceled at the request of the insured. The fact that one of the insured intended to go out of business would not, we think, bring both, jointly insured, within the stipulation for a lower rate in case the insured intended to go out of business.

It follows that the judgment of the municipal court must be reversed, and the cause remanded for judgment for the plaintiff in accordance with this opinion.

By the Court.—It is so ordered.

PAGE, Appellant, vs. MODERN WOODMEN OF AMERICA, Respondent.

January 11—February 1, 1916.

Death: Presumption from absence: Life insurance: Benefit societies: Waiver of proofs of death.

1. Proof of diligent search and inquiry is not required to establish the presumption of death of a person who has been absent from his home or place of residence for seven years without being heard from.
2. In an action upon a benefit certificate, proof that the insured (plaintiff's husband) left his home in March, 1905, that neither the plaintiff nor any other person had had any tidings or information concerning him since the summer of 1905, that he had not been heard from for eight years prior to the trial, and that his whereabouts were wholly unknown, established the legal presumption that he was dead.

Page v. Modern Woodmen of America, 162 Wis. 259.

3. The refusal of a benefit society, after being notified of the presumed death of a member by reason of his not having been heard from for more than seven years, to furnish to the beneficiary blanks for proof of death, constituted a waiver of its requirement that proof of death should be made on blanks to be furnished by it before an action could be maintained on the benefit certificate.

APPEAL from a judgment of the circuit court for Polk county: OREEN T. WILLIAMS, Judge. *Reversed.*

This is an action by the plaintiff to recover on a benefit certificate for $2,000 issued by the defendant upon the life of Arthur E. Page, the husband of the plaintiff, and payable upon his death.

The defendant is a corporation organized and doing business under the laws of the state of Illinois. The plaintiff's husband, Arthur E. Page, became a member and was insured in the defendant order in the state of Iowa on the 5th day of January, 1901. Sometime after the month of June, 1903, the membership was transferred to the local camp at Frederick, Wisconsin.

The evidence discloses that the plaintiff and Arthur E. Page were married in the year 1880. They lived at Morse, Iowa, for about three years after their marriage, during which time they resided on a rented farm. In the fall of the third year Mr. Page went to Stratton, Nebraska, to take up a homestead and the plaintiff joined him the following April. Mr. Page remained there eight years, six of which the plaintiff was with him. During the time they resided upon the homestead Mr. Page spent six weeks in Colorado with a surveying outfit, two months in the eastern part of Nebraska, and then went to the state of Washington. On this Western trip he was away a little less than a year, going to Tacoma and San Francisco. During all of this time he had worked his timber claim and homestead enough to comply with the law. After his return from the West the family lived in Stratton for about three months and then returned to Morse,

Iowa, where Mr. Page rented different farms for a period of eight or nine years. At the expiration of this period Mr. Page went to southern California, but failing to find any suitable occupation he returned home and he and his family moved to Frederick, Wisconsin. This was in the year 1903. Mr. Page purchased eighty acres of land at Frederick, and while living there was engaged in cutting timber from this land and making cord-wood. About January 12, 1905, he had 200 cords of wood for sale. He went to St. Paul, Minnesota, to sell the same, and arranged with one Coburn of Frederick to load and ship the wood to him as he sold it. After selling the greater part of this wood in St. Paul Mr. Page left there, and early in March ceased to write to his wife or to any one else at Frederick. He never returned to Frederick. The evidence tends to show that he was friendly with the plaintiff, that he was attached to his children, and that he manifested respect and esteem toward them. The plaintiff has not heard from him directly since the 2d day of March, 1905. Mr. Page had some financial obligations and some payments were due about the time of his disappearance. Plaintiff made inquiries of relatives and friends as to his whereabouts when the time came to pay dues and assessments on the benefit certificate, but they were fruitless. She also advertised in the Woodman paper asking for information concerning him and received no reply. Plaintiff paid his dues and assessments as a member of the defendant company up to November, 1912. About eighteen months after Mr. Page's disappearance plaintiff received a letter from a brother of Mr. Page residing at St. Louis, Missouri, stating that Arthur E. Page had been at his house in St. Louis in the spring or summer of 1905, that he left again, and that he stated at the time that he was going to Galveston, Texas. No further inquiries were made. His son Arthur left home in the latter part of the year that the father disappeared and has not been heard from since.

The court submitted the case to a jury, who returned a general verdict for the defendant.

The circuit court entered judgment on the verdict dismissing plaintiff's complaint with costs. From such judgment this appeal is taken.

For the appellant the cause was submitted on the brief of *Morris E. Yager,* attorney, and *Holland & Lovett,* of counsel.

For the respondent there was a brief by *Truman Plants* and *Wolfe, Wolfe & Reid,* and oral argument by *W. F. Wolfe.*

SIEBECKER, J. The plaintiff contends that the circuit court erred in submitting to the jury the inquiry whether or not the insured, Arthur E. Page, was dead at the time of the trial. In ruling upon plaintiff's motion for a directed verdict in her favor the court declared that in his opinion the evidence, in the light of the decision in the *Miller Case* (*Miller v. Sovereign Camp W. O. W.* 140 Wis. 505, 122 N. W. 1126), would justify a direction of a verdict in her favor, but that he deemed it appropriate to take a verdict to lay the foundation for a modification by this court of the rule declared in the decisions of this court as regards the necessity of making diligent search and inquiry to establish the presumptive death of a person who has been absent from his home and place of residence for seven years without being heard from. The earlier authorities of this court on this question and the different rules which obtain in other jurisdictions on this subject were re-examined on the appeal to this court of the *Miller Case,* and it was determined not to modify the rule on this subject as established by the decisions of this court. No considerations have been suggested that have led us to conclude that the rule declared in the *Miller Case* should be modified.

An examination of the evidence in the instant case satisfies us that it permits only of the inference that plaintiff's husband left his home and place of residence in the early part of March, 1905, and that neither the plaintiff nor any

other person has had any tidings or information concerning him or of his whereabouts since the summer of 1905. The evidence clearly establishes the fact that Arthur E. Page had not been heard from for a period of eight years immediately preceding the time of the trial of this case and that his whereabouts are wholly unknown. Under this state of the evidence the legal presumption that he is dead is established. This entitled the plaintiff to a direction of the verdict in her favor on this issue, and it was error of the trial court to refuse to direct the jury to render a verdict accordingly. *Cowan v. Lindsay,* 30 Wis. 586; *Whiteley v. Equitable L. Assur. Soc.* 72 Wis. 170, 39 N. W. 369; *Miller v. Sovereign Camp W. O. W.* 140 Wis. 505, 122 N. W. 1126.

Upon the facts shown the court correctly held that defendant's refusal, through its officers, to furnish plaintiff blanks for proof of death upon her request and notice of Page's presumed death by reason of his not having been heard from for over seven years, constituted a waiver of the defendant's requirement that proof of death shall be made on blanks to be furnished by defendant before action can be brought to recover on the benefit certificate. The evidence shows that a proper request for such blanks was made and was refused. It appears that the company's officers denied liability on the certificate under plaintiff's claim that it had matured by force of the presumption that Page was dead, in the light of all the facts and circumstances showing his disappearance and the absence of any intelligence or tidings that he was alive. Upon this state of the record the plaintiff is entitled to recover the amount due on the certificate.

By the Court.—The judgment appealed from is reversed, and the cause is remanded to the circuit court with direction to set aside the verdict and award the plaintiff judgment for the recovery of the amount due on the benefit certificate.

KERWIN, J., took no part.

CALHOUN, Administratrix, Respondent, vs. GREAT NORTHERN RAILWAY COMPANY, Appellant.

January 11—February 1, 1916.

Railroads: Negligence: Death of switchman: Defective running board: Evidence: Sufficiency: Proximate cause: Inspection: Federal statutes, when applicable: Pleading: Interstate commerce: Survival of actions: Separate recovery for suffering: Double recovery: Dependents: Appeal: Verdict, when conclusive.

1. In an action against a railway company for death of a switchman who fell from the top of a car, findings by the jury to the effect that defendant negligently permitted the end of one of the boards of the running board of the car to project above the adjacent board to such an extent as to constitute a defect or insufficiency in the car, and that the fall of the deceased from the car was caused by his stumbling over the projecting board end, are *held* to have such support in the evidence that they should not be disturbed.
2. Under the federal Employers' Liability Act (35 U. S. Stats. at Large, 65, ch. 149, sec. 1) giving to a railway employee engaged in interstate commerce a right to recover for injury or death "resulting in whole or in part" from negligence of the railway company, the common-law rule as to proximate cause has no relevancy, it being sufficient that the defect or negligence pleaded contributed in any manner to cause the injury.
3. The Safety Appliance Act (36 U. S. Stats. at Large, 298, ch. 160, sec. 2) imposes an absolute duty upon common carriers to equip their cars with "secure running boards;" and in an action for death caused by a defective running board it is no defense that defendant had made proper inspection, if the board was in fact defective.
4. Where, in an action for the death of a railway employee, the answer alleged that deceased was at the time of the injury engaged in interstate commerce and that fact was established upon the trial, it was the duty of the court to apply the federal acts.
5. Under 36 U. S. Stats. at Large, 291, ch. 143, sec. 9, providing for the survival of any right of action given by the act to a person suffering injury, a cause of action for pain and suffering of a deceased railway employee survived to his mother, the sole beneficiary, and a recovery of the amount of her pecuniary loss resulting from his death and also of damages for his pain and suffering between the time of injury and death was not a double recovery for the same injury.

6. The trial court having in such case sustained the findings of the jury on the question of damages, and there being ample evidence to support them, they cannot be disturbed on appeal on the ground that the mother was not dependent upon the deceased.

BARNES, J., WINSLOW, C. J., and MARSHALL, J., dissent.

APPEAL from a judgment of the circuit court for Douglas county: CHESTER A. FOWLER, Judge. *Affirmed.*

This action was brought by the plaintiff as administratrix of the estate of James N. Calhoun, her son, who was killed while in the employ of the defendant. The defendant was engaged in the business of interstate transportation and the deceased was in its employ as switchman in its yards at Superior, Wisconsin.

The negligence alleged is in substance defective coupling appliances, unusual and extraordinary jerking or jarring of the car upon which the deceased was riding, and defective running board upon the car from which deceased fell.

Two causes of action are set up in the complaint based upon the same grounds of negligence, one being for damages which the plaintiff, mother of deceased, sustained by reason of the death of her son, and the other for conscious pain and suffering between time of injury and death.

The defendant answered denying negligence and averring assumption of risk and concurrent negligence of the deceased. Motions for nonsuit and directed verdict by the defendant were denied.

It was conceded on the trial that the case was one under the federal Employers' Liability Act of April 22, 1908 (35 U. S. Stats. at Large, 65, ch. 149, sec. 1), the provisions of which material to this case are as follows:

"That every common carrier by railroad while engaging in commerce between any of the several states or territories, . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none,

then of such employee's parents, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, . . ."

Also Safety Appliance Act of April 14, 1910 (36 U. S. Stats. at Large, 298, ch. 160, sec. 2, 1 Fed. Stats. Ann. (1912 Supp.) sec. 2, p. 336), as follows:

"That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this act to haul, or permit to be hauled or used on its line any car subject to the provisions of this act not equipped with appliances provided for in this act, to wit: all cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards. . . ."

Also act of April 5, 1910 (36 U. S. Stats. at Large, 291, ch. 143, sec. 9), as follows:

"That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

The jury returned the following verdict:

"(1) Did the end of one of the boards of the running board project above the adjacent board to such an extent as to constitute a defect or insufficiency in the car? *A.* Yes.

"If to question 1 you answer 'Yes,' answer this:

"(2) Did the defendant's servants use ordinary care in permitting the defect or insufficiency thus found to be in existence at the time of the injury? *A.* No.

"(3) Did the deceased stumble over the projecting board end, and as a result of such stumbling fall from the car? *A.* Yes.

"(4) Was there any want of ordinary care on the part of Mr. Calhoun that proximately contributed to produce his death? *A.* No.

"(5) What sum will compensate the mother of Mr. Calhoun for the pecuniary loss sustained as a result of his death? *A.* $2,500.

"(6) What sum will compensate for the pain and suffering by Calhoun from his injury to his death? *A.* $500."

Both parties moved for judgment on the verdict. Counsel for defendant also moved for new trial. Judgment was rendered in favor of the plaintiff upon the verdict, from which this appeal was taken.

J. A. Murphy, for the appellant.

W. P. Crawford, for the respondent.

KERWIN, J. 1. The serious question in this case is whether there is sufficient evidence to support the verdict. The jury found that the end of one of the boards of the running board projected above the adjacent board to such an extent as to constitute a defect or insufficiency in the car; that deceased stumbled over the projecting board end and as a result of such stumbling fell from the car; that defendant was negligent in allowing the defect to be in existence at the time of the injury.

The deceased was in the employ of defendant as a switchman in its yards and at the time of injury was riding on top of the car from which he fell while several cars, including the one on which deceased was riding, were being pushed by an engine northward. There was one car in front or north of the one on which deceased was riding and this car was to be "kicked" onto a sidetrack. The process of kicking the car onto a sidetrack as it was being done at the time of the injury is accomplished by uncoupling the car to be kicked, increasing the speed so as to give the car sufficient momentum to carry it onto the sidetrack when detached from the train,

and then decreasing the speed of the train from which the kicked car is detached so as to allow it to pass away from the train and onto the sidetrack. The evidence shows that the kicking operation was carried on without any sudden jerk of the car upon which deceased was riding; that the running board was about twenty-three inches wide, constructed of three narrow boards placed close together on the top of the car; that the alleged defect consisted in the end of one of these boards being from one fourth to five eighths of an inch higher than the end of the adjacent board where the two boards met at about the middle of the car, the car being about thirty-three feet long. The string of cars was being pushed northward by an engine on a slight down grade. The deceased fell from the north end of the car upon which he was riding while the kicking operation was going on, or about the time the car immediately in front of the one upon which he was riding was kicked onto the side or repair track. The accident occurred on a cold December night, and there was frost on the running board which showed a track going north about two feet south of the defect or projecting end of the board and another some two or three feet north of the defect. The theory of respondent's counsel is that deceased was moving northward on the car during the kicking operation and stubbed his toe, throwing him forward, and before he could recover himself was thrown off the car, and that the decrease of speed, sudden or otherwise, accelerated his motion forward. The usual practice in kicking off a car is to pull the pin between the two cars, and when the uncoupling is made to give the signal to the engineer, who increases his speed and then makes a stop, and thereby kicks off the car to be spotted. There was evidence that there were no footprints at the point where the end of the board projected and that north of the projection there were footprints, indicating that the deceased proceeded north after passing over the defect.

There is no direct evidence that the deceased stubbed his

toe on the end of the projecting board and was thereby caused to stumble forward and off the car, but it is argued by respondent's counsel that in view of the tracks in the frost and the operation of kicking at or about the time deceased fell, the jury was entitled to find that the defect caused the fall, consequent injury, and death, while on the part of appellant it is insisted that there is not sufficient evidence to support the verdict on the point independent of the evidence of the fireman, who testified that deceased admitted shortly after he fell that he slipped and fell; that he went to get the brake and slipped and fell off. It is argued by appellant that the undisputed admission of the fireman, together with all the other evidence in the case, shows conclusively that the deceased did not stub his toe and fall on account of the projecting board and that there is no evidence to support the verdict.

. The court below held in a written opinion in the record that the credibility of the evidence of the fireman as to the declarations of deceased was for the jury; that the evidence was not free from suspicion and the appearance of the witness not the best. The trial court also held that the jury had a right to infer, from the footprints upon either side of the projecting board end being so far apart, that deceased did not step over the board end in an ordinary or natural manner, and that it is hard to account for this long space between the footprints except upon the theory that the air brakes suddenly stopped the car just as deceased had his foot where it last rested before the projection, with the result that he was at this point thrown violently forward and took the long stride in an attempt to recover himself, or hit his toe on the board end as he was traveling north on the car and this caused him to lurch forward and take a long step to recover himself.

The evidence is discussed by counsel on both sides at considerable length, and we must say it is a rather close question whether it is sufficient to support the verdict, but the court below upheld the jury in finding the evidence sufficient, and

we cannot say that it was clearly wrong, therefore under repeated decisions of this court the findings must be upheld.

2. It is further insisted by counsel for appellant that it is established in the case without dispute that the day before the accident the car was inspected, repaired, and put in good condition. The evidence, however, is not without dispute as to whether there was a defect in the running board at the time of the accident.

There is also much argument by counsel on both sides upon the common-law rule of proximate cause, which has no relevancy to the case. It is conceded that the case is governed by the federal act, which fixes right of recovery for injury "resulting in whole or in part" from negligence.

It is sufficient that the defect contributed in any manner to cause the injury. *Alexander v. M., St. P. & S. S. M. R. Co.* 156 Wis. 477, 146 N. W. 510.

The Safety Appliance Act passed in April, 1910, and quoted from in the statement of facts, also imperatively requires common carriers to equip their cars with "secure running boards." This statute imposes an absolute duty upon the common carrier to comply with the statute. *Delk v. St. L. & S. F. R. Co.* 220 U. S. 580, 31 Sup. Ct. 617. That defendant made proper inspection is no defense if the running board was in fact defective. *St. Louis, I. M. & S. R. Co. v. Taylor,* 210 U. S. 281, 28 Sup. Ct. 616.

Some point is made by counsel for appellant that the federal acts were not pleaded. But the answer alleges that deceased was at the time of the injury engaged in interstate commerce and the facts were established upon the trial, and the concession of counsel for appellant brings the case within the federal acts, and it was therefore the duty of the court to apply the law. *Grand Trunk W. R. Co. v. Lindsay,* 233 U. S. 42, 34 Sup. Ct. 581.

Counsel for appellant claims there was a double recovery and that there can be no recovery for pain and suffering.

Under the act of April 5, 1910 (36 U. S. Stats. at Large, 291, ch. 143, 1 Fed. Stats. Ann. (1912 Supp.) p. 335), the cause of action for pain and suffering survives to the plaintiff. This statute provides for the survival of any right of action given by the act to a person suffering injury. The statute has been construed in *Kansas City S. R. Co. v. Leslie,* 238 U. S. 599, 35 Sup. Ct. 584, and *St. Louis, I. M. & S. R. Co. v. Craft,* 237 U. S. 648, 35 Sup. Ct. 704. In the latter case it is said:

"The conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived."

The recovery is not double. Each cause of action constitutes a separate item of damages.

It is further argued by counsel for appellant that the plaintiff here and sole beneficiary was not dependent upon the deceased and therefore no damages are recoverable. The court below sustained the findings of the jury on the question of damages and there is ample evidence to support them. Under such circumstances the findings cannot be disturbed. *Hewitt v. Southern Wis. R. Co.* 159 Wis. 309, 150 N. W. 502; *Behling v. Wis. B. & I. Co.* 158 Wis. 584, 149 N. W. 484.

We find no prejudicial error in the record.

By the Court.—The judgment is affirmed.

BARNES, J. (*dissenting*). The only theory on which plaintiff can recover is that deceased stubbed his toe against the raised end of one of the footboards on the top of the car and that this caused him to lurch forward a distance of sixteen and one-half feet and over the end of the car. There is no evidence that deceased did stub his toe and no evidence as to what caused him to fall. There is evidence that foot-

prints were discernible on the running board which were wide apart, and it is said that this evidence was sufficient to warrant the jury in finding that the accident happened in the manner stated. There is a possibility that the injury occurred in this way. The probabilities are that it did not. It was incumbent on the plaintiff to show by a preponderance of the evidence that the defect complained of was in some degree responsible for the death of Mr. Calhoun. It seems to me that the cause of his death rests in pure conjecture.

WINSLOW, C. J. I concur in the foregoing dissent.

MARSHALL, J. I concur in the foregoing dissent.

MOHAWK COMPANY, Respondent, vs. BANKERS SURETY COMPANY, imp., Appellant.

January 11—February 1, 1916.

Landlord and tenant: Breach of covenants: Remedies of lessor: Election: Foreclosure: Liens: Quieting title: Covenant to erect building: Conditions of surety bond: Measure of damages for breach.

1. The right, under a stipulation in a lease, to declare a forfeiture thereof for breach of any of its covenants by the lessee, is one created for the benefit of the lessor, and he is not obliged to invoke it, but may elect whether to hold the lessee responsible in damages for the breach or to declare the lease at an end.
2. Where in a lease for ninety-nine years the lessees agreed to erect a building on the land, to be completed before a certain date, and gave a bond to secure performance of such agreement and to save the lessor harmless from all liens and claims for liens and all costs, charges, and damages (including costs of suits) for or on account of such liens or claims, such condition of the bond shows that it was contemplated that the lessor was to have time to clear the leased premises of such liens by action if necessary.
3. The lessees having defaulted in payment of the rent and also in the erection of the building, the lessor gave notice of the termination of the lease and commenced foreclosure proceedings

under sec. 2197*a*, Stats., but it appeared that improvements to the amount of $5,000, required in order to bring the case within that statute, had not been made. *Held*, that a foreclosure judgment under the statute was improper, but such judgment was within the general jurisdiction of equity, valid between the parties, and sufficient as a decree to remove a cloud on the title as against the lessees and those claiming liens under or through them.

4. The surety on the bond given by the lessees, not having been made a party to the foreclosure suit and the defense thereof not having been tendered to it, was not concluded by the judgment; nor was it relieved thereby of anything.
5. The acts of the lessor in giving notice and prosecuting the foreclosure suit were equivalent to an election by him to terminate the lease and take possession one year after judgment therein quieting his title, unless the premises were sooner redeemed; and, the lessor having the right to clear the premises of liens at their expense, neither the lessees nor their surety could object to this.
6. For the lessees' default in failing to erect the building (which would have been security for the performance of all other covenants of the lease) the measure of damages recoverable is not the same as in case of building contracts generally. The lessees and the surety on their bond are liable for all damages logically flowing from such breach; and the fact that performance of the covenants to pay rent and taxes was not covered by the bond, cannot be taken to enlarge or diminish such damages.
7. The damages recoverable in such case include rents and taxes, not paid by the lessees, which accrued prior to the time when the lessor elected to and did resume possession of the premises free and clear of liens; but do not include rents or taxes accruing thereafter.

APPEAL from a judgment of the circuit court for Douglas county: CHESTER A. FOWLER, Judge. *Reversed.*

For the appellant there were briefs by *Abbott, MacPherran, Lewis & Gilbert,* and oral argument by *E. W. MacPherran.*

For the respondent there was a brief by *Hanitch & Hartley,* and oral argument by *C. J. Hartley* and *Louis Hanitch.*

TIMLIN, J. The plaintiff, owner of certain land, on October 1, 1909, executed a lease thereof for ninety-nine years

to Matthew and William Leithauser. The lessees agreed to forthwith proceed and erect according to described plans and specifications a building upon the demised premises and to complete the same on or before May 1, 1910. At the termination of the lease, all its covenants performed, the building was to be the property of the lessor. The performance of this covenant was required to be and was secured by bond in the sum of $30,000 with the appellant as surety thereon, and this action is on the bond. The condition of the bond was:

"Now, therefore, if the said principals shall erect and complete said theater building in full conformance with said plans and specifications not later than May 1, 1910, and save said obligee harmless from any and all liens and claims for liens for or on account of work, skill, or materials used in said constructions and from all costs, charges and damages (including costs of suits begun or completed, with a reasonable allowance for attorney's fees) for or on account of such liens or claims for liens, then this obligation shall be null and void, otherwise of full force and effect."

This bond was dated October 26, 1909, and immediately after its execution the lessees took possession of the demised premises and commenced the erection of the building provided for in the lease. They proceeded therewith as far as to construct a basement wall, when they ceased operations. After the execution of the lease and bond the lessees assigned their term to a corporation called the People's Theater Company. Only two quarterly instalments of rent were paid under the lease. The lease contained, in addition to the covenant to build, covenants to pay rent quarterly and to pay taxes and assessments and also other covenants. Sec. 2197*a*, Stats., in force when this lease was executed, provided that in case of a default in the conditions or breach of the covenants of any lease of land for a term exceeding fifty years which required the lessee to construct improvements or buildings on the land demised at his cost exceeding in value $5,000, and in case such improvements have been made, the lessor might

have a remedy by foreclosure. The latter, in such case, was denied the remedy of unlawful detainer provided by ch. 145, Stats. The lessee in such case is entitled to retain possession for one year and pay up the rent in arrears and that subsequently accruing, etc., and have the property. During this year the lessee is entitled to the rents, issues, and profits thereof. At the end of the year the lessor is entitled to a writ of assistance in case the lessee refuses to surrender possession. Notice of termination of lease was given, and foreclosure was begun under this statute by the plaintiff against the lessees and their assignees and carried to judgment, but the facts did not bring the lease in question within the terms of that statute because improvements to the amount of $5,000 had not been actually made on the demised premises.

This statute confers very valuable rights upon the lessee described in the statute and cuts the lessor off from a somewhat summary remedy common to all other lessors. Those entering into a lease after the enactment of this statute are supposed to do so with knowledge of the statute. The right to this foreclosure is given to the lessor in language permissive in form but perhaps mandatory where the lessee chooses to assert the valuable rights conferred on him by that statute. Whether improvements to the value of $5,000 or the improvements specified in the lease have actually been made is usually a question of fact.

In the instant case there was default in the payment of rent and there was also default in failing to construct the building required. For the damages flowing from the latter default the lessees and their surety, the appellant, are liable. The question is here upon the rule of damages. On the part of the appellant it is contended that the measure of damages should be the same or similar to that applied in cases of building contracts generally. This contention must be dismissed at once, for the relations of the parties are entirely different. There the owner agrees to pay a certain sum of money and

the contractor agrees to erect a described building. The advantage lost to the owner is really the difference in value between the sum which he agreed to pay and the building in place which the contractor agreed to erect, together with loss of use of the property for some time. Here the owner was to pay nothing and to have a building placed upon his premises which would be security for the performance of all other covenants in the lease on the part of the lessee. The owner has parted with the full consideration by executing and delivering the lease for the desired term upon the agreed rate. His position is more analogous to that of an owner who has paid the building contractor in advance. Neither is the fact that the lease contained a covenant to pay rent and another to pay taxes, which covenants were not mentioned in the bond, important. The presence of these covenants and the failure to require security for their performance cannot be taken to enlarge or diminish the legal damages logically flowing from the breach in question and hence within the contemplation of the parties. We may also lay out of sight a covenant on the part of the lessors that they would advance as a loan the sum of $20,000, to be secured by mortgage upon the $30,000 building to be erected when erected. There would even then be an equity of redemption of $10,000 available to the lessors as security. The right to declare a forfeiture of a lease is one created by stipulation in the lease for the benefit of the lessor and he is not obliged to invoke it. He has the choice whether to hold the lessee responsible in damages for breach of covenant or to declare the lease at an end for breach of condition. We do not think his delay to declare or enforce a forfeiture has any effect upon the measure of damages. The lessor's option above mentioned must have been known to the lessees and to their surety when the contract of suretyship was entered into. The condition of the bond is so written as to cover not only the legal damages flowing from the failure to erect and complete the theater

building within the time and on the terms specified, but also the failure to save the lessor harmless from liens and claims for liens imposed upon said premises or created by the lessees, including costs of suits begun or completed by the lessor for or on account of such liens or claims for liens. This qualifies the contract. It indicates that the parties hereto contemplated that the lessor was to have time to clear the leased premises of such liens by action if necessary. The foreclosure judgment mentioned, while improper and unnecessary under the terms of the foreclosure statute mentioned, nevertheless was within the general jurisdiction of equity and valid as between the parties thereto, and sufficient as a decree to remove a cloud against the lessees and those claiming liens for labor or material under or through said lessees. The appellant was not a party to that suit and the defense of the suit was not tendered to it. It is therefore not concluded thereby. But it was not relieved thereby of anything. We think the facts amply show that a suit in equity by the lessor to remove a cloud was necessary. The acts of the lessor in giving notice and commencing and prosecuting under the statute aforesaid, which would have governed the case had the improvements stipulated in the lease been made, are equivalent to an election by the landlord that he would terminate the lease and take possession one year after judgment quieting his title unless sooner redeemed. Neither the lessees nor their surety is in a position to object to this. The foundation constructed by the lessees was found on sufficient evidence to add no value to the reversionary interest of the lessor. While the damages allowed by the learned circuit court did not rest on these exact principles a large part of the amount was within the rule of compensation and within the amount which the plaintiff would be entitled to recover in any event. The cases of *Longfellow v. McGregor,* 61 Minn. 494, 63 N. W. 1032; *Johnson v. Cook,* 24 Wash. 474, 64 Pac. 729; *Rock v. Monarch B. Co.* 87 Ohio St. 244, 100 N. E. 887;

O'Brien v. Ill. S. Co. 203 Fed. 436, 121 C. C. A. 546; *U. S. v. U. S. F. & G. Co.* 236 U. S. 512, 35 Sup. Ct. 298; *Sharon v. American F. Co.* 172 Mo. App. 309, 157 S. W. 972, while not exactly in point, contain features somewhat analogous.

The learned circuit court itemized the damages allowed as follows:

Taxes accruing after the surety contract which should have been paid by the lessees and were necessarily paid by the lessor	$981 08
Rent unpaid and in arrears up to January 21, 1912, 1 year, 8 months, 19 days	1,925 00
Costs and reasonable expenses for attorney fees paid by the plaintiff in the suit mentioned	257 15
Rentals from January 21, 1912, until plaintiff leased the property to a third person July 1, 1913	1,395 00
Taxes and special assessments accruing after January 21, 1912, necessarily paid by plaintiff	874 42
Total	$5,432 65

This with interest to January 1, 1915, resulted in a judgment for $6,070. The plaintiff lost its security for the covenants of the lease. Compensation, which is the guiding rule in damages, would require this loss to be made good. The damages had all accrued on May 1, 1910, when the lessees failed in their contract to erect the building. But security for covenants to be performed or moneys to become due looks to the future. When the plaintiff on January 21, 1912, elected to resume possession and did resume possession of the demised premises free and clear of liens, it accepted this possession of the demised premises in cancellation of all obligations to become due thereafter on the lease. It elected for such subsequently accruing damages this remedy instead of the remedy for breach of covenant. It did not do so by mere threats to take possession or declaration that the lease was at an end, because it had the right to clear off liens at appellant's expense; but it did by such notice and full possession taken free and clear of all liens in pursuance of such notice and the decree quieting title. We therefore think that the recovery should be reduced by the items of $1,395 for rents accruing

after January 21, 1912, when plaintiff took possession, and $874.42 for taxes and special assessments also accruing after that date. The cause should be remanded to the circuit court with directions to reduce the amount by these two items, make a new computation of the interest on the remaining amount from January 21, 1912, to the date of decree, and render judgment in favor of the plaintiff and against the appellant in the last mentioned amount. The appellant to recover costs in this court.

By the Court.—It is so ordered.

SPROUT, WALDRON & COMPANY, Appellant, vs. AMERY MERCANTILE COMPANY, Respondent.

January 11—February 1, 1916.

Unlicensed foreign corporations: Validity of contracts: Interstate commerce: Sale of property located in the state.

1. Where a foreign corporation sold to a Wisconsin corporation an attrition mill which was located and had been used in this state and also another mill which was to be shipped into the state, and the price of the former had been agreed upon, although the written contract of sale stated only the gross price for the two, the sale of the mill then in the state was not an interstate commerce transaction, nor was it a necessary incident to the carrying on of such commerce.
2. The vendor corporation not having been licensed to do business in Wisconsin, the contract of sale was void under sec. 1770*b*, Stats., in so far as it related to the mill then within the state.

APPEAL from a judgment of the circuit court for Polk county: W. B. QUINLAN, Judge. *Affirmed.*

The plaintiff is a foreign corporation engaged in manufacturing machinery in the state of Pennsylvania and is not licensed to do business in Wisconsin. Through its agents it sold machinery in this state from time to time, such agents

taking orders which were filled from the factory located at Muncy. In 1913 it sold, through one of its agents, to Boulay Brothers of Fond du Lac, an attrition mill manufactured by it. Under the contract of sale title was reserved in the plaintiff because the purchase price had not been fully paid. On June 12, 1913, the purchasers began to operate the mill. It was not satisfactory to them, probably because the motor furnished was unable to develop sufficient power to properly operate the machine. The purchasers refused to pay the purchase price, and thereupon a new agreement was made whereby the plaintiff agreed to ship a larger mill to take the place of the one then in use, in consideration of the return of the old mill and the payment of $125 additional to the price at which the old mill was sold. It was further agreed between the parties that until such time as the new mill was furnished and could be put in operation Boulay Brothers were to have the right to use the machine which had been installed. Under this arrangement the mill first shipped was used until about October 28th, when the new mill was installed and the old one was set aside. During the month of December, 1913, an agent of the plaintiff called on the defendant, a Wisconsin corporation, at Amery, Wisconsin, and entered into a contract with the defendant for the purchase and sale of two mills, one of them being the mill at Fond du Lac, and the other to be shipped from the factory in Pennsylvania. The contract stated the gross price to be paid for the two mills, but did not specify the amount agreed upon for each one of the mills. It was also agreed that some extras were to be furnished both for the Fond du Lac mill and the one to be shipped from the factory. It was shown in the testimony without dispute that the agreed price of the mill at Fond du Lac was $725. Both mills were delivered according to contract, and defendant refused to pay the agreed price, claiming that the condition of the mill at Fond du Lac was misrepresented by the agent. The issues raised by the pleadings were submitted to a jury, which returned a verdict

in favor of the plaintiff for $362.50 on account of the Fond du Lac mill. The court set aside this verdict and ordered the complaint dismissed on the ground that, plaintiff being a foreign corporation not authorized to do business in the state, the contract was void and no recovery could be had thereon. From this judgment plaintiff appeals.

For the appellant the cause was submitted on the brief of *J. W. Soderberg.*

For the respondent there was a brief by *W. N. Fuller,* attorney, and *W. T. Kennedy,* of counsel, and oral argument by *Mr. Fuller.*

BARNES, J. In this case it is held:

1. That the sale of the mill at Fond du Lac was not an interstate commerce transaction, nor was it a necessary incident to the carrying on of such commerce.

2. That the contract, in so far as it involved such mill, was a contract relating to property within the state and was void under sec. 1770*b*, Stats.

By the Court.—Judgment affirmed.

STACK and others, Appellants, vs. ROTH BROTHERS COMPANY, Respondent.

January 11—February 1, 1916.

Contracts: Validity: Statute of frauds: Contract for sale of goods: Agreement to buy jointly and divide: Consideration: Mutual promises: Judicial sale: Chilling bidding: Breach of contract: Damages: Pleading.

1. The statute of frauds (sec. 2308, Stats.) relative to contracts for the sale of goods for the price of $50 or more is applicable only to contracts between seller and buyer; and an oral agreement to buy jointly and afterwards divide a bankrupt stock of goods was not void under that statute nor under the Uniform Sales Act (sec. 1684*t*—4, Stats.).

2. The fact that as to some of the goods the inventory value was to measure their division value did not change such an agreement from one of division to one of sale.
3. Each of the parties thereto having agreed to furnish one half of the purchase price, the agreement was not *nudum pactum*, such promises being performable, concurrent, and mutually binding upon both parties at the same time.
4. Agreements to bid jointly at a public sale, if not made for the purpose of chilling or suppressing bidding, are valid.
5. In an action for breach of an agreement to buy jointly and afterwards divide a large bankrupt stock of goods, upon a demurrer *ore tenus* to the complaint damage to the plaintiffs is sufficiently shown by allegations that it was necessary for them to make financial arrangements for the half of the price which they were to furnish, and by a statement of their counsel (which it was agreed the court might consider) that they were advised of defendant's repudiation of the contract at the last moment, when they were not able to take care of themselves.

APPEAL from a judgment of the circuit court for Douglas county: E. C. HIGBEE, Judge. *Reversed.*

Action to recover damages for the breach of an oral contract to jointly purchase a stock of goods and divide the same after the purchase.

The allegations in the complaint material to the questions raised on appeal are that there was in Superior a bankrupt stock of goods of the wholesale value of $170,863.12 advertised for sale on a certain date; that a short time previous to said date the plaintiffs and the defendant entered into a contract wherein

"it was mutually promised, understood, and agreed, among other things, that in consideration of the mutual promises of the parties, said parties should bid at said auction sale not to exceed the sum of one hundred twenty thousand dollars ($120,000), and should buy the said stock of merchandise and said store fixtures, provided the same could be bought for not to exceed said sum, and that such bids were to be made and such stock and fixtures purchased for the joint benefit of both parties. It was further mutually understood and agreed, that if the parties, or either of them, were the successful bidders and said stock and fixtures were purchased

by them or either of them, each of said parties should contribute one half of the amount of the bid upon which said stock and fixtures were purchased; that the store fixtures should be taken by the plaintiffs at fifty per cent. of the inventory value thereof; that the men's clothing and men's shoes should be sold in bulk, and the money realized from the sale thereof equally divided; that said *Roth Brothers Company* should be assigned and should take all the ladies' and children's shoes, and all the house furnishings; that plaintiffs should be assigned and should take all the cloaks, suits, and furs, and that the balance of said stock should then be divided between the parties *pro rata*. That relying upon the promises and agreements of the defendant aforesaid, plaintiffs made arrangements to obtain the necessary amount of money, and to carry out the contract on their part, and, on the day of said sale, and before and at the hour set for the same, appeared at the place at which said sale was advertised to be made, ready and willing to carry out and perform the aforesaid contract on their part; that the defendants, then and there, repudiated said contract, and refused to perform the same, and the said defendants, then and there, bid on said stock and said fixtures at said auction sale and were the successful bidders thereat, and purchased the said stock and the said fixtures at said sale for the sum of one hundred one thousand seven hundred fifty ($101,750) dollars, and wholly refused to carry out said contract or to assign or transfer to the plaintiffs said store fixtures and the portion of said stock which it was agreed should be assigned to plaintiffs, or any part thereof, but, on the contrary, said defendants retained the whole of said property for their sole benefit and profit, contrary to the terms of the agreement aforesaid."

Plaintiffs demand judgment in the sum of $26,405.68.

At the opening of the trial plaintiffs' counsel stated that the contract was oral; also that the defendant on the day of the sale and before the bidding began notified plaintiffs that it repudiated the contract. But he further stated, "they [plaintiffs] came there ready to carry out their agreement and at the last second were put in a position not to be able to take care of themselves." The parties agreed that the state-

ments of plaintiffs' counsel that the contract was oral, and was repudiated by defendant before sale, should be considered by the court in ruling upon a demurrer *ore tenus* to the complaint. The court sustained the demurrer upon the ground that the alleged contract was *nudum pactum,* and from a judgment dismissing the action the plaintiffs appealed.

For the appellants there was a brief by *Grace, Hudnall & Fridley* and *W. P. Crawford,* and oral argument by *Mr. C. R. Fridley* and *Mr. Crawford.*

For the respondent there was a brief by *Hanitch & Hartley,* and oral argument by *Louis Hanitch* and *C. J. Hartley.*

VINJE, J. The defendant seeks to sustain the judgment on two grounds: first, because the contract is void under the statute of frauds, sec. 2308, Stats. 1915, and the Uniform Sales Act, sec. 1684*t*—4, Stats. 1915; and second, because the contract is *nudum pactum* and, no part of the same having been executed and the plaintiffs not having been placed at a disadvantage by the repudiation thereof, no recovery can be had. Though the court disposed of the case on the second ground, counsel for defendant, if we understand them correctly, place more reliance upon the first ground stated. They argue that the complaint presents a case where joint owners agree to sell to one of the joint owners part of the property at a fixed price, and that such agreement comes within the statute of frauds and the Uniform Sales Act and is therefore void. The only case cited as being directly in point is *Mace v. Heath,* 30 Neb. 620, 46 N. W. 918. The syllabus sustains the claim made, but the facts of the case do not. There is a fatal variance between the two. The syllabus states:

"A verbal contract to engage in the business of purchasing five carloads of baled hay, and dividing the same with the defendants, the value being in excess of $50, no part of the hay being delivered, nor any portion of the consideration being paid, is within the statute of frauds, and void."

The facts as stated in the opinion are that the defendant in error entered into an oral agreement with the plaintiffs in error to sell and deliver to them five carloads of hay, which was to be purchased by him and shipped in his name. In a counterclaim they ask damages for the breach of such oral contract. Obviously an unexecuted oral contract by A. to sell to B. and C. hay of the value of more than $50 is void under the statute of frauds. There was no joint venture or partnership feature about the transaction. It was simply an oral agreement by one party to sell hay to two parties.

The case of *Wiley v. Wiley,* 115 Md. 646, 81 Atl. 180, relied upon by the defendant, was one where two parties orally agreed to jointly farm a certain tract of land to be purchased; to apply the profits on the purchase price, and when the tract was paid for each should receive a deed of a one-half interest therein. The grantor deeded to one of the parties and the other brought an action against his copartner for specific performance. The court held he was not entitled thereto, as his oral agreement was void under the statute of frauds, requiring an agreement for an interest in land to be in writing. The court, however, awarded him compensation for the value of his share of the profits with interest. The case of *Green v. Drummond,* 31 Md. 71, is very similar in its facts. Both cases were held to be within the statute because an interest in land was sought to be enforced through an oral agreement. The present case is not such a one. It is more like that of *Bullard v. Smith,* 139 Mass. 492, 2 N. E. 86, in which it was held that an oral agreement to share equally in the profits and losses resulting from the purchase and sale of stock already owned by one of the parties to the agreement was not within the statute of frauds. In *Mason v. Spiller,* 186 Mass. 346, 71 N. E. 779, an oral agreement between parties for a division of the remaining partnership property was held not to be within the statute because there was no contract of sale. So, also, in *Bogigian v. Hassanoff,* 186 Mass. 380, 71 N. E.

789, it was held that an oral agreement between the owner of goods and one who had advanced money on them that they should be sold by the combined efforts of the parties on terms and conditions agreed upon and the proceeds applied to compensating the lender to the amount advanced and the balance to go to the owner, was not within the statute of frauds.

In *Mygatt v. Tarbell,* 78 Wis. 351, 47 N. W. 618, it was held that an agreement between two execution creditors, each of whom claimed priority in his levy upon certain property, to allow it to be sold under one execution and to divide the proceeds equally, was not void under the statute of frauds as a sale of the property. The same was held in *Hunt v. Elliott,* 80 Ind. 245, where two mortgagors of personal property orally agreed that one should bid it in at a judicial sale and dispose of it for the benefit of both.

An oral agreement for the joint purchase of a sloop is not within the statute of frauds. *Reeves v. Goff,* Penn. (N. J.) 609. So an oral agreement to purchase property at the request of another, hold it, and upon being reimbursed for his expense and trouble transfer it to the other, is not within the statute because it is not an agreement to sell from one to the other. *Blair v. Lynch,* 20 N. Y. Wkly. Dig. 575. This case was reversed upon another ground by the court of appeals in 105 N. Y. 636, 11 N. E. 947, where the question of the statute of frauds is not discussed. In *Colt v. Clapp,* 127 Mass. 476, 480, it is stated that the statute of frauds relative to the sale of goods of the value of $50 or more is applicable only to contracts between seller and buyer. This rule was recognized by our court in *Brown v. Slauson,* 23 Wis. 244, where it was held that since the oral agreement between plaintiff and defendant was that the latter should buy a boat and afterwards sell plaintiff a quarter interest therein, and not, as contended by plaintiff, an oral agreement for a joint purchase of the specified interests, it was void under the statute of frauds. A like ruling was made in *Lewin v.*

Stewart, 17 How. Pr. 5, where it was unsuccessfully sought to show that the purchase of cotton was a joint purchase instead of a purchase by one and a resale to the other. But in *Dodge v. Clyde,* 7 Rob. (N. Y.) 410, where it was shown that three parties were jointly interested in the purchase of a ferry-boat, it was held that the statute did not apply because there was no sale from one to the others, but merely a division of interests growing out of a joint purchase. For somewhat analogous cases held not to be within the statute see Smith on the Law of Fraud, § 373, sub. (e).

It will be seen from the preceding cases that wherever there has been an oral agreement to buy jointly it has been held not to be within the statute, irrespective of whether the joint property so bought was to be sold and the proceeds divided or the property itself divided *in specie.* In the case at bar the agreement is for both kinds of division. The fact that as to some of the property the inventory value is to measure its division value does not change the agreement from one of division to one of sale. The parties do not stand in the relation of seller and buyer. They agree to buy jointly and to divide what they buy.

The argument of defendant's counsel that the cases involving a partnership relation were so decided because the general partnership agreement determined the share each was to take upon a division does not seem to be borne out by the cases themselves. In each of them the oral agreement contained the terms of division, and it was this agreement together with that of joint purchase that was held valid. The conclusion we reach both upon principle and authority is that the oral agreement pleaded is not within the statute of frauds, sec. 2308, Stats. 1915, nor within the Uniform Sales Act, sec. 1684*t*—4, Stats. 1915.

It is quite evident that the agreement was not *nudum pactum.* The consideration was a promise for a promise. Plaintiffs agreed to furnish one half the purchase price and

the defendant to furnish the other half. Such promises were performable, concurrent, and mutually binding upon both parties at the same time. This satisfies the call of the law. *Hopkins v. Racine M. & W. I. Co.* 137 Wis. 583, 119 N. W. 301; 6 Ruling Case Law, 676 *et seq.*

The agreement to buy jointly at the public sale was valid. This was a sale of a large stock, and it must be presumed from the allegations of the complaint to the effect that it was necessary for plaintiffs to make arrangements to procure one half the purchase price that they could not handle the stock alone. Agreements to bid jointly at a public sale, if not made for the purpose of chilling or suppressing bidding, are valid. *Hunt v. Elliott,* 80 Ind. 245; 6 Ruling Case Law, 811 and cases cited.

The claim that plaintiffs were not put to a disadvantage by a breach of the contract on the day of the sale is not sustained by the allegations of the complaint charging that it was necessary for them to make financial arrangements for one half the purchase price and the oral statement of their counsel that they were advised of the breach at the last second when they were not able to take care of themselves. Upon a demurrer *ore tenus* these allegations and statements of counsel, which the parties agreed might be considered, *prima facie* show damage.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

I. L. LAMM COMPANY, Appellant, vs. PEAKS and another, Respondents.

January 12—February 1, 1916.

Attachment: Demand not due: Condition precedent: Insufficient undertaking: Vacating judgment and attachment.

The giving of the undertaking required by sec. 2731, Stats., for three times the amount demanded is a condition of the right to maintain an action on a demand not yet due; and where such an undertaking was not given it was proper for the trial court, on motion, to set aside a judgment taken by default and vacate the attachment proceedings.

APPEAL from an order of the circuit court for Washburn county: GEORGE GRIMM, Judge. *Affirmed.*

Plaintiff commenced an action in the circuit court for Washburn county on a demand, not due, for $330.50 and interest thereon from March 4, 1915, and caused a writ of attachment to be issued therein, pursuant to which, in form, a levy was made on real estate in which defendants were interested. In due time judgment was rendered in such action. Defendants appeared in the action but did not answer. No notice of the application for judgment was given. As soon as they were informed of the judgment, they caused a motion to be made to set it aside and to vacate pending proceedings to enforce it, upon the ground, among others, that the statute authorizing the maintenance of an action and the issuance of a writ of attachment therein on a demand, not due, was not complied with in that the undertaking given was not conditioned in three times the amount of the demand. The undertaking was in the sum of $750, or less than twice the amount of the demand. The motion was granted.

For the appellant the cause was submitted on the brief of *W. E. Haily.*

L. H. Mead, for the respondents.

MARSHALL, J. The only authority for the maintenance of an action to recover a debt, not due, is found in sec. 2731, Stats., which requires, as a condition of such maintenance, the issuance of a writ of attachment upon an undertaking in three times the amount of the demand. It is conceded that such an undertaking was not given, but is suggested that the remedy of the defendants was by plea in abatement. The case not being one where there was a complete cause of action when the summons was served, but something was required to be done as a condition of enforcing it, a motion in the action to vacate the proceedings was proper. So ruled in *Lombard v. McMillan,* 95 Wis. 627, 634, 70 N. W. 673.

That the giving of the undertaking required by sec. 2731 was an absolute condition of the right to maintain the action, and in absence thereof that it was proper for the court to dismiss it and vacate all proceedings had therein, is ruled by *Gowan v. Hanson,* 55 Wis. 341, 13 N. W. 238, and *Streissguth v. Reigelman,* 75 Wis. 212, 43 N. W. 1116.

In the first case cited, this court held that "the giving of an undertaking for three times the amount demanded is as essential to the right to maintain the action as the making of the affidavit. Both things are absolutely necessary and requisite where the debt is not due, and the omission of either is fatal to the action," and that the circuit court should have dismissed the suit on defendant's motion.

It follows that no error was committed in vacating the judgment and attachment proceedings.

By the Court.—The order is affirmed.

ROCK, Respondent, vs. EKERN, Appellant.

January 12—February 1, 1916.

Contracts: Validity: Public policy: Private employment of counsel to assist district attorney in criminal prosecution.

1. **The employment and payment by private persons of counsel to assist the district attorney in the prosecution of persons for crime is against the public policy of this state, and a contract therefor is void.**
2. **The preliminary examination of a person accused of crime is merely one step in the prosecution of such crime, and the rule above stated is applicable thereto.**
3. **Acquiescence of the accused, the court, and the district attorney in the rendering of assistance to the district attorney by an attorney privately employed does not purge the contract of employment of its illegality or furnish ground for a recovery of compensation under it.**

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

This is an action brought by the plaintiff, an attorney at law, to recover for services rendered pursuant to a contract in a criminal prosecution in which defendant was the complaining witness.

One Fowler, treasurer of a company in which defendant was interested, was charged with having embezzled some of the company's money. Plaintiff was employed by the defendant to secure a requisition from the governor for the return of the accused. After the requisition was issued the accused returned to the state in response to it. A short time before the preliminary hearing of the accused the defendant entered into a contract with the plaintiff by which the plaintiff was employed by the defendant privately to assist in the criminal prosecution of the accused. The district attorney consented to this assistance. The contract reads as follows:

"February 26, 1914.

"*A. T. Rock,* the undersigned, hereby agrees to assist the district attorney of Douglas county, Wis., in the prosecution of Homer T. Fowler so long as *L. P. Ekern,* the complaining witness, desires the services of said *Rock* therein, at and for the sum of twenty-five (25) dollars per day and his expenses when called from home in said prosecution; and said *L. P. Ekern* hereby agrees to pay said *Rock* for his services said sum of twenty-five (25) dollars per day for each and every day of his services and pay his expenses when out of Superior or Duluth, Minn., in said work.

(Signed) "A. T. ROCK.
"L. P. EKERN.
"February 26, 1914.

"Received from *L. P. Ekern* twenty-five (25) dollars as advance fees on above contract.

(Signed) "A. T. ROCK."

The plaintiff assisted in the preliminary examination of Fowler, and the court, the district attorney, the lawyers of the accused, and the accused acquiesced in the plaintiff's assisting the district attorney in the prosecution of the case. Plaintiff had full charge of the case and conducted the examination. At the conclusion of the hearing the municipal judge dismissed the complaint against the accused and that terminated the prosecution. The defendant refused to pay the plaintiff for his services as per contract, and this suit was brought to recover payment for the services rendered under the contract. The following is an itemized statement of the amount plaintiff claims is due him from defendant:

1913.	
Feb. 25. One-half day examining books of Fowler-Eimon-Oyaas Co., at $25 per day	$12 50
Feb. 26–27–28. Examining books of Fowler-Eimon-Oyaas Co., at $25 per day	75 00
Mar. 3 to 12. Attending trial of State of Wisconsin vs. Homer Fowler, nine days at $25 per day	225 00
April 3 and 4. Attending court in case of L. P. Ekern vs. Homer Fowler, at $25 per day	50 00
Total	$362 00

The court submitted a general verdict to the jury, who found for the plaintiff in the sum of $212.50. The verdict contains the statement: "Of the above sum nothing is found as fees in the civil suit." This part of the verdict is not involved on this appeal. The court in accordance with the verdict entered judgment for the plaintiff to recover the sum of $212.50, together with the costs and disbursements of the action. From such judgment this appeal is taken.

The cause was submitted for the appellant on the brief of *Hanitch & Hartley,* and for the respondent on that of *Dietrich & Dietrich.*

SIEBECKER, J. The plaintiff sues upon the express contract he made with the defendant, which appears in the foregoing statement. It was agreed that the plaintiff was "to assist the district attorney of Douglas county, Wis., in the prosecution of Homer T. Fowler so long as *L. P. Ekern,* the complaining witness, desires the services . . ." The evidence shows that the plaintiff rendered services under the contract by assisting the district attorney in conducting the preliminary examination in the municipal court of Douglas county. He claims there was due for nine days' services in attending court on such examination the sum of $225. The jury found $212.50 due him for such services and included nothing for other services. The defendant challenges the right of plaintiff to recover under the contract upon the ground that the contract is against the policy of the law and the statutes of this state and void, and that no recovery thereon will be permitted. The question of the policy of the state, regarding such contracts as this, was examined by this court in the case of *Biemel v. State,* 71 Wis. 444, 37 N. W. 244. In that case an attorney who had been employed and paid for his services by a private party was permitted by the court to assist the district attorney in the prosecution of the case. This court there held that the statutes of the state pro-

viding for the election of a district attorney to act as the public prosecutor and prohibiting him from receiving "any fee or reward from or on behalf of any prosecutor or other individual, for services in any prosecution or business to which it shall be his official duty to attend; nor be concerned as attorney or counsel for either party, other than for the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution commenced but undetermined shall depend," together with the statute vesting in the judges of the courts the power to appoint attorneys to assist the district attorney whenever the court finds it necessary and proper in prosecuting felonies and prosecutions before grand juries, declare a policy of the state which regulates and limits the appointment of such counsel to assist in such prosecutions to attorneys who are not employed and paid by private parties, and that such counsel must be appointed by the court and paid from the public fund and thus place such assisting attorney in the same position of impartiality as the district attorney elected by the people. The court declared:

"We think it is quite clear from the reading of our statutes on the subject, as well as upon public policy, that an attorney employed and paid by private parties should not be permitted either by the courts or by the prosecuting attorney to assist in the trial of such criminal cases."

It is emphasized in the opinion that prosecutors in criminal cases should be free from prejudice and have no private interest in prosecutions. In *Wight v. Rindskopf,* 43 Wis. 344, in speaking of the duties and functions of prosecuting officers, the court states that he "is a *quasi*-judicial officer, retained by the public for the prosecution of persons accused of crime, in the exercise of a sound discretion to distinguish between the guilty and the innocent. . . . He is trusted with broad official discretion, generally subject, however, to judicial control." These views are supported in the case of *State*

v. Russell, 83 Wis. 330, 53 N. W. 441. These adjudications clearly establish that employment and payment of private counsel to assist the district attorney in the prosecution of persons for crime by private parties is against the public policy of this state. We are of the opinion that this policy has not been changed by subsequent legislation and must be adhered to. From the facts and circumstances shown in this case it appears that plaintiff contracted with the defendant "to assist the district attorney of Douglas county, Wis., in the prosecution of Homer T. Fowler so long as *L. P. Ekern* [defendant], the complaining witness, desires the services of said *Rock* [plaintiff] therein. . . ." It is without dispute that the amount of the recovery against defendant was for services plaintiff rendered under this contract in the preliminary examination of Fowler upon defendant's complaints. The contract as proved is against the public policy of this state and the trial court erred in permitting the plaintiff to recover thereon. The acquiescence of the accused, the court, and the district attorney to allow plaintiff to assist in the prosecution of Fowler under his private employment by defendant does not purge the contract of employment of its illegal character and affords no excuse to enforce it. *Wight v. Rindskopf, supra.* In *Melchoir v. McCarty,* 31 Wis. 252, it was held: "The general rule of law is, that all contracts which are repugnant to justice, or founded upon an immoral consideration, or which are against the general policy of the common law, or contrary to the provisions of any statute, are void;" even where such statute does not expressly declare them void.

It is argued that the plaintiff rendered the services here involved upon the preliminary examination and hence they are not of the class of services which are prohibited to be performed by counsel employed by private parties under this public policy. We cannot accede to this claim. A preliminary examination of a person accused of crime is one step in

the prosecution for the crime charged. It is so regarded and treated in the common law and the statutes. The court committed error in permitting the plaintiff to recover on the contract in this case.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the superior court of Douglas county with direction to enter judgment dismissing plaintiff's complaint.

BROBST and others, Appellants, vs. MARTY and another, Respondents.

January 12—February 1, 1916.

Partition of personal property of unincorporated association: Building erected on land given with provision for a reverter: Fixtures.

1. Where a voluntary, unincorporated association, organized to build a cheese factory and to make and sell cheese and butter, built such a factory upon land which was given to it for that purpose but was to revert to the donors in case the building so placed thereon should cease to be used for such purpose, the members of the association were owners of such building as tenants in common and, in the absence of any agreement to continue the business for any specified length of time, a part of such owners might maintain an action under sec. 2327*a*, Stats., for a division of the property.
2. If the association took possession of the land under an oral contract of gift which was void under the statute of frauds and such contract became validated by performance, the rights of the association must be measured by such contract.
3. A finding by the trial court that the cheese factory, though built upon a solid stone foundation, was personal property which would not revert to the original owners of the land, is *held* to be supported by the evidence.
4. While physical annexation is an important consideration in determining whether an article or building is a fixture, the intention of the parties is the controlling consideration.

APPEAL from a judgment of the circuit court for Green county: GEORGE GRIMM, Circuit Judge. *Reversed.*

This action was brought to secure partition of personal property, or a sale thereof in case it could not be partitioned to advantage. The court found as facts that the plaintiffs and certain others in February, 1898, organized a voluntary unincorporated association for the purpose of building a cheese factory and of manufacturing and selling cheese and butter, such association to be named the Spring Creek Cheese Manufacturing Company; that it was understood by the parties that their interests should be known and designated by shares of stock and that each of such shares should be in the sum of $25, and that the number of shares originally subscribed for was twenty-three, and that thereafter some changes in ownership took place and that four additional shares were sold; that at the time of the organization it was intended that the same should be incorporated, but such intention was never carried into effect; that about the time of the organization one Stabler agreed to give to the company one quarter of an acre of land and one Brobst a like quantity, upon the condition that the same should be used by said company as long as it was used for cheese or butter making purposes; that it was the intention of said donors and it was understood and agreed between them and the organizers of the company that in the event that said company or its assigns should cease to use the lands for such purposes the same should revert to the donors; that such agreement was verbal on the part of Stabler and as to Brobst was in writing, but that said written agreement has been lost; that thereafter the company entered into possession of the land donated and erected valuable improvements thereon, consisting of a cheese factory, cellar, well, and barn, and graded a driveway from the highway to the cheese factory, and that they expended in all about the sum of $1,200; that part of such factory is built on the land donated by Stabler and part on the land donated by Brobst; that the buildings were and are built on a solid stone foundation embedded in the soil and that a cheese cellar was excavated under a part of the factory building, and that the walls and floors thereof

are of stone, mortar, and cement; that said association has by itself and its tenants been in the constant possession, use, and occupation of the premises, which have been continuously used and are now being used for the purpose of manufacturing cheese; that the agreement between Stabler and Brobst and said association respecting the giving of said lands for factory purposes has been fully executed; that the company at no time, by resolution or otherwise, determined to discontinue the use of said premises for the purposes stated, and that the proceeds arising from the rents and profits of said cheese factory premises have been divided among the shareholders of said company; that at the time of the organization of said company no agreement was entered into as to the length of time that said business enterprise should continue, and that the business policy of the company has always been determined by a majority vote of the stock of the company.

As conclusions of law the court found that the agreement with Stabler and Brobst, in so far as it has been performed, is valid; that the erection of the buildings referred to is such a performance of the agreement as to take the same out of the statute of frauds; that the plaintiffs and defendants are the owners of an estate upon condition subsequent of the premises agreed to be given to said company, and that the parties to said association are entitled to the use of said premises so long as the same shall be used for cheese or butter making purposes, and that upon cessation of such use the same is to revert to the donors or their heirs; that all of the buildings upon said premises are personal property, and that upon the reversion of said premises such buildings may be removed therefrom; that the plaintiffs were not at the time of the commencement of this action and they are not at the present time the owners of such vested interests in the premises as to entitle them to partition of same; that said premises are not subject to partition and that the same will not be subject to par-

tition until after the cessation of the use of the same for cheese manufacturing or butter making purposes; that plaintiffs were not at the commencement of this action and they are not at the present time the owners of such vested interests in said buildings as to entitle them to partition of the same, and that said buildings will not be subject to partition until the reversion of said real estate upon the cessation of the use of same for the purposes of manufacturing cheese and butter. Upon these findings and conclusions judgment was entered dismissing the complaint.

The plaintiffs own fifteen of the twenty-seven so-called shares of stock and the defendants twelve of such shares. The donors of the real estate referred to are not parties to the action. No claim was made in the complaint by the plaintiffs to any interest in the real estate upon which the cheese factory was built, and the relief sought was for a partition of the factory building, or for sale thereof and a distribution of the proceeds in case partition could not be made without great prejudice to the owners, as well as for such other relief as might be agreeable to equity and good conscience.

For the appellants the cause was submitted on the brief of *J. L. Sherron.*

E. D. McGowan, for the respondents.

BARNES, J. On the findings of fact made the plaintiffs were entitled to judgment. The owners of fifteen of the twenty-seven so-called shares of stock are plaintiffs. Plaintiffs also include four of the six owners of this stock. There was no agreement to continue the business for any specified length of time, and in fact it has been continued since 1898. No equitable consideration has been suggested which would justify the refusal of relief. The building cannot be partitioned and must therefore be sold. It does not follow that the purchaser will not continue to put it to the uses to which it

has been devoted in the past. If there is any demand for such an establishment in the community, it is worth more for the use to which it has been put than it would be for purposes of removal. The plaintiffs and defendants are owners of the building as tenants in common. *Higgins v. Riddell,* 12 Wis. 586. The proceeding is authorized under sec. 2327*a,* Stats. A sale is authorized under sec. 2327*b* where the property involved is not susceptible of division.

The court found that under the parol agreement in reference to the land such land was to revert to the owners when the building placed thereon was no longer used as a cheese factory. This finding is certainly sustained by the evidence. It may be that the association took possession of the land under a void contract and that such contract has been validated by performance. If such is the case, the rights of the association must be measured by such contract. There is no showing whatever that the association in any manner secured any greater rights.

Neither can it be held on the evidence that the building is a fixture which is the property of the owners of the land on which it stands and therefore no right of removal exists. While physical annexation is an important consideration in determining whether an article or building is a fixture, the intention of the parties is the controlling consideration in determining the question. *Rinzel v. Stumpf,* 116 Wis. 287, 93 N. W. 36; *E. M. Fish Co. v. Young,* 127 Wis. 149, 106 N. W. 795; *Baringer v. Evenson,* 127 Wis. 36, 106 N. W. 801. Here the court found on sufficient evidence that there was no intention that the building should be regarded as a fixture. The building was in possession of the owners through their tenant, and the court properly held that under the facts it did not originally belong to the landowners nor revert to them thereafter.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment as prayed for in the complaint.

SCHMIDT and another, Respondents, vs. GRENZOW and others, imp., Appellants.

January 12—February 1, 1916.

Mortgages: Foreclosure: Deficiency judgment against heirs of mortgagor: Contingent claim against decedent.

1. **A judgment for deficiency in a foreclosure action cannot properly be entered against the heirs of a deceased mortgagor where complete administration of his estate has been had and no claim was filed by the mortgagee in the administration proceedings. *Pereles v. Leiser*, 119 Wis. 347, followed; *Pereles v. Leiser*, 138 Wis. 401, distinguished.**
2. **The sum secured by a mortgage being a fixed amount and due at a definite time in the future, the mere contingency as to whether or not there will be a deficiency after a foreclosure sale does not make the mortgagee's claim a contingent one, within the meaning of sec. 3858, Stats.**

APPEAL from a part of a judgment of the circuit court for Green county: GEORGE GRIMM, Circuit Judge. *Reversed.*

Action to foreclose a real-estate mortgage of $6,000 securing two notes of $5,000 and $1,000, each, executed by one E. O. Grenzow, since deceased.

Administration on the estate of the mortgagor had been completed before this action was begun, and the sum of $1,762.27 out of his personal estate was assigned to each of the four appellants. At the time of administration the mortgage indebtedness was not due and plaintiffs filed no claim against the estate. The plaintiff *Schmidt* owns the note of $5,000 and the plaintiff *Babler* is the owner of the $1,000 note. The defendant Mary Legler is liable as an indorser of the $1,000 note and does not appeal. In the usual foreclosure judgment the court also ordered a judgment for a deficiency, if any should arise, against the four heirs to the extent of $1,762.27 each. From that part of the judgment they appeal.

For the appellants there was a brief by *Sprague & Jenks*,

attorneys for *Louise Grenzow,* and *Burr Sprague,* guardian *ad litem* for *Harry L. Grenzow, Orpha M. Grenzow,* and *Daisy B. Grenzow;* and oral argument by *Burr Sprague.*

For the respondents the cause was submitted on the brief of *J. L. Sherron.*

VINJE, J. This case presents the question whether a judgment for a deficiency in a foreclosure action can be properly entered against the heirs of a deceased mortgagor where complete administration of his estate has been had and no claim has been filed by the mortgagee in the administration proceedings. The question was answered in the negative in *Pereles v. Leiser,* 119 Wis. 347, 96 N. W. 799. The only difference between that case and this is that there the indebtedness was due at the time of administration and here it was not. But a fixed amount due at a definite time in the future is not a contingent claim within the meaning of sec. 3858, Stats. 1915. Hence, the only contingency in this case is whether or not there will be a deficiency after sale. That was the only contingency in the *Pereles Case* and it was argued that such contingency made the claim a contingent one. But the court held that it did not. It is evident that the contingency of a deficiency is no greater where the note is not due than where it is due.

If a mortgagee deems himself insecure he can file his claim against the estate. If he does not do so he must be held to rely solely upon the security.

The case of *Pereles v. Leiser,* 138 Wis. 401, 120 N. W. 274, is relied upon as authority for the right to a deficiency judgment. In that case the judgment of the circuit court against the executor for a deficiency had to be treated as a valid judgment because unappealed from for two years, and it was held that the allowance of such valid judgment against the estate by the county court after the time for filing claims had expired was not error, as it was only another way of col-

lecting the judgment. The decision in *Pereles v. Leiser*, 119 Wis. 347, 96 N. W. 799, rules this case.

By the Court.—That part of the judgment appealed from is reversed.

DEAN and others, Appellants, vs. DEAN, Respondent.

January 12—February 1, 1916.

Evidence: Foreign laws: Pleading: Insurance: Benefit societies: Change of beneficiaries: By-laws must be followed: Waiver by local officers: New by-laws, when binding on member.

1. **The law of another state should be pleaded in order to make evidence thereof admissible.**
2. **Subject to certain exceptions, a member of a fraternal order who wishes to change the beneficiary named in his certificate must do so in the manner prescribed by his certificate and the laws of the association.**
3. **Officers of a local lodge, whose duties with regard to a change of beneficiaries are simply ministerial, cannot waive a requirement of the laws of the association that a change must be made by surrender of the certificate and issuance of a new one by the supreme secretary.**
4. **Where a benefit certificate provides that the insured shall be bound by by-laws thereafter adopted, he will be so bound provided the change made is simply a change in a matter of detail deemed necessary or advisable to carry out the fundamental principle or plan of insurance, and not a change in a substantial part of the plan itself or a nullification of any substantial part of the existing contract of insurance.**
5. **A new by-law in such a case which made no change except to provide that certain persons should be beneficiaries in case no beneficiary was named when the original beneficiary predeceased the insured, took away no right of the insured and was binding notwithstanding a prior ineffectual attempt of the insured to designate a new beneficiary after the death of the one named in his certificate.**

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

The action is brought by the plaintiffs, who are the children of Chauncey B. Dean, deceased, by his first marriage, to recover upon a benefit certificate for $2,000 issued December 23, 1898, by the Mystic Workers of the World, a fraternal order, on the life of said Chauncey B. Dean. The money having been brought into court by the order, *Clara B. Dean,* widow of the said Chauncey, was substituted as the defendant in the action and the action was tried by the court without a jury.

The material facts were not in dispute and were as follows: The certificate was issued to Chauncey B. Dean at Belvidere, Illinois, December 23, 1898, and provided that the insured was entitled "to participate in the beneficiary fund of the order in the manner and upon the conditions of the contract printed on the back hereof and of the *constitution, by-laws, and rules of the order,* in an amount not exceeding $2,000, which shall at death be paid to Frances K. Dean, bearing relationship to said member as wife." Sec. 40 of the by-laws of the order at that time provided that each person applying to become a benefit member of the order must, among other things, "conform to the requirements of the ritual and agree to abide by the laws of the order then *or thereafter* in force." Sec. 95 provided that the by-laws might be altered or amended at any regular session of the supreme lodge or special session called for that purpose under certain requirements with regard to notice to subordinate lodges. Sec. 79 provided that in case a member desired to make any change of beneficiary "he shall surrender his certificate with a statement thereon in writing stating the change he wishes made, and upon payment of fifty cents to pay the expense the supreme secretary shall issue a new certificate as desired." Sec. 84 provided that no person connected with the order "is authorized to waive any of the provisions of these laws except the supreme master by his written dispensation." No provision was made in the constitution or by-laws with regard to the disposition

of the death benefit in case of the death of the beneficiary before the death of the insured, no new designation of beneficiaries having been made by the insured. Frances K. Dean died March 3, 1899, and Chauncey B. Dean married the defendant, *Clara,* prior to December 2, 1907. On the last named date Mr. Dean, who was a practicing lawyer in Belvidere, himself wrote upon the certificate the following:

"I, Chauncey B. Dean, to whom the within certificate was issued, do hereby revoke my former direction as to the payment of the beneficiary fund due at my death, and now authorize and direct such payment to be made to my wife, *Clara B. Dean.*

"Witness my hand and seal, this second day of December, 1907. CHAUNCEY B. DEAN. (Seal.)"

He then took the certificate to the secretary of the local lodge at Belvidere and showed him the revocation. The secretary told Mr. Dean that according to the constitution it would be necessary to surrender the old policy and have a new one issued by the supreme lodge, and that a fee of fifty cents was required. Mr. Dean, however, said in substance that he wished no mention of the matter to be made and no entry on the lodge books; that he did not wish to surrender the certificate, he simply wanted the secretary to sign as a witness and place the seal of the lodge upon it and that would answer his purpose. Dean then signed the revocation, the secretary signed as a witness and placed thereon the lodge seal, Dean retained the certificate, and it was never surrendered nor was any new certificate issued and no entry was made upon the lodge books. This constituted the entire transaction. In June, 1912, the by-laws of the order were revised and a new by-law added to the effect that in case the beneficiary predeceased the insured and no other designation made, the benefit should be paid first to the widow or widower, or, if none, to the children, and then in order to the mother if living, father if living, brothers and sisters if liv-

ing, and lastly to dependents, provided, however, that in case a widow or widower and children survive, the widow or widower not being the parent of the deceased member's children, then payment shall be made to the children.

Dean died January 20, 1914, being at that time a member of the order in good standing and not having made any further attempt to change the beneficiary in the certificate. Upon the trial the statutes of Illinois relating to fraternal insurance associations as well as a number of decisions of the supreme court of that state were offered and received in evidence. The trial court concluded that the attempted revocation of the original beneficiary and the designation of *Clara B. Dean* as beneficiary was legally made; that the contract was an Illinois contract; that the plaintiffs have no claim on the death benefit; that the amendment to the by-laws made in 1912 did not affect or become part of the contract; and that the defendant, *Clara,* was entitled to recover the full sum paid into court. From judgment in accordance with this finding the plaintiffs appeal.

For the appellants there was a brief by *Jeffris, Mouat, Oestreich & Avery,* and oral argument by *O. A. Oestreich* and *M. O. Mouat.*

For the respondent there was a brief by *William Biester* and *Geo. G. Sutherland,* and oral argument by *Mr. Sutherland.*

WINSLOW, C. J. The contract was an Illinois contract and controlled by Illinois law. Testimony was received against objection showing what the law of Illinois was regarding the effect of a change in the by-laws upon such contracts, although the Illinois law had not been pleaded. Strictly speaking, foreign law should doubtless be pleaded before evidence thereof is admissible. *White v. M., St. P. & S. S. M. R. Co.* 147 Wis. 141, 133 N. W. 148; *Elmergreen v. Weimer,* 138 Wis. 112, 119 N. W. 836. The question is of no mo-

ment here, however. The law of Illinois is substantially the same as the law of Wisconsin so far as the issues involved in this case are concerned.

There are manifestly two questions in the case: (1) Was the attempted revocation and designation of a new beneficiary valid? and (2) Does the new by-law passed in 1912 affect the rights of the parties?

1. It is settled by a long and consistent line of decisions in this state that a member of a fraternal order who wishes to change the beneficiary named in his certificate must do so in the manner prescribed by his certificate and the laws of the association with three exceptions, none of which are applicable here. The subject is so fully discussed in the case of *McGowan v. Supreme Court I. O. F.* 104 Wis. 173, 80 N. W. 603, and the later case of *Faubel v. Eckhart,* 151 Wis. 155, 138 N. W. 615, that it seems unnecessary to enlarge upon it here. See, also, Bacon, Ben. Soc. §§ 307, 308; *Delaney v. Delaney,* 175 Ill. 187, 198, 51 N. E. 961.

Admittedly there was no compliance with the laws of the association here, nor was a substantial compliance even attempted, hence there was no change of beneficiaries, unless compliance with the requirements of the laws was waived. That there was no waiver is clear. Sec. 84 of the laws provides that no person is authorized to waive any requirements of the laws except the supreme master by written dispensation. But there would be no waiver even in the absence of this provision. The duties of the officers of the local lodge with regard to the change of beneficiaries are simply ministerial: the change must be made and the new certificate issued by the officers of the supreme lodge alone. To hold that officers who cannot by the most solemn writing make a valid change can do so by mere silence would be little short of absurd. *Grand Lodge A. O. U. W. v. Connolly,* 58 N. J. Eq. 180, 43 Atl. 286.

2. It is settled in this state that where the benefit certifi-

cate provides that the insured shall be bound by by-laws thereafter adopted he will be so bound provided the change made is simply a change in a matter of detail deemed necessary or advisable to carry out the fundamental principle or plan of insurance, and not a change in a substantial part of the plan itself or a nullification of any substantial part of the existing contract of insurance. *Curtis v. Modern Woodmen,* 159 Wis. 303, 150 N. W. 417, and cases cited. The Illinois decisions go even further and hold that the power of appointment of a beneficiary may be divested by subsequent changes in the laws of the order if the certificate provides that the rights of the insured shall be subject to such future changes. *Baldwin v. Begley,* 185 Ill. 180, 56 N. E. 1065; *Peterson v. Gibson,* 191 Ill. 365, 61 N. E. 127.

In the present case the benefit certificate was conditioned, in effect, that the member should abide by the laws of the order then or thereafter in force. The new law of 1912 did not take away a single contract right possessed by the insured. He could control the policy and change the beneficiary with the same freedom as before. The only change in the situation was that certain persons were made beneficiaries in case no new beneficiary was named when the original beneficiary predeceased the insured. This took away no right from the member, but simply prevented a lapse in case of his neglect.

By the Court.—Judgment reversed, and action remanded with directions to render judgment for the plaintiffs in accordance with the opinion.

RHEIN, Appellant, vs. BURNS and another, Respondents.

January 12—February 1, 1916.

Contracts: Construction: Ambiguity: Sale or contract for work: Acceptance: Questions for jury: Special verdict: Omissions: Finding by court, when presumed: Instructions to jury: Damages: Remission of part: Appeal: Disposition of case.

1. Whether the contract under which plaintiff made for defendants a "winding machine" for absorbent cotton and which, it was conceded, called for a weigher device as well as a winding device, called also for a header device (which plaintiff in fact furnished) as a constituent part of the machine, is *held* upon conflicting evidence to have been a question for the jury.
2. In an action for a balance due on such contract, defendants having counterclaimed for damages, and the court having charged the jury that if they answered "no" to a question as to whether the machine satisfied the guaranty in the contract they need not answer a question as to whether there was a breach by plaintiff of the contract in respect to furnishing information as to putting up and packing the absorbent cotton, it was error to instruct the jury that if they answered either of those questions in favor of defendants they should include in their assessment of damages, in addition to the down payment of $100 made by defendants, all loss which defendants sustained as a proximate result of plaintiff's failure to comply with either or both of said provisions of the contract.
3. The jury having acted in accordance with such instruction and made no answer to the second question, and it being impossible to determine how much of the damages assessed was for the breach covered by the unanswered question, the judgment for defendants is reversed unless they elect to take judgment for $100 only, the amount which they had paid on the contract.
4. The contract, by which plaintiff guaranteed "to make a machine that will wind absorbent cotton in a satisfactory manner," etc., was a contract for doing the work of making the machine, not for the sale and delivery of property.
5. No request having been made for submission of a question as to whether defendants accepted the machine as satisfying the guaranty, and there being evidence which would reasonably support a finding that they had not, the trial court must be presumed to have determined that question in favor of defendants, for whom judgment was rendered on their counterclaim.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

Action to recover on contract. Plaintiff claimed a balance due of $200 for installing a winding machine in the *Janesville Batting Mills,* for putting up for the trade absorbent cotton. Defendants defended upon the ground of breach of contract and counterclaimed on such ground for damages.

As a result of some negotiations between defendant *Burns* and plaintiff regarding the installation of a winding machine in the mill of the defendant *Janesville Batting Mills* a written contract was made as follows:

"Contract made between *J. A. Rhein* of Chicago and *T. P. Burns* of Janesville, February 3, 1912. This is to certify that I guarantee to make a machine that will wind absorbent cotton in a satisfactory manner for the trade generally and to give all the information about putting up the same, papering, boxing, and packing it for the sum of three hundred ($300) dollars, one hundred ($100) down and one hundred ($100) dollars in thirty days after we get the same to work satisfactory and the other one hundred ($100) dollars in sixty days after we get the same to work satisfactory.

"J. A. RHEIN.
"T. P. BURNS."

The down payment was made and plaintiff constructed a machine consisting of a weigher device, a header device, and a winding device, and the same was put in operation. There was evidence tending to prove that the machine called for by the contract required the three features, and evidence tending to prove that it required only the weighing and winding device. Plaintiff conceded that he was bound by the contract as to the last two features, but not as to the header device. There was evidence tending to prove that the guaranty contained in the contract was not satisfied and that the machine was not accepted by defendants. There was also evidence tending to prove that there was a breach of the contract as regards giving defendants all the information necessary about

putting up absorbent cotton, papering, boxing, and packing the cotton in a manner satisfactory to the general trade, and evidence as to damages in respect to both matters. There was also evidence tending to prove the contrary of both of defendants' claims.

The court submitted the cause to the jury for a special verdict, instructing that the first question, covering the subject of whether the machine satisfied the guaranty, should be answered, taking into consideration the evidence in respect to whether the header device was a constituent part of the machine contracted for, that if they answered the first question in favor of the defendants, not to answer the second, covering the subject of breach of that part of the contract in regard to instructions, and if they answered either the first or second question in favor of the defendants, they should answer the third question, covering the subject of damages, and to include, in addition to the $100 paid on the contract, all loss which defendants sustained as a proximate result of the failure to comply with either or both of the provisions of the contract, to the extent such loss could not have been avoided by the exercise of ordinary care and business prudence on the part of the defendants. In response thereto, the jury found that plaintiff did not make for defendants a machine that would wind absorbent cotton in a satisfactory manner for the trade, left the question as to breach of the contract respecting furnishing information for putting up absorbent cotton and papering, boxing, and packing it, unanswered, and assessed the defendants' damages at $300.

There was a motion for a new trial on behalf of plaintiff, made and denied, and exceptions taken to each denial and to some features of the instructions, and in respect to other matters which, so far as necessary, will be referred to in the opinion.

Judgment was rendered in favor of the defendants on the verdict and plaintiff appealed.

For the appellant there was a brief by *Richardson & Dunwiddie,* and oral argument by *M. P. Richardson.*

For the respondents there was a brief by *J. J. Cunningham,* attorney, and *Geo. G. Sutherland,* of counsel, and oral argument by *Mr. Sutherland.*

MARSHALL, J. The court instructed the jury in respect to the question as to whether plaintiff made for defendants a machine that would wind absorbent cotton in a satisfactory manner for the general trade, that they should determine from the evidence whether the machine agreed upon included a header device as a constituent part of it, and answer the question in view of their determination in that respect.

It is contended that the instruction referred to was erroneous as there was no evidence that the contract called for a machine including a header device. True the direct evidence was substantially as counsel for appellant claims, yet there was no controversy but what the winding machine mentioned in the agreement was not a mere winding device. It was conceded, on the trial, that the machine included a weigher device, and there was ample evidence showing that the header device, weigher device, and winding device were essential features of a complete machine for doing the work contemplated, and that plaintiff set up the machine with such three features as if the contract covered each as a constituent part of the entirety, denominated a winding machine. The term "winding machine" appears clearly ambiguous when it is conceded that it is more than a mere winding device. Upon the evidence, direct and circumstantial, it is considered that the trial court did not err in giving the instructions complained of.

It is further contended that the court erred in instructing the jury that in case of their finding the contract was breached, either in respect to making the machine agreed upon or in respect to giving information about putting up ab-

sorbent cotton in a manner satisfactory to the trade, to include, in answering the question covering the subject of damages, the down payment of $100 with interest and "all loss which the defendants sustained as a proximate result of the plaintiff's failure to comply with either or both of the provisions of the contract embraced in the first and second questions, to the extent to which such loss could not have been avoided by the exercise of ordinary care and business prudence on the part of the defendants."

As indicated in the statement, the court instructed the jury not to make any answer to the question covering the subject of whether plaintiff breached the contract respecting furnishing information, in case of their finding that it was breached in respect to making the machine so as to satisfy the guaranty, and that no answer was given to the second question.

We are unable to understand why the jury were instructed to assess damages for breaching the contract as to both features in case of their finding there was a breach as to one. It seems there was a plain error at this point, as counsel for appellant contend, and that it is impossible to determine how much of the $300 of damages found was attributed by the jury to the feature covered by the unanswered question.

It is further contended that the court erred in not ordering judgment in plaintiff's favor upon the ground that defendants accepted the machine by using it and by failing to give notice within a reasonable time of its rejection as not satisfying the guaranty. Such contention and others are grounded on the theory that there was a sale and delivery of property which is not the case. The contract was for doing the work of making a machine for respondents, not for the sale and delivery of property within the rule applied in *Oscar Smith & Sons Co. v. Janesville Batting Mills,* 150 Wis. 528, 137 N. W. 966, cited to our attention, or the rule of the Uniform Sales statutes.

The trial court was not requested to submit a question to

the jury on the subject of whether respondents accepted the machine as satisfying the guaranty, and so the court must be presumed to have determined it, so far as it was a controverted matter of fact, with all the effect of a jury finding. If there was any evidence which in any reasonable view will support it, that is sufficient. As we read the record, there is such evidence and we will rest the matter without extending the opinion by quoting the same. It may be, as contended, that the evidence of *Burns,* who testified on the subject on behalf of respondents, is somewhat contradictory and that the more consistent evidence was given by plaintiff, and that the circumstances rather corroborate the latter, as contended by counsel for appellant, yet we cannot say that there is no believable evidence showing that respondents never accepted the machine as satisfying the guaranty.

What has been said seems to cover all matters presented which merit special attention. As we view the case there was no definite evidence of damages for breach of the guaranty, as to the machine, except that relating to the payment on the contract of $100. The court might have given respondents an option to take judgment for that amount, thus curing the error of directing the jury to assess damages for the fault covered by the unanswered question. We have concluded to reverse the judgment and remand the cause for a new trial, unless respondents elect in writing filed with the clerk of the trial court within twenty days after the filing of the *remittitur* with such clerk, to take judgment for $100 with interest thereon from the 3d day of February, 1912, and costs.

By the Court.—So ordered.

HILTGEN, Appellant, vs. BIEVER, Respondent.

January 13—February 1, 1916.

Sale on trial: Retention and use: Acceptance.

Where gang plows were sold on trial, the purchaser to have a reasonable time to test them and determine whether they were suitable, and he plowed with them all his own land, one hundred acres, and ninety-two acres for other persons, using the plows for more than twenty days, when one day would have been sufficient for a test, he must be held to have accepted the plows and to be liable for the purchase price.

APPEAL from a judgment of the circuit court for Ozaukee county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

This action was brought to recover the purchase price of certain twelve-inch gang plows and extra equipment at an agreed price of $575. The defendant in his amended answer admits the sale and selling price, but alleges that the plaintiff, instead of delivering twelve-inch plows, delivered fourteen-inch plows, and further set up the plaintiff's knowledge that defendant intended to use said plows in the state of Montana, and when defendant discovered that said implements were not of the kind he had ordered he informed the plaintiff of the fact, and plaintiff agreed that if defendant could not use them in the operation of his farm and in properly plowing his land defendant would not be obliged to pay for them. The answer further alleges that the defendant was unable to make much, if any, use of said plows on account of their extra width, and it was impossible for him to plow the land as he could have done had he received the plows agreed upon; that his engine purchased from the plaintiff at the same time he purchased the plows did not have sufficient power to operate said plows; that owing to the lateness of the season and the distance from market defendant was obliged to make use of the plows in plowing his land in said state of

Montana; that defendant has never accepted said plows and refuses now to accept the same. The answer also sets up several counterclaims.

The following is the portion of the special verdict material upon this appeal:

"(1) Did the defendant, *Peter C. Biever,* on the occasion when the parties met at the car in Milwaukee, accept the gang plows, then on the car, in satisfaction of the terms of the written order signed by him on January 3, 1911? *A.* No.

"(2) If you answer the first question 'No,' then answer this question: Did the plaintiff, on the occasion when the parties met at the car in Milwaukee, agree that the defendant might take said gang plows to Montana and if he could not use them for plowing land he would not be obliged to pay for them? *A.* Yes.

"(5) Were the seven extra stubble bottom shears delivered on the car at Milwaukee ready for shipment to Montana? *A.* No."

After verdict the plaintiff moved to change the answer to the first question from "No" to "Yes" and to strike out the answer to the second question, and that if such motion be denied the plaintiff be permitted to amend his complaint by inserting the following:

"That thereafter and on or about the month of February or March, 1911, the said defendant shipped said goods, wares, and merchandise, being said gang plows and appurtenances above described, to the state of Montana, and that he in said state, during the spring and summer of the year 1911, used the gang plows and appurtenances for plowing all of his land in said state and the land of other persons, that said gang plows could be used by defendant and were used by him in plowing said lands aforesaid, and worked satisfactorily and to the satisfaction of the defendant, and the defendant then and there accepted said goods, wares, and merchandise, to wit, said gang plows and their appurtenances as above described, as and for said goods, wares, and merchandise so sold as aforesaid, and for judgment in favor of the plaintiff as prayed for in his complaint."

Plaintiff also moved to set the verdict aside and for new trial. The court denied all motions made by plaintiff and ordered judgment in favor of the defendant dismissing the complaint with costs. Judgment was entered accordingly, from which this appeal was taken.

Chas. J. Kunny, for the appellant.

For the respondent the cause was submitted on the brief of *William F. Schanen,* attorney, and *James D. Shaw,* of counsel.

KERWIN, J. The contract made by the parties as found by the second question and answer of the special verdict amounted to a sale on trial. Under it the defendant was to have a reasonable time, under all the circumstances of the case, to try the plows. It is very clear from the undisputed evidence that the defendant accepted the plows. The evidence is undisputed that he not only plowed all his own land, 100 acres, but plowed ninety-two acres for other persons. He used the plows twenty-two or twenty-three days. There is no evidence that it was necessary to use the plows any considerable time in order to determine whether they would do good work. Obviously a day or less would have been sufficient to test the plows and determine whether they were suitable.

Under such circumstances it must be held that the defendant accepted the plows as a compliance with the terms of sale and is liable for the purchase price. *Fox v. Wilkinson,* 133 Wis. 337, 113 N. W. 669; *Kelsey v. J. W. Ringrose N. Co.* 152 Wis. 499, 140 N. W. 66; *Estey O. Co. v. Lehman,* 132 Wis. 144, 111 N. W. 1097.

There is no evidence that the plows were of less value than the purchase price. The complaint was that they were larger, fourteen-inch plows, while the contract called for twelve-inch plows. All the counterclaims for damages pleaded, except the claim for seven extra stubble bottom

shears, were decided against the defendant and no appeal taken by him. The evidence tends to show that the seven shears were worth $21. This sum, therefore, should be deducted from the purchase price of the goods sold, viz. $575, and judgment rendered for the balance.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to enter judgment for the plaintiff for $554 with interest and costs.

JACOBS, Respondent, vs. WISCONSIN NATIONAL LIFE INSURANCE COMPANY, Appellant.

January 13—February 1, 1916.

Contracts: Validity: Corporations: Powers: Life insurance companies: Sale of "profit-sharing bonds:" Consideration: Rescission by purchaser.

1. A contract is not to be condemned merely because it is ingenious, nor unless it contravenes some rule of positive law or conflicts with public policy.
2. All stock corporations, when not expressly or by implication forbidden to do so, have by necessary inference general power to make contracts furthering the objects of their creation.
3. The issuance and sale by a domestic life insurance company of a limited number of "profit-sharing bonds," wherein the company agreed to set apart annually from its earnings and place in a special fund one dollar for each thousand dollars of insurance outstanding and in force, and to divide the fund annually among the purchasers of the bonds for thirty years,—such fund to be taken only from the expense charges collected as part of the annual premiums paid to the company for insurance; the proceeds of the sales of the bonds to be used for the promotion of the company's business of life insurance; and the company assuming no other liability or obligation upon the bonds,—was within the general power of the corporation to make contracts; and there being nothing therein contrary to any statute or to public policy, such bonds are valid.
4. The mere fact that such bonds are a speculative investment for the purchaser does not render them invalid.

5. Such bonds being valid, a purchaser thereof received a legal consideration for his money and, in the absence of fraud or mistake, cannot enforce a rescission of the contract or a return of his money.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Weed & Hollister,* and oral argument by *H. I. Weed.*

Charles D. Smith, for the respondent.

TIMLIN, J. The defendant is a life insurance company organized under ch. 89, Wisconsin Statutes. The articles of incorporation provided that the business of the corporation should be (1) to make insurance upon the lives of individuals, and every insurance appertaining thereto or connected therewith; (2) to grant, purchase, and dispose of annuities; (3) to insure persons against physical disability or death caused by accident or disease and to issue such contracts either independently or in conjunction with life risks; (4) to invest and reinvest the funds of the corporation, purchase and hold real estate for the use and convenient transaction of its business; and (5) to enjoy all the powers, privileges, and rights conferred upon domestic life insurance companies and be subject to all the restrictions, regulations, and obligations imposed upon such companies by the laws of the state of Wisconsin. The capital stock was fixed at $100,000, divided into 1,000 shares of $100 each. Contracts of insurance granted by the defendant were to be issued upon the plan of nonparticipation in profits with or without premium reductions, the insurance was to be upon the legal reserve basis, and the reserve required by the tables of mortality approved for that purpose was to be maintained so as to guarantee the policies at maturity.

Defendant issued what is called a profit-sharing bond, which was in substance a contract to set apart annually from

the earnings of the company and place in a special fund a sum of money equal to one dollar for each one thousand dollars' worth of insurance outstanding and in force. A number of profit-sharing bonds were issued and sold for a present cash payment of $150 each. The number of these bonds to be issued was limited to 2,000. The proceeds of these sales were to be used for the promotion of defendant's business of life insurance in the several states, territories, and countries to which the company might be admitted. The purchaser in accepting the bond did so with the express understanding and agreement that the company assumed no liability or obligation other than the duty to set apart annually one dollar for each thousand dollars of insurance outstanding and in force and to divide this annually among the purchasers of these bonds for a period of thirty years. The fund to be so raised and divided was to be taken exclusively and only from the expense charges levied and collected with and as a part of the annual premiums paid to the company for insurance. It is apparent that this is a device to raise money for the promotion and extension of defendant's legitimate business; that it in no way affects the ability of the defendant to respond for death losses or impairs the legal reserve required. At the same time it is apparent that it is a very speculative investment on the part of the purchaser of the bond. He may in thirty years receive many times the amount paid for the bond or he may receive little or nothing.

In this action to recover back the amount paid for four of these bonds the learned circuit judge directed judgment for the plaintiff apparently on the ground that the bonds were void, consequently the plaintiff received nothing for his money. The conclusion of law covering this decision of the circuit court is as follows: "that said so-called 'profit-sharing bonds' are void for want of authority in the defendant life insurance company to issue and sell the same." We are referred to no statute which forbids, either expressly or by im-

plication, the making of such contract by a corporation like defendant. On the contrary we have in this state sec. 1947, sub. 4, making the provisions of ch. 86 of the Statutes applicable to insurance companies. Ch. 86 relates to the organization, powers, and dissolution of corporations generally. We also have in ch. 85 general powers conferred upon every corporation to make all contracts necessary and proper to effect its purposes and conduct its business. This last chapter also confers on each corporation of this state power "to mortgage its revenues to secure the payment of its debts or to borrow money for the purposes of the corporation." The only ground assigned for holding the so-called income bond void is the speculative character of the investment therein. This affects only the obligee in the bond. It is not speculative but quite certain as regards the obligor insurance company. The transaction amounts to this: the insurance company, instead of waiting for profits to accumulate and using these profits to promote and advance its insurance business, makes a contract whereby these anticipated profits are sold as above indicated and thereby money is at once and in the early years of the insurance company available with which to advance its insurance business, the purchaser of the bond taking his chances of reimbursement out of profits created or aided by his own money and the insurance company assuming no other obligation than that of setting apart annually for a limited period from the annual premiums collected for life insurance one dollar for each thousand dollars of life insurance outstanding and in force. A contract is not to be condemned merely because it is ingenious. *Govier v. Brechler,* 159 Wis. 157, 161, 149 N. W. 740. Nor unless it contravenes some rule of positive law or conflicts with public policy. *Shepard v. Pabst,* 149 Wis. 35, 45, 135 N. W. 158. All stock corporations, when not expressly or by implication forbidden to do so, have general power to make contracts furthering the objects of their creation. This authority exists by necessary

inference from the general powers conferred on the corporation to do business. *Blunt v. Walker,* 11 Wis. 334; *Clark v. Farrington,* 11 Wis. 306; *Winterfield v. Cream City B. Co.* 96 Wis. 239, 71 N. W. 101; *Eastman v. Parkinson,* 133 Wis. 375, 113 N. W. 649.

We discover nothing in the contract here in question contravening any statute, conflicting with the objects or purposes of the corporation, or offending against public policy, and therefore the bond must be held to be valid. If the bond is valid the plaintiff received a legal consideration for his money, and, no fraud or mistake being proven, he cannot enforce a rescission of the contract or a return of his money. It follows that the judgment of the circuit court must be reversed, and the cause remanded with directions to dismiss the complaint.

By the Court.—Judgment reversed, with directions to dismiss the complaint.

WEGENER, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

January 13—February 1, 1916.

Carriers: Loss of goods in transit: Evidence: Tariffs and bill of lading: Pleading: Contract as to measure of damages.

1. In an action to recover damages for delay and loss in a shipment of poultry, where the answer alleged that the shipment was made pursuant to the law, the published tariffs of defendant, and particularly a bill of lading of which a copy is annexed, "all of the various covenants, agreements, and conditions of which bill of lading the defendant hereby pleads as a part of the answer herein," such tariffs and bill of lading were sufficiently pleaded and it was error to exclude them when offered in evidence.
2. Such tariffs and bill of lading constituted the contract of shipment, and a stipulation therein that the amount of any loss or

damage for which the carrier was liable should be computed on the basis of the value of the property at the place and time of shipment, was valid and binding upon the shipper.

3. A finding that the loss of a part of a shipment of poultry between the place of shipment in Wisconsin and the warehouse of the consignee in New York, where the goods were first checked up, occurred in the railway transit, is *held* to be sustained by the evidence, although the consignee receipted (as he said was customary) for the goods without notation of loss and they were hauled on auto trucks about a mile from the freight depot to the warehouse.

APPEAL from a judgment of the county court of Dodge county: C. W. LAMOREUX, Judge. *Modified and affirmed.*

Action to recover damages for delay in the shipment of poultry and for loss of part thereof.

On November 17, 1912, plaintiff delivered to the defendant at Minnesota Junction, Wisconsin, forty-eight barrels and fifty-two boxes of dressed poultry for shipment to New York. The jury found that owing to the negligence of the defendant a part of the shipment was lost in transit and the balance was damaged; and they assessed plaintiff's damages in the sum of $856.91. From a judgment in said amount with costs entered in favor of the plaintiff the defendant appealed.

For the appellant there were briefs by *Edward M. Smart,* attorney, and *Charles H. Gorman,* of counsel, and oral argument by *Mr. Gorman.*

August Kading, for the respondent.

VINJE, J. The shipment was made under a bill of lading and tariffs approved by the interstate commerce commission. The defendant sought to introduce both the bill of lading and the tariffs in evidence to show under what terms and conditions the shipment was made, but they were excluded, except that the bill of lading was admitted for the sole purpose of showing that defendant had received the shipment. The

ground for their exclusion does not appear. It is now claimed that they were not properly pleaded. The answer "alleges that said shipment was made under and pursuant to the law in such cases made and provided, the public and published tariffs of defendant, and particularly a bill of lading, a true and correct copy of which is hereunto annexed marked Exhibit 'A,' all of the various covenants, agreements, and conditions of which bill of lading the defendant hereby pleads as a part of the answer herein." This sufficiently pleads the tariffs and the bill of lading and it was error to exclude them.

The court instructed the jury that the measure of damages for the lost poultry was the market value of the same at the time and place of destination; and that the measure of damages for the damaged poultry was the difference between the market value of the poultry at the time and place of destination in the condition in which it would have arrived, if properly handled and transported, and the market value at the time and place of destination in the condition in which it did arrive, and the jury assessed the damages at $856.91.

The bill of lading contained this provision:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee including the freight charges, if prepaid) *at the place and time of shipment* under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs, upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

The bill of lading and the tariffs constituted the contract of shipment, and defendant claims that under it the market value at the place of shipment, plus freight, drayage, and commissions, and not the market value at the place of destination, measured the damages. This is correct. Such stipu-

lations as to measure of damages, or other reasonable conditions touching the shipment, are valid and binding upon the shipper. *Ullman v. C. & N. W. R. Co.* 112 Wis. 150, 88 N. W. 41; *Willard v. C. & N. W. R. Co.* 150 Wis. 234, 136 N. W. 646; *Cohen v. M., St. P. & S. S. M. R. Co., ante,* p. 73, 155 N. W. 945; *Inman & Co. v. Seaboard A. L. R. Co.* 159 Fed. 960; *Davis v. N. Y., O. & W. R. Co.* 70 Minn. 37, 72 N. W. 823; 4 Ruling Case Law, 930. The evidence shows that after crediting plaintiff with freight, drayage, and commissions at New York, the market value of the poultry at the place of shipment, including the lost poultry, was $318.46 less than its market value at the place of destination as found by the jury. If, therefore, defendant is liable for the poultry lost, the judgment should be reduced $318.46, and if not, it should be reduced $392.71, the value of the lost poultry being $74.25.

It appears that one barrel of poultry and a part of another were lost between the place of shipment and the warehouse of the consignee where the goods were first checked up in New York. They were hauled on auto trucks about a mile from the freight depot to the warehouse, and the argument is that the loss may as well have occurred in that haul as while in the possession of a rail carrier. The consignee receipted for the goods without any notation of loss, but he says that it is customary to so receipt even if there is a known loss. The jury found that the poultry was lost while in railway transit. We think there are legitimate inferences to sustain such a finding.

By the Court.—Judgment modified by deducting therefrom, as of its date, the sum of $318.46, and as so modified affirmed, with costs to the defendant.

MEIDENBAUER, Respondent, vs. TOWN OF PEWAUKEE, Appellant.

January 13—February 1, 1916.

Highways: Injury from defect or insufficiency: Liability of town: Engine standing in highway: Unguarded quarry hole: Notice of defects: Contributory negligence: Shying of horse: Momentary loss of control: Proximate cause: Special verdict: Form of questions.

1. While being driven along a highway near which and within the limits of an intersecting highway a locomotive engine had been left standing, plaintiff's horse became frightened at the engine and shied toward an unguarded quarry excavation which extended into the highway, and as a result plaintiff, his vehicle, and the horse fell into the excavation at a point where it was about seventeen feet distant from the traveled track. A question submitted in the special verdict, "Did the unguarded quarry hole within the limits of the highway cause such highway to be in a condition of insufficiency?" is *held*, though faulty, not to have been fatally defective, in view of instructions that in answering it the jury should consider whether under all the circumstances the lack of a railing or barrier rendered the highway at that place "not reasonably safe"—meaning, plainly, not reasonably safe for public travel.
2. The recital in such question of undisputed facts as to the quarry hole was not improper as invading the province of the jury; nor was the question open to the criticism that it practically told the jury that it was the duty of the town to make its highways suitable for travel over their entire width.
3. While a town is not bound to keep a highway suitable for travel throughout its entire width, a defect within the limits of the highway, though not within the traveled part thereof, may constitute an insufficiency if it is so connected with the traveled part that the road is not reasonably safe under all the circumstances; and that question in this case was one for the jury.
4. In connection with a question as to whether the town had notice of the fact that the engine was being left on the intersecting highway, it was not necessary to submit another question as to whether it had notice of such fact in time to have had the engine removed before the accident,—the jury having been fully instructed on the subject of constructive notice.

5. A question, which the jury answered in the negative, "Was the plaintiff guilty of any contributory negligence or want of ordinary care which contributed to produce and was the proximate cause of his injury?" was erroneous. It should have been, Was the plaintiff guilty of any want of ordinary care which proximately contributed to produce his injury? But, the case being barren of any evidence of contributory negligence, the error was not prejudicial.
6. A horse should not be considered as having been uncontrollable in the sense that it had escaped from management by its driver and become a runaway, where it merely shied out of the traveled track and after going a few steps, while momentarily not under control, reached an excavation into which it fell.
7. Even if, in this case, the loss of control over the horse was more than momentary, and even if the excavation was not an actionable defect in the highway, nevertheless the town is liable, since it clearly appears that the engine in the highway was an object naturally calculated to frighten horses of ordinary gentleness and constituted an actionable defect which proximately caused the injury, plaintiff's horse having been startled thereby and having dashed into the excavation before he could, in the exercise of ordinary care, restrain it.

APPEAL from a judgment of the county court of Waukesha county: DAVID W. AGNEW, Judge. *Affirmed.*

Action to recover for an injury to person and property alleged to have been proximately caused by insufficiency of a highway in the defendant town.

The Waukesha Lime & Stone Company maintained a railway track within the limits of an east and west highway, crossing the one in question, which was a north and south road. It was in the habit of leaving a locomotive engine standing at a particular point, on such track, a short distance west of the intersection of the east and west with the north and south road, after working hours until time for operations to commence on the succeeding day, and to keep such engine fired up, when reasonably required to guard against danger from freezing. The engine was so located with fire in the furnace on the occasion in question. On the opposite side of the north and south highway, some hundred feet or so, from

where the engine stood, there was a quarry excavation about twenty-one feet deep, which extended from outside the highway area into it from ten and one-half feet at the intersection of the two ways to four feet and nine inches, about fifty feet from such intersection and at the point where the accident occurred. At such point the excavation was about seventeen feet from the traveled track. The highway was three rods wide. The drop into the quarry hole was abrupt. It was wholly unguarded at the time of the accident and had been for a long time, though, formerly, it was guarded by a fence. As plaintiff was driving south, along the north and south highway, about 7:15 o'clock p. m. on the 6th day of March, 1914, and had reached the vicinity of the engine, his horse shied toward the side on which the quarry excavation encroached upon the highway, so that the wheel of his vehicle on that side went over the bank, carrying him, the horse, and the vehicle into such excavation, and causing injury to him in his person and property.

The complaint contained all the allegations requisite to make out a cause of action to recover compensation for the loss plaintiff sustained. Defendant answered, putting in issue, in the main, such allegations and pleading contributory negligence of the plaintiff.

There was evidence to establish the matters of fact before stated, and evidence tending to show that the engine, on the occasion in question, was emitting smoke and sparks; that the horse was of ordinary gentleness; that when it took fright at the sight of the engine, it instantly shied toward the excavation, momentarily became uncontrollable, and reached and went into such excavation. There was also evidence to carry the case to the jury on the question of damages.

The jury rendered a verdict as follows:

"(1) Was the horse driven by the plaintiff on the night in question an ordinarily gentle driving horse? *A.* Yes.

"(2) Did the accident occur within the limits of the public highway in question in the defendant town? *A.* Yes.

"(3) Did the unguarded quarry hole within the limits of the highway cause such highway to be in a condition of insufficiency? *A.* Yes.

"(4) Was the engine in question on the highway running east and west at a point designated by cinder pile on the night in question? *A.* Yes.

"(5) Did the defendant town, through its officers, have notice of the fact that said engine was being left on the highway at the point known as the cinder pile? *A.* Yes.

"(6) Did the plaintiff's horse become frightened at the engine in question? *A.* Yes.

"(7) Was the plaintiff guilty of any contributory negligence or want of ordinary care which contributed to produce and was the proximate cause of his injury? *A.* No.

"(8) Did the plaintiff lose control of his horse immediately preceding the accident? *A.* Yes.

"(9) If you answer 'Yes' to the eighth question, then you may answer this question: Was such loss of control permanent or merely momentary? *A.* Momentary.

"(10) Was the failure to have barriers or railings at the quarry hole in question the proximate cause of plaintiff's injury? *A.* Yes.

"(11) What damage did the plaintiff suffer by reason of the alleged injuries caused by said accident? *A.* $300."

Judgment was rendered in plaintiff's favor on such verdict.

For the appellant there was a brief by *Muckleston & Thomas,* attorneys, and *V. H. Tichenor,* of counsel, and oral argument by *J. E. Thomas.*

For the respondent there was a brief by *Tullar, Lockney & Tullar,* and oral argument by *D. S. Tullar.*

MARSHALL, J. Was the question, "Did the unguarded hole within the limits of the highway cause such highway to be in a condition of insufficiency," fatally defective? Counsel for appellant suggests it was because the proper test of the suitableness of a highway is whether it is reasonably safe for public travel by persons in the exercise of ordinary care, and that the way the question was worded the jury may not have

gotten that idea. Furthermore, that the recitals as to the quarry hole being within the limits of the highway and its being unguarded, invaded the province of the jury.

There was no dispute as regards the location of the quarry hole, nor as to its having been, at the time of the accident, and for a long time prior thereto, wholly unguarded. Therefore there was nothing improper in reciting such undisputed facts. If there were any room for jury interference in respect to the matter, it was as to whether the unguarded hole, under the circumstances, rendered the highway not reasonably safe for travel by persons in the exercise of ordinary care. That matter was wholly left to the jury, if the words "caused the highway to be in a condition of insufficiency" in connection with the instructions, unprejudicially submitted it.

The question is far from being a good model to be followed; but there are many such situations which may exist without involving fatal infirmity. As contended by counsel for appellant, the better way is to submit such a matter to a jury by a question calling for a finding as to the sufficiency of the highway, specifying plainly what will constitute it, as, whether it was reasonably safe for travel by persons in the exercise of ordinary care. *Wheeler v. Westport,* 30 Wis. 392; *Kortendick v. Waterford,* 142 Wis. 413, 418, 125 N. W. 945. That has been said over and over again, and there is little excuse for not phrasing a question, in a case of this sort, in harmony therewith. However, the wording of the statute, sec. 1339, is that a municipality shall be liable for damages which "shall happen to any person, his team, carriage or other property by reason of the insufficiency or want of repairs" of any highway therein. The court early construed such statute in respect to what constitutes insufficiency, and the better way, in submitting such a matter to a jury, is to embody such construction in the question. A failure to do so or to give instructions in respect to the matter, might be prejudicially

fatal in case of such a question being requested and refused and the jury not being so instructed as to enable them to understand what constitutes the insufficiency of the statute. No such request was made in this case, and the jury were informed by the court's instructions as to the proper test of "insufficiency." They were told that, in determining the question, to consider whether, under all the circumstances, the lack of a railing or barrier rendered the highway where the accident occurred "not reasonably safe." That meant, plainly, not reasonably safe for public travel. They were further directed that, in case of their finding "from a preponderance of the evidence that for want of railing or barriers the highway was not sufficiently safe"—clearly referring to reasonable safety and sufficiency for public travel previously mentioned in the instructions—to answer the question accordingly. It is considered, in view of such instructions, that the question complained of was not fatally defective, though as before said, it is not a very good model to follow, even in connection with proper instructions.

It is suggested that the third question practically told the jury that it is the duty of a town to make its highways suitable for public travel for the entire width, contrary to *Rhyner v. Menasha,* 97 Wis. 523, 73 N. W. 41; *Kelley v. Fond du Lac,* 31 Wis. 179, and other cases in respect to that matter. It does not seem so. It was left to the jury to say, under all the circumstances, whether the unguarded excavation rendered the highway insufficient. Among those circumstances were the railway track on the cross road, a few feet from the excavation, and the evidence as regards the custom of leaving an engine standing near by on such track and fired up, as testified to by the witnesses. In view of the whole situation, it was a fair jury question as to whether the unguarded excavation rendered the highway insufficient within the meaning of the statute and the decisions of this court.

While it is not incumbent on a town to prepare a highway

for its whole width so as to be, in general, suitable for public travel in every portion of it; but only a part thereof sufficient in extent for the safety and convenience of travel, and its liability, primarily, is limited to damages in the traveled track,—*Hawes v. Fox Lake,* 33 Wis. 438; *James v. Portage,* 48 Wis. 677, 5 N. W. 31; *Goeltz v. Ashland,* 75 Wis. 642, 44 N. W. 770; *Hammacher v. New Berlin,* 124 Wis. 249, 102 N. W. 489,—a defect within the limits of the highway need not, necessarily, be within such part to render it insufficient for public use. It is sufficient to so render it if the defect is so connected with the traveled part that the road is not reasonably safe under all the circumstances. *Carpenter v. Rolling,* 107 Wis. 559, 83 N. W. 953; *Hebbe v. Maple Creek,* 121 Wis. 668, 99 N. W. 442. However, in absence of special circumstances, a defect so far from the traveled track as the quarry hole was, might be considered, as a matter of law, as not rendering the highway actionably defective. But there were such special circumstances in this case, proper to be considered by the jury. The surface of the road seems to have been substantially smooth up to the brink of the deep excavation, and the engine was but a short distance away, so that, in case of its startling a horse traveling alongside of such excavation, the animal would naturally swerve suddenly toward it. The jury were instructed to determine the matter in the light of the whole situation.

Error is suggested because the court submitted the fifth question, without one requested, as regards whether the officers of the town had notice of the fact that the engine was left on the highway in time to have had the same removed before the accident occurred. The jury were very fully instructed on the subject of constructive notice, so the submission of the question requested was not necessary. They were told that if it had been a common practice for weeks or months to leave the engine, as at the time of the accident, that, as a matter of law, rendered the town chargeable with notice of such practice.

The seventh question was so worded as to require appellant, in order to secure an answer in its favor on the subject of contributory negligence, to find that respondent was guilty of "contributory negligence or want of ordinary care" which not only contributed to produce, but which "proximately caused the injury." That question was certainly rather confusing and plainly erroneous. The term "contributory negligence" and the term "want of ordinary care" should not have been used so as to convey the idea that they are distinct. The term "want of ordinary care" only should have been used. The term "contributory negligence" which proximately caused "the injury" involves almost, if not quite, a contradiction. Moreover, if respondent was guilty of any want of ordinary care which proximately contributed to produce his injury, though it was not the proximate cause of it, he could not recover. The question was not aided by the instructions. On the contrary, the infirmities in it were emphasized thereby.

Notwithstanding what has been said as to the seventh question, in view of the finding that the horse was an ordinarily gentle driving horse, that respondent only lost control of it momentarily, and immediately preceding the accident, and the undisputed evidence that the horse shied immediately upon respondent observing the engine and suddenly took a few steps sideways and thus reached the excavation, in spite of respondent's efforts to prevent it, it does not seem that such question was prejudicial. The case seems to be barren of any evidence of contributory negligence.

The criticisms of the eighth and of the ninth questions do not appear to have any substantial merit. True, unless the loss of control of the horse was merely momentary, so that it did not acquire the status of a runaway horse before it reached the excavation, in one view of the case, that would be material. *Schillinger v. Verona,* 96 Wis. 456, 71 N. W. 888; *Ehleiter v. Milwaukee,* 121 Wis. 85, 98 N. W. 934. But the findings and the evidence clearly negative the idea that the horse had

acquired such status before the accident, within what was said in *Ehleiter v. Milwaukee.* It merely shied out of the traveled track and after going a few steps, momentarily not submitting to respondent's efforts to direct it, the brink of the excavation was reached. A horse is not to be considered as uncontrollable in the sense that it has escaped from management by its driver, and become a runaway, during the brief interval of shying denominated by the term "momentarily not controlled by the driver." *Titus v. Northbridge,* 97 Mass. 258. The form of the question on the subject of proximate cause is criticised because it recited the absence of barriers or a railing at the quarry hole. As we remarked in discussing the third question, such recitals merely referred to undisputed matters and therefore were proper.

While no serious complaint seems to be made because the jury found that the unguarded quarry hole was the proximate cause of the accident, it is evident that, if it were not, then the condition which caused the horse to shy was such cause, and for that, according to the verdict, the appellant was responsible. In that view, whether the horse reached the excavation while momentarily shying is immaterial. It is well settled that, if an ordinarily gentle horse is startled by an actionable defect in a highway, and before its driver can, by the exercise of ordinary care, restrain it, it dashes against some object or into a hole or ditch, thereby causing injury to the driver or his property, the municipality in which such highway is situated is liable therefor, whether such object, hole, or ditch constitutes an actionable defect in the highway or not. *Kelley v. Fond du Lac,* 31 Wis. 179; *Donohue v. Warren,* 95 Wis. 367, 70 N. W. 305; *Schillinger v. Verona,* 96 Wis. 456, 71 N. W. 888; *Seaver v. Union,* 113 Wis. 322, 334, 89 N. W. 163. The verdict of the jury made a clear case for respondent under that rule, in connection with the decision by the court that the engine, conditioned as the evidence pretty clearly showed, was an object naturally calculated to frighten horses of ordinary gentleness, which, as mat-

ter of fact, it seems was so clear that there was no prejudicial error in not submitting the matter to the jury.

It follows that, in any view we can take of the case, the judgment appealed from is right.

By the Court.—The judgment is affirmed.

J. B. Bradford Piano Company, Appellant, vs. Hacker, Respondent.

January 13—February 1, 1916.

Sales: Refusal to accept: When property passes: Recovery of purchase price: Nominal damages for breach: Appeal: Affirmance of judgment.

1. Defendant, in company with plaintiff's agent, selected a piano at the factory in Chicago, but wished certain alterations in the tone and in the color of the case, which the manufacturer agreed to make. The sale price and shipment to defendant in this state were agreed upon, and a written memorandum of sale was made accordingly. The work necessary to put the piano in deliverable condition took from two to three weeks, and in the meantime defendant repudiated the contract. *Held*, that property in the piano had not passed to defendant, under the Uniform Sales Act (sec. 1684*t*—18, and sub. 2, 5, sec. 1684*t*—19, Stats.), at the time of such repudiation, and hence plaintiff could not recover the purchase price.
2. In an action for the purchase price, in such case, there being no claim for recovery of damages and no evidence offered to show damages resulting from the breach of contract, the most liberal rule of practice would not entitle plaintiff to more than nominal damages; and since under sub. (6), sec. 2918, Stats., upon a judgment for nominal damages defendant and not plaintiff would be entitled to costs, a judgment for defendant should be affirmed.

Appeal from a judgment of the circuit court for Washington county: Martin L. Lueck, Circuit Judge. *Affirmed.*

This is an action to recover the purchase price of a Conover inner player piano sold by the plaintiff to the defendant.

The plaintiff is a Wisconsin corporation engaged in the sale of music and musical instruments with its principal place of business in Milwaukee, Wisconsin. Plaintiff's business with the defendant was transacted through H. W. Randall, manager of the player piano department. About two years ago Randall sold the plaintiff a Melville-Clark Apollo player piano. In February, 1914, she returned to the store and expressed a desire to exchange it for a new instrument. A short time after this defendant called again and the price was discussed. Randall offered to take the Melville-Clark player piano and $250 in exchange for the $1,000 Conover inner player piano. Defendant was satisfied with the price provided she liked the new instrument. She felt that the Steck Eolian player piano was her choice, but she consented to go to Chicago with Randall and see the Conover instruments there, where the assortment offered greater opportunity for choice. Randall paid the expenses of the trip, and upon reaching Chicago took defendant to the Cable Company's warerooms and from there to the Cable factory. They met a Mr. Baumann, who was in charge at the factory, and they tried out several instruments. Defendant finally showed a preference for one and agreed to take it provided the case would be stained a certain darker color and the tone made more brilliant, which was agreed to by Randall and the Cable Company. Randall then escorted defendant to the depot, where he suggested that she sign the following order, to which she assented. The material parts of the order are:

Date of order 4/2/14.	*J. B. Bradford Piano Co.*, Milwaukee, Wis.	
Salesman H. W. R.	Sold to *Miss B. Hacker* Hartford, Wis.	
	Ship to *Miss B. Hacker* Town and State Hartford, Wis.	
	Ship when . . .	
Terms:	Cash delivered	Price.
	Conover Inner Player p. c. c. 167237	$1,000 00
	. . . . .	
	Cr.	
	Melville-Clark Piano R. Mahy.	750 00
	(Signed) BERTHA HACKER.	$250 00

This order was duly sent to the Cable Company, confirming the verbal order as given by Randall while he and *Miss Hacker* were at the factory. On April 7, 1914, the defendant sent a letter to the *Bradford Piano Company* repudiating the contract. The *Bradford Company* on May 2, 1914, made a tender of delivery of the piano as refinished. At the time of the trial the piano was in the warerooms of the *Bradford Company.*

Mr. Randall testified that he thought the work to be done on the instrument could be done in one day. Mr. Baumann, the person in charge of the Cable Company's factory, testified that the process of staining the instrument the shade desired by the defendant took about two or three weeks.

At the conclusion of plaintiff's case before a jury the defendant moved for a nonsuit, which motion was granted. Judgment was entered dismissing plaintiff's complaint and that defendant recover her costs and disbursements of the action. From such judgment this appeal is taken.

The cause was submitted for the appellant on the brief of *H. L. Kellogg,* and for the respondent on that of *Sawyer & Sawyer.*

SIEBECKER, J. The trial court held that the facts and circumstances show as matter of law that the property in the piano was not transferred to *Miss Hacker* at the time the written order for the purchase was given nor prior to the time *Miss Hacker* repudiated this contract on April 7, 1914. The plaintiff assails this holding of the trial court upon the ground that, on the evidence, it was a question for the jury to determine whether or not the parties to the contract intended that the property in the piano was transferred prior to the time defendant repudiated the sale. The evidence shows that defendant and plaintiff's agent negotiated for the sale on April 2, 1914, at the factory of the Cable Company in the city of Chicago, where the defendant selected the piano in question. It appears that she was not satisfied with the

color of the case of the instrument she selected and insisted on having the color altered and made darker. The manufacturer agreed with plaintiff and defendant to alter the color so as to comply with the understanding of the parties, to regulate the tone of the instrument as defendant desired it, and to insert the player action and test it as is usually done before sending instruments from the factory to customers. The sale price and the shipment of the instrument by railroad to Hartford, Wisconsin, by the plaintiff were agreed upon by plaintiff's agent and defendant as specified in the written memorandum of sale, set out in the above statement. The defendant signed this memorandum at the depot in Chicago. The evidence shows that the piano was returned to the varnishing department of the factory and a color coat of varnish applied to bring the color to the shade desired by the defendant. After this coat had dried two more coats of regular varnish were put on, which when properly dried completed the piano so that it was ready for shipment. This process took from two to three weeks, when the instrument was boxed and shipped. Defendant repudiated the contract on the fifth day from the date of sale. The facts and circumstances show that the piano was not in a deliverable condition at any time up to the date of the repudiation on April 7, 1914. The contract also required the shipment of the instrument from Chicago to Hartford, Wisconsin, which could not be done, and in fact was not attempted to be done, within two weeks or more after the sale. The conduct of the parties at the factory and in negotiating the sale, when taken in connection with the terms of the contract and the circumstances of the case, fails to show that it was mutually understood and intended that the property in the instrument should pass to defendant at this time. It is plain that the defendant had no control of nor any dominion over the instrument while in the factory and that the Cable Company retained full control and possession to deal with the property as its own. The evi-

dence, showing the entire transaction, does not permit of the inference that the parties mutually intended that the property passed to defendant under the agreement of sale of the instrument, as contemplated by the provisions of sec. 1684*t*—18, Stats. 1915. In the light of the provisions of sub. 2, 5, sec. 1684*t*—19, Stats. 1915, it is clear that the property had not passed to defendant when she repudiated the contract. Sub. 2 provides:

"Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them in a deliverable state, the property does not pass until such thing be done."

It is obvious that the piano was not in a deliverable state until the coloring of the case had been altered to comply with the conditions of the sale, within the contemplation of this statute, and hence the property had not passed when defendant repudiated the sale. It is also manifest that the transaction is governed by the provisions of sub. 5 of this statute as regards delivery of the instrument. This section provides that:

"If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

The condition as to shipment expressed in the written memorandum of sale required of plaintiff to ship and deliver the instrument at Hartford, Wisconsin. Taking, then, the conditions and requirements of putting the piano in a deliverable state before such delivery as above indicated and delivery thereof by the seller as specified, it is clear under all the facts and circumstances of the case that the property in the instrument had not passed to defendant at the time she repudiated the contract.

Under the circumstances and conditions of the sale defend-

ant's breach of the contract on April 7, 1914, renders her liable to the plaintiff for the damages it suffered from such breach under the provisions of sec. 1684*t*—64, Stats. 1915, and the decisions of this court. It was held in *Badger State L. Co. v. G. W. Jones L. Co.* 140 Wis. 73, 121 N. W. 933, that where specific performance cannot be enforced either party may stop performance and subject himself to the payment of compensatory damages. "In such cases it is held that an action cannot be maintained to recover the contract price, but may be maintained to recover damages for the breach of the contract." Citing cases in this court. The complaint is framed for recovery of the purchase price and no evidence was offered to show damages resulting from the breach of contract. Appellant makes no claim upon the record for recovery of damages. The most liberal rule of practice authorized under the statutes (ch. 219, Laws 1915: sec. 2836*b*, Stats. 1915) in the light of the record would entitle plaintiff to no more than nominal damages, and requires affirmance of the judgment upon the authority of *Cronemillar v. Duluth-Superior M. Co.* 134 Wis. 248, 114 N. W. 432. On appeal a judgment for defendant will be affirmed if nominal damages do not carry costs but subject plaintiff to costs. Under sub. (6), sec. 2918, Stats. 1915, plaintiff is not entitled to costs on recovery of nominal damages, and costs are allowed to defendant.

By the Court.—The judgment appealed from is affirmed.

FEDERAL RUBBER MANUFACTURING COMPANY, Appellant, vs. HAVOLIC and another, Respondents.

January 14—February 1, 1916.

Workmen's compensation: When compensation allowed: Injury from horse-play: "Service growing out of and incidental to his employment."

1. To be within the Workmen's Compensation Act an injury to an employee must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.
2. The claimant, an employee in a rubber tire factory whose duties did not require him to use or come in contact with the compressed air system, and who knew that its use by employees to clean their clothes was forbidden, on quitting work for the day took down the air hose and began to blow the dust from his clothes. A fellow-workman, taking the hose from his hands, proceeded to clean his (the claimant's) back, and as a joke held the nozzle to his rectum and thereby ruptured his intestines. *Held*, that the injury was not one incidental to the employment, nor was the claimant at the time "performing service growing out of and incidental to his employment," within the meaning of sub. (2), sec. 2394—3, Stats. 1915.

[3. There being proof that, although it was formally prohibited, employees were accustomed to use the hose to brush their clothes without rebuke from the foreman, no opinion is expressed as to what the rights of the claimant would have been had he hurt himself while he was handling the hose for that purpose.]

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This is an appeal from a judgment confirming an award of the *Industrial Commission* in favor of the respondent *Havolic* under the Workmen's Compensation Act (secs. 2394—1 to 2394—31, Stats. 1915).

The essential facts are not disputed. *Havolic* worked for the plaintiff in its rubber tire factory, his duties being to feed stock into a tubing machine. In the department in which he worked there was a compressed air system with hose

and nozzles attached for use in some of the factory operations, but *Havolic* had no duty which required him either to use or come in contact with the system or the hose. Employees were forbidden to use the hose for the purpose of cleaning their clothes and *Havolic* knew of the prohibition, but many employees did do so, and on the evening of the accident *Havolic,* on quitting work, took down the hose from its place and began to use it to blow the dust from his clothing. He had cleaned a part of his clothing when a fellow-workman came up and (whether of his own motion or at *Havolic's* request is a matter in dispute) took the hose from *Havolic's* hand and proceeded to clean his (*Havolic's*) back. The air in the hose was at a pressure of nearly or quite eighty pounds, and the fellow-workman, apparently by way of practical joke, held the nozzle to *Havolic's* rectum, with the result that the intestines were ruptured. *Havolic* was compelled to go to the hospital for several weeks and was totally disabled for seventeen weeks. For these injuries the award complained of was made.

For the appellant there was a brief by *Robert R. Freeman* and *Henry J. Bendinger,* and oral argument by *Mr. Bendinger.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

WINSLOW, C. J. This court has endeavored to give to the Workmen's Compensation Act a broad and enlightened construction, to the end that it may accomplish to the fullest extent its beneficent purpose. It is to be remembered, however, that this purpose was to compensate for injuries resulting from one class of accidents only, namely, industrial accidents. There is liability only "where, at the time of the accident, the employee is performing service growing out of and incidental to his employment." Sub. (2), sec. 2394—3,

Stats. 1915. It was held in *Hoenig v. Industrial Comm.* 159 Wis. 646, 150 N. W. 996, after full argument and consideration, that the injuries covered by the act are such as "are incidental to and grow out of the employment." This seems practically to mean the same thing as the expression in the English compensation act "arising out of and in the course of the employment."

Under the English act it has been held that accidents resulting from "larking" or playing with machinery cannot be held to arise out of the employment. *Furniss v. Gartside,* 3 Butterworth's Workm. C. C. 411; *Cole v. Evans,* 4 id. 138.

The Massachusetts act provides compensation for an injury which arises "out of" the employment, and it was well said by the Massachusetts supreme court in *McNicol's Case,* 215 Mass. 497, 102 N. E. 697:

"The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

The "causative danger" in the present case does not come within the test here prescribed nor anywhere near it.

Had the claimant hurt himself in some way while he was handling the hose in the effort to remove the dust from his clothes a different question would have been presented. There was proof that employees were accustomed to brush their clothes in this manner without rebuke from the foreman, though there was a formal prohibition of such action, and we express no opinion as to the rights of the parties had the accident happened in this way. But how injuries resulting from such inexcusable and revolting horse-play as this can be said to be incidental to the employment we are unable to understand. It is equally impossible to understand how it can be

said that the claimant at the time of the accident was performing service "growing out of and incidental to his employment."

By the Court.—Judgment reversed without costs, and action remanded with directions to reverse the award of the *Industrial Commission*.

MENOMINEE BAY SHORE LUMBER COMPANY, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

January 14—February 1, 1916.

Workmen's compensation: Proceedings before industrial commission: Minors: Guardians not necessary: Compromise of claim: Award pursuant thereto: Review: Vacation: New award.

1. The industrial commission being merely an administrative body, in proceedings before it in behalf of a minor employee, under the Workmen's Compensation Act, it is not essential that he be represented by a guardian.
2. A minor employee, under the Workmen's Compensation Act, may, like an adult, compromise his claim for compensation, subject to the power of the industrial commission under sec. 2394—15, Stats., to review, set aside, modify, or confirm such compromise upon application made within one year.
3. A mere formal award of compensation made by the industrial commission pursuant to a compromise and stipulation between the parties is not such a review and confirmation of the compromise as sec. 2394—15 contemplates.
4. Relief against such an award is not limited to an action under sec. 2394—19, commenced within twenty days in the circuit court; and an application made within one year from the time of the compromise, though in form for an original award, might be treated as a request for a review and vacation of the compromise, and a new award might be made thereon, in effect setting aside and remedying the injustice of the compromise agreement.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to set aside an award made by the defendant *Commission* in favor of defendant *Schmidt.*

Defendant *Schmidt,* a minor eighteen years of age, while in the employ of plaintiff, on the 26th day of January, 1914, fell off a lumber pile and was injured. The provisions of the Workmen's Compensation Act applied to the matter. The accident was duly reported to the *Industrial Commission,* and the age of the injured person stated. He was paid some compensation and later made an agreement in writing with plaintiff, reciting the matters aforesaid and the following: The fall from the lumber pile caused injuries to the employee's head producing a disability from the date of the accident to the time of the agreement. When injured he was receiving $10.50 per week. He has been paid, as compensation under the Workmen's Compensation Act, $88.66 for the period from January 27, 1914, to April 27, 1914. He has also received medical and surgical treatment, medicines, and surgical supplies and apparatus as required, for the ninety days subsequent to the injury. There is a dispute between him and his employer as to whether he is still disabled so that he cannot return to the employment at which he was working at the time of the accident, and it is desired by both parties that the dispute be compromised and settled. The recitals were followed by an agreement that the *Industrial Commission* might enter an award in a lump sum, on the statement of facts, that the employer pay *Schmidt* $54.56 in addition to the $88.66 previously paid. The instrument was filed with the *Industrial Commission* and it made an award accordingly, which was, in due form, satisfied on the 1st day of June, 1914.

In the proceedings aforesaid, *Schmidt* was not represented by a guardian of any sort, but was represented by an attorney. He could not read or write English; but the agreement he made was explained to and understood by him.

On September after the satisfaction aforesaid, *Schmidt,* represented by a general guardian, filed an application for

compensation for the injury settled for as aforesaid. In such application, disability in the neck and back was claimed, whereas the disability mentioned in the settlement was to the head. The matter was duly heard before the *Commission,* it being insisted on behalf of the applicant that he was not bound by the award or the stipulation therefor because he was not represented in the proceedings by a guardian, and in opposition thereto that such award was binding because a guardian in such proceedings is not essential.

The *Commission* decided that its previous finding, based on the stipulation for settlement, was erroneous; but that an award in favor of a minor upon facts found in a regular hearing is conclusive, whether the minor is represented by a guardian or not, but that a minor cannot bind himself by an agreement that a certain sum will fully compensate him for all disability resulting from an injury when the facts are otherwise, and that an award made on such an agreement does not preclude the *Commission* from entertaining an application for further compensation in accordance with the actual facts.

Upon proofs submitted, the *Commission* exonerated plaintiff from any intention to overreach its employee in making the compromise agreement, and awarded additional compensation.

The second award was affirmed by the circuit court upon the ground that the minor had a right to disavow his agreement and hence the *Commission* had jurisdiction to make the second award. Judgment was rendered accordingly.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *I. A. Fish,* of counsel, and oral argument by *Mr. Fish.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general; for the respondent *Schmidt,* a brief by *L. M. Evert;* and the cause was argued orally by *Mr. Gilman.*

MARSHALL, J. The *Industrial Commission* is not a court. It is an administrative body, merely. No authority is cited to our attention, and we are unable to find any, that a guardian is jurisdictionally essential to proceedings in behalf of a minor by such a body, in the absence of a statute requiring it. The Workmen's Compensation Act makes no such requirement. It seems to contemplate that a minor, the same as an adult, may make application to the *Industrial Commission* to determine the compensation which should be awarded in case of his receiving a personal injury under such circumstances as to warrant a recovery therefor by proceedings before such *Commission*. He need not, necessarily, be represented by a guardian. Sub. (2), sec. 2394—7, Stats., provides that minors "who are legally permitted to work under the laws of the state" "for the purposes of sec. 2394—8, *shall be considered the same* and shall have the same power of contracting as adult employees."

It is quite significant that minors, mentioned, for the purposes indicated, are not only empowered to contract to the same extent as adults, but are, for all such purposes, to be considered the same as adults. That is a pretty plain legislative declaration that a guardian to represent a minor, in matters within the jurisdiction of the *Industrial Commission* under the Workmen's Compensation Law, is not essential.

Sec. 2394—8, referred to in sub. (2) aforesaid, provides that any employee, as defined in such subsection "shall be deemed to have accepted and shall, within the meaning of section 2394—3, be subject to the provisions of sections 2394—3 to 2394—31, inclusive," in cases which include the one in question. Thus the entire Workmen's Compensation Act is covered, as the sections referred to are all there is of it.

Nothing further need be said to show that there was no fatal infirmity in the first award from the mere fact that respondent *Schmidt* was not represented before the *Commission* by a guardian. That is in harmony with *Foth v. Macomber & W. R. Co.* 161 Wis. 549, 154 N. W. 369, 371.

Appellant's counsel suggest that, regardless of whether the *Commission* errs, jurisdictionally or otherwise, in deciding an application for compensation, its action can only be disturbed by proceedings under sec. 2394—19, Stats., which provides that such a determination shall be subject to review only by action commenced within twenty days from its date in the circuit court for Dane county; and shall be set aside only upon the ground that "the commission acted without or in excess of its powers," or "the order or award was procured by fraud," or "the findings of fact by the commission do not support the order or award." It is considered that such section must be read in connection with sec. 2394—15, Stats., which provides that "every compromise of any claim for compensation under sections 2394—3 to 2394—31, inclusive, shall be subject to be reviewed by, and set aside, modified or confirmed by the commission upon application made within one year from the time of such compromise." That contemplates, in general, that compromises of disputes concerning compensation, subject to the power of the *Commission* to set aside, modify, or confirm the same within the time indicated, as to minors, who are within the scope of the Workmen's Compensation Act, are to be considered the same as others; that competency to compromise, subject to the indicated control by the *Commission,* applies to one class the same as to the other.

Counsel for appellant contends that the first award was confirmatory of the compromise and exhausted the power of the *Commission* under sec. 2394—15 aforesaid. Counsel for respondents contend that the application which resulted in the second award was, in effect, a request for a review and vacation of the compromise and that the proceedings which resulted in the first award were, in no sense, such a review as the statute contemplates. We incline to that idea. Such statute clearly provides for a hearing on application therefor in respect to the validity or justice of a compromise. There

was no such hearing in this case when the first award was made. There was only a mere formal award, following the stipulation of the parties. Whether it was just or not was evidently not thought of. The later application, in practical effect, called for such a review and a decision was made, in effect, that the compromise agreement was unjust to the extent remedied by the second award. The challenge of the compromise was made in time and it matters not that it was in the form of an application for an original award.

The result is that the judgment appealed from should be affirmed upon the ground that the second award was, in reality, the result of exercise of the *Commission's* power to set aside a compromise. The *Commission* has very broad power in that field, enabling it to protect minors or others who may, through mistake, make an improvident settlement. We thus treat the matter the same as if respondent *Schmidt* were an adult.

By the Court.—The judgment is affirmed.

COLLINS, Plaintiff in error, vs. THE STATE, Defendant in error.

January 14—February 1, 1916.

Highways: Obstruction: Statute construed: Action, civil or criminal? When a fence is an obstruction.

1. Sec. 1326, Stats., since its amendment by ch. 143, Laws 1909, makes the obstruction of a public highway in the manner therein stated a crime punishable in a criminal action.
2. Although not specifically mentioned in sec. 1326, Stats., a fence wilfully placed in the traveled track of a highway constitutes an obstruction, within the meaning of that section. In the light of the history of the statute, fences so placed must be deemed to be included in the general words "other materials or substances intended or calculated to impede or incommode the lawful use of such highway."

ERROR to review a judgment of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

The plaintiff in error, hereinafter called the defendant, is charged in the information with obstructing a public highway by wilfully and maliciously placing and building a fence within and along the traveled track in violation of sec. 1326, Stats. 1915.

The defendant together with his brother is the owner of the southwest quarter (S. W. ¼) of section thirty-six (36), range nineteen (19), in the town of Troy in St. Croix county. A highway ran along the north side of this tract of land which had been used by the public for a period of forty years or more. When defendant purchased the land his grantors told him that one Simpson, owner of land on the other side of the highway, was encroaching on the north side of the traveled track and that no part of the grade along the north side of this land was on the southwest quarter (S. W. ¼) of section thirty-six (36), the land which they sold to him. The defendant, being under the impression that the highway was encroaching on his land, consulted an attorney in regard to building a fence along his north line. The attorney advised him that he might build a fence along his north line, and that if the town officers disputed his right to put a fence there they would probably tear it down and he could then bring an action in trespass and try out the question as to the location of the highway. Defendant, relying on this advice, built a fence in and along the highway. Part of this fence was in the traveled track of the highway. Mr. Simpson, his neighbor, who was then the pathmaster, told defendant not to build a fence there until he obtained permission from the town chairman, but defendant replied, "He didn't care." Simpson then called up the chairman and again spoke to the defendant and delivered the chairman's message to the effect that *Collins* must not build the fence, to which *Collins* an-

swered, "I don't care; going to build the fence anyhow." Simpson again told him he better not build the fence until the line was established. *Collins* then said, "I will fence anyhow," and did erect the fence.

The action was commenced in justice's court and the defendant answered and deposited a bond conditioned on an appeal to the circuit court. The justice's court found the bond sufficient. Defendant moved for a discharge on the ground that the complaint did not state a crime or an offense under the statutes, but this motion was overruled. The trial proceeded in justice's court, and the defendant, offering no testimony, was adjudged guilty of the offense.

Upon appeal to the circuit court the defendant was convicted and sentenced to pay a fine of $25 and the costs of the prosecution, amounting to $148, and in default of the payment of the fine and costs he be confined to the common jail of St. Croix county, Wisconsin, until such fine and costs are paid, not to exceed four months. To review such judgment defendant sued out this writ of error.

For the plaintiff in error there was a brief by *McNally & Doar* and *F. M. White,* and oral argument by *W. T. Doar.*

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

SIEBECKER, J. Sec. 1326, Stats., prior to its amendment by ch. 143, Laws 1909, provided for the punishment of persons for obstructing any highway by imposing a penalty as a forfeiture which was recoverable in a civil action. The amendment changed the nature of the offense from "a forfeiture" to "a misdemeanor" and increased the penalty from a maximum of twenty-five dollars to "a fine of not less than ten nor more than one hundred dollars." From the contents of the amended statute it is clear that the offense is made a crime punishable in a criminal action. The objections that

the state proceeded wrongfully against the defendant by prosecuting him criminally for the alleged offense are not well taken, and the ruling of the circuit court on these points must be affirmed.

It is argued that the court erred in holding that sec. 1326, Stats. 1915, as amended, denounces the placing of fences in highways as an obstruction if intended or calculated to impede or incommode the lawful use of such highways. The history of the legislation as embodied in this section of the statutes shows that the mischief which the legislature intended to provide against was the obstruction of highways which rendered it dangerous to the public while traveling thereon. It is obvious that the object of the amendment to the law in 1909 was to enlarge its scope so as to include certain specific dangers to travelers not theretofore included in the statutes. This was accomplished by inserting an enumeration of the specific dangers in the statute before the general words "or other materials or substances." The last quoted words were evidently used to designate the obstructions which were included in the statute before this amendment. The statute was thus enlarged in its scope by denouncing as criminal the specific acts of placing in any highway "any depression, ditch, humps or embankments of earth, logs, stone or stones, nails, glass," in addition to what was denounced thereby before its amendment. This court declared under the old act that: "It is the settled law of this state that a structure within the limits of the highway which impedes or seriously inconveniences travel thereon constitutes an 'obstruction' within the meaning of sec. 1326, Stats. (1898), authorizing its summary removal." (Citing.) *Jones v. Tobin,* 135 Wis. 286, 115 N. W. 807. It was also held that a fence post placed in the traveled portion of a sidewalk on a highway is an obstruction within the statute in its amended form. *Jennings v. Johonnott,* 149 Wis. 660, 135 N. W. 170.

We have examined the evidence and are satisfied that it is sufficient to warrant the jury in finding that defendant wil-

fully placed the fence in the traveled track of the highway in question with the intent to impede or incommode the lawful use of this highway. We find no reversible error in the record.

By the Court.—The judgment of the circuit court is affirmed.

DAGAN, Plaintiff in error, vs. THE STATE, Defendant in error.

January 14—February 1, 1916.

Intoxicating liquors: Sale to Indians: Statute construed.

Construing it in accordance with the doctrine of "last antecedent" and in the light of the history of the legislation on the subject, sec. 1567, Stats.,—providing that "no person shall sell . . . liquor to any Indian or to any mixed-blood Indian, except civilized persons of Indian descent not members of any tribe,"—prohibits the sale of liquor to any full-blood Indian whether he belongs to a tribe or not.

ERROR to review a judgment of the municipal court of Brown county: N. J. MONAHAN, Judge. *Affirmed.*

For the plaintiff in error the cause was submitted on the brief of *Kittell & Burke* and *Dennison Wheelock.*

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

KERWIN, J. The plaintiff in error was convicted of having sold intoxicating liquor to one Chas. Wheelock, an Indian, contrary to the provisions of sec. 1567, Stats. The judgment of conviction was brought here for review by writ of error.

"Section 1567. No person shall sell, barter, give or in any manner dispose of any intoxicating liquor to any Indian or to any mixed-blood Indian, except civilized persons of Indian descent not members of any tribe; and every person so offend-

ing shall for each offense be punished by a fine not exceeding one hundred dollars or by imprisonment in the county jail not exceeding three months, or both."

Under the foregoing statute it is the contention of counsel for plaintiff in error that if Chas. Wheelock was not a member of any tribe of Indians there should have been a verdict of not guilty. On the part of the defendant in error it is argued that, Chas. Wheelock being a full-blood Indian, the sale of intoxicating liquor to him was within the prohibition of the statute whether he was a member of a tribe or not. The argument of the defendant in error is that the statute makes two classes: first, full-blood Indians, and second, mixed-blood Indians, except civilized persons of Indian descent not members of any tribe, and that the clause "except civilized persons of Indian descent not members of any tribe" modifies the phrase next preceding it—"to any mixed-blood Indian,"—and does not refer to or affect the phrase "to any Indian." In *Zwietusch v. East Milwaukee,* 161 Wis. 519, 522, 154 N. W. 981, 982, this court quotes from 36 Cyc. 1123, j, as follows:

"By what is known as the doctrine of the 'last antecedent,' relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote, unless such extension is clearly required by a consideration of the entire act." See, also, 2 Lewis's Sutherland, Stat. Constr. (2d ed.) §§ 420, 421; *Jorgenson v. Superior,* 111 Wis. 561, 87 N. W. 565.

There is nothing in the statute in the instant case which requires a different construction. On the contrary the history of the legislation on the subject supports such construction. When this statute was first enacted (R. S. 1849, ch. 30) it prohibited the sale of intoxicating liquor to "any Indian." Sec. 1 provided:

"If any person shall sell, barter, give, or in any manner dispose of any intoxicating drink to any Indian within this state, he shall forfeit for every such offense the sum of fifty

dollars, to be recovered by any person who will sue for the same in his own name, in an action of debt, before any justice of the peace of the county in which the offense shall be committed."

The statute was re-enacted in the Revised Statutes of 1858, ch. 36. In the Revised Statutes of 1878, sec. 1567, the statute in its present form was enacted. So it seems that the legislature by the amendment intended to leave the prohibition against selling intoxicating liquor "to any Indian" as it existed before the amendment and to add to the statute by the amendment a prohibition against selling intoxicating liquor to such mixed-blood Indians as were not civilized persons of Indian descent or members of any tribe.

In *People v. Gebhard,* 151 Mich. 192, 115 N. W. 54, it was held that the phrase "nor to any person of Indian descent," in a statute prohibiting the sale of intoxicating liquor, was not synonymous or co-extensive with the words "nor to any Indian."

The fundamental rule in the construction of statutes is to ascertain and give effect to the intention of the legislature. From the light which the context affords, in connection with the history of the legislation, the court is of opinion that the construction placed upon the statute by the attorney general is correct and expresses the intention of the legislature, namely, that the statute prohibits sale of intoxicating liquor to all full-blood Indians.

This construction seems to be in harmony with decisions touching the subject. *People v. Gebhard,* 151 Mich. 192, 115 N. W. 54; *People v. Bray,* 105 Cal. 344, 38 Pac. 731; *State v. Wise,* 70 Minn. 99, 72 N. W. 843; *Farrell v. U. S.* 110 Fed. 942.

It is without dispute that Chas. Wheelock was a full-blood Indian, hence the sale to him was prohibited by the statute whether he belonged to a tribe or not.

It follows that the judgment below must be affirmed.

By the Court.—The judgment is affirmed.

NORRIS, Respondent, vs. NORRIS, Appellant.

November 17, 1915—February 22, 1916.

Divorce: Judgment: Alimony or final division? Revision: Examination of adverse party.

1. Where no definite sum in the aggregate is fixed by the divorce judgment and where the duration of the period over which payments are to extend is subject to the contingency of remarriage or death, such judgment, however labeled, is one for alimony.
2. So much of a judgment in a divorce action as awards alimony is not a final judgment, but is subject to revision and alteration; and in a proceeding to obtain such a revision an examination of a party under sec. 4096, Stats., may be had.

SIEBECKER, KERWIN, and TIMLIN, JJ., dissent.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

The plaintiff and defendant were divorced in 1907. The findings determine as a fact that the plaintiff, being paid $75 monthly during her life or until she remarries, shall have "no other or further right, title, interest, or claim of any kind or nature whatsoever against said defendant in or to his property." Conclusions of law were made in accordance with the findings referred to, and the judgment provided that plaintiff be paid monthly by the defendant, so long as she lived or until she remarried, $75 per month as a "final division and distribution of the estate, both real and personal, of the defendant, pursuant to the provisions of section 2364, Wis. Stats.," and that having the aforesaid sum plaintiff should have "no other or further right, title, interest, or claim of any kind whatsoever against said defendant or in or to his property, and that each and every right or interest which the plaintiff has in and to the property of the defendant be and the same is hereby divested."

On April 28, 1915, the plaintiff procured an order to show cause why the judgment referred to should not be revised, al-

tered, and amended respecting the amount of alimony therein provided in a way more just and equitable to the plaintiff and why judgment should not be made and entered in said action providing adequate and fair alimony to the plaintiff, or why, in lieu thereof, there should not be a final division and distribution of the estate of the defendant, both real and personal, between the parties to the action. In support of this order a petition was filed setting forth facts on which plaintiff relied to secure a modification of the provisions of the divorce judgment relating to what was alleged to be alimony. The defendant interposed an answer to this petition, in which he alleged that the judgment entered provided for a final division of his estate, and that there was no authority in law for revising or amending such judgment. In addition thereto certain facts were set up tending to show that the provision of the original judgment was fair and ample under all circumstances. The plaintiff gave due notice of the examination of the defendant as an adverse witness under sec. 4096, Stats. The defendant then filed a petition praying for an order staying the proposed examination until further order of the court. This petition was based on the claim that the judgment of 1907 was a final one and that in any event an examination could not be had under sec. 4096 in a proceeding of this kind. An order was entered staying the examination pending the hearing on defendant's petition. The circuit court decided that the examination should proceed, and from the order entered on such decision the defendant appeals.

Lawrence A. Olwell, for the appellant.

For the respondent there was a brief by *Kronshage, McGovern & Hannan,* and oral argument by *F. E. McGovern.*

BARNES, J. A divorce judgment which only provides a monthly allowance for the wife, to terminate on her remarriage or death, is not a final division of the husband's estate

under sec. 2364, Stats., no matter how it is designated, but is a judgment for alimony which is subject to revision under sec. 2369. On this proposition the case of *Lally v. Lally,* 152 Wis. 56, 138 N. W. 651, is adhered to under the rule of *stare decisis.* We do not wish to be understood as deciding that a circuit court may not fix a specific sum to be paid in instalments or in gross and render a final judgment under sec. 2364, although the amount fixed might even exceed the value of the property then possessed by the husband, nor is the *Lally Case* to be construed as so holding. What we do decide is, that where no definite sum in the aggregate is fixed by the divorce judgment and where the duration of the period over which payments are to extend is subject to the contingency of remarriage or death, such judgment, however labeled, is one for alimony.

The further point is made that an examination under sec. 4096 can only be had at some time after the commencement of an action or proceeding and *before judgment,* and that inasmuch as judgment was rendered in the divorce action in 1907 the present application was made after judgment and that therefore the case is entirely outside of the statute. Among other things sec. 2369, Stats., provides:

"After a judgment providing for alimony or other allowance for the wife and children, or either of them, or for the appointment of trustees as aforesaid the court may, from time to time, on the petition of either of the parties, revise and alter such judgment respecting the amount of such alimony or allowance and the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, and may make any judgment respecting any of the said matters which such court might have made in the original action."

So much of a judgment in a divorce action as awards alimony is not a final judgment, but is subject to revision and alteration. As to this portion of the judgment the court is as free to act on subsequent applications as it was originally.

When the existing judgment is amended, there is to all intents and purposes a new judgment for alimony, and we think it would be an extremely narrow and technical construction of sec. 4096 to hold that it does not permit an examination in a proceeding like the one before us.

By the Court.—Order affirmed.

The following opinions were filed March 13, 1916:

SIEBECKER, J. (*dissenting*). I am of the opinion that the original judgment of divorce in this action adjudges a final division and distribution of the husband's estate and hence cannot be modified in this proceeding. The grounds of my opinion are fully elaborated in the dissenting opinion of Mr. Justice KERWIN in the case of *Lally v. Lally,* 152 Wis. 56, 138 N. W. 651. My judgment is that a court may, under sec. 2364, Stats., award a judgment of final division and distribution of a husband's estate whether he has any specific real or personal property or not. I consider that a husband's earning ability is treated under the adjudications of this and other courts as property for the purposes of a final division and distribution of his estate in a divorce action.

KERWIN, J. (*dissenting*). I dissent from the opinion of the majority of the court. I think the case of *Lally v. Lally,* 152 Wis. 56, 138 N. W. 651, was incorrectly decided and that to follow the decision in that case is simply perpetuating an error.

The rule of *stare decisis* is invoked in the majority opinion in the instant case, apparently as a justification for adhering to the *Lally Case.* True, the rule of *stare decisis* applies where the decision is of such long standing as to become a rule of property and where the overruling of it would be likely to work great mischief. No reason appears for adhering to the rule of *stare decisis* here. *Harrington v. Pier,*

105 Wis. 485, 493, 82 N. W. 345; *Baker v. Madison,* 62 Wis. 137, 22 N. W. 141, 583; *Van Valkenburgh v. Milwaukee,* 43 Wis. 574; *Hawks v. Pritzlaff,* 51 Wis. 160, 7 N. W. 303; *Kneeland v. Milwaukee,* 15 Wis. 454, 474; *Pratt v. Brown,* 3 Wis. 603; *Whereatt v. Worth,* 108 Wis. 291, 84 N. W. 441.

It is held in the majority opinion in the instant case that an award of any sum either in gross or payable in instalments, if so denominated in the judgment, is final division whether there is sufficient property out of which the award can be paid or not; but that an award to a wife of a sum payable annually during her life or widowhood, though denominated in the judgment as final division, is not a final division. To put it another way, the majority opinion holds that an award of any sum, no matter how small, payable monthly for any definite period is final division, if so declared in the judgment, while an award of a like sum payable monthly for the life of the wife where she has an expectancy of twenty-five years, more or less, or payment of such sum during widowhood, is not a final division. There is no authority under the statute governing alimony and final division for such distinction. The statute authorizes the court to award alimony or make final division and there is no limitation as to how this shall be done. The power to make final division includes the power to determine what shall be final division in the absence of restriction in the written law; and there is none.

In my opinion the decisions in *Lally v. Lally, supra,* and the instant case are out of harmony with every other decision of this court upon the subject. *Hopkins v. Hopkins,* 40 Wis. 462; *Thomas v. Thomas,* 41 Wis. 229; *Bacon v. Bacon,* 43 Wis. 197; *Blake v. Blake,* 68 Wis. 303, 32 N. W. 48; *Campbell v. Campbell,* 37 Wis. 206; *Maxwell v. Sawyer,* 90 Wis. 352, 63 N. W. 283; *Palica v. Palica,* 114 Wis. 236, 90 N. W. 165; *Von Trott v. Von Trott,* 118 Wis. 29, 94 N. W. 798;

Kistler v. Kistler, 141 Wis. 491, 124 N. W. 1028; *Brenger v. Brenger,* 142 Wis. 26, 125 N. W. 109.

I think *Lally v. Lally, supra,* should be overruled and the judgment below in the instant case held to be a final division and distribution of property.

TIMLIN, J., also dissented.

BURKHARDT MILLING & ELECTRIC POWER COMPANY, Respondent, vs. CITY OF HUDSON, Appellant.

December 8, 1915—February 22, 1916.

Taxation: Recovery of illegal taxes: Payment of more than equitable share: Parties: Pleading: Public utility in several districts: Apportionment of assessed valuation: Proper ratio.

1. An electric light and power company whose property and business extends into two or more taxing districts cannot maintain an action under sec. 1164, Stats., to recover a part of the taxes paid by it in one of such districts, on the ground that such taxes were based upon an improper apportionment among the districts of the assessed valuation of its property, unless it shall appear, not only that the company paid to the defendant more than the latter's just portion of the whole tax, but also that—because of the higher rate in the defendant district, or for some other reason—the whole amount of the taxes paid by the company in all the districts was increased by such improper apportionment.
2. All of the taxing districts interested in the apportionment should be made parties to such an action, so that the whole controversy may be disposed of therein.
3. The objection that there is defect of parties may be taken by answer.
4. Under sec. 1037*c*, Stats. 1911, where the property or business of a public utility mentioned in sec. 1037*a* extends into two or more taxing districts the ratio by which the proportion of the assessed valuation properly belonging to each district is to be determined is that expressed by taking as the numerator the sum of the property located and the business transacted in the district in question and as the denominator the total of the property and business in all the districts.

SIEBECKER, J., WINSLOW, C. J., and MARSHALL, J., dissent.

APPEAL from a judgment of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Reversed.*

This action was brought in the county court of St. Croix county, appealed to the circuit court for St. Croix county, and tried *de novo* there.

The amended complaint set up the ownership of the electric light and power plant situated in four districts, viz. city of *Hudson,* village of North Hudson, town of Hudson, and town of St. Joseph; that the assessors of the four districts met and assessed the total value of the property at $75,000 and apportioned the property among the four districts. The apportionment is set out at length and will be stated hereafter in the stipulated facts. It is also alleged that the rate of taxation in the city of *Hudson* for 1913 was thirty-two and one-half mills, in the town of Hudson ten and seven-tenths mills, in the town of St. Joseph eleven mills, and in the village of North Hudson seventeen mills. The complaint further alleges that the method of apportioning the taxes was illegal and excessive and that plaintiff paid under protest $330.26 more than could have been assessed against him in the city of *Hudson;* that plaintiff demanded the $330.26, which was refused, and asks judgment for that amount with interest and costs.

The defendant demurred to the complaint, which demurrer was overruled. The defendant then answered admitting the assessment apportioned to the city of *Hudson,* defendant, and denied that said $330.26 levied by defendant was excessive, and denied generally the allegations of the complaint not admitted. And for a further answer the defendant alleged that the village of North Hudson, town of Hudson, and town of St. Joseph were necessary parties to the action.

The case was tried upon the following stipulated facts:

"It is hereby stipulated for the purpose of the trial of this case, that the defendant, city of *Hudson,* is a municipal corporation organized and existing under and by virtue of the laws of the state of Wisconsin, and situated in the said St.

Croix county, and that it is a city of the fourth class, organized and existing under a special charter.

"That said plaintiff is a corporation organized and existing under and by virtue of the laws of the state of Wisconsin.

"That said plaintiff company owns and operates an electric light and power plant consisting of two dams with flowage rights, two power houses, and two sets of generating machinery with poles and wires, transformers, meters, etc., and that its said electric light and power plant is situated in the following four assessment districts, to wit: city of *Hudson,* village of North Hudson, town of Hudson, and town of St. Joseph, in said county of St. Croix. The power house and dams are located outside the limits of the city of *Hudson.*

"That said electric light and power plant is owned and operated by said plaintiff and is not used or operated in connection with any street railway company.

"That the above facts existed during the years 1912 and 1913, and still exist.

"That for the year 1913 said property of said plaintiff was assessable for general taxes under and by virtue of sections 1037*a* and 1037*c* to 1037*j* of Wisconsin Statutes of 1911.

"That on the 20th day of June, 1913, the four assessors of said four assessment districts duly met at the office of the city clerk in the city of *Hudson* for the purpose of assessing the said electric light and power plant of said plaintiff for purposes of taxation, and they found and placed the total assessed valuation of said property at $75,000 and valued and assessed the same at that amount.

"That in apportioning said property among the four said assessment districts they valued the property located in the city of *Hudson* at $14,580, that amount being 19.44 per cent. of the total assessed valuation of $75,000. They found that the total business transacted by the company for the year 1912 was $20,262, and it is admitted that that is the correct amount of the business transacted by the company in all four districts; and it was found by said assessors, as the fact is, that $19,363 of said business was transacted in the city of *Hudson,* and that said amount of business so transacted in the city of *Hudson* was 95.56 per cent. of the total business transacted by the company. The assessors added the per-

centage of property in the city of *Hudson* to the percentage of business transacted in the city of *Hudson,* that is, they added said 19.44 per cent. to said 95.56 per cent., which gave a total of 115 per cent. of both property and business in the city of *Hudson.* They divided that by two, which gave 57.5 per cent., and apportioned to the city of *Hudson* 57.5 per cent. of the assessed valuation of $75,000, making an assessed valuation apportioned to the city of *Hudson* of $43,132, and the assessor of said city of *Hudson* placed upon the assessment roll of said city, against said plaintiff on account of its electric light and power plant, an assessed valuation of $43,132, which assessment was arrived at by the method above stated.

"That on said assessed valuation there was placed upon the tax roll of the city of *Hudson* for said year of 1913, against said plaintiff company, a tax amounting to $1,401.79, and on the 15th day of January, 1914, said assessed valuation and said tax based thereon appeared upon the tax roll in the hands of the city treasurer of said city as a personal property tax against said plaintiff company because of its said electric light and power plant.

"That at said time there duly appeared on said tax roll of the city of Hudson $31.14 of taxes as a tax against said plaintiff on real estate belonging to said plaintiff situated in said city of *Hudson.*

"That on said 15th day of January, 1914, said plaintiff claimed and asserted to said city treasurer that $330.26 of said alleged tax of $1,401.79 against said plaintiff on account of said electric light and power plant was illegal and unjust, excessive and void, and on said day said plaintiff duly tendered and offered to pay to E. H. Streeter, the city treasurer of said city, all of said taxes, both real and personal, except said amount of $330.26 claimed by said plaintiff to be excessive, illegal, and void, and on said day said treasurer refused to receive said tender and refused to permit said plaintiff to pay the part of said tax admitted by said plaintiff to be legal, and refused to permit said plaintiff to pay any part of said taxes unless it paid the whole amount appearing upon said tax roll against said plaintiff, to wit, $1,432.93, and that on said 15th day of January, 1914, said plaintiff paid said city treasurer the whole amount of said tax appearing on said

tax roll, to wit, $1,432.93, of which $330.26 was paid by said plaintiff to said treasurer and said city under protest and against its will. The said plaintiff claimed and asserted to said city treasurer that $330.26 of said alleged tax was excessive, illegal, and void, and said plaintiff notified said city at the time it so paid said tax that it intended to and would in due time bring a proper action against said city for the purpose of recovering back to said plaintiff said $330.26 claimed by said plaintiff to be excessive, illegal, and void.

"That on said 15th day of January, 1914, there was attached to said tax roll of said city of *Hudson* the warrant for the collection of said taxes as required by law, and at said time said city treasurer threatened said plaintiff that unless said tax was paid in full he would enforce the collection of taxes so appearing on said tax roll by levy upon said plaintiff's property, a sufficient amount of which was situated in the city of *Hudson* out of which said tax could have been paid, and said plaintiff was forced to pay said tax, and the whole thereof, including said $330.26 claimed as excessive by it, in order to remove the lien of said taxes from its said real estate.

"That on or about the 9th day of February, 1914, said plaintiff duly filed with the city clerk of the city of *Hudson* a claim in due form against said city for the sum of $330.26 on account of said alleged unjust, illegal, and excessive tax which said plaintiff company paid said city of *Hudson,* which said claim was duly acted upon by the common council of said city of *Hudson* a short time thereafter, and the same was disallowed prior to the commencement of this action.

"All of the above facts are hereby stipulated to be true for the purposes of this action, with the right, however, reserved in either party to show on the trial that any or all of said facts are untrue, and with the right to correct any statement therein that may be incorrectly stated. It is agreed that the rate of taxation in the city of *Hudson* for 1913 was thirty-two and one-half mills on the dollar of assessed valuation."

The court found the facts in accordance with the foregoing stipulation and ordered judgment for plaintiff against the defendant for $330.26 with interest and costs. Judg-

ment was entered accordingly, from which this appeal was taken.

Chas. A. Cross, for the appellant.

There was also a brief in behalf of the Wisconsin Tax Commission, and the cause was argued orally by the *Attorney General.*

Spencer Haven, for the respondent.

KERWIN, J. 1. It is contended by appellant that the action cannot be maintained because it does not appear that the plaintiff paid more taxes than it was equitably bound to pay. Even if it be conceded that it is established that the plaintiff paid more taxes in the defendant district than the just portion of the whole tax due to defendant, it does not appear that it paid more than it otherwise would have paid. If the rate of taxation were the same in the defendant city as in the other three districts, the plaintiff cannot complain, because the improper distribution of the whole valuation between the different districts could not prejudice the plaintiff or increase the whole amount of its tax. If the valuation in defendant city were $16,409 too high, the aggregate valuation in the other three districts would be that amount lower, since it is stipulated that the aggregate amount of property in all the districts is $75,000.

The rate in each district is alleged in the complaint. But these allegations are denied by the answer. The rate in defendant city is established in the case, but the rate in the other districts is not. So we are unable to say from the record before us what the rate in the other districts is. If it is the same as in defendant city the plaintiff has made no case. True, it is alleged in the complaint that the rate in the other districts is about one third of the rate in defendant city, but there is no proof of this fact.

The statute, sec. 1164, under which this action is brought provides that no claim shall be allowed and no action main-

tained unless it shall appear that the plaintiff has paid more than its equitable share of the taxes. It does not appear from the record in the instant case that the plaintiff has paid more than its equitable share of the taxes.

2. It is further contended by appellant that the other assessment districts should have been made parties to the action. Counsel for respondent answers this contention by saying that the demurrer was not directed to defect of parties and therefore did not reach the question, and that the objection was raised in no other manner.

But the objection that there was defect of parties was raised by the answer and that was sufficient under sec. 2654, Stats. We think the other districts, namely, village of North Hudson, town of Hudson, and town of St. Joseph, were proper parties to the action. The bringing in of all parties interested in a controversy in order to avoid circuity of action under the statutes of this state and decisions of this court is favored. Secs. 2610, 2656*a*, Stats.; *Washburn v. Lee,* 128 Wis. 312, 320, 107 N. W. 649; *Hurley v. Walter,* 129 Wis. 508, 511, 109 N. W. 558. The court has a broad discretionary power to bring in parties. *Schmuhl v. Milwaukee E. R. & L. Co.* 156 Wis. 585, 146 N. W. 787; *Kresge v. Maryland C. Co.* 154 Wis. 627, 143 N. W. 668; *Hemenway v. Beecher,* 139 Wis. 399, 402, 121 N. W. 150; *Swanby v. Northern State Bank,* 150 Wis. 572, 137 N. W. 763. We think all the districts should be made parties in the present action and thus dispose of the whole controversy. It follows from what has been said that the judgment must be reversed.

3. The important question in the case, however, is the apportionment between the four districts, and this question should be decided so that upon a new trial all questions may be settled and further litigation avoided.

It appears from the undisputed facts and the court below found:

"That on the 20th day of June, 1913, the four assessors of

said four assessment districts duly met at the office of the city clerk in said city of *Hudson* for the purpose of assessing said electric light and power plant of said plaintiff for purposes of taxation and found and placed the total assessed valuation of said property at $75,000 and valued and assessed the same at that amount.

"That in apportioning said property among the four said assessment districts they valued the property located in the city of *Hudson* at $14,580, that amount being 19.44 per cent. of the total assessed valuation of $75,000. They found that the total business transacted by the company for the year 1912 was $20,262, and that is the correct amount of the business transacted by the company in all four districts; and it was found by said assessors and the court here finds that $19,363 of said business was transacted in the city of *Hudson,* and that said amount of business so transacted in the city of *Hudson* was 95.56 per cent. of the total business transacted by said company. That said assessors added the percentage of property in the city of *Hudson* to the percentage of business transacted in the city of *Hudson;* that is, they added said 19.44 per cent. to said 95.56 per cent., which gave a total of 115 per cent. of both property and business in the city of *Hudson.* They divided that amount, to wit, 115 per cent., by two, which gave 57.5 per cent., and apportioned to the city of *Hudson* 57.5 per cent. of the assessed valuation of $75,000, making an assessed valuation apportioned by them to the city of *Hudson* of $43,132, and the assessors of said city of *Hudson* placed upon the assessment roll of said city of *Hudson* against said plaintiff on account of its said electric light and power plant an assessed valuation of $43,132, which assessment was arrived at by the method above stated.

"That on said assessed valuation there was placed upon the tax roll of the city of *Hudson* for said year 1913, against said plaintiff company, a tax amounting to $1,401.79, and on the 15th day of January, 1914, said assessed valuation and said tax based thereon appeared upon the tax roll in the hands of the city treasurer of said city as a personal property tax against said plaintiff company because of its said electric light and power plant."

It is clear that the method of apportionment adopted by

the assessors was not in compliance with the statute. Sec. 1037*c*, Stats. 1911, is as follows:

"If the property or business of any such person, company or corporation extends into two or more districts the assessors of all the assessment districts in which any part of such property is located shall meet and assess all the property of such person, company or corporation, and extend on the assessment rolls of their respective districts the proportion of the assessed valuation thereof properly belonging to each. Such proportion shall be determined by the ratio which the property located and the business transacted in each district bears to the total property and business of such person, company or corporation. The amount so assessed shall be subject to the same tax rate as other property in said district."

The assessors found that the total property of the plaintiff located in the city of *Hudson* was $14,580, that the total business transacted by the company in the city of *Hudson* was $19,363, aggregating $33,943 total property located and business done in the city of *Hudson*. The assessors also found that the total assessed valuation of the plaintiff's property in the four districts was $75,000 and the total business done $20,262, making a total of property and business in the four districts of $95,262. Under the method of apportionment by the plain provisions of the statute the ratio should be obtained as follows: $33,943 the numerator and $95,262 the denominator of the fractional part of the total assessed valuation, $75,000, which should be apportioned to the city of *Hudson*. This fraction reduced to a decimal gives 35.63 per cent. of the total assessed valuation which should be apportioned to the city of *Hudson*. Thirty-five and sixty-three hundredths per cent. of $75,000 gives the amount which should be assessed to the city of *Hudson* as $26,722.50. The assessors placed the amount at $43,132, an excess of about $16,409. It was stipulated and found that the rate of taxation in the city of *Hudson* for the year 1913 was thirty-two and one-half mills on the dollar. Thirty-two and one-half mills of the ex-

cess of assessment in the city of *Hudson* would amount to about $533. Obviously the plaintiff did not consider that it was entitled to this amount because judgment was taken for only $330.26.

All the facts were admitted except the rate of taxation in the three districts not parties to the action. The material question here, therefore, is the proper method of apportionment, and the court is of opinion that the method adopted by the court below was the correct method and in accordance with the statute. The method adopted by the assessors does not determine the ratio which the property located and the business transacted in the city of *Hudson* bears to the whole property and business done. The language of the statute, "by the ratio which the property located and the business transacted in each district bears to the total property and business," is plain and unambiguous, and the court cannot disregard it.

It follows from what has been said that on the main proposition, namely, the apportionment, the judgment of the court below was correct, but because of other errors committed the judgment must be reversed and the other districts brought in by proper amendment and made parties to the action, to the end that their rights may be determined and such judgment rendered as shall settle all the rights of the four districts involved in the matter.

By the Court.—The judgment of the court below is reversed, and the cause remanded for further proceedings according to law and in accordance with this opinion. The appellant to recover costs in this court.

SIEBECKER, J. (*dissenting*). The trial court's construction of sec. 51.44, Stats. 1915, and the construction put upon it by the Wisconsin tax commission differ very materially, and the operative effect of the statute under these two constructions produces widely different results in the amounts

apportioned to the taxing districts into which the property and business of the utility extend. This difference in the result is shown in the assessment of the plaintiff's utility for the year here in question in the city of *Hudson*. Under the tax commission's construction of the law, $43,132 of the assessed valuation of plaintiff's plant was apportioned to the city of *Hudson*, and under the circuit court's construction of the law only $26,722.50 of such valuation is apportioned to the city of *Hudson*, resulting in a difference in plaintiff's tax in the city of *Hudson* for the year 1913 of $533.30. The tax commission has construed the law as it did in this instance since its enactment and applied it as so construed for four years. Consequently if this assessment is erroneous then three other assessments are erroneous. The commission's brief informs us that their method of apportionment has been carried out for four years in all assessments throughout the state, amounting to at least 2,000 district assessments. It seems to me this practical construction of the law must be followed by the courts, if it is permissible, and thus avoid the perplexing and disastrous consequences of overturning the 2,000 or more tax levies and the tax payments in the different taxing districts involved throughout the state. If a statute in its administration has received a permissible and reasonable interpretation, then the courts adopt and follow that interpretation though it may not be in harmony with the meaning which the court finds the legislature had in mind. I am of the opinion that there is no good ground for holding that the tax commission gave this statute an interpretation out of harmony with or contrary to the natural and ordinary meaning of its terms. Sec. 51.43, Stats. 1915, declares that the property of water, light, heat, and power plants conducted as public utilities shall be deemed personal property for the purposes of taxation and shall be assessed as a single item. Sec. 51.44 provides for the assessment of such property, when located in two or more assessment districts, by the assessors of

the districts at a joint meeting, and that the assessors shall "extend on the assessment rolls of their respective districts the proportion of the assessed valuation thereof properly belonging to each. Such proportion shall be determined by the ratio which the property located and the business transacted in each district bears to the total property and business of such person, company or corporation." The words of the statute, to my mind, signify that the proportion shall be the ratio which the property located in each district and the business transacted in each district bears to the total property and the total business. What is this ratio? The business referred to obviously means the gross earnings, and so the commission and the circuit court interpreted the word. How then is "the proportion of the assessed valuation thereof properly belonging to each" district to be calculated? If the apportionment be made upon the ratio which the total of the property and the gross earnings of each district bear to the total of the property and the gross earnings of the entire plant, then the districts where there are no earnings whatever and the districts where the earnings are produced are given an equal proportionate share of the assessed value thereof. The object of providing a change in the method of assessment, as stated by the commission to the legislature, was to provide a method of apportionment of the assessed value of the entire plant whereby the assessment district which produced the earnings should receive such a distributive share of the whole tax as the assessed property and the assessed gross receipts of each district jointly produced. This statute was intended to increase the tax receipts from these plants in the assessment districts which produced the earnings of the business, and this for the reason the commission urged upon the legislature, that the revenue-producing districts established the actual value of the property of the entire physical plant and hence the benefit of the tax due to earnings ought in equity to be received by the districts that paid them. The tax com-

mission administered the law so as to accomplish this result so far as practicable, and the administration of the law as here interpreted frustrates this purpose and object of the legislature, in that it transfers the benefit of the tax receipts from the district where the business is done to the district where there is no business. It seems logical, reasonable, and just in the light of the history of the legislation on the subject that the factor of gross earnings should be treated as of equal importance with the factor of the physical property in determining a just distribution of the taxes realized from the enterprises, and that the tax commission's method of apportioning the tax was calculated on a ratio which complied with the terms of the statute and which accomplished the result intended by the legislature. But it is urged that the commission's interpretation of the statute does violence to the language used and is therefore not a permissible interpretation of the statute. The phrasing of the statute is, "Such proportion shall be determined by the ratio which the property located and the business transacted in each district bears to the total property and business of such person, company or corporation." The claim is that the terms in their grammatical construction and their ordinary significance express but the idea, namely, that the proportion must be the ratio which the property and the business in each district, when added together, bear to the total sum of the property and business of the whole plant. These terms of the statute, I think, do not in their ordinary use and meaning convey only such a restricted and narrow meaning and should not be limited in their meaning to this precise mathematical formula adopted by the court. They logically and reasonably permit of the interpretation that the proportion shall be determined by the ratio which the property and the gross earnings in each district, taken separately, respectively bear to the property and gross earnings of the whole plant, and that the result thus obtained fixes the percentage for apportioning the total tax ac-

cording to the taxable valuation of property and business in each district. This gives equal significance to the physical property and the gross earnings in determining the assessed value of the plant in the several districts into which it extends. Since this is, in my opinion, a proper and reasonable interpretation of the language of the statute, it seems to me that the court, in the light of the history of this legislation showing the intent of the legislature in enacting the law and the practical construction given it by the tax commission in harmony therewith, should follow the practical administration given it by the tax commission, which would prevent the disastrous results of invalidating the assessments in a large number of taxing districts in the state. I consider that the plaintiff's taxes were apportioned by the commission according to law and that plaintiff's complaint in this action should be dismissed.

WINSLOW, C. J., and MARSHALL, J. We concur in the foregoing dissenting opinion of Mr. Justice SIEBECKER.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent, vs. ROCK COUNTY SUGAR COMPANY, Appellant.

January 13—February 22, 1916.

Interstate commerce: Regulation: Constitutional law: Federal authority paramount: Conflicting state statutes: Railroads: Demurrage: "Additional free time" for unloading cars: Statutes: Construction: Partial or total invalidity: Burden on interstate commerce.

1. The federal government is the paramount authority in the regulation of interstate commerce; the laws of Congress on that subject supersede and override all state statutes conflicting therewith; and where the federal government, acting through its con-

stitutional agencies, has fully covered the subject by regulations of its own, there is usually no room for further state regulation.

2. Sec. 1797—10*m*, Stats., providing that the consignee of carload freight "shall be allowed for unloading without car service or demurrage being assessed, additional free time equivalent to the number of days in excess of seventy-five miles per day of twenty-four hours consumed by the common carrier in transporting said freight from point of shipment to point of destination," is invalid as to interstate shipments for the reason that it attempts to add variable time, depending upon length of haul and time occupied in transit, to the time for unloading cars fixed in the demurrage regulations filed with and approved by the interstate commerce commission pursuant to the federal act to regulate commerce.

3. Mere general words in a state statute will ordinarily be restrained so as to include only such subjects as the legislature had jurisdiction to include; but where the plain meaning of the statute is that it shall apply equally to a subject over which the legislature has jurisdiction and one over which it has no jurisdiction, and such subjects are so interrelated that it is reasonably apparent that the regulation of one alone in the manner and to the extent specified in the statute would not have been attempted, then the statute, being invalid in its main purpose, must be held wholly nugatory.

4. Under the foregoing rule, in view of the interrelation of state and interstate freights and the impracticability of having different periods of "free time" for unloading, sec. 1797—10*m*, Stats., is *held* wholly void, not only as to interstate commerce but as to local or state commerce as well.

[5. Whether, if said section were upheld as to local or state commerce, it would impose a burden on interstate commerce by its tendency to expedite the movement of intrastate freight at the expense of interstate freight, not decided.]

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Jeffris, Mouat, Oestreich & Avery,* and oral argument by *O. A. Oestreich.*

For the respondent there was a brief by *Lines, Spooner, Ellis & Quarles,* and oral argument by *Louis Quarles.*

TIMLIN, J. This action was brought to recover $2,720 demurrage charges accruing on local or state shipments and

$321 of like charges upon interstate shipments to the defendant. The plaintiff had judgment on both demands for $335.68 damages and costs. An appeal by the plaintiff from this judgment was withdrawn and the case is heard on the appeal by defendant. The only question raised by that appeal is whether the statute, sec. 1797—10*m*, is valid. If invalid, the judgment should not be disturbed. If valid, the judgment must be reversed. That statute reads as follows:

"1. In all cases where common carriers move carload freight from point of shipment to point of destination at an average rate of less than seventy-five miles for each twenty-four hours, consignee shall be allowed for unloading without car service or demurrage being assessed, additional free time equivalent to the number of days in excess of seventy-five miles per day of twenty-four hours consumed by the common carrier in transporting said freight from point of shipment to point of destination.

"2. For the purpose of determining whether or not the consignee shall be entitled to additional free time as provided for in subsection 1 of this section, the time consumed by the common carrier in transporting the freight shall begin to run at twelve o'clock midnight of the day on which the freight is delivered to the common carrier at point of shipment and shall end at twelve o'clock midnight of the day on which the car is placed at a point accessible to the consignee for the purpose of unloading.

"3. The provisions of this section shall apply to carload freight transported by one or more common carriers from point of shipment to point of destination. Provided, that whenever any railroad company shall notify the railroad commission of Wisconsin that conditions have arisen on its line of railroad over which it has no control and is [not?] liable for, stating in said notification the facts of the case, the railroad commission may, if it deems the facts such as to warrant, issue its order suspending the operation of this section not to exceed thirty days, but may continue such order from time to time as the conditions may warrant. The consignee must use due and reasonable diligence in unloading all cars,

and any failure to do so shall subject the consignee to a like supervision by the railroad commission. It is further provided that when conditions warrant the railroad commission shall have power to promulgate reasonable and just rules and regulations to enforce or modify the provisions of this section."

The statute purports to include all cases of shipment, whether local or interstate; it adds variable time, depending upon length of haul and time occupied in transit, to the time for unloading cars fixed by rule of the plaintiff approved by the Wisconsin railroad commission and by the interstate commerce commission; it authorizes the railroad commission of Wisconsin to suspend the operation of that section of the statute as to the transportation of carload freight by one or more common carriers from point of shipment to point of destination, and it contains other requirements not necessary to be considered.

From the viewpoint of the economist this statute is quite absurd. Delay in the transmission of freight cars, which is an evil injuriously affecting the shipper, the consignee, and the public, is to be corrected by retaliatory delay. Public interest demands that cars be actively engaged and readily obtainable and that the carrier be not required to purchase and use a number of cars disproportionate to the business done by it, for that must ultimately result in advanced rates of carriage on account of greater capital investment. Similar to this statute, only more obvious in its absurdity, would be a law to the effect that if one killed my cow I might kill one of his. Such a law might have some tendency to prevent him killing my cow, but the net result would be that the collective wealth is diminished by the value of two cows and the supply of milk to the public diminished correspondingly. The retaliatory features of this act, by which it appears that if the carrier delay the consignee and keep the car and its contents out of commerce for a time the consignee will have

the right to delay the carrier and keep the car out of commerce for another time, would have as against the carrier some preventive tendency, but the public would be the loser, and there are other more effective and less wasteful modes of prevention.

Courts may not refuse to enforce a statute merely because it offends against economic principles, consequently in reviewing the decision of the learned circuit court refusing to enforce the statute we must remove the subject from the testing chamber of the "dismal science" and into the "gladsome light of jurisprudence." Here, if we find the statute in conflict with a paramount rule of law, we vindicate and uphold the latter by refusing to uphold the former, and this necessary result is sometimes loosely spoken of as "declaring the statute unconstitutional." The federal government is the paramount authority in the regulation of interstate commerce, and the laws of Congress on that subject supersede and override all state statutes conflicting therewith. Also where the federal government, acting through its constitutional agencies, has fully covered the subject by regulations of its own, there is usually no room for further state regulation.

Sec. 1 of the act to regulate commerce, approved February 4, 1887, as amended by sec. 7, ch. 309, 36 U. S. Stats. at Large, 539, provides that the term "transportation" shall include all services in connection with the receipt, delivery, and handling of property transmitted. The carrier is required to establish, observe, and enforce just and reasonable regulations regarding the delivery of property, and these regulations filed with the interstate commerce commission are lawful until set aside. Further, the demurrage rules of the American Railway Association were, by the interstate commerce commission bulletin of June 3, 1912, approved subject to the right to examine and disapprove later on complaint made. *Mich. Cent. R. Co. v. Mich. R. R. Comm.* 183 Mich. 6, 148 N. W. 800; Conference Ruling No. 223, Bulletin No. 5,

Interstate Comm. Comm.; Barnes, Interstate Transp. p. 447; *Berwind-White C. M. Co. v. C. & E. R. Co.* 235 U. S. 371, 35 Sup. Ct. 131; *Pennsylvania Co. v. U. S.* 236 U. S. 351, 35 Sup. Ct. 370; *Texas & P. R. Co. v. Interstate Comm. Comm.* 162 U. S. 197, 16 Sup. Ct. 666; *Chicago, R. I. & P. R. Co. v. Hardwick F. E. Co.* 226 U. S. 426, 33 Sup. Ct. 174; *St. Louis, I. M. & S. R. Co. v. Edwards,* 227 U. S. 265, 33 Sup. Ct. 362; *State v. C., M. & St. P. R. Co.* 136 Wis. 407, 117 N. W. 686, 19 L. R. A. N. S. 326.

The federal act to regulate commerce requires that carriers shall publish, post, and file all terminal charges which in any wise change, affect, or determine the value of the services rendered to the shipper or consignee, and all such charges become a part of the "rates and charges" which the carrier shall require, demand, collect, or retain. Such terminal charges include demurrage charges, which are not within the jurisdiction of state authorities. *Peale v. Central R. Co. of N. J.* 18 Int. Comm. Comm. Rep. 25. The very words of the statute, "additional free time," must, with reference to interstate shipments, be taken to mean additional to that specified in the schedules on file with the interstate commerce commission. Congress has acted in the matter of regulating this feature of interstate commerce and that action excludes further or additional regulation covering the same subject by the state legislature. *State v. C., M. & St. P. R. Co.* 136 Wis. 407, 117 N. W. 686. This regulation, by adding "additional free time," conflicts with the regulation made as described pursuant to the laws of the United States. *State v. C., M. & St. P. R. Co., supra.* The question then arises whether the legislature intended that this act should be in force as to local or state commerce only. The statute is manifestly aimed at delays at the point of shipment, at transfer points between that and the destination of the freight, and delays in large yards where the freight is delivered to be afterwards distributed on the various sidetracks to the several

consignees. It therefore affects interstate commerce principally. The actual rate of travel between the point of shipment and point of destination is not intended to be accelerated by this law, because no railroad train which keeps moving travels less than seventy-five miles in twenty-four hours. The delays by snow blockades or washouts may be considered negligible. One effect of upholding this law as to local or state commerce would be to place a premium upon expediting from the points of shipment, transfer points, or from the large yards to the consignee intrastate freight as against interstate freight. The railroad would naturally deliver the state or local freight first so as to shorten the time for the consignee to hold the car without demurrage charges. Another effect which the law would have would be to induce the consignee, after delivery, to unload his interstate freight first. Further "free time" for unloading means more difficulty in obtaining cars for interstate as well as for local transportation. State and interstate freight are carried in different cars of the same train and sometimes in the same car. While the present mode of switching cars obtains, local freight must be moved in order to distribute interstate freight, and *vice versa*. The interrelation of state and interstate freights, the impracticability of having different spaces of "free time" for unloading, taken in connection with the general words in the act, tend to show that it was not intended that the act might be upheld as to state or local freight if invalid as to interstate freight. There is nothing in the words of the act, or in the subject to which the act applies, which would authorize us to hold that there is a separable portion of the act applicable to local or state commerce which could be upheld notwithstanding the invalidity of the act in general.

A comparison of the decision in *Trade-Mark Cases,* 100 U. S. 82, and *Waters-Pierce Oil Co. v. Texas,* 177 U. S. 28, 20 Sup. Ct. 518, with the distinction noted in the last mentioned case makes this point of law perfectly clear. Mere

general words in a statute literally including cases over which the legislature had no jurisdiction may be limited to cases where the legislature had power to act if that intention of the legislature can be derived from a consideration of other language in the statute, its subject matter, the evils intended to be remedied thereby, and the practicability of separating the invalid from the valid portions of the statute. Mere general words will ordinarily be restrained so as to include only such subjects as the state legislature had jurisdiction to include. See Revisor's Notes to sub. 10, sec. 1770*b*, Stats. All statutes are in some degree limited by this consideration. It is not necessary to specify in a state statute that it is limited to persons, property, or transactions within the state. But where the plain meaning of the statute is that it shall apply to these matters over which the state legislature has jurisdiction and equally to these matters over which the state legislature has no jurisdiction, and these subjects are so interrelated that it is reasonably apparent that the legislature would not have attempted the regulation of one alone in the manner and to the extent specified in the statute, then the statute, being invalid in its main purpose, must be held wholly nugatory. *Waters-Pierce Oil Co. v. Texas, supra; Ashland L. Co. v. Detroit S. Co.* 114 Wis. 66, 78, 89 N. W. 904; *Elwell v. Adder M. Co.* 136 Wis. 82, 116 N. W. 882, and cases cited; *Chicago T. & T. Co. v. Bashford,* 120 Wis. 281, 284, 97 N. W. 940; *Security Mut. L. Ins. Co. v. Prewitt,* 202 U. S. 246, 249, 26 Sup. Ct. 619; *Sargent v. Rutland R. Co.* 86 Vt. 328, 85 Atl. 654.

It might be that this law, if upheld as to local or state commerce, would impose a burden on interstate commerce by its tendency to expedite the movement of intrastate freight at the expense of interstate freight, but we do not find it necessary to decide that point. We prefer to rest this decision on the ground that the statute is invalid as to interstate commerce and that the provisions relative to local or state com-

merce, covered by the same general words, included in the same provisions, and subject to the same duties do not, taking into consideration the words of the statute and the subject matter of regulation, constitute a separate or severable portion of the statute which might survive.

Other points of invalidity alleged need not be noticed. It follows that the judgment of the circuit court should be affirmed.

By the Court.—Judgment affirmed.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent, vs. ROCK COUNTY SUGAR COMPANY, Appellant.

January 12—February 22, 1916.

Chicago, M. & St. P. R. Co. v. Rock Co. S. Co., ante, p. 374, followed.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Jeffris, Mouat, Oestreich & Avery*, and oral argument by *O. A. Oestreich.*

For the respondent there was a brief by *Lines, Spooner, Ellis & Quarles*, and oral argument by *Louis Quarles.*

TIMLIN, J. This action was brought to recover $848 demurrage charges accruing on local or state shipments and $411 of like charges upon interstate shipments to the defendant. This case is in all other respects like the case of *Chicago, M. & St. P. R. Co. v. Rock Co. S. Co., ante*, p. 374, 156 N. W. 607, and is ruled thereby.

By the Court.—Judgment affirmed.

WISCONSIN TELEPHONE COMPANY, Appellant, vs. RAILROAD COMMISSION OF WISCONSIN and others, Respondents.

January 14—February 22, 1916.

Telephone companies: Physical connection, when required: Railroad commission: Powers: Review of orders: Burden of proof: "Public convenience and necessity:" "Irreparable injury:" Constitutional law: Taking of property: Compensation: Prescribing conditions of connection: Preventing loss: Extra toll charges: Police power.

1. Under sec. 1797*m*—4, Stats. 1911, a physical connection between telephone systems may be ordered only when public convenience and necessity require it and where it will not result in irreparable injury to the owners or users of the facilities of the systems nor in substantial detriment to the service.
2. In an action to set aside an order of the railroad commission directing a physical connection between telephone systems, the burden is on the plaintiff, under sec. 1797*m*—70, Stats., to show by clear and satisfactory evidence that such order was unreasonable or unlawful.
3. The word "necessity" is relative rather than absolute, and its meaning in a given case must be ascertained by reference to the context and to the objects and purposes of the statute in which it is found. In statutes relating to regulation of public utilities it will be construed to mean not absolute but reasonable necessity.
4. A physical connection between two telephone systems is required by "public convenience and necessity" within the meaning of sec. 1797*m*—4, Stats. 1911, if there is a strong or urgent need for such connection.
5. In an action to set aside an order of the railroad commission requiring such a connection it is *held* that the finding of the commission that necessity existed therefor is not shown to be wrong or unreasonable by clear and satisfactory evidence.
6. The words "irreparable injury" in sec. 1797*m*—4, Stats. 1911, are not used in the sense in which they are commonly used in equitable actions, nor is the word "injury" used in its strict legal sense as meaning a violation of a legal right; but the phrase denotes a substantial financial loss which cannot be recovered or made good.
7. Under said section the railroad commission is not authorized to order a physical connection between telephone systems in a city

if it would result in substantial loss to either of the companies involved; but if the connection can be made on lawful conditions that will obviate substantial loss the commission is empowered to order it and to fix the conditions under which it shall be made.

8. So construed, sec. 1797*m*—4, Stats. 1911, is not invalid as authorizing a taking of property without due process of law and without compensation, nor as denying the equal protection of the laws.
9. An order by the railroad commission in this case that a physical connection be made between two telephone systems, prescribing terms and conditions to preserve the interests of and to compensate the respective companies for the additional service furnished by reason thereof, cannot be said to be unlawful in the absence of testimony showing the effect of operation under it.
10. Such an order may, under sub. 3, ch. 546, Laws 1911, be revised from time to time by the commission, upon application of any interested party or by the commission acting on its own motion; and any order made on such application is reviewable by the courts.
11. Having no power of condemnation, the railroad commission could not order a physical connection between two telephone systems which would result in the taking of property of one of them, and then direct the exaction of an extra charge for toll service on the theory of making compensation for such property; but it might direct the exaction of such extra charge for the extra service rendered to those who take advantage of the connection, and thus prevent incidental loss that might result to one company from the connection by removing any inducement there might otherwise be for the subscribers of that company to quit it and become subscribers of the other company with which the connection was made.
12. The railroad commission is an administrative body which was not created for the purpose of deciding constitutional or legal questions, and while incidentally it may, in carrying on its functions, be called upon to state what its construction of an existing law is, it has no authority to decide whether a statutory requirement is within or without the police power. Thus, while it may determine the question of fact whether a physical connection between telephone systems will result in loss to one company, it has no power to decide the question of law whether the loss, if any, is one which the state has a right to inflict without making compensation.
13. Sec. 1797*m*—4, Stats. 1911, does not authorize the requiring of a physical connection if it would deprive one of the telephone companies of the beneficial use of its local exchange, but a find-

ing of the commission that such a result would not follow cannot be said to be incorrect, in the absence of evidence to that effect.

14. The compelling of a physical connection between telephone systems does not result in any taking, in a constitutional sense, of any part of the switchboard or wires of one company and giving them to the other company and its patrons, but merely places the equipment in such condition that each company can furnish service to the patrons of the other, for which service payment is to be made. The fact that the connection involves some expense does not alter the situation, because the state has the right, within reasonable limitations, to require public service corporations to increase their facilities where the public interest requires such increase.

15. Even if, in such case, it were conceded that there was a taking of the property of one company by the requirement of a switchboard connection or by the use of its wires by patrons of the other company, such taking is a technical one only, resulting in no loss, and is within the legitimate scope of the police power.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appellant *Wisconsin Telephone Company* owns and operates and for many years last past has owned and operated a local telephone exchange in the city of La Crosse. It also operates long-distance toll lines which reach most of the populous centers in the state, and it has made contract arrangements for connections with local toll lines where it deemed it advantageous to do so. It is controlled by the American Telephone and Telegraph Company and has telephone connections which reach out over the United States and Canada and is part of what is commonly known as the "Bell System." The defendant *La Crosse Telephone Company* also owns and operates and for many years last past has operated a local telephone exchange in the city of La Crosse. It also owns and operates toll lines in the vicinity of La Crosse and connects with the Tri-State Company, over whose lines it is able to reach St. Paul and points beyond. Both companies have connections with three local toll lines, popularly known as the "Teasdale," "Kneen," and "Gaveney" systems. The plaint-

iff's exchange in La Crosse is the oldest in point of time. The plant of the *La Crosse Telephone Company* was installed by residents of the city of La Crosse because there was dissatisfaction with the manner in which the appellant carried on its business.

The long-distance service afforded by the Bell Company was nation wide and in fact international, while that of the *La Crosse Company* was confined to a restricted area in the vicinity of the city. The Bell Company did not deem it to be for its interest to establish a physical connection with the plant of the *La Crosse Company.* A local subscriber of that company could not use his phone in talking with any one who had to be reached over the Bell lines, but would have to go to a booth or place where a Bell telephone was installed. It is also claimed that as to one of the local toll lines referred to, some of those served by it could not reach parties served exclusively by the Bell wires. This is denied by counsel for appellant, and we have found it difficult to ascertain from the record just what the fact is. Each of the companies maintained a telephone of the other in its exchange; so that if there was a long-distance call over the Bell wires for a subscriber of the *La Crosse Company,* the central office of that company was advised of that fact by telephone and in turn notified its subscriber. This arrangement and method of doing business was reciprocal.

By ch. 546, Laws 1911 (sec. 1797*m*—4, Stats.), physical connection was required to be made between telephone systems whenever the public convenience and necessity required such connection and it would not result in irreparable injury to the owners or users of these facilities nor in substantial detriment to the service. After the passage of this act the appellant persisted in its refusal to make the physical connection, and *Frank Winter,* a citizen of La Crosse and a subscriber of the local telephone company, commenced a proceeding before the *Railroad Commission,* which was charged with

the administration of the statute, to compel the appellant to do its part toward making the connection. The hearing on *Mr. Winter's* petition resulted in an order directing that the connection asked for be made. The plaintiff brought this action to have this order declared void. The circuit court sustained the *Commission* and dismissed the complaint. Plaintiff appeals.

For the appellant there was a brief by *Miller, Mack & Fairchild,* and oral argument by *Edwin S. Mack.* They contended, *inter alia,* that the terms of the statute do not justify the order for physical connection entered by the *Commission.* At common law a corporation engaged in a business connected with the public interest is bound to give service only through its own instrumentalities owned or controlled by it, and is under no obligation to go beyond those limits or to employ other instrumentalities unless it elects so to do. If a public utility does contract for services beyond the termination of its own instrumentalities, it has the right to select its own agencies to the exclusion of all others for such extended services. The fact that a public utility has made an agreement for the exchange of business with one company or one agency does not give to other companies or agencies a right to demand a similar exchange of business or facilities for themselves. This rule is applicable to telephone companies as well as to carriers. *Pacific T. & T. Co. v. Anderson,* 196 Fed. 699, 703; *Home T. Co. v. People's T. & T. Co.* 125 Tenn. 270, 141 S. W. 845; *Atchison, T. & S. F. R. Co. v. D. & N. O. R. Co.* 110 U. S. 667, 4 Sup. Ct. 185; *Pullman's P. C. Co. v. M. P. R. Co.* 115 U. S. 587, 6 Sup. Ct. 194; *Express Cases,* 117 U. S. 1, 601, 6 Sup. Ct. 542, 628, 1190; *Louisville & N. R. Co. v. West Coast N. S. Co.* 198 U. S. 483, 25 Sup. Ct. 745; *Donovan v. Pennsylvania Co.* 199 U. S. 279, 26 Sup. Ct. 91; *Depot C. & B. Co. v. Kansas City T. R. Co.* 190 Fed. 212; *Home T. Co. v. Sarcoxie L. & T. Co.* 236 Mo. 114, 139 S. W. 108. The act in question (if it

be constitutional) imposes on telephone companies a duty not required of them at common law, and which they unquestionably could not be required to perform in the absence of statute. Such duty is not one of the company's absolute duties, but strictly and only secondary in its nature. *Washington ex rel. Oregon R. & N. Co. v. Fairchild,* 224 U. S. 510, 32 Sup. Ct. 535. Whatever power there is to require the making of physical connection between lines must have been given for the benefit of the public alone, and such right must be exercised for the benefit of the public and not of another telephone company. *Interstate Comm. Comm. v. D., L. & W. R. Co.* 216 U. S. 531, 30 Sup. Ct. 415.

Public convenience and necessity do not require the physical connection ordered. Public convenience and necessity "are an urgent and immediate public need" to remedy an "evil" amounting to "an unreasonable burden upon the community." *In re Shelton St. R. Co.* 69 Conn. 626, 38 Atl. 362; *Hunter v. Mayor, etc.* 5 R. I. 325; *Schuster v. Milwaukee E. R. & L. Co.* 142 Wis. 578, 587, 588, 126 N. W. 26; *Washington ex rel. Oregon R. & N. Co. v. Fairchild,* 224 U. S. 510, 32 Sup. Ct. 535. If a public utility can furnish the service required, even though in fact it is not furnishing it, public convenience does not require the furnishing of the facilities through some other agency. This has been given effect by the *Commission* where a second utility sought to enter a field already served by a first. *In re La Crosse G. & E. Co.* 2 Wis. R. R. Comm. Rep. 3; *In re Cashton,* 2 Wis. R. R. Comm. Rep. 677, citing *Matter of Amsterdam, J. & G. R. Co.* 87 Hun, 578, 33 N. Y. Supp. 1009; *Weld v. Gas & E. L. Comm'rs,* 197 Mass. 556, 84 N. E. 101. The general rule is that it is the duty of a public service corporation to furnish service to the public, and not to furnish service to similar competing utilities, except in so far as members of the public desire service in the same way. Furthermore, the company is entitled to furnish service through its own instru-

mentalities, and it need not use the instrumentalities of rivals when it has its own available. *Atchison, T. & S. F. R. Co. v. D. & N. O. R. Co.* 110 U. S. 667, 4 Sup. Ct. 185; *Express Cases,* 117 U. S. 1, 601, 6 Sup. Ct. 542, 628, 1190; *Louisville & N. R. Co. v. West Coast N. S. Co.* 198 U. S. 483, 25 Sup. Ct. 745; *Southern P. Co. v. Interstate Comm. Comm.* 200 U. S. 536, 26 Sup. Ct. 330; *People ex rel. Cairo T. Co. v. Western U. T. Co.* 166 Ill. 15, 46 N. E. 731. See, also, *Lundquist v. G. T. W. R. Co.* 121 Fed. 915; *Little Rock & M. R. Co. v. St. L., I. M. & S. R. Co.* 41 Fed. 559; *Little Rock & M. R. Co. v. E. T., V. & G. R. Co.* 47 Fed. 771; *Oregon S. L. & U. N. R. Co. v. N. P. R. Co.* 61 Fed. 158; *Central S. Y. Co. v. L. & N. R. Co.* 192 U. S. 568, 24 Sup. Ct. 339; *Louisville & N. R. Co. v. Central S. Y. Co.* 212 U. S. 132, 29 Sup. Ct. 246; *Mississippi R. R. Comm. v. Y. & M. V. R. Co.* 100 Miss. 595, 56 South. 668; *Home T. Co. v. People's T. & T. Co.* 125 Tenn. 270, 141 S. W. 845, 848.

The physical connection ordered will cause irreparable injury to the plaintiff. *Wilson v. Mineral Point,* 39 Wis. 160, 164; *Eau Claire W. Co. v. Eau Claire,* 127 Wis. 154, 159, 106 N. W. 679; *Butterick P. Co. v. Rose,* 141 Wis. 533, 539, 124 N. W. 647; 23 Cyc. 356; *Ins. Co. of N. A. v. Bonner,* 7 Colo. App. 97, 42 Pac. 681, 682. The term "irreparable injury" as used in the act, which will prevent physical connection being ordered, means an injury for which the act itself does not furnish full and adequate compensation. *Carpenter v. Grisham,* 59 Mo. 247; *Western U. T. Co. v. Rogers,* 42 N. J. Eq. 311, 314, 11 Atl. 13.

The provisions of the act requiring physical connection are unconstitutional because they fail to provide compensation and are not a taking for public use. The state cannot prevent a public service company from earning on the value of its property, including the value of the established business. The value of this established business must be given recognition in rate cases and in proceedings by eminent domain as

well as in taxation cases. *Appleton W. W. Co. v. Railroad Comm.* 154 Wis. 121, 146, 142 N. W. 476; *Duluth St. R. Co. v. Railroad Comm.* 161 Wis. 245, 152 N. W. 887; *Omaha v. Omaha W. Co.* 218 U. S. 180, 202, 30 Sup. Ct. 615; *Nat. W. W. Co. v. Kansas City,* 62 Fed. 853, 865; *Gloucester W. S. Co. v. Gloucester,* 179 Mass. 365, 60 N. E. 977, 981; *Missouri, K. & T. R. Co. v. Love,* 177 Fed. 493, 496; *State ex rel. N. C. Foster L. Co. v. Williams,* 123 Wis. 61, 69, 100 N. W. 1048. The order does not contemplate merely a mechanical union of the lines of the plaintiff and the *La Crosse Company.* It requires the use of the lines in a single circuit, and it necessarily involves the taking and use of the plaintiff's rights and property. For this right and privilege the plaintiff has a constitutional right to compensation. The law can justify such an appropriation only if it fulfils the constitutional requirement of providing compensation and that in advance. The rule is that the statute authorizing the taking of property must itself provide for the payment of damages and an adequate remedy by which the owner may procure the compensation. *Louisville & N. R. Co. v. Central S. Y. Co.* 212 U. S. 132, 144, 29 Sup. Ct. 246; *Cherokee Nation v. S. K. R. Co.* 135 U. S. 641, 660, 10 Sup. Ct. 965; *Sweet v. Rechel,* 159 U. S. 380, 16 Sup. Ct. 43; *Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S. 226, 238, 17 Sup. Ct. 581; *Comm. ex rel. Norton B. of T. v. N. & W. R. Co.* 111 Va. 59, 68 S. E. 351; *Lange v. La C. & E. R. Co.* 118 Wis. 558, 563, 95 N. W. 952; *Shepardson v. M. & B. R. Co.* 6 Wis. 605; *Powers v. Bears,* 12 Wis. 213, 221; *Sherman v. M., L. S. & W. R. Co.* 40 Wis. 645, 651. There is a taking within the constitutional prohibition where the usefulness of property is substantially impaired, even though the property remain physically in the owner's possession. *Pumpelly v. Green Bay & M. C. Co.* 13 Wall. 166; *Janesville v. Carpenter,* 77 Wis. 288, 301, 46 N. W. 128. The compensation that is required is "just compensation," and this means that it must afford a full and perfect equivalent for all dam-

ages suffered. *Monongahela N. Co. v. U. S.* 148 U. S. 312, 13 Sup. Ct. 622; Lewis, Em. Dom. (3d ed.) § 360; *State ex rel. N. P. R. Co. v. Railroad Comm.* 140 Wis. 145, 121 N. W. 919. The wide difference between the undertaking to furnish telephone facilities to individuals through instruments supplied for the purpose and an undertaking to join with another telephone company in serving the patrons of that company has been recognized judicially. *Home T. Co. v. People's T. & T. Co.* 125 Tenn. 270, 141 S. W. 845, 848; *State ex rel. Goodwine v. Cadwallader,* 172 Ind. 619, 87 N. E. 644, 89 N. E. 319. For cases directly involving the constitutionality of compulsory physical connection of telephone companies, see *Billings Mut. T. Co. v. Rocky Mountain Bell T. Co.* 155 Fed. 207; *Pacific T. & T. Co. v. Eshleman,* 166 Cal. 640, 137 Pac. 1119; *Home T. Co. v. Sarcoxie L. & T. Co.* 236 Mo. 114, 139 S. W. 108; *Home T. Co. v. People's T. & T. Co.* 125 Tenn. 270, 141 S. W. 845.

Even eminent domain must be exercised for a different use—not for the same use by a different person. *West River B. Co. v. Dix,* 6 How. 507; *Lake Shore & M. S. R. Co. v. C. & W. I. R. Co.* 97 Ill. 506, 512; *Cary Library v. Bliss,* 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765, 771; *State ex rel. Kettle Falls P. & I. Co. v. Superior Court,* 46 Wash. 500, 90 Pac. 650, 652; *Eastern Wis. R. & L. Co. v. Hackett,* 135 Wis. 464, 115 N. W. 376, 1136, 1139; *State ex rel. N. P. R. Co. v. Railroad Comm.* 140 Wis. 145, 159, 121 N. W. 919. Taking the property of one public service corporation for use by another public service corporation in the same manner, would mean simply to take the property of one and give it to another without any advantage whatever to the public. *Samish River B. Co. v. Union B. Co.* 32 Wash. 586, 73 Pac. 670; 15 Cyc. 613; *Evansville & H. T. Co. v. Henderson B. Co.* 134 Fed. 973, 978; *Mississippi R. R. Comm. v. Y. & M. V. R. Co.* 100 Miss. 595, 56 South. 668; *Home T. Co. v. People's T. & T. Co.* 125 Tenn. 270, 141 S. W. 845.

For the respondent *Railroad Commission of Wisconsin*

there was a brief by the *Attorney General* and *Walter Drew,* deputy attorney general, and oral argument by *Mr. Drew.*

Frank Winter, respondent, *in pro. per.*

BARNES, J. Sub. 1 and 2 of sec. 1797*m*—4, Stats., as amended by sec. 1, ch. 546, Laws 1911, read as follows:

"1. Every public utility, and every person, association or corporation having conduits, subways, poles or other equipment on, over or under any street or highway, shall for a reasonable compensation, permit the use of the same by any public utility, whenever public convenience and necessity require such use, and such use will not result in irreparable injury to the owner or other users of such equipment, nor in any substantial detriment to the service to be rendered by such owners or other users, and every utility for the conveyance of telephone messages shall permit a physical connection or connections to be made, and telephone service to be furnished, between any telephone system operated by it, and the telephone toll line operated by another such public utility, or between its toll line and the telephone system of another such public utility, or between its toll line and the toll line of another such public utility, or between its telephone system and the telephone system of another such public utility, whenever public convenience and necessity require such physical connection or connections, and such physical connection or connections will not result in irreparable injury to the owners or other users of the facilities of such public utilities, nor in any substantial detriment to the service to be rendered by such public utilities. The term 'physical connection,' as used in this section, shall mean such number of trunk lines or complete wire circuits and connections as may be required to furnish reasonably adequate telephone service between such public utilities.

"2. In case of failure to agree upon such use or the conditions or compensation for such use, or in case of failure to agree upon such physical connection or connections, or the terms and conditions upon which the same shall be made, any public utility or any person, association or corporation interested may apply to the commission, and if after investigation

the commission shall ascertain that public convenience and necessity require such use or such physical connection or connections, and that such use or such physical connection or connections would not result in irreparable injury to the owner or other users of such equipment or of the facilities of such public utilities, nor in any substantial detriment to the service to be rendered by such owner or such public utilities or other users of such equipment or facilities, it shall by order direct that such use be permitted and prescribe reasonable conditions and compensation for such joint use, and that such physical connection or connections be made, and determine how and within what time such connection or connections shall be made, and by whom the expense of making and maintaining such connection or connections shall be paid."

The statute involved covers two distinct subjects. The first provision relates to the use by a stranger of conduits, subways, poles, and other equipment located in streets and highways and owned by some other person, firm, or corporation. Under the statute such use must be permitted where public convenience and necessity require it and where it will not result in irreparable injury to the owner or other users of the equipment, subject to the condition that a reasonable compensation must be paid for such use.

The second provision relates to the matter of physical connection between telephone exchanges, and differs from the first in one important particular at least, in that it provides for no compensation for the taking or the use of the facilities of one telephone company by another, if any such thing is contemplated. Three conditions must co-exist before a physical connection is required: Public necessity and convenience must demand the connection; such connection must not result in irreparable injury to the owners or users of the facilities of the companies that would be affected; and the connection must not result in substantial detriment to the service.

As we read the decision of the *Railroad Commission,* it construed the law as not permitting physical connection where

it would result in substantial loss to either of the companies involved. This is not said in so many words, but it is a fairly deducible conclusion from the language used. So construed and applied there is at the present day little room for asserting that the legislation is not a legitimate exercise of the police power vested in the legislature. As facts the *Commission* found: (1) that public convenience and necessity required that the connection be made; (2) that such connection would not result in any substantial detriment to the service of either company; and (3) that such connection could be so made as not to result in irreparable injury, or in fact in any injury, to either of the utilities involved. The court sustained the order of the *Commission,* but appears to have reached the conclusion that the order was right on a different ground, or at least an additional one, from that on which the *Commission* based its decision. The opinion of the court would indicate that it entertained the view that although a part of plaintiff's property was taken without compensation and although the application of the statute might result in greatly depreciating the value of its local exchange at La Crosse, still it was a valid exercise of the police power.

The plaintiff argues (1) that public necessity and convenience did not require a physical connection in this instance, and that the finding to the contrary has no sufficient support in the evidence and is against the testimony offered; (2) that the order will result in irreparable injury to it in at least four particulars: (a) it will practically destroy its local exchange at La Crosse; (b) it will divert toll business to La Crosse which plaintiff now receives over independent lines with which it is connected, to the local company; (c) it will enable the local company to divert unprofitable outgoing toll business from its own lines to those of the plaintiff; (d) it will enable the local company to ascertain what toll lines of the plaintiff in the vicinity of La Crosse are profitable, and result in duplication; (3) that the order and

statute violate plaintiff's constitutional rights, in that they take its property without due process of law and without compensation and deny to it the equal protection of the laws.

If the contention is correct that the finding of convenience and necessity should not be permitted to stand, it is decisive of the case and no other question need be considered. The question raised is one of fact, and the plaintiff has against it the conclusion reached by the *Commission,* which has also received the sanction of the trial court. The burden rested on the plaintiff in the lower court to show by clear and satisfactory evidence that the determination of the *Railroad Commission* was unreasonable or unlawful. Sec. 1797*m*—70, Stats. At the time of the hearing before the *Commission* there were 1,786 subscribers to the local exchange of the plaintiff at La Crosse, and 3,082 subscribers to the exchange of the local company. Included in these figures are 561 users who were subscribers to both exchanges. Under conditions that existed, where there was a call over the Bell toll line for a resident of La Crosse who was a subscriber to the exchange of the local company but not to that of the plaintiff, an operator in the local company's office was notified of such call by telephone. The operator then notified its subscriber of the call and such subscriber could respond only by going to a Bell station or to a place where a Bell phone was in use. In the meantime the toll line might be pre-empted by other users and considerable delay caused to the person who was obliged to wait. There was testimony tending to show that the average waiting time was half an hour. Delay and inconvenience also no doubt often occurred to the person calling who desired to talk with a party at La Crosse. If the caller's place of business was equipped with a Bell telephone and the caller in the meantime could proceed with his usual work, the inconvenience might not be great, but if made from some station removed from his place of business it might be very considerable. There can be no doubt that this method of

doing business was unsatisfactory, because of inconvenience to the party called and often to the caller on account of delay in securing a connection after the lapse of time that would be necessary in order to enable the party called to reach a Bell phone. The same situation arose where a subscriber to the local exchange of the plaintiff who was not a subscriber to the local exchange of the *La Crosse Telephone Company* desired to use the toll lines of the latter company or its connections at points not served by the toll lines of the plaintiff. La Crosse is a city of about 30,000 inhabitants, and it is probable that many persons had occasion to use the toll lines of one or both companies whose convenience might in some degree at least be promoted by the physical connection asked for. Be this as it may, there were over 1,200 subscribers to the exchange of the plaintiff and more than 2,500 subscribers to that of the local company whose convenience might well demand that the connection be made. It is no doubt true that not all of these subscribers used the toll lines and that some of them seldom used them. But the *Commission* found that the toll calls for one month amounted to $6,000 for the Bell line and to about $4,500 for the local system; so that it is apparent that the toll lines are liberally patronized. The inconvenience in sending outgoing messages would be practically the same for residents of La Crosse as the receiving of incoming ones.

The number of people who would be affected by the connection sought is by no means insignificant. It is large enough so that if the connection is a matter of convenience and necessity it is also a matter of public convenience and necessity. About the connection being a convenience there can be no doubt. This, however, is not sufficient, because it must also be a necessity. The words are not synonymous and effect must be given both. The word "convenience" is much broader and more inclusive than the word "necessity." Most things that are necessities are also conveniences, but not all

conveniences are necessities. If we regard the word "necessity" as meaning something that is indispensable, it could not be said that the connection ordered in the present case was a "necessity." But if such a definition were adopted it would leave the law so that it would be a thing of ornament rather than of use, because it is improbable that a situation would arise where it could be said that a physical connection between telephone lines was indispensable to the public. The legislature certainly had some situations in mind to which the law was intended to apply. The word "necessity" has been used in a variety of statutes, particularly in those enacted in reference to condemnation and to regulation of public utilities. It is even more frequently found in our so-called "Sunday laws." It has been generally held to mean something more nearly akin to convenience than the definition found in standard dictionaries would indicate. So it is said the word will be construed to mean not absolute but reasonable necessity. *Samish River B. Co. v. Union B. Co.* 32 Wash. 586, 73 Pac. 670; *Wardsboro v. Jamaica,* 59 Vt. 514, 9 Atl. 11; *Bryan v. Branford,* 50 Conn. 246, 253; *Pepin Tp. v. Sage,* 129 Fed. 657, 665. Inconvenience may be so great as to amount to necessity. *Lawton v. Rivers,* 2 McCord (S. C.) 445, 13 Am. Dec. 741. A strong or urgent reason why a thing should be done creates a necessity for doing it. *Todd v. Flournoy's Heirs,* 56 Ala. 99, 113. The word connotes different degrees of necessity. It sometimes means indispensable; at others, needful, requisite, or conducive. *St. Louis G. A. Co. v. Wanamaker,* 115 Mo. App. 270, 90 S. W. 737, 743. The words "convenience and necessity" mean urgent immediate public need. *Application of Shelton St. R. Co.* 69 Conn. 626, 38 Atl. 362. So held under a statute prohibiting the construction of parallel lines of street railroad except when public convenience and necessity required it. Necessity does not exist unless the inconvenience would be so great as to amount to an unreasonable burden on the com-

munity. *Hunter v. Mayor, etc.* 5 R. I. 325. The Michigan court holds that if a proposed improvement is a convenience of sufficient importance to warrant the expense of making it, it is a public necessity. *Comm'rs of Parks v. Moesta,* 91 Mich. 149, 51 N. W. 903. The Kentucky court holds that a thing which is expedient is a necessity. *Warden v. M., H. & E. R. Co.* 128 Ky. 563, 108 S. W. 880. The term is relative rather than absolute. No definition can be given that would fit all statutes in which the word has been used. The meaning in a given case must be ascertained by reference to the context and to the objects and purposes of the statute in which it is found. If there was a strong or urgent need of the connection here sought, then there was a necessity for it, and the finding that necessity existed is not shown to be wrong or unreasonable by clear and satisfactory evidence.

This brings us to a consideration of the injurious results which the appellant insists will flow from the statute and the order of the *Commission* made thereunder. The first of these suggested is the most substantial. The local exchange of the plaintiff was constructed before that of the local company, at a cost of $240,000. The local company is owned by resident stockholders who have been active in extending its business and have brought strong influence to bear on telephone users to patronize their company, with the result that a large exchange was built up to a considerable extent at least at the expense of the older company, because there has been a marked falling off in the number of its patrons since its competitor appeared in the field. The exchange of the local company being now much larger than that of the plaintiff, it is more attractive and perhaps more useful to a telephone user than is that of the plaintiff. The appellant contends, logically enough, that the only substantial hold which it has on so much of its business as remains is the advantage it can offer its subscribers of direct toll connections with all important points in the United States and Canada; that it is entitled to this advantage, and that if taken away its local exchange will in-

evitably lose most of the business it has and its investment will be largely destroyed, because the value of its property will be reduced at least fifty per cent. It further contends that not only will its business and property be largely destroyed, but that such business will be transferred to a competitor without a cent of compensation, and that such a result would be an unlawful taking of property, practically to the same extent that a law would be which allowed railroads to operate their properties but prohibited them from exacting any substantial compensation for the service performed. The *Railroad Commission* substantially finds that an unconditional order for annexation would produce the results claimed, and such finding is well supported by the evidence offered and appears to be an entirely reasonable result to reach. The conclusion of the *Commission,* however, was that from a practical standpoint the case stated was really a hypothetical one and one to which the law did not apply. As before stated, it took the ground that a connection could not be ordered if it resulted in substantial loss to either of the companies involved, and that inasmuch as it was empowered to fix the conditions under which the connection should be made, the question before it in any given case was, Could connection be made on lawful conditions that would obviate substantial loss? If so, it was empowered to act, provided other requisites existed. If not, the case was one which would fall without the statute and one where it had no power to order a connection.

Sub. 2 of the statute quoted provides that in case the utilities interested shall fail to agree upon the physical connection desired, or upon "the terms and conditions upon which the same shall be made," the *Railroad Commission* may fix such "terms and conditions" on proper application. After stating that the law did not contemplate a physical connection which would render the earning power of the local exchange of the plaintiff practically nil, the *Commission* in its decision proceeds:

"No subterfuge can be indulged under the statute which

will have the effect of depriving any private property, employed in a public service, of its earning capacity.

"In the peculiar situation found in the instant case, it is possible to prescribe terms and conditions which will preserve the interests of the utilities respectively after the connection has been made. The subscriber of one company desiring toll service over the lines of the other company must pay, in addition to the rate charged the patrons of the latter company, a reasonable compensation for the additional service. Neither company will be permitted to absorb such additional charge, but the same must be paid by the patrons of either company using the toll lines of the connecting company. This will not result in any discrimination between subscribers of the same exchanges, but will result in a just and necessary discrimination between the subscribers of the two exchanges. A subscriber who has not installed the telephones of both exchanges is not entitled to the toll service of both exchanges without paying an additional charge to the exchange with which he is not connected when desiring to use its toll-line facilities.

"There is no evidence showing that any irreparable injury will or can result to the owner or other user of the facilities of the respondent companies. Under the terms and conditions outlined above the business of neither company will be disturbed and their relations to each other with respect to existing local business will be the same as at present. Certainly neither can suffer any injury under the circumstances."

In the order presently before us the terms and conditions were not definitely fixed because the parties had the right to agree upon them if they were able to do so. Being unable to agree, the *Commission* made a subsequent order, which will be found in *Winter v. La Crosse Tel. Co.* 15 Wis. R. R. Comm. Rep. 36, 42. While this order is not directly involved in this proceeding, it is instructive as illustrative of what the *Commission* had in mind. The part of it material to this case is as follows:

"It is further ordered, that each subscriber of the *Wisconsin Telephone Company* desiring service over the toll

lines of the *La Crosse Telephone Company* shall be charged for each message, in addition to the regular charge of the *La Crosse Telephone Company,* as follows:

"1. For all distances of not over 50 miles from the office of the *La Crosse Telephone Company,* 5 cents; for all distances over 50 miles and not over 100 miles from such office, 10 cents; and for all distances over 100 miles from such office, 15 cents. All distances shall be measured by air line.

"It is further ordered, that each subscriber of the *La Crosse Telephone Company* desiring service over the toll lines of the *Wisconsin Telephone Company* shall be charged for each message, in addition to the regular charge of the *Wisconsin Telephone Company,* as follows:

"2. For all distances of not over 50 miles from the office of the *Wisconsin Telephone Company,* 5 cents; for all distances over 50 miles and not over 100 miles from such office, 10 cents; and for all distances over 100 miles from such office, 15 cents. All distances shall be measured by air line.

"3. Neither of the companies shall absorb any such additional charges, but shall collect the same from its subscribers; but each of the companies shall be liable to the other and shall pay to the other the long-distance tariff toll plus such additional charge.

"If this division of tolls, after a fair trial, shall be found to be inequitable, and the companies cannot agree upon a proper division of the tolls, the *Commission* will by supplemental order establish such division."

It will be observed that the *Commission* takes the position that the physical connection desired could be made without taking the plaintiff's property in the constitutional sense and without detriment to it. There is evidence *pro* and *con* as to the effect of such connection. It is necessarily opinion evidence, and in the absence of testimony showing the effect of operation under the order it is impossible to say that the *Commission* is not right. Its judgment is that the extra charge provided for will deter present subscribers to the local exchange of the plaintiff from discontinuing the use of the Bell phone and substituting that of the local company. The correctness of this judgment should be subjected to the acid

test of experience before it is condemned. The law makes provision for the protection of plaintiff's rights if they have been unduly trenched upon. Sub. 3, sec. 1797*m*—4, Stats. 1911, provides that the order of the *Commission* may be revised from time to time on the application of any interested party or by the *Commission* acting on its own motion. Any order made on such application would of course be reviewable by the courts.

It is suggested that it was not within the power of the *Railroad Commission* to make such a regulation as it proposed to make in its original decision and as it afterwards made in its supplemental order. If these orders were made on the theory that there was a taking of property for which compensation should be made and that such property was paid for by the exaction of the extra charge provided for, we do not see how they could be sustained, because no power of condemnation is conferred on the *Commission*. The orders, however, are made on the theory that there is no taking. The charge is exacted because an extra service is furnished to those who take advantage of the connection and for the purpose of removing any inducement there might be on the part of plaintiff's subscribers to quit it because of the connection and become patrons of the local exchange of the rival company. The purpose of the regulation is not to pay for any taking of property, but to prevent incidental loss that might result to the plaintiff from the connection. Viewed in this light, we see no objection to the regulation and think it comes fairly within the statute.

We shall not discuss in detail objections (b), (c), and (d), hereinbefore enumerated, as such discussion would serve no useful purpose. The *Commission* of necessity must have concluded that such objections were not well taken, or that they could and would be obviated by the regulations which it intended to prescribe. Sufficient answer can be made to all of them in the absence of any showing as to the practical ef-

fect which the connection has had upon the revenues of the plaintiff. It was stated on the argument that a physical connection was in fact made not long after the entry of the order of August 20, 1914. By the time the decision in this case is announced the parties will be able to present to the *Commission,* if they so desire, facts instead of theories and opinions, and if the conclusion first reached proves to be wrong it can be rectified.

The constitutionality of the law is attacked as well as the validity of the order of the *Commission* made thereunder. If the law was correctly interpreted by the *Commission* there is no substantial basis for asserting that it is subject to any constitutional infirmity. If a mistaken interpretation has been placed upon it, another question arises, because it is essential to know what a law means before we proceed to pass upon its validity. The uncertainty in this case, if there is any, arises out of the meaning of the words "irreparable injury" as used in the act. The phrase is most frequently found in the books in cases dealing with equity suits, irreparable injury being the basis on which most equity actions rest. As there used, this court has said an injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard. *Eau Claire W. Co. v. Eau Claire,* 127 Wis. 154, 159, 106 N. W. 679; *Wilson v. Mineral Point,* 39 Wis. 160. The appellant urges that the legislature had this definition in mind when it passed the act, and that, inasmuch as the physical connection would result in serious loss to it in the particulars claimed, and the amount of such loss could not be ascertained, the *Commission* had no authority under the law to order the connection. The *Commission* meets this by saying that the plaintiff would suffer no loss if the connection were made under proper regulations.

It would seem apparent that the legislature did not use the phrase in the sense referred to. While situations would arise where the damages resulting from ordering a connection could not be adequately compensated for or measured in money value, cases might just as well arise where they could be. The legislature hardly intended that where the amount of money compensation could not be fixed no connection should be made, while, if the amount of damages that would result could be ascertained, then a connection should be made. The owner would be just as much entitled to relief in the one case as in the other, although the character of the relief might be different. There is no provision for compensation in the act, so none could be recovered where damages resulted and were ascertainable, although a connection would have to be made. Such a construction would, to say the least, raise grave doubts as to the validity of the law. The objection to the suggested meaning of the phrase "irreparable injury" holds good whether we consider that the legislature had in mind the legal definition of the word "injury" or the popular meaning of it. If loss results which the state cannot inflict in the exercise of the police power, the loser is entitled to compensation, and this right exists where the damages can be ascertained to a certainty as fully as where they cannot be. We conclude that the legislature did not use these words in the sense in which they are understood in equity law.

There is some doubt as to whether the legislature used the word "injury" in its popular or in its legal sense. Ordinarily the word "injury" is used to designate a thing which inflicts harm or damage, but a thing which inflicts more than a slight loss. Cent. Dict. And the word "irreparable" means something that cannot be repaired or recovered or made good. So where there is substantial loss or damage which is not recoverable, it is entirely correct to say that there is irreparable injury. Losses caused by fire where there is no insurance, or by flood or pests, as well as many

others, are commonly and properly referred to as irreparable injuries.

The generally accepted legal definition of the word "injury" is more restricted. A thing done is said to be an injury when it violates a legal right of a party. Certain acts which inflict loss are held to be *damnum absque injuria.* Some authorities interpret the phrase as meaning "injury without wrong" (Bouv. Law Dict.), and others, "loss without injury" (2 Words & Phrases, 1823), and still others, as "a loss without wrong" (13 Cyc. 255). Losses are frequently occasioned by a legitimate exercise of the police power for which no recovery can be had because no legal right has been violated. The words "irreparable injury" found in this statute are used in one of the two senses last referred to. It is not very material to a decision of this case which definition is adopted, but the question is directly before us and it may be important in the administration of the law to suggest what we deem to be the true interpretation.

If we say they are used in the sense last discussed, then the words perform no function and are mere surplusage, unless we say that what the legislature meant was to require a physical connection in every case where in the exercise of its police power it had the right to require it, provided public convenience and necessity would be thereby promoted and substantial detriment to the service would not follow. This construction would require the connection to be made unless it would result in legal damage to or violate a legal right of one of the parties concerned. By legal damage we mean loss which the state could not lawfully inflict under its police power and which of course would not fall within the class of wrongs to which the rule of *damnum absque injuria* applies. This would be an unusual form of legislation, to say the least. It is equivalent to a command in the first instance to make a physical connection, provided the state in the exercise of its police power has the right to order it. The utilities

would have to decide in each instance whether the power was exceeded or not. If one or both of them should decide against the connection, then the question, which is one of law, is passed up to the *Railroad Commission* for decision under the second subsection of the act. This is an administrative body which is not created for the purpose of deciding grave constitutional or even legal questions. Incidentally it may in carrying on its functions be called upon to state what its construction of existing law is. This is very different from calling on it for decision as to whether a statutory requirement is within or without the police power. The question whether a telephone company would sustain a loss in a given case by reason of a physical connection is one of fact. But if loss be found, the question whether the state has the right to inflict it without compensation is one of law. The impropriety of attempting to vest this kind of jurisdiction in the *Railroad Commission* is well pointed out in *Chicago & N. W. R. Co. v. Railroad Comm., ante,* p. 91, 155 N. W. 941.

The situation presented is such that it is difficult to see how substantial loss would result to one utility in case a connection was ordered, without resulting in a corresponding benefit to the other. If such other is benefited, it should in all fairness be required to pay. It is hardly conceivable that the legislature had a purpose in mind to discriminate against public utilities by taking away the business of one without any compensation and handing it over to the other, if we were to concede for the moment that it might do so. Public convenience and necessity might possibly be promoted by entirely doing away with the local exchange business of the plaintiff, assuming that this could lawfully be accomplished. But such convenience and necessity does not require that its business be in effect handed over as a gift to its rival. If the right exists to do away with this asset, then the right exists to compel the beneficiary to pay for it. Both companies are in La Crosse because the people through their representa-

tives granted them franchises. The inconvenience of having two local telephone systems in a city is obvious to any one familiar with their operation. Assuming that efficient regulation can be had, duplication cannot be justified from any economic standpoint, and the legislature has recognized this fact in the law under consideration (sec. 1797*m*—74). In dealing with existing situations it is not supposable that it did not intend to deal with them equitably, and it is our opinion that the *Commission* took a correct view of the statute and that such statute does not contemplate that a connection should be made where it would result in substantial loss to one of the utilities affected thereby, and that the word "injury" was used to denote substantial financial loss. The connection ordered entailed some expense upon the plaintiff. This expense was incurred in providing a facility that was convenient to the public in transacting business with plaintiff and can in no correct sense be regarded as a loss. Neither could the amount of it be considered substantial in a matter of this kind.

We construe the statute as not authorizing physical connection if it would deprive the plaintiff of the beneficial use of its local exchange. If the facts found are correct no such result will follow, and we cannot say that the findings of fact are not correct. This eliminates the contention of the plaintiff that is most forcefully urged.

Plaintiff's counsel further argue quite strenuously that the use of its wires and of part of its switchboard and distributing frame is taken from it by the order of the *Commission* and given to the *La Crosse Telephone Company* without compensation. Whenever the wires of the plaintiff are reached and used over those of the local company, this is claimed to be a taking of the plaintiff's property for the use and benefit of that company because plaintiff is deprived of its property while the use continues. We do not understand this to be the situation or the legal effect of what has been done. We

do not see how it can be said that the *La Crosse Company* either takes or uses the wires or appliances of the plaintiff. Whatever appropriation there is, is by the person who is using the wire, and for this he pays the regular toll charge and something additional besides. The patron is using the precise thing which the plaintiff has to sell, the thing from which its earnings are derived, and the thing which it is obliged to furnish the public. It is difficult to see how a patron of the *La Crosse Company* by using its local exchange to connect with the Bell Company's toll line is taking the property of the latter to any greater extent that he would be if he stepped into its central office and had the party he desired to reach called from there. It is true that a connection must be established between the wires of the local company and the switchboard of the plaintiff. To say that this is a taking of property is far-fetched. There may be a technical appropriation, but there is no taking in the constitutional sense. Neither would the fact that there was some expense incurred alter the situation, because it is the right of the state within reasonable limitations to require public service corporations to increase their facilities where the public interest requires the increase. Instead of damage resulting from the connection ordered, it would be more reasonable to suppose that both profit and convenience would result therefrom. We do not see how the switchboard connection required can entail any substantial loss upon the plaintiff. If it should be conceded that there was a taking of plaintiff's property by either of the requirements referred to, it is a technical taking that results in no loss and it is entirely within the legitimate scope of the police power. The legislature has seen fit to exercise such power, provided no substantial loss would result. The authorities we deem to be quite conclusive on this point. *Wis., M. & P. R. Co. v. Jacobson,* 179 U. S. 287, 21 Sup. Ct. 115; *Mich. Cent. R. Co. v. Mich. R. R. Comm.* 236 U. S. 615, 35 Sup. Ct. 422; *Grand Trunk R. Co. v. Mich. R. R.*

Comm. 231 U. S. 457, 34 Sup. Ct. 152; *Chicago, M. & St. P. R. Co. v. Iowa,* 233 U. S. 234, 34 Sup. Ct. 492; *State ex rel. Oregon R. & N. Co. v. Fairchild,* 224 U. S. 510, 32 Sup. Ct. 535; *Atlantic C. L. R. Co. v. North Carolina Corp. Comm.* 206 U. S. 1, 27 Sup. Ct. 585; *Minneapolis & St. L. R. Co. v. State ex rel. R. R. & W. Comm.* 193 U. S. 53, 24 Sup. Ct. 396; *Pacific T. & T. Co. v. Wright-Dickinson H. Co.* 214 Fed. 666; *Pioneer T. & T. Co. v. Grant Co. R. T. Co.* (Okla.) 119 Pac. 968; *Pioneer T. & T. Co. v. State,* 38 Okla. 554, 134 Pac. 398; *Hooper T. Co. v. Nebraska T. Co.* 96 Neb. 245, 147 N. W. 674; *State ex rel. Public Service Comm. v. Skagit River T. & T. Co.* 85 Wash. 29, 147 Pac. 885. Under the facts found and sustained by the evidence irreparable injury, within the meaning of the statute, did not result to the plaintiff from the order complained of. We do not think that the order resulted in any taking of the plaintiff's property, but if there is a taking it has not resulted in substantial damage or irreparable injury and is one which the legislature had a right to provide for.

By the Court.—The judgment appealed from is affirmed, without prejudice to the right of the plaintiff to make a subsequent application to set the order aside if it so desires.

The following opinion was filed March 2, 1916:

TIMLIN, J. I concur in the result, but disclaim any responsibility for or acquiescence in what is said in the opinion of the court with reference to irreparable loss and to limitations there suggested upon the police power of the state.

STATE EX REL. RICHTER VS. CHADBOURNE.

January 14—February 22, 1916.

Supreme court: Original jurisdiction: Constitutional law: Statutes: General or local? Creation of superior court in county: Abolition of county court: Title of local law: Failure to express subject: When statute wholly void.

1. In view of the public rights that may be affected, and on the ground that the remedy through the circuit court and to this court by appeal is inadequate because of the long delay involved, the supreme court entertains original jurisdiction of an action of *quo warranto* to test the constitutionality of chs. 518, 589, Laws 1915, which create a superior court in Fond du Lac county, with extensive civil and criminal jurisdiction, and abolish the county court and vest its powers in the new court so created.
2. A law may be general within the meaning of sec. 21, art. VII, Const. (providing that "no general law shall be in force until published"), and at the same time be local within the meaning of sec. 18, art. IV (providing that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title").
3. If, after giving the title of a private or local law a liberal construction, including within its meaning all matters reasonably germane thereto, it is found that the body of the act contains matters of substance foreign to the title so construed, then such law falls within the condemnation of the constitution.
4. Ch. 518 (amended by ch. 589), Laws 1915, creating a superior court in Fond du Lac county and abolishing the county court therein, being limited in its effect to the boundaries of that county, is a local law within the meaning of sec. 18, art. IV, Const.; and the omission from the title of any reference to the abolition of the county court brings it within the condemnation of that section.
5. Statutes void in their main purpose or void as to a substantial part which is closely interrelated with other substantial parts thereof are void *in toto*.
6. The creation of the superior court in Fond du Lac county and the abolition of the county court are so closely interrelated that ch. 518, Laws 1915, and the amending act, ch. 589, are void not merely so far as they affect the county court but *in toto*.

BARNES, J., dissents.

ORIGINAL ACTION of *quo warranto* brought in this court on the relation of *A. E. Richter* against *F. W. Chadbourne* to test the constitutionality of chs. 518 and 589 of the Laws of 1915, creating a superior court of Fond du Lac county and abolishing the county court thereof. In April, 1913, the relator was duly elected county judge of Fond du Lac county for a term of six years from the first Monday of January, 1914. On said last date he duly qualified and entered upon the duties of his office and performed the same until September 2, 1915, when the office was declared abolished by the laws above mentioned and the jurisdiction of the county court transferred to the superior court of Fond du Lac county. The defendant, who was by the governor appointed judge of the newly created superior court, on September 2, 1915, demanded possession of the county court rooms, records, books, papers, and property belonging thereto and threatened relator with legal proceedings of ouster if surrender was not made as demanded. Under written protest the relator surrendered possession, and at the same time he notified the defendant and the county board of supervisors that he claimed the law creating the superior court and abolishing the county court to be invalid. On September 2, 1915, the defendant took possession of the rooms and property of the county court and has since acted as judge of the superior court of Fond du Lac county and has exercised the jurisdiction theretofore exercised by the county court.

The provisions of ch. 518 which relate to the county court are as follows:

"Sec. 65. From and after September first, 1915, all of the powers of the county court of Fond du Lac county and of the county judge shall be and hereby are transferred to and vested in the superior court of Fond du Lac county and its judge.

"Sec. 66. From and after the first day of September, 1915, the county court of Fond du Lac county shall be and

hereby is abolished and the office of the judge of said county court vacated.

"Sec. 67. All matters and proceedings pending before the county court of Fond du Lac county or the judge thereof on September first, 1915, shall be and hereby are transferred to and vested in the jurisdiction of the superior court of Fond du Lac county and of its judge.

"Sec. 68. All of the records, files, proceedings and property of the county court of Fond du Lac county on September first, 1915, shall be and hereby are turned over to and vested in the superior court of Fond du Lac county and its judge.

"Sec. 69. The provisions of law with reference to the office of register in probate of the county court of Fond du Lac county shall apply to and provide for a register in probate for the superior court of Fond du Lac county."

Ch. 518 was entitled "An act to create a superior court in the county of Fond du Lac." Ch. 589 was entitled "An act to amend sections 3, 5, 12 and 64 of chapter 518 of the Laws of 1915, relating to the superior court of Fond du Lac county." The amendments do not affect any question material to the determination of the case.

For the plaintiff there were briefs by *Doe, Ballhorn, Wilkie & Doe,* and oral argument by *J. B. Doe* and *Harold M. Wilkie.*

For the defendant there was a brief by *H. E. Swett, T. L. Doyle,* and *R. L. Morse,* attorneys, and *J. M. Gooding, F. A. Foster, D. D. Sutherland, L. E. Lurvey,* and *F. Ryan Duffy,* of counsel; and the cause was argued orally by *Mr. Doyle* and *Mr. Morse.*

VINJE, J. In the *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, the question of the original jurisdiction of this court was treated so fully that only a brief reference to the subject need now be made. It was said in substance that where in a matter of public right the remedy in

the lower court is entirely lacking or absolutely inadequate this court will take original jurisdiction to the end that justice shall not be denied. In this case there is no lack of jurisdiction in the circuit court, but in view of the public rights that may be affected by the acts of the newly created court whose process runs to all parts of the state and which has civil jurisdiction up to $25,000, and jurisdiction of all criminal cases except homicide, it is deemed that the remedy through the circuit court and to this court by appeal is inadequate because of the long delay involved. The rights of litigants who may desire or be compelled to resort to that court and the importance of the probate business of Fond du Lac county that must be transacted therein, alike call for a speedy determination of the question of the validity of its creation. For these reasons this court entertains original jurisdiction of the case.

The relator urges a number of constitutional objections to the validity of ch. 518 of the Laws of 1915, creating the court. Many of them are of such importance and so far reaching in their results that it has been thought best not to pass upon them in this case since its disposition can be rested upon only two of them, namely: first, that ch. 518 is a local bill within the meaning of sec. 18, art. IV, of the constitution, and second, that its subject is not expressed in the title as required by said section, which reads: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title."

In *Milwaukee Co. v. Isenring,* 109 Wis. 9, 85 N. W. 131, the cases in this state involving the question of when a law is general or local within the meaning of the constitutional provision above quoted were reviewed at length, and it was there held that a law might be public and local, or it might be general in the restricted sense in which the term is used in sec. 21, art. VII, of the constitution, which provides that "no gen-

eral law shall be in force until published," and at the same time be a local law; the word "general" as here used meaning public in the sense that it affects the public at large in a single defined subdivision of the state such as a county, town, city, or village, or a collection of such localities not constituting a legitimate class for purposes of legislation, and still is local within the meaning of sec. 18, art. IV, because affecting but a single locality not constituting a legitimate class for legislation. It was also held in that case that a bill entitled "An act in relation to sheriff's fees," which dealt with the compensation of the sheriff of Milwaukee county only, was local in character. In *Wagner v. Milwaukee Co.* 112 Wis. 601, 88 N. W. 577, the same construction was given to an act authorizing any county to build a viaduct costing not less than $80,000, with other conditions, because it could apply only to Milwaukee county.

The law in question deals with the establishment of a superior court in Fond du Lac county and the abolishment of its county court. It is limited in its effect to the boundaries of Fond du Lac county and therefore local in character. True, it is public or general in the sense that it may affect publicly or generally all the people of the county or outside thereof, but it deals with the establishment and abolition of courts of a specified locality which does not constitute a class for purposes of legislation. So within the rule laid down in the case of *Milwaukee Co. v. Isenring, supra,* it must be held to be a local law coming within the provisions of sec. 18, art. IV, of the constitution.

The failure of counsel for defendant to realize that a law may be general or public within the meaning of sec. 21, art. VII, and still be local within the meaning of sec. 18, art. IV, has led them to claim that acts like the one in question have been held to be not local in these cases: *In re Boyle,* 9 Wis. 264; *In re Bergin,* 31 Wis. 383; *State ex rel. Att'y Gen. v. Foote,* 11 Wis. 14; *Meshke v. Van Doren,* 16 Wis. 319.

Only the case of *In re Bergin,* 31 Wis. 383, lends color to this claim. There the question was whether ch. 137, Laws of 1871, which authorized the commencement of criminal prosecution by information instead of indictment, applied to the municipal court of Milwaukee county. It was claimed it did not because the act creating that court was a local act. The court says: "A short and most conclusive answer to this position is, that this court in *In re Boyle,* 9 Wis. 264, held that the act of 1859 establishing such a court is a general law." This ruling must be deemed to stand on a par with that of *Zitske v. Goldberg,* 38 Wis. 216, referred to by Mr. Justice MARSHALL in *Milwaukee Co. v. Isenring,* 109 Wis. 9, 14, 85 N. W. 131, as a case where, without discussion, the words "local" and "general" in its restricted sense were held not applicable to the same act. For in *In re Boyle* the only point decided bearing upon the question under consideration was that the act creating the municipal court of Milwaukee county was a general act within the meaning of sec. 21, art. VII, of the constitution, requiring it to be published before it took effect. In *State ex rel. Att'y Gen. v. Foote,* 11 Wis. 14, the same act was held to be public and that judicial notice of its publication would be taken. In *Meshke v. Van Doren,* 16 Wis. 319, an act conferring upon the county court of Winnebago county jurisdiction concurrent with the circuit court up to $500 was held to be a public act of which the court would take judicial notice. So it appears that none of the cases relied upon except *In re Bergin,* 31 Wis. 383, bear out the claim made, and that the latter case as to this question was based upon the misconception that an act could not be both general and local, though the court in *State ex rel. Cothren v. Lean,* 9 Wis. 279, after a full discussion and mature consideration had decided that it could. That such decision has since been quite consistently adhered to is pointed out in *Milwaukee Co. v. Isenring,* 109 Wis. 9, 85 N. W. 131.

The readjustment of local courts in Fond du Lac county constituted the subject of ch. 518, and the main purpose thereof was twofold: first, the creation of a new court called the superior court, and second, the abolition of the county court. Of such main purpose only one half is expressed in the title, namely, the creation of the new court. The abolition of the county court is not mentioned therein, though such court was created pursuant to constitutional provisions as early as 1849 and has continued in existence ever since. Not only is that true of Fond du Lac county, but it is true of every other county in the state since its organization as a county. All counties have county courts exercising general probate jurisdiction, while some have limited civil or civil and criminal jurisdiction in addition to their probate jurisdiction. Pursuant to the provisions of sec. 14, art. VII, of the constitution, ch. 86 of the Statutes of 1849 abolished the office of judge of probate and established county courts in each of the counties of the state. The constitution also provides for the establishment of municipal and inferior courts. Sec. 2, art. VII. We have at present thirty-three municipal courts, one superior court, one district court, and one civil court consisting of seven branches. In the establishment of all these courts the probate jurisdiction of a county court has not been invaded, much less has such a court been abolished. It is obvious, of course, that, where a new court is created in a locality already supplied with courts having jurisdiction of all cases that may arise, the new court must at least have concurrent jurisdiction with existing ones, and that it may take away entirely some jurisdiction from other courts. But the creation of one court does not naturally or reasonably imply the abolishment of another, and especially is this so where the new court is styled a superior court. Previous to the attempted abolishment of the court in question we have had only two superior courts, that of Milwaukee county, now abolished, and that of Douglas county. The

creation of neither of those interfered with the probate jurisdiction of the county court of the county in which it was organized or abolished an existing court. Since during the establishment of all these courts the probate jurisdiction of county courts has been kept inviolate, how could the people of Fond du Lac county dream that they were to be deprived of their county court when they read that ch. 518 was "An act to create a superior court in the county of Fond du Lac?" Conceding, as this court has held time and again, that a title must be liberally construed, and must be held to include within it anything reasonably germane to the expressed subject, still it cannot, in view of the history of the creation of previous courts as well as in view of the lack of any logical connection between the creation of a superior court and the abolishment of a county court, be held that the title in question includes within it the idea that the county court of Fond du Lac county was to be abolished.

So far as it has come to our attention, acts abolishing an existing court and creating a new one or transferring the entire jurisdiction of one court to another, have referred to the existing court in their title. Thus ch. 107 of the Laws of 1873 changed the name of the police court to the municipal court and enlarged its jurisdiction. Its title was "An act relating to the police court of the city of Madison." Ch. 146 of the Laws of 1876 established a municipal court in Marathon county. In 1879 the court was abolished and a new one created by ch. 115 of the Laws of 1879. The title of the latter act was "An act to establish a municipal court in the city of Wausau and county of Marathon, *and to repeal chapter one hundred and forty-six, general laws of 1876.*" The superior court of Milwaukee county was created by ch. 125 of the Laws of 1887. In 1903 it was abolished by ch. 1 of the laws of that year entitled: "An act to repeal the acts establishing a superior court for Milwaukee county and providing for the transfer of causes and proceedings pending

therein to the circuit court for the second judicial circuit." An examination of nearly a dozen acts creating other inferior courts of record in this state has failed to disclose a single case of the inclusion of matters foreign to the main subject of the act.

The constitutional prohibition against the passage of private or local laws whose subjects are not expressed in their title has a substantial foundation for its existence. That it was considered important by the framers of the constitution is evidenced by the fact that it found a place in the basic law of the state. It is of no less importance now than then. The mischief of smuggling private or local laws through the legislature under false, inadequate, or misleading titles is a serious one, and whenever such smuggling, whether intentional or not, is found to have taken place, courts should not hesitate to declare a law so passed invalid. No branch of the government however high is above a constitutional prohibition or safeguard, and no citizen however low is outside their beneficial protection. Within the scope of its operation the constitution acts upon all alike.

If after giving the title of a private or local law a liberal construction, including within its meaning all matters reasonably germane thereto, it is found that the body of the act contains matters of substance foreign to the title so construed, then such law falls within the condemnation of the constitution. We think the titles of chapters 518 and 589 of the Laws of 1915, though liberally construed, fail to meet the requirements of the basic law and hence they are declared invalid.

They are void not only in so far as they affect the county court but *in toto,* because from the whole scheme of the acts we cannot assume the legislature would have created a superior court in Fond du Lac county without abolishing the county court. The two are so interrelated in the acts that they must stand or fall together. Statutes void in their main purpose or void as to a substantial part which is closely

interrelated with other substantial parts thereof are void *in toto*. *Chicago, M. & St. P. R. Co. v. Rock Co. S. Co., ante,* p. 374, 156 N. W. 607, and cases cited.

By the Court.—It is considered, ordered, and adjudged that the defendant, *F. W. Chadbourne,* has no right to the office of county judge of Fond du Lac county or to the exercise of the functions or duties thereof, and that he be ousted and excluded therefrom.

That the relator, *A. E. Richter,* is and has been since the 1st day of September, 1915, entitled to the said office by virtue of the election and qualification alleged in the complaint, and to the franchises, privileges, and emoluments thereof, and that he have and recover of the defendant, *F. W. Chadbourne,* his costs of this action, to be taxed by the clerk.

BARNES, J. (*dissenting*). The method here pursued of disposing of a public officer is not one calculated to create a very favorable impression. What the reasons were for attempting to legislate *Judge Richter* out of office I do not know. The fact that the movement seems to have had the backing of nearly the entire bar of Fond du Lac county negatives the idea that partisan politics entered into the matter. At the same time the lengthy postponement of the time at which an election could be held would seem to indicate that the Judge might be more popular with the electors than he was with the lawyers. These are considerations, however, which do not concern this court. The question is, Had the legislature the right to enact such a law as it did, and, if so, did it proceed in a constitutional manner in doing so?

The constitution expressly authorizes the legislature to abolish the office of judge of probate. Sec. 14, art. VII, Const. This is what *Mr. Richter* was. So I think we have no debatable question so far. There is some conflict in the decisions as to whether such a law as we have here is general or local. Perhaps the weight of authority accords with the

conclusion of the court; so I find no fault with the decision in this regard. I do not believe that the title is fatally defective.

In speaking of the sufficiency of the title to a local law, this court said in *In re Southern Wis. P. Co.* 140 Wis. 245, 251, 122 N. W. 801:

"An act of the legislature should not be adjudged invalid except upon clear and unmistakable grounds, and the title of a private or local act should be liberally construed, and the act should not be declared void merely because such title does not express the subject as fully or as unequivocally as possible. *Mills v. Charleton,* 29 Wis. 400. The title to an act must be liberally construed, giving all reasonable leeway for the exercise of legislative discretion. It should not be held insufficient if a reasonable doubt exists as to its sufficiency. It is only where the title is so insufficient and so defective as not to reasonably suggest the purpose of the act it covers, and where a reading of the act will disclose provisions that are clearly outside of its title, that it will be held invalid. *Milwaukee Co. v. Isenring,* 109 Wis. 9, 24, 85 N. W. 131. The title to a legislative act must not only be liberally construed, but the act should not be condemned as insufficient because of the title, unless, giving such title the largest scope which reason will permit, something is found in the body of the act which is neither within the literal meaning nor the spirit of the title nor germane thereto."

The law in question is entitled "An act to create a superior court in the county of Fond du Lac." Every provision in it which confers jurisdiction is germane to the title. Certainly the legislature could lawfully under this title transfer to the new court every shred of jurisdiction theretofore exercised by the county judge and leave him so that he could not perform a single judicial function. To say that it could not go farther and wipe out the office, where there was nothing left for the officer to do, without stating in the title that such was one of the purposes of the act, is to my mind drawing a pretty fine line. Of course the purpose of the constitutional

provision is apparent. But in these days when great publicity is given to pretty much everything that is so, and to a great deal that is not so, the chances that people were not informed as to what was going on are remote. The legislature must be given credit for honesty of purpose and of intending at least to follow the mandates of the constitution. We cannot assume that there was any intention on its part to smuggle through legislation without giving interested parties an opportunity to be heard. Having taken all jurisdiction away from the county judge, as the legislature had the undoubted right to do under the title, I think the clause abolishing the office was germane to the act.

CURTICE, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

February 1—February 22, 1916.

Railroads: Negligence: Injury to employee: Action under state or federal law? Interstate commerce: Pleading: Amendment: Changing cause of action: Limitation of actions: Construction of pleading: Intent of counsel.

1. In an action by an employee against a railway company for an injury alleged to have been caused by negligence the complaint did not show that at the time of the injury the parties were engaged in interstate commerce. The answer alleged that fact and that the cause of action, if any, was under the federal statute, not under the state law. More than two years after the injury plaintiff was allowed to amend the complaint so as to allege that the parties were engaged in interstate commerce when the injury occurred. Defendant then amended its answer so as to set up the federal statute of limitations. *Held*, that the amendment to the complaint did not change the cause of action or substitute a different one, but related back to the original complaint and cured defects therein; hence the statute of limitations was no defense.

2. A statement, in such case, by plaintiff's counsel that in the original complaint he intended to state a cause of action under the state law is immaterial, the pleading itself not being ambiguous or of doubtful meaning.
3. The answer having set up the facts omitted from the complaint and necessary to perfect the cause of action under the federal statute, defendant was in no way surprised or prejudiced by the amendment of the complaint so as to allege the same facts.

BARNES and VINJE, JJ., dissent.

APPEAL from a judgment of the circuit for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

This action was brought to recover for personal injuries. The original complaint, omitting title, was as follows:

"First. That the defendant is a railway corporation, organized under the laws of the state of Wisconsin; that at all times herein mentioned it owned and operated a line of railway in and through said state and between the cities of Marinette and Green Bay, Wisconsin.

"Second. That at all times hereinafter stated, when injured, plaintiff, a resident of said city of Green Bay, was in the employ and service of defendant as a freight conductor on one of defendant's freight trains operating between said cities; that on the 9th day of October, 1911, while running southerly and about to head in onto the siding at Little Suamico, a station on said line in Oconto county, the defendant's said freight on which plaintiff then was employed as conductor was carelessly and negligently run into by one of defendant's passenger trains following after before the freight had time to pull onto the siding, and plaintiff was injured as hereinafter alleged.

"Third. On information and belief plaintiff alleges that defendant's servants in charge of the said passenger train knew of its presence and that the said passenger was following close after on the same block; that said servants had been warned to that effect by a caution card or notice delivered to them at Pensaukee, a station next north of Little Suamico, providing and directing that they proceed with caution prepared to stop within their vision, and that they might expect to find Extra 116, plaintiff's said freight train, within the

block; that, notwithstanding, defendant's servants in charge and control of said passenger train did not proceed with caution and so as to be able to stop within the vision, but recklessly, carelessly, and negligently run said passenger train at a high and dangerous rate of speed, and so run it against and into the said freight at said place.

"Fourth. That the defendant's servants, the train dispatcher and others, having control of the running of said trains, while the said freight was proceeding south, carelessly and negligently suffered and caused the said passenger train to be let onto the said block with the said freight, thereby causing the said passenger to enter the block and proceed on its way southerly before the block was clear and before the freight had left it, which made it possible and likely that such an accident might happen.

"Fifth. That the said passenger train, by reason of the aforesaid negligence, ran into the said freight with great force and violence, and the plaintiff was, by the said negligence, severely and greatly injured, to wit, plaintiff's left hip and leg were severely sprained and injured; that he was confined to the hospital for some ten days on account thereof and suffered great pain; that said injury has continued, causes the plaintiff pain, and renders him unable to do many kinds of manual labor that he could formerly do; that said injury has caused plaintiff loss and damage in expense for treatment and in loss of time and earnings, still does, and will in the future greatly impair plaintiff's ability to earn a livelihood; all to his damage in the sum of $5,000.

"Wherefore plaintiff demands judgment against the defendant for said sum and for costs."

Among other things the defendant set up facts showing that at the time of injury the plaintiff and defendant were engaged in interstate commerce, and that the cause of action, if any existed, was under the federal act, not under the laws of the state of Wisconsin. Judgment was demanded by defendant abating the action.

Afterwards the plaintiff was allowed to amend his complaint by adding allegations to the effect that defendant's

road runs through the state of Michigan and between the cities of Green Bay, Wisconsin, and Menominee, Michigan, and that plaintiff and defendant were at the time of the injury alleged engaged in interstate commerce. Defendant then amended its answer setting up the statute of limitations.

At the time of the amendment of the complaint two years from the time of the alleged injury had expired. The court below held that the original cause of action was one under the state law, and that the amendment of the complaint set up a cause of action under the federal act and that such action was barred by the two-year statute, and sustained the defendant's demurrer and dismissed the complaint.

The plaintiff appealed to this court from the judgment dismissing the complaint.

For the appellant there was a brief by *Martin, Martin & Martin,* and oral argument by *Gerald Clifford.*

Edward M. Smart, for the respondent.

KERWIN, J. The point involved upon this appeal, under the assignments of error, is whether the amended complaint set up a different cause of action than that stated in the original complaint. The contention of the appellant is that there is but one cause of action, and that under the federal act; while on the part of the respondent it is insisted that the original complaint set up a cause of action under the state law, and that the amendment changed it from a cause of action under the state law to one under the federal act.

It is obvious that but one cause of action existed upon all the facts stated in the amended complaint. It is equally obvious that the original complaint was defective in failing to state certain facts going to show that at the time the injury was sustained the parties were engaged in interstate commerce. Nothing stated in the amended complaint was in conflict or inconsistent with the allegations of the original complaint. The cause of action upon which the plaintiff

sought to recover damages was defectively stated in the original complaint and the defects were cured by the amendment. But one cause of action was stated. The amendment related back to the original complaint and became a part of it, hence the statute of limitations was no defense. *Missouri, K. & T. R. Co. v. Wulf,* 226 U. S. 570, 33 Sup. Ct. 135; *Gainesville M. R. Co. v. Vandiver,* 141 Ga. 350, 80 S. E. 997; *Bixler v. Pa. R. Co.* 201 Fed. 553; *Smith v. A. C. L. R. Co.* 210 Fed. 761; *Cincinnati, N. O. & T. P. R. Co. v. Goode,* 163 Ky. 60, 173 S. W. 329; *Vickery v. N. L. N. R. Co.* (Conn.) 89 Atl. 277; *Schieffelin v. Whipple,* 10 Wis. 81; *Callahan v. C. & N. W. R. Co.* 161 Wis. 288, 154 N. W. 449.

Counsel for respondent has favored us with a very able and exhaustive discussion of cases touching the question involved and we confess that there is some lack of harmony in the decisions. We think, however, that most, if not all, of the authorities cited by counsel for respondent can be distinguished from the instant case.

We shall not attempt to discuss the numerous cases referred to by counsel for respondent except two which are particularly relied upon, namely, *Union P. R. Co. v. Wyler,* 158 U. S. 285, 15 Sup. Ct. 877, and *Meinshausen v. A. Gettelman B. Co.* 133 Wis. 95, 113 N. W. 408.

In *Meinshausen v. A. Gettelman B. Co., supra,* there were two causes of action, the amended complaint setting up a new and different cause of action from that set up in the original complaint, therefore the case is not in point.

We think a careful examination of *Union P. R. Co. v. Wyler, supra,* will show that it is clearly distinguishable from the instant case. In the *Wyler Case* the amendment changed not only the cause of action but the nature and substance of the cause of action. The whole discussion in the opinion in the *Wyler Case* goes upon the idea that an entirely new and different cause of action cannot be set up by way

of amendment and thus escape the plea of the statute of limitation on the ground that the new cause of action related back to the time of filing the complaint. But the facts in the *Wyler Case* and the reasoning in the opinion have no application to a case where there is but one cause of action which is defectively stated and the defect cured by amendment.

The learned trial judge below seems to have attached importance to the fact that counsel for appellant stated that he intended to state a cause of action under the state law. We think this statement wholly immaterial. The mental operations of counsel could not create two causes of action where but one existed. The intent of the pleader might be significant or helpful in giving construction to an allegation which was ambiguous or of doubtful meaning. But there is no such question here.

There is another feature of this case which is worthy of notice. When the defendant answered the original complaint it set up the facts which were omitted in the plaintiff's defective complaint and necessary to perfect the cause of action under the federal act and which were afterwards set up by plaintiff in the amendment complained of. The defendant was therefore in no way surprised or prejudiced by the amendment. Doubtless the case could have gone to trial on the pleadings as originally framed and the complaint on the trial amended or treated as amended in accordance with the issues made by the pleadings as originally framed. *Callahan v. C. & N. W. R. Co.* 161 Wis. 288, 154 N. W. 449; *Bieri v. Fonger,* 139 Wis. 150, 120 N. W. 862; *Graber v. D., S. S. & A. R. Co.* 159 Wis. 414, 150 N. W. 489; *Wabash R. Co. v. Hayes,* 234 U. S. 86, 34 Sup. Ct. 729.

As said in *Union P. R. Co. v. Wyler,* 158 U. S. 285 (15 Sup. Ct. 877) at pp. 297, 298, "The whole doctrine of relation rests in a fiction of law, adopted to subserve, and not to defeat right and justice."

We are convinced that the amendment did not introduce a

new cause of action, but cured the defective cause of action originally pleaded, hence the amendment was proper.

By the Court.—The judgment is reversed, and the cause remanded for further proceedings according to law.

BARNES, J. (*dissenting*). The original complaint carefully avoided any reference to the federal statute. It contained no allegation tending to show that plaintiff was engaged in interstate commerce when hurt. It shows with considerable care and particularity that he was engaged in intrastate commerce. Had a motion been made to make the pleading more definite and certain in reference to the nature of plaintiff's employment it would have received short shrift, because it was neither indefinite nor uncertain in this regard. If the action had been begun on this complaint in the federal court it would, I think, very promptly have been held that it did not state a cause of action under the federal act. Defendant pleaded as a defense to the action that plaintiff was engaged in interstate commerce when injured. Had plaintiff demurred to this defense the demurrer would, I believe, have been just as promptly overruled, on the theory that such answer, if true, stated a good defense. A perfect cause of action was stated under the law of Wisconsin, while no cause of action was stated under the law of the United States. To be sure, little need be added to the complaint to bring the case under the federal law. The statement of the simple fact that at the time plaintiff was injured he was engaged in interstate commerce would have been all-sufficient. But the pleading of this simple fact would produce important results. Without such allegation the rights of the parties would have to be determined by the existing law in one jurisdiction. With it they would have to be determined by the law of another jurisdiction. The change indicated would work a change from state to federal law, and there are substantial and important differences between them. Under the

state law contributory negligence is a complete defense where the negligence of the defendant is less than that of the servant. If the servant is negligent but his negligence is less than that of the master, there can be a full recovery. Sec. 1816, Stats. 1911. Under the federal act contributory negligence is not a defense, but affects the amount of recovery. Under the state law assumption of hazard is no defense to such an action as we have here. Under the federal law it is a complete defense. Under the state statute defendant would be liable for the negligence of a fellow-servant when such negligence caused the injury in whole or in greater part. The federal statute is different in verbiage at least. The manner of submitting the two actions is different and the beneficiaries are different. A cause of action includes the facts showing plaintiff's right and its violation by the defendant. *McArthur v. Moffet,* 143 Wis. 564, 128 N. W. 445. Enough has been said to show that a person who is injured by a railway company while engaged in intrastate commerce has different rights and a different cause of action from what he would have, had he been injured while engaged in interstate commerce.

It is true that the plaintiff did not in fact have two causes of action in reference to which he might exercise a right of election. There was only one cause of action, and whether it came under state or federal law depended on the facts. Undoubtedly the pleader in the present case was mistaken as to what the facts were when the complaint was drawn. It was stated on the oral argument by counsel for the appellant that it was supposed that the train on which plaintiff was employed when injured started from Marinette, when as a matter of fact it started from Menominee. Instead of its being an intrastate train it was an interstate train. On the facts before him the able counsel for the plaintiff stated a perfectly good cause of action under the state law, such a cause as he frankly said he intended to state. There is no defect in the

pleading. It is almost a model. Counsel found himself in the position he would have been in had he brought an action of tort and found when he came to trial that on his evidence he could only recover on contract; or if he had brought an action on express contract but found that he could not prove it and would have to recover on *quantum meruit* if at all. The cause of action declared on would be different from the one on which recovery could be had. Now if a client discloses to his lawyer the facts on which he claims to have a right of action against some one and such facts would give a right of action, and the pleader, following the facts as they have been detailed to him, states a perfectly good cause of action in the complaint drawn, I do not believe there is any infirmity in the pleading or that it contains a defective statement of a cause of action. The trouble is with the facts, not with the pleading. A cause of action is defectively stated when some material allegation is omitted therefrom and without which the complaint on its face does not state any cause of action whatever. Whether a cause of action is stated, as well as the nature of the cause of action, must be determined from an examination of the complaint itself and not from a consideration of extraneous facts which are not set forth in the pleading. It is a contradiction to say in one breath that a complaint states a good cause of action and in the next to say that it states a defective cause of action. Whether it is one or the other must be determined from the face of the pleading. It cannot be that a good cause of action cannot be set forth in a complaint simply because the party is unable to prove the necessary facts to establish it.

In this instance the plaintiff was anxious to bring his case under the state law and the defendant was desirous that it should fall under the federal act. Both were of the mind that it would be more advantageous for the defendant to have the case come under the federal law. This court had decided that unless the question of the application of the federal law

was raised in some appropriate way before or during the trial, the defendant would be held to have waived the benefit of it. *Leora v. M., St. P. & S. S. M. R. Co.* 156 Wis. 386, 146 N. W. 520. So the defendant to protect its rights here promptly raised the question at the first opportunity by appropriate averments in its answer. Under our Code system of pleading, the allegation stood as denied unless the plaintiff chose to amend his complaint by alleging the same fact. It is said in the opinion of the court that because of this allegation the defendant was in no way surprised or *prejudiced* by the amendment and that the case could have "gone to trial on the pleadings as originally framed and the complaint on the trial amended or treated as amended in accordance with the issues made by the pleadings as originally framed." This is a rather jaunty way to dispose of what will, I think, at least be conceded to be a close question. One of the issues raised by the original pleading was whether the plaintiff was engaged in interstate commerce when hurt. The defendant took the affirmative and the plaintiff the negative of the question. If the defendant prevailed it would be entitled to judgment dismissing the complaint. If plaintiff then brought the proper action the bar of the statute of limitations would be a complete defense. I hardly think the court seriously intends to hold that an amendment which deprives a litigant of the benefit of a statute of limitations is one which in no way prejudices him. Neither do I think that, where a defendant sets up proper defensive matter in an answer which by force of law stands as denied by the plaintiff, the court can thereafter, for the purpose of avoiding a limitation statute, transfer such allegation to the complaint as of the time it was drawn. A defendant should not be made to suffer for drawing a proper pleading. The averment was essential unless defendant was willing to waive the benefit of the federal law. In this case no trap was laid for plaintiff. He was promptly advised of the dangers ahead. He did not heed the warning

given, but because it was given it is held that defendant was not surprised or prejudiced by what was subsequently done. Doubtless the parties could have gone to trial on the pleadings as originally framed. If they did, judgment would have to go for defendant if it prevailed on its contention that the case was within the federal statute. There would be no occasion to amend or treat as amended the original complaint to make it conform to the issues made by the "pleadings as originally framed," because such issues were made up by the original complaint and answer. It seems to me to be rather grasping at straws in this case to say that the complaint is in any way aided or improved by what is alleged in the answer. If defendant sought a continuance on the ground of surprise when the amended complaint was served, a court would say at once that it was not surprised. But there is no claim of surprise. Defendant is relying on a statute of limitation, and such a defense is no longer unconscionable in this state. *Whereatt v. Worth,* 108 Wis. 291, 84 N. W. 441.

I dislike to see the plaintiff lose what may be a meritorious cause of action because of the mistake made here. The question before us is one which arises under the laws of the United States and one on which the federal supreme court has the final say. Its decisions in such cases are not only valuable as precedents, but are binding on this court. If I read those decisions aright, that court has held that where rights are asserted under one law in an original pleading and under another by an amended pleading, in other words, where there is a change from law to law, there is a change of causes of action, and that if a limitation statute has run on the amended cause of action at the time the amendment is made, it is a good defense although it had not run when the action was originally commenced. This is what I think the court decided in *Union P. R. Co. v. Wyler,* 158 U. S. 285, 15 Sup. Ct. 877. This decision was approved in the *Wulf Case*

(*Missouri, K. & T. R. Co. v. Wulf*) 226 U. S. 570, 33 Sup. Ct. 135, where the distinction between it and the case under consideration was clearly pointed out and where it was held, in accordance with the uniform current of authority, that an amendment changing the beneficiary was not a change of causes of action.

In the opinion of the court it is stated that the *Wyler Case* is clearly distinguishable from the present case, because there the amendment changed not only the cause of action but the nature and substance of the cause of action.

I am unable to see any distinction in principle between the two cases. In the *Wyler Case* plaintiff was injured in Kansas and brought a common-law action to recover damages for his injury in the state of Missouri, alleging as a ground of negligence that defendant employed an incompetent fellow-servant who was responsible for plaintiff's injury. Thereafter plaintiff, probably doubting his ability to prove the cause of action stated, amended his complaint by alleging that he was injured through the negligence of a fellow-servant, referring to the same servant who was alleged to be incompetent in the original complaint. The amendment further set forth that the injury occurred in the state of Kansas and that under a statute of that state the master was liable for an injury which occurred through the negligence of a fellow-servant. To this amendment the defendant set up by way of defense that the statute of limitations had run at the time the complaint was amended, and the question and the sole question in the case was whether there was a change of causes of action. The original action, as before stated, was the usual common-law action for negligence. The amended complaint was based on the common law as amended in the particular stated by a statute of the state of Kansas. The court held that there was a change of causes of action because there was a change from law to law.

In the instant case the action was brought under the com-

mon law as amended by the statutes of the state of Wisconsin. Under the amended complaint a cause of action was stated under the common law as amended by the statutes of the United States. It seems to me that there is a change from law to law as much in the one case as there is in the other, and that the doctrine of the *Wyler Case* is fully approved in *Missouri, K. & T. R. Co. v. Wulf,* 226 U. S. 570, 33 Sup. Ct. 135. If I have a correct concept of what has been decided in these two cases, I think they are decisive of the case at bar.

Cases not decided by the federal supreme court do not have the same binding force and effect on this court as do the decisions of that court, but it is entirely germane to the question under discussion to say that the great weight of authority supports the contention here made by the respondent. Among the cases holding that under substantially similar facts the allowance of such an amendment as was here made changes the cause of action stated in the original complaint, and that the defense of the statute of limitations is available as of the time the amendment is made, are the following: *Allen v. T. V. R. Co.* 229 Pa. St. 97, 78 Atl. 34, 30 L. R. A. N. S. 1096; *Bradley v. Chicago-Virden C. Co.* 231 Ill. 622, 83 N. E. 424; *Henderson v. Moeaqua C. M. & M. Co.* 145 Ill. App. 637; *McHugh v. St. Louis T. Co.* 190 Mo. 85, 88 S. W. 853; *Wasson v. Boland,* 136 Mo. App. 622, 118 S. W. 663; *Hall v. L. & N. R. Co.* 157 Fed. 464, affirmed (*Louisville & N. R. Co. v. Hall*) 98 C. C. A. 664; *Wingert v. Carpenter,* 101 Mich. 395, 59 N. W. 662; *Hughes v. N. Y., O. & W. R. Co.* 158 App. Div. 443, 143 N. Y. Supp. 603; *Moliter v. Wabash R. Co.* 180 Mo. App. 84, 168 S. W. 250; *Brinkmeier v. Mo. Pac. R. Co.* 81 Kan. 101, 105 Pac. 221; *Creteau v. C. & N. W. R. Co.* 113 Minn. 418, 129 N. W. 855.

The cases relied on by appellant, with two or three not very important exceptions, are cases where there was a change of beneficiary by amendment. Such a change is held

by nearly all courts not to change the cause of action. In fact I see little difference between the situation presently before the court and that which confronted this court in *Stevens v. Brooks,* 23 Wis. 196; *Meinshausen v. A. Gettelman B. Co.* 133 Wis. 95, 113 N. W. 408; and *Haverlund v. C., St. P., M. & O. R. Co.* 143 Wis. 415, 128 N. W. 273.

VINJE, J. I concur in the foregoing dissenting opinion of Mr. Justice BARNES.

NUTHALS, Administrator, Appellant, vs. CITY OF GREEN BAY, Respondent.

February 1—February 22, 1916.

Highways: Establishment by user: Wharf connecting street and river.

1. The provision in sec. 1294, Stats., that all unrecorded roads used and *worked* for ten years shall become legal highways, does not abrogate the common-law rule of this state that a highway may be created by user alone for twenty years.
2. A highway or street need not take any specific form of structure. If it serves the purpose of a street or highway it is immaterial what its form may be or that it may also serve some other purpose.
3. Where, within the lines of a street extended to the established dock line on a river which was also a public highway, a wharf and the filled approach thereto served to connect the travel on the city streets with the travel on the river, and there was evidence that public travel over such wharf had been more or less continuous for over twenty-five years and that it was used for all purposes for which the public had any use for it, a jury would be warranted in finding that such wharf was a public street, even though it had never been opened as a street and had been used to some extent by adjoining owners for storage purposes and it was not shown that it was built by the city or that the city had ever expended any money on its repair or maintenance.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Reversed.*

Action to recover damages for the death of one Constant Nuthals, who on September 8, 1912, drowned by reason of falling through an alleged defective trestle work or wharf at a place claimed to be in a public street of the defendant city.

The Fox river at the place in question in the city of *Green Bay* runs nearly north and south. Washington street parallels the river on the east. Cedar street intersects Washington street at right angles. The original plat of the city shows Cedar street extending to the Fox river, but the shore line is indicated some 200 feet east of where it is at present. From the original shore line to about nine feet west of the west line of Washington street, Cedar street has been raised by a dirt fill throughout its full width. At the end of this fill a wharf or trestle, built on piling, extends to the established dock line a distance of eighty-seven feet on the north line of the street and of 116 feet on the south line. About eighteen feet from the end of this wharf and about eight feet from its north line the deceased fell through it. North of this wharf and connected to it is the wharf property of the F. Hurlbut Company.

At the close of the testimony the court directed a verdict in favor of the defendant, and from a judgment entered accordingly the plaintiff appealed.

For the appellant there were briefs by *Minahan & Minahan,* and oral argument by *V. I. Minahan.* They argued, among other things, that a wharf such as the one in question is, as a matter of law, a part of the highway. *People v. Lambier,* 5 Denio, 9, 47 Am. Dec. 273; *In re Brooklyn,* 73 N. Y. 179; *Knickerbocker Ice Co. v. Forty-second St. & Grand St. F. R. Co.* 176 N. Y. 408, 68 N. E. 864.

William Cook, attorney, and *Robert A. Kaftan,* of counsel, for the respondent, contended, *inter alia,* that a public wharf, even when at the end of a street, is not a public highway. *State v. Cowan,* 29 N. C. 239; *State ex rel. Wauconda Inv. Co. v. Superior Court,* 68 Wash. 660, 124 Pac. 127; *Palen*

v. Ocean City, 72 N. J. Law, 15, 62 Atl. 947; *Clark v. Los Angeles,* 160 Cal. 317, 116 Pac. 966; *Horn v. People,* 26 Mich. 221; *Kemp v. Stradley,* 134 Mich. 676, 97 N. W. 41; *Ill. & St. L. R. & C. Co. v. St. Louis,* 2 Dill. 70, 12 Fed. Cas. 1199.

VINJE, J. The circuit court directed a verdict for defendant because there was not sufficient evidence to go to the jury on the question of whether or not the *locus in quo* was a public street. In doing so the court erred. It is true there was no evidence that the city built the wharf or approach thereto or as to who built it. Neither was there any evidence that the city had ever expended any money on its repair or maintenance. On the contrary the only one shown to have repaired the wharf was the Hurlbut Company. But it is not necessary that the city should have opened the street or built or repaired the wharf in order to constitute the same a public street. A place may become a street or highway by twenty years' user only. The provision of sec. 1294, Stats., that all unrecorded roads used and *worked* for ten years shall become legal highways, did not abrogate the common-law rule of this state that a highway may be created by user alone for twenty years. *Chippewa Falls v. Hopkins,* 109 Wis. 611, 85 N. W. 553. Neither does a highway or street need to take any specific form of structure, such as earth, earth embankment, bridge, or trestle. If its form and structure is such that it serves the purpose of a street or highway and is used as such, it is immaterial what its form may be or that it may also serve another purpose. Here the fill and wharf served to connect the travel on the city streets with travel on the Fox river. Both streets and river were public highways—the former by the acts of the city or its people, the latter by the provisions of the Ordinance of 1787 and the constitution of the state (sec. 1, art. IX). This travel was within the lines of Cedar street extended to the established dock line and was shown

to have been more or less continuous for over twenty-five years. The evidence shows that ice wagons used to drive up and deliver ice to boats; the Standard Oil Company delivered oil to boats over it; owners of boats went over it to get oil from the company; different kinds of boats have tied up there and used the wharf and fill to reach the city streets; transportation companies advertised excursions from the wharf and used to take on and leave their excursionists there; the general public used it, particularly on Sundays and holidays, for picnic parties; and there is testimony that it was used for all purposes for which the public had any use for it. Fred Hurlbut, of the F. Hurlbut Company, testified that they had never regarded the wharf as the property of their company though they had used it for years for the storage of salt, brick, sewer pipe, etc., but had always left a passageway open for teams and foot or other travel. They had repaired it from time to time to facilitate their use of it for storage purposes. From such evidence, if believed, the jury would be warranted in finding that the place where the deceased fell through was in a public street.

The trial court seems to have placed great reliance on the case of *Curtiss v. Bovina,* 138 Wis. 660, 120 N. W. 401, as governing this case. It does not. There it was shown that the town board expressly refused to lay out the highway across the river and that the bridge was built by private parties. It was held that the fact that the town had permitted such private parties to use some old planks discarded from a culvert in the road to repair the bridge did not make it a part of the highway. No twenty years' user was involved, as it was shown that the highway was laid out and the bridge built about ten years previous to the accident. The case of *Johnson v. Milwaukee,* 46 Wis. 569, 1 N. W. 187, relied upon by plaintiff, is more in point.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

TARCZEK, by guardian *ad litem*, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

February 1—February 22, 1916.

Appeal: Verdict, when disturbed: Carriers: Railroads: When person becomes passenger: Injury at station: Defect in platform: Questions for jury: Intoxication of plaintiff: Contributory negligence: Brief stricken from files.

1. Where a verdict is challenged in the trial court and the judge of that court deliberately approves the findings before judgment, his decision on the question is not to be disturbed unless clearly wrong.
2. One who goes to a railway station within a reasonable time before the scheduled arrival of a train, with the *bona fide* intention of taking the train, becomes a passenger.
3. Sub. 1, sec. 1797—9, Stats. 1913,—requiring railway companies to keep open their passenger stations for not less than twenty minutes before the scheduled time of arrival of a passenger train and until it has departed,—is entitled to considerable weight but is not controlling in determining what constitutes a reasonable time within the meaning of the foregoing rules.
4. Whether in this case the plaintiff, who had come to the defendant's railway station intending, as he claimed, to take a train due to arrive at 5:50 p. m., and who, while on the station platform at a time not exactly fixed but which the station agent said was about 5:20 p. m., in some way fell under the wheels of a passing freight train, was a passenger at the time of the accident, is *held* upon the evidence to have been a question for the jury.
5. It is the duty of a railway company to furnish at a station a reasonably safe platform *in view of the dangers to be apprehended;* and the dangers to be apprehended as the result of a stumble on a railway platform at a distance of four feet from a moving train are so much greater than those from a stumble on an ordinary sidewalk that the same measure of diligence cannot apply in both cases.
6. Upon evidence tending to show that plaintiff's fall from a station platform under a moving train was caused by his stubbing his toe against a plank about four feet from the track and projecting about one and three-quarters inches above the crushed stone which formed a part of the platform next to the planking, the

question whether the platform was reasonably safe was one for the jury.

7. Upon the evidence, stated in the opinion, it is *held* that plaintiff was not conclusively shown to have been intoxicated or to have been guilty of contributory negligence.

8. A brief in which defendant's claim agent, a member of the bar of this court who procured typewritten statements from several of the witnesses in the case soon after the accident, is charged with framing up a false defense, manufacturing testimony, and suborning perjury in this and other cases,—there being no foundation for the charge except the fact that the making of certain statements said to have been made to him is denied,—is stricken from the files.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed.*

Personal injuries. The plaintiff, a Russian laborer, nineteen years of age at the time of the accident, was on the station platform at the village of Suring, Oconto county, at about 5:20 p. m. January 1, 1914, as a south-bound freight train passed the station, and in some way fell under the wheels of the train, losing his right hand and the little finger of his left hand. He claimed that he was at the station for the purpose of taking a south-bound passenger train which was due at 5:50 p. m. and that he stubbed his toe on the edge of a plank in the station platform, which was raised above the rest of the platform about one and three-quarters inches, and was thus thrown under the train. The jury found by special verdict (1) that the plaintiff fell under the train on the day stated; (2) that the fall was caused by his stumbling against one of the planks of the station platform; (3) that the relation of passenger and carrier then existed between plaintiff and defendant; (4) that the platform was defective and not reasonably safe for passengers; (5) that such defective condition constituted negligence; (6) that such negligence was the proximate cause of plaintiff's injury; (7) that the platform was also defective by reason of insufficient lighting; (8) that such defective condition constituted negligence;

(9) that such negligence was the proximate cause of plaintiff's injury; (10) that plaintiff was not intoxicated at the time of the injury; (11) that want of ordinary care on his part did not contribute to his injury; and that plaintiff's damages were $7,260.

The defendant moved for judgment notwithstanding the verdict, and also to change the answers and for judgment on the verdict as corrected, but the motions were overruled and judgment rendered for the plaintiff on the verdict, from which judgment defendant appeals.

Edward M. Smart, for the appellant.

For the respondent the cause was argued orally by *V. I. Minahan* and *R. A. Kaftan.*

WINSLOW, C. J. No detail errors are alleged, but the broad contention is made that a verdict for the defendant should have been directed because the evidence showed beyond dispute that (1) the plaintiff was not a passenger, (2) that the platform was sufficient and properly lighted, (3) that the plaintiff was intoxicated, and (4) that he was guilty of contributory negligence.

If we were triers of the facts we think we should find much difficulty in reaching the conclusions reached by the jury, but we are not: our function is simply to ascertain whether there is any credible evidence to support the findings of the jury. In this connection it is to be remembered that where, as in this case, the verdict is challenged in the trial court and the judge of that court deliberately approves the findings before judgment, his decision on the question is not to be disturbed unless clearly wrong. *Slam v. Lake Superior T. & T. R. Co.* 152 Wis. 426, 140 N. W. 30; *Lingelbach v. Theresa Village Mut. F. Ins. Co.* 154 Wis. 595, 143 N. W. 688.

We shall take up the appellant's contentions in the order indicated.

1. It is doubtless true that one who goes to a railway station within a reasonable time before the scheduled arrival of a train, with the *bona fide* intention of taking the train, becomes a passenger. 4 Elliott, Railroads (2d ed.) § 1579; *Ill. Cent. R. Co. v. Laloge,* 113 Ky. 896, 69 S. W. 795, 62 L. R. A. 405; *Widener v. Ala. G. S. R. Co.* (Ala.) 69 South. 558.

Generally the question is one for the jury, but the circumstances may be such as to make it a question for the court. Was it a question for the court in this case? We think not. It appears by the evidence that the passenger train which the plaintiff desired to take was due at 5:50 p. m. The plaintiff came to the station and sat down in the waiting room at about 3 p. m. A freight train was due at 3:30 p. m., but was late on the day of the accident. This was the train under which the plaintiff fell. The exact time of its arrival is not fixed by the testimony of any witness. The station agent says that it was about 5:20 p. m. Another witness says that he went to the station at about 5:15, but whether the witness meant that he reached the station at that time or left his house, some blocks distant, does not appear. No other witness attempts to fix the time, and it seems evident that no one looked at a clock. It appears, however, that another man who was intending to take the passenger train, one Yakel, who was then a section foreman in the defendant's employ, and who had been visiting relatives in the village, was getting ready to go to the station when he heard the freight train whistle and immediately went to the station, about three blocks distant, with two suitcases. The witness was having one of his suitcases checked by the station agent's assistant at the time the freight train passed the platform and the accident happened. This circumstance has considerable persuasiveness in view of the inability of any witness to fix the exact time. Yakel was a railroad man. Presumably he knew the scheduled time of the train which he expected to

take, and he was about to go to the station when the distant whistle of the freight train was heard. When he reached the station the proper employee was ready to and did in fact check his baggage for the passenger train. All this seems to indicate that the usual preparations were being made for the arrival of the passenger train at the time of the accident.

The appellant calls attention to sub. 1 of sec. 1797—9, Stats. 1913, requiring railway companies to keep open their passenger stations for not less than twenty minutes before the scheduled time of arrival of a passenger train and until the train has departed, and claims that this fixes a legislative standard of reasonable time, which in the absence of special circumstances must be deemed controlling. This provision is certainly entitled to be considered as having considerable weight in determining the question, but we should be unwilling to say that it is in any sense controlling. In view of the uncertainty as to the exact time in the present case and the fact that at least one other prospective passenger considered that it was time to go to the station and prepare for departure on the same train, we feel unable to say that the question was not for the jury.

2. It appeared that the station at Suring is on the east side of the railway track, which runs north and south. The platform consisted in part of planking and in part of crushed-stone screenings. The planking consisted of five sixteen-foot planks laid side by side lengthwise next to the track and extending back from the track four feet and two inches. The balance of the platform was of crushed-stone screenings packed down like a macadam pavement, except that in front of the station doors connecting planks ran from the doorstep to the outer planking aforesaid and at right angles therewith. The defect claimed to exist in this platform was that the crushed stone had been worn away, or was originally at a lower level than the planking, so that the edge of the plank projected abruptly above the crushed stone about one inch

and three-quarters. There was considerable testimony as to the height and abruptness of this rise, but there was certainly testimony which would entitle the jury to find that the condition was practically that claimed to exist by the plaintiff.

It is said by the defendant that the duty of the defendant is only to provide a reasonably safe platform and that such an inequality in the platform cannot be held to make it unsafe. Many cases are cited from this and other courts holding in effect that such depressions in city sidewalks and streets are not defects within the legal meaning of that term. We do not regard these cases as controlling or particularly helpful. The carrier's duty is to furnish a reasonably safe platform *in view of the dangers to be apprehended.* The dangers to be apprehended as the result of a stumble on a railway platform at a distance of four feet from a moving train are so much greater than the dangers to be apprehended from a stumble on the ordinary sidewalk that it is evident that the same measure of diligence cannot apply. *Crowe v. Mich. Cent. R. Co.* 142 Mich. 692, 106 N. W. 395. We regard the question whether the platform in question here was reasonably safe in view of the dangers to be apprehended as properly a jury question. Our conclusion on this point renders it unnecessary to consider the question as to alleged insufficient lighting of the platform.

3 and 4. The question as to the plaintiff's alleged intoxication and his alleged contributory negligence will be considered together. The plaintiff was a laborer, a "lumberjack" who had been working in a lumber camp. He was looking for work. On the night before the accident he stopped at a place called Mountain, fifteen miles north of Suring, and got breakfast there. He, with a companion aged thirty, left Mountain at 4 o'clock a. m., stopped at Breed, six miles north of Suring, at 8 a. m., and were next seen at Suring in the afternoon. Plaintiff claims that when he got to Suring at

about 3 p. m. he went to the station and sat down in the waiting room, and his companion left him; that they had heard of work to be had at the next station south of Suring, about two miles south, and had determined to wait and take the train to that point, and that his partner had agreed to pay his fare; that he had fifty cents and no more in his pocket and had no dinner. It appears undisputedly that the plaintiff sat in the station drowsing until the freight train approached. He claims that at this time his companion came in and told him the train was coming; that he went out the door; that as he was going out a man told him that it was not his train, but that it would come quick; that he walked south on the platform and thought he would stand out there and wait for his train; that he struck his toe on something and fell under the train. There were several witnesses who claimed to have seen two men resembling the plaintiff and his companion drinking in saloons on the afternoon in question, and there was evidence to the effect that the plaintiff staggered as he came out of the station and that he smelled strongly of whisky when he was picked up after the accident. On the other hand, the plaintiff himself testified that he had no beer or whisky at Suring that day. The station agent and his helper both noticed the plaintiff sitting in the waiting room at about 3 p. m., and stated that he sat there until he went out to meet the train; that he was quiet and looked rational; and that neither of them saw any evidence that he was drunk or that he had liquor about him. That there were two men in a somewhat intoxicated condition on the streets and in the saloons of the village that afternoon seems quite certain from the testimony of a number of witnesses, but the fact that the plaintiff was one of them is certainly a matter of considerable doubt. If any fact is a verity in the case it is the fact that the plaintiff was sitting quietly and drowsily in the station from about 3 o'clock until about 5:20 o'clock, yet the two drunken foreigners or lumberjacks were seen by Mr. Smith,

superintendent of the Falls Manufacturing Company, on the main street near the station about *four* o'clock p. m. and several times again *within the next half or three quarters of an hour.* This testimony seems to make it rather more than probable that the plaintiff was not one of the two lumberjacks who were seen drunk by the witnesses. It is to be remarked also that several of the witnesses were not at all sure that the plaintiff was one of the men whom they saw. On the whole evidence we cannot say that the plaintiff was conclusively shown to have been intoxicated or to have been guilty of contributory negligence.

Twelve pages of the respondent's brief are devoted to abuse of the defendant's claim agent, who procured typewritten statements from several of the witnesses in the case soon after the accident. The agent is charged with framing up a false defense, manufacturing testimony, and suborning perjury in this and other cases. There is no foundation for the charge except the fact, not infrequent, that the making of certain statements said to have been made to the claim agent is denied. Such things as are here charged could hardly be done without the knowledge of the defendant's attorney. Both the claim agent and the defendant's attorney are members of the bar of this court. If they are guilty of these things measures should be taken to rid the bar of their presence; if they are not guilty they have no redress. To embalm these charges upon the files of this court in such a way that the accused party has no opportunity to meet them seems to us a gross abuse of counsel's privilege. If counsel thinks his case is aided by such tactics he is entirely mistaken. The judgment is affirmed in spite of this breach of privilege, not because of it. The brief is ordered to be stricken from the files.

By the Court.—Judgment affirmed with costs, except that no costs are to be allowed for the printing of respondent's brief.

PORTE, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

February 1—February 22, 1916.

Assignment of future earnings: Validity: Termination of employment: New contract: Nonjoinder of wife in assignment: Foreign judgment, when binding: Public policy: Estoppel.

1. An assignment of future earnings is valid only as to earnings to become due under an existing contract of employment.
2. Plaintiff's employment by the defendant railway company as a switchman in Chicago is *held* to have terminated prior to his employment by the same company as a brakeman at Green Bay, Wisconsin, it appearing that both parties considered and treated the latter employment as a new contract.
3. An assignment made by plaintiff in Illinois, during the earlier employment, of all his wages earned and to be earned from the defendant was absolutely void, under the common law, as to wages earned under the new employment; and a power of attorney to collect such wages, attached to the assignment, was also void.
4. Such assignment was also void as to the wages earned in the new employment, under the Wisconsin statute (sec. 2313*a*, Stats. 1915) declaring that no assignment of exempt wages "shall be valid for any purpose" if not signed by the assignor's wife.
5. In an action brought in Illinois against the railway company the assignee recovered judgment for wages earned under the new contract. This plaintiff was not made a party or served with process in that action, but he informed the defendant that his earnings were exempt and the assignment invalid under the Wisconsin statutes. The defendant did not interpose those defenses in that action or inform the Illinois court that the wages in question were earned under an employment not existing when the assignment was executed. *Held*, that under those circumstances the judgment was not binding upon this plaintiff so as to preclude his recovery, in an action in Wisconsin, of the wages due from the defendant.
6. The assignment being contrary to the public policy of this state, plaintiff had the legal right to resist its enforcement here; and upon the facts stated there was no estoppel.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed.*

This is an action to recover wages earned by the plaintiff while in the employ of the defendant company as a brakeman.

The plaintiff, a married man having a family dependent upon him, was in the employ of the defendant company as a switchman at Chicago, Illinois, until October 9, 1912. At this time he quit his employment with the company at Chicago and moved to Green Bay, Wisconsin, on account of the ill health of his wife. On August 15, 1912, the plaintiff, while residing in Chicago, Illinois, and while in the employ of the defendant, assigned to L. G. Cobb & Co. his wages for the ensuing year until August 31, 1913. This assignment was in writing signed by him but not by his wife. The instrument also gave to Cobb & Co. power of attorney to sue, collect, and receipt for money due them under the assignment. The assignment reads as follows:

"For a valuable consideration to me in hand paid by L. G. Cobb & Co., a corporation, the receipt of which is hereby acknowledged, I do hereby sell, transfer, assign and set over to the said L. G. Cobb & Co., a corporation, or its assigns, all wages and claim for wages or commission earned and to be earned, and all claims and demands due or to become due me from the *Chic. & No. West. Ry. Co.,* their successors, heirs or assigns, or any other firm, person, company or corporation, by whom I may hereafter be employed, or who may owe me money for any consideration whatsoever, up to and including the last day of August, 1913; and I hereby authorize and direct the party or parties named above, or any of them, to pay the said demand and claim and all thereof to the said L. G. Cobb & Co., a corporation, or its assigns.

"I do hereby constitute and appoint the said L. G. Cobb & Co., a corporation, or its assigns, my attorneys in my name to take all legal measures which may be proper or necessary for the complete recovery and enjoyment of the claim or claims hereby assigned; and I hereby authorize and empower it to receive any money which may become due hereon and

receipt for the same in my name, hereby ratifying any acts my said attorneys may take herein.

"Witness my hand and seal this 15th day of August, 1912.

"BARNEM F. PORT. (Seal.)"

On October 24, 1912, upon plaintiff's application for employment as brakeman and having passed the physical examination, he was employed by and commenced work for the defendant company as a brakeman at Green Bay, Wisconsin. The defendant paid the plaintiff for services performed under this employment until December 1, 1912. On November 27, 1912, the defendant received notice of the assignment; and on December 6, 1912, the assignment was filed with the defendant. On January 27, 1913, L. G. Cobb & Co., the assignee, brought suit on the assignment against the defendant company in Chicago, Illinois, and recovered judgment on March 21, 1913, for $116.05 of the amount due plaintiff for his December and January earnings. The plaintiff on February 3, 1913, commenced an action against the defendant company to recover these wages earned between December 1st and January 18th, amounting to $118.82. After two postponements the plaintiff took judgment by default. Defendant appealed the action to the circuit court for Brown county, where judgment was rendered for the plaintiff in the sum of $108, together with the costs and disbursements of the action. The plaintiff was not a party to the suit by L. G. Cobb & Co. against the defendant in Chicago, Illinois, no service of summons having been made upon him. The plaintiff's attorney by letters dated February 13 and 17, 1913, notified the defendant, before the L. G. Cobb & Co. action was tried, that plaintiff claimed the assignment was void and that the amount due him was exempt as wages earned in Wisconsin, and that plaintiff claimed the right to recover the wages due him from defendant. From the above judgment this appeal is taken.

Edward M. Smart, for the appellant.

R. I. McCreery, for the respondent.

SIEBECKER, J. The defendant asserts that the trial court erred in holding that plaintiff was employed by defendant in October, 1912, and that he commenced work for defendant under this employment on October 24, 1912. The record clearly sustains the trial court on this point. The record shows that on October 14, 1912, the plaintiff applied to the defendant for employment as brakeman at Green Bay, Wisconsin. This was an entirely different position from the one he held as switchman in Chicago. The transactions between the plaintiff and defendant on the subject show that both parties considered and treated it as a new contract of employment. From this it necessarily follows that plaintiff's employment as switchman in Chicago was terminated.

Plaintiff's assignment of his earnings for future services is a valid assignment only of the earnings which became due under the employment existing at the time of the assignment. Wages to be earned under an employment not in existence are not assignable. The law recognizes no assignment of future earnings unless such earnings are based on an existing contract of employment. This doctrine is based on considerations of a policy that such assignments tend to subject wage earners to harsh and unreasonable conditions of servitude which operate against the general welfare. In their legal aspect such assignments are considered to deal with a mere possibility not coupled with an interest. *Lehigh Valley R. Co. v. Woodring,* 116 Pa. St. 513, 9 Atl. 58; *Mallin v. Wenham,* 209 Ill. 252, 70 N. E. 564; *Stromberg, Allen & Co. v. Hill,* 170 Ill. App. 323; *Blakeslee v. Make-Man T. Co.* 175 Ill. App. 515; *Herbert v. Bronson,* 125 Mass. 474; *Mulhall v. Quinn,* 1 Gray (67 Mass.) 105; *Eagan v. Luby,* 133 Mass. 543; 4 Cyc. 18, "Assignments—Future earnings." We consider that the assignment in question was absolutely void as to the earnings of plaintiff here in question under the common law and that the power of attorney attached to the instrument of assignment is likewise void. An additional con-

sideration in plaintiff's favor arises under the Wisconsin statute, which inhibits the assignment of any wages for more than sixty days and of all exempt wages unless the assignor's wife joins in the contract of assignment as prescribed by sec. 2313*a*, Stats. 1915. The statute is a clear declaration of the state policy on this subject and under it no assignment of exempt salary or wages "shall be valid for any purpose" unless in writing and signed by the wife. In the light of this state of the case the assignee of the plaintiff under the assignment in question acquired no interest or right to the wages plaintiff earned under the October, 1912, contract with defendant.

It is contended that since the Illinois court adjudged that the assignment is a valid transfer of the earnings here in dispute and awarded recovery thereof by the assignment against the defendant, which judgment the defendant paid, the plaintiff is estopped in law to recover these earnings. The record does not show that the Illinois court was informed by the defendant in that action that the earnings in question were due for services rendered under an employment which was not in existence when the assignment was executed. If this fact had been brought to the Illinois court's attention the court undoubtedly would have dismissed the complaint because the adjudications of the Illinois courts declare that in law such an assignment of future earnings is void. See *Stromberg* and *Blakeslee* cases, *supra*. It also appears that plaintiff was not served with process nor was he a party to the action in Illinois, and he was not requested by defendant to defend in the Illinois action. Under these facts and circumstances it devolved on defendant to interpose all defenses to the assignment, including the defense arising out of the Wisconsin statute, which plaintiff's attorney had brought to the attention of defendant's attorneys before judgment was rendered in the Illinois court. *Pierce v. C. & N. W. R. Co.*

36 Wis. 283; *Frels v. Little Black F. M. Ins. Co.* 120 Wis. 590, 98 N. W. 522.

The Illinois judgment, under the facts above indicated, does not bind plaintiff under the rule that it shall be given such faith and credit in Wisconsin as it received in the state where rendered. *D'Arcy v. Ketchum,* 11 How. (52 U. S.) 165; *Pennoyer v. Neff,* 95 U. S. 714; *Hamilton v. Rogers,* 67 Mich. 135, 138, 34 N. W. 278; *Pickett v. Ferguson,* 45 Ark. 177. Plaintiff had informed defendant that his earnings were exempt and that the assignment was invalid under the Wisconsin statutes. He had the legal right to resist the enforcement of any alleged Illinois contract in Wisconsin if it contravened the public policy of the state of Wisconsin. *Fox v. Postal Tel.-Cable Co.* 138 Wis. 648, 120 N. W. 399. The plaintiff clearly called defendant's attention to the fact that he would insist on this right when the settlement was proposed, hence defendant was not misled by plaintiff, which caused it to waive any rights in the Illinois litigation. There is no reversible error in the record.

By the Court.—The judgment appealed from is affirmed.

MOLZOFF, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

February 1—February 22, 1916.

Railroads: Injury to employee on track: Negligence: Questions for jury: Liability under federal statute.

1. **In an action under the federal Employers' Liability Act it appeared that plaintiff, in the discharge of his duties as an employee of the defendant railway company, was returning from the west to the east side of a river and, as he frequently did, was riding on the footboard of a switch engine. The engine stopped before reaching a railway bridge over the river and plaintiff proceeded to walk over a trestle which formed the western end of**

the bridge. While he was on the trestle the engine started again and struck and injured him. Many of defendant's employees were accustomed to cross the bridge in going to and from their work. Upon these facts, and upon evidence from which the jury might have found that plaintiff rode upon the footboard with the knowledge of the fireman and engineer; that either of them could have seen him on the trestle before the engine started, had they looked; that ordinary care and a rule of the defendant required the ringing of the bell or blowing of the whistle before starting the engine after it had stopped near the trestle; that neither of such signals was given; that a brakeman who was riding with plaintiff on the footboard until the engine stopped told him that it would go no further; and that plaintiff relied upon such statement,—it was error to direct a verdict for defendant.

2. The action being under the federal statute, it was not necessary to prove that the negligence of defendant's employees was the proximate cause of the injury, but only that the injury resulted in whole or in part from such negligence.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Reversed.*

This action was brought to recover for personal injuries sustained by plaintiff while in the service of the defendant. After the evidence was in the court below directed a verdict for defendant. Judgment was entered accordingly dismissing the complaint, from which judgment this appeal was taken.

For the appellant there were briefs by *Charles K. Bong,* attorney, and *Victor I. Minahan,* of counsel, and oral argument by *Mr. Minahan.*

For the respondent there was a brief by *Greene, Fairchild, North, Parker & McGillan,* attorneys, and *Chas. H. Van Alstine* and *H. J. Killilea,* of counsel, and oral argument by *H. O. Fairchild.*

KERWIN, J. Briefly stated, the negligence complained of is that the plaintiff was a "yard man" in the employ of the defendant, and that it was the duty of defendant to furnish a safe place for plaintiff to work and warn him of dangers

arising out of the course of his employment; that defendant failed in its duty, and in consequence plaintiff was seriously injured; that on July 21, 1914, plaintiff, in the course of his duty as employee of defendant, was returning from the roundhouse of defendant on the track and bridge of defendant, and through the negligence of defendant was run down and struck by an engine operated by defendant's employees.

The particular negligence complained of is that the engine bell was not sounded so as to give plaintiff notice of the approach of the engine; that the engine was moved after it had come to a complete stop without any lookout to see whether any person was in a place of danger; and that plaintiff was misinformed as to the movements of the engine by a member of the switching crew, which information was relied upon by him.

The questions involved are mainly questions of fact, namely, whether there was sufficient evidence to carry the case to the jury on the defendant's alleged negligence.

It is conceded that the case comes under the federal act. The evidence tends to show that the defendant maintains its depot and depot grounds on the east side of the city of Green Bay, Wisconsin, and also a small switching yard there; on the west side of Green Bay it maintains large shops and extensive switching yards; there is a railroad bridge across the Fox river connecting these two yards; the bridge consists of a trestle at the west side of the river about 290 feet in length; there is no pathway on this trestle, but upon each side, about two feet below the level of the ties, is a stringer upon which a person may stand in safety while a train is passing; the bridge proper is built upon wooden piers and said piers are so constructed that it is practicable for a person crossing the bridge to stand thereon in safety while a train is passing. The main line of the company runs over this bridge, and about 300 feet west of the westerly approach is what is known as the Green Bay and Kewaunee Y, which is a switch con-

necting the defendant's line with the lines of the Green Bay & Western and Kewaunee, Green Bay & Western Railroad Companies. The duties of the plaintiff were mainly on the east side of the river, but he was frequently required to go across the bridge to the west side on errands of different kinds, such as carrying tools over to the shops on the west side to be sharpened or repaired. There is evidence that it was customary for the "boss" to send plaintiff over sometimes every day and sometimes twice a day, and that plaintiff was accustomed to ride upon the engine going back and forth, with the knowledge of employees operating the engine; that upon the day in question plaintiff was sent to the west side with some tools to be sharpened; that he rode in the caboose, delivered the tools at the shop, and was to call for them the next day; that he saw an engine at the water tank and was told by one of the brakemen in charge that it was going east over the river; that the engine was backing up, dragging some fourteen or fifteen cars; that the train crew consisted of a fireman, engineer, and three brakemen; that just before the engine started the plaintiff spoke to the fireman and engineer, then got on the footboard with the three brakemen and rode from the west yard over to the Green Bay Y, a distance of about one half mile; that one of the brakemen got off shortly before the engine reached the Green Bay Y, another got off at the Y, and the third rode with plaintiff until the engine stopped at or near the trestle. The evidence varies as to the exact distance from the trestle, some witnesses putting it at forty-two feet west of the beginning of the trestle and others at the beginning of the trestle. The brakeman who remained on the footboard until the engine stopped at the trestle then got off and said to plaintiff, "Mike, we don't go any further, we are going to do some work on the Green Bay Y." The plaintiff testified that he assumed that the switching would take considerable time, an hour or so, and proceeded to walk east over the bridge. After he had walked some dis-

tance on the trestle (the evidence varying as to the distance, some witnesses putting it at forty-two feet, others at as high as 120 feet) the engine started east and struck plaintiff, causing the injuries complained of. Plaintiff did not hear the engine approaching until it was quite close to him,—he says about eighteen or twenty feet from him; that it was coming quite fast, and he became panic-stricken and ran from one side of the track to the other a couple of times until the engine struck him; that he went only about ten feet after he saw the engine and began to run before he was struck.

It further appears from the evidence that a large number of employees engaged in the shops and in the employ of the defendant were accustomed to cross the bridge in going to and from their work at different hours of the day, and that plaintiff was accustomed to ride back to the east side upon switch engines when returning from the west side while in the discharge of his duties as employee of the defendant. That sometimes plaintiff walked across the bridge in going to and from the shops on the west side.

There is no direct evidence that the engineer or fireman knew that plaintiff rode on the footboard or that he got off at the bridge on the day in question, but in view of all the circumstances of the case we think the jury would have been entitled to find that the fireman and engineer knew, or ought to have known, that he was riding on the footboard on his way over the river to his work on the east side.

The evidence is conflicting as to whether or not the bell was rung before starting onto the bridge after plaintiff got off the footboard, but upon this point the evidence is also sufficient to warrant the jury in finding that the bell did not ring, or that if it did ring it was only a low, muffled stroke and not sufficient to give warning. Counsel for respondent contends, first, that the bell was rung, and second, that it was not negligence on the part of the defendant to fail to ring the bell where the engine stopped only a few seconds. The evi-

dence is conflicting as to how long the engine stopped, varying from a couple of seconds to about a minute. There is also evidence that it is always necessary and customary before starting an engine to give the signal either by ringing the bell or blowing the whistle, unless it be known to the person operating the engine that no one is in danger. There is evidence on the part of the defendant that the engineer and fireman looked east before starting onto the bridge and did not see plaintiff, and that in view of his distance from the engine, some evidence showing it was only about forty-two feet, he could not be seen; while on the part of the plaintiff there is evidence to the effect that neither the fireman nor the engineer looked, but were facing the switch, west, and did not look upon the bridge before the engine started, and that if they had looked they could have seen plaintiff.

There is also evidence in the case that under the rules of the defendant the person in charge of an engine upon moving it is bound to give a signal either by blowing the whistle or ringing the bell.

There is also evidence that the plaintiff was more than sixty feet away from the engine at the time it started, and that at this point he could be seen by the engineer and fireman, or either of them, had they looked.

We shall not attempt to discuss the evidence in detail on the question of negligence. We think it was sufficient to entitle the jury to find that the plaintiff rode upon the footboard with the knowledge of the fireman and engineer, and that either of them looking could have seen him on the bridge before the engine started; that under the circumstances of the case ordinary care required that the bell should have been rung or the whistle blown before starting the engine, and that neither was done; that the brakeman who remained upon the footboard with plaintiff until the engine stopped made the statement that the engine would go no further, and that plaintiff relied upon this statement.

The starting of the engine without signal, warning, or lookout, under the circumstances detailed by the evidence, would constitute negligence regardless of the question whether the misinformation given by the brakeman Patterson alone was sufficient. The case of *Skaggs v. Ill. Cent. R. Co.* 124 Minn. 503, 145 N. W. 381, seems to support the contention of appellant that such misinformation, relied upon, constitutes negligence.

It is contended by counsel for respondent that in any event the alleged negligence was not the proximate cause of the injury. Under the federal act it is sufficient if the injury to an employee results in whole or in part from the negligence of any of the officers, agents, or employees of the common carrier. Act of April 22, 1908 (35 U. S. Stats. at Large, 65, ch. 149, sec. 1). It is insisted by counsel for respondent that plaintiff knew the engine was going to "back up" because he so stated to the brakeman, and that this was sufficient warning. It is by no means clear that plaintiff knew that the engine was going to back up or that he understood the engine was going east onto the trestle. His acts in going on the bridge in front of it would indicate that he did not, and he so testified. The engine was going east, dragging cars after it, until it reached the trestle. The plaintiff may well have understood that by "backing up" it was intended that the engine would go west in the opposite direction from that it had been going up to the time it stopped at the trestle. It was for the jury to say whether such statement, if made, was sufficient warning.

Counsel also relies upon *St. Louis & S. F. R. Co. v. Conarty,* 238 U. S. 243, 35 Sup. Ct. 785. This case is not favorable to plaintiff. It did not arise under the federal act above referred to, but under the Safety Appliance Act of April 14, 1910 (36 U. S. Stats. at Large, 298, ch. 160, 1 Fed. Stats. Ann. (1912 Supp.) sec. 2, p. 336). The Safety Appliance Act was passed to protect a certain class, and the

court held in the *Conarty Case, supra,* that the deceased was not "within the class of persons for whose benefit the Safety Appliance Act required that the car be equipped with automatic couplers and drawbars of standard height."

A careful review of all the evidence convinces the court that there was ample evidence to carry the case to the jury and therefore the court below was in error in directing a verdict for the defendant.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

JAY, Appellant, vs. NORTHERN PACIFIC RAILWAY COMPANY, Respondent.

February 2—February 22, 1916.

Railroads: Injury to person crossing track: Contributory negligence: Failure to look: Warning signals at highway crossings: Omission to give: When injury "caused" thereby: Warnings due only to travelers on highways.

1. Plaintiff, a licensee who had the right to cross defendant's railway tracks at a station and was accustomed to do so many times daily, and who while crossing the main track was struck and injured by a train, is *held* to have been guilty of contributory negligence, as a matter of law, upon undisputed evidence that after he knew the train was coming he went around the end of a string of cars on a sidetrack and proceeded to pass over the main track without looking toward the approaching train.
2. It appearing that plaintiff not only had ample warning but in fact knew that the train was coming—having seen the smoke and heard the noise,—it cannot be said that, within the meaning of sub. 6, sec. 1809, Stats. 1911, his injury "was *caused* by the omission" of defendant to give the warning signals provided for in sub. 4 of said section.
3. It further appearing that plaintiff was not traveling on or over a highway, but was merely crossing the railway tracks diagonally to the depot, at a point 400 feet from the highway, sub. 4, sec.

1809, Stats. 1911, is inapplicable. That statute was enacted for the protection of travelers on highways, and the duty to give the warning signals therein provided for is due only to such travelers.

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

This is an action brought to recover damages for personal injury. In June, 1913, the plaintiff was engaged with a crew of men in loading cedar at Muskeg, a station on the defendant's line of road, not within the limits of an incorporated city or village, but having a depot and depot platform for the use of passengers and for receiving and delivering freight. The complaint sets forth that at the westerly end of the depot grounds and to the west of defendant's station there was a public highway crossing the defendant's tracks; that it was necessary for the plaintiff in prosecuting his work to be upon and cross and recross the tracks at said station many times daily; that on June 18, 1913, plaintiff, while crossing defendant's track at a point about 400 feet easterly from the public highway crossing, was struck by one of defendant's locomotives which was then and there traveling west hauling a freight train; that at the time of striking plaintiff the locomotive was being negligently and carelessly run at a dangerous and excessive rate of speed, to wit, about forty miles an hour; that defendant's engine crew in charge of said locomotive at said time negligently and carelessly failed and omitted to blow the whistle on said locomotive when the same was eighty rods distant from said highway crossing, and grossly and negligently failed and omitted to blow the whistle of the locomotive at any time before striking the plaintiff, and negligently and carelessly failed and omitted to ring the locomotive bell continuously from the time the locomotive was eighty rods from the public highway crossing until such crossing was reached or to ring the bell at all before striking the plaintiff, and that said employees like-

wise failed to otherwise give any warning or notice to the plaintiff of the approach of the train by which he was struck.

The complaint further alleges that the defendant's sidetrack is located on the depot grounds to the south of its main track and parallel therewith and that the passenger platform is north of said track; that at the time of being struck plaintiff was crossing over the sidetrack to the main track, and that he was unable to see the approaching locomotive until he was upon the main track because there were box cars upon the sidetrack which obscured his vision in the direction from which the train approached, and that when plaintiff stepped out from the end of the box cars upon the main track it was too late to avoid the train because of the great rate of speed at which it was being run, and that plaintiff at all times used due care for his personal safety. The material allegations of the complaint were put in issue by the answer. At the close of the trial the court directed a verdict for the defendant, and from the judgment entered on such directed verdict dismissing the complaint the plaintiff appeals.

For the appellant the cause was submitted on the brief of *C. F. Morris.*

For the respondent there was a brief by *Hanitch & Hartley,* attorneys, and *C. W. Bunn,* of counsel, and oral argument by *C. J. Hartley.*

BARNES, J. The plaintiff was clearly a licensee who had the right to cross over the tracks of the defendant while doing his work. The trial court held that he was guilty of contributory negligence as a matter of law. The appellant argues that a jury question was presented by the evidence on the issue of such negligence, and that, whether there was or not, the court erred in directing a verdict, because contributory negligence was no defense to the action.

It is entirely clear under our decisions that the court was right in holding that on the undisputed testimony there was

no jury question on contributory negligence. The accident occurred shortly after noon. The plaintiff knew that the train was due about that time. He saw the smoke and heard the noise of the train when it was a mile away. He directed one of his employees to flag it. He warned a farmer who was unloading cedar near the sidetrack that the train was coming and to look out for his horses. The train was then about a quarter of a mile away. When he first heard it and saw the smoke he says his view was obstructed by some cars that were on the sidetrack. He went around the end of this string of cars and proceeded to pass over the main track without looking toward the approaching train. He had the opportunity to do so before entering upon the danger zone, but took no advantage of it, and entirely fails to give any satisfactory reason or excuse for neglecting his plain legal duty. The facts show as clear a case of contributory negligence as often comes before this court, and it has been repeatedly held that under such facts it is the duty of the court to take this issue from the jury. The latest case on this point is *Meissner v. Southern Wis. R. Co.* 160 Wis. 507, 152 N. W. 291. In the opinion in this case will be found a partial list of the prior cases on the same point.

Appellant's second contention rests on sub. 4 and 6 of sec. 1809, Stats. 1911. The material parts of these two subsections read as follows:

Sub. 4. "No such railroad company or corporation shall run any train or locomotive over any public traveled grade highway crossing, outside of the limits of any incorporated city or village, unless the whistle shall be blown eighty rods from such crossing and the engine bell rung continuously from thence until such crossing be reached by such train or locomotive."

Sub. 6. "In any action brought by any person or his legal representative against a railroad company or corporation operating a railroad in this state, to recover for personal injuries or death, if it appears that the injury or death in ques-

tion was caused by the omission of a railroad company or any such corporation to comply with any of the requirements of section 1809, the fact that the person injured or killed was guilty of any want of ordinary care contributing to the injury or death, shall not bar a recovery of the damages caused by any such omission of a railroad company or any such corporation, and no want of care upon the part of the person injured or killed under such circumstances, less than gross negligence, shall bar such recovery."

So much of this latter subsection as provides that a slight want of ordinary care shall not prevent recovery was added by ch. 653, Laws 1911, the law being entitled: "An act to amend subsection 6 of section 1809 of the statutes, relating to injuries at railroad crossings." This subsection was twice amended in 1915, but these amendments have no application to this case and would not affect it if they had.

Before plaintiff can recover under this statute it must appear that it is applicable to the situation disclosed by the evidence, and further, that the injury "was *caused* by the omission" of the railroad company to give the required signals.

The plaintiff's case would seem to be fatally weak in both respects. The purpose of the statute is to give timely warning of the approach of a train to those who are entitled to it so that they may avoid injury. The plaintiff not only had ample warning that the train was coming but he knew as a matter of fact that it was. This was apparent because of the smoke which plaintiff saw when he was behind the freight cars, and it was likewise apparent from the noise of the train which he admits he heard when it was still a mile away. He knew the direction from which the train was coming, and there was no other train in the vicinity to distract his attention. How it can be said in this case that the failure to give the warning signals provided for "caused" the injury here, is difficult to see, when the noise made by the approaching train was at least as well calculated to warn the plaintiff of his danger as the signals provided for would be. A finding

of causal connection would rest on speculation under the evidence in this case. No stronger case is made here on the evidence than was made in *Smith v. C. & N. W. R. Co.* 161 Wis. 560, 154 N. W. 623, where it was held as a matter of law that the plaintiff's injury did not result *"in whole or in part, directly or indirectly"* (sub. 2, sec. 1809*v*, Stats.), from the failure to use a statutory headlight.

It is also reasonably clear that sub. 4 of sec. 1809 does not apply to this case. The plaintiff was not traveling on or over a highway and was not intending to do so. He did not approach nearer than 400 feet to the highway and was simply proceeding diagonally across the tracks on his way to the depot.

It is true that sec. 1809 is a safety statute and as such should be liberally construed in the interest of the traveling public. It is also true that the 1911 amendment is somewhat drastic. But in the final analysis of the statute the question is, What did the legislature intend? That intention should neither be extended nor restricted by endeavoring to bring cases within it that do not belong there nor by excluding cases that do. It has never been held by this court that sec. 1809, as it existed prior to the amendment of 1911, applied to persons who were not on a highway. While the defense of contributory negligence was taken away by that amendment, it does not in the slightest degree affect the question of the negligence of a railroad. In *Ransom v. C., St. P., M. & O. R. Co.* 62 Wis. 178, 22 N. W. 147, it was held that the statute was intended for the protection of travelers over a highway at or near a crossing, and that it did not exclude from protection travelers on the highway who did not intend to use the crossing. 62 Wis. 182. In this case the plaintiff's wife was traveling over a highway which ran parallel to and near by a railroad in close proximity to a crossing and her horse took fright and ran away and injured her. It did not appear that she intended to cross over the railroad. In *Walters v. C., M.*

& St. P. R. Co. 104 Wis. 251, 80 N. W. 451, the court held that where an engine was approaching a highway crossing, but was brought to a stop before the crossing was reached, there was no duty on the part of the railway company to give the statutory signals for the crossing. In so far as the *Ransom Case* conflicted with what was decided in the *Walters Case* it was expressly overruled. This case could hardly have been decided on any other theory than that the statutory signals were intended to be given for the protection of travelers on highways. These two cases were reviewed in *Kujawa v. C., M. & St. P. R. Co.* 135 Wis. 562, 116 N. W. 249. The decision in the *Walters Case* was not disapproved, but it was held not to apply to the facts in the case then before the court. It was further held that it would be too narrow a construction to say that no one could invoke the benefit of sec. 1809, Stats., except where an actual collision occurred on the crossing. The court then proceeds to state the purpose of the statute as follows:

"The statutory requirement that the engine bell be rung before reaching and while passing over the crossing is designed, not merely to prevent travelers who are about to use the crossing from running into the train, but also to enable them to know of the approach of the train at a sufficient distance to guard their horses against taking fright."

It is pretty clear that when all three of those cases were decided the judicial thought was that the statute in question was one passed for the benefit of travelers on highways and that it went no farther. Such would seem to be its obvious purpose. It only applies to the part of a line of railroad that lies outside of incorporated cities or villages. It has no application except where the crossing is at grade, and the requirements extend to only the eighty rods of road nearest the crossing as the train approaches. If it were intended to apply to the farmer working with his team in his field adjacent to the track, or to the licensee walking upon the track,

there would be no object in limiting the requirements to eighty rods, because an injury which might result from the running of a train in the cases mentioned or in kindred cases would be much more liable to happen at points distant from highway crossings than within the particular quarter of a mile specified. So, too, if the statute was designed to protect persons other than travelers on highways, no good reason is apparent why the signals provided for need not be given where the crossing was above or below grade.

The case of *Schug v. C., M. & St. P. R. Co.* 102 Wis. 515, 78 N. W. 1090, relied on by the appellant, is not in point. The statute there involved was not confined by its terms to injuries at crossings, but was one that extended to licensees who might be passing over the tracks of a railway company at any point within a city. Provisions substantially similar to that found in what is now sub. 4 of sec. 1809 have been before the courts of many states, and it has almost invariably been held that such statutes were intended as warnings to travelers who were using the highways. The general rule deduced from the authorities as stated in Cyc. is as follows:

"In the absence of a provision in the statute specifically designating persons to whom the duty of giving crossing signals or warnings is due, it is generally held that such warnings are due only to persons on the highway using, about to use, or who have just used the crossing, and not to trespassers or licensees on the railroad tracks or right of way at places other than a crossing, nor to persons riding or driving along parallel to the railroad." 33 Cyc. 784 and numerous cases cited.

The last clause of the quotation is contrary to what has been decided by this court, but the remaining portion of the quotation is in substantial accord with the cases cited. Such in substance is the rule laid down in 3 Elliott, Railroads (2d ed.) § 1158, and cases cited in note 90, p. 333; *Harly v. Cent. R. Co.* 42 N. Y. 468, 471; *Randall v. B. & O. R. Co.* 109 U. S. 478, 3 Sup. Ct. 322; *Lepard v. Mich. Cent. R. Co.*

166 Mich. 373, 130 N. W. 668, 40 L. R. A. N. S. 1105; *Missouri, K. & T. R. Co. v. Saunders,* 101 Tex. 255, 106 S. W. 321, 14 L. R. A. N. S. 998 and cases cited in note; *Toomey v. So. Pac. R. Co.* 86 Cal. 374, 24 Pac. 1074; *Williams v. C. & A. R. Co.* 135 Ill. 491, 26 N. E. 661; *Hutto v. Southern R. Co.* (S. C.) 84 S. E. 719.

The plaintiff cannot recover for failure to give the statutory signals unless he was one of the class for whose benefit the statute was passed. See note to *Wolf v. Smith* (149 Ala. 457, 42 South. 824) 9 L. R. A. N. S. 343, and *Denton v. M., K. & T. R. Co.* (90 Kan. 51, 133 Pac. 558) 47 L. R. A. N. S. 820. It follows from what has been said that the lower court was right in directing a verdict.

By the Court.—Judgment affirmed.

BAYFIELD COUNTY, Appellant, vs. PISHON, Trustee, Respondent.

February 2—February 22, 1916.

Taxation of incomes: Statute construed: Nonresidents: Income of trust estate located elsewhere but administered by Wisconsin court.

1. Sub. 3, sec. 1087*m*—2, Stats. 1911, imposes a tax only upon such part of a nonresident's income as is derived from sources within the state or within its territorial jurisdiction.
2. The language of said statute being unambiguous, it must be given its plain, ordinary meaning.
3. The income of a trust estate—consisting of moneys, stocks, bonds, and other securities—created by a resident testator in favor of nonresident beneficiaries and being administered by a nonresident trustee appointed by and amenable to a county court of this state, is not taxable in this state where none of such income was derived from property actually located or business actually transacted within the state.
4. The property, in such a case, is not constructively in this state, so as to make the income thereof taxable here, merely because a county court of this state is administering the trust.

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

The appeal is from a judgment in an action to recover $1,356.86 with interest, income tax assessed against the defendant, and adjudging and determining that such tax was illegally levied and assessed and was void because such income was not taxable in Wisconsin.

The case was tried upon the following stipulated facts:

"It is hereby stipulated and agreed, pursuant to section 2788 of the Wisconsin Statutes, that the following facts are and shall be admitted by both parties for the purpose of and on the trial of this action:

"1. Isaac H. Wing died testate at the town of Bayfield, Bayfield county, Wisconsin, August 27, 1907.

"2. At the time of his death he was and had been for more than twenty-five years a resident of said county.

"3. His will was duly probated in the county court of said *Bayfield County* on the 22d day of October, 1907, by the terms of which a trust was created in favor of the beneficiaries hereinafter named; a copy of which will is hereunto annexed and made part hereof.

"4. One of the trustees named in said will, Abby L. Benjamin, was a sister of said decedent, and the other trustee, Albion P. Benjamin, was her husband. Said trustees were the parents of the life tenants named in said will, Jeannette Benjamin and Alice Benjamin.

"5. Each of said life tenants was more than twenty-one years of age at the time of the death of said testator, and neither of them has ever been married. Neither of said life tenants has ever lived in the state of Wisconsin, but both of them have resided throughout their lives and still reside in the state of Maine.

"6. Said Albion P. Benjamin having died prior to September 1, 1908, the appointment by said testator of said Abby L. Benjamin as trustee was ratified and confirmed by the county court of said *Bayfield County* on said last mentioned date, whereupon she gave bond as required by said court, which was duly approved, and letters of trust were accordingly issued to her as sole trustee by said court on the 15th day of

September, 1908. Thereafter, and prior to May 26, 1909, the executors of the will of said testator turned over to said Abby L. Benjamin as such trustee all of the assets belonging to said estate, which assets she removed to the said state of Maine, where they remained in the custody and possession of said Abby L. Benjamin, as such trustee, until her death, which occurred January 8, 1913.

"7. The assets of said estate at the time of the death of said decedent consisted and have ever since consisted of moneys, stocks, bonds, and other securities.

"8. After the death of said Abby L. Benjamin as aforesaid, and on the 21st day of April, 1913, *Hiram L. Pishon* of Augusta, Maine, was duly appointed as sole trustee by said county court to fill the vacancy created by the death of said Abby L. Benjamin, and said *Pishon* immediately qualified, and has ever since acted, and is now acting, as such trustee, and has had in his possession within said state of Maine ever since his appointment and qualification as aforesaid all the assets of said estate, and has received the income derived therefrom throughout said period and ever since the death of said Abby L. Benjamin as aforesaid. Said *Pishon* has never resided in the state of Wisconsin, but has resided in the state of Maine throughout his life and still resides there.

"9. None of the income which has accrued to the estate of said testator, and none of the income which has been received by said Abby L. Benjamin, or said *Pishon,* as such trustee, and none of the income which has been received by either said Jeannette Benjamin or Alice Benjamin, has been derived from property located or business transacted within the state of Wisconsin. Each of said trustees paid said income to said beneficiaries according as the same was collected from time to time during each year.

"10. The only persons now in being who have any interest in said trust estate are said life tenants, Jeannette Benjamin and Alice Benjamin, and one Henry F. Perkins. Said Perkins at the time of the death of said testator resided, has ever since resided, and still resides in the state of Oregon. In case of the death of said life tenants without issue, said Perkins surviving them, said entire trust estate will go to him under said will.

"11. Said Abby L. Benjamin, after her appointment and qualification as such trustee, rendered her accounts annually

to said Bayfield county court until her death, and said *Hiram L. Pishon* has likewise rendered his accounts to said court annually as such trustee from and after his said appointment and qualification, and neither of said trustees ever rendered any account to any other court or exercised his or her official functions as such trustee as aforesaid otherwise than by and under the authority conferred upon them by said Bayfield county court as aforesaid.

"12. The income-tax assessor of said *Bayfield County* in form levied and assessed a tax on an income of $14,391 for the first nine months of the year 1911 against said *Pishon* as such trustee, said sum being the total income of said estate during said period, and the amount of said tax, as extended upon the tax roll for the year 1913, being $498.46; and for the year ending October 1, 1912, said income-tax assessor in form levied and assessed a tax against said *Hiram L. Pishon* as such trustee on an income of $20,390, said sum being the total income of said estate for said year, and the tax upon said income, as extended upon the tax roll for the year 1913, being $858.40. No deduction was made for exemption in either case. If said income was taxable, said taxes became due and payable January 31, 1914. Payment thereof was demanded of said *Pishon,* who refused to pay the same or any part thereof.

"13. Neither the said trustee, Abby L. Benjamin, nor said *Hiram L. Pishon,* nor any one in behalf of either of them, at any time appeared before the county board of review in the matter of the assessment of the tax upon the income of said trust estate, nor did either of them nor any one for them ever appeal from the decision of the county board of review in such matter.

"14. Nothing contained in the ninth paragraph of this stipulation shall be so construed as to prevent the court from finding that said income or a part thereof was derived from property constructively located or business constructively transacted in said state or within its jurisdiction by reason of the fact that said trustee was appointed by and is amenable to the county court of said *Bayfield County.*"

For the appellant the cause was submitted on the brief of *A. M. Warden,* district attorney, and *John J. Fisher.*

William F. Shea, for the respondent.

KERWIN, J. Upon the undisputed facts we think the judgment below must be affirmed.

The part of the statute relating to the question before us reads:

"The tax shall be assessed, levied and collected upon all income, not hereinafter exempted, received by every person residing within the state, and by every nonresident of the state upon such income as is derived from sources within the state or within its jurisdiction. So much of the income of any person residing within the state as is derived from rentals, stocks, bonds, securities or evidences of indebtedness shall be assessed and taxed, whether such income is derived from sources within or without the state; provided, that any person engaged in business within and without the state shall, with respect to income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, be taxed only upon that proportion of such income as is derived from business transacted and property located within the state, which shall be determined in the manner specified in subdivision (e) of section 1770*b*, as far as applicable." Sub. 3, sec. 1087*m*—2, Stats. 1911.

This statute imposes a tax only upon such part of a nonresident's income as is derived from sources within the state or within its jurisdiction. It is quite obvious that the purpose of the statute is to tax a nonresident upon his income derived from sources within the territorial jurisdiction of the state. *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164; *State ex rel. Manitowoc G. Co. v. Wis. Tax Comm.* 161 Wis. 111, 152 N. W. 848.

The income under consideration was not derived from property located or business transacted in the state of Wisconsin, and the owners of the property never resided in Wisconsin.

But it is contended by appellant that the property was constructively in Wisconsin because the Bayfield county court in Wisconsin was administering the trust. We do not think the statute is capable of such construction. The language of the statute must be given its plain, ordinary meaning. *Van*

Dyke v. Milwaukee, 150 Wis. 460, 150 N. W. 509; *U. S. G. Co. v. Oak Creek,* 161 Wis. 211, 153 N. W. 241. The words of the statute are unambiguous, and this court must construe them according to their plain, ordinary meaning. *Rogers-Ruger Co. v. Murray,* 115 Wis. 267, 91 N. W. 657; *Ashland v. Maciejewski,* 140 Wis. 642, 123 N. W. 130; *Gilbert v. Dutruit,* 91 Wis. 661, 65 N. W. 511.

Some other questions are discussed by counsel in their brief, but in the view we take of the case it is not necessary to consider them.

By the Court.—The judgment is affirmed.

BAKER LAND & TITLE COMPANY, Appellant, vs. BAYFIELD COUNTY LAND COMPANY, Respondent.

February 2—February 22, 1916.

Tax titles: Affidavit of publication of notice of sale: Filing with county clerk: Presumption of filing by treasurer: Effect of filing before instead of after sale: Preservation of evidence.

1. Where the printer's affidavit of publication of notice of a tax sale was filed with the county clerk after the last publication but before the sale it will be presumed to have been so filed by the county treasurer.
2. The fact that the treasurer filed such affidavit with the clerk before the sale instead of immediately after it as required by sec. 1141, Stats., did not avoid the sale or the tax deed based thereon.
3. Statutes relating to the preservation of evidence, even in tax proceedings, are complied with when the evidence is preserved with the proper custodian and in the proper manner and within the proper time, although several days ahead of the last day fixed for such filing and preservation.

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *E. C. Alvord,* and for the respondent on that of *John Walsh.*

TIMLIN, J. In this action of ejectment the defendant answered denying the plaintiff's title and setting up his own title to the premises in suit by virtue of five separate deeds, which title he asked to have quieted by decree. The last of these deeds, recorded May 20, 1914, less than three years before action commenced, the court found to be valid and that it conveyed the title of the land to the defendant, and decreed as requested by defendant. The only point made against that deed is that the date of the last publication of the notice of the tax sale on which the deed was founded was May 4, 1911; the printer's affidavit of such publication was filed with the county clerk on May 5, 1911; and the date of the tax sale was May 16, 1911. The land is vacant and unoccupied. Sec. 1141, Stats., provides that the treasurer shall, immediately after the close of the sale of lands for taxes, deposit in the office of the county clerk all affidavits, notices, etc., in relation to such tax sale, to be filed and preserved in the county clerk's office. Sec. 1132 provides that the printer shall transmit his affidavit of publication to the treasurer and the treasurer shall carefully preserve such affidavit and deposit it with the county clerk as above stated. The county treasurer testified that he received from the printer the affidavit and filed the same with the clerk. We need not pass on the competency of this testimony, for the same fact would be inferred from the record in the absence of such testimony. No statute requires the affidavit to be filed with the county treasurer. Had the treasurer received the printer's affidavit on the 5th of May and held it in his possession until after the sale took place and then filed it with the county clerk, there would have been a literal compliance with the statute. The affidavit was found in the custody of the proper officer, filed by him in his office on May 5, 1911, and the tax deed was presumptive evidence of the regularity of the prior proceedings. Sec. 1176. The regular way is for the treasurer to file it with the clerk; the irregular way is to have some other per-

son do so. All is regular not affirmatively shown to be irregular. We must presume that the affidavit was filed with the county clerk by the county treasurer. Does the fact that the treasurer filed the affidavit with the clerk on May 5th before the sale instead of on May 17th after the sale avoid the sale or avoid the tax deed issued on such sale? The requirement that the treasurer file the specified papers with the clerk after the sale is doubtless for the purpose of preserving a record of the proceedings prior to and upon the sale. This purpose is subserved by filing the printer's affidavit of publication after the time for the last publication has expired and before the sale but within the requisite time after the last publication, although less than four weeks since the date of the last publication. The county treasurer does not derive his authority to make the sale from this affidavit. He acts under a statutory power which requires for its valid exercise a performance of all conditions precedent. The requirement above mentioned is not such a condition.

Statutes relating to the preservation of evidence, even in tax proceedings, are complied with when the evidence is preserved with the proper custodian and in the proper manner and within the proper time, although several days ahead of the last day fixed for such filing and preservation. No other point is made by the appellant. *Allen v. Allen,* 114 Wis. 615, 91 N. W. 218; *Gould v. Killen,* 152 Wis. 197 (139 N. W. 758) and cases collected at p. 206.

By the Court.—Judgment affirmed.

LUNDBERG, Appellant, vs. INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION, Respondent.

February 3—February 22, 1916.

Insurance commissioner: Powers: Approval of policy forms: Collateral attack: Stipulation that company was duly licensed: Presumption: Accident policy: Statutory requirements: Typography: Expert testimony: Liability for gunshot wounds: Eye-witness clause: Validity: Public policy: Who is "eye-witness."

1. The insurance commissioner is vested with power to determine whether a form of policy submitted for his approval complies with all the statutory requirements (including those relating to its typography as well as those relating to its contents), and his decision that it does so comply cannot be collaterally attacked in an action upon such a policy by a beneficiary.
2. In such an action, therefore, expert testimony is inadmissible to show that in a policy of the form approved by the commissioner a certain provision was not printed in bold-face or prominent type as required by sub. 2, sec. 1960, Stats. 1913.
3. A stipulation upon the trial of an action upon an accident insurance policy that prior to the issuance of the policy the defendant company had been duly authorized to transact its appropriate business in Wisconsin, was equivalent to stipulating that defendant had filed its policy form with the insurance commissioner and that it had been approved by him as required by sec. 1960, Stats. 1913, since it is not to be assumed or presumed, in the absence of proof, that a license would have been issued to defendant if it had failed to comply with the law.
4. The plaintiff in such an action was entitled to show that the policy in suit was not of the form approved, or that no form had ever been submitted for approval; but the trial court having held in this case that the policy on its face showed that it complied with the statutes,—in which conclusion this court concurs,—it is unnecessary to decide whether expert testimony offered by the plaintiff as to the typography of the policy would be sufficient to throw the burden on defendant of proving that there was no departure from the approved form.
5. A provision in an accident insurance policy to the effect that the company will not be liable at all for injuries resulting to the insured from the discharge of firearms unless the accidental character of the injuries be established by the testimony of "an eye-witness to all of the circumstances of the casualty," is not void as against public policy.

6. One who saw the insured on a lake rowing towards a boat landing, afterwards heard a shot from the direction of the landing, and soon after went to the landing, where she found him dead, lying in the bottom of the boat, with his rifle between his legs, was not "an eye-witness to all of the circumstances of the casualty," within the meaning of an accident policy.

APPEAL from a judgment of the circuit court for Price county: G. N. RISJORD, Circuit Judge. *Affirmed.*

On August 5, 1914, one Charles Lundberg procured a $5,000 accident insurance policy from the defendant covering a period of one year from date. On the 18th of October following the insured died as a result of a gunshot wound. His widow, who is the beneficiary named in the policy, brings this action. The policy was attached to and made a part of the complaint. Such policy contained a provision to the effect that there should be no liability on the part of the company for the payment of any sum on account of bodily injury produced by the discharge of firearms, "unless the claimant shall establish the accidental character of the injury by the testimony of a person other than the member or the claimant, who was an eye-witness to all of the circumstances of the casualty." When the case was called for trial the complaint was amended by adding the following paragraph:

"That paragraph V of said policy, which provides that there shall be no liability on the part of the defendant association on account of bodily injury produced by the discharge of firearms, unless the claimant shall establish the accidental character of the injury by testimony of a person other than the member or the claimant, who was an eye-witness to all of the circumstances of the casualty, is illegal, void and a nullity for the reason that the insertion of said paragraph V in said policy is in violation of the provisions of subdiv. 2 of sec. 1960 of the Wisconsin Statutes of 1913 and contrary to public policy."

The following facts were stipulated on the trial:

"I. The defendant is a foreign insurance association, and prior to the issuance of the policy in this case it had been

duly authorized to transact its appropriate business within the state of Wisconsin.

"II. The original policy is identified and made a part of the evidence in this case.

"III. The decedent, as was his usual custom, on the day of the accident went to a small lake some four miles from his home for the purpose of hunting and fishing. He ate dinner at a farmer's house near the lake and went out on the lake. He was expected to return for supper. About 5:30 o'clock in the afternoon the housewife began preparations for the evening meal. For this purpose she went from the house to a milk house on the shore of the lake and some fifteen rods from the boat landing. As she went to the milk house she observed the deceased rowing towards the landing. While at the milk house she heard a shot of a gun from the direction of the landing and soon after went to the landing. She found the deceased lying in the bottom of the boat with his legs over the seat. She called to him once or twice, and as he did not answer she ran away. Soon after her husband came to the place and found the deceased lying in the bottom of the boat with his legs over the seat. He had fallen over backward from the boat seat, his rifle between his legs, the muzzle resting upon the front edge of the boat seat pointing in the direction he had fallen, and the deceased had a bullet hole through his body, the bullet having entered the breast. In the boat was fishing tackle and the disjointed fishing rod. No one saw the deceased at the time of the discharge of the gun, from the time he was seen rowing towards the landing till the woman reached the landing after she heard the shot. The rifle was found to be discharged, the hammer in contact with the firing pin, and the shell in the chamber. The discharge of said gun caused the injury and death.

"IV. The plaintiff further offers expert evidence to establish that the division specifying the excepted risks, being division 5 of the policy, was not printed in bold-face type.

"V. The defendant offers no evidence."

The offer of the plaintiff to show by the testimony of an expert witness that the provision of the policy referred to was not printed in bold-face type was rejected by the court as being incompetent. The court held that the provision of the

policy in dispute was not contrary to public policy and that the plaintiff's evidence did not meet the requirements of such provision. Judgment was accordingly entered dismissing the complaint, from which judgment the plaintiff appeals.

W. K. Parkinson, for the appellant.

For the respondent there was a brief by *R. M. Haines,* general counsel, and *Dunshee & Haines* and *Barry & Barry,* attorneys, and oral argument by *R. M. Haines.*

BARNES, J. Appellant argues that the court erred (1) in refusing to receive expert evidence tending to show that the eye-witness provision of the policy in question was not printed in bold-face type; (2) in holding that such provision was printed in bold-face type and with greater prominence than any other portion of the text of the policy; (3) in holding that the eye-witness clause was not contrary to public policy; and (4) in holding that the plaintiff's evidence was insufficient to meet the requirements of this clause. In order to get our true bearings in the case it is necessary to refer to a number of statutory provisions that were in force when the policy was issued.

Sub. 1 of sec. 1960, Stats. 1913, reads:

"On and after the first day of January, 1914, no policy of insurance against loss or damage, from the sickness, or the bodily injury or death of the insured by accident shall be issued or delivered to any person in this state until a copy of the form thereof and of the classification of risks and the premium rates pertaining thereto have been filed with the commissioner of insurance; nor shall it be so issued or delivered until the expiration of thirty days after it has been so filed unless the said commissioner shall sooner give his written approval thereto. If the said commissioner shall notify, in writing, the company, corporation, association, society or other insurer which has filed such form that it does not comply with the requirements of law, specifying the reasons for his opinion, it shall be unlawful thereafter for any such insurer to issue any policy in such form."

Sub. 2 of the same section, among other things, provides that no policy shall be issued or delivered

"unless the exceptions of the policy be printed with the same prominence as the benefits to which they apply, provided, however, that any portion of such policy which purports, by reason of the circumstances under which a loss is incurred, to reduce any indemnity promised therein to an amount less than that provided for the same loss occurring under ordinary circumstances, shall be printed in bold-face type and with greater prominence than any other portion of the text of the policy."

This subsection also provides for the style of type that must be used in printing certain portions of a policy. Sub. 3 contains a list of provisions which must be incorporated in an accident policy.

Sub. 14 of said sec. 1960 (p. 1486, Stats. 1913) provides:

"Any policy covered by this act, the form of which has received the approval of the commissioner of insurance may be issued or delivered in this state on and after the first day of October, 1913."

Sub. 13 of the same section provides:

"Any company, corporation, association, society or other insurer or any officer or agent thereof, which or who issues or delivers to any person in this state any policy in wilful violation of the provisions of this act shall be punished by a fine of not more than one hundred dollars for each offense, and the commissioner of insurance may revoke the license of any company, corporation, association, society or other insurer of another state or country, or of the agent thereof, which or who wilfully violates any provision of this act."

Sub. 9 of said sec. 1960 (p. 1486, Stats. 1913) reads:

"A policy issued in violation of this act shall be held valid but shall be construed as provided in this act and when any provision in such policy is in conflict with any provision of this act the rights, duties and obligations of the insurer, the policy-holder and the beneficiary shall be governed by the provisions of this act."

The statutes referred to required the respondent to submit its form of policy to the insurance commissioner. Such officer had thirty days in which to approve or disapprove of the form submitted. If no objection was made within that time, then the form *ipso facto* stood approved without further official action. During this interim it was declared to be unlawful to issue a policy. If the commissioner was dissatisfied with the form submitted, it was necessary to provide a form that would meet his approval. Until this was done a policy could not lawfully be issued, and for violation of the law the insurance company was not only subject to a fine but the commissioner might revoke its license to do business in the state. It is perfectly obvious that the provisions of law referred to required the commissioner to pass upon the typographical make-up of the policy as well as upon the reading matter therein contained. It is just as apparent that the legislature vested in the commissioner the power to determine a question of fact, to wit: Did the form submitted comply with the requirements of law? Whether or not there is any way in which to review such a decision is not before us, because we are entirely satisfied that it cannot be collaterally attacked in a suit under a policy by a beneficiary named therein. Where it is made unlawful to issue a policy in a form not approved by the commissioner, it would be an incongruity to say that after an approved form had been issued the insurer could not claim the benefits of provisions contained in the policy because forsooth some printer could be found who was willing to swear that the commissioner did not know what "bold-face" or "prominent" type was when he saw it. The office of insurance commissioner is an almighty important one. This fact has been judicially determined by this court. *Ekern v. McGovern,* 154 Wis. 157, 142 N. W. 595. It is not supposable that the legislature intended for a moment that his official determinations should be upset by the opinion of any and every person who was able to qualify as

an expert. It would be surprising if he himself would be able to prepare a form which some expert would not endeavor to pick to pieces.

It was stipulated in the case that prior to the issuance of the policy sued on the defendant had been duly authorized to transact its appropriate business in Wisconsin. This was equivalent to stipulating that the defendant had filed its policy form with the commissioner and that it had been approved by that officer. It is not to be assumed or presumed, in the absence of proof, that a license would have been issued to the defendant if it had failed to comply with this important provision of law.

Of course there is the very remote possibility that the defendant, after filing a satisfactory form of policy, proceeded to violate the law by issuing policies in a different form. The stipulation is incomplete, in that it fails to cover this contingency. The real question was whether the form of the policy in suit was a *facsimile* of the one that had been approved. An affirmative answer to this question would end the attack made on its form. But the plaintiff was entitled to show that the policy sued on was not of the form approved by the commissioner, or that no form had ever been submitted for approval. Whether evidence such as was offered here would be sufficient to throw the burden on the defendant of proving that there was no departure from the approved form, we do not find it necessary to decide. The trial court held that the policy on its face showed that it complied with the statute and refused to receive expert evidence to contradict this patent fact. This court concurs in the conclusion reached in this regard by the lower court.

It seems too plain to justify argument that on the facts stipulated the claimant failed to establish the accidental character of the injury by the testimony of "an eye-witness of all the circumstances of the casualty," as the policy required where death resulted from a gunshot wound.

Neither do we know of any rule of law which would justify the court in holding the provision of the policy in question void as being against public policy. It was obviously inserted to prevent recovery by the beneficiaries of suicides. Presumably the premium charged was fixed with reference to this limitation on liability. The insurance policy sued on is a matter of contract. We see no reason why the defendant might not have provided that it should not be liable at all for injuries resulting from gunshot wounds or poison. Appellant's counsel cite no authorities to sustain the contention made. The authorities dealing with the precise point before us are not numerous, but they sustain the decision of the trial court. *Connell v. Iowa State T. M. Asso.* 139 Iowa, 444, 116 N. W. 820; *Roeh v. Business Men's P. Asso.* 164 Iowa, 199, 145 N. W. 479, 37 Eng. & Am. Ann. Cas. 813; *Nat. Acc. Soc. v. Ralstin,* 101 Ill. App. 192. Many other decisions on kindred questions will be found in the opinion of the court in the *Roeh Case.* This court in common with many others has held that it is competent for parties to bind themselves by contract to a shorter period of limitation than that provided for by statute. *Hart v. Citizens' Ins. Co.* 86 Wis. 77, 56 N. W. 332; *Griem v. Fidelity & C. Co.* 99 Wis. 530, 75 N. W. 67. If this can be done, parties ought to be competent to agree that recovery could not be had for certain injuries except on condition that the accidental character thereof be established by an eye-witness.

By the Court.—Judgment affirmed.

STATE EX REL. CONWAY and others, Appellants, vs. DISTRICT BOARD OF JOINT SCHOOL DISTRICT NO. 6 OF THE TOWNS OF PLYMOUTH AND WONEWOC AND THE CITY OF ELROY, Respondents.

February 3—February 22, 1916.

Mandamus: *When writ issues: Mistake in remedy: Amendment of pleading: Constitutional law: Schools: Holding graduating exercises in church: Sectarian instruction: Nonsectarian prayers: Compelling support of or attendance at "place of worship:" "Rights of conscience:" Giving preference to modes of worship, etc.*

1. The writ of *mandamus* is not granted to take effect prospectively, and hence is not the proper remedy to compel a school board to hold future graduating exercises elsewhere than in a church and to omit from such exercises the offering of any invocation or prayer.
2. Under sec. 2836*b*, Stats. 1915, this court has power to permit plaintiffs who have mistaken their remedy and brought a wrong action to amend their pleading so that the matter in controversy may be disposed of on its merits.
3. Although graduating exercises are a part of a school curriculum and under the direction and control of the school board, the holding of such exercises in a church building is not in itself the giving of sectarian instruction, within the meaning of sec. 3, art. X, Const.
4. Where no charge is made for the use of the church in which such exercises are held and nothing is paid to the clergyman delivering an invocation, no one is compelled to "erect or support any place of worship, or to maintain any ministry, against his consent," nor is any money "drawn from the treasury for the benefit of religious societies," in violation of sec. 18, art. I, Const.
5. Parents and pupils of all denominations have the right to attend the graduating exercises of a public school without their legal rights being invaded; but in attending such exercises once a year in a church of a denomination other than that to which they belong they are not being "compelled to attend . . . any place of worship," within the meaning of sec. 18, art. I, Const. That section means that no one shall be required to attend a place where religious services are being held or religious instruction given at the time he is required to be present.

6. The holding of such exercises in a church does not constitute an "interference with the rights of conscience," within the meaning of sec. 18, art. I, Const.; nor is it a violation of any other provision of that section.
7. The final decision upon the question whether any right guaranteed by the constitution is violated must rest with the courts and not with the individual; and the mere assertion of persons who desire to attend graduating exercises with their children that being compelled to enter a church of a denomination other than their own is violative of their assured rights of conscience, does not make it so.
8. The offering of a nonsectarian invocation or prayer by a Catholic or Protestant clergyman at the annual graduating exercises of a public school is not sectarian instruction within the meaning of sec. 3, art. X, Const.; it does not interfere with any right of conscience which the law recognizes; permitting it is not the giving of any preference to any religious establishment or mode of worship, in a constitutional sense; nor does it violate any other provision of sec. 18, art. I, Const.

APPEAL from a judgment of the circuit court for Juneau county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

The plaintiff filed a petition in the circuit court praying that a writ of *mandamus* issue from said court to the defendants commanding that they discontinue the practice of holding graduating exercises in any of the churches of the city of Elroy or churches elsewhere or permitting or suffering any minister or person to offer an invocation or prayer at the graduating exercises of such school district, and commanding the defendants to hold the graduating exercises in other places than in any of the churches of the city of Elroy or churches elsewhere, and for such further order or relief as might be proper. The petition set forth that the petitioners were residents and taxpayers of joint school district number 6 in the towns of Plymouth, Wonewoc, and the city of Elroy, in Juneau county, Wisconsin; that they were taxed for the support of said school and were entitled to the benefits thereof by having their children instructed therein according to law; that they are parents of children whom they

desire to have educated in said school, and that children of the petitioners are in fact attending the same for the purpose of receiving instruction.

The petition then recites that for many years it has been the practice of the defendant board to hold graduating exercises for high school graduates and that the practice still prevails and is part of the school requirements of the district board before pupils are granted diplomas; that it has been the practice of the board to conduct a part of the graduating exercises in the different churches of the city of Elroy and a part of such exercises in the opera house and to invite and engage certain ministers and priests to officiate at such graduating exercises, their duty while so officiating being to give a so-called invocation which consisted of a religious service, prayer, blessing, or religious exercise; that by reason of the practice followed by said board in engaging Protestant ministers and inviting Catholic priests to officiate at said graduating exercises, it has wounded the sensibilities of both Protestant and Catholic patrons of said schools alike and subjected those patrons and others similarly situated to humiliation and forced upon them "the offense of conscience" by reason of these religious exercises, and that by reason of such acts said board has allowed and encouraged sectarian instruction in the public school in question.

The petition further recites that since the establishment of the district the practice complained of has been pursued against the ineffectual protests of taxpayers, parents, and patrons of the school and that the board threatens to continue such practice; that by reason of the practice followed certain citizens and taxpayers of Elroy belonging to the Catholic church and living in the school district refuse to allow their children who are about to graduate, as well as other children of theirs, to attend the graduating exercises, and also refuse to attend themselves on account of the religious functions that are made a part of such exercises; that although such

practice has been followed for more than six years the school board has taken no steps to correct the abuse and such practice still continues and threatens to continue in the future; that by reason of the school board refusing to omit the practice set forth and by reason of the believers in the Catholic faith refusing to allow their children to attend graduating exercises, such children did not receive their diplomas at such exercises, but were granted them privately afterward by special request; that such a situation produces a bad state of affairs, both to the parents, patrons, and graduates of the school, and causes young men and women who desire to participate in the honors of graduation much chagrin and mortification at not being able to participate in the exercises with their fellow graduates; that because of conscientious scruples Catholic parents and citizens have refrained from taking part in what they believe to be distinctly Protestant religious worship, and that the practice of having prayers offered by Protestant ministers is contrary to the right of conscience and in violation of law; that petitioners have requested said board to discontinue the practice complained of to the extent of not holding the graduating exercises in churches and in not permitting prayers to be offered by denominational clergymen, and that said board has neglected and refused to comply with such request and refused to interfere with the matter in any way; that such graduating exercises are an integral part of the curriculum of our public schools; that permitting religious service to take place in a public school, and permitting a minister to offer an invocation or prayer at such time, amounts to a sanction of the minister of one sect and an invitation to lend his personal influence and prestige to the particular sect in preference to all others, and that this action amounts to the teaching of certain religious doctrines of the particular sect so favored.

The petition further shows that permitting ministers of different denominations to offer prayers to the graduates and

patrons assembled, irrespective of their religious creeds and regardless of the wording of the prayer, amounts to giving sectarian instruction; that such prayers must necessarily be clothed with external form for delivery and reception and held with internal significance; that it is these various forms, together with their various significances, which constitute the various sectarian churches, and that prayer in the Protestant service is delivered standing and received sitting, and in the Catholic service it is offered and received kneeling; that Protestants worship a Supreme Being by prayer alone and hold that prayer is supreme worship; that Catholics worship the Supreme Being by official sacrifice and prayer and teach that official sacrifice is supreme worship; that prayer, therefore, as well in external form as doctrine, differs with the different services and is sectarian, and is therefore in violation of sec. 3 of art. X of the constitution; that by permitting the acts complained of in a public school the board has permitted and suffered the practice of religious and sectarian instruction to become part of the public school curriculum which is conducted by those who are allied by profession to sectarianism and who teach the same by suggestion; that such practice interferes with religious liberty and subjects the pupils to slight, insult, and contempt because of their religious faith.

The petition then recites that the petitioners enjoined the school board in the year 1912 from carrying on any religious services in connection with the graduating exercises and that thereupon said board refused to hold any graduating exercises at all; that such action tends to engender strife and to perpetuate in a public school curriculum religious and sectarian doctrines and to impress upon the pupils that they can expect no honors or favors at the hands of the school board unless it is permitted to hold graduating exercises in accordance with certain religious and sectarian forms.

Upon this petition an alternative writ of *mandamus* was

issued. The defendants made a motion to quash such writ because neither the petition nor the writ stated facts showing that the petitioners or either of them were entitled to such writ. The issue joined by the motion to quash was heard before the court and such motion was granted. From a judgment entered in accordance with the decision of the court the plaintiffs appeal.

James P. Riley, for the appellants.

For the respondents there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *Evan A. Evans.*

BARNES, J. It is fortunate that the present hapless controversy is of a genus that seldom makes its appearance in this court. Our population is made up of many people divided into many religious sects, as well as many people who belong to no sect, all of whom contribute to the maintenance of our state school system in proportion to their ability to pay. The number of our people who do not believe in the existence of a Supreme Being and in Life Hereafter is almost negligible. Of the vast majority who do, some think Eternal Bliss can be most safely insured by pursuing one route and others by pursuing other routes, and hence the number of sects into which we are divided. There is no subject on which people are more touchy than on that of religion. We may think that there is small reason for such a state of mind, but it is a "condition and not a theory" which confronts us. It may well be said that the grievance here complained of is trifling, but human nature is much the same whether the individual be Catholic or Protestant. Reverse conditions and let a Catholic school board select a church or building devoted to Catholic services in which to hold graduating exercises and engage a Catholic clergyman to deliver a nonsectarian prayer or invocation, and the devout Lutheran, Presbyterian, Methodist, Baptist, or other member of a Protestant communion would be just as likely to take

umbrage at what was done as were the petitioners in the present case. Our constitution makers wisely sought to prevent as far as they could the injection into the affairs of state of anything that would tend to germinate or foster religious rancor or bitterness. It is wise and just that its provisions be adhered to in spirit as well as in letter. For reasons that will be stated later, we conclude that the petitioners are not entitled to relief on the facts stated. Nevertheless, we think it would be a wise exercise of official discretion to discontinue such practices as are here complained of when objection thereto is made by any substantial number of school patrons. We do not underrate the efficacy of prayer. Neither are we prepared to say that the average high school graduate may not need it. But whenever it is likely to do more harm than good, it might well be dispensed with. It is not at all times wise or politic to do certain things although no legal rights would be invaded by doing them.

Turning aside from ethical considerations and taking up the legal questions involved, it is clear that if the plaintiffs have a cause of action they did not pursue the proper remedy. It was here sought to use the writ of *mandamus* to compel the school board to do away with the practices complained of at the graduation exercises to be held for that year. The writ is not granted to take effect prospectively. 2 Spelling, Injunctions, § 1385; High, Extr. Leg. Rem. (3d ed.) §§ 12, 36; Tapping, Mandamus, 10 (74 Law Lib. 63); Wood, Mandamus (2d ed.) 51. In *State ex rel. Board of Ed. v. Hunter,* 111 Wis. 582, 588, 87 N. W. 485, this court said:

"The general principle is frequently stated that *mandamus* will not lie to compel performance of an act by a public officer unless the act be one that is actually due from the officer at the time of the application. Until the time arrives when the duty should be performed, there is no default of duty; and mere threats not to perform the duty will not take the place of default."

This rule was again announced in *State ex rel. Cook v. Houser,* 122 Wis. 534, 100 N. W. 964. It is in accordance with the well nigh uniform current of authority and may well be said to be elementary.

Counsel on both sides expressed the desire that the court should take up the case on the merits and dispose of it if possible. The request is a commendable one. If the plaintiffs have a cause of action but have mistaken their remedy, it is a better administration of justice to permit them to amend their pleading than it is to turn them out of court and compel them to begin anew. Ample power has been conferred on the court to pursue such practice by sec. 2836*b,* Stats. 1915 (ch. 219, Laws 1915), if such power did not exist independently of statute.

The plaintiffs' contentions are twofold: (1) that the acts complained of violate the constitutional rights guaranteed to them by sec. 3 of art. X of our constitution, and (2) that they violate the rights guaranteed by sec. 18 of art. I of that instrument.

The provision first referred to reads as follows:

"The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein."

Sec. 18 of art. I provides:

"The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury

for the benefit of religious societies, or religious or theological seminaries."

The two things complained of are the use of a church building in which to hold graduation exercises and the delivery of an invocation or prayer thereat by a denominational clergyman. The holding of graduation exercises in a church is not in itself the giving of sectarian instruction, within the meaning of sec. 3 of art. X above quoted. This is obvious, and presently eliminates from consideration the constitutional provision first quoted. Neither is it shown that the taxpayers were called upon to pay for the use of the churches in which the exercises were held, nor that the clergymen who gave the invocations were paid for doing so. Such being the case, no one has been called upon against his will to erect or support any place of worship or maintain any ministry, nor has any money been drawn from the treasury for the benefit of a religious society. A man may feel constrained to enter a house of worship belonging to a different sect from the one with which he affiliates, but if no sectarian services are carried on he is not compelled to worship God contrary to the dictates of his conscience and is not obliged to do so at all. The only clauses of sec. 18 of art. I that are at all applicable to the question under discussion are those which provide that no person shall be *compelled* to attend any place of worship against his consent and which forbid interference with the rights of conscience. Obviously graduation exercises are a part of the school curriculum and are under the direction and control of school boards. They may be dispensed with, but so long as they are not, school boards cannot escape responsibility for them. Parents and pupils of all denominations have a right to attend such exercises without their legal rights being invaded. It would be far-fetched, however, to say that by so doing they are compelled to attend a place of worship. True, the building is one ordinarily used for conducting religious services. Other buildings that are not churches are often used for like purposes. So are our pub-

lic streets. Indeed, at the present day, churches are largely used for social gatherings of various kinds at which no religious services of any kind are carried on. The kind of a building is hardly the significant thing from the legal standpoint, but the fact that worship is carried on when there is actual or moral compulsion. Graduation exercises take place but once a year. Often in smaller places church auditoriums are more commodious and better calculated to take care of the overflow crowds that congregate at such times than any other building that is available. To say that a person attending such place once a year is compelled to attend a place of worship would be giving prominence to form rather than to substance. When the constitution protects the individual from being compelled to attend a place of worship, it undoubtedly means that he shall not be required to attend a place where religious instruction is being given at the time he is required to be present. It protects a man from being obliged to attend the services of the Salvation Army in our public streets, or from being compelled to enter a hall or opera house while such services are being carried on, just as much as it does against being forced to enter a church. It is what is done, not the name of the place where it is done, that is significant.

The fact that certain persons desire to attend graduation exercises with their children, and that they say that being compelled to enter a church of a different denomination from that to which they belong is violative of their assured rights of conscience, does not make it so. If it is clear that the thing complained of does not violate any right guaranteed by the constitution, then the courts cannot interfere in their behalf, because the final decision on this question must necessarily rest with the courts and not with the individual. The individual must decide for himself whether his conscience tells him that he must not frequent a certain place. If it does, he should punctiliously regard its behests and stay away. But the court cannot turn casuist further than to de-

termine whether a legal right has been invaded in any given case. Neither can it say that a thing offends against conscience when there is no substantial reason why it should. It is not sufficient for a person to say: "This thing is contrary to what my conscience tells me to be right, therefore it must be stopped." The individual cannot foreclose inquiry into the reasonableness of his request by his bare assertion. Some consciences are very tender and very highly developed, so much so that the possessor regards as being wrong many things that the law regards as harmless. Some refrain from playing cards for amusement, some from dancing, some from attending places of amusement, and some from all these things, because they consider it wrong to participate in or countenance them. The law regards none of these things as being essentially wrong in itself. At the same time it recognizes the right of any one to stay away from them where the promptings of conscience indicate that it would be wrong to attend.

To the lay mind there is very little difference in principle between the case before us and *Dorner v. School Dist.* 137 Wis. 147, 118 N. W. 353. There a Catholic parochial school was built adjacent to a Catholic church and some of the school rooms were rented and used for the purposes of a public school. The Catholic school children attended church services before school hours in the morning, and prayers were recited and hymns were sung during school hours in the portion of the school building used for parochial school purposes and in rooms either adjoining or adjacent to those rented by the public school authorities. The parochial school was taught by Sisters clad in the conventional garb of the order to which they belonged. The lower court found that the public school conducted in the parochial school building had at times been pervaded and characterized by sectarian instruction, and very properly enjoined the continuance of such practices. It held, however, that the school board was acting within its legal rights in renting and using a part of the

parochial school building for the purposes of a public school, and such decision was affirmed in this court. There are points of dissimilarity between the two cases, but it would be difficult to say that those who felt aggrieved in the *Dorner Case* did not have at least as strong a ground for complaint as did the plaintiffs in the present case. It is true that the public school was not conducted in the church building and that certain rooms in the parochial school were exclusively devoted to the use of the public school. But it is also true that the school building was one in which sectarian instruction was given and was within the shadow of a church which was attended daily by the children attending the parochial school; that the teachers in such school were clad in a religious garb, and that the public school attendants or many of them were within the hearing of prayers recited aloud in the parochial school rooms, as well as within the hearing of sectarian hymns sung in such rooms. We conclude that the holding of graduation exercises in a church building is not in and of itself contrary to either of the constitutional provisions relied on by the plaintiffs.

A somewhat different question is raised by the complaint about prayers being offered at graduation exercises by denominational clergymen. A prayer may be either sectarian or nonsectarian in character. The sessions of our national Congress, of our state legislature, and of our great party conventions are customarily opened with prayer. These prayers are almost invariably nonsectarian in character, so much so that a person reading them or listening to them would be entirely at a loss to discover to what denomination the clergyman belonged. The enthusiast who places his desire to make proselytes to the faith he professes above his sense of propriety may occasionally "slop over," but it is only just to say that our clergy rarely offend in this regard. To be sure, offense may be very adroitly given if the clergyman is so minded, but there is no claim that any such thing has occurred in this case.

The court decided in the *Edgerton Bible Case* that the giving of a nonsectarian prayer was not sectarian instruction. We quote from the opinion:

"The term 'sectarian instruction,' in the constitution, manifestly refers exclusively to instruction in religious doctrines, and the prohibition is only aimed at such instruction as is sectarian; that is to say, instruction in religious doctrines which are believed by some religious sects and rejected by others. Hence, to teach the existence of a Supreme Being, of infinite wisdom, power, and goodness, and that it is the highest duty of all men to adore, obey, and love Him, is not sectarian, because all religious sects so believe and teach. The instruction becomes sectarian when it goes further, and inculcates doctrine or dogma concerning which the religious sects are in conflict. This we understand to be the meaning of the constitutional prohibition." *State ex rel. Weiss v. District Board,* 76 Wis. 177, 193, 194, 44 N. W. 967.

In the case before us it appears from the allegations of the petition that both Catholic priests and Protestant ministers had at different times been selected to deliver the invocation at graduation exercises. There is no claim that on any of these occasions any unseemly hint or suggestion was made by any of the reverend gentlemen who were so honored. In fact the contrary appears by inference at least. So it is clear that no showing was made that sectarian instruction was given as that term is defined in the case last cited. Had it appeared that the invocations given were sectarian in character and that the school board threatened to continue or permit such practices in the future, we do not wish to be understood as intimating that a court of equity would not enjoin the continuance of such practice.

We think it would be difficult to pick out any clause of sec. 18, art. I, of the constitution which by any fair or reasonable construction could be said to be violated by the delivery of a nonsectarian prayer at a graduation exercise. No man is compelled to worship, nor compelled to attend a place of worship, nor does he, as before stated, attend such a place ex-

cept in the most technical sense when he attends graduation exercises. Pupils do not congregate on such an occasion for the purpose of worship, and the short nonsectarian invocation that is usually given is a mere incident which occupies but a few moments of the two hours or more that is usually occupied with the program prepared for such occasions. If the prayer be nonsectarian it does not interfere with any right of conscience that the law recognizes, and neither is the matter of permitting it the giving of any preference to any religious establishment or religious mode of worship in a constitutional sense. A very different question would arise if an attempt were made to introduce the practice of having prayer as part of the daily routine in our public schools. Considering what has been done here and the rare occasions on which it has been or can be done, the matter complained of seems to be too inconsequential to furnish the subject of a lawsuit. It follows from what has been said that the judgment of the lower court was right.

By the Court.—Judgment affirmed.

WARDEN, Appellant, vs. HART and others, Respondents.

February 4—February 22, 1916.

Municipal corporations: Permitting platform scales in street: Injunction: Rights of taxpayers: Aldermen.

1. **Prior to the enactment of ch. 382, Laws 1913, while a municipality might not grant a right to maintain a platform scales in a street, it might permit a temporary use of the street for that purpose by an abutting owner where such use did not interfere with the public use for travel or any other lawful public use of the street, such permission being subject to revocation at any time.**
2. **A resident taxpayer who neither suffered nor was threatened with any loss or other special or peculiar damage from such temporary use of the street under a permit from the city coun-**

cil, had no such interest in the matter as entitled him to maintain an action to restrain such use; and the mere fact that he was an alderman did not add anything to his rights in that respect.

APPEAL from a judgment of the circuit court for Juneau county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

J. T. Dithmar, for the appellant.

For the respondents there was a brief by *Henry C. Rowan,* attorney, and *Grotophorst, Evans & Thomas,* of counsel, and oral argument by *Evan A. Evans.*

TIMLIN, J. The appellant, an alderman of the city of *Elroy* and a resident and freeholder and taxpayer therein, brings this suit to enjoin *W. H. Hart* and *Hugh Campbell* from making an excavation in a public street of that city for the purpose of constructing a platform scales under permit from the common council of the city. He makes the city of *Elroy* a party but asks no relief against it. The answer in substance avers a permit from the common council of the city of *Elroy* to construct in the street a platform scales and a release by the Chicago & Northwestern Railway Company, which is the abutting owner, and that the plaintiff had no such interest in the matter as entitled him to maintain the action. The findings of the court sustained the answer and also found on sufficient evidence that the platform scales when completed would not in any wise obstruct public travel upon or the public use of the street in question. For some purposes which do not materially interfere with the public use of the streets a city has inherent power to permit temporary use of part of the street by abutting owners or those acting for them, such as deposit of building material, the use of an excavated area under a sidewalk, the maintenance of signs, or the like. The sub-sidewalk excavation is spoken of in *Burnham v. Milwaukee,* 155 Wis. 90, 143 N. W. 1067, as a "convenience of a temporary character which" the lotowner "was rightfully enjoy-

ing and had the right to enjoy until such time as the city, representing the state in its paramount right to the use of the street, should by proper ordinance or resolution terminate his right of enjoyment." This species of usufruct is also recognized in *McClure v. Sparta,* 84 Wis. 269, 54 N. W. 337.

In *Emerson v. Babcock,* 66 Iowa, 257, 23 N. W. 656, speaking of a platform scales in the street, the court says:

"If the plaintiff was permitted to maintain his scales in the street for a time, the privilege must be regarded as a mere license which may be terminated at any time, and it is immaterial whether the erection in the street amounts to a nuisance."

That is, it is immaterial as regards the power of the city to have it removed. Ch. 382, Laws of 1913, is prospective in its operation and does not apply in this case. *Lakeside L. Co. v. Jacobs,* 134 Wis. 188, 114 N. W. 446, is not in point because there the parties sought to uphold by action a legal right founded upon a grant which the municipality had no power to make. Here we may assume the municipality has no power to grant the right to maintain a platform scales in the streets. That privilege is not the subject of grant, but the municipality may permit a temporary use by the owner of the street where such use does not interfere with the public use for travel or any other lawful public use of the street, and the permission is subject to revocation at any time at the pleasure of the municipality. It is against this sort of act by the city that the appellant as a taxpayer seeks to maintain the action.

The next question is with reference to his right to do so. Averment and proof that the appellant is a taxpayer gives him no standing in a court of equity to regulate or control municipal affairs except in cases where the administrative act is unlawful and the taxpayer is threatened with or suffers a pecuniary loss in consequence thereof. *Zettel v. West*

Bend, 79 Wis. 316, 48 N. W. 379. A private person cannot maintain an action for damages resulting from the obstruction of a public highway, or a suit in equity to prevent such obstruction, unless it appear that he has sustained damages differing not merely in degree but in kind from the damage sustained by the general public. *Tilly v. Mitchell & L. Co.* 121 Wis. 1, 98 N. W. 969; *Baier v. Schermerhorn,* 96 Wis. 372, 71 N. W. 600; *Mahler v. Brumder,* 92 Wis. 477, 66 N. W. 502; *Stone v. Oconomowoc,* 71 Wis. 155, 36 N. W. 829; *Bell v. Platteville,* 71 Wis. 139, 36 N. W. 831.

The mere fact that appellant is an alderman cannot, under the circumstances, add anything to his right to maintain the action. Aldermen must, generally speaking, govern the city through the regular channels of city government, not by adversary proceedings in the courts. If appellant's official status as a single alderman were relevant, then his vote as alderman in favor of the permit in question might also be relevant; but neither of these is relevant. He cannot maintain this action because he suffers no pecuniary loss in consequence of the act sought to be enjoined and because the wrong, if wrong it is, is to the general public and not in the least special or peculiar to the appellant.

By the Court.—Judgment affirmed.

In re Weaver.

February 4—February 22, 1916.

Prohibition: When writ issues: Criminal law: Lack of preliminary examination: Jurisdiction of circuit court: Remedy by plea in abatement.

1. The writ of prohibition is a high prerogative writ by which, where there is no other adequate remedy, an inferior court is prevented from going outside of or beyond its jurisdiction.
2. The fact that there has been no preliminary examination of the accused is not sufficient ground for the issuance of a writ of prohibition to prevent the circuit court from proceeding in a criminal action, (1) because that fact does not affect the jurisdiction of the circuit court, and (2) because the remedy by plea in abatement is adequate and complete.

Application for writ of prohibition. *Denied.*

The cause was argued orally by *E. C. Alvord,* for the petitioner.

Per Curiam. The petitioner asks for a writ of prohibition commanding the circuit court for Bayfield county to desist from further proceedings in a criminal action pending therein against him on the ground that the examining magistrate lost jurisdiction of the preliminary examination in the case and hence that there has been no legal examination.

Counsel are entirely mistaken as to the scope and functions of the writ of prohibition. It is a high prerogative writ by which an inferior court is prevented from going outside of or beyond its jurisdiction where there is no other adequate remedy. *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081. That it should not issue in the present case is apparent for two reasons. *First,* the entire absence of a preliminary examination in a criminal case does not affect the jurisdiction of the circuit court. Unless the defendant pleads the lack of an examination before pleading to the merits he waives the point. Sec. 4654, Stats. 1915.

This would not be so if the examination were necessary to the jurisdiction. *Second,* the remedy by plea in abatement is adequate and complete. If this court could be called upon to try in advance all preliminary objections in criminal cases because there is apprehension that the circuit courts will rule adversely upon them, the administration of the criminal law would be in a very unsatisfactory state and this court would probably have little time for anything else. To state the proposition is to answer it.

Motion denied.

OGDEN, Plaintiff in error, vs. THE STATE, Defendant in error.

February 5—February 22, 1916.

Juvenile courts are not criminal courts: Nature of proceedings: Review: Writ of error or appeal?

Juvenile courts, under secs. 573—1 to 573—10, Stats. 1915, are not criminal courts; the proceedings therein are special proceedings, civil in their nature, but not according to the course of the common law; and a determination therein that a child is delinquent is not reviewable on writ of error, but only upon an appeal taken in the manner and within the time specified in sub. 3, sec. 573—6.

ERROR to review an order of the juvenile branch of the municipal court of Winnebago county: A. H. Goss, Judge. *Writ quashed.*

Grace Ogden was proceeded against in the juvenile court and found to be a delinquent.

The chief of police of the city of Oshkosh petitioned the court for an inquest concerning *Grace Ogden* on the charge of delinquency. A summons was served on her father and mother to appear in court with her on the 16th day of Sep-

tember, 1914, to answer the petition. The parties duly appeared, and it appearing from the evidence adduced that she was eighteen years of age she was discharged by the court. On October 27th the chief of police filed an affidavit stating that from the records in the register of deeds' office he believed that said alleged delinquent was only seventeen years of age and asked that the judgment of discharge be vacated and a retrial ordered. The court made an order requiring *Grace Ogden* to show cause why this judgment should not be vacated and further proceedings be had. The court overruled all objections to its jurisdiction on account of prejudice and for want of power to vacate its former judgment in the case and ordered that another inquest be had. A second inquest was had before a jury. The jury returned a verdict finding *Grace Ogden* delinquent as charged in the original petition.

On this finding of the jury an order was entered committing *Grace Ogden* to the Wisconsin industrial school for girls at Milwaukee, Wisconsin. She prosecutes this writ of error to obtain reversal of that order.

For the plaintiff in error there was a brief by *B. E. Van Keuren,* attorney, and *M. H. Eaton,* of counsel, and oral argument by *Mr. Van Keuren.*

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

SIEBECKER, J. The provisions of the statute creating the "juvenile court" and defining its powers and jurisdiction show that it is a special statutory tribunal of limited jurisdiction to deal with "dependent," "neglected," and "delinquent" children. The provisions of the statute prescribe a special procedure for holding inquests in all cases embraced within its jurisdiction and for making orders for the care, custody, and commitment of these children in the various

ways specified in the statute for the promoting of their physical, moral, and mental welfare. An examination of these statutes discloses that the proceedings provided to accomplish these purposes and objects are special in form and of the nature of those employed in civil actions. It is manifest from the scheme and object of this legislation that it was not intended in establishing the juvenile court to create a tribunal having the powers and characteristics of courts that exercise the jurisdiction of enforcing the criminal law. The inquests in cases in this court are not criminal in their substance and nature, but partake of the nature of those denominated in the law civil actions and are controlled by the practice and procedure applicable in civil cases.

By sub. 3, sec. 573—6, Stats. 1915, conferring the right of review on appeal, it is provided that an "appeal may be taken directly to the supreme court within twenty days from date of said finding, determination or judgment, in the same manner as appeals are taken in civil actions in the circuit court from judgments therein." This is significant as showing that the legislature treated any proceeding in this court as a proceeding in a civil action. In the instant case this statute was not followed to obtain a review of the case on appeal to this court. The order of the lower court which it is sought to have reviewed by this court was entered December 31, 1914. The time for appealing therefrom under the above statute expired within twenty days from December 31, 1914, but nothing was done to effect an appeal within that time. On July 10, 1915, the plaintiff in error obtained a writ of error from this court to review the order committing her to the industrial school for girls. The question is presented, Has she the right to prosecute this writ to obtain a review of the case by this court? It is the established law of this state that a writ of error can only be prosecuted from a final judgment or an award in the nature of a final judgment in proceedings according to the course of the common

law as it existed in the territory of Wisconsin at the time of the adoption of the state constitution. *Crocker v. State,* 60 Wis. 553, 19 N. W. 435; *Buttrick v. Roy,* 72 Wis. 164, 39 N. W. 345; *Jackson v. State,* 92 Wis. 422, 66 N. W. 393; *State ex rel. Andrews v. Oshkosh,* 84 Wis. 548, 54 N. W. 1095; *Ætna A. & L. Co. v. Lyman,* 155 Wis. 135, 144 N. W. 278. We have shown that the juvenile court proceedings are special proceedings for the exercise of the special limited jurisdiction of this court, as conferred by statute, and that its proceedings are not according to the course of the common law. In such cases there is no right of review by writ of error and the parties aggrieved are limited to an appeal as given by statute. The statute grants to such parties an appeal upon the terms specified and limits the time of taking it to twenty days from the entry of the finding, determination, or judgment. This statute was not complied with in this case. Upon the record and proceedings taken the writ of error must be quashed.

By the Court.—The writ of error is quashed.

PAWLAK, by guardian *ad litem,* Appellant, vs. HAYES, Respondent.

February 5—February 22, 1916.

Workmen's compensation: Assignment to employer of cause of action against third person: Election between remedies: When right to elect arises: Malpractice of physician treating injury: Liability of employer.

1. Under sub. 1, sec. 2394—25, Stats., the making of a lawful claim against the employer for compensation for an injury operates to assign to him any cause of action in tort which the employee may then have against any other person for such injury; but it does not assign a cause of action not then existing.
2. Sub. 1, 2, sec. 2394—25, Stats., contemplate an election to be made by the employee between the statutory remedy against his em-

ployer and the common-law remedy against a third person whose negligence caused or contributed to the injury; but the right to such election does not arise until, to the knowledge of the employee, who exercises ordinary diligence in respect thereto, such negligence of the third person intervenes.

3. When, therefore, the injury is aggravated by malpractice of the physician treating it, the employee may, when he first learns of such malpractice, elect to hold the physician liable and release the employer, although he previously made a claim against the latter.

4. Sub. 1, sec. 2394—9, Stats., requiring the employer to furnish a physician and making him liable for the value of the physician's services for not to exceed ninety days, implies liability for any aggravation of the injury caused by the negligence of the physician treating the employee during that time. [Whether the employer would be liable for malpractice of the physician after the expiration of ninety days, is not decided.]

APPEAL from an order of the circuit court for Chippewa county: JAMES WICKHAM, Circuit Judge. *Reversed.*

Action to recover damages for malpractice. Plaintiff alleges that on the 5th day of March, 1914, while in the employ of the John S. Owen Lumber Company, a log rolled onto him and he sustained a fracture of the leg; that he employed the defendant to treat him for the injury, and that by reason of the negligence and lack of skill of the defendant in the treatment given him within a couple of weeks after the injury and subsequent thereto the leg was improperly set and treated, to the damage of plaintiff. The complaint further alleges that at the time of the injury both plaintiff and his employer, the John S. Owen Lumber Company, were under the provisions of the Workmen's Compensation Act, and that plaintiff made a claim against his employer under the act and received compensation and part of his medical expenses from March 5 to about August 20, 1914; that as soon as he discovered the negligence of the defendant he refused to accept any more compensation from his employer, and he offers to return the same or so much thereof as the court may adjudicate. The defendant entered a general demurrer to the

complaint, and from an order sustaining the same the plaintiff appealed.

A. L. Smongeski, for the appellant.

For the respondent there was a brief by *Robert R. Freeman,* and oral argument by *Timothy Brown.*

VINJE, J. The circuit court sustained the demurrer to the complaint on the ground that when plaintiff filed a claim against his employer his cause of action for the injury received and the proximate results thereof was assigned to his employer by virtue of sub. 1 of sec. 2394—25, Stats., which reads as follows:

"The making of a lawful claim against an employer for compensation under sections 2394—3 to 2394—31, inclusive, for the injury or death of his employee shall operate as an assignment of any cause of action in tort which the employee or his personal representative may have against any other party for such injury or death; and such employer may enforce in his own name the liability of such other party."

It is quite evident from the reading of this subdivision that it contemplates the existence at the same time of two remedies, either of which the employee may pursue. He may invoke the statutory remedy against his employer, or the common-law remedy against the third person who by his negligence caused or contributed to his injury. *McGarvey v. Independent O. & G. Co.* 156 Wis. 580, 146 N. W. 895. It is equally obvious that these two remedies must co-exist in order to give the employee an election. That the statute contemplated an election is made clear by sub. 2 of the same section, which provides that "The making of a claim by an employee against a third party for damages by reason of an accident covered by sections 2394—3 to 2394—31, inclusive, shall operate as a waiver of any claim for compensation against the employer." Thus, while the statute gives the employee the option of pursuing either remedy it deprives

him of all rights under the one he does not pursue as soon as he makes his election, by assigning to the employer his cause of action against the third party if he proceeds against the employer, and by releasing the employer if he proceeds against the third party.

It does not appear that at the time plaintiff was injured there was any negligence by any third party or, indeed, by any one. This being so, plaintiff had no election to make when he filed his claim under the statute against his employer and no cause of action passed to the latter. The employee could proceed only against his employer. There was no one else liable so far as the complaint discloses. He could not at that time be required to make an election because the facts giving rise to an election were not then in existence, nor could they be reasonably anticipated because malpractice is the exception, not the rule. No duty or opportunity to elect could arise until the facts creating the liability of the third person came into existence. In this case they were not known to plaintiff until about August 20th, and there is nothing to show he was negligent in not sooner ascertaining them. As soon as they came to his notice he promptly elected to hold the third person whose alleged negligence aggravated his first injury, and thereby he waived further liability against his employer. Sub. 2, sec. 2394—25.

The making of a lawful claim against the employer *eo instanti* operates to assign to him any cause of action the employee may then have against a third party. *McGarvey v. Independent O. & G. Co.* 156 Wis. 580, 146 N. W. 895. But it does not assign a cause of action then not *in esse*. It merely acts upon what is in existence at the time the lawful claim is made. When the negligence of a third party, to the knowledge of the employee, who exercises ordinary diligence in respect thereto, intervenes, his right to an election arises, not before then. It was therefore competent for plaintiff, when he first learned of the negligence of the defendant, to

elect to hold him and release his employer or to hold his employer under the provisions of the Compensation Act. In a common-law action for negligence it has been held that the defendant is liable for the aggravation of the injury caused by the malpractice of the physician called by plaintiff to treat it where it is shown that he exercised ordinary care in the selection of the physician. *Selleck v. Janesville,* 100 Wis. 157, 75 N. W. 975. The Compensation Act requires the employer to furnish a physician and makes him liable for the value of the physician's services for not to exceed ninety days. Sub. 1, sec. 2394—9. This we think implies liability for any aggravation of the injury caused by the negligence of the physician treating the employee during such time. Whether the employer would be liable for malpractice after the expiration of ninety days is not decided. The negligent treatment here is alleged to have begun about two weeks after the accident.

By the Court.—Order reversed, and cause remanded with directions to overrule the demurrer and for further proceedings according to law.

RANDALL, Respondent, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

February 2—February 22, 1916.

Railroads: Regulation as to headlights: Constitutional law: Police power: Classification: Absolute liability for damages resulting from violation: Criminal conviction not a condition precedent: When person is a trespasser on track: Federal statute: Effect on prior judgment: Excessive damages.

1. Sec. 1809*v*, Stats. 1913,—requiring that every railroad locomotive, except those used exclusively for switching and yard service, shall be equipped with a headlight that in clear weather will throw a light which will enable the operator to discern a man-

sized object "at a distance of not less than eight hundred feet," when operated at nighttime, and declaring that any corporation violating its provisions "shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine . . . , and in addition shall be liable for all damages resulting in whole or in part, directly or indirectly, from such violation,"—is not invalid as being unreasonable and indefinite, but is a proper exercise by the legislature of the police power for the safety of the public.

2. The exception in said statute of locomotives used exclusively for switching and yard service is a legitimate and reasonable classification in view of the purpose of the act and the special methods required for the conduct of switch and yard service.
3. The locomotive of a through train is not within the exception while hauling such train through the yard at a station.
4. Said statute imposes an absolute liability upon railroad companies for damages resulting from its violation; and a conviction for such violation is not a condition precedent to the recovery of damages.
5. An absolute liability being imposed by said statute, where plaintiff's injuries were caused in whole or in part by defendant's failure to have a proper headlight on its engine, the questions of negligence, proximate cause, and contributory negligence (not characterized by recklessness or wantonness) are not involved in the inquiry as to the right of recovery.
6. A game warden who arrived at a station after midnight intended to return by the same train, the cars of which were placed on a sidetrack to remain until the return trip at 4:35 a. m. After completing his work of inspection in the baggage car at about 1:50 a. m. he started to go across the tracks to the ticket office with the intention of buying his ticket and then returning to the cars on the sidetrack and remaining there until the train should depart. While crossing the main track he was struck by a train. *Held*, that it was not unlawful for him to attempt to buy his ticket more than two hours before his train left, and that he was not a trespasser.
7. A finding by the jury to the effect that the failure to have a proper headlight on the engine of the train which struck the plaintiff contributed to produce his injury, is *held* to be sustained by the evidence.
8. Plaintiff having in May, 1914, recovered a judgment for damages on account of such injury, the act of Congress of March 4, 1915, even if it abrogates the state regulation as to headlights, cannot affect his rights under such judgment.

9. The refusal of the trial court to set aside as excessive or to reduce an award of $2,500 for serious injuries to the left arm and shoulder of a man about forty years of age, is *held* not so clearly wrong as to justify this court in disturbing the award.

APPEAL from a judgment of the circuit court for Price county: G. N. RISJORD, Circuit Judge. *Affirmed.*

This is an action to recover damages for an injury sustained by the plaintiff as a result of a collision with one of defendant's locomotives.

The defendant is a railroad corporation operating more than fifty miles of track within the state and one of its stations is located at Spencer, Wisconsin. The defendant's tracks run through Spencer in a northerly and southerly direction. The main track is the first one east of the depot and there is a platform about twelve feet wide extending from the depot toward this track. The branch line track leading to Ashland is the second track east of the depot and a coach track is the third one east of the depot. There is a platform about twelve feet in width between the main line track and the Ashland branch track. The two platforms are connected by crosswalks.

The plaintiff is a man about forty years of age and is deaf. At the time of the accident he was a game warden. He boarded the south-bound train at Phillips, a station on the Ashland branch, for the purpose of detecting violations of the game laws. This was on Sunday evening, November 17, 1912. He rode to Spencer in the baggage and express car, which contained the shipped deer. The train reached Spencer shortly after midnight, and the cars were put on the third or coach track and were to remain there up to the time for the return trip to Ashland. The plaintiff was busy with his inspection, except for a short time while he went to a restaurant for lunch, until 1:50 a. m. Having completed this work at this time he left the baggage and express coach to go to the ticket office to purchase a ticket for his return trip to

Phillips. He attempted to cross the tracks on one of the crosswalks. The night was not clear, rather cloudy and dark. Plaintiff testified that, before crossing the main track, about ten feet from the rails he looked up and down the track, but saw nothing; that he then started to walk across the track when he sensed something to be wrong, so jumped to save himself. The locomotive struck the plaintiff and inflicted serious injury on his left arm and shoulder. Plaintiff further testified that when he looked in both directions before crossing he did not see any train approaching nor did he see any light or a headlight. One Genett testified that he saw the engine and that it had no headlight. The testimony of the plaintiff and Genett is flatly contradicted by seven of the railroad employees as regards the engine having a headlight. They all assert that the headlight was lighted and the two side lights also. It is admitted, however, that the headlight on the engine did not comply with the calls of the statute.

The court submitted a special verdict to the jury, who found (1) that the locomotive was not equipped with a regulation headlight; (2) that the failure to have such a headlight was a proximate cause of plaintiff's injury; (3) that defendant's servants were guilty of negligence in running the train the way they did at the time of the injury; (4) that such negligence was a proximate cause of the plaintiff's injury; (5) that plaintiff was not a trespasser at the time; (6) that the plaintiff was not guilty of any want of ordinary care that contributed proximately to produce his injury; and (7) assessed plaintiff's damages at $2,500.

The court granted plaintiff's motion for judgment on the verdict and entered judgment in plaintiff's favor in the sum of $2,500 damages, together with the cost and disbursements of the action. From such judgment this appeal is taken.

For the appellant there was a brief by *W. A. Hayes,* attorney, and *John L. Erdall,* of counsel, and oral argument by *Mr. Hayes.*

W. K. Parkinson, for the respondent.

SIEBECKER, J. It stands admitted that the engine with which the plaintiff collided was not equipped with a headlight as prescribed by the statute, sec. 1809*v*, Stats. 1915. This statute requires that every railroad locomotive, except those used exclusively for switching and yard service, shall be equipped with a headlight that in clear weather will throw a light which will enable the operator to discern a man-sized object "at a distance of not less than eight hundred feet," when operated at nighttime. Any violation of the provisions of this statute is declared to be "a misdemeanor" punishable by a fine, and the offender "in addition shall be liable for all damages resulting in whole or in part, directly or indirectly, from such violation." The provisions of this statute are assailed as invalid upon the grounds of being unreasonable and indefinite. Similar statutes have been adopted in many other states and have been upheld by courts as a proper exercise by the legislature of the police power for the safety of the public. *Atlantic C. L. R. Co. v. State,* 135 Ga. 545, 69 S. E. 725; *S. C.* 234 U. S. 280, 34 Sup. Ct. 829; *Vandalia R. Co. v. Railroad Comm.* 182 Ind. 382, 101 N. E. 85; *Chicago, R. I. & P. R. Co. v. Bryant* (Ark.) 162 S. W. 51. The federal supreme court, on appeal of the *Atlantic Coast Line Case,* declares:

"The use of locomotive headlights, however, is directly related to safety in operation. It cannot be denied that the protective power of government, subject to which the carrier conducts his business and manages its property, extends as well to the regulation of this part of the carrier's equipment as to apparatus for heating cars or to automatic couplers. The legislature may require an adequate headlight, and whether the carrier's practice is properly conducive to safety, or a new method affording greater protection should be substituted, is a matter for the legislative judgment."

The Georgia statute in its provisions is very like our statute, and the state and federal courts both declare that the action of the legislature is not an arbitrary or unreasonable regulation in this field, and that such statutes do not deprive

the carrier of liberty or property without due process of law. The provision excepting from the law locomotives used exclusively for switching and yard service is a legitimate and reasonable classification in view of the purpose of the act and the special methods required for the conduct of switch and yard service. These considerations bearing on the question of classification are also pertinent to the claim made that the engine in question at the time of the collision was employed in yard service and hence within the exception of the statute respecting switch- and yard-service locomotives. It is obvious that it cannot be so considered, for it is provided that only such locomotives are to be excepted from the regulation as "are used exclusively for switching service or in railroad yards." Manifestly all locomotives used in hauling trains are necessarily required to be used in passing through railroad yards with their headlights in use, and the regulation headlight is appropriate and practicable for that purpose. There is no basis for the claim that this locomotive at the time of collision was within the exception of the statute.

It is urged that no right of recovery under the statute exists until the party charged with its violation has been convicted thereof in a criminal prosecution. We discover no such legislative intent in the provisions of the act. Its language, purpose, and object indicate that the legislature conferred on persons who suffer damages resulting from its violation a right to recover them regardless of any conviction of the offender for the criminal act. After prescribing a criminal punishment for its violation it provides that the offender "in addition shall be liable for all damages resulting in whole or in part, directly or indirectly, from such violation." This language in its ordinary significance implies that a violation of the regulation imposes on the offender an absolute liability for the damages resulting from his conduct. The terms of this statute are the same in significance as those requiring railroads to fence their right of way and maintain cattle-

guards and making companies liable for damages to animals or persons thereon "occasioned in any manner, in whole or in part, by the want of such fences or cattle-guards." Sub. 2, sec. 1810, Stats. By the repeated decisions of this court it has been held that the fence statute imposed an absolute liability on railroad companies for damages resulting from a violation of this duty. The language in the two statutes is couched in equally positive terms as to imposing a liability resulting from their violation. In *Schwind v. C., M. & St. P. R. Co.* 140 Wis. 1, 121 N. W. 639, Mr. Justice DODGE, in speaking of the fence statute and distinguishing its terms from the terms of those statutes which impose similar duties, but where failure to perform the statutory duty is merely an act of negligence and therefore involves proximate causal relation to establish liability for resulting injuries, declares:

"All such cases are, however, beside the question presented by our present sec. 1810, Stats. (1898), for that, in addition to commanding the railroads to build a fence, expressly provides that in its absence 'such road shall be liable for all damages done to cattle, horses or other domestic animals, or persons thereon, occasioned in any manner, in whole or in part, by want of such fences or cattle-guards.' An injury may well be occasioned in whole or in part by the absence of a fence, although it may not be proximately caused thereby. It is enough if such omission gives occasion for entry on the place of injury. *Curry v. C. & N. W. R. Co.* 43 Wis. 665, 676." *Atkinson v. C. & N. W. R. Co.* 119 Wis. 176, 96 N. W. 529; *Hayes v. Mich. Cent. R. Co.* 111 U. S. 228, 4 Sup. Ct. 369; *Quackenbush v. Wis. & M. R. Co.* 62 Wis. 411, 22 N. W. 519.

And so here, since the statute imposes an absolute liability, the questions of negligence, proximate causal relation, and contributory negligence as understood in the law are not involved in the inquiry of plaintiff's right to a recovery and defendant's liability therefor. There is no doubt but that the plaintiff collided with the engine as alleged and that he suffered personal injuries. There is no evidence tending to

show that his action involved in the collision was characterized by such recklessness or wantonness as to defeat his right of recovery.

It is also clear that the jury were justified in finding that plaintiff was not a trespasser in attempting to cross at the time he did for the purpose of buying a ticket at the depot ticket office for his return trip to Phillips. Under the circumstances it was not unlawful for him to attempt to get his ticket two hours and more before his train left for Phillips. It appears that the cars of the train he expected to take were on the coach track and that he attempted to procure his ticket and return to these cars to remain until the train would depart. The attempt to purchase his ticket at this time and in the manner he undertook to do so furnishes no basis for holding that he was trespassing. He was rightly pursuing his purpose of returning to Phillips on defendant's train. The plaintiff testifies that he looked up and down the track before attempting to cross it on his way to the ticket office and did not see the approaching engine and train and that there was no light thrown on the track as he stepped on it. He is corroborated by another witness to the effect that the engine had no headlight. While this evidence is contradicted by a large number of witnesses, we cannot say that it is wholly incredible and that the trial court erred in submitting the issue to a jury. The court's attention was again directed to this question on defendant's motion after verdict which the court overruled. The trial court's conclusion on this question is of weight in support of the jury's finding that the defendant's failure to have a proper headlight on the engine contributed to produce the plaintiff's injuries. The record sustains the inference that the want of a headlight contributed to cause the collision and entitles plaintiff to recover under the statute.

It is asserted that the field of legislation covered by this statute is included in the act of Congress of March 4, 1915,

which abrogates the state regulation. The judgment in this case was rendered in May, 1914. Under this state of the facts the act of Congress cannot affect plaintiff's right to recover on the judgment theretofore awarded to him.

The defendant asserts that the amount of damages found by the jury is excessive. The trial judge, speaking on the question in his opinion denying defendant's motion after verdict, states: "I do not think, under the evidence as to plaintiff's injuries in this case, it can be very seriously contended that the damages are excessive, at least so excessive as to warrant a new trial or alternative judgment under a reduced verdict for that reason." An examination of the record on this subject does not convince us that the trial court's conclusion is so clearly against the weight of the evidence on this question as to justify disturbing the award of damages. There is no reversible error shown in the record.

By the Court.—The judgment appealed from is affirmed.

WINSLOW, C. J., and BARNES, J., dissent.

ENGEN, Administrator, Respondent, vs. CHIPPEWA VALLEY RAILWAY, LIGHT & POWER COMPANY, Appellant.

February 5—February 25, 1916.

Street railways: Injury to passenger: Negligence: Excessive speed on curve: Contributory negligence: Standing on platform: Questions for jury: Evidence: Harmless errors: Excessive damages: Examination of discharged employee as adverse witness.

1. In an action for injuries sustained by a passenger who was thrown from the vestibule of defendant's interurban car as it was turning a street corner, the evidence—including testimony of the motorman that the speed did not exceed from five to seven miles per hour, and testimony of other passengers as to the

effect produced by rounding the corner at the rate at which the car was going—is *held* to sustain a finding by the jury that defendant was negligent in running the car at an excessive speed around the curve.

2. Whether or not a passenger is guilty of negligence in riding on the platform of a street car when there are vacant seats inside is ordinarily a question for the jury, although cases may arise where negligence is so clearly established as to be a matter of law.

3. It appearing in this case that the accident happened within the limits of a city, where the interurban cars performed the usual functions of urban street cars, that there was no rule forbidding passengers to occupy the platform, and that during this same trip other passengers had ridden upon the platform without protest from the conductor, a finding by the jury, approved by the trial court, acquitting the injured passenger of contributory negligence is *held* not so clearly wrong that this court should disturb it, although it also appeared that he had been standing close to the edge of the platform next to the open door, that he was not holding on to anything, that he was familiar with the road and the various turns the car would have to make, and that he knew there were vacant seats inside.

4. In an action for injuries sustained by a person whose death resulted from other causes prior to the trial, the court having instructed the jury that no damages could be assessed for the death, no harm resulted from the admission of expert testimony tending to show that his death might have been hastened to some extent by the injuries.

5. An award of $1,800 for injuries causing deceased to suffer a good deal of pain and to be disabled for a long period of time,—part of which time he was at the hospital,—is *held*, though large, not so excessive as to warrant this court in disturbing it.

[6. Whether it was error to permit a discharged employee of the defendant company to be examined as an adverse witness, is not determined, such error, if any, being harmless.]

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Bundy & Wilcox,* and oral argument by *Roy P. Wilcox.*

Fred Arnold, for the respondent.

PER CURIAM. The plaintiff brings this action as administrator of the estate of J. O. Engen, deceased, to recover

damages for personal injuries sustained by the deceased while a passenger on one of the defendant's interurban cars and while going from Chippewa Falls to his home in Eau Claire. The deceased was standing in the vestibule in the rear end of the car, and while it was turning a street corner he was thrown off and suffered injury. The negligence alleged was the running of the car at an excessive rate of speed and the failure to keep the vestibule doors closed. The jury found that the defendant was negligent in both regards. The trial court held that there was sufficient evidence to warrant the jury in finding that the car was running at a negligent rate of speed at the time of the injury, but held that the evidence was not sufficient to sustain the finding that the defendant was negligent because it failed to keep the vestibule doors closed, and accordingly set this finding aside. The jury also acquitted the deceased of contributory negligence. On the verdict as corrected judgment was entered for the plaintiff, and defendant appeals therefrom.

The appellant argues that the evidence was wholly insufficient to sustain the finding of negligence; that the deceased was guilty of contributory negligence as a matter of law; that the court erred in permitting a former employee of the defendant to be examined as an adverse witness; and that the damages assessed are excessive.

On the question of defendant's negligence it is argued that the only testimony of any value tending to show the rate of speed was that given by the motorman; that his evidence was to the effect that the car was not rounding the corner at a speed to exceed from five to seven miles an hour, and that it cannot be held negligence as a matter of law for a car to turn a corner at this rate of speed, because it was not shown to be contrary to the usual method of operation. There was other testimony in the case bearing on this question which was quite as important as that given by the motorman. He did not pretend to have any accurate means of measuring the rate of speed, and in fact his testimony shows that he did

little more than to make an estimate. Such estimate may have been entirely honest, and the occupation of the witness was such that he was better qualified to fix the rate of speed at which the car was going than an ordinary witness would be. In fact none of the other witnesses who testified on the point attempted to say how fast the car was proceeding, but testified to the effect produced by rounding the corner at the rate at which the car was going. Such evidence is fully as convincing on the question of whether the speed was excessive as any estimates would be of the actual number of miles per hour which the car was traveling. The witness Steady testified that he didn't know how fast the car was going, but he did know they struck the curve "at an awful gait," and that as the curve was struck his left shoulder and the side of his head were thrown against the partition on the side of the car window and that he was thrown over there from about the middle of the car seat. At least one other witness testified to much the same state of facts, although he did not claim the jolt was quite as severe as it was stated to be by Mr. Steady. If we assume that the testimony of the motorman was correct, still, if turning the corner produced the results that were testified to by some of the other witnesses, it was fairly within the province of the jury to say that the defendant was negligent in running the car at even that rate of speed around the curve.

The issue on the contributory negligence of the deceased raises a much closer question. Deceased had been standing on the vestibule platform while the car was going a considerable distance. There is hardly any room for saying that he went out there so as to be ready to step off the car when his place of destination was reached. The vestibule was a very small one, calculated to furnish a way of ingress to and egress from the car rather than for the purpose of carrying passengers. The door to the left side of the car was closed and a tool box was placed in front of it, which was used to

some extent as a seat by passengers. Deceased stood in a space 24 x 27 inches, between the car step on the right-hand side of the car, the car window, and the controller box. He had plenty of opportunity to take hold of something if he desired to do so. He must have known that the door at the right side of the vestibule was open, that he was standing very close to the edge of the platform next to the open door, and that even a moderate side sway of the car in turning a corner might cause him to lose his balance and have a tendency to throw him off. He was thoroughly familiar with the road, having traveled it many times, and knew of the various turns that the car would have to make before reaching the place where he desired to alight. The deceased was perfectly sober, he knew that there was an abundance of vacant seats inside of the car and that there was space on the platform which he might occupy without danger, and also that he might protect himself where he was by taking hold of handholds or other objects within his reach. He stood in about as dangerous a place as he could stand, without taking any precautions to protect himself against contingencies that he should have known were likely to happen.

On this state of facts the question arises whether the court should say as a matter of law that the deceased did not exercise ordinary care for his safety or that on the evidence a jury question was presented.

In the case of steam roads it is very generally held that it is negligence *per se* for a passenger to stand on a car platform where there is a seat provided inside for his accommodation. This court seems to have approved of that doctrine, although the point was not directly before it, in *Miller v. C., St. P., M. & O. R. Co.* 135 Wis. 247, 115 N. W. 794. Many of the cases laying down the general rule referred to will be found there.

The situation in reference to street cars, however, is very different from that pertaining to steam roads. The trains

of the latter run at a high rate of speed and make comparatively infrequent stops. Ordinarily every traveler is provided with a seat for his convenience and comfort. This is essential because of the long journeys that are made on these cars. In the case of street cars the public are expected and invited to ride on platforms at certain times when there are overflow crowds that cannot be given seats. It does not appear here that there was any rule of the company forbidding passengers to occupy platforms when there were vacant seats inside. It does appear that on the journey in question there were passengers at one time or another on the platform of this car during most of its journey from Chippewa Falls to Eau Claire, and that no protest was made against their being there by the conductor in charge of the car.

There are three lines of decisions bearing on this question. Some courts hold that it is negligence *per se* for a passenger to stand upon the platform of a street car while it is in motion if there are vacant seats inside. Other courts hold that it is always a question for the jury to say whether or not a passenger is guilty of negligence in riding on the platform of a street car. Still other courts hold that the inquiry should be and is, Did the passenger fail to exercise ordinary care? and that under most situations this is a question for the jury, but that cases may arise where negligence is so clearly established that it is the duty of the court to say as a matter of law that the passenger was guilty of contributory negligence. This we deem to be the correct rule of law. It might be said here that it fairly appears that inside the limits of the cities of Eau Claire and Chippewa Falls the interurban cars of the defendant perform the usual functions of urban street cars and that the accident in question occurred within the corporate limits of the city of Eau Claire.

The question of the contributory negligence of the deceased was here submitted to the jury and it found that he exercised ordinary care. This finding has received the ap-

proval of the trial court. If this court were passing upon this question as a trier of fact it might find it difficult to say that the great mass of mankind under similar circumstances would have acted as the deceased did, although there might be a difference of opinion about that proposition. The jury and the trial court were in a better position to determine that question than is this court, and they have said that men of ordinary care and prudence customarily take the chances which the deceased did in this case. We do not feel sufficiently certain that they are wrong to warrant us in disturbing that conclusion.

It is claimed that the damages, $1,800, are excessive, and they are certainly pretty high for the injury received. The deceased died from a complication of diseases not in any way traceable to the injury and not as a result of the injury itself, although there is a little expert evidence tending to show that his death might have been hastened to some extent by his fall. Error is assigned on the admission of this testimony; but in view of the fact that the court instructed the jury that no damages could be assessed for the death of the deceased, no harm was done. The deceased was at the hospital for some time and according to the evidence suffered a good deal of pain and his disability extended over quite a long period of time, and we cannot say that the damages assessed here are any more liberal than many other assessments have been where the court has refused to disturb them.

It is not necessary to discuss the assignment of error arising out of the examination of the discharged employee as an adverse witness, further than to say that should error be conceded it was entirely harmless. We do not wish to be understood as intimating that any error was committed. We simply refrain from discussing and deciding the legal question raised.

Judgment affirmed.

CONNOLLY, Respondent, vs. WAUSHARA GRANITE COMPANY, Appellant.

December 7, 1915—March 14, 1916.

Master and servant: Injury to employee in quarry: Unsafe working place: Contributory negligence.

In an action for injury to a drill man working in a granite quarry, caused by a loose piece of rock being displaced and coming down upon his foot, the evidence is *held* to support findings by the jury to the effect that defendant negligently failed to provide a safe place for plaintiff to work and that plaintiff was not guilty of contributory negligence.

APPEAL from a judgment of the circuit court for Waushara county: BYRON B. PARK, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *McCabe & Dahlman* and *John J. Wood, Jr.*, and oral argument by *Maurice W. McCabe.*

For the respondent there was a brief by *Goggins & Brazeau,* of counsel, and *E. F. Kileen,* attorney, and oral argument by *Theo. W. Brazeau.*

The following opinion was filed January 11, 1916:

TIMLIN, J. The plaintiff was an experienced drill man working in defendant's granite quarry. His regular work was drilling holes in blocks of granite detached from the ledge by some other workmen by blasting about three weeks prior to the injury. Plaintiff's drill work was for the purpose of breaking these detached stones along the line of drill holes into pieces convenient for handling or manufacture. Near the place of plaintiff's injury was a bench of stone in or adjacent to the ledge, having an upper surface of about ten by twelve feet and worked down so that its upper surface was six or eight feet from the bottom of the quarry. From the bottom of the quarry, slanting up to the top of this bench, was a filling of loose stone detached by some prior blast made before the plaintiff began work in the quarry. Plaintiff

went to the top of the bench to assist with a crowbar a fellow workman to move a stone from the bench and throw it down toward the bottom, there to be marked and drilled as said. Observing that he had left his hammer and drills where the stone they were moving might fall on them, he descended from the bench and removed them and then started back up to the bench to complete the removal of the piece of rock. On his way up he accidentally stepped on a loose piece of rock, which act shook or displaced a large loose piece of rock about three feet higher up, which came down on plaintiff's foot, injuring it. At first the injury did not appear very serious, but, apparently without fault of the plaintiff, it so progressed that amputation of the foot became necessary.

Liability is predicated upon the claim that the defendant did not furnish as safe a place in which to work as the nature of the work would permit and that the finding of the jury brings the case within the rule of *Dolphin v. Peacock M. Co.* 155 Wis. 439, 448, 144 N. W. 1112; *Rosholt v. Worden-Allen Co.* 155 Wis. 168, 144 N. W. 650; *Sparrow v. Menasha P. Co.* 154 Wis. 459, 143 N. W. 317.

There was evidence tending to show that in the usual operation of such quarries the men who blasted down from the ledge, after a blast, dislodged all the unstable overhanging stone and let them roll down toward the bottom of the quarry, and there is evidence from what happened here that this was not done or was not properly done in the instant case. It would serve no good purpose to narrate the evidence more specifically. Suffice it to say that we are convinced that on the question of the defendant's negligence and the plaintiff's contributory negligence and the amount of damages legally consequent upon the injury, there was evidence to support the verdict, and the judgment must be affirmed.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on March 14, 1916.

PUTNAM, Appellant, vs. BROWNE and another, Respondents.

December 8, 1915—March 14, 1916.

Libel: Privilege: Criticism of candidate for office: False statements: Insults: Newspaper article: Meaning: When libelous: Justification: Proof of substance of charge: Excessive publication.

1. A candidate for a public office where integrity, incorruptibility, and judicial ability are absolute essentials places his character in these respects before the people for consideration and discussion, and fair comment or criticism—even though caustic and severe—made in good faith and without malice by a newspaper is privileged; but insult, contemptuous phrase, or false and libelous statements of fact are not privileged.
2. Secs. 94—17 and 94—38, Stats. 1911,—providing a penalty for knowingly publishing any false statement intended or tending to affect a candidate at any primary or election,—do not change the principles of law with respect to privilege in a civil action for libel, but add to the penalties which may follow the publication of false and libelous statements of fact regarding candidates for public office.
3. In judging of the meaning of any given part of an alleged libelous newspaper article the whole article must be considered.
4. If a newspaper article conveys the idea that a candidate for office received and took part in the unlawful distribution of a part of a political corruption fund, or that he sold his political influence and surrendered his honest belief for money, it is libelous unless proven to be true; but if it simply conveys the idea that he received and distributed in lawful ways a part of a large political campaign fund and received money for political labor and influence exerted in lawful ways and not contrary to his honest convictions, it is not libelous.
5. A newspaper editorial which contained a thinly veiled comparison of a candidate for judicial office to Judas Iscariot was libelous as matter of law and not privileged, such comparison being a jibe, a contemptuous insult, and not fair criticism of any type.
6. In order to be a complete defense to an action for libel a justification must be as broad as the libel; but it is sufficient if the substance of the charge be proven.
7. Thus, where the alleged libelous statement was that a certain amount of money was received and disbursed by plaintiff for corrupt and unlawful political purposes, it is a sufficient justification to show that a substantial sum was so received and disbursed, though less than the amount charged.

[8. Whether the fact that a newspaper, though primarily a local county paper, had some incidental circulation outside of the county, would prevent it from successfully interposing the defense of privilege when it had honestly discussed the qualifications of candidates for office in that county, not decided.]

APPEAL from a judgment of the circuit court for Waupaca county: CHESTER A. FOWLER, Judge. *Reversed.*

Action for libel. In the spring of 1913 the plaintiff, a lawyer, was a candidate for county judge of Waupaca county and the defendant printing company published in its weekly newspaper, the Waupaca Republican-Post, an editorial partially written by the defendant *Browne,* as follows:

"Do Voters Look with Favor on Distributor of 'Slush' Money?

"The statement of campaign disbursements in the campaign of 1910 by the Connor campaign committee shows that *Giles H. Putnam,* candidate from New London for county judge, received several hundred dollars from the big Connor slush fund.

"In the records of the office of register of deeds of Fond du Lac county are the following items filed by James A. Hogan, treasurer of the Republican state committee, his temporary residence being at Fond du Lac at that time:

"On July 23, 1910, check No. 443 for $31.47 to *G. H. Putnam* for services and expenses; August 1, 1910, check No. 798, $13 for expense, *G. H. Putnam;* August 2, 1910, check No. 829, expenses to date, $16.20, *G. H. Putnam;* August 18, 1910, for organization Waupaca county, $50, to *G. H. Putnam; August 18, 1910, organization Manitowoc county, $200, to G. H. Putnam;* August 31, for organization in Waupaca county, $75, to *G. H. Putnam.*

"The campaign of 1910 was one of the most important in the history of Wisconsin or even the nation. La Follette had been doing things in the United States senate. The Wisconsin idea was fast becoming nationalized. The special interests of the country were alarmed, and after many conferences decided to make a final stand in Wisconsin against the progressive movement and defeat La Follette at all hazards. They marshaled to their sides every possible available resource and

a nation-wide conference took place. W. D. Connor, the Marshfield lumberman, who had been chairman a few years before of the Republican state central committee, and who, as such chairman, had a list of valuable names in each county in the state, was selected as their chairman and they placed in his hands $100,000 which he expended. How much more was expended by committee out of the state no one will ever know. La Follette was unable to go upon the stump and had no money to expend for a campaign. The citizenship of Wisconsin showed that it was not purchasable and that the birthright of citizenship was worth more than a mess of pottage. Loyal citizens, Democrats and Republicans, said that the battle was the people's battle, and, without hope of reward, threw themselves into the contest and La Follette and progressive principles triumphed.

"Wisconsin gave a majority to La Follette of over 100,000 at the primaries. Waupaca county did its share and stood as one of the banner counties in the state, notwithstanding the fact that *Mr. Putnam,* the candidate for county judge, received $385.67 to defeat La Follette and the principles he stood for.

"Do you think that selling one's influence for $385.67 is a good qualification for a high position like that of county judge? In days gone by, the receiving of thirty pieces of silver forever and rightfully condemned a man. Times have not so changed that receiving $385.67 for the purpose of defeating a man who was championing the people's cause ought to be a virtue or a qualification for office.

"We do not know that these sums amounting to $385.67 were all the amounts that were received by *Mr. Putnam* in the eventful campaign of 1910. Had all of the men who received parts of the Connor slush fund been proud of the part they took in that campaign, we do not imagine that they would have been so quiet about the filing of their expense account which was dug up by an ever-vigilant newspaper reporter and first published by the Milwaukee Journal December 16, 1910.

"A county judge should be a man of the highest character and integrity, with a reputation above reproach. W. M. Emmons is such a man. He was born and raised on a farm in the town of Dayton, Waupaca county, and has lived in Wau-

paca county all his lifetime with the exception of about four years. We have never heard a single word or whisper against his high character, and we believe the people will find him a faithful public servant if they elect him as their county judge."

The defendants by answer denied all malice and claimed that the article was conditionally privileged. They admitted that there was one error in the article, namely, the statement of $200 paid to *G. H. Putnam* for the organization of Manitowoc county contained in the account of the treasurer of the Republican state committee filed in the office of the register of deeds of Fond du Lac county; but they alleged that the information as to this item was obtained from the previous publication thereof in other newspapers, that the same was undenied by the plaintiff, and was honestly believed by the defendants to be true. The answer also contained an allegation that the plaintiff received some of the items of money named in the article and distributed some portion thereof, and did not disburse for legitimate campaign expenses all of such sums so received by him. This allegation was treated as a partial but not a complete defense.

The jury returned a verdict for the defendants, and the plaintiff appeals from judgment on the verdict.

For the appellant there was a brief by *Martin, Martin & Martin,* and oral argument by *P. H. Martin.*

For the respondents there was a brief by *Browne, Browne & Smith,* attorneys, and *Kreutzer, Bird, Rosenberry & Okoneski,* of counsel, and oral argument by *C. B. Bird* and *L. D. Smith.*

The following opinion was filed January 14, 1916:

WINSLOW, C. J. A number of errors in the charge of the court are alleged, but it seems to us that we can attain greater clarity by treating the case abstractly and stating the general principles applicable than by taking up the alleged errors in detail.

The occasion was one of conditional privilege. The plaintiff was a candidate for the office of county judge, a position where integrity, incorruptibility, and judicial ability are absolute essentials. By his candidacy he placed his character in these respects before the people for consideration and discussion. One voter might in good faith and without malice place before other voters fair criticism of or comment upon the plaintiff's acts in these respects without liability, but he could not make libelous statements of fact which were false any more than he could if no such candidacy existed, nor could he indulge in insult or contemptuous phrase. A local newspaper might do the same things and no more. But while the privilege is thus confined to fair comment or criticism upon facts, the comment may doubtless be caustic and severe if the facts warrant it. Such has been the position of this court in the case of criticism of public officers. *Buckstaff v. Viall,* 84 Wis. 129, 54 N. W. 111; *Williams v. Hicks P. Co.* 159 Wis. 90, 150 N. W. 183; *Leuch v. Berger,* 161 Wis. 564, 155 N. W. 148. The same rule has also been applied to publications concerning candidates. *Ingalls v. Morrissey,* 154 Wis. 632, 143 N. W. 681.

It is recognized that there is a disagreement in the authorities on the question whether false statements concerning candidates for office made without malice and in good faith are privileged. In some jurisdictions it is held that all matters, true or false, having a bearing on the fitness of a candidate may be published without liability if it be shown that they were published without malice, in good faith, and in the honest belief that the facts stated were true. *Briggs v. Garrett,* 111 Pa. St. 404, 2 Atl. 513; *Coleman v. MacLennan,* 78 Kan. 711, 98 Pac. 281, 20 L. R. A. N. S. 361. We deem the other view, however, to be supported not only by our own decisions but by the better reason and by the great weight of authority in other courts. Newell, Slander & L. (3d ed.) §§ 633–636; 25 Cyc. 402–405 and notes; *Post P. Co. v. Hallam,* 59 Fed. 530.

We do not overlook secs. 94—17 and 94—38 in ch. 650, Laws 1911 (now secs. 12.17 and 4543*v*, Stats. 1915), which provide that no person shall knowingly publish any false statement in relation to a candidate intended or tending to affect the voting at any primary or election, and also provide for the punishment of such an act criminally by fine or imprisonment or both. We do not, however, see in these provisions any purpose to change the established principles of law with respect to privilege in a civil action. One of these principles, as we have seen, is that the conditional privilege as regards a public officer or candidate for public office does not extend to false statements of fact. The statutory provisions cited seem intended to add to rather than to subtract from the penalties which may follow the publication of false and libelous statements of fact regarding candidates for public office.

It is true that in certain classes of cases the law of conditional privilege will protect one who makes an entirely false charge, as, for instance, one who communicates to an officer of the law a charge of crime against another, in good faith, believing it to be true, and acting simply from a sense of public duty. *Joseph v. Baars,* 142 Wis. 390, 125 N. W. 913. The reason for this is very plain, and it is equally apparent that it is not present in such cases as the one before us.

Now in the present case the first question for the jury was what meaning the article carried to the readers of the paper. In view of the political conditions in the state in 1910 and at the time of the publication as shown by the evidence, did this article convey the idea to the readers of the paper (1) that the plaintiff received and took part in the unlawful distribution of a part of a political corruption fund in the primary campaign of 1910, or (2) that he sold his political influence and surrendered his honest belief for money in that campaign? If it carried these ideas or either of them it was libelous unless proven to be true. If, however, it simply conveyed the idea that the plaintiff received and distributed in lawful ways a part of a large political campaign fund and

that he received money for political labor and influence exerted in lawful ways and not contrary to his honest convictions, the article was not libelous in these two respects. In judging of the meaning of any given part of the article the whole article is of course to be considered.

The propositions just referred to are really the only statements of fact in the article, but there is a comment upon them which stands upon an entirely different basis, and that is the thinly veiled comparison of the plaintiff to Judas Iscariot. This is not a statement of fact but a comment or criticism. It likens the plaintiff, not to an ordinary turncoat, but to the man who, in the estimation of the Christian world, committed the greatest crime in history by selling the life of his divine Master for money.

It requires no argument to prove that this is a jibe, a contemptuous insult, and not fair criticism of any type; hence it is not privileged. *Curtis v. Mussey,* 6 Gray, 261. Being libelous on its face, the only question to be submitted to the jury in connection with it is the question of the amount of damages. Thus the defense of conditional privilege drops entirely out of the case.

Returning now to the consideration of the questions arising with regard to the statements of fact first herein discussed, if the jury find those statements not to carry a libelous meaning they also drop out of the case, but in case the jury find that they carry the libelous meaning above referred to, the question will then arise, Are they, or is either of them, substantially true? This question, however, will only arise in case justification is properly pleaded, which it seems is not the case at present.

It is doubtless true that in order to be a complete defense a justification must be as broad as the libel, and that an allegation of the truth of a part of the facts alleged in the libel can operate only as a partial defense. In the present case the defendants are compelled to admit that the plaintiff did not in

fact receive $200 for organizing Manitowoc county and hence that he did not receive or disburse $385.67 as charged, but $185.67 at the most. Thus it is evident that they cannot plead that the entire sum named in the article was received and disbursed but only a part thereof. Ordinarily this would only be a plea in mitigation of damages, but in a case like the present it would be a plea of justification. The rule is that the substance of the charge only need be proven true. *Nehrling v. Herold Co.* 112 Wis. 558, 567, 88 N. W. 614; *Conner v. Standard P. Co.* 183 Mass. 474, 67 N. E. 596. The material substance of the statement in question (if it be held by the jury to convey a libelous meaning) is that money was received and disbursed by the plaintiff for corrupt and unlawful political purposes, not that precisely $385.67 was so received and disbursed. The quality of the act does not depend upon the amount so long as the amount is substantial and not trivial. It is really immaterial whether it was $50 or $385.67. So if it be shown by the defendants that a substantial sum was so received and disbursed, though that sum be much less than $385.67, they will have shown a justification as to the supposed libelous statement under consideration. There was testimony in the case tending to support the defendants' contention in this regard, but inasmuch as there must be a new trial of the case we forbear to comment upon it.

While there was no law in 1909 limiting the amount which could be legally spent by candidates for public office (the first law on that subject being ch. 650, Laws 1911: secs. 94—1 to 94—38, Stats. 1913), there were many ways in which money could be corruptly and unlawfully used. While men might doubtless be hired to do lawful political labor it was unlawful to buy votes, either directly or indirectly under pretense of paying for work or by the use of other subterfuges. It was, with certain exceptions, unlawful for any person to pay or agree to pay money to secure the

nomination of a state senator or assemblyman unless the person making the promise or payment was a *bona fide* resident of the district, and it was necessarily unlawful to use such moneys for such purposes if collected. Sec. 4543*b*, Stats. 1898. Whether there were other unlawful and corrupt uses to which money could be put in 1909 it is unnecessary now to consider. Similar considerations apply to the supposed charge that the plaintiff sold his political influence for money. The question of the amount of money is entirely immaterial if the fact itself be shown.

We do not deem it necessary to review the charge of the court at length. It contained at least two vital errors which render a new trial necessary, viz. (1) it did not inform the jury that the comparison to Judas was libelous as matter of law and not privileged, and (2) it told the jury in substance that if the statements were made in good faith and in honest belief in their truth they were privileged whether true or false.

The question was somewhat debated in the argument of the case whether the fact that the newspaper in question, though primarily a local county paper, had some circulation outside of Waupaca county would prevent the successful interposition of the defense of privilege under the rule as to excessive publication announced in *Buckstaff v. Hicks*, 94 Wis. 34, 68 N. W. 403.

The view taken of the case renders it unnecessary to decide this question, but we deem it not improper to remark that the rule as stated in the *Buckstaff Case* seems unquestionably extreme. Carried to its logical result it means that a distinctively county newspaper with some incidental outside circulation is protected by no privilege when it honestly discusses the qualifications of candidates for county offices, and this would mean practically that there could be no newspaper discussion of the subject because it is believed that all local papers of any influence have more or less outside circulation. While we do not reach the question in this case, we feel jus-

tified in saying that we do not consider it foreclosed by the *Buckstaff Case.* See on this subject *Coleman v. MacLennan,* 78 Kan. 711, 98 Pac. 281; 25 Cyc. 387; *Hatch v. Lane,* 105 Mass. 394; *Arnold v. Ingram,* 151 Wis. 438, 138 N. W. 111.

By the Court.—Judgment reversed, and action remanded for a new trial.

SIEBECKER, J., took no part.

A motion for a rehearing was denied, with $25 costs, on March 14, 1916.

HAMLEY, Appellant, vs. TILL, Respondent.

February 1—March 14, 1916.

Vendor and purchaser of land: Validity of contract: Insufficient description: Bills and notes: Consideration: Unauthorized corporate stock: Fraud: Holder in due course.

1. A contract to convey an undivided one acre out of a designated tract containing a specified number of acres may be valid; but where the tract out of which the acre is to be sold is not capable of identification from the instrument evidencing the sale, nothing passes for want of description.
2. Notes given for preferred stock in a corporation which had no authority to issue such stock, and notes given for so-called certificate contracts of the corporation, which purported to convey an undivided interest in lands in a foreign country but which in fact conveyed no enforceable rights and were merely illusory and fraudulent, were without consideration and there could be no recovery thereon as between the payee and the maker.
3. The defense of fraud is available against an interstate commerce contract as well as against other contracts.
4. In an action by an indorsee of the notes above mentioned, evidence showing, among other things, that plaintiff knew of the fraudulent character of the consideration for the notes before he purchased them, is *held* to sustain findings by the jury to the effect that he did not acquire them in the usual course of business or for value or in good faith.

APPEAL from a judgment of the circuit court for St. Croix county: JAMES O'NEILL, Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *McNally & Doar.*

For the respondent there was a brief by *James R. Hickey,* attorney, and *Spencer Haven,* of counsel, and oral argument by *C. G. Kinney.*

TIMLIN, J. The action is by the indorsee of four promissory notes executed by respondent to the Honduras Development Company for $200 each, two of them bearing date October 14, 1911, and two December 27, 1911. Briefly, the defenses are that the payee was an unlicensed foreign corporation doing business in this state, and also that it procured the notes by fraudulent representation of one Phillips, and the plaintiff was not a holder in good faith or in due course. The case was tried before the court and jury, and the latter found by special verdict that the plaintiff did not acquire said notes in the usual course of business or for value or in good faith; but, although fraud by the Honduras Development Company was averred and that averment supported by some evidence, there was no question concerning this fraud submitted to the jury. The court did decide that the evidence showed there was no consideration for the two notes given for preferred stock which the Honduras Company had no authority to issue, and that the other two notes were taken in Wisconsin by an unlicensed foreign corporation contrary to the provisions of sec. 1770*b*, Stats., and were void. The jury then found the plaintiff not a purchaser in due course or in good faith. A description of this corporation and its operations and the documents it was engaged in selling to the public would, upon the uncontradicted evidence, warrant the court below in going much farther than he did in passing upon this phase of the case. The Honduras Development Company, ostensibly a corporation organized under

the laws of Arizona with a common capital stock of $100,000 divided into 1,000 shares of $100 each, had an office in St. Paul, Minnesota, where it was engaged in selling to the public through the agency of its general manager, one Phillips, preferred stock, of which it had none, and so-called certificate contracts which conveyed no rights enforceable at law or in equity and were merely illusory and fraudulent. It does not appear that it had any other business. Its articles of incorporation included almost every known form of human activity from constructing and operating railroads and carrying on banking to trading in real estate and personal property. These articles were executed and acknowledged in St. Paul, Minnesota, on August 21, 1911, and five days later filed in the office of the county recorder of Maricopa county, in the territory of Arizona, and in the office of the territorial auditor of that territory. It does not appear that any of the incorporators resided within, or indeed was ever within, the territory of Arizona. We cannot judicially notice the laws of Arizona, but must presume they are like ours. These laws must possess great potency and long range if they can confer corporate status on nonresidents of Arizona. Creation of a corporation is a legislative act and state statutes have no extraterritorial operation. The Honduras Company had a branch office at St. Paul, Minnesota, but was not licensed to carry on business in that state or in the state of Wisconsin. Its sale of preferred stock need not be further described than by saying it had no preferred stock. It issued for $150, payable in instalments and forfeitable for failure to pay, what it called a certificate contract, purporting on its face to entitle the purchaser to "an undivided one-acre interest in and to a two-thousand-acre tract of land lying and being in the department of Atlantida in the republic of Honduras, one of the Central American states, a more particular and accurate description of which said two-thousand-acre tract of land will be contained in the plantation certificate furnished this contract

owner when said contract shall have been performed by paying the purchase price designated in the application for said contract." The Honduras Company agreed to plant and care for the land for a period of five years from and after the first planting by it and thereafter up to such time as the land represented by the contracts or certificates so sold would be conveyed to a company organized by the certificate owners. The plantation certificate owners would, after the expiration of the first five years following the first planting and every five-year period thereafter, receive notice from the secretary of the Honduras Company, whereupon they might vote by mail with that secretary for or against incorporation. If a majority of the plantation holders were opposed to incorporation they would have another chance to vote on this subject in the same way at the end of five more years. When they could agree as determined in this mode the Honduras Company would convey the land or some land to a corporation which these plantation certificate holders might organize. In the meantime the Honduras Company was to attend to the land, care for it, and cultivate it for a percentage of the crop output, the remainder of such output, if any, to be distributed by the Honduras Company among the contract holders or plantation certificate holders, or both.

Cases might be found which support a deed or contract to convey an undivided one acre or several acres out of a designated tract containing a specified number of acres because the court considered this a crude way of expressing the intention to convey such undivided interest in said described tract as would be represented by a fraction having the number of acres stated to be sold for its numerator and the whole number of acres in the designated and described tract as its denominator. But where the tract out of which the acre is to be sold is not capable of identification from the instrument evidencing the sale, nothing passes for want of description. Here the Honduras Company might as well have sold one acre of land in the department of Atlantida in the republic of Honduras be-

cause their description identifies the land no closer than this. It is true a better description is promised in the plantation certificate which is to follow, provided, etc., but the purchaser has no way of ascertaining whether the description covers the same land he has purchased; besides there is no limit on the number of acres the Honduras Company might sell out of a given tract in this way. If the description were good, after the first sale the Honduras Company, if it owned the land in the department mentioned, became a tenant in common with the first purchaser, after a second sale a tenant in common with the first and second purchasers, and so on, always retaining an undivided interest in the land until it had sold 2,000 of these certificates. This it might never do. So the purchasers of these certificates under the guardianship and tutelage of the Honduras Company could never incorporate without the consent of the latter. In addition to this, there was evidence that the Honduras Company never possessed more than 300 acres of land, and whether that was mountain or marsh, timber or plain, rural or urban, we do not know. The contract in question secured to the purchaser no land of any definite kind or description, provided only that the land was in the department of Atlantida in the republic of Honduras. These certificate contracts are on the face and by their setting of promises ingeniously fraudulent.

It is argued that the notes in question were taken in a transaction of interstate commerce and therefore, notwithstanding that the Honduras Company had no license to carry on business either in Minnesota or Wisconsin, the provisions of sec. 1770*b* annulling its contracts are not applicable because of the exception found by this court excluding interstate commerce transactions from the provisions of sec. 1770*b*. But fraud is a defense available against an interstate commerce contract as well as against other contracts.

The appellant knew of the business in which the Honduras Company was engaged; he knew that the consideration for these notes was either unauthorized and fraudulent pre-

ferred stock or the illusory and equally fraudulent certificate contract, because he knew of no other business the Honduras Company had and he had been a holder in that company of some of this so-called preferred stock and exchanged this stock with the Honduras Company for the notes in question. True he testifies that he paid also part cash for these notes. But the testimony was not very satisfactory on this point. He apparently had some controversy with the Honduras Company regarding his preferred stock before he bought the notes in suit. What this controversy was is not fully disclosed, but enough was shown to warrant the jury in finding that the appellant was endeavoring to get the Honduras Company to take back the so-called preferred stock which he had purchased and that that company took it back with some money for the notes in suit. The jury was also warranted in believing, although he testified both ways on the subject, that the appellant had heard rumors prior to his purchase of the notes in question that Mr. Phillips, who was the chief man in the Honduras Company and who made or directed the transactions between that company and the appellant and between that company and the respondent, had some state prison experience prior to the launching of the Honduras Development Company. It may be that the appellant was a victim of the Honduras Development Company and believed that he was not and consequently that the respondent was not, that he believed in the validity of his preferred stock and in the legitimacy of the business in which the Honduras Company was engaged. There are many such simple, credulous souls, no doubt, but from the evidence in this case it was for the jury to say whether the plaintiff belonged in that class or whether he had sufficient notice and knowledge to put him, as a man of ordinary intelligence, on inquiry before he purchased the notes of the respondent.

By the Court.—Judgment affirmed.

WARD, Respondent, vs. BABCOCK and others, Commissioners, Appellants.

February 22—March 14, 1916.

Drainage districts: Report of commissioners: Order requiring modification: Appeal: Establishment of district, how far conclusive: Assessment of benefits: Remonstrances: Hearing: Evidence: Instructions to jury.

1. Under sec. 1379—20, Stats., an appeal may be taken from an order of the circuit court requiring drainage commissioners to modify their report, before such modification is actually made or the report as modified is confirmed.
2. The establishment of a drainage district by the court pursuant to sec. 1379—17, Stats. 1911 (sec. 1379—14, Stats. 1915), conclusively establishes that all the lands included will be benefited and that the total benefits will exceed the total damages and cost of construction.
3. Upon the trial, pursuant to sec. 1379—20, Stats., of an issue as to benefits, arising on the remonstrance of a landowner, it was error to exclude testimony offered by the commissioners tending to explain the difference between the assessments for construction and the assessments of benefits, and to refuse to give a requested instruction to the effect that the assessment of benefits upon which the jury was required to pass constituted the basis upon which the assessment for construction should be apportioned and in no manner indicated the amount which the remonstrant might be required to pay toward the cost of construction.
4. In reviewing an assessment of benefits the jury should have before it, as nearly as possible, all the data upon which the commissioners acted.
5. Benefits in such cases, like values, may be proven not only by opinion but by relevant instances; and if other tracts of land bear substantially the same relation to the improvement as does the land of the remonstrant, the benefits assessed to such other tracts and acquiesced in by the owners thereof would have some probative force.
6. An instruction, in such a case, that the jury were not to consider any general benefits caused by the proposed ditches and drains, but only such actual special benefits, if any, as were caused to the lands of the remonstrant, and that general benefits are such as the owner of the land enjoys in common with the public at large,

and special benefits are such direct and actual benefits as are received exclusively by the land in question, was inappropriate and erroneous as tending to suggest to the jury that the lands of the remonstrant must have received special benefits over and above other lands in the drainage district.

7. If underdrainage of the remonstrant's land is necessary to the obtaining of beneficial results from the drainage scheme, evidence as to the cost of such underdrainage is relevant and material upon the question of benefits; and it was error in such a case to instruct the jury that in assessing benefits they should not consider any increase in market value which would be caused by drains so put in by the remonstrant.

APPEAL from an order of the circuit court for Walworth county: E. B. BELDEN, Circuit Judge. *Reversed.*

The appeal is from an order of the circuit court based on the verdict of a jury and modifying a report of the drainage commissioners with reference to benefits and damages accruing to the lands in said drainage district of the respondent, *Daniel Ward,* and ordering that the commissioners take further proceedings in that behalf, as provided by statute.

For the appellants there were briefs by *Whitehead & Matheson,* attorneys, and *Thompson, Myers & Kearney,* of counsel, and oral argument by *A. E. Matheson* and *Peter J. Myers.*

For the respondent there was a brief by *Tullar & Lockney,* attorneys, and *Henry Lockney* and *Jay W. Page,* of counsel, and oral argument by *Henry Lockney.*

PER CURIAM. The report of the commissioners under sec. 1379—18, Stats., was attacked by respondent only in respect to the assessment of his damages, which was considered too low, and in respect to the assessment of his benefits, which he considered too high. The circuit court was authorized to "impanel a jury and take its verdict upon the trial of such issues." Sub. 2, sec. 1379—31*m:* "The court shall have an equitable supervision over all matters pertaining to drainage district proceedings with like force and effect as if the said proceeding were a case in equity." All other issues, if any, arising

on any remonstrance are to be tried by the court. Sec. 1379—20. The same section provides that where there is no remonstrance, or where the finding is in favor of the validity of the proceedings, or after the report shall have been modified to conform to the findings, the court shall confirm the report, and the order of confirmation shall be final and conclusive unless within thirty days an appeal be taken to the supreme court. The language of the statute in this particular is as follows: "The proposed assessments [shall be] approved and confirmed, unless within thirty days an appeal be taken to the supreme court."

Here the first question for the consideration of this court arises. The respondent contends that this appeal cannot be taken until after approval and confirmation of the modified report. The statute is somewhat obscure, but the more accurate interpretation appears to be that approval and confirmation of the modified report do not precede an appeal to the supreme court, but that such approval and confirmation will follow the modification of the report by the commissioners unless within thirty days an appeal be taken to the supreme court, and in that case there shall be no approval or confirmation until after the appeal is disposed of. This seems the more reasonable interpretation, because no good purpose could be subserved by requiring the report, before it is finally decided on appeal, to be rewritten and then compelling the losing party to obtain an order of confirmation of said report so rewritten before the appeal to the supreme court from the final command to modify the same given by the circuit court in the special proceeding consisting of the trial of the remonstrances. This construction is confirmed by sec. 1379—20*m*, specifying when the confirmation should be made by the circuit court and enumerating certain past things, among them a remonstrance heard and determined and no appeal taken therefrom. This appeal, taken after the trial last mentioned and the entry of the final order on such trial and before the commis-

sioners rewrote their report to conform to the modification there ordered and before said rewritten report was approved or confirmed, must be held to have been taken in time.

The appellants complain of a mistrial of the issues framed pursuant to sec. 1379—20. They point out that the assessment district contains 4,040.82 acres, the number of parcels of land assessed for benefits is 176, of which the respondent, *Ward,* owned eight. The total estimated cost of construction is $61,476.99; the total benefits assessed to the several parcels of land constituting the drainage district are $142,802.36. The benefits assessed to the eight tracts of *Mr. Ward* by the commissioners were $7,438.76. The cost of construction is only about forty-two per cent. of the benefits assessed. This assessment of benefits on the lands of respondent was reduced by the verdict from $7,438.76 to $1,337, and forty-two per cent. of this latter sum would make respondent's share of the cost of construction, assuming the cost equals the estimate, $561.54, as against $3,124.25 which would follow the finding of the commissioners. This was quite an extraordinary cut in the respondent's assessment of benefits and must require an increase in the amounts which the other property owners will respectively be required to pay to defray the cost of the work.

Keeping in mind that a public purpose is essential to support all taxation and that in addition to this a benefit at least equal to the amount of his tax must accrue to the owner of property before he can be charged with a special assessment in these proceedings, we can better understand the nature of the statute which requires that the whole cost of construction and the total benefits be found, and which also provides that in case the cost exceeds these benefits no drainage district shall be established. The establishment of a drainage district properly made by the court conclusively establishes that all the lands included will be benefited and that the aggregate of such benefits will exceed the damages and cost of construc-

tion. It is not contemplated that assessments should be collected up to the amount of the benefits derived, except where absolutely necessary to complete the public improvement. The order creating the district is final and conclusive on the propositions that the proposed drainage district is a public improvement, that the public welfare and health will be advanced by its creation, and that it is established under the law as a drainage district. In the establishment of this district and in the ascertainment of the cost of construction and the amount of benefits the circuit court exercised an equitable jurisdiction over the proceeding. The statute provides that the damages to the land caused by the construction of the improvement and the benefits flowing from such construction are questions which may be tried before a jury. But after the district is established, the ascertainment of damages and benefits must be on the hypothesis that the total benefits exceed the total damages and cost of construction.

The learned circuit judge excluded testimony offered by the commissioners tending to explain the difference between the assessments for construction and the assessments of benefits, and refused an instruction requested to the effect that the assessment of benefits upon which the jury was required to pass constituted the basis upon which the assessment for cost of construction should be apportioned and in no manner indicated the amount which the respondent might be required to pay toward such cost of construction. Instead of that he instructed the jury as follows: "These questions must be determined entirely apart from and uninfluenced by the matter of cost of construction of the proposed drains and ditches, which is not for consideration in this case whatever."

We think these rulings were erroneous and probably accounted for the remarkable difference in the estimate of benefits by the commissioners and by the jurors. In reviewing the judgment of the commissioners as to the amount of benefits, the jury should have before it as near as possible all the

data upon which the commissioners acted. An expensive, well-constructed system of drainage, backed by ample resources for its construction and upkeep, might confer greater benefits on adjacent lands than one not so complete. Besides, benefits in such cases, like values, may be proven not only by opinion but by relevant instances. If other tracts of land bore the same or substantially the same relation to this public improvement as did the lands of the respondent, the benefits assessed to the former lands and acquiesced in by the owners thereof would have some probative force on the inquiry. In condemnation proceedings, when we seek to ascertain the market value of land taken, proof of the price at which other similar tracts were sold within a reasonable time prior to the taking is considered competent.

We are also of opinion that the court erred in its instructions relative to general benefits. There was no such question in controversy. The inquiry was, How much were these lands benefited by the construction of the drains in question? To say to the jury that they were not to consider any general benefits caused by the proposed ditches and drains, but only to take into consideration and assess upon the lands of the remonstrant such actual special benefits, if any, as they might find from the evidence were caused to the lands of remonstrant, had a tendency to suggest to the jury that the lands in question must have received special benefits over and above other lands in the drainage district. To say to the jury that general benefits are such benefits as the owner of the land in question enjoys in common with the public at large and special benefits are such direct and actual benefits as are received exclusively by the land in question and not by the public or lands generally, is inappropriate to the question before the jury. The public or lands generally at an earlier stage of the proceeding were excluded from consideration, and to interpose this question and lay it before the jury at the trial had a tendency to mislead.

We are of the opinion that the court erred in rejecting the evidence offered by the commissioners as to the cost of underdraining *Ward's* lands to connect with the completed drains of the district and in giving the instructions on this subject. The court instructed the jury:

"Whether *Mr. Ward* shall connect with the proposed drainage system by his own underdrainage is entirely for him to say. . . . There has been some evidence of a plan of internal drainage which might be used by remonstrant in draining or improving his lands. . . . But in assessing benefits you should not take into consideration any increase in market value, if any, which would be caused by any drains so put in by remonstrant, for that would be the result of the expenditure of his own money. . . ."

The question of the cost to remonstrant in adopting a system of internal drainage by underdraining his land in connection with the general drains of the district is material in ascertaining what the amount of the benefits, if any, would be to remonstrant. If underdrainage is necessary to obtain beneficial results from the drainage scheme, then the cost thereof is a relevant and material item in ascertaining whether the landowner has any benefits above his damage. Such cost is an item of expense to the landowner to secure the beneficial result from the drainage system and has evidential value in determining the question of benefits. The evidence was improperly excluded from the case.

The court gave the following instruction:

"Benefits are determined by the difference in fair market value of the lands in question June 25, 1913, without the proposed drainage system, and with it completed, without regard to cost of construction of the general system, cost to the remonstrant of connecting therewith, if he chooses so to do, or damages, if any, resulting to remonstrant by reason of the construction of the proposed drainage system in and upon his lands."

Generally speaking, the error of the circuit court seems to

have been in regarding the distinction between general and special benefits, sometimes highly proper, as applicable to the questions before the jury on this special proceeding, and in considering that benefits could only be estimated or arrived at by the very narrow and technical process of considering only evidence bearing directly upon the point, when he should have thrown open the case for the widest investigation based on all data available to the commissioners in fixing the amount of benefits.

The order is reversed, and the cause remanded for further proceedings according to law. Costs are allowed to appellants.

JENSEN, Respondent, vs. MILLER, Appellant.

February 22—March 14, 1916.

Money had and received: Payment to agent on land contract: Failure of owner to convey: Liability of agent.

1. Defendant, as agent for the owner of a farm, contracted to sell it to plaintiff, who paid $100 down. Defendant's principal was unable to convey title, but defendant refused upon demand to repay the $100 to plaintiff and afterwards paid one half thereof to his principal and retained the remainder. *Held*, that an action against defendant to recover the $100 is not based upon the contract between plaintiff and defendant's principal, but is an action for money had and received, arising from defendant's implied agreement to return the part of the purchase price paid if the farm was not conveyed as agreed.
2. Defendant having asserted in such action that the money belonged to his principal, but on the trial having admitted that the latter had no right to it as against plaintiff, could thereafter assert only such claim as he had to the money and, having none, a judgment in favor of plaintiff was proper.
3. An agent who has money to which his principal has no right is personally liable to the party from whom it is wrongfully withheld.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Action to recover $100 paid defendant as part purchase price of a farm. Defendant acted as agent for one Hansche in the sale of the latter's farm to the plaintiff. A written contract of sale was entered into between plaintiff and Hansche which recited that $100 of the purchase price was paid. Defendant concedes that through no fault of plaintiff Hansche was unable to convey the title bargained for. After Hansche's default and while the money paid was still in the hands of defendant a demand for its repayment to plaintiff was made. Defendant refused to pay back the money, though there was no provision for its forfeiture in case sale was not made. Subsequently he paid one half thereof to Hansche and retained the remainder. Upon these facts found, and not disputed, the court entered judgment for plaintiff and the defendant appealed.

For the appellant there was a brief by *H. G. Smieding,* attorney, and *Fulton Thompson,* of counsel, and oral argument by *Mr. Smieding.*

For the respondent the cause was submitted on the brief of *Simmons & Walker.*

VINJE, J. The chief contention of defendant is that the action cannot be maintained against him because he was the agent of a disclosed principal; that this is an action upon a contract made between plaintiff and Hansche, and since in such a contract defendant did not bind himself as surety or otherwise, the action must be brought against the principal and not the agent, citing *McCurdy v. Rogers,* 21 Wis. 197; *Charboneau v. Henni,* 24 Wis. 250; *West v. Wells,* 54 Wis. 525, 11 N. W. 677; and numerous decisions from other jurisdictions. The claim is further made that if money is paid to a known agent for the use of his principal an action for money had and received cannot be maintained against the agent even though he has not turned it over to his principal, citing 2 Corp. Jur. p. 821, § 495; 1 Addison, Contracts (Morgan's ed.) sec. 87; 1 Parsons, Contracts, 79, and nu-

merous cases. The present action is one for money had and received. It is not based upon any provision contained in the contract entered into between plaintiff and Hansche. It arises from the implied agreement to return the part of the purchase price paid if conveyance is not made as agreed upon. The person in possession of the money has without consideration been enriched at the expense of plaintiff, hence the latter's right to recover it back. *Siggins v. C. & N. W. R. Co.* 153 Wis. 122, 140 N. W. 1128. The cases cited to the first claim therefore do not apply, since the action is not founded upon covenants made in a contract with the principal. As to the second claim there is a division of authorities. Practically all agree that if a color or claim of right on the part of the principal to the money is made the action cannot be maintained against the agent. It is held the principal is entitled to assert his right in an action against him, and the agent making the claim of right on the part of his principal is entitled to have the latter substituted as a party. But this is not such a case. And even if it were, under our practice permitting all parties in interest to be made parties, the action should not be dismissed as to the agent, but the principal should be made a party defendant and the case should then proceed against the two. Here the defendant on the trial admitted that his principal had no right to this money because he could not convey as agreed. Such admission, though not foreclosing the principal on the question in another action, binds the defendant in this case and limits him to assert only such claim as he may have for the money. Confessedly he has none. He says, so far as he is concerned it belongs to his principal, and then admits that the latter has no right to it as against plaintiff. Thus while he came rightfully in possession of it, he wrongfully withholds it from plaintiff as found by the trial court, because upon the facts admitted by him he should have paid the money to plaintiff when he demanded it. The case is within the principle announced in *Blizzard v.*

Brown, 152 Wis. 160, 139 N. W. 737, to the effect that an agent who has money to which his principal has no right is personally liable to the party from whom it is wrongfully withheld. A collection of authorities on the subject will there be found.

By the Court.—Judgment affirmed.

KLAUS, Respondent, vs. KLAUS, Appellant.

February 22—March 14, 1916.

Divorce: Cruel and inhuman treatment: Evidence: Sufficiency: Pleading: Particularity: Variance: Amendment to conform to proof: Final division of property.

1. Findings as to the cruel and inhuman treatment of a wife by her husband, upon which a judgment of divorce was based, are *held* to be sustained by the evidence.
2. Where the conduct complained of constitutes a continued course of ill-treatment, particularity in the allegations as to time and place becomes unimportant and generally impracticable and should not be required.
3. Where a good cause of action within the jurisdiction of the court was established on the trial and all controversies in respect thereto were fully and fairly tried without objection, a variance between the allegations of the complaint and the evidence is not material, and the complaint may be amended to correspond with the facts proved or, on appeal, may be deemed to have been so amended if necessary to sustain the judgment.
4. A final division of property in a divorce action, restoring to the wife, subject to a charge of $800 in favor of the husband, real estate of the value of $6,000 which she had owned before marriage and the parties had lived upon but which had been conveyed by her to the husband, who paid off a mortgage and made improvements; awarding to the wife the household furniture except furnishings for one bedroom; and vesting title to the remainder of the property, valued at $3,156, in the husband,—is *held* to have been just and proper.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This is an action for divorce on the ground of cruel and inhuman treatment.

The plaintiff and defendant were married about the month of January, 1891, and from the time of their marriage to the commencement of this action they have continuously resided in the city of Racine. The issue of the marriage is one daughter, Josephine, who is now twenty-four years of age and able to care for herself. By a former marriage the plaintiff had three children, two boys and a girl. These children lived with the parties and contributed all of their earnings toward the maintenance of the home up to the time they became twenty-two years of age. Thereafter the two sons paid $5 per week for board and the daughter paid $3.50 per week for board while residing at the home of the parties. At the time of marriage the plaintiff owned about two acres of land in the city of Racine upon which was situated a brick veneer house. At this time there was a $600 mortgage on this property and the plaintiff was otherwise indebted in the sum of $100. The defendant paid this $700. During the year 1905, Douglas avenue, the street plaintiff's property was located on, was paved and an assessment levied against her property. The defendant refused to pay this assessment unless he was given a lien on the land, so the plaintiff gave him a quitclaim deed of the premises.

The complaint alleges generally cruel and inhuman treatment, and specifies that about ten years ago the defendant assaulted the plaintiff and knocked her against a building in the yard, causing the plaintiff to become unconscious; that the defendant left their home various times for several days at a time, and that on the 25th day of January, 1915, he deserted plaintiff and refused to return to their home; that defendant on numerous occasions criticised the plaintiff in a cruel manner for procuring improper food for the family, and on one occasion took some of the food from their home and exhibited it to the workmen at the place where he was

employed for the purpose of humiliating and degrading the plaintiff. The plaintiff further alleges that she maintained upon the land adjoining the house a large market garden which produced sufficient income to provide the family with groceries, and that the defendant is the owner of personal property of the value of $4,000 besides what remains of the real estate he obtained from the plaintiff, of the value of $6,000.

The court found that the plaintiff was entitled to a divorce from the bonds of matrimony on the ground that soon after the marriage defendant began to practice toward the plaintiff a course of cruel and inhuman treatment without cause, justification, or excuse. The acts of cruelty found by the court were that on numerous occasions defendant struck and kicked the plaintiff, used vile and opprobrious epithets toward her, wrongfully accused her of procuring improper food for the family and of being improvident in not saving money, and that defendant otherwise caused her great humiliation; that on the 25th day of January, 1915, the defendant left his home and refuses to return; that all of said conduct of defendant has been largely without fault on the part of the plaintiff and has resulted in seriously affecting her health and renders it unsafe for her to longer live with the defendant as his wife. The court also found that the value of the real estate owned by the defendant was $6,000 and the personal property, mortgages, money, and other securities of the value of $3,156, making a total of $9,156, beside the household furniture.

The judgment dissolves the bonds of matrimony between the parties and provides:

"That as and for a final division of all the property of the parties to this action and in lieu of all court costs, permanent alimony, and further allowance of attorney's fees, there be and hereby is awarded to the plaintiff, *Gertrude Klaus,* free and clear from all claims and demands of the defendant, *Clemens Klaus,* except as hereinafter stated, the following

described real and personal property, to wit:" [description of real estate], "and the title to said premises be and the same hereby is absolutely vested in fee simple in the plaintiff, *Gertrude Klaus,* subject, however, to the payment by said plaintiff, *Gertrude Klaus,* to the defendant, *Clemens Klaus,* of the sum of $800" [specifications of payment]; "that in addition to the real estate above awarded to the plaintiff there is hereby awarded to the plaintiff all of the household furniture of the parties to this action, including the piano and stoves, excepting only one bedroom set, with bedding, together with sufficient chairs to properly furnish a bedroom, is hereby awarded to the defendant."

It is further provided in the judgment "that all of the rest, residue, and remainder of the property of the parties to this action be and the same is vested in the defendant, *Clemens Klaus,* free and clear of all claims and demands of the plaintiff, *Gertrude Klaus.*" From such judgment this appeal is taken.

For the appellant there was a brief by *Heck & Krenzke,* and oral argument by *Charles Krenzke.*

For the respondent there was a brief by *Thompson, Myers & Kearney,* and oral argument by *Peter J. Myers.*

SIEBECKER, J. The appellant assails the findings of the court upon the ground that the evidence does not sustain the court's findings of fact. We are satisfied upon the record that the evidence abundantly supports the facts found. The argument is made that the evidence wholly fails to show any specific times and occasions when defendant was guilty of treating plaintiff in a cruel and inhuman manner. The court's conclusion that the defendant ill-treated plaintiff throughout the period of their married life and that such treatment was cruel is not against the preponderance of the evidence and hence cannot be disturbed.

The point is made that the allegations and the proof are too general and indefinite to constitute a legal cause of action. There were no objections made at the trial upon the ground

that the pleadings were insufficient nor was objection to the evidence offered. It also appears that defendant was fully prepared to defend the action and that the action has been fully and fairly tried. An inspection of the complaint shows that it alleges a good cause of action under the statutes. In addition to the evidence showing a general and continuous course of defendant's ill-treatment of plaintiff, it also appears that he, on one occasion about two years ago, before he left their home in January, 1915, assaulted, beat, and injured her. It is claimed that no such specific allegation is made in the complaint and hence the alleged cause of action must fail. Where the conduct complained of constitutes a continued course of ill-treatment, particularity of time and place becomes unimportant and generally impracticable and should not be required. *Smedley v. Smedley,* 30 Ala. 714; *Cole v. Cole,* 23 Iowa, 433. The objection that the evidence and allegations of the complaint are at variance is of no merit. This is aptly answered in the opinion of the court in *Bieri v. Fonger,* 139 Wis. 150, 120 N. W. 862, ". . . if a good cause of action is established upon a trial and all controversies in reference to the matter are fully tried without objection and such cause is within the jurisdiction of the court and might have been but was not fully pleaded or was not the particular cause of action the pleader had in mind at the outset, though the facts are fairly stated, the complaint may be amended to correspond with the cause proved either before or after verdict, saving the substantial rights of the adverse party or, if need be to sustain the judgment, it will, on appeal, be deemed amended in accordance with the judgment." See, also, *Matthews v. Baraboo,* 39 Wis. 674; *Monk v. Hurlburt,* 151 Wis. 41, 138 N. W. 59; *Hopkins v. C., M. & St. P. R. Co.* 128 Wis. 403, 107 N. W. 330; *Kleimenhagen v. Dixon,* 122 Wis. 526, 100 N. W. 826; *Aschermann v. Philip Best B. Co.* 45 Wis. 262; ch. 219, Laws 1915, and sec. 2669*a*, Stats. 1915.

An examination of the facts of the case convinces us that the

trial court properly restored to plaintiff the part of the real estate which defendant had received from the plaintiff and that the final division and distribution of defendant's estate between the parties is just and proper in the light of all the facts and circumstances of the case.

By the Court.—The judgment appealed from is affirmed. The respondent to recover costs on this appeal.

ANDREYSZAK, Appellant, vs. WERTHMANN, Respondent.

February 22—March 14, 1916.

Master and servant: Injury in operating sausage machine: Contributory negligence: Special verdict: Inconsistency: Unsupported findings.

1. While engaged in feeding meat into the hopper of a sausage machine plaintiff voluntarily omitted to use a stamper which defendant had provided for pressing the meat down into the hopper, but instead used his hand for that purpose and in so doing his fingers were caught in the cutting part of the machine and injured. The jury found that the omission to use the stamper proximately contributed to the injury and that plaintiff was guilty of contributory negligence. *Held*, that a judgment for defendant was proper, notwithstanding a further finding that plaintiff slipped on the floor at the time of the accident, it being clear from the evidence that had he been using the stamper he would not have been injured even though he slipped.
2. Other findings by the jury as to negligence of the defendant causing the injury, which had no support in the evidence, did not, even if inconsistent with the findings on which the judgment is based, entitle plaintiff to judgment or to a new trial.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This action was brought to recover for personal injuries sustained by plaintiff in consequence of his left hand becom-

ing caught in a revolving auger-like conveyor of a sausage machine. The jury returned the following verdict:

"(1) Did the defendant at the time of the plaintiff's injury fail to exercise ordinary care with respect to furnishing light at the place of plaintiff's employment? *A.* Yes.

"(2) If you answer the first question 'Yes,' then answer this question: Was such failure a proximate cause of the plaintiff's injury? *A.* Yes.

"(3) Did the plaintiff slip on said floor at the time of the accident? *A.* Yes.

"(4) If you answer question No. 3 'Yes,' then answer this question: Was the condition of the floor such as to render the place of employment as safe as the nature of the employment would reasonably permit? *A.* Yes.

"(5) If you answer question No. 4 'No,' then was such condition a proximate cause of plaintiff's injury? *A.* ——.

"(6) Did the plaintiff's hand enter the grinding machine in consequence of his slipping upon the floor? *A.* Yes.

"(7) Did the defendant to the knowledge of the plaintiff provide a stamper to be used in forcing meat into the machine? *A.* Yes.

"(8) Did the defendant instruct the plaintiff to use the stamper in the operation of the machine in question? *A.* No.

"(9) Did the plaintiff voluntarily omit to use the stamper? *A.* Yes.

"(10) Did the omission to use the stamper proximately contribute to the plaintiff's injury? *A.* Yes.

"(11) Did the defendant adopt and use in and about the manner of feeding the machine, at the time and place in question, a method that was reasonably adequate to render the use of such machine safe? *A.* No.

"(12) If you answer the above question 'No,' then was such failure to adopt and use such method a proximate cause of plaintiff's injury? *A.* Yes.

"(13) Was the plaintiff guilty of any want of ordinary care which proximately contributed to his injury? *A.* Yes.

"(14) What sum will reasonably compensate plaintiff for the injuries which he received? *A.* $2,250."

Plaintiff moved to change the answers to several questions

of the special verdict, for judgment on the verdict as so changed, and for judgment notwithstanding the verdict, and that the verdict be set aside and a new trial granted. All these motions were denied and the defendant's motion for judgment dismissing the complaint was granted and judgment entered accordingly, from which this appeal was taken.

For the appellant there were briefs by *Tibbs, Foster & Schroeder,* attorneys, and *H. B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.*

For the respondent the cause was submitted on the brief of *Lorenz & Lorenz,* attorneys, and *James D. Shaw,* of counsel.

KERWIN, J. The special verdict is set out in the statement of facts. The fourth, seventh, ninth, tenth, and thirteenth findings of the jury support the judgment. The thirteenth finding, to the effect that the plaintiff was guilty of want of ordinary care which proximately contributed to his injury, alone disposes of the case and justified affirmance of the judgment.

Counsel for appellant, however, insists (1) that these findings are not supported by the evidence; and (2) that they are inconsistent with other findings, hence in any event there should be a new trial. The fourth, seventh, ninth, tenth, and thirteenth findings are well supported by the evidence.

The plaintiff at the time of injury was engaged in feeding a sausage machine by taking meat from a vessel with his right hand and feeding it into the hopper of the machine, and at times it became necessary to press the meat down in the hopper. The jury found that the defendant, to the knowledge of the plaintiff, provided a stamper to be used in forcing the meat into the hopper of the machine, and that the plaintiff voluntarily omitted to use the stamper, but on the contrary put the meat into the hopper with his right hand and pressed it down with his left, and while in the act of pressing it down with his left hand his fingers were caught in the screw or cutting part of the machine and injured.

It is undisputed that the plaintiff had his left hand in the hopper pressing down the meat when the injury occurred, but he testified that he slipped on the greasy floor and that the slipping caused the injury.

Counsel for appellant relies upon findings 1, 2, 3, 11, and 12, and insists that these findings at least entitled the appellant to a new trial because they are inconsistent with other findings in favor of the defendant. We do not think this contention is tenable. The appellant claims that he slipped because of the greasy condition of the floor and that this caused his hand to come in contact with the cutting part of the machine, and that the failure of the defendant to furnish light, which was the proximate cause of the injury and the plaintiff's slipping on the floor at the time of the accident, as found by the jury under the first, second, and third findings, was sufficient to entitle the plaintiff to judgment or at least to a new trial. We think this contention is untenable. Under the fourth finding the jury found that the condition of the floor was such as to render the place of employment as safe as the nature of the employment would reasonably permit, and there is no evidence sufficient to support the findings that insufficiency of light in any manner contributed to the injury. Nor is there any evidence to support the eleventh finding of the jury, to the effect that the defendant failed to adopt and use in and about the manner of feeding the machine, at the time and place in question, a method that was reasonably adequate to render the use of such machine safe. There is no evidence whatever that any other method could have been adopted in or about the feeding of the machine to render it more safe. The first, second, eleventh, and twelfth findings being unsupported by the evidence, it follows that upon the record and undisputed evidence the defendant was entitled to judgment.

It is undisputed that at the time of the injury the plaintiff was pressing the meat down into the hopper with his left hand and was not using the stamper provided by defendant for

that purpose. It is clear also from the evidence that had he been using the stamper he would not have been injured even though he slipped, as he testified and as the jury found. So that his contributory negligence is established by the undisputed evidence, and this alone would be sufficient to warrant affirmance of the judgment below.

By the Court.—Judgment affirmed.

HARDER, Appellant, vs. REINHARDT, Respondent.

February 25—March 14, 1916.

Bills and notes: Delivery for special purpose: Evidence: Contemporaneous oral agreement: Recitals: Burden of proof.

1. Under sec. 1675—16, Stats., in an action by the payee upon a promissory note, the maker was properly permitted to show a contemporaneous oral agreement pursuant to which the note was delivered conditionally and for a special purpose only and was not to be paid unless the amount thereof was collected by the maker in a certain suit to foreclose a mechanic's lien. Such evidence did not tend to vary or contradict the written contract.
2. The words "being money loaned me October 21, 1912," contained in such note, constituted a recital or statement of the consideration and placed upon the maker the burden of proving the real nature of the transaction.

APPEAL from a judgment of the circuit court for Milwaukee county: CHESTER A. FOWLER, Judge. *Affirmed.*

This action was brought by the plaintiff, *Harder,* against the defendant, *Reinhardt,* upon a promissory note, of which the following is a copy:

"$800. Milwaukee, Wis., April 14, 1913.

"For value received six (6) months after date I promise to pay to *Frank J. Harder,* or order, at Milwaukee, Wisconsin, eight hundred dollars ($800), with interest at the rate of —— per cent. per annum until paid, being money loaned me October 21, 1912.

"Witness: Oscar Bing. C. H. REINHARDT."

The answer admitted the making of the note, but alleged

facts tending to show that it was delivered for a special purpose only and not to be paid by the defendant except under the conditions hereinafter set out. The facts were these: One Pettigrew, a son-in-law of Daniel W. Bloor, entered into a contract with the defendant for the construction of a building. The property, when the building was completed and its cost ascertained, was to be deeded by Pettigrew to Bloor. The plaintiff was a real-estate man, had transacted business for Bloor, and acted for Pettigrew and Bloor in making payments as the same became due under the contract, the payments to be made out of funds to be furnished by Bloor. One payment of $700 had been made by plaintiff pursuant to the arrangement, and the defendant had demanded a second payment from plaintiff as the agent of Bloor. Plaintiff, having no funds in his hands belonging to Bloor, gave to the defendant his personal check on October 21, 1912, for $800, writing across the lower left-hand corner thereof the words "Pettigrew account," and charged the same to Bloor's account in his ledger. Shortly after the giving of the check and before any funds belonging to Bloor had come into plaintiff's hands, and on the 8th day of November, 1912, Bloor died. Thereafter plaintiff and defendant sought to collect the several amounts due them. It was proposed that the plaintiff and defendant should file claims against the estate of the deceased Bloor in county court. But after some discussion and counsel with attorneys, it is claimed by the defendant that it was agreed he should file a claim for a mechanic's lien against the property and include therein the $800 advanced to him by the plaintiff, and that the note in question was given upon the understanding that it was not to be paid unless the $800 was collected in the lien suit. The plaintiff claimed the advancement was in fact a loan and that it was so agreed between the parties at the time it was made. The jury found against the plaintiff's contention. The plaintiff does not attack the verdict as unsupported by the evidence and the verdict stands as a verity in the case.

The jury by its verdict found (1) that it was understood between the parties at the time plaintiff gave the $800 check to defendant that plaintiff was advancing the money on the Bloor contract and that plaintiff was to look to Bloor and not to defendant for reimbursement; (2) that it was agreed between the parties that the defendant, for the benefit of the plaintiff, should include the $800 claim of plaintiff against Bloor's estate in his mechanic's lien foreclosure suit brought to enforce against the premises his claim for money due for constructing the building for Bloor; (3) that the note in suit was given for the purpose of using it to further recovery of the $800, together with defendant's claim of $1,201, in the mechanic's lien foreclosure suit, and with the understanding between the parties that the note would not be used against the defendant nor the amount thereof demanded from him unless the plaintiff should recover the full $2,001 in the foreclosure suit. Upon the verdict judgment was rendered for the defendant, and plaintiff appeals.

The cause was submitted for the appellant on the brief of *Adolph Kanneberg,* and for the respondent on that of *Hannaford & Brown.*

ROSENBERRY, J. Plaintiff objected to any evidence of the facts found by the special verdict, on the ground that it was incompetent, irrelevant, and immaterial and in conflict with the contract; that it was not in writing; and that it tended to contradict the written contract of the parties. The objection made at the beginning of the trial was renewed throughout its course and the question preserved by appropriate motions and exceptions, and the sole question to be determined on this appeal is whether or not the evidence of the oral agreement made between the parties at the time of the making and delivery of the note was properly received by the trial court.

Sec. 1675—16, Stats., reads as follows:

"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the pur-

pose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; *and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument.* But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

In the case of *Paulson v. Boyd,* 137 Wis. 241, 118 N. W. 841, approving *Hodge v. Smith,* 130 Wis. 326, 110 N. W. 192, the facts in the *Paulson Case* being in many respects similar to those in the instant case, this court stated the law in the following language:

"It is familiar law, notwithstanding some conflict in the authorities, that a person may manually deliver an instrument, though it be in the form of commercial paper, to another, on its face containing a binding obligation *in præsenti* of such person to such other, with a contemporaneous verbal agreement that it shall not take effect until the happening of some specified event, and that the paper, as between the parties, will have no validity as a binding contract till the condition shall have been satisfied; and that proof of such condition does not violate the rule that a written instrument cannot be varied by a contemporaneous parol agreement; that such evidence only goes to show that the instrument never had vitality as a contract."

The trial court was clearly right in admitting the evidence concerning the making of the contemporaneous oral contract and within the rule above set forth. The evidence admitted by the trial court did not tend to vary or contradict the written contract, but tended to establish the fact that the note was delivered conditionally and for a special purpose only.

The words "being money loaned me October 21, 1912,"

contained in the note, constituted a recital or statement of the consideration for which the note purported to be given and placed the burden upon the defendant of proving the true nature of the transaction, which burden the defendant assumed and met with satisfactory competent evidence.

For a case distinguishing between recitals and contractual elements see *Conant v. Estate of Kimball,* 95 Wis. 550, 70 N. W. 74; that a recital is not a part of a deed, *Clark v. Post,* 113 N. Y. 17, 25, 20 N. E. 573; that a statement of the consideration for a contract may be explained or contradicted, see *Crowe v. Colbeth,* 63 Wis. 643, 24 N. W. 478; *Halvorsen v. Halvorsen,* 120 Wis. 52, 97 N. W. 494; *Mueller v. Cook,* 126 Wis. 504, 105 N. W. 1054; *Kipp v. Laun,* 146 Wis. 591, 131 N. W. 418; 4 Wigmore, Evidence, § 2433. The evidence was properly received and the judgment should be affirmed.

By the Court.—Judgment affirmed.

PETERSON, Appellant, vs. INDEPENDENT ORDER OF FORESTERS, Respondent.

February 23—March 14, 1916.

Insurance: Mutual benefit societies: False statements in application: Avoiding policy: Remedies: When action may be brought.

1. Representations by the assured in his application for membership in a fraternal benefit association, to the effect that he had suffered no injury and had no medical attendance within five years, were necessarily material to the risk, and substantial falsity therein avoided the contract of insurance, where the application and benefit certificate made such statements warranties and provided that the contract should be void if they were untrue.
2. A requirement in the constitution and by-laws of a fraternal benefit association, which were made a part of the contract of insurance, that remedies within the order shall be exhausted before action on death claims can be brought in the courts, is a valid contract provision.

3. Sec. 4202*m*, Stats.,—relating to representations or warranties contained in applications for insurance policies,—does not apply to fraternal or mutual benefit societies. Under sub. 9, sec. 1956, Stats., express reference must be made to such societies in a law of that nature in order to make it applicable to them.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is an action to recover a death benefit of $1,000 under the terms of a mortuary benefit certificate issued by the defendant, a Canadian fraternal association, upon the life of Peter E. Peterson, deceased, payable to the plaintiff, who was his widow.

The certificate was issued October 27, 1911, upon an application which stated, in reply to questions, that the applicant had not been treated "for diseases . . . or injuries" during the preceding five years and that he had suffered no injury. A further question in the application blank asking for the name and address of every physician who had attended or prescribed for the applicant within five years was left unanswered. The application warranted the truth of the representations made therein, made the application, as well as the constitution and by-laws of the association, part of the contract of insurance, and provided for avoidance of the contract in case of false answers in the application. The benefit certificate also contained provisions to the same effect. Peterson died October 3, 1912, of carcinoma of the stomach and liver. The proof of death filed by the plaintiff was accompanied by a statement of the attending physician in which it was stated, among other things, that said physician attended the deceased professionally about February, 1910, for about seven or eight weeks for "contusion of the chest, laceration of leg." This entire statement was adopted by the claimant and made part of her claim.

The constitution and by-laws of the order require the presentation of death claims to the chief ranger, and if rejected by him provision is made for appeals first to the executive council and from that body to the supreme court of

the order. It is further provided that the beneficiary shall exhaust all remedies within the order by appeal before he can resort to the courts.

In the present case the plaintiff submitted proofs of death to the chief ranger, who rejected the claim, whereupon the plaintiff immediately brought this action. The trial court directed a verdict for the defendant (1) because the deceased made a material and false representation in his application, and (2) because the plaintiff had not exhausted her remedy by appeal within the order. The plaintiff appeals from judgment on the verdict.

The cause was submitted for the appellant on the brief of *Rubin, Fawcett & Dutcher,* attorneys, and *Paul R. Newcomb,* of counsel, and for the respondent on that of *Nohl & Nohl.*

WINSLOW, C. J. This judgment must be affirmed, because (1) the representations made by the assured in his application to the effect that he had suffered no injury and had no medical attendance within five years were not only warranties but they were necessarily material to the risk; they are shown by the proof of death to have been not merely nominally but substantially false, and this fact avoids the policy; (2) the provision that remedies within the order shall be exhausted before action can be brought in the courts is a valid contract provision. *McGowan v. Supreme Court I. O. F.* 104 Wis. 173, 80 N. W. 603; *Loeffler v. Modern Woodmen,* 100 Wis. 79, 75 N. W. 1012; 2 Bacon, Ben. Soc. (3d ed.) § 450*a* and cases cited; (3) sec. 4202*m,* Stats., relating to representations or warranties contained in applications for insurance policies, does not apply to the present case, because under sub. 9, sec. 1956, Stats., express reference must be made to fraternal benefit societies in a law of this nature in order to make the law applicable to them.

By the Court.—Judgment affirmed.

KURYER PUBLISHING COMPANY, Appellant, vs. MESSMER and others, Respondents.

February 23—March 14, 1916.

Appealable order: Denial of adverse examination: Religious societies: Church discipline: Forbidding reading of newspaper.

1. An order of the circuit court practically denying all examination of an adverse party under sec. 4096, Stats., is appealable.
2. The issuance, publication, and circulation by bishops of the Roman Catholic church of a pastoral letter warning the members of that church against a certain newspaper and forbidding the keeping or reading of it by those who would continue good church members, but not requiring the breach of any contract nor the withholding of any advertising patronage, was within the scope of church discipline and violated no legal right of the publisher of said newspaper. Any resulting pecuniary loss to such publisher is therefore *damnum absque injuria*.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

The appeal is from an order denying an adverse examination of the defendant *Messmer* under sec. 4096, Stats. The action was brought to recover damages on account of the publication of a certain pastoral letter issued, circulated, and published by the defendants as bishops of the Roman Catholic church in the dioceses of Milwaukee, Green Bay, Marquette, Superior, and La Crosse. The complaint sets out at great length the publication and circulation of this letter by the defendants and alleges that the defendants entered into a conspiracy for the purpose of injuring the plaintiff in its business as publisher of a newspaper, and that the said pastoral letter was maliciously published and circulated for such purpose. A perpetual injunction was also prayed for restraining any other acts in furtherance of the alleged conspiracy, and commanding the defendant bishops to withdraw and rescind the pastoral letter.

The complaint alleges that the defendants caused said letter to be sent to the clergy of the Catholic church broadcast

and ordered the same read from the pulpit wherever Polish Catholics worshiped and that it be strictly enforced. It also appears from the complaint that the plaintiff is the publisher of a certain daily paper known as the Kuryer Polski, published in the Polish language, which has a large circulation among Polish Catholics. The following is the portion of the pastoral letter specially complained of:

"Obedient to this apostolic command we hereby solemnly condemn the said Kuryer Polski, published in the city of Milwaukee, and the Dziennik Narodowy, published in Chicago, as publications greatly injurious to Catholic faith and discipline and falling under the rules and prohibitions of the Roman Index. Therefore, should any Catholic still dare in face of this solemn warning to read or keep or subscribe to or write for the said Kuryer Polski and Dziennik Narodowy, as long as these papers continue their present course and attitude in ecclesiastical affairs, a matter to be decided by ourselves, let them know that they commit a grievous sin before God and the Church. Should any such Catholic dare to go to confession and communion without confessing or telling to the priest that they still read or keep or subscribe to the papers mentioned, let them understand that by such confession and communion they commit a horrible sacrilege. This solemn warning will also hold good in case that the aforementioned papers should in future be conducted under changed names though still in the same anti-Catholic spirit."

The said letter is set forth at length as part of the complaint.

The order appealed from in effect enjoins and restrains the plaintiff from examining the defendant on any matter pertaining to or bearing upon the so-called pastoral letter set out in the complaint, or upon the reasons for promulgating the same or the intention and purpose of the defendants as to any instructions given by them to priests with reference to the manner in which the said letter was to be enforced, or as to the effect upon any Catholic who should read, write for, or keep said Kuryer Polski in his home or place of business.

The court below held that in reference to the pastoral letter the subject matter was of purely ecclesiastical cognizance, and that the reasons, motives, and purposes of the defendants in issuing the same, and the question as to whether the Kuryer Polski had offended against the discipline or doctrine of the Catholic church, was an ecclesiastical question, and that the civil courts had no rights or jurisdiction to examine in regard to the matter.

For the appellant there were briefs by *Cochems & Wolfe*, and oral argument by *H. O. Wolfe* and *H. F. Cochems*.

In support of a motion to dismiss the appeal there was a brief by *O'Connor & Graebner*, attorneys for respondent *Messmer*, *Paul D. Carpenter*, attorney for respondent *Schinner*, *John F. Doherty*, attorney for respondent *Schwebach*, and *Martin, Martin & Martin*, of counsel.

For the respondents, upon the merits of the case, there was a brief signed by *J. L. O'Connor*, attorney for respondent *Messmer*, *Paul D. Carpenter*, attorney for respondent *Schinner*, *John F. Doherty*, attorney for respondent *Schwebach*, and *P. H. Martin*, of counsel; and the cause was argued orally by *Mr. Martin*, *Mr. Carpenter*, and *Mr. O'Connor*.

PER CURIAM. Point is made that the order before us is not appealable, hence this appeal should be dismissed.

(1) The order appealed from practically denied all examination, hence under repeated decisions of this court is appealable.

(2) Notwithstanding much prolixity in the complaint the real gravamen of the action is an attempt to hold the defendants liable for the pastoral letter. This letter does not require the breach of any contract nor the withholding of any advertising patronage, but warns against the newspaper in question and forbids those who would continue good church members to keep it or read it. The only result of their refusal is to lose their standing as members of the church. This

was within the scope of church discipline, and if incidental pecuniary loss accrues to the plaintiff it is *damnum absque injuria*. By maintaining their church discipline and declaring the paper improper to be read by church members they have violated no legal right of the plaintiff. It might be otherwise if they attempted to forbid social or business intercourse with the plaintiff in respect to trade or commerce or something which ordinarily could not affect the faith of the members. Recommending to the members what they should read under pain of expulsion from the church communion is within the jurisdiction of every pastor and prelate of every church which professes to leave such matters to the determination of its clergymen.

The order appealed from is affirmed.

VINJE, J., dissents.

WITT, Appellant, vs. VOIGT, Respondent.

February 23—March 14, 1916.

Animals: Evidence as to habits: Sales: Warranty: Breach: Offer of evidence: Sufficiency.

1. If it be established that an animal of mature age did not, up to a certain time, have a certain habit, that fact tends to cast doubt upon evidence that shortly thereafter it did have such habit.
2. Thus, in an action for breach of a warranty by defendant that a horse sold by him was kind and gentle and would not kick or bite, there being evidence for plaintiff that the horse kicked, bit, and was vicious after the sale, it was error to exclude testimony offered by defendant to show that prior to the sale the horse was not vicious and did not kick or bite.
3. A statement by defendant's counsel in such case to the effect that he had witnesses in court who were familiar with the horse before it was sold and who would testify that it did not kick, bite, or act viciously while defendant had it, whereupon the court informed him that such evidence would not be received, was a sufficient offer of the evidence under the circumstances.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action begun in the civil court to recover damages for breach of warranty in the sale of a horse. Upon a general verdict for plaintiff in the sum of $152.07 the civil court entered judgment and the defendant appealed. The complaint alleged that the "defendant warranted and represented to the plaintiff that said horse was kind and gentle and would not kick or bite, and that the same was a suitable horse for said plaintiff for use in his said business as a painter." It is further alleged "that at the time of said sale and warranty said horse was not kind and gentle, but on the contrary was vicious, and the horse was not one that would not kick, but on the contrary was addicted to kicking, and restive and ungovernable whenever the plaintiff attempted to place a harness upon said horse." The plaintiff showed by his own testimony and that of several others that the warranty was made, and showed by like testimony that the horse kicked, bit, and was vicious. Defendant sought to show by five witnesses who would testify to their familiarity with the horse preceding the sale that this horse was not a vicious horse, a kicker, or biter, but the testimony was excluded by the trial court on the ground that if there was a warranty as alleged in the complaint and supported by proof, then it was immaterial what the horse had been before sale, because the warranty related to the future and there was the evidence of eye-witnesses to the fact that it did kick and bite and act viciously in the possession of plaintiff; and if there was no warranty no cause of action remained. Because of the exclusion of such evidence the circuit court ordered a new trial, and plaintiff appealed.

William J. Morgan, for the appellant.

For the respondent the cause was submitted on the brief of *Lenicheck, Robinson, Fairchild & Boesel.*

VINJE, J. The gist of plaintiff's argument is that since the jury found a warranty and found a breach thereof it is

immaterial what had been the habits of the horse in the past as to biting and kicking; that since it was established that the horse did kick and bite while in plaintiff's possession, proof of the fact that it did not do so while defendant had it would not relieve him of liability on his warranty that the horse would not kick and bite. This argument is sound assuming that it is admitted or established beyond controversy that the horse did, without any fault on plaintiff's part, kick and bite while he had it. Animals, however, like human beings, have habits or propensities more or less fixed and enduring. Therefore, if it be established that an animal of mature age up to a certain time does not have a certain habit, such fact tends to cast doubt upon evidence that shortly thereafter it did have such habit. In fact the only way to rebut evidence that the horse kicked and bit upon certain occasions while in plaintiff's possession, by others than eye-witnesses to those occasions, would be by evidence of the horse's previous good conduct in that respect. The probative force of such evidence would be for the jury. It might be of such character as to wholly discredit the evidence of those who testified they saw it bite and kick, or it might satisfy the jury that if the horse did bite and kick the fault lay with the plaintiff in the manner in which he handled it. In either case no recovery could be had. The defendant should have been permitted to put in this defense and the circuit court properly granted a new trial because of its exclusion. *Kavanaugh v. Wausau,* 120 Wis. 611, 98 N. W. 550.

Some point is made that a proper offer of evidence was not tendered by the defendant. A careful perusal of the colloquy between court and counsel establishes the fact that defendant's counsel said in substance that he had witnesses in court who were familiar with the horse before it was sold and who would testify that it did not kick, bite, or act viciously while defendant had it, whereupon the court informed him

that such evidence would not be received. This was a sufficient offer under the circumstances.

This appeal was taken before the amendment of 1915 declaring orders for new trials upon appeals from the civil court nonappealable.

By the Court.—Order affirmed.

TIMME, Appellant, vs. KOPMEIER, Respondent.

February 23—March 14, 1916.

Corporations: Directors: Contract to repurchase stock of employee: Validity: Public policy: Appeal: Findings of fact.

1. The directors of a private corporation are considered in the law as standing in a fiduciary relation toward the stockholders, and a contract by such a director, dealing with matters of corporate interest, which is antagonistic to the free and impartial discharge of his official duties is void on the grounds of public policy unless all of the stockholders with full knowledge assent thereto.
2. Thus, a contract between a director of a private corporation and a purchaser of stock who became the manager of the company, by which it was agreed that if said manager's employment with the company should be discontinued for any reason he would sell his stock and the director would repurchase the same and pay full par value therefor plus *pro rata* share of accumulated profits, was void unless made with the knowledge and consent of all the other stockholders.
3. In an action by the manager upon such contract, a finding by the trial court that a stockholder, wife of one of the other directors of the corporation, did not know of or consent to or ratify such contract, is *held* to be sustained by the evidence.

[4. Whether the contract in such a case would be void if it provided only for an option on the part of the manager to demand that the director purchase his stock in the event of the discontinuance of his service with the corporation, is not decided.]

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This is an action brought to recover the value of 100 shares of stock, on a contract of repurchase of the stock, bought by plaintiff from the Kopmeier Motor Car Company.

The Kopmeier Motor Car Company was incorporated under the laws of the state of Wisconsin in January, 1909, with an authorized capitalization of $50,000. On October 15, 1909, the articles of incorporation were amended, and as amended authorized an increase of the capital stock from $50,000 to $100,000. Certificates of stock were issued to *John H. Kopmeier,* Norman J. Kopmeier, Waldemar S. J. Kopmeier, and Meta Kopmeier, wife of Waldemar. Norman J. Kopmeier surrendered a portion of his stock in November, 1910. There were three directors of the corporation at this time: *John H.,* Waldemar S. J., and Norman J. Kopmeier. The plaintiff entered the employ of the Kopmeier Motor Car Company about October 1, 1909, as manager, and very shortly after this date he expressed a desire to purchase some stock in the corporation. At a meeting of the directors and *Mr. Timme* in November, 1910, it was agreed that the corporation should sell plaintiff 100 shares of stock at the par value thereof, namely, $10,000. He was also made a director. At the same time and as a part of the transaction plaintiff and defendant entered into the following contract:

"This agreement, made and entered into this 5th day of December, 1910, between *A. F. Timme,* of the city of Milwaukee, Milwaukee county, Wisconsin, party of the first part, and *John H. Kopmeier,* of the same place, party of the second part, witnesseth:

"Whereas, the party of the first part is now in the employ as manager, from month to month, of Kopmeier Motor Car Co., a corporation organized and existing under and by virtue of the laws of the state of Wisconsin, and has, on or about the 1st day of November, 1910, purchased from said company one hundred (100) shares of the capital stock thereof, for the price of one hundred dollars ($100) per share, for the purpose of increasing the capital of said company; and

"Whereas, the party of the second part is a stockholder of said company and desirous of increasing the capital of said

company to the amount of stock purchased by the party of the first part,

"Now, therefore, the parties hereto agree as follows:

"First. In consideration of the purchase and sale by said company to the party of the first part of said stock, and in consideration of one dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, party of the first part does hereby agree to and with the party of the second part that if, at any time while said party of the first part shall remain in the employ of said company, he should desire to sell said stock, option is hereby given to the party of the second part to purchase the same and to pay to the party of the first part therefor the full face or par value of said stock plus *pro rata* share of accumulated profits.

"Second. The party of the first part hereby agrees to and with the party of the second part that if his employment with said company is discontinued, either by mutual agreement of the said company and the party of the first part, or by the death of the party of the first part, or by the act of either said party of the first part or said company, or by operation of law, or for any reason whatsoever, the party of the first part shall sell to, and the party of the second part shall purchase, all of said stock and pay therefor the full face or par value thereof plus *pro rata* share of accumulated profits of said company.

"Third. It is mutually agreed, by and between the parties hereto, that all of the terms, covenants, and conditions of this contract shall inure and bind the respective heirs, executors, and administrators of the respective parties.

"In witness whereof the parties hereto have hereunto set their respective hands and seals in duplicate at the city of Milwaukee, Milwaukee county, Wisconsin, the day and year first above written.

"Witnessed by
"John T. Zilisch.
"W. J. Kopmeier."

A. F. TIMME.
JOHN H. KOPMEIER.

At the time this contract was made and executed the defendant was a director of the company and continued to hold this office up to the time this action was commenced. In August, 1912, plaintiff resigned from his position with the Kopmeier Motor Car Company and demanded of defendant

that he repurchase the stock in accordance with the above agreement. Defendant has refused to repurchase the stock as provided in the contract.

The trial court found that Meta Kopmeier, wife of Waldemar Kopmeier, and a stockholder, knew nothing of this transaction and that she did not ratify it, and declared the agreement void. Judgment was entered dismissing plaintiff's complaint, and from such judgment this appeal is taken.

Lynn S. Pease, for the appellant.

Henry J. Killilea, for the respondent.

SIEBECKER, J. The trial court found that Meta Kopmeier had no notice or knowledge of the making of the contract between plaintiff and defendant for the repurchase of the stock by defendant from plaintiff and that she at no time consented thereto or ratified it. We have examined the evidence and find that plaintiff's evidence and that of Meta Kopmeier is in sharp conflict on the point as to whether or not she had knowledge of the contract between plaintiff and defendant. It is contended that the facts and circumstances show that Mrs. Kopmeier tacitly consented and acquiesced in having her husband represent her interests as a stockholder at corporate meetings and in the transaction of its business. If such consent and acquiescence were not positively refuted by other evidence in the case we would be disposed to accede to this claim. But Meta Kopmeier testifies positively that she had no information of the transaction and this contract; that although she made diligent effort to ascertain about the affairs of the company from her husband and others she wholly failed to get the requested information; that she never assented to the contract, and that none of the stockholders and officers were authorized to represent and act for her in the matter. Although the facts and circumstances might permit of an inference in conflict with these positive declarations of Mrs. Kopmeier, we cannot say that the trial court's finding on this point is against the clear preponderance of

the evidence. We are of the opinion that this finding of fact cannot be disturbed by the court. This state of facts on this point distinguishes this case from the case of *Jones v. Williams,* 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, relied on by appellant. In that case the court found that a contract of repurchase of stock executed by one who was a stockholder and director was not the personal contract of such director but the contract of the corporation.

The principal controversy in this case arises on the question of the validity of the contract. The trial court filed an opinion in writing giving a full review of the cases before him and a full statement of the grounds for his decision. The court held that the provision of the contract whereby plaintiff and defendant agreed that in the event that plaintiff's "employment with said company is discontinued," either by mutual agreement or by plaintiff's death, *"or by the act of either said party of the first part or said company,"* or by operation of law *or for any other reason,* then plaintiff shall sell and defendant shall purchase " 'all of [plaintiff's] said stock and pay therefor the full face or par value thereof plus *pro rata* share of accumulated profits of said company,' is contrary to public policy and renders the agreement illegal and unenforceable, unless made with the knowledge and consent of all the stockholders of the corporation." The court declares this result must follow though it appears as fact in the case that the contract between plaintiff and defendant was made in good faith and that neither party had any intent of securing any secret or special benefit therefrom to the prejudice or disadvantage of the other stockholders.

Directors of a corporation occupy a position of trust and confidence and are considered in the law as standing in a fiduciary relation toward the stockholders and as trustees for them. The directors of a corporation are not permitted to use their position of trust and confidence to further their private interests, nor to become parties to contracts concerning corporate affairs intrusted to their management which con-

flict with a free and impartial discharge of their duties toward the stockholders. Any participation by them in contracts dealing with matters of corporate interest which is antagonistic to their free and impartial discharge of official duties is denounced by the law, unless all of the stockholders with full knowledge assent thereto. This doctrine is declared in *West v. Camden,* 135 U. S. 507, 10 Sup. Ct. 838, to be applicable "to the directors of a private corporation, charged with duties of a fiduciary character to private parties, on the view that it is public policy to secure fidelity in the discharge of such duties. (Citing.) We think this principle is equally applicable on the ground of public policy, although there was not to be any direct private gain to the defendant; for . . . it was the right of the other stockholders . . . 'to have the defendant's judgment, as an officer of the company, exercised with a sole regard to the interests of the company.'" These principles are recognized and applied in *Sauerhering v. Rueping,* 137 Wis. 407, 119 N. W. 184. Under the facts of the instant case the defendant became interested in purchasing plaintiff's stock whenever any of the contingencies specified in the contract happened. The defendant as director had a voice in determining whether or not plaintiff was to continue in the management of the corporate business and whether or not plaintiff's management was for the general interest of the corporation and its stockholders. Obviously his duties as director and his private interest under the contract to repurchase plaintiff's stock upon the conditions stated were antagonistic and his private interests might oblige him to act contrary to his duties toward the other stockholders. Under such circumstances such contracts are held void on the grounds of public policy unless all of the stockholders assent thereto. The transactions showing how plaintiff came to be employed and put into office by the corporation and his purchase of the stock and the making of the contract for resale thereof to defendant are closely inter-

woven and show that the plaintiff, the corporation, and the defendant were thereby mutually induced to make these arrangements by which plaintiff became interested as stockholder and officer. The case of *Wilbur v. Stoepel,* 82 Mich. 344, 46 N. W. 724, involved a contract like the one here, with two directors on the one part, without the assent of all the stockholders. The court in speaking of the antagonistic relation of such directors as contractors and corporate officers declares:

"Their natural desire and inclination would be to continue the plaintiff as manager, although it were against the interest of the other stockholders, . . . but for the agreement which might render them liable for the payment of a large sum if they failed to retain him. Nor is such contract made valid by the good faith of the parties to it. Its effect upon stockholders who are not parties to it, or do not consent to it, is the same in the one case as in the other. The law therefore wisely condemns and prohibits all such contracts."

Of other cases cited to our attention the following recognize the same doctrine and apply it to contracts of this character under varying circumstances: *Guernsey v. Cook,* 120 Mass. 501; *Withers v. Edmonds,* 26 Tex. Civ. App. 189, 62 S. W. 795; *Noel v. Drake,* 28 Kan. 265; *Sims v. Petaluma G. L. Co.* 131 Cal. 656, 63 Pac. 1011; *Singers-Bigger v. Young,* 166 Fed. 82. Whether or not a contract between the parties to this action which provided only for an option on the part of *Timme* to demand a repurchase of the stock by defendant in the event of his discontinuance in the service of the corporation would be condemned by this rule of public policy, is not necessarily involved here and we express no opinion on that point. The case of *Bonta v. Gridley,* 77 App. Div. 33, 78 N. Y. Supp. 961, is in conflict with the foregoing authorities, as are some *arguendo* observations in other cases, but we are persuaded that the better rule is as held in the *Wilbur* and other cases above cited.

By the Court.—The judgment appealed from is affirmed.

MORGAN, Respondent, vs. BUDLONG and another, Appellants.

February 23—March 14, 1916.

Negligence: Defective walk on land adjacent to highway: Use by public with consent of owners: Injury: Liability: Dedication: Pleading.

1. A complaint showing that plaintiff was injured by reason of a defect in a dilapidated and dangerous sidewalk maintained by defendants upon their own land adjacent to a highway, over which the public, including plaintiff, traveled with the consent if not by invitation of the defendants, is *held*, on demurrer, to state a cause of action against the defendants.
2. Allegations in such complaint that defendants built the sidewalk on their own land for the benefit of the public and that the public generally used such walk do not show a dedication of a public way over the land and acceptance of such dedication by the public.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

The action is for damages for personal injuries received by plaintiff.

The allegations of the amended complaint, so far as material, show that the defendants are owners of property in the town of Wauwatosa abutting on Grand avenue, a public highway; that prior to November 29, 1913, the defendants built a sidewalk upon their property "to be used by persons passing in and along from said Grand avenue over and upon the property of said defendants;" that the sidewalk was used extensively by the public with the consent of the defendants; that on November 29, 1913, and prior thereto said sidewalk was out of repair; that it contained, among other things, holes and loose boards and was unsuitable and unsafe for public travel or use; that on November 29, 1913, plaintiff while passing over said sidewalk stepped into a hole in said sidewalk and was injured; that said defect had existed for a long time prior to said date to defendants' knowledge.

There is no allegation in the complaint that the sidewalk was insufficient or defective when originally built. The contention is it became decayed and dilapidated by wear and use. It was admitted on the argument here that the sidewalk was not in the public highway, but along the land of the defendants adjacent to said highway.

The complaint was demurred to for want of facts sufficient to constitute a cause of action. The demurrer was overruled with leave to answer. This appeal is from the order overruling the demurrer.

For the appellants there was a brief by *Lines, Spooner, Ellis & Quarles,* and a supplemental brief by *Lines, Spooner, Ellis & Quarles,* attorneys, and *Willet M. Spooner,* of counsel; and the cause was argued orally by *Leo Mann.*

For the respondent there was a brief by *Lehr & Kiefer,* attorneys, and *J. Elmer Lehr,* of counsel, and oral argument by *J. Elmer Lehr.*

KERWIN, J. An examination of the amended complaint demurred to shows that the walk was built on the land of defendants and not in the public highway. And while it is alleged that the walk was much used by the public, there is no allegation of acceptance of any dedication to the public, nor are any facts pleaded which show that the town became chargeable with the duty of keeping the sidewalk in question in repair or accepting it as a public walk. If it were alleged that the sidewalk in question was constructed within the limits of a public highway and accepted by the public as a part of such highway, a different question would be presented. Giving the allegations of the complaint the most favorable construction they will bear in support of the claim of appellants they merely show that the defendants built the sidewalk on their own land for the benefit of the public, and that the public generally used such walk in traveling over it. These allegations fall far short of showing dedication of a public

way by a landowner over his land and acceptance of such dedication by the public.

The allegations of the complaint show quite clearly that the defendants maintained an unsafe and dangerous walk upon their premises over which the public, including the plaintiff, were permitted to travel with the consent if not by invitation of the defendants. The instant case is controlled by *Brinilson v. C. & N. W. R. Co.* 144 Wis. 614, 129 N. W. 664, and other cases similar in principle to the *Brinilson Case.*

By the Court.—The order is affirmed.

ROHLEDER, by guardian *ad litem,* Respondent, vs. WRIGHT, Appellant.

February 24—March 14, 1916.

Evidence: Examination of adverse party before trial: Statute construed: "Party:" "Agent:" Guardian ad litem *of infant.*

1. The guardian *ad litem* of an infant party is not subject to an examination under sec. 4096, Stats. 1915, at the instance of the adverse party. While technically a party to the action, such guardian is not "the party" nor is he an "agent" of the infant, within the meaning of that section; and the fact that he is also the father and general guardian of the infant does not bring him within the statute.
2. The word "party" in said sec. 4096 means the real party in interest.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action for malpractice, brought by an infant about three years of age. The father of the infant was appointed guardian *ad litem,* and the defendant sought to examine him under sec. 4096, Stats. 1915. The court upon motion ordered the examination dismissed and enjoined further proceedings therein. From such order the defendant appealed.

For the appellant there was a brief by *Lines, Spooner, Ellis & Quarles,* and oral argument by *Geo. G. Goetz.*

For the respondent there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *Paul R. Newcomb,* of counsel, and oral argument by *Mr. Newcomb.*

VINJE, J. This appeal presents the question of whether a guardian *ad litem* is subject to an examination under sec. 4096, Stats. 1915. Said section provides that

"No action to obtain a discovery under oath, in aid of prosecution or defense of another action, shall be allowed; but the examination of the party, his or its assignor, officer, agent, or employee, or of the person who was such officer, agent, or employee, at the time of the occurrence of the facts made the subject of the examination, . . . otherwise than as a witness on a trial, may be taken by deposition at the instance of the adverse party in any action or proceeding, at any time after the commencement thereof and before judgment."

The examination provided for by this statute takes the place of the old bill of discovery, whose object was to obtain evidence to be used against the opposite party on the trial of the action whether or not he submitted himself to be examined on the trial. Not only does the statute supplant the old bill of discovery, but it goes further by permitting an officer, agent, or employee of the party as well as the party to be examined, and such examination is not limited to matters which the party seeking the examination cannot prove by other witnesses or evidence, but may extend to all material issues in the action. *Meier v. Paulus,* 70 Wis. 165, 35 N. W. 301. So the statute not only supplanted but extended the equity procedure. It has consistently been held to be remedial in its nature and entitled to a liberal construction in favor of the rights conferred by it. *Cleveland v. Burnham,* 60 Wis. 16, 21, 17 N. W. 126, 18 N. W. 190; *Kelly v. C. & N. W. R. Co.* 60 Wis. 480, 489, 19 N. W. 521; *Whereatt v. Ellis,* 65

' Rohleder v. Wright, 162 Wis. 580.

Wis. 639, 643, 27 N. W. 630, 28 N. W. 333; *Nichols v. McGeoch,* 78 Wis. 360, 47 N. W. 372; *Frawley v. Cosgrove,* 83 Wis. 441, 53 N. W. 689; *Schmidt v. Menasha W. W. Co.* 92 Wis. 529, 66 N. W. 695. But it should not be given a construction beyond its evident scope and purpose so as to confer rights not intended to be conferred.

It is quite evident that a guardian *ad litem* is not an agent of the minor within the meaning of the statute. An agent is either in fact or by operation of law chosen by the principal; the guardian *ad litem* is appointed by the court and answerable to the court. Sec. 2613, Stats.; *Richter v. Estate of Leiby,* 107 Wis. 404, 83 N. W. 694. His office is to appear for the real party in interest, the minor, and protect his rights in the pending action. *Will of Rice,* 150 Wis. 401, 136 N. W. 956, 137 N. W. 778. The infant appears in court by his guardian *ad litem,* and while the latter is technically a party to the action and may perform some of the functions of a party, such as verifying the complaint (*Phillips v. Portage T. Co.* 137 Wis. 189, 118 N. W. 539), still the real party in interest is the minor. When bringing an action he is the party plaintiff. The fact that he appears by guardian *ad litem* does not make two parties plaintiff. Failure to appoint a guardian *ad litem* for a minor does not throw him out of court. He still remains a party to the action, and the omission to appoint may be remedied at any stage of the proceeding. *Redlin v. Wagner,* 160 Wis. 447, 152 N. W. 160, and cases cited. Hence when the statute in general terms provides that the examination of a party may be taken it must be construed to be the real party in interest, and not a mere nominal party to the action. This construction would follow from the language of the statute itself. When the object of the examination is considered it becomes still more apparent that such construction should obtain. The party is permitted to be examined in order that his conscience may be probed; that he may give some evidence relative to the mat-

ter in issue that may be favorable or useful to the examining party and that may be used against the party examined, on the trial. The facts and circumstances out of which the action springs and concerning which inquiry is made, arose long before the appointment of the guardian *ad litem*. His knowledge of them in the great majority of cases must be derived from the statement of others or the examination of papers or records accessible to the other party. As guardian *ad litem* he has little or no personal knowledge of the facts out of which the action arises. That is not usually so with the minor. He is the actor on his side of the case and it is his rights that are sought to be affected by the examination. In *Meier v. Paulus,* 70 Wis. 165, 171, 35 N. W. 301, it was said: "The examination of a party is in the nature of an admission so far as his answers are material to the issues in the action, and such admissions are always admitted as original evidence against him." Such being the effect of the examination, the legislative intent to permit the rights of minor litigants to be affected by answers made by a person appointed by the court to protect them must clearly appear. In England prior to 1893 a minor was not subject to adverse examination and yet it was held that a guardian *ad litem* was not a party within the meaning of the rule providing for the adverse examination of "a party to the action." *Curtis v. Mundy,* [1892] 2 Q. B. 178; *Mayor v. Collins,* 24 Q. B. D. 361. In 1893 rule 29 of order XXXI specifically extended the right of examination to infants and their guardians *ad litem*. The following cases have held that a guardian *ad litem* or "next friend" is not such a party to the action as to entitle the opposite party to examine him adversely under similar statutes: *Gray v. Parke,* 155 Mass. 433, 29 N. E. 641; *Vano v. Canadian C. C. M. Co.* 13 Ont. 421; *Dyke v. Stephens,* L. R. 30 Ch. D. 189; *Re Corsellis,* 48 L. T. 425.

In the instant case the guardian *ad litem* is the father of the minor, and the latter is of such tender years that he can-

not be examined; therefore, it is urged, the father should be permitted to be examined either as guardian *ad litem* or as a general guardian of plaintiff. The peculiar facts of the present case cannot affect the reasonable construction that should be given the statute. If the statute reasonably construed bars defendant from an examination it is a misfortune that should not operate to extend its legitimate scope and object. A general guardian of a minor is no more his agent within the meaning of the statute than is the guardian *ad litem,* and cannot be examined as such, or as a party. *O'Shea v. Wilkinson,* 95 Cal. 454, 30 Pac. 588.

By the Court.—Order affirmed.

LOOK, Respondent, vs. JOHNSON and others, Receivers, Appellants.

February 24—March 14, 1916.

Street and interurban railways: Negligence of motorman: Unnecessary noises: Frightening horse which was being led from track: Contributory negligence: Questions for jury.

1. Although under ordinary circumstances the making of the usual noises attendant upon the operation of a car does not constitute negligence, yet in this case the jury were warranted in finding that the motorman of an interurban car was negligent in releasing the air with a loud hissing noise and in blowing the whistle while plaintiff was in the act of leading from the track, only two or three feet in front of the car, a young horse which had been standing partly over the track, harnessed to a wagon which was backed up to the curb—there being evidence that the noises were unnecessary at the time they were made.
2. The plaintiff in such case, who, when the horse reared upon hearing the noises, threw his arms around its neck to keep from being run over and was dragged some distance, cannot be held to have been guilty of contributory negligence as a matter of law merely because, being in a position of surprise and sudden peril, he did not choose the safest means of escape.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action to recover damages for personal injury. About 6 o'clock on the morning of August 2, 1914, plaintiff left his horse and wagon standing on Wells street about sixty feet from its intersection with Fourth street. The wagon was backed up to the curb and the horse stood at an angle facing slightly to the west and partly over the car track. A Chicago-bound interurban car approached from the east and stopped within two or three feet of the horse. The motorman either blew the whistle or rang the gong to call plaintiff, who was in an adjacent store getting a load of goods to place on the wagon. Plaintiff came out and went to the head of the horse, untied the weight, and asked the motorman to give him time to remove the horse. He took hold of the bridle, and as he started to lead the horse off the track the motorman released the air, causing a loud hissing noise. There is testimony that he blew the whistle and rang the gong also. The horse became frightened and started to run, and plaintiff threw his arms around its neck and was dragged for some distance, receiving the injuries complained of.

The jury found (1) that the motorman sounded the gong in an unusual and unnecessary manner while plaintiff was removing the horse from the track; (2) that the motorman was not guilty of negligence in sounding the gong in such an unusual and unnecessary manner; (3) that while plaintiff was removing the horse from the track the motorman released the air brake in such a manner as to make an unusual and unnecessary noise; (4) that the motorman was guilty of negligence in releasing the air brake in such a manner as to make such unusual and unnecessary noise; (5) that such negligence on the part of the motorman was a proximate cause of plaintiff's injury; (6) that the motorman sounded the whistle on the car in an unusual and unnecessary manner while plaintiff was removing the horse from the track; (7) that the

motorman was guilty of negligence in sounding the whistle in such unusual and unnecessary manner; (8) that such negligence on the part of the motorman was a proximate cause of plaintiff's injury; (9) that no want of ordinary care on the part of the plaintiff proximately contributed to produce his injury; and (10) damages in the sum of $550. From a judgment for plaintiff entered upon the verdict the defendant appealed.

For the appellants there was a brief by *Edgar L. Wood,* attorney, and *Bull & Johnson,* of counsel, and oral argument by *Mr. Wood.*

For the respondent there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *George C. Dutcher* and *Paul R. Newcomb,* of counsel, and oral argument by *Mr. Newcomb.*

VINJE, J. Defendant takes the broad ground that, assuming plaintiff's evidence to be true, it does not as a matter of law show negligence on its part; that since it is admitted the motorman ran his car to within three feet of the horse standing unattended, sounded the gong and blew the whistle while approaching or close to the horse without his showing any signs of fright, it follows that, even if the gong was sounded, the whistle blown, and the air released while plaintiff was taking the horse across the track, such sounds being usual and ordinary ones made by a car when starting, no negligence is shown, because negligence cannot be predicated upon the usual noises made in the operation of a car, citing *Abbot v. Kalbus,* 74 Wis. 504, 43 N. W. 367; *Cahoon v. C. & N. W. R. Co.* 85 Wis. 570, 55 N. W. 900; *Bishop v. Belle City St. R. Co.* 92 Wis. 139, 65 N. W. 733; *Eastwood v. La Crosse City R. Co.* 94 Wis. 163, 68 N. W. 651; *Gould v. Merrill R. & L. Co.* 139 Wis. 433, 121 N. W. 161; *Flaherty v. Harrison,* 98 Wis. 559, 74 N. W. 360; *Walters v. C., M. & St. P. R. Co.* 104 Wis. 251, 80 N. W. 451; *Wilson v. Chippewa Valley E. R. Co.* 120 Wis. 636, 98 N. W. 536; *Crowley v. C.,*

St. P., M. & O. R. Co. 122 Wis. 287, 99 N. W. 1016; and *Fay v. M., St. P. & S. S. M. R. Co.* 131 Wis. 639, 111 N. W. 683. The motorman's reason for coming so close to the horse before stopping is thus stated by him:

"I came around Second and Wells and I saw the horse there. I was then two blocks away. I drove right up within about three feet of the horse and stopped. He was tied. I didn't stop back about ten feet because the horse was not scared. I drove up to within two feet of the horse to attract the man's attention enough so he would have to come out and get the rig out. That is the reason for going within two feet of the horse's head instead of ten feet, to have this man come out and get his rig out of the way."

While the car was so standing plaintiff came out of the store and went to the horse's head and said to the motorman, "Please, gentleman, give me a little time. I will take off the wagon and take away the horse to the right side and you can get through, because the horse is a young horse." There is evidence to the effect that as soon as plaintiff unhitched the stone weight the air was released with a hissing sound, the whistle blown real loud and shrill and the gong sounded, and the horse became frightened and ran away. Conceding that the evidence does not support the finding that the air was released and the whistle blown in an unusual manner, still there is evidence that such release and blowing were unnecessary and negligent *at the time they were made* because made while the horse was standing so close in front of the car and before time was given plaintiff to remove him. The rule that negligence cannot be predicated upon the usual noises attendant upon the operation of a car is limited to usual and ordinary circumstances. The situation may be such that the release of the air or the blowing of a whistle or premature starting of a car may constitute negligence. Here the situation was at least somewhat unusual. A young horse standing close in front of a car making preparations to start, though not having shown fright at the approaching car, might be-

come frightened upon hearing the release of the air and the sound of the whistle while he was in the act of getting out of the way. Evidently the jury came to the conclusion that the making of such noises with the horse so close was unnecessary; that the motorman should have allowed plaintiff to take the horse off the track or at least farther away before such sounds were made; and that his failure to do so constituted negligence. Such conclusion rests upon sufficient facts, and inferences which a jury may legitimately draw therefrom, to render it proof against an attack that it is wrong as a matter of law. The case is not unlike that of *Heer v. Warren-Scharf A. P. Co.* 118 Wis. 57, 94 N. W. 789, where it was held that it was a question for the jury to determine whether it was negligence to start a steam roller, standing outside the limits of the driveway of a street, at the moment a passing horse is slightly in front of it.

Some claim is made that plaintiff was guilty of contributory negligence as a matter of law because he hung to the neck of the horse instead of to the bridle. He testified that when the whistle blew and the air was released he had his hand in the bridle ring; that the horse reared and he was afraid he would fall under him and get hurt, so he threw his hands over the neck of the horse to keep from being run over, and held on till he fell off on Fourth street. He no doubt was and deemed himself in a position of surprise and sudden peril; therefore he cannot be held negligent as a matter of law because he did not choose the safest means of escape. *Bain v. N. P. R. Co.* 120 Wis. 412, 423, 98 N. W. 241, and cases cited.

By the Court.—Judgment affirmed.

STATE EX REL. NEHRBASS and another, Respondents, vs. HARPER, Appellant.

February 24—March 14, 1916.

Municipal corporations: Ordinances: Validity: Redelegation of legislative power by council: Erection of public garages: Consent of adjacent property owners.

1. **The common council of a city cannot redelegate legislative power properly delegated to it.**
2. **A municipal ordinance (sub. (d) and (e), sec. 474, Milwaukee Code of 1914) providing, in effect, that no public garage shall be erected outside of the business sections of the city without the written consent of two thirds of all the real-estate owners within three hundred feet, is void for the reason that it attempts to delegate legislative power vested in the common council to private persons, giving to them the power to say, not on grounds of public welfare, public health, or the like, but as a matter in their own discretion, that a particular property owner shall not be permitted to use a particular piece of property in a certain way.**

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

Mandamus by petitioners and respondents to compel the defendant and appellant, as inspector of buildings of the city of Milwaukee, to issue a permit for the erection of a garage for the storage and repair of automobiles on Oakland avenue in the city of Milwaukee. The petitioners alleged the facts necessary to show a full compliance with all the provisions of law and orders of every kind provided for by law in relation to securing a permit for the purpose of erecting the proposed garage, with the single exception that they had not complied with sec. 474 of the Milwaukee Code of 1914, hereinafter set out. The defendant and appellant demurred to the petition, the demurrer was overruled by the circuit court, and the defendant brings this appeal from the order overruling the demurrer.

For the appellant there were briefs by *Daniel W. Hoan,* city attorney, and *E. L. McIntyre,* assistant city attorney, and oral argument by *Mr. McIntyre.* To the point that the ordinance is not an invalid delegation of legislative power, they cited 19 Am. & Eng. Ency. of Law (2d ed.) 489, 492; *Chicago v. Stratton,* 162 Ill. 494, 44 N. E. 853, 35 L. R. A. 84, 53 Am. St. Rep. 325; *Boyd v. Milwaukee,* 92 Wis. 456, 66 N. W. 603; *Loewenbach v. Milwaukee,* 139 Wis. 49, 119 N. W. 888; *People ex rel. Keller v. Oak Park,* 266 Ill. 365, 107 N. E. 636; *People ex rel. Busching v. Ericsson,* 263 Ill. 368, 105 N. E. 315.

For the respondents there was a brief by *W. H. Timlin, Jr., Patrick W. Dean,* and *John W. Burkhardt,* and oral argument by *Mr. Timlin.*

ROSENBERRY, J. Upon the argument it was conceded by counsel that the only question involved was the validity of sub. (d) and (e) of sec. 474 of the Milwaukee Code of 1914, which are as follows:

"(d) Livery, boarding or sales stables, gas houses, gas reservoirs or holders, paint, oil or varnish works, salesroom or storage room for automobiles or garages for the keeping of automobiles for hire may be built within that portion of the city not set aside for business purposes, providing that the person, firm or corporation desiring to build, remodel or maintain such building for the purpose of a livery, boarding or sales stable, gas house, gas reservoir or holder, paint, oil or varnish works, salesroom or storage room for automobiles or garage for the keeping of automobiles for hire shall first obtain the written consent of two thirds of all the real-estate owners within three hundred feet of the space occupied by the business proposed to be maintained."

"(e) This written consent shall be accompanied by an affidavit setting forth that each name signed thereto is the signature in own handwriting of the person so named. This petition with affidavit attached must be filed with the inspector of buildings at the time that an application for a building permit, for the erection, construction or remodeling of any build-

ing for such purposes of occupancy as a livery, boarding or sales stable, gas house, gas reservoir or holder, paint, oil or varnish works, salesroom or storage room for automobiles or garage for the keeping of automobiles for hire is made."

The petition further alleged that the property upon which the proposed garage was to be erected was in what is known as the residence district and its erection forbidden by the terms of the code, unless sub. (d) and (e) were complied with, but alleged that said subsections were void.

The validity of the ordinance is attacked upon two grounds: First, that it is unreasonable and not a proper exercise of the police power; and second, that it is void for the reason that it attempts to delegate legislative power vested in the council to private citizens.

We find it necessary to consider the second ground of objection only. It will be noted that under the terms of the ordinance the real-estate owners are not to determine whether a garage shall be erected within any certain specified limits, but may determine whether a particular garage shall be erected by a specified property owner at a particular place. The delegation of this power to adjacent property owners without any restriction or limitation whatever vests in such property owners the power to say as a matter of discretion that another property owner shall not be permitted to use his property in a certain way. No attempt is made to place it upon the ground of public welfare, public health, or any other interest which the public might have in the matter, but the determination is left to the desire, whim, or caprice of the adjacent owners.

Sec. 1, ch. 266, Laws 1907, relating to sleeping-car berths, is as follows:

"Whenever a person pays for the use of a double lower berth in a sleeping car, he shall have the right to direct whether the upper berth shall be open or closed, unless the upper berth is actually occupied by some other person; and the proprietor of the car and the person in charge of it shall comply with such direction."

In a case arising under the provisions of this law the court said:

"Had it been thought that there is a substantial reason why, in the public interests, an upper berth should be closed when unoccupied, in case of the lower one being in use, the law would have so provided in all cases, instead of leaving it to the mere dictation, whether springing from judgment or mere whim, of each individual customer for a lower berth, to control the upper one, in respect to the matter. To thus leave such matter to the mere caprice of the occupant of the lower berth is a confession on the face of the act that it was not treated by the legislature as one deemed to be reasonably vital to the public interests. So the law is not, in reality, a police regulation but an unwarranted interference with property rights; an attempt in the circumstances specified to give to any person, at his option, who pays for a part of a section in a sleeping car the use, free of charge, of the balance thereof; an obvious though well meant attempt, it would seem, through mistaken notions of legislative power, to appropriate the property of one for the benefit of another in violation of several constitutional safeguards that might be referred to, but particularly the guarantee that 'no person shall be . . . deprived of life, liberty, or property without due process of law,' and the further guarantee that 'private property shall not be taken for public use without just compensation therefor,' and the safeguard springing from the whole constitutional system that private property shall not be taken at all for private use, except in the enforcement of obligations *inter partes.*" *State v. Redmon,* 134 Wis. 89, 112, 114 N. W. 137.

A village ordinance read as follows:

"All saloons in said village shall be closed at 11 o'clock p. m. each day and remain closed until 5 o'clock on the following morning, unless by special permission of the president."

The court held this ordinance void for two reasons:

"First, because it attempts to confer arbitrary power upon an executive officer, and allows him, in executing the ordinance, to make unjust and groundless discriminations among persons similarly situated (*State ex rel. Garrabad v. Dering,* 84 Wis. 585, 54 N. W. 1104); second, because the power to

regulate saloons is a lawmaking power vested in the village board (Stats. 1898, sec. 893, sub. 26), which cannot be delegated. A legislative body cannot delegate to a mere administrative officer power to make a law, but it can make a law with provisions that it shall go into effect or be suspended in its operation upon the ascertainment of a fact or state of facts by an administrative officer or board. *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 65 N. W. 738; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 116 N. W. 905. In the present case the ordinance by its terms gives power to the president to decide arbitrarily and in the exercise of his own discretion when a saloon shall close. This is an attempt to vest legislative discretion in him, and cannot be sustained." *Little Chute v. Van Camp,* 136 Wis. 526, 527, 528, 117 N. W. 1012.

A county board cannot delegate to one not a member of the board the power and authority to act as a member of a committee of the board. *Forest Co. v. Shaw,* 150 Wis. 294, 136 N. W. 642.

In a case where this court had under consideration the validity of a statute authorizing certain freeholders within certain enumerated taxing districts, upon compliance with certain conditions, to require the officers of a taxing district to levy a tax for highway purposes, this court said:

"Under our constitutional form of government the legislature cannot delegate legislative powers to any officer or to any body of persons, individual or corporate, aside from the power to confer local legislative and administrative powers on county boards and municipal corporations." *State ex rel. Carey v. Ballard,* 158 Wis. 251, 257, 148 N. W. 1090.

If the state cannot delegate such power, certainly a common council cannot redelegate legislative power properly delegated to it.

The ordinance in question is not one left to take effect or to be suspended *in futuro* upon the ascertainment of some prescribed fact or the happening of some event, but attempts to delegate to property owners the right to say how a particular person shall use a particular piece of property, and we think

is void and within the prohibition of the rule laid down in the cases cited above. We have carefully examined the cases cited by appellant's counsel and deem them inapplicable in the present case.

State ex rel. Att'y Gen. v. O'Neill, 24 Wis. 149, provided that a certain act should be void unless accepted by a majority of the legal voters of the city of Milwaukee in the manner therein prescribed. This was held not to be a delegation of legislative power, but the law was said to be "a complete enactment in itself; contains an entire and perfect declaration of the legislative will; requires nothing to perfect it as a law; while it is only left to the people to be affected by it to determine whether they will avail themselves of its provisions."

An attempt was made upon the argument to bring the case within this rule by claiming that the ordinance was general in its operation and that its provisions were simply waived by adjacent property owners. Notwithstanding, it is plain that the question of whether or not a garage shall be erected in a particular place is determined, not by the common council, but by the property owners.

In *Ryan v. Outagamie Co.* 80 Wis. 336, 50 N. W. 340, cited by appellant, the question was whether the statute authorizing county boards to fix the compensation of officers and magistrates for services to be performed under the act commonly known as the "Tramp Law," was an improper delegation of legislative power. The court held that it was not such an improper delegation, for the reason that it vested in a local governing body the power to fix the compensation of a local officer and was plainly a local matter. The case under consideration is in no respect analogous to the *Ryan Case,* and the principle there announced is not applicable to this case. The demurrer was properly overruled, and the order of the circuit court should be affirmed.

By the Court.—Order affirmed.

MARTIN, Administratrix, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

February 24—March 14, 1916.

Appeal: Affirmance by divided court: Railroads: Death of employee.

In an action for death of a railway employee who was run over by a car in defendant's yards, a judgment upon a directed verdict for the defendant is affirmed by a divided court.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff as administratrix of the estate of Jesse Martin, deceased, to recover for the death of her husband, said Jesse Martin, who was killed in the yards of the defendant November 8, 1913. The deceased was night switchman, and shortly after arriving at the yards on the evening in question was run over and killed by a car that was "shunted" over a team track by other cars that were "kicked" through the yards.

The complaint sets forth two causes of action. In one it was claimed that the plaintiff was entitled to the benefit of the federal Employers' Liability Act. The two causes of action are based upon the negligence of the employees of the defendant. The answer puts in issue the allegations of the complaint, and further alleges that the deceased was killed because of his own carelessness and negligence. After the evidence was all in the court directed a verdict for the defendant. Judgment was entered accordingly in favor of the defendant, from which this appeal was taken.

For the appellant there was a brief by *Glicksman, Gold & Corrigan,* attorneys, and *Henry Mahoney,* of counsel, and oral argument by *Mr. W. L. Gold* and *Mr. Mahoney.*

For the respondent there was a brief by *C. H. Van Alstine, H. J. Killilea,* and *R. M. Trump,* and oral argument by *Mr. Trump* and *Mr. Killilea.*

KERWIN, J. In this case the judgment of the court below must stand, because the five sitting justices are divided on the question as to whether the judgment should be affirmed or reversed. Three of the justices, Chief Justice WINSLOW and Justices VINJE and ROSENBERRY, favor affirmance, while Justice SIEBECKER and the writer favor reversal.

By the Court.—Judgment is affirmed.

PELLETT and another, Appellants, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

February 25—March 14, 1916.

Workmen's compensation: Notice of injury: Failure to give: When employer not misled: Burden of proof: Waiver: Notice of hearing: Contents: Reopening matter after award: Procedure: Discretion: Setting aside award: "Fraud" does not include perjury: Statutes: Construction.

1. Evidence that on the day after an employee fell and was injured he told one of his employers how he fell, that he was hurt, and that he had gone to a doctor; that the employer said he would pay the doctor's bill; and that afterwards he did pay $5 thereon and also paid the employee $2 for loss of time, was sufficient to cast upon the employers the burden of showing that they were in fact misled by the failure of the employee to give written notice of the injury as provided in sec. 2394—11, Stats., and was sufficient, in the absence of evidence to the contrary, to sustain a finding that they were not misled.
2. By such payment of $2 to the employee, if made within thirty days after the accident, the employers, under said sec. 2394—11, waived the statutory notice of injury.
3. The notice of hearing given by the industrial commission under sec. 2394—16, Stats., should either have attached thereto a copy of the application for compensation or should contain a statement of the time, place, and general nature of the injury claimed to have been received.
4. Where an award had been made after a hearing but, because the employers had not received the notice sent them, the matter was opened to permit them to put in their evidence and to cross-examine the claimant, no error was committed in not compel-

ling the claimant to put in anew his evidence,—a wide discretion in such matters of mere procedure being vested in the commission in the absence of statutory regulations.

5. In sec. 2394—19, Stats. 1915, providing that an award may be set aside on the ground that it "was procured by fraud," the fraud alluded to does not include perjury or the concealment of material facts upon the hearing.

6. The report of the legislative committee which drafted the Workmen's Compensation Act may be referred to for the purpose of ascertaining the correct construction of the language used in the act.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to set aside an award against the plaintiffs made by the *Industrial Commission* in favor of *James Suffern,* who on July 29, 1914, sustained an injury while in their employ. Upon notice a hearing was had before the *Commission* in Manitowoc on August 28, 1914, and an award made. Subsequently the matter was opened up at the request of plaintiffs, who had not received the notices of the hearing mailed them, due to their absence from home, and a further hearing was had November 4, 1914, at which time all parties appeared, and the *Commission* made an award of $441.81 in favor of *Suffern.* Thereupon plaintiffs brought an action in the circuit court for Dane county to set aside the award. The court made findings of fact and conclusions of law sustaining the award, and from a judgment entered accordingly the plaintiffs appealed.

For the appellants the cause was submitted on the brief of *Nash & Nash.*

For the respondent *Industrial Commission of Wisconsin* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

VINJE, J. Plaintiffs complain of the finding that they were not misled to their prejudice by the failure of the claimant to give them written notice of his injury as required by

statute. There is evidence that the next day after claimant fell and was hurt he told one of his employers how he fell and that he was hurt and had gone to a doctor; that the employer told him he would pay the doctor's bill, and some time later did pay $5; that within thirty days his employers paid him $2 for loss of time caused by the injury. Such evidence, in the absence of any evidence to show that they were misled, was alone sufficient upon which to base a finding that the employers were not prejudiced by the claimant's failure to give the statutory notice of injury. But if this were not so, the notice would, by virtue of sec. 2394—11, Stats., be waived by the payment within thirty days of compensation. That section provides for written notice of injury within thirty days and then says: "Provided, however, that any payment of compensation under sections 2394—3 to 2394—31, inclusive, in whole or in part, made by the employer before the expiration of said thirty days, shall be equivalent to the notice herein required."

Even assuming there had been no payment of the $2 within thirty days, the *Commission* properly held that upon the evidence adduced by claimant as to the knowledge plaintiffs had of his injury the burden rested upon them to show that they were in fact misled by a failure to receive written notice of injury.

The sufficiency of the notice of hearing is challenged. Sec. 2394—16 provides: "The commission shall cause notice of such hearing, embracing a general statement of such claim, to be given to each party interested." The notice in question stated that a hearing was to be had "to determine and adjust the difference in dispute as set forth in the application on file," and it is claimed that such notice does not comply with the statute in that it does not embrace a general statement of the claim. We express no opinion as to the merits of this assignment of error, since it appears that before the second hearing was held plaintiffs had received a copy of the award

and were otherwise acquainted with the nature of the claim, so they could not be prejudiced by the notice received even if it were defective. Without intimating that it does or does not comply with the statute, we suggest that in justice to employers either a copy of the application for compensation should be attached to the notice or else it should contain a statement of the time, place, and general nature of the injury claimed to have been received.

The claim that plaintiffs were denied a copy of the evidence taken upon the first hearing does not seem to be sustained by the record. It shows they complained because they did not have it, but they proceeded with the hearing. No formal request for it and refusal is shown by the record so far as we have been able to discover.

Since the proceeding was opened up for the purpose of permitting plaintiffs to cross-examine the claimant and introduce evidence in chief, no error was committed by not compelling the claimant to put in anew his evidence. That was put in upon the first hearing, and the matter was opened up to allow plaintiffs to put in their evidence and to cross-examine the claimant. The *Commission* did not act without jurisdiction on the first hearing and was therefore under no obligation to annul what was then done. It could, as it did, let such evidence stand and supplement it by that taken on the second hearing. No doubt it was also within its discretion to set aside what had been done and begin anew had it seen fit to do so. In such matters of mere procedure a wide field of discretion must be given the *Commission* in the absence of statutory regulations as to how it should proceed.

Plaintiffs also seek to set aside the award because it was procured by fraud. The allegations as to fraud on claimant's part are substantially these: (a) that *Suffern* testified before the *Commission* that he was totally disabled for six months, when in fact he was not, and that he settled with a casualty company in which he was insured for only one month of total

disability; (b) that he concealed from the *Commission* that he was subsequently and within six months of his injury injured while in the employ of one Kennedy, resulting in total disability for ten days and partial disability for one week more. Plaintiffs also allege they first learned of *Suffern's* representations to the casualty company January 11, 1915, and that the *Commission* refused to set aside the award because more than ten days had elapsed since it was made. Sec. 2394—17, Stats. 1915.

It will be seen the fraud complained of consisted of false testimony on the part of the claimant and of concealment by him of facts material to the issue before the *Commission.* Sec. 2394—19, Stats. 1915, provides that an award may be set aside on the following grounds: "(1) That the commission acted without or in excess of its powers. (2) That the order or award was procured by fraud. (3) That the findings of fact by the commission do not support the order or award." The question, therefore, presented is whether the fraud alleged, assuming it to be sustained by proof, constitutes a ground for setting aside the award. It may be conceded that the language of the statute upon an original construction, regardless of principles guiding equity in granting relief from judgments obtained by fraud as announced in *Boring v. Ott,* 138 Wis. 260, 119 N. W. 865; *Uecker v. Thiedt,* 137 Wis. 634, 119 N. W. 878; and *Laun v. Kipp,* 155 Wis. 347, 145 N. W. 183, and regardless of the intent of the legislature as expressed in the report of and discussions before the committee that drafted the Workmen's Compensation Act, is susceptible of the construction that the fraud meant by the act includes perjury or the concealment of material facts upon the hearing. It is also susceptible of the construction that it includes neither; that it was not contemplated that trial after trial should be had upon the question of whether a witness testified falsely, for if one award could be set aside upon that ground a subsequent one could also, and

so on indefinitely. Happily there is as to this statute no doubt upon the subject. The report of the committee referred to and the discussions had before it conclusively show that it was the legislative intent that perjured testimony or concealment of material facts were not such fraud as the statute contemplates. In their report the committee said: "The fraud alluded to in the second ground will be only such as was perpetrated in securing the award, and will not include false testimony of any party, because such questions all will be decided by the board" (commission). This view is reinforced by the discussions before the committee, too lengthy to be here inserted. Such being the express legislative construction given the language used; and such construction being repugnant neither to the language used nor to judicial principles, must control. That reference may be had to the report for the purpose of ascertaining the correct construction of the language used was held in *Minneapolis, St. P. & S. S. M. R. Co. v. Industrial Comm.* 153 Wis. 552, 558, 141 N. W. 1119; *Hoenig v. Industrial Comm.* 159 Wis. 646, 648, 150 N. W. 996. The court therefore properly refused to receive evidence of the fraud alleged, since if established it could not affect the validity of the award.

By the Court.—Judgment affirmed.

STATE EX REL. VOLKMAN, Plaintiff in error, vs. WALTERMATH, Defendant in error.

February 25—March 14, 1916.

Bastardy: Not a criminal prosecution: Sealed verdict may be changed.

1. A bastardy action is not a criminal prosecution, but a statutory proceeding to enforce a civil obligation or duty, the procedure being, however, criminal in form.
2. In a bastardy action, as in other actions to enforce civil liability, if the sealed verdict is defective or if the jury on polling refuse to affirm it, they may be sent out again for further deliberation, and a fuller or different verdict afterwards returned will be good.

ERROR to review a judgment of the civil court of Milwaukee county: MICHAEL F. BLENSKI, Judge. *Reversed.*

The facts are these: A jury in a bastardy action were instructed by the court that if they agreed they might seal their verdict and separate. They did so and came into court on the following morning, and, after delivery of a sealed verdict of "not guilty" and reading thereof by the clerk, were polled on demand of the plaintiff, whereupon one of the jurors answered that it was not his verdict, and they were sent back for further deliberation. Being unable to agree they were subsequently discharged and a new trial ordered. Some weeks afterwards, on defendant's motion, the order granting a new trial was vacated, the action dismissed, and the defendant discharged on the ground that he had been acquitted by the sealed verdict. To reverse this judgment this writ of error is prosecuted.

For the plaintiff in error there was a brief by the *Attorney General, Winfred C. Zabel,* district attorney, and *Louis H. Koenig,* assistant district attorney, and oral argument by *Mr. Koenig* and *Mr. Daniel W. Sullivan.*

For the defendant in error there was a brief by *Paul O. Husting,* and oral argument by *B. J. Husting.*

WINSLOW, C. J. In this case it is held:

1. A bastardy action is not a criminal prosecution, but a statutory proceeding to enforce a civil obligation or duty, the procedure being, however, criminal in form. *Baker v. State,* 65 Wis. 50, 26 N. W. 167; *Barry v. Niessen,* 114 Wis. 256, 90 N. W. 166; *Smith v. State,* 146 Wis. 111, 130 N. W. 894.

2. While in a criminal prosecution a sealed verdict cannot be amended or changed after the jury have separated (*Koch v. State,* 126 Wis. 470, 106 N. W. 531), the better rule and the weight of authority is to the effect that, in an action to enforce civil liability, if the sealed verdict is defective or if the jury on polling refuse to affirm it, they may be sent out again for further deliberation, and that a fuller or different verdict afterward returned will be good. *Comm. v. Tobin,* 125 Mass. 203; *Root v. Sherwood,* 6 Johns. 68; *Steele v. Etheridge,* 15 Minn. 501; *Rigg v. Bias,* 44 Kan. 148, 24 Pac. 56; Proffatt, Jury Trial, § 460; 38 Cyc. 1874.

By the Court.—Judgment reversed, and action remanded for a new trial and further proceedings according to law.

ZIELICA and wife, Respondents, vs. WORZALLA and others, Appellants.

February 3—April 11, 1916.

Vendor and purchaser of land: Construction of contract: Ambiguity: Parol evidence: "Clear:" Breach of contract: Measure of damages: Instructions to jury: Harmless errors: Validity of contract: Sunday: Pleading: Presumption as to delivery: Costs: Taxation: Fees of constables: Service of summons and subpœnas.

1. Where a contract to convey cut-over land provided that the vendors should "clear" a certain seven acres by the following first day of April, and it appeared that the land had been cleared once and was an old pine slashing grown up to poplars which could easily be plowed under, the word "clear" was so far ambiguous that parol evidence of the circumstances surrounding

the transaction was admissible to show the sense in which the word was used; and such evidence is *held* to sustain a finding by the jury to the effect that the parties intended to require the removal of old stumps and down timber so that the seven acres would be ready for immediate plowing and planting.

2. For a breach of an agreement by the vendors of land to clear a part thereof the purchasers' damages should include the reasonable cost of completing the clearing as the contract required and the reasonable value of the use of the land for one season, if they lost such use as the direct result of the breach; but the "reasonable value of the use" should be understood to mean fair rental value, and an instruction that under certain circumstances the jury might find as damages the full value of the crops which it was reasonably certain could have been produced, was probably erroneous.
3. An error, in such case, in the instruction as to the measure of damages, was not prejudicial, where it appears that the sum found by the jury did not exceed the reasonable cost of clearing the land, together with its reasonable rental value.
4. Where the complaint alleges and the answer admits that the contract in suit was made on a secular day, defendant cannot escape liability on the ground that it was in fact made on Sunday unless he proves beyond a doubt that the execution of the contract, including its delivery, was completed on Sunday.
5. A constable not being, in his official capacity, required or authorized to serve the summons and complaint in an action in the circuit court, he acts in serving them simply as a private person, not as an officer, and is not entitled to official fees therefor.
6. But, under sec. 842, Stats., in serving and returning a circuit court subpœna a constable acts officially and hence is entitled, under sec. 2959, to charge the fees therefor which the sheriff is entitled to charge.

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Modified and affirmed.*

Action by the vendees in a contract for the conveyance of 120 acres of cut-over land against the vendors for the breach of one of the clauses of the contract which provided that the vendors should "clear" a certain seven acres of the land and build a house upon the land, of a certain description, both the clearing and house to be completed on or before April 1, 1914. It was alleged in the complaint and admitted in the

answer that the contract was entered into August 2, 1913. The plaintiff lived in Chicago at the time and the defendants were partners engaged in selling real estate, having their principal office at Stevens Point and a branch office five miles east of Mosinee. In response to advertising circulars sent out by defendants the plaintiff came to Mosinee in the evening of Saturday, August 2d, looked over the lands on the following Sunday, and returned to Chicago Sunday night, having on that day signed the contract and made the first payment of $500. The purchase price was $1,850, payable in instalments, and the whole amount was paid prior to November 1, 1914. It is admitted that the dwelling house was not completed until May 20, 1914, but it is claimed that the seven acres of land was fully cleared at the time agreed on. Plaintiff and his wife arrived at Mosinee with their household property May 6th, but claimed that they were unable to move into the house for several days on account of its unfinished condition. The chief contention on the trial was as to whether the seven acres of land was "cleared" within the meaning of that term as used in the contract, and oral evidence was received of the circumstances surrounding the parties as bearing upon the meaning of the word. A special verdict was returned by the jury by which it was found (1) that the parties intended by the contract to bind the defendants to clear the seven-acre tract so that it would be ready for immediate plowing and planting, and (2) did not mean that it should be cleared to the same extent and in the same manner as were the lands of others shown by the defendants to the plaintiff; (3) that the tract was not cleared in the manner nor to the extent agreed; (4) that the plaintiffs suffered $241 damage thereby; (5) that the house was not ready for occupancy when the plaintiffs arrived on May 6th; and (6) that plaintiffs suffered $9 damage thereby. Judgment for the plaintiffs for $250 damages and costs was entered on the verdict, and the defendants appeal.

A. L. Smongeski, for the appellants.

For the respondents there was a brief by *Smith & Leicht,* and oral argument by *Brayton E. Smith.*

The following opinion was filed February 22, 1916:

WINSLOW, C. J. We think that the word "clear" in this contract is so far ambiguous in its meaning that parol evidence of the circumstances surrounding the transaction was admissible to show the sense in which it was used. The land had been "cleared" once. It was (as described by the defendants' witness Burdick) an old pine slashing grown up to poplars which could be easily plowed under. Now, did the word mean simply to remove the poplar saplings and brush which had grown up since the first clearing, or did it mean also to remove the old stumps and down timber which remained from the original clearing so that the land could be put under plow? Let it be conceded that the word "clear" as applied to ordinary wood or timber land has a definite meaning, to wit, "to remove the timber but not the stumps" (*Seavey v. Shurick,* 110 Ind. 494, 11 N. E. 597), it is very evident that it must mean something else when applied to cut-over land where the timber has been already removed and there is nothing left but stumps and the usual crop of small poplars and brush. There is no error, therefore, in receiving testimony as to the circumstances surrounding the transaction which tended to show in what sense the parties used the word, and there was certainly enough testimony of this nature to justify the conclusion of the jury.

The only other serious question raised in the trial was the question of the damages resulting from failure to clear the land. On this question the trial judge instructed the jury that the damages should include the reasonable cost of completing the clearing so as to bring it within the requirements of the contract, also the reasonable value of the use of the land for one season, providing that the plaintiffs lost such use as the direct result of defendants' breach of the contract. If it is understood that "reasonable value of the use" means fair rental value, there seems no doubt that these instructions

are correct. The court, however, further told the jury in substance that under certain circumstances they might find as the reasonable value of the use the full value of the crops which it was reasonably certain could have been produced on the land. We should be slow to approve this latter instruction; the value of a crop never planted is in a high degree speculative, uncertain, and conjectural. See on this subject *Flick v. Wetherbee,* 20 Wis. 392; *Kelley, M. & Co. v. La Crosse C. Co.* 120 Wis. 84, 97 N. W. 674; 13 Cyc. 56.

We find it unnecessary to decide the question. By the overwhelming preponderance of the evidence it appeared that the reasonable cost of clearing the land, together with its reasonable rental value, had it been cleared as the contract provided, aggregated at least the sum fixed by the jury as the damages for failure to clear the land, hence there was no prejudicial error in the instruction in question even conceding it to have been erroneous.

The objection is now made for the first time that the evidence shows that the contract was made on Sunday and hence should not be enforced because contrary to the policy of our law. A sufficient answer to this objection is that the complaint alleges and the answer admits that the contract was made on a secular day, and this admission has never been withdrawn. While this might not be conclusive if it appeared beyond doubt that the contract was fully completed on Sunday (*Jacobson v. Bentzler,* 127 Wis. 566, 107 N. W. 7), it certainly makes it necessary that the proof of Sunday execution of the contract be so complete as to leave no room for doubt. While the proof here makes it quite certain that the paper was drawn and signed on Sunday, there is no proof as to when it was delivered, and delivery was doubtless essential to make it a complete contract. *Non constat* that it was delivered on Sunday, though signed on that day. The presumption would rather be (in support of the admission in the pleadings) that it was delivered by mail on a secular day and thus became a valid contract. *Gibbs & S. M. Co. v. Brucker,* 111 U. S. 597, 4 Sup. Ct. 572.

Several objections were made to the proposed bill of costs, which were overruled by the clerk. Upon motion to review the clerk's taxation but one item allowed was complained of, namely, an item of $9.80 "sheriff's fees." It appears by the record that the sheriff served no papers in the case; a constable served the summons and complaint on one defendant, a private individual served them on the other two defendants, another constable served a subpœna on four witnesses, and the aggregate fees and mileage for the three services make up the item complained of.

In justification of these charges the plaintiff relies chiefly on sec. 2959, Stats., which provides in substance that where a fee is allowed to one officer for the performance of a service, other officers who are authorized by law to perform the same service shall receive the same fee. The difficulty with regard to the charge for service of the summons and complaint is that a constable is not in his official capacity required or authorized to serve them. The circuit court summons is not a writ or process issued out of court, but simply a notice given to defendant by the plaintiff. *Mezchen v. More,* 54 Wis. 214, 11 N. W. 534. The statute makes special provision that the summons and complaint in a circuit court action may be served by the sheriff "or by any other person not a party to the action" (sec. 2635, Stats.). The duties of a constable as prescribed by sec. 842, Stats., do not in terms include the service of these papers, and we think that the provisions of sec. 2635 must be held exclusive. Hence in serving them the constable acts simply as a private person, not as an officer, and is not entitled to official fees therefor. As to the service of the subpœna the situation is different. There is no statute providing for the service of a circuit court subpœna by the sheriff alone, and the section prescribing the duties of a constable (sec. 842) makes it his duty to serve any "writ, process, order or notice . . . lawfully directed to or required to be executed by him by any court or officer." This is substantially the same provision as sub. (4) of sec.

725, defining the duties of a sheriff, and we think that a constable in serving and returning a circuit court subpœna acts officially and hence is entitled to charge the fees therefor which the sheriff is entitled to charge.

The fees charged for copying and serving the summons and complaint aggregated $5.60 and these were erroneously allowed. The balance of the item complained of, being the amount charged by a constable for fees and mileage in serving the subpœna at the same rate allowed a sheriff, was proper. The judgment must be modified accordingly.

By the Court.—Judgment modified by reducing the same as of its date in the sum of $5.60, and as so modified affirmed. No costs allowed except the fees of the clerk of this court to be paid by respondents.

A motion for a rehearing was denied, with $25 costs, on April 11, 1916.

STATE EX REL. OWEN, Attorney General, vs. DONALD, Secretary of State.

April 15, 1916.

Accounting as to trust funds and lands: Referees' report modified and confirmed.

The following report of the special referee, Judge Samuel D. Hastings, appointed by the court in the above entitled action (see 160 Wis. 21, 156) was filed October 7, 1915, and is here printed by order of the court:

REPORT OF SPECIAL REFEREE.

By the judgment of the court in the above entitled action, it was referred to the undersigned, as special referee, for an accounting. The order is that

"There shall be an accounting . . . of all dealings with the trust fund lands of the date of ch. 367, Laws 1897, and so long prior thereto as practicable, not earlier than the de-

cision under ch. 537, Laws 1865,—and of lands acquired under the forestry legislation since 1897, except those donated to the state for forestry purposes or acquired by proceeds of the latter, and an accounting of all proceeds of such trust lands and income thereof and income which such proceeds would have earned had the same been devoted to the trust to which they belonged, such accounting to include all moneys paid into the forestry fund or general fund, derived from trust fund lands or lands purchased therewith and income from such proceeds, and a partition shall be made of the entire property so found equitably and legally to belong to the constitutional trusts, including any indebtedness from the general fund; giving due credit for all proper disbursements chargeable to such trust funds,—so that each of the constitutional trusts will have its equitable and legal portion of the trust fund property with identity established as to lands and other assets, as near as may be, after the manner of the decision under ch. 537, Laws 1865. Such accounting shall include all matters not specifically mentioned so far as necessary to cover the field discussed in the opinion and carry out the intent thereof, guided by such opinion."

The proceeding in which this order was made is conceded to be without precedent. The action as originally commenced terminated by the decision of the court that the relator had no cause of action. His claim called the court's attention to the fact that the legislature, and public officials pursuant to its direction, had been dealing in an unconstitutional manner with funds appropriated by the constitution to specified purposes, with the result of diverting from said purposes part of said funds. Upon its own motion the court caused to be made matter of record facts showing the general character of such unconstitutional dealing with such funds; by its process restrained the public officials from further dealing with the property of said funds; decided definitely certain questions as to the constitutional power of the legislature to deal with them; and proposes, by its final judgment, to determine the status of all the remaining property which was originally devoted to such purposes, and how much of the

other property of the state should be taken and devoted to said purposes in place of that wrongfully used. The order imposes upon the referee the duty of ascertaining, within certain specified limits, the dealings of the legislature and officials with said funds, the duty of deciding questions arising out of facts discovered, not definitely met by the decision because not definitely presented by the facts before the court. It leaves it for the referee to decide how far certain lines of investigation are practicable, and how far "the accounting shall include all matters not specifically mentioned, so far as necessary to carry out the intent of the court, as expressed in their opinion."

The scope of the order makes it proper, if not necessary, to state somewhat in detail my construction of it and some of the questions that the facts have presented and my solution of them.

The order calls for an accounting and partition of property.

The accounting is not between two or more different persons or corporations, each owning separate interests in property to be partitioned, or between parties mutually indebted to each other.

The accounting is between different funds all belonging to the same party—the state.

Technically a fund consists of money or its equivalent, as distinguished from land or other kinds of property from which it is derived. Art. X of the constitution uses the term in that sense. But the legislature has used the term as including lands from which the money is derived, and I have used it with that meaning in this report by referring to certain lands and property rights as belonging to certain funds.

The state keeps account of the moneys coming into the hands of its treasurer under the heads of different funds, theoretically treating each fund as if it were a separate purse

or pocket into which all moneys received for the several different uses or purposes were respectively placed.

The funds with which this report deals are designated by the statutes and officials as (1) university fund; (2) agricultural college fund; (3) school fund; (4) normal school fund; (5) drainage fund; (6) forest reserve fund; (7) general fund; and when all the property going into a fund is to be kept intact as a permanent principal, only the income to be spent, the income is treated as a separate fund and a separate account kept of it, as the "university fund" income account; the "school fund" income account.

The constitution creates two funds. Art. X. The only one continued by the statute just as created, and named, is the "university fund." It consists of the proceeds of all lands granted to the state for a university. The other is the school fund. The constitutional "school fund" consists of certain specified moneys and the proceeds of all lands granted to the state for educational purposes—except for a university—and all moneys derived from grants not specifying any purpose for which it is made. The agricultural college grant and the swamp land grants were made after the constitution was adopted, and all moneys derived from them for school purposes are part of the constitutional school fund. But the legislature has subdivided this fund by calling that part of it derived from the agricultural college grant "agricultural college fund;" and that portion of it derived from the swamp land grant "normal school fund," leaving the remainder to be known as the "school fund." But these subdivisions retain the characteristics and protection of the constitutional funds.

The drainage fund differs from the educational funds in that it is not a permanent fund with an income which is all that can be spent. The entire proceeds of the property from which it is derived is to be spent, and it is not a fund created or protected by the constitution. This distinction is recognized in the court's opinion by referring to the "drainage fund" and the "constitutional trust funds."

The "general fund" is that in which the state keeps all its funds not belonging to one of said constitutional funds or some other fund which the legislature has created in which to keep part of the state's funds which the legislature has appropriated to a particular purpose and over which it has control unrestrained by any constitutional provision or grant creating a trust. Such is the character of the forest reserve fund so far as it consists of funds provided by the state, as distinguished from lands and moneys granted to the state to be used only for forestry purposes and to be returned to the donor or grantor if not so used. And in the accounting between the general fund and the constitutional trust funds, the forestry fund, so far as not a trust fund, is treated as a branch of the general fund, to the extent of treating any indebtedness that may be found due from the forestry fund as part of the indebtedness of the general fund.

The property to be partitioned consists, first, of property owned by the state; second, indebtedness of one fund to another, the claim being assigned to the creditor fund as an item of property belonging to it.

Property.

I find that all the lands ever conveyed to the state for the support of a university have been scheduled and kept separate in the records of the state land office as university fund lands; that all the lands ever conveyed to the state for the support of an agricultural college have been separately scheduled in the records of the state land office as agricultural college fund lands; and that all the lands conveyed to the state to be used for educational purposes, not included in the two classes last mentioned, have been separately scheduled in the records of the state land office as school fund lands, and that there never has been any action by state officials relative to any of said lands tending to create any confusion or uncertainty as to which of said funds the lands respectively belong. The only actions by the legislature which could tend to cre-

ate any confusion or uncertainty as to the status of said lands as belonging to the several funds are the statutes of 1903 and 1905, referred to in the decision in this case, purporting to set aside state lands as a forest reserve. Those acts having been adjudged unconstitutional and void, all of said lands remain fully identified by the records as to which fund they belong. And I have not deemed it necessary, in order to comply with the intent of the order of the court, to have separate lists of the unsold lands made and attached to my report for the purpose of establishing their identity as property belonging to the respective funds.

Those conveyed to the state under the provisions of the act of 1850 are designated swamp lands. Those conveyed to the state pursuant to the provisions of the act of 1855 were given to indemnify the state for lands it failed to receive conveyances for covered by the grant of 1850, and the character of its title is determined by the act of 1850. They are designated "indemnity lands." When the state acquired title to any of these lands, swamp or indemnity, the extent to which they became part of the normal school fund or the drainage fund depended upon the action of the legislature under the provisions of the act of 1850 relative to them.

The only confusion or uncertainty as to which fund lands now owned by the state belong is confined to the lands obtained under the swamp land grant of 1850 and the indemnity grant of 1855. That all now owned by the state belong to either the normal school fund or the drainage fund is clear beyond question. The question not definitely decided by the court is whether all, and, if not all, how many, have become normal school fund lands.

I interpret the court's decision as deciding that the act of Congress of 1850, granting the swamp lands to the state, imposed upon it the duty of deciding what share of said lands or the proceeds derived from their sale was necessary for their reclamation or drainage; that all of said lands which

the legislature decided were not necessary for such reclamation or drainage were made by the constitution a part of the school fund; that once having been relieved of all trust for the purpose of reclamation, and by the constitution made school lands, they could not afterwards be relieved or divested of their character as such; and that while the decision of the legislature that certain of said lands are not necessary for reclamation is final as to such lands, it does not prevent the legislature from later deciding that more or other of said lands are not necessary for reclamation.

The question is, What constitutes a decision by the legislature that some of said lands are not necessary for reclamation? It is decided that by the act of 1865 and subsequent acts referred to in the court's decision, the legislature decided that half of all the lands, both swamp and indemnity, were not necessary for reclamation, and such half became normal school lands. Have they since decided that all or part of the remaining half were not necessary?

The federal supreme court, whose decisions are binding on construction of federal statutes, have construed the act of 1850 and held that certain action by the legislature relative to the lands amounts to a decision by it that the lands referred to are not necessary for reclamation. A state legislature had given a portion of the lands to a corporation to be used for other purposes than reclamation. The title of the state's grantee was questioned on the ground that the state could not dispose of the lands in violation of the trust created by the grant. The court held that, when the state had decided that the lands were not necessary for reclamation, it was freed from any trust relative to them and could use or dispose of them for any purpose, and "that any application of the proceeds by the state to any other object is to be taken as a declaration of its judgment that the application of the proceeds to reclamation of the lands is not necessary." See *U. S. v. Louisiana,* 127 U. S. 182, 8 Sup. Ct. 1047.

In *State ex rel. Douglas v. Hastings,* 11 Wis. 448, 453, in referring to the statute which provided that half of the proceeds of sale of swamp lands should be devoted to drainage, the court say: "That act is a legislative declaration or recognition that at least so much" is necessary to be appropriated to the purposes specified in the act of Congress. Giving or devoting to another purpose must be an equally clear declaration that the lands or funds given are not necessary for the purposes specified in the act.

The construction put by the court, in the opinion in this case, on the act of our legislature in 1865 is in harmony with the decision of the federal court. The legislature never made any declaration of its decision that half of the lands were not necessary for reclamation in any other manner than by disposing of them for another purpose. There can be no doubt that their act would have amounted to such a decision had there been no constitutional provision affecting them. It is true that in the case before the federal court there was no constitutional provision which prevented the legislature from disposing of the lands for any purpose it saw fit, after relieving the state from any trust as to them, by its decision that they were not necessary for reclamation, and that the legislature of this state, by the act of 1865, set aside part of the lands for the use for which the constitution held them, so soon as the legislature had made its decision that they were not necessary for drainage. In both cases there was no constitutional objection to the disposition made of the lands by the legislature, while an act of the Wisconsin legislature attempting to dispose of the lands after the state was relieved from any trust imposed by the grant, for any other purpose than schools, would be unconstitutional and void. But that fact could not render less clear and emphatic the decision of the legislature that the lands were not necessary for the purposes of reclamation. The decision that the lands are not necessary for reclamation must precede the decision

to give, and the decision to give is as conclusive evidence of the prior decision as to the necessity of retaining the lands for the purpose of the trust, when the decision is to give for an unauthorized purpose, as when it is to give for an authorized purpose. The fact that an unconstitutional act is as void and ineffectual as to all unconstitutional provisions as if never enacted, does not affect the question. It is the fact of the second decision, and not its validity or effect, that is conclusive evidence of the decision which necessarily precedes it. It was not the act of the legislature in 1865, devoting one half of the swamp lands to school purposes, and designating them and the proceeds of their sale a normal school fund, that made them part of the constitutional school fund and surrounded them with the constitutional protection against the legislature devoting them to any other purpose. Had there been no constitutional provision putting that class of lands into the constitutional school fund, any subsequent legislature could have taken them out of the normal school fund and devoted them to other uses than schools. It was the constitution that attached the constitutional trust feature to the state's title so soon as the legislature decided that the lands were not necessary for reclamation purposes. That decision was the only act of the legislature that was a factor in converting the lands into constitutional trust fund lands. Should the legislature, in express terms, by recital or section in a statute, state its decision that the lands mentioned in the act were not necessary for reclamation, and then by another provision or section of the act give the lands to some purpose not authorized by the constitution, the fact that the latter provision would be void would not render null and void nor work a reversal of their decision. The question to be decided by the legislature under the act of 1850 is one of fact and not of policy, and it cannot be assumed that the legislature would not have decided the question as they did had they realized that they could not give the lands away after being relieved

from the trust. That would be accusing them of deciding a pure question of fact contrary to what they understood the fact to be.

The act of deciding the question of fact is judicial, not legislative. Had the act of Congress making the grant provided that the decision should be made by the governor or secretary of the interior, the act of the officer named would have been of the same character as that of the legislature,—not the making of a law but the decision of a fact. While the fact that one provision of a statute which is the inducement for another is void because not a lawful exercise of legislative power, renders void and of no force the other provision which in itself is constitutional, the presumption being that the legislature would not have enacted the valid one alone, the fact that the legislature has no power to enact a statute—a legislative act—giving away swamp lands after deciding that they are not necessary for reclamation, cannot have the effect of destroying the fact that they have made the decision, or of changing it.

I have construed the law and the opinion of the court to be that, whenever the legislature has by an enactment in the form of a statute provided that lands which at the time constituted part of the swamp or indemnity lands, which it had not previously decided were not necessary for reclamation, should be devoted to some other use, whether that use was one authorized by the constitution or not, it has by such act made known its decision that such lands were not necessary for the purposes of reclamation, and that such lands were changed by the constitution from drainage fund to school fund lands.

To what fund or funds do the unsold swamp and indemnity lands, to which the state has unquestioned title, belong? I have classified them under three heads: *First,* those described in Schedule A are lands actually partitioned to the normal school fund, pursuant to ch. 537, Laws 1865, and subsequent acts of the legislature. *Second,* those described

in Schedule B are lands actually partitioned to the drainage fund pursuant to ch. 537, Laws 1865. *Third,* those described in Schedule C are lands not actually partitioned between said funds, but under the rule of the decision of 1865 belonging to both in common, each entitled to an undivided half, the fund to be divided when the lands were sold. It is clear that all the lands described in Schedule A and the undivided half of those described in Schedule C belong to the normal school fund. Those described in Schedule B and the undivided half of those described in Schedule C belong to the drainage fund, unless the legislature since 1865 has decided that some or all of them were not necessary for the purposes of reclamation.

Ch. 264, Laws 1905, provides that "The sale of all lands belonging to the state north of town 33 shall cease upon the passage of this act, and such lands north of town 33 shall constitute the state forest reserve." This act was amended by ch. 638, Laws 1911, so as to include all lands within the Menominee, Stockbridge, and Munsee Indian reservations. Permission is given to sell some of the lands upon recommendation of the state forester and approval of the state board of forestry, but the proceeds of such sales are to constitute a forest reserve fund to be used only for forestry purposes.

I construe this act as a declaration by the legislature of its decision that none of the swamp lands falling within the description were necessary for reclamation, and that decision changed such lands from the drainage to the school land class and they became part of the normal school fund, if they had not become such before.

But not all of the lands described in said Schedules B and C are north of town 33 or within said reservations. Those not north of town 33 or within one of said reservations are not affected by said act and remain part of the drainage fund to the same extent as before its passage, unless changed to the school land class by some other act of the legislature.

Ch. 450, Laws 1903, provides that "all public lands remaining unsold, and all lands so withdrawn from sale, and such other lands as the state may hereafter acquire for that purpose shall constitute the state forest reserve." The act provides that if the state forester concludes that it is for the best interest of the state that any particular parcel of said lands be not reserved as part of the state forest it may be sold. But as none might be sold but all be retained as part of the forest, the act necessarily carries with it the declaration that the legislature had decided that none of the lands were necessary for reclamation, and such decision changed the lands which were drainage lands to the school land class.

I therefore find and report that all of the lands described in Schedules A, B, and C are normal school lands and belong to the normal school fund.

There is language in the opinion and judgment of the court which may seem or be inconsistent with my conclusion. Secs. 250 and 251 of the Statutes provide for the same division of swamp and indemnity lands between the normal school and drainage funds as was provided for by the act of 1865. It is made clear that those provisions are still in force so far as they affect the lands set aside as normal school lands. If they are equally in force as to the other half of the lands, it may be the opinion of the court that they are still part of the drainage fund. The judgment only adjudges that the half set aside for educational purposes by the act of 1865 are school lands. The implication may be that the other half are not. The opinion says: "Such sections are a part of the written law of this state, unaffected by any act, or part thereof, *so far as interfering with the proceeds of the* lands partitioned off to the school fund class under the law of 1865 or lands which should be, under the rule there, going as in such act provided." The writer of the opinion wrote the syllabus. It reads in part:

"30. The partition of the swamp lands under ch. 537, Laws 1865, one half for school purposes and one half for

drainage purposes, relieved the former from any trust for the latter and gave the school land half the status of school lands as regards moneys arising therefrom subject to be added to by any future express or implied determination to further limit the amount of land to be devoted to drainage purposes."

I have not understood the court as deciding that such determination had been made.

There are two tracts of said swamp lands which require special mention because of legislative action relative to them.

Ch. 49, Laws 1897, provides that "The commissioners of the public lands are hereby authorized and directed to withdraw from sale the southwest quarter of the southeast quarter of section twenty-two (22), township seventeen (17) north, of range two (2) east, and to set aside said land for the perpetual use of the Wisconsin military reservation." The land described was partitioned to the normal school fund in 1865. As the act is unconstitutional and void, the land still remains part of the normal school fund.

Ch. 293, Laws 1899, provides that "The commissioners of the public lands are hereby authorized and directed to withdraw from sale the northwest quarter of the northeast quarter of section twenty-one (21), township seventeen (17), north, of range two (2), east, and to set aside said land for the perpetual use of the Wisconsin military reservation." This land was never partitioned to either the normal school fund or drainage fund, but belonged, prior to the act of 1899, one half undivided to each fund. While the act was void and ineffectual as an attempt to dispose of the land for an unauthorized purpose, it evidenced the decision of the legislature that it was not necessary for drainage, and the character of the half belonging to the drainage fund was changed from drainage to school fund lands, and it now belongs to the normal school fund.

Two loans were made of normal school funds secured by mortgages. The mortgages were foreclosed and the property

bid in for the state and a sheriff's deed issued to the state for the same. Said lands belong to the normal school fund and are described as follows: Lot nine (9), block nineteen (19), in W. M. Dennison's addition to the city of Watertown, and lots 3, 4, 5, and 8 of block 251 in the village (now city) of Manitowoc.

Indian reservations—Lands conveyed to state.

Some of the lands patented by the United States to the state of Wisconsin as included in the grant of swamp lands, act of 1850, are located within Indian reservations. A claim is made in behalf of the Indians that they have a prior title to the lands, or right of possession with right to remove the timber. The validity of that claim is not involved in this case. But the question to what fund the lands, if the state's title is sustained, or what it may receive in lieu of the lands, belongs, is involved. The reservation in which the lands are situated, for which the state has patents, is not within the forest reserve as originally defined by the act of 1905, but was brought within it by an amendment in 1911. The lands are all within the provisions of the act of 1903. And ch. 96, Laws 1907, authorizes the commissioners of public lands to convey to the United States all the state's right, title, and interest in said lands, on receipt of the full appraised value of the lands and timber, and provides that the money received "shall be paid into the state treasury and, except when otherwise disposed of by constitutional provision, shall constitute a part of the forest reserve fund." These lands and all received for them, directly or indirectly, belong to the normal school fund when the legislature has decided that none are necessary for drainage. For reasons hereinbefore stated, I find and report that whatever right, title, or interest the state has in said lands belongs to and constitutes part of the normal school fund. A description of said lands is contained in Schedule D.

Indian reservations—Lands not conveyed to the state.

Some lands within Indian reservations not conveyed are claimed by the state to be within the grant of 1850. I understand that the reason why patents have not been issued for them is that an adverse claim is made to them in behalf of the Indians and some are not admitted to be swamp lands.

Has the legislature decided that said lands and the proceeds to be derived from them were not necessary for reclamation?

The acts of 1903 and 1905 relative to state forest reserve mention only "lands belonging to the state" and "all public lands remaining unsold." Is this language to be construed as meaning only such as have been patented or all such as the state had title to of any kind?

In *State ex rel. Parsons v. Comm'rs,* 9 Wis. 236, the act of 1850 was construed, and it was held that the title to the lands remained in the United States until patents were issued, and until patent issued the state had no right to sell them. The same construction was adopted by the United States supreme court in *Michigan L. & L. Co. v. Rust,* 168 U. S. 589, 18 Sup. Ct. 208. The state officials never offered the lands for sale before patented. The language of the act of 1905 is, "The sale of all lands belonging to the state north of town 33 shall cease" and "*such* lands . . . shall constitute the state forest reserve." And the language of the act of 1903 is "all public lands remaining unsold, and all lands so withdrawn from sale, . . . shall constitute the state forest reserve." Considered alone, these acts appear to cover only lands to which the state had patents and legal title. If this is a correct construction, neither act is a decision by the legislature as to the necessity for using for reclamation swamp lands for which patents may thereafter be obtained.

Are these lands within the provisions of ch. 96, Laws 1907? Its language is, "all state lands . . . within any of the sev-

eral Indian reservations in Wisconsin." In view of the decision of the supreme court that the state did not own the swamp lands before patent issued, and the action of the legislature and state land commissioners in not treating such lands as state lands, I have construed the language "state lands" as including only those swamp lands for which the state had patents, and treated the state's interest in these lands as belonging one half to the normal school fund and one half to the drainage fund.

Other claims for lands and money.

The state claims from the United States other lands than have been conveyed to it, aside from those in Indian reservations, and more money than it has received, based on the acts of 1850 and 1855. Provision has been made for the prosecution and settlement of such claims. Ch. 624, Laws 1915. I find no action by the legislature relative to such claims that has had or can have the effect of creating any uncertainty or confusion as to which funds they belong. As the decision of the legislature now stands, they belong one half to the normal school and one half to the drainage fund.

Reservations in lands conveyed.

Ch. 374, Laws 1909, provides that "Whenever the state of Wisconsin shall hereafter convey in any manner whatsoever any of its lands, the conveyance thereof shall be subject to the continued ownership by the state of all minerals" and of all mining and water-power rights. Patents since issued have contained exceptions and reservations of minerals and such rights. All such reserved rights in swamp or indemnity lands belong to the normal school fund. And such minerals or rights in any lands which belonged to either of the other constitutional trust funds belong to the fund to which the land belonged.

Lands sold on contract.

Some swamp and indemnity lands have been sold on contract and have not been fully paid for. The interest in said lands and the balance unpaid on said contracts I have treated as belonging to the normal school fund, as all sales and contracts were made since 1910.

Schedule F contains a description of all of said lands lying north of township thirty-three (33) and being within the forest reserve as defined in said act of 1905, with dates of sale and contracts and the amount unpaid on each contract. Each tract that had been partitioned to the normal school fund under the act of 1865 is designated on said schedule by the letter N, and each tract partitioned to the drainage fund is designated by the letter D, and each tract not partitioned between said funds is designated by the abbreviation "Ind."

It shows the amount unpaid on the lands marked D is....	$9,059 00
It shows the amount unpaid on the lands marked N is....	9,245 00
It shows the amount unpaid on the lands marked "Ind." is	5,821 00
	$24,125 00

Schedule G contains a description of all of said lands lying south of township thirty-four (34), and shows the same facts in the same manner relative to the contracts therein referred to as is shown by Schedule F relative to the contracts referred to in it.

It shows the amount unpaid on lands marked D is.....	$847 00
And the amount unpaid on lands marked N is.....	1,496 00
	$2,343 00

It shows no indemnity lands.

Money in the treasury not credited.

Some of the indemnity lands were partitioned between the drainage fund and the normal school fund under the provisions of the act of 1865. Those acquired later were not partitioned, but when sold the proceeds paid into the state treasury, credited to a fund designated "indemnity land

fund" and transferred from that fund one half to the normal school fund and one half to the drainage fund. The amount so paid into that fund during the fiscal year ending in 1903 was $1,400.74. It has never been transferred to the other funds, and belongs one half to the normal school fund and one half to the drainage fund.

The schedules referred to—A to K—are so fully described herein that an inspection of them by the court would inform it of no additional fact except the descriptions of the several subdivisions. Such descriptions would not aid the court in determining whether the report and accounting should be confirmed or modified. The schedules are made from facts contained in the records of the state land office. Should any be lost or destroyed, they could be reproduced from said records from the description of the schedules contained herein. There are no adversary parties to this proceeding. The judgment based upon this report, so far as said schedules cut any figure, merely determines the status of the state's property as between different funds for the guidance of the legislature and state officials. The state land commissioners are state officers, with their office in the same building as that of the clerk of this court, and I see no reason why the court should not permit such part of the record in this proceeding as said schedules constitute to remain in the state land office. They would occupy considerable space in the office of the clerk of this court, while the land office would naturally be resorted to for the descriptions contained in them. Sec. 2416, Stats., makes it the duty of the clerk of this court to have and keep the custody of records and papers thereof, but it does not require him to keep them in any particular place in the state house, nor does it control the action of the court relative to them.

I have identified said schedules by indorsement and signature as those referred to in this report, and leave them in said land office subject to the order of the court as to their custody, should any be made.

The following facts in addition to those before stated appear from said schedules:

	Acres.	Acres.
Of the lands described in Schedule A, there are north of township 33	58,336.71	
And south of township 34	4,725.25	
Total		63,061.96
Of the lands described in Schedule B, there are north of township 33	69,417.23	
And south of township 34	6,376.40	
Total		75,793.63
Of the lands described in Schedule C, there are north of township 33	11,402.71	
And south of township 34	1,183.99	
Total		12,586.70

Indebtedness of the general fund.

The order requires the referee to include as an item in the accounting "any indebtedness from the general fund to any trust fund, giving due credit for all proper disbursements chargeable to the trust funds." The opinion makes it clear that the general fund is to be charged, in ascertaining said indebtedness, with all moneys belonging to the trust funds actually paid into and used as part of the general or forestry fund. It does not specially mention as items to be charged against the general fund amounts equal to the value of trust fund property lost to the fund by unlawful act of the legislature or state official, the property never having gone into any other fund. It does not appear that the fact of such losses was known to the court. The order requires the accounting to "include all matters not specifically mentioned so far as necessary to cover the field discussed in the opinion and carry out the intent thereof, guided by such opinion." The opinion says the accounting is "to determine the legal and equitable status of the claims of the trust funds upon the general fund." Such claim is treated as an indebtedness of the state. The opinion further says: "The state is liable to make good the misuse [of the trust fund] the same as any trustee is responsible for money intrusted to his care." The princi-

pal object and purpose of the proceeding is to have the integrity of the trust funds fully restored. To do this, all that the fund has lost through action of the legislature in dealing with it must be made good and paid out of the general fund, whether or not that or any other fund ever received it.

I have construed the opinion of the court as holding that the general fund is chargeable with whatever amount a constitutional trust fund has lost by direction of the legislature followed by state officials, whether the money or property lost was diverted to some other fund and used by the state, or given away without consideration.

The order is that the accounting shall include all dealings with the trust funds of the date of ch. 367, Laws 1897, and so long prior thereto as practicable, not earlier than the decision under ch. 537, Laws 1865.

I have examined all the acts of the legislature, general and private and local laws, between said dates, relating to swamp or indemnity lands. I have found many authorizing unlawful use of portions of the drainage fund. These acts I have classified under three heads:

1. Those authorizing use for other purposes than drainage, but giving no data for determining how much of the fund the act applied to.

2. Those authorizing the use of a portion of the fund for a number of specified purposes, including in those specified schools and drainage, and presenting the same uncertainty found in the first class as to the amount of the fund the act applied to.

3. Those when certain specific drainage fund lands were given away for purposes of building bridges; to private corporations; to aid in improving streams for log driving; and to counties to give as bonus to railroad companies.

To ascertain the amount of the funds unlawfully diverted by action taken under the provisions of the first and second classes of acts, and to ascertain what lands and funds the leg-

islature decided by such enactments were not necessary for drainage, would require the examination of county and town records at great expense and with uncertainty as to their containing the desired information, and I have treated such investigation as not practicable.

The third class I have construed and treated as decisions by the legislature that the lands disposed of were not necessary for drainage purposes, and treated the state or general fund responsible to the trust fund to which they belonged for their value at the time they were wrongfully converted and lost to the fund.

I have found the following cases in the third class:

Ch. 400, P. & L. Laws 1866, named and appointed three commissioners to build a bridge across the Menominee river. It provided that to aid in the construction of said bridge there should be granted to said commissioners swamp lands in the town of Marinette set apart for drainage purposes, not more than ten sections, patents to be issued by the state land commissioners when the lands were selected. Pursuant to that act, patents were issued for 5,587.74 acres of said land during the years 1867 and 1868, the last patent being dated June 4, 1868. The lands were at that time valued at and being sold for $1.25 per acre, and were worth at that time $6,984.70. The state or general fund became indebted to that amount at that time to the fund to which the lands then belonged, and the lands having become school fund lands by reason of the decision of the legislature that they were not necessary for drainage, and the constitution, that indebtedness was and is to the normal school fund.

The judgment specifies as items to be included in the accounting what the proceeds of trust fund lands wrongfully diverted would have earned had the same been diverted to the trust to which they belonged. As the lands were given away and no proceeds derived from them, the case does not fall within the language of the judgment, literally construed, but

I have construed the opinion and law as holding the general fund liable to the same extent when the property is given away, and that the state or general fund became indebted for what an amount equal to the value of said lands would have earned as part of the fund to which it belonged, and I find as a fact that it would have earned at the least three and one-half per cent.

The normal school fund is a permanent fund, "the interest of which and all other revenues derived from the school lands shall be exclusively applied" to the support and maintenance of schools and libraries. No part of it is added to the principal. Const. art. X, sec. 2. As explained above, in carrying out the intent of this provision the state has kept a separate account, designated the "normal school fund income," to which fund or account all income from the principal fund properly belongs. Any indebtedness from the state or general fund for loss of income as interest or earnings would be to this fund.

Ch. 261, Laws 1880, provided that all swamp lands in Marathon, Clark, and Shawano counties, and in designated parts of Oconto and Chippewa counties, patented to the state prior to January 1, 1880, and set apart as drainage lands, were granted and disposed of to said counties, to each severally the lands within its borders, with power to sell, dispose of, and convey the lands to any railroad corporation that should construct and equip certain railroads. Pursuant to the provisions of said act, 63,622.55 acres were patented to said counties April 12, 1880. Said lands were valued and being sold at an average of $1.25 per acre at that time and were worth $79,528.19. Said amount as part of the normal school fund would have earned at least three and one-half per cent. Under the construction of the law as applied above to the Marinette lands, I find the general fund indebted to the normal school fund $79,528.19, and to the normal school fund income account in an amount equal to the interest on

said amount at three and one-half per cent. from April 12, 1880.

Ch. 334, Laws 1867, created the Lemonweir Improvement Company, a corporation with power to improve a river so as to facilitate the running of lumber, logs, etc. To enable the corporation to make such improvements, the act provided that there was granted to it an amount equal to twelve sections of drainage fund lands, to be selected in four counties named, on completion of said improvements. Pursuant to the provisions of said act, 7,640.20 acres of said lands were conveyed to said corporation during the year 1868.

Said lands were valued and being sold at the time for $1.25 per acre and were worth $9,550.25. I find that the general fund—the state—became indebted to the normal school fund for that amount. That said amount, as part of said fund, would have earned at least three and one-half per cent. from that date, and that the state or general fund is indebted to the normal school income fund for the amount of said interest, unless paid.

It will be noticed that I have treated the lands conveyed pursuant to ch. 400, P. & L. Laws 1866, ch. 261, Laws 1880, and ch. 334, Laws 1867, as lost from the trust fund—given away by the legislature. While it is well settled that "no trust attached to and traveled with the title" by reason of anything in the grant from the United States, the question may arise whether that is true as to the lands that became constitutional trust fund lands by operation of the constitution. Could the legislature give title to the lands to a grantee who paid nothing for them, the conveyance showing on its face by recital—as those given for the lands in question did—that such was the fact? A deed executed by an attorney in fact which shows on its face that the attorney exceeded his authority in executing it, passes no title. *Meade v. Brothers,* 28 Wis. 689. Probably the land commissioners could legally and should have refused to execute the conveyances.

The state could have had them canceled by judgment of a court. But the conveyances have stood unchallenged from thirty-five to forty years. All right of the state to have them canceled by judgment of a court is barred by the statute of limitations. See *State v. Milwaukee,* 152 Wis. 228, 138 N. W. 1006. And without doubt most of the lands have been occupied more than ten years by subsequent purchasers claiming under written instruments. If the title is still in the state, the lands belong to the trust fund and there is no indebtedness arising from the state's dealing with them, and it would be the duty of the state to have its title to said lands cleared from the cloud upon them occasioned by said unauthorized conveyances, so far as present claimants under them are not protected by statutory limitations or laches.

Diverted funds.

Before the lands covered by the grant by Congress September 28, 1850, were identified, more than 70,000 acres had been sold or otherwise disposed of by the United States. To indemnify the state for the loss of said lands, Congress, by act of March 2, 1855, gave to the state all moneys received by the United States for such of said lands as it had sold and been paid for, and an equal quantity of other lands to indemnify the state for those lost for which the United States had received nothing—as those entered on land warrants. These lands and funds, being part of the grant of 1850, were given and received on the same terms and subject to the same trusts as the lands to which the state acquired title under the act of 1850. If the same trust for reclamation did not follow the indemnity lands, then they all belonged to the school fund and the state is indebted to that fund for all such lands and proceeds of such sales as she has given to the drainage fund. There may be a question as to whether the state received the money on the same terms and conditions as it did the lands. If not, it was a mere grant of so much money. If so, are such moneys within the provision of the constitution (art. X, sec. 2), "all moneys arising from any grant to the state where

the purposes of such grant are not specified"? Does the term "grant" include gifts of money as well as lands, or does it include lands only? If it includes moneys, and there is no trust specified, the money all belonged to the school fund. If the constitution referred to lands only, then the trust must be worked out through the grant of 1850, the money being the proceeds of the land sold. The United States, at the time the constitution was adopted, owned vast quantities of land. It was granting them liberally to the new states for specified purposes. It is quite probable that land grants were the only kind of grants that the framers of the constitution thought of getting. But that would not indicate that they used language limiting the operation of the constitution to that class of grants. In its larger sense, anything given by one to another is a grant. And the term is usually used in reference to things given by government. It is also frequently used as meaning only gifts of real estate, as in sec. 2077, Stats. *Tobin v. Tobin,* 139 Wis. 494, 121 N. W. 144. Its meaning in any particular connection is a matter of construction.

The term "grant" is used in the constitution as including gifts of other things than land. Art. VIII, sec. 10: "Whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works." The opinion points out the fact that a large school fund was a prominent thought and purpose of the constitutional convention. They put the five per cent. cash grant to the state, by the same section of the constitution we are considering, into the school fund, indicating a purpose to put all unfettered gifts of property into that fund, and not simply gifts of land. I think the term was used with its broader meaning. Should Congress or some wealthy citizen of the state donate to it a sum of money without specifying any purpose for which it should be used, I think this provision would put it into the school fund.

But I think that the proper construction of the acts of

Congress is that the money received by the United States for the lands and turned over by it in place of the lands, the title to which had vested in the state, was part of the grant and impressed with the same trusts as the lands. It was clearly treated and considered as such by Congress and the state. The reason for giving the money is stated in the act granting it, and shows that it was given as part of the grant. The state, by the acts of 1865 and 1869, treated it as part of the grant and made the same provision for dividing it as it did for dividing the lands. If the term "grant" is to be construed as meaning only grant of lands, the money turned over in lieu of the lands was money arising from the grant within the meaning of the constitution.

The amount of money paid by the United States under this act of 1855 was $141,878.05. One half of it was paid into the normal school fund. The other half the legislature first provided should be paid to the drainage fund. It was afterwards, pursuant to provisions of ch. 185, Laws 1893, paid to the normal school income fund. The act of the legislature making such appropriation followed its decision, evidenced by the act, that the amount was not necessary for drainage or reclamation of the swamp lands, which decision made it part of the normal school fund. And it was a misuse of it as part of that fund to take it from the principal and spend it.

I have treated the act as creating a debt against the general fund of $70,939.02. It was paid during the fiscal year ending September 30, 1893. As part of the normal school fund it would have earned three and one-half per cent. per annum since that date, and the general fund is indebted to the normal school income fund for an amount equal to that interest, unless it has been paid.

Ch. 367, Laws 1897, provided that "The moneys received for the sale of lands shall be covered into the general fund, except when otherwise disposed of by constitutional provision."

The land commissioners construed this provision (1) as relating only to sales thereafter made, and not including money received as payments on contracts for lands sold before that time; (2) and, at first, as applying only to swamp lands, but as applying to all such lands. No moneys received for the sale of indemnity lands were paid into the general fund before 1904. The act was never construed as including receipts from the sales of lands belonging to the university, agricultural college, or school funds.

Commencing with the fiscal year ending in 1898, all receipts for swamp lands sold during that year were paid into the general fund. This continued until the fiscal year ending in 1906. During that and all subsequent years all moneys received from the sale of said land located within the state forest reserve, as defined by the act of 1905, have been paid into the forest reserve fund, and all received for sale of said lands not in said reserve have been paid into the general fund.

Schedule I shows the amounts paid during each year into the general fund received from sale of such lands as were partitioned under the act of 1865 to the normal school fund. The general fund became indebted to the normal school fund at the end of each year for the amount so received during the year, probably for the amount of each item when paid in. But as these items were numerous and many quite small, I have considered it sufficiently accurate to take the amounts by years.

Schedule II shows the amounts paid into said fund from the sales of land which were partitioned to the drainage fund under the act of 1865.

For the amounts shown in Schedule II down to and including the year ending in 1903, the general fund became indebted to the drainage fund.

I have above stated my reasons for deciding that the effect of the act of 1903 was to change all unsold drainage fund lands from that class to the school land class. For all moneys re-

ceived by the general fund from the sale of lands after the year 1903, as shown in Schedule II, the general fund became indebted to the normal school fund.

All receipts from the sale of indemnity lands made after the year ending in 1903 were paid either to the general fund or to the forest reserve fund. Schedule III shows the amounts paid into the general fund from sales of indemnity lands never partitioned. Had there been no modification of the decision of 1865, the general fund would have become indebted to the normal school fund for one half of said amounts and to the drainage fund for the other half. But for the reasons given above for treating all the unsold swamp and indemnity lands as normal school lands since the act of 1903, I have treated the general fund's indebtedness for the whole amount as indebtedness to the normal school fund.

Schedule VII shows the amounts paid into the forest reserve fund from sales of indemnity lands not partitioned. I have treated all of said lands as belonging to the normal school fund when sold, and the forest reserve fund, or general fund, indebted to the normal school fund for said amounts.

Schedule VIII shows the amounts paid into the forest reserve fund from sales of swamp lands, which, according to the partition of 1865, belonged to the *normal school* fund. The forest reserve fund—or general fund—became indebted to the normal school fund for said amounts.

Schedule IX shows the amounts paid into the forest reserve fund from sales of swamp lands which had been partitioned under the act of 1865 to the drainage fund. For reasons above stated I have treated the forest reserve fund, or general fund, indebted for said amounts to the normal school fund.

There was much valuable timber on many of the swamp and indemnity lands. Some was cut and removed by trespassers and some sold. There has been collected from said trespassers and for said timber sold large amounts. I have treated the amounts collected as belonging to the same funds to which the lands belonged.

Schedule IV shows the amounts collected for trespasses upon and timber sold from swamp lands partitioned under the act of 1865 to the normal school fund and paid into the general fund. I have treated said amounts as an indebtedness from the general fund to the normal school fund.

Schedule V shows the amounts collected for trespasses upon and timber cut from swamp lands partitioned under the act of 1865 to the drainage fund and paid into the general fund. For all of said amounts collected for trespasses committed or sales made prior to the act of 1903, I have treated the general fund indebted to the drainage fund. For all other of said amounts I have treated the general fund indebted to the normal school fund.

Schedule VI shows the amount collected for trespass upon and timber sold from indemnity lands not partitioned between the normal school and drainage funds under the act of 1865 and paid into the general fund. As the whole amount was collected during the year ending in 1904, I have treated the general fund as indebted to the normal school fund for the entire amount.

Schedule X shows the amounts collected for trespasses upon and timber sold from swamp lands partitioned under the act of 1865 to the normal school fund and paid into the forest reserve fund. The forest reserve fund—or the general fund—is indebted to the normal school fund for said amounts.

Schedule XI shows the amounts collected for trespasses upon and timber sold from swamp lands partitioned under the act of 1865 to the drainage fund and paid to the forest reserve fund. Because of the acts of 1903 and 1905, I have treated all of said lands as belonging to the normal school fund during the years mentioned in said schedule, and the forest reserve fund—or general fund—as indebted to the normal school fund for all of said amounts.

Some of the swamp lands were sold on contract, only part of the purchase price being paid at the time of the sale. As

the deferred payments became due and were paid, they were paid or credited during several years part to the general fund and part to the forest reserve fund.

Schedule XIII shows the amounts of principal on contracts for the sale of swamp lands partitioned to the *drainage fund* under the act of 1865 collected and paid into the general fund. All sales evidenced by said contracts were made after 1903. I have treated the general fund as indebted to the normal school fund for said amounts.

Schedule XIV shows the amounts of principal falling due on contracts for swamp lands partitioned to the normal school fund under the act of 1865 and paid into the general fund. I have treated the general fund as indebted to the normal school fund for all said amounts.

When the lands were sold on contract the deferred payments drew interest. The question arises whether such interest is part of the "proceeds of the land" or "moneys arising from the sale of such lands," within the meaning of the constitution, and by it made part of the permanent fund which is to be invested and not spent. When the facts presented the questions it seemed to me that such interest was made by the constitution part of the permanent fund. But I find that the legislature of 1849 put a different construction upon the constitution and treated the deferred payments as loans and provided that the interest should be paid into the income fund. That construction has always been followed and all such interest has been paid into the income fund when not diverted to the general or forestry fund. I have given the benefit of the doubt to the constitutionality of the action of the legislature, and treated the indebtedness of the general fund for such interest to be to the income fund rather than to the principal. Sec. 61, ch. 24, R. S. 1849; sec. 246, Stats. Should the other construction be adopted, there would be debts from the general fund to each of the four constitutional trust funds for all the interest that has been col-

lected on deferred payments on contracts, as the legislature could not constitutionally provide that these should be taken from the principal and spent as income.

Schedule XV shows the amount of interest collected on contracts for the sale of swamp lands partitioned to the normal school fund under the act of 1865 and paid into the general fund. I have treated the general fund as indebted to the normal school income fund for all said amounts.

Schedule XVI shows the amounts of interest on contracts for sale of swamp lands partitioned to the drainage fund under the act of 1865 collected and paid into the general fund. All said contracts were made after 1905, and I have treated the general fund as indebted to the normal school income fund for all of said amounts.

Schedule XVII shows the amounts of interest on contracts for the sale of swamp lands partitioned to the normal school fund under the act of 1865 collected and paid into the forest reserve fund. I have treated the general fund as indebted to the normal school income fund for said amounts.

Schedule XVIII shows the amounts of interest on contracts for the sale of swamp lands partitioned to the drainage fund under the act of 1865 collected and paid into the forest reserve fund. All of said sales were made after the act of 1903, and I have treated the general fund as indebted to the normal school income fund for all of said amounts.

Schedule XIX shows the amounts of principal falling due on contracts for sale of swamp lands partitioned to the normal school fund under the act of 1865 and sold on contract, collected and paid into the forest reserve fund. I have treated the general fund as indebted to the normal school fund for all of said amounts.

Schedule XX shows the amounts of principal falling due on contracts for sale of swamp lands partitioned to the *drainage* fund under the act of 1865 collected and paid into the forest reserve fund. All of said sales were made after the

act of 1903, and I have treated the general fund as indebted to the normal school fund for all of said amounts.

The legislature has at different times taken large sums from the four constitutional trust funds and used them for other state purposes, giving the transactions the form of a loan by issuing certificates of state indebtedness for the amounts. These certificates the court adjudged void, and the state or general fund indebted for the respective amounts taken to the respective funds. The amounts of such indebtedness are as follows: To the university fund, $111,000; to the agricultural college fund, $60,600; to the school fund, $1,563,700; to the normal school fund, $515,700. The state has always paid to the respective income funds interest at seven per cent. on the amount of said indebtedness. During the year 1901, $840 received from the sale of school lands was paid into the general fund, probably by mistake. It has never been transferred to the school fund. Added to the above, it makes the general fund indebtedness to the school fund $1,564,540.

Ch. 276, Laws 1882, provided that the state land commissioners should convey to H. M. Fuller and others all the state's right, title, and interest in certain swamp and overflowed lands in Ashland county for a consideration of $1.25 per acre. Pursuant to said act lands were conveyed July 20, 1882, for which the grantees paid $3,850.37. The money was paid into the general fund and used for general state purposes. The lands were in an Indian reservation and had never been patented to the state. All the state's right, title, and interest in the lands was derived under the grant of 1850, and said money belonged to the normal school and drainage funds, one half to each. And the general fund became indebted to the normal school fund July 20, 1882, in the sum of $1,975.18½, and to the drainage fund $1,975.18½. I have considered the status of those lands under the head of "Indian reservation lands not conveyed to the state."

Credit for disbursements.

The order requires that, in ascertaining the amount of indebtedness from the general fund to any trust fund, due credit shall be given for "all proper disbursements chargeable to such trust funds."

I find nothing in the opinion indicating what class of disbursements are to be so credited. If this were an action and accounting between two separate parties, one a trustee, the other the *cestui que trust,* I would find in the law defining the rights of a trustee rules by which to test each disbursement. The accounting is not between different parties to determine their respective rights in certain property or a fund, or to settle mutual accounts, and ascertain the balance due from one to the other. The case is not one of one party holding and managing a property or fund as a simple trustee for the benefit of another person as *cestui que trust.* The accounting is between different funds, all belonging to one and the same party, the state, which is as fully the beneficiary of the fund as the trustee. The only trust which cuts any figure in the accounting is one created by the constitution, and designated in the opinion as a "constitutional trust." In other opinions the state is referred to as a *quasi-trustee* of the school funds created by the constitution (*State v. Milwaukee,* 158 Wis. 564, 575, 149 N. W. 579). In what sense and to what extent is the state a trustee of the constitutional trust funds?

The people, in the direct exercise of their sovereign power, as their own lawmakers, provided in the constitution that certain moneys and properties belonging to the state should constitute a school fund, the principal to be kept intact and the income only to be expended for school purposes. By the same instrument they vested in the legislature all their legislative power not directly exercised by themselves, but with no power to reverse or alter the laws that they themselves

had made. The legislature, therefore, had and has no power to make any other use of the constitutional trust funds than that provided for by the constitution. Over all funds and property, whether held by the state in "its governmental function" or in "its proprietary capacity" (*State v. Milwaukee,* 152 Wis. 228, 235, 138 N. W. 1006), the legislature has full control except as limited by the constitution. The people might amend the constitution and do away with the school fund. It is only because of the self-imposed limitation upon the use that the state will make of a portion of its property that it can be said to hold it in trust. This is certainly true as to all coming to the fund under the swamp land grant and fines, forfeitures, and escheats. The constitutional trust attached to the state's title to the trust fund is only a limitation on the power of the legislature, depriving it of power to use for any other purpose than that named.

It may be that as to lands granted to the state for the express purpose of schools there is a trust feature connected with the title that would enable the grantor to call the state to account and forfeit the state's title should it make other use of the lands. But no such question is involved in this case. The United States is not a party to this proceeding. We are considering only the state's dealing with its own property, in violation of its own constitutional provisions, and so far as the constitution creates a trust all the trust property stands on the same footing. It is for the state to decide whether, when it establishes a constitutional trust as to some of its own property, it will pay out of other funds the expense of caring for and administering the trust fund or deduct from such fund such expense. This is a question of the construction of the constitution. If it is the intent of the constitution that a constitutionally created trust fund shall be taken care of by the state from other funds, the intent must be the same as to all property in such fund whether donated to the state for that purpose or not. In determining whether,

in the accounting between the general fund and a trust fund, the general fund should be credited with all disbursements made for the protection and administration of the trust fund, the question is not what would be the rule if the accounting were between an ordinary trustee and another person as *cestui que trust,* but what is the meaning of the constitution creating the trust. The state is the owner of all trust fund property and all general fund property. It can devote its general fund to the maintenance of schools as well as its trust fund property. In paying for the care of the trust fund property out of the general fund it is only paying out money for itself for one of its governmental functions. I have construed the constitution as meaning that expense of the care and administration of the trust fund property should be borne by the state or general fund. If this is not the meaning of the constitution, I know of no rule to apply except that governing the relation of trustee and *cestui que trust,* which would make the entire expense of the state land department in caring for and administering the trust funds a charge *pro rata* against those funds.

Some of my reasons for this construction of the constitution are:

1st. It has always been the construction placed upon it by the legislature and state officials. The expenses of the land department have never been taken out of the trust funds or their income. The statute has always provided that "all expenses incurred . . . in the care, protection and sale" of constitutional trust fund land should be paid out of the general fund. Ch. 56, Laws 1866; sec. 190, Stats. Ch. 118, Laws 1915, makes an appropriation from the general fund to the state board of forestry for the protection from forest fires of any lands owned by the state north of town 33.

2d. When it is only net proceeds, after deducting expenses, that are to go into the fund and remain part of it, it is so expressed, the distinction being made between the whole

and the net. The language of sec. 2, art. X, of the constitution is "the proceeds of all lands" and "all moneys arising from any grant to the state" and the "clear proceeds of all property that may accrue to the state by forfeiture or escheat," and "the clear proceeds of all fines." "Clear proceeds" means net proceeds (*State v. De Lano,* 80 Wis. 259, 49 N. W. 808). It is "the entire proceeds" and "all moneys" arising from grants and only net proceeds from other property that constitute the fund. The requirement of the constitution (art. X, sec. 8) is that the commissioners "shall invest *all* moneys arising from the sale of such lands," and (art. X, sec. 2) "the interest . . . and all other revenues derived from the school lands shall be exclusively applied to" support and maintenance of schools.

3d. If the framers of the constitution meant that the expense of caring for the property and administering the fund should be a charge against the fund, it is reasonable to suppose that they would have so provided in express terms.

4th. It is expressly held in the opinion in this case that "whatever is reasonably required to care for the trust lands of any character, as regards fire hazard, or trespassing or realizing on annual forest crops naturally produced thereon, and to utilize the dead, down, dying, and mature timber for the benefit of the fund for which the lands are held, may doubtless be done and at the general public expense." This would not be true if the constitution contemplated that such expense should be a charge against and paid out of the trust funds. The judgment refers to the state's "constitutional duty to conserve" the lands.

Money has been expended under the direction of the state forester and paid out of the forest reserve fund in providing means for the protection from fire of lands intended to be reserved as a permanent state forest. The swamp and indemnity lands owned by the state have been protected to some extent by such means. I have discovered no means of ascer-

taining to what extent. Construing the constitution as I have, as requiring the state from its general funds to take care of and administer its constitutional trust funds, and not at the expense of the principal of the fund, I have not considered any disbursement made from the general or forest reserve fund in whole or in part for the protection and care of the constitutional trust fund lands as chargeable to such trust fund within the intent and meaning of the opinion of the court, and I have only credited the general fund with amounts paid from it to the constitutional trust fund or the income fund connected with it.

Income.

The judgment is that there shall be included in the accounting the "income which such proceeds would have earned had the same been devoted to the trust to which they belonged," as well as the actual income earned.

As I have explained above, the constitutional trust funds are permanent funds; the principal to be kept intact but not increased by its earnings, all of which are to be exclusively applied to the support and maintenance of schools and libraries. Had moneys wrongfully paid into the general or forest reserve fund been in the fund to which they belonged, their earnings would have gone into the income funds and been spent annually. Any indebtedness for the loss of such earnings would be to the income fund. The legislature has for many years made annual appropriations to the normal school fund income. These have far exceeded the amount of the general fund's indebtedness to the income fund. I have presumed that, in determining the amount it would appropriate each time to the fund, account was taken of the amount of income being derived from the permanent fund, and had the amount of diverted money been in the fund producing an income the appropriation would have been less by the amount that the income would have been increased, and that all indebtedness of the general fund to the income account has

been paid. If we indulge in the opposite presumption, that the appropriations would have been no less had the principal of the fund been kept intact, and treat the indebtedness as technically not paid, we would simply find an indebtedness which the legislature could provide for paying by enacting that the next appropriation should be for that express purpose, if the appropriation should be as large as that made in 1915. If less than that, the debt would be paid by two average appropriations.

Taking this view of the situation, I have not deemed it necessary to figure out the exact amount the smaller diverted items would have earned. A few of the larger ones will illustrate the situation. Figured at three and one-half per cent. to June 30, 1915, the earnings on items in

Schedule I would be	$92,001 11
" II " "	41,995 85
" III " "	23,918 59
" VII " "	16,980 08
" VIII " "	19,114 82
" IX " "	19,354 45
On value of lands given away	123,281 27
On $70,939.02 taken from principal and spent as income	54,622 92
	$391,269 09
It is apparent without figuring that the interest on all the other items could not make the total exceed	$425,000 00
Add to this the general fund's indebtedness to the income fund for the items of interest received by the general fund and forest reserve fund on deferred payments as per Schedules XV, XVI, XVII, and XVIII	8,616 03
And receipts for hay, grass, and rent, as per Schedules XXI and XXII, which I treat as indebtedness to the income fund	3,223 00
We have a total indebtedness to the normal school fund of	$437,839 03

The appropriations made to such income fund by sub. 32 of sec. 172—54 in ch. 633, Laws 1915, were $458,751; the appropriations made in 1909 were $206,300 (ch. 320); and those made in 1907 (ch. 350, ch. 299, and ch. 505) aggregate $365,000.

Since the organization of the forestry department considerable sums have been collected for rent and hay and grass cut from swamp and indemnity lands. A small amount has

been paid into the general fund, the balance into the forest reserve fund. The amounts are shown in Schedules XXI and XXII. This being revenue derived from the lands, belonged to the income fund. I have so treated it in the accounting.

Drainage fund.

Schedules II and V show an indebtedness from the general fund to the drainage fund at the end of the fiscal year 1903 of $94,035.76, which with $1,975.18, one half paid by Fuller and others, makes the debt $96,011.94. Had the money been paid into the drainage fund and disbursed to the counties, as it would have been under the then existing statutes, no interest would have been earned. The legislature could probably control that fund, change the statute requiring its distribution among the counties, and hold it in the treasury for future use for drainage. If the act of 1897, ch. 367, is construed to mean that all moneys thereafter received from the sale of drainage fund lands shall not be distributed among the counties to be used for drainage, but shall become part of the general fund and be used for general state purposes, it evidences the decision of the legislature that no more of such lands or proceeds from sales of them are necessary for drainage, and all unsold lands and receipts from future sales became part of the normal school fund, and the general fund is indebted to the normal school fund for said $96,011.94. If the meaning of the act is simply that the drainage fund money should be placed in the state treasury and held there to be used for drainage purposes as the legislature might thereafter direct, the act would not amount to a decision that it was not necessary for drainage. As no express appropriation to any other particular use was made of such moneys as might be paid into the general fund, received from the sale of drainage fund lands, the act of 1897 has been construed by subsequent legislatures and the attorney general as simply requiring the money belonging to the fund to be held in the state treasury, and when occasion arose for

its use for drainage the legislature could provide for such use and transfer enough from the general fund to the drainage fund to meet the appropriation for drainage made by the legislature. Following this construction, the legislature has, in 1903 and since, appropriated to uses which it decided were reclamation, within the meaning of the act of 1850, moneys in the drainage fund and provided that moneys in the general fund received from the sale of swamp lands should be transferred to the drainage fund. In pursuance of such acts there were transferred from the general to the drainage fund the following amounts:

During the fiscal year ending in 1905	$15,907 46
" " " " " " 1912	50,000 00
" " " " " " 1913	31,000 00
" " " " " " 1914	25,500 00
	$122,407 46

While there never was a permanent drainage fund, principal invested producing an income, the fund would be equitably entitled to what the general fund had derived from the drainage fund money. This would probably be two per cent., which banks paid on money deposited with them by the state treasurer. Adding interest on the several items shown in Schedules II and V which belonged to the drainage fund, and the amount would still be considerably less than said amounts transferred from the general to the drainage fund.

I have treated the general fund's indebtedness to the drainage fund as fully paid.

All indebtedness is from the general fund.

The schedules show large amounts of trust funds paid to the forest reserve fund. The forest reserve fund, as above shown, is only in part a trust fund. Only such lands and moneys as have been given to the state in trust for a forest reserve are held in trust. The trust is created by the terms of the grants. It is in no sense a constitutional trust. All other moneys, lands, or other property in the forest reserve

fund belong to the state as property in the general fund not fettered by any constitutional or other trust. Any claim that a constitutional trust fund has for its property diverted to the forest reserve fund is a claim against the general fund. The order and judgment mentions no indebtedness from any fund except the general fund. While I have in separate schedules kept separate the items belonging to the normal school fund paid into the forest reserve fund, I have treated the amounts as creating indebtedness against the general fund.

A separate account has been kept by the forestry department of all its dealings with property and moneys given to the state in trust for forestry purposes, and in making this accounting I have only dealt with that part of the fund which is not a trust fund.

The following are the schedules above referred to, numbered from I to XXII:

Schedule I. Amounts paid into general fund from receipts from sale of swamp lands partitioned to *normal school fund* under act of 1865. (The year named is that in which the fiscal year ended.)

Year 1898, amount		$45,091 40
" 1899 "		14,395 00
" 1900 "		19,403 00
" 1901 "		6,287 19
" 1902 "		3,300 00
" 1903 "		5,181 00
" 1904 "		39,560 25
" 1905 "		30,208 62
" 1906 "		11,255 00
" 1907 "		14,932 00
" 1908 "		13,065 00
" 1909 "		3,575 00
" 1910 "		3,428 00
" 1911 "		4,661 00
" 1912 "		3,409 00
" 1913 "		267 00
		$218,018 46

NOTE.—$84 of said amount paid into said general fund during the year 1912 was for land the sale of which was canceled, and belongs to the party paying it. I have deducted it from the amounts received by the general fund, leaving the balance..... $217,934 46

Schedule II. Amounts paid into general fund from receipts from sale of swamp lands partitioned to the *drainage fund* under the act of 1865. (The year named is that in which the fiscal year ended.)

Year 1898, amount			$51,253 44
" 1899 "			12,330 00
" 1900 "			14,357 00
" 1901 "			5,718 00
" 1902 "			3,370 00
" 1903 "	$91,992 44		4,964 00
" 1904 "			32,583 52
" 1905 "			23,502 00
" 1906 "			10,290 00
" 1907 "			14,455 00
" 1908 "			15,965 00
" 1909 "			2,935 00
" 1910 "			4,265 00
" 1911 "			3,024 00
" 1912 "			2,310 40
" 1913 "	110,087 92		758 00
	$202,080 36		$202,080 36

NOTE.—$144 of said sum paid to said fund during the year 1912 was for lands the sale of which was canceled and belongs to the party paying it. It should be deducted from the amount chargeable to the general fund..... $201,936 36

Schedule III. Amounts received from the sale of indemnity lands which were never partitioned between the normal school and drainage funds, and paid into the general fund and not transferred to normal school or drainage fund.

Year 1904, amount	$21,625 00
" 1905 "	18,758 00
" 1906 "	9,695 00
" 1907 "	13,435 00
" 1908 "	5,770 00
" 1909 "	735 00
" 1910 "	4,255 00
" 1911 "	800 00
" 1912 "	2,248 00
" 1913 "	2,690 00
" 1914 "	345 90
	$80,356 90

Schedule IV. Amounts collected for *trespass* upon and timber sold from swamp lands partitioned under the act of

1865 to the *normal school fund* and paid into the general fund.

Year	1898,	amount	$661 23
"	1900	"	503 50
"	1901	"	188 00
"	1902	"	433 73
"	1903	"	237 15
"	1904	"	1,239 68
"	1905	"	499 00
"	1907	"	53 46
"	1909	"	819 71
"	1911	"	602 78
			$5,238 24

Schedule V. Amounts collected for *trespasses* upon and timber sold from swamp lands partitioned under the act of 1865 to drainage fund, paid into general fund.

Year	1893,	amount		$683 62
"	1899	"		15 00
"	1900	"		944 72
"	1902	"	($2,043 34)	400 00
"	1904	"		1,254 18
"	1907	"		150 00
"	1909	"		876 15
"	1910	"	($2,381 01)	100 68
			($4,424 35)	$4,424 35

Schedule VI. Amount collected for trespasses upon and timber sold from indemnity lands not partitioned between the normal school and drainage funds under the act of 1865 and paid into the general fund.

Year	1904,	amount	$1,370 16

Schedule VII. Amounts paid into the *forest reserve fund* from sales of indemnity lands that were never partitioned between the normal school and drainage funds.

Year	1907,	amount	$49,864 00
"	1908	"	444 00
"	1909	"	644 50
"	1911	"	13,543 00
"	1912	"	1,862 00
"	1913	"	209 00
"	1914	"	1,746 16
			$68,312 66

Schedule VIII. Amounts paid into forest reserve fund from the receipts from the sale of swamp lands partitioned to the normal school fund under the act of 1865.

Year 1906, amount		$2,614 50
" 1907 "		21,893 80
" 1908 "		8,422 00
" 1909 "		4,563 00
" 1910 "		4,461 17
" 1911 "		40,951 00
" 1912 "		16,908 37
" 1913 "		9,615 89
" 1914 "		7,294 00
		$116,723 73
NOTE.—$613 of this amount was the price paid for land, the sale of which was canceled and money returned to purchaser or held for him in treasury		613 00
		$116,110 73

Schedule IX. Amounts paid into the forest reserve fund from receipts from the sale of swamp lands partitioned to the drainage fund under the act of 1865.

Year 1906, amount		$1,122 50
" 1907 "		23,833 00
" 1908 "		7,499 00
" 1909 "		4,473 00
" 1910 "		5,575 35
" 1911 "		42,998 00
" 1912 "		14,276 00
" 1913 "		10,158 49
" 1914 "		9,737 00
" 1915 "		130 00
		$119,803 34
Amount refunded to purchasers on canceled sales		916 00
		$118,886 34

Schedule X. Amounts collected for trespass upon and timber sold from swamp lands partitioned under the act of 1865 to the *normal school fund* and paid into the forest reserve fund.

Year 1906, amount		$673 40
" 1907 "		5,675 11
" 1908 "		1,633 59
" 1909 "		10,417 49
" 1910 "		3,064 87
" 1911 "		8,664 24
" 1912 "		9,162 89
" 1913 "		10,335 37
" 1914 "		2,442 74
" 1915 "		99 06
		$52,168 76

Schedule XI. Amounts collected for trespass upon and timber sold from swamp lands partitioned in 1865 to *drainage* fund and paid to *forest reserve fund.*

Year	1906,	amount	$424 43
"	1907	"	2,494 72
"	1908	"	1,252 16
"	1909	"	10,573 00
"	1910	"	3,516 08
"	1911	"	4,398 36
"	1912	"	11,053 41
"	1913	"	10,036 53
"	1914	"	2,515 50
"	1915	"	310 70
			$46,574 89

Schedule XII. Amounts collected for trespass upon and timber sold from indemnity lands not partitioned between the normal school fund and the drainage fund in 1865 and paid to the forest reserve fund.

Year	1908,	amount	$1,310 21
"	1910	"	168 65
"	1911	"	254 00
"	1913	"	1,056 12
"	1914	"	831 59
			$3,620 57

Schedule XIII. Amounts falling due on contracts for swamp lands assigned to drainage fund under act of 1865 and sold on contract, collected and paid into the general fund.

Year	1913,	amount	$235 00
"	1914	"	200 00
"	1915	"	705 00
			$1,140 00

Schedule XIV. Amounts falling due on contracts for swamp lands assigned to the normal school fund under the act of 1865 and sold on contract, collected and paid into the general fund.

Year	1913,	amount	$300 00
"	1914	"	227 00
"	1915	"	783 00
			$1,310 00

Schedule XV. Amounts of *interest* on contracts for sale of swamp lands partitioned to normal school fund under act of 1865, collected and paid into the *general fund.*

Year	1912,	amount	$233 35
"	1913	"	340 96
"	1914	"	102 66
"	1915	"	267 13
			$934 10

Schedule XVI. Amounts of *interest* on contracts for sale of swamp lands partitioned to drainage fund under act of 1865, collected and paid into the *general* fund.

Year	1912,	amount	$176 87
"	1913	"	237 29
"	1914	"	94 21
"	1915	"	16 87
			$525 24

Schedule XVII. Amounts of *interest* on contracts for sale of swamp lands partitioned to *normal school* fund under act of 1865, collected and paid into the forest reserve fund.

Year	1912,	amount	$633 02
"	1913	"	713 72
"	1914	"	1,270 25
"	1915	"	938 79
			$3,555 78

Schedule XVIII. Amounts of *interest* on contracts for sale of swamp lands partitioned to the *drainage fund* under the act of 1865, collected and paid into the forest reserve fund.

Year	1912,	amount	$672 24
"	1913	"	917 16
"	1914	"	1,164 37
"	1915	"	847 14
			$3,600 91

Schedule XIX. Amounts of principal falling due on contracts for swamp lands assigned to the *normal school fund* under the act of 1865 and sold on contract, collected and paid into the forest reserve fund.

Year	1912,	amount	$470 00
"	1913	"	1,847 80
"	1914	"	1,429 25
"	1915	"	600 00
			$4,347 05

Schedule XX. Amounts of principal falling due on contracts for swamp lands partitioned to the *drainage* fund under the act of 1865 and sold on contract, collected and paid into forest reserve fund.

Year	1912,	amount	$827 00
"	1913	"	960 00
"	1914	"	1,375 00
"	1915	"	979 20
			$4,141 20

Schedule XXI. Amounts collected for rents and hay and grass sold from swamp lands partitioned to *drainage fund* under the act of 1865 and paid into the forest reserve fund.

Year	1907,	amount	$12 60
"	1908	"	125 50
"	1909	"	34 00
"	1911	"	260 15
"	1912	"	200 00
"	1913	"	316 18
"	1914	"	465 00
"	1915	"	99 54
			$1,512 97

Schedule XXII. Amounts collected for rent and hay and grass sold from lands partitioned to the normal school fund under act of 1865 and paid into *forest reserve fund.*

Year	1910,	amount	$140 86
"	1911	"	306 72
"	1912	"	234 34
"	1913	"	400 00
"	1914	"	500 00
"	1915	"	6 50
			$1,589 35

There was collected for hay and grass sold from swamp lands partitioned under the act of 1865 to the normal school fund and paid into the general fund during year ending 1910..... $120 68

Newly acquired lands.

These were acquired by the forestry department by purchase and on tax deeds. Schedule I contains descriptions of those purchased; Schedule K of those acquired on tax title. The judgment is that they "have the cast of the constitutional trust fund lands and will be administered accordingly

until, upon a full accounting, it shall be found what part, if any, will remain after fully restoring the integrity of the trust fund lands and trust funds." The accounting shows a large indebtedness to each of the four constitutional trust funds. The integrity of said funds will not be fully restored until all of said indebtedness is paid. The reason for such lands having such cast is stated in the opinion as follows:

"On account of the unwarranted confusion of different classes of trust fund lands with lands purchased by proceeds of trust fund lands and other moneys, including money drawn from the general fund, and income from trust funds, and other confusions, all must be regarded as having the cast of trust fund lands and money so far as necessary to the full restoration of such trust fund lands and property, and identification of the amount belonging to each fund as of the date of ch. 367, Laws 1897, and further back if found practicable."

If the meaning of the court is that the newly acquired lands have the cast only of such trust fund lands as were confused with others, as only swamp and indemnity lands were so confused there is no lien upon them in favor of any fund other than the normal school fund; and if the meaning is that the lien in favor of the normal school fund extends only to securing the indebtedness to it occasioned by such confusion of lands, it would not cover the debt arising from money taken and used for other state purposes in form of loans secured by certificates of indebtedness, nor to the indebtedness arising from the lands given away and lost to the fund, nor to that arising from using the principal of the fund as income.

It may not be necessary for this report to cover the extent of that lien more definitely than it is covered by the judgment. I assume that the court would want it definitely, either by the report approved or modified and confirmed or by further provision in the judgment. The former course seems to be that indicated in the opinion. *State ex rel. Owen v. Donald,* 160 Wis. 21, 152, 151 N. W. 331.

I have construed the opinion and judgment of the court to be that upon the facts and conclusions pointed out in this report all the newly acquired lands have the cast of normal school lands, and are to be administered as such until the entire debt of the general fund as found in this report is fully paid.

CONCLUSIONS.

Following the interpretation of the court's opinion and judgment, and of the constitution and statutes, as above explained, I find and report:

1. As to the normal school fund.

(a) All of the lands conveyed to the state of Wisconsin pursuant to the provisions of the act of Congress approved September 28, 1850, and the act of Congress approved March 2, 1855, and known as swamp and indemnity lands, respectively, to which the state still holds title, belong to the normal school fund. Said lands are described in Schedules A, B, and C, referred to as part of this report. 151,442.29 acres.

(b) The southwest quarter of the southeast quarter of section twenty-two (22), township seventeen (17), range two (2) east, and the northwest quarter of the northeast quarter of section twenty-one (21), township seventeen (17), range two (2) east, which the legislature attempted by ch. 49, Laws 1897, and ch. 293, Laws 1899, to set aside as a perpetual military reserve, belong to the normal school fund.

(c) Lot nine (9), block nineteen (19), in W. M. Denmison's addition to the city of Watertown, and lots 3, 4, 5, and 8, in block 251 in the village (now city) of Manitowoc, belong to the normal school fund.

(d) All the right, title, or interest that the state of Wisconsin has in lands in the Menominee and Stockbridge and Munsee Indian reservations, for which lands patents were given to the state under the act of Congress approved September 28, 1850,—the state's title being contested in behalf of the Indians,—belong to the normal school fund. Said

lands are described in Schedule D, referred to as part of this report. The quantity shown is 16,214.48 acres.

(e) An undivided one-half of all lands in Indian reservations to which the state is entitled to patents under said act of 1850, but which have not been patented, belongs to said normal school fund.

(f) An undivided one-half interest in all claims of the state against the United States for other lands and more money than it has received, based on the provisions of the said acts of Congress of 1850 and 1855, belongs to the normal school fund.

(g) All mineral and all mining and water-power rights excepted from or reserved in patents for swamp or indemnity lands given by the state since June 12, 1909, belong to the normal school fund.

(h) Contracts held by the state for the sale since 1910 of 8,992.90 acres of swamp and indemnity lands lying north of township thirty-three (33), on which there remains unpaid $24,125, belong to the normal school fund. They are described in Schedule F, referred to as part of this report.

(i) Contracts held by the state for the sale since 1910 of 840 acres of swamp and indemnity lands lying south of township thirty-four (34), on which there remains unpaid $2,343, belong to the normal school fund. They are described in Schedule G, referred to as part of this report.

(k) Seven hundred dollars and thirty-seven cents ($700.37), one half of $1,400.74 in the state treasury to the credit of a fund designated "indemnity land fund," belongs to the normal school fund.

(l) There are in the custody of the state land commissioners securities for loans made from the principal of said normal school fund, of which there is a correct and detailed record in the office of the secretary of state, and a balance in the state treasury to the credit of said fund, all of which belong to said normal school fund.

(m) The general fund is indebted to the normal school fund in the sum of one million five hundred and seventeen thousand five hundred and fourteen dollars and twenty-three cents ($1,517,514.23), which arose as follows:

(1)	The value of normal school lands given away without consideration	$96,063 14
(2)	Moneys belonging to the principal of this fund placed in the income fund and spent	70,939 02
(3)	Moneys taken from the principal of the trust fund and used as part of the general fund for general state purposes	515,700 00
(4)	Proceeds from sales of normal school lands paid into and used as part of the general fund	419,674 69
(5)	Proceeds from sale of normal school lands paid into the forest reserve fund and used for forestry purposes	414,162 20
		$1,515,539 05
(6)	One half amount received from Fuller and others for interest in swamp lands not patented to state	1,975 18
		$1,517,514 23

(n) The normal school fund has a lien upon all the lands acquired by the state under the "forestry law," either by purchase or by tax deeds, for the full amount of said indebtedness of the general fund to said normal school fund. All of said lands have the cast of normal school fund lands and are to be administered as such until upon a full accounting it shall appear that said indebtedness has been fully paid from the proceeds of said lands or other sources. Said lands are described in Schedules I and K. The quantity shown is 157,091.44 acres.

2. As to drainage fund.

(a) There are no unsold swamp or indemnity lands which have been conveyed to the state that belong to the drainage fund.

(b) There are pending claims against the United States for other lands than have been conveyed to the state under the provisions of the acts of Congress approved September 28, 1850, and March 2, 1855, and for moneys received by the United States on the sale by it of lands claimed by

the state under said acts. One half of all lands and moneys, if any, received by the state on said claims, or others of the same character, belong to said drainage fund, subject to the decision by the legislature that said half or some part of it is not necessary for reclamation of said lands. Any such decision would automatically transfer the lands or funds affected by it to the normal school fund.

(c) Seven hundred dollars and thirty-seven cents ($700.37), one-half of $1,400.74 in the state treasury to the credit of a fund designated "indemnity land fund," belongs to the drainage fund.

(d) There is a small balance in the state treasury to the credit of the drainage fund which belongs to said fund.

(e) There is no indebtedness from the general fund to said drainage fund.

3. As to the school fund.

(a) There are in the custody of the state land commissioners securities for loans made from the principal of said fund, of which there is a correct and detailed record in the office of the secretary of state, and a balance in the state treasury to the credit of said fund, all of which belong to said school fund.

(b) The general fund is indebted to said school fund in the sum of one million five hundred and sixty-four thousand five hundred and forty dollars ($1,564,540), which arose as follows:

(1) Money taken from the principal of the said school fund and used as part of the general fund for general state purposes.....	$1,563,700 00
(2) Money derived from the sale of school lands and paid into the general fund.....	840 00
	$1,564,540 00

4. As to the university fund.

(a) There are in the custody of the state land commissioners securities for loans made from the principal of said fund, of which there is a correct and detailed record in the office of the secretary of state, and a balance in the state

treasury to the credit of said fund, all of which belong to said university fund.

(b) The general fund is indebted to said university fund in the sum of one hundred and eleven thousand dollars ($111,000), all of which arose from moneys taken from the principal of said fund and used as part of the general fund for general state purposes.

5. As to the agricultural college fund.

(a) There are in the custody of the state land commissioners securities for loans made from the principal of said fund, of which there is a correct and detailed record in the office of the secretary of state, and a balance in the state treasury to the credit of said fund, all of which belong to said agricultural college fund.

(b) The general fund is indebted to said agricultural college fund in the sum of sixty thousand six hundred dollars ($60,600), all of which arose from moneys taken from the principal of said fund and used as part of the general fund for general state purposes.

6. As to the normal school income fund.

The state has paid annually to said fund an amount equal to seven per cent. on said $515,700 since said amount was taken from said normal school fund, and has appropriated and paid to said income fund amounts far greater in the aggregate than all the other amounts for which the general fund is indebted to the normal school fund would have earned had they been in said fund and loaned. There is no indebtedness from the general fund to said income fund.

7. As to the school income fund.

The state has always paid to said fund interest at the rate of seven per cent. per annum on said $1,563,700 of indebtedness to the school fund, and has made large annual appropriations and payments to said income fund. There is no indebtedness from the general fund to said income fund.

8. As to the university and agricultural college income funds.

The state has always paid to said funds interest at the rate of seven per cent. per annum on the amount of the general fund's indebtedness to the university and agricultural college funds respectively, hereinbefore stated, and the general fund is not indebted to either of said income funds.

9. As to all said trust and income funds.

The contracts referred to above as belonging to the normal school fund (h) were treated by the state land commissioners as belonging to the forest reserve fund; and those above referred to (i) were treated by said commissioners as belonging to the general fund, and none of them were ever credited to the normal school fund.

There are in said normal school fund, belonging and properly credited to it, contracts for the sale of lands partitioned to it, made prior to 1903, on which part of the purchase money has not been paid. There are also in said university, agricultural college, and school funds contracts for the sale of lands belonging to them respectively, on which part of the purchase money has not been paid. These contracts belong respectively to the funds to which the lands belonged, and are all so carried on the books of the state land office and secretary of state.

In the foregoing statement that certain contracts and securities belong respectively to the respective funds named, the intent and meaning is that the principal belongs to said funds and the interest accrued and to accrue belongs to the respective income funds.

10. The schedules showing payments into the general and forest reserve funds show payments only to July 1, 1915. Payments of small items have been made since on the contracts referred to in Schedules F and G and have been credited to the general fund and forest reserve fund in the same

manner as before this action arose. I have not deemed it necessary to follow these payments down to date, as more might be made the next day and during the time intervening between the filing of this report and final judgment. But I find and report that all amounts paid on said contracts since July 1, 1915, or that may hereafter be paid, belong to the normal school fund, and the judgment of the court should order them transferred to and credited to said normal school fund.

(Signed) SAMUEL D. HASTINGS,
October 7, 1915. Special Referee.

Thereafter, on April 15, 1916, the Commissioners of Public Lands filed the following report:

REPORT OF COMMISSIONERS OF PUBLIC LANDS.

The mandate of the court herein having referred the above entitled cause to the Commissioners of Public Lands and Judge Samuel D. Hastings, as special referee, for the purpose of making the accounting required by the eleventh paragraph of said mandate;

And the said Judge Samuel D. Hastings, special referee, having heretofore and on the 7th day of October, A. D. 1915, made and filed in this court his report of such accounting as such referee;

And we, the Commissioners of Public Lands, having considered the said report of said Judge Samuel D. Hastings, are of the opinion and so report, that Schedule II of said report should be corrected by deducting therefrom the sum of three thousand eight hundred and seventy-five dollars and twenty-five cents, which amount, received for the sale of certain city lots in the city of Fond du Lac, is included in the computation of said Schedule II, and which were never any part of the trust fund lands.

With the above exception, we approve of and concur in the report as filed by said Judge Samuel D. Hastings, special referee, herein.

Dated this 15th day of April, A. D. 1916.

J. S. DONALD, Secretary of State,
HENRY JOHNSON, State Treasurer,
WALTER C. OWEN, Attorney General,
Commissioners of Public Lands.

The following order was made by the court and filed April 15, 1916:

The referees' report in the above entitled cause having been duly considered and conclusions reached in respect thereto:

ORDERED as follows:

1st. The amount in Schedule II is changed by deducting $3,875.25, proceeds of Fond du Lac, Wisconsin, lots, they not having been trust fund property.

2d. In harmony with such change, the amount under subdivision (m) of the conclusions, as proceeds of sale of land of normal school character, paid into the general fund, is changed to $415,799.44, making the total which should be accounted for by the state to the normal school fund, exclusive of that represented by certificates of indebtedness, $996,591.77, and with the amount so represented, $1,512,291.77.

3d. The report is further modified so far as it would, when confirmed, otherwise require dues to the trust fund to be charged against and deplete the general fund in advance of provision being made therefor by the legislature.

4th. The conclusions in the report, subject to the changes aforesaid, are confirmed; provided, however, that, regardless of the strict legal character of the certificates of indebtedness, the trust fund, as to income, should be protected as heretofore, according to the letter of such certificates, and

the other indebtedness to the trust fund referred to in subdivision 2 of this order should be suitably protected as to income until the principal shall have been restored by legislative action.

5th. ORDERED further that, whereas the report of the referees brings the matters referred to therein down to July 1, 1915, as indicated in the last paragraph of such report, the state officers having charge of the property and funds of normal school character should continue such account as to occurrences with such property since such date or hereafter, on the same basis as that indicated in such report, correcting any errors which may have been made since such date by payment of money into the general fund or forestry fund which rightfully should have been paid into the normal school fund or normal school fund income.

6th. ORDERED further that this confirmation shall be subject to correction on application made therefor as may be found hereafter necessary in order to correct mistakes.

7th. ORDERED further that a copy of the referees' report, together with this order and the schedules referred to in such report, be recorded in the office of the Commissioners of Public Lands, in such form as to be convenient for reference in respect to any matter therein referred to.

Dated the 15th day of April, 1916.

By the Court,

ARTHUR A. MCLEOD,

Clerk.

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1. Where, pursuant to sec. 2022, Stats., the commissioner of banking takes possession of the property and business of a banking corporation and while liquidating its affairs occupies and uses premises of which such corporation was lessee, he is liable to pay for such use out of the funds of the corporation in his hands; and the rent stipulated in the lease fixes the measure of such liability. *Citizens Savings & T. Co. v. Rogers,* 216

2. Where at the time the commissioner took charge of an insolvent trust company a certain sum was due to the company on open account from its lessor, and thereafter the lessor became bankrupt and the commissioner and the trust company filed their claim on open account against such lessor in the bankruptcy proceedings, stating in the proof of claim that the said sum was due over and above all setoffs, they thereby waived their right to offset said sum against rent due the lessor. *Ibid.*

3. Amounts due to the trust company as interest on a mortgage given to it by its lessor and not included in said open account might be offset against rentals up to the time the lessor became a bankrupt; but as to rents thereafter accruing the right of offset did not exist. *Ibid.*

4. The trustee in bankruptcy of the lessor, having become vested with the title and right to possession of the building, a part of which was leased to the trust company, was entitled to the rents so long as he elected to retain possession of the building in the interest of the creditors whom he represented. *Ibid.*

5. Where such trustee in bankruptcy afterwards elected to surrender the building to the trustee for the holders of the bonds secured by the mortgage on the building given by the bankrupt lessor, and the bankruptcy court so ordered and said trustee for the bondholders took peaceable possession without any protest from the mortgagor or its creditors, such possession entitled the trustee to collect the rents from the lessees, including the commissioner of banking and the trust company whose business was being liquidated. *Ibid.*

6. The bankrupt lessor and mortgagor having had only a ninety-nine-year leasehold interest in a part of the mortgaged building, and the trustee under the mortgage, after receiving possession from the trustee in bankruptcy, having in turn surrendered said part of the building to the owners, such owners became entitled either to their share of the rent thereafter accruing under the

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1. Under sec. 1379—20, Stats., an appeal may be taken from an order of the circuit court requiring drainage commissioners to modify their report, before such modification is actually made or the report as modified is confirmed. *Ward v. Babcock*, 539
2. The establishment of a drainage district by the court pursuant to sec. 1379—17, Stats. 1911 (sec. 1379—14, Stats. 1915), conclusively establishes that all the lands included will be benefited and that the total benefits will exceed the total damages and cost of construction. *Ibid.*
3. Upon the trial, pursuant to sec. 1379—20, Stats., of an issue as to benefits, arising on the remonstrance of a landowner, it was error to exclude testimony offered by the commissioners tending to explain the difference between the assessments for construction and the assessments of benefits, and to refuse to give a requested instruction to the effect that the assessment of benefits upon which the jury was required to pass constituted the basis upon which the assessment for construction should be apportioned and in no manner indicated the amount which the remonstrant might be required to pay toward the cost of construction. *Ibid.*
4. In reviewing an assessment of benefits the jury should have before it, as nearly as possible, all the data upon which the commissioners acted. *Ibid.*
5. Benefits in such cases, like values, may be proven not only by opinion but by relevant instances; and if other tracts of land bear substantially the same relation to the improvement as does the land of the remonstrant, the benefits assessed to such other tracts and acquiesced in by the owners thereof would have some probative force. *Ibid.*
6. An instruction, in such a case, that the jury were not to consider any general benefits caused by the proposed ditches and drains, but only such actual special benefits, if any, as were caused to the lands of the remonstrant, and that general benefits are such as the owner of the land enjoys in common with the public at large, and special benefits are such direct and actual benefits as are received exclusively by the land in question, was inappropriate and erroneous as tending to suggest to the jury that the lands of the remonstrant must have received special benefits over and above other lands in the drainage district. *Ibid.*
7. If underdrainage of the remonstrant's land is necessary to the obtaining of beneficial results from the drainage scheme, evidence as to the cost of such underdrainage is relevant and material upon the question of benefits; and it was error in such a case to instruct the jury that in assessing benefits they should not consider any increase in market value which would be caused by drains so put in by the remonstrant. *Ibid.*
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2. Such an action being one to enforce a penalty or forfeiture for criminal misconduct, the defendant cannot be compelled to be a witness against himself therein. *Ibid.*

3. A proceeding for the examination, under sec. 4096, Stats., of a defendant in such an action, the purpose of which was to prove by himself that he was guilty of a criminal violation of the primary law which would forfeit his right to hold an office to which he had been elected, was properly dismissed. *Ibid.*

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1. A covenant to renew a lease, if the terms are definitely fixed, or means are provided whereby they may be made certain by construction, is enforceable. *Fergen v. Lyons*, 131

2. In a lease of a farm for one year, a clause providing that the lessee "has the first privilege of renting the farm if not sold at the end of the year" is *held* susceptible of being made certain by the application of settled rules for construction. *Ibid.*

3. Reading such clause in the light of all the terms of the lease and the circumstances characterizing its making, and applying the rule that a meaning should be ascribed thereto which will sustain it as a binding promise for a renewal if that can reasonably be done, it is *held* to have the effect of a general promise to renew, at the lessee's option, in case of the farm not being sold before the end of the first term, if the lessor concluded to lease it for the succeeding year. *Ibid.*

4. Such a general promise, subject to the contingencies mentioned, would call for a new lease for a year on the same terms as the original lease, but without any covenant for further renewal. *Ibid.*

5. Tender of the down payment required for a renewal lease was not necessary, before bringing an equitable action on the covenant to renew, where the lessors had voluntarily disabled themselves from keeping the covenant before the renewal lease was demandable, thus in effect waiving the tender. *Ibid.*

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1. An officer's return showing service of a summons can be overcome only by the most clear and satisfactory evidence to the contrary. *Arapahoe State Bank v. Houser*, 80
2. Mere denial of service by the interested party is not ordinarily sufficient to overcome the officer's return, especially when that return is supported by the officer's testimony. *Ibid.*
3. In this case the return being supported by the officer's positive, consistent testimony as to the circumstances thereof and corroborated by many other circumstances, and impeached only by the denial of the interested defendant, a finding of the trial court that the summons was not served on such defendant is *held* to be contrary to the clear preponderance of the evidence. *Ibid.*

PROFITS: Loss of: Damages. See LANDLORD AND TENANT, 11, 12. VENDOR AND PURCHASER, 3.

PROHIBITION.

1. The writ of prohibition is a high prerogative writ by which, where there is no other adequate remedy, an inferior court is prevented from going outside of or beyond its jurisdiction. *In re Weaver*, 499
2. The fact that there has been no preliminary examination of the accused is not sufficient ground for the issuance of a writ of prohibition to prevent the circuit court from proceeding in a criminal action (1) because that fact does not affect the jurisdiction of the circuit court, and (2) because the remedy by plea in abatement is adequate and complete. *Ibid.*

PROMISSORY NOTES. See BILLS AND NOTES.

PROXIMATE CAUSE. See CARRIERS, 16. HIGHWAYS, 14. LANDLORD AND TENANT, 20. MASTER AND SERVANT, 2, 8, 14, 16, 21. NEGLIGENCE, 1–3. RAILROADS, 8.

PUBLIC LANDS: Trust lands and funds. See *State ex rel. Owen v. Donald*, 609

PUBLIC POLICY. See ASSIGNMENTS, 6. ATTORNEY AND CLIENT. CONTRACTS, 5. CORPORATIONS, 4. INSURANCE, 5, 13, 22, 25, 35.

PUBLIC SALES. See CONTRACTS, 4.

PUBLIC SCHOOLS: Graduating exercises in churches: Prayers. See CONSTITUTIONAL LAW. MANDAMUS.

PUBLIC UTILITIES.

See RAILROADS, 1–6. STATUTES, 10. TAXATION, 1–3. TELEGRAPHS AND TELEPHONES.

1. Absence of legal right on the part of a city to condemn the plant of a public utility therein goes to the jurisdiction of the circuit court to entertain an action brought by the city for that purpose under sec. 1797*m*—80, Stats. 1913, and *certiorari* will lie to review the court's proceeding. *State ex rel. Wis. T., L., H. & P. Co. v. Circuit Court*, 234
2. Under sec. 1797*m*—77, Stats. (by which licenses, permits, and franchises granted to public utilities before the Public Utility

RAILROAD COMMISSION.

RAILROADS.

REFORMATION OF INSTRUMENTS.

RELIGIOUS SOCIETIES.

SALES.

SHERIFFS AND CONSTABLES.

See PROCESS.

STATUTES.

Constitutionality. See COMMERCE. COURTS, 1. HIGHWAYS, 4. MASTER AND SERVANT, 18, 20. RAILROADS, 1, 4, 5, 11. TELEGRAPHS AND TELEPHONES, 5, 9.

Same: Partial or total invalidity. See STATUTES, 6.

1. Mere general words in a state statute will ordinarily be restrained so as to include only such subjects as the legislature had jurisdiction to include; but where the plain meaning of the statute is that it shall apply equally to a subject over which the legislature has jurisdiction and one over which it has no jurisdiction, and such subjects are so interrelated that it is reasonably apparent that the regulation of one alone in the manner and to the extent specified in the statute would not have been attempted, then the statute, being invalid in its main purpose, must be held wholly nugatory. *Chicago, M. & St. P. R. Co. v. Rock Co. S. Co.* 374

2. Statutes void in their main purpose or void as to a substantial part which is closely interrelated with other substantial parts thereof are void *in toto. State ex rel. Richter v. Chadbourne,* 410

Same: Enactment: Titles: General and local laws.

3. A law may be general within the meaning of sec. 21, art. VII, Const. (providing that "no general law shall be in force until published"), and at the same time be local within the meaning of sec. 18, art. IV (providing that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title"). *State ex rel. Richter v. Chadbourne,* 410

4. If, after giving the title of a private or local law a liberal construction, including within its meaning all matters reasonably germane thereto, it is found that the body of the act contains matters of substance foreign to the title so construed, then such law falls within the condemnation of the constitution. *Ibid.*

STREET AND INTERURBAN RAILWAYS.

Injuries to passengers.

1. The degree of care which those operating an interurban railway are bound to exercise towards passengers about to board a car is the utmost or highest degree of care that the ordinarily prudent man would exercise under similar circumstances, consistent with such mode of transportation. *Hiller v. Johnson*, 19

2. In an action for personal injuries alleged to have been sustained through the negligent starting of an interurban car as plaintiff was attempting to board it, an instruction as to the care which defendants were bound to exercise towards passengers about to board a car was not erroneous on the ground that it assumed that plaintiff was a passenger, where it was given with reference to a question in the special verdict which the jury were to answer only in case they found, in answer to previous questions, facts which constituted plaintiff a passenger, viz. that the car was standing still when he attempted to board it, and that defendants' servants started it while he was in the act of boarding it. *Ibid.*

3. In an action for injuries sustained by a passenger who was thrown from the vestibule of defendant's interurban car as it was turning a street corner, the evidence—including testimony of the motorman that the speed did not exceed from five to seven miles per hour, and testimony of other passengers as to the effect produced by rounding the corner at the rate at which the car was going—is *held* to sustain a finding by the jury that defendant was negligent in running the car at an excessive speed around the curve. *Engen v. Chippewa Valley R., L. & P. Co.* 515

4. Whether or not a passenger is guilty of negligence in riding on the platform of a street car when there are vacant seats inside is ordinarily a question for the jury, although cases may arise where negligence is so clearly established as to be a matter of law. *Ibid.*

5. It appearing in this case that the accident happened within the limits of a city, where the interurban cars performed the usual functions of urban street cars, that there was no rule forbidding passengers to occupy the platform, and that during this same trip other passengers had ridden upon the platform without protest from the conductor, a finding by the jury, approved by the trial court, acquitting the injured passenger of contributory negligence is *held* not so clearly wrong that this court should disturb it, although it also appeared that he had been standing close to the edge of the platform next to the open door, that he was not holding on to anything, that he was familiar with the road and the various turns the car would have to make, and that he knew there were vacant seats inside. *Ibid.*

Ejection of passenger: Standing on platform: Rules.

6. A rule of a street railway company that "the conductor shall request passengers to enter the car and move forward, endeavoring to keep the rear platform clear at all times," is a proper and reasonable regulation which the conductor is authorized to enforce and with which passengers must comply if they can reasonably do so. *Coombs v. Southern Wis. R. Co.* 111

SUBSCRIPTIONS.

SUNDAY.

TAXATION.

Public utilities: Assessed valuation: Apportionment among taxing districts.

1. An electric light and power company whose property and business extends into two or more taxing districts cannot maintain an action under sec. 1164, Stats., to recover a part of the taxes paid by it in one of such districts, on the ground that such taxes were based upon an improper apportionment among the districts of the assessed valuation of its property, unless it shall appear, not only that the company paid to the defendant more than the latter's just portion of the whole tax, but also that—because of the higher rate in the defendant district, or for some other reason—the whole amount of the taxes paid by the company in all the districts was increased by such improper apportionment. *Burkhardt M. & E. P. Co. v. Hudson,* 361
2. All of the taxing districts interested in the apportionment should be made parties to such an action, so that the whole controversy may be disposed of therein. *Ibid.*
3. Under sec. 1037*c*, Stats. 1911, where the property or business of a public utility mentioned in sec. 1037*a* extends into two or more taxing districts the ratio by which the proportion of the assessed valuation properly belonging to each district is to be determined is that expressed by taking as the numerator the sum of the property located and the business transacted in the district in question and as the denominator the total of the property and business in all the districts. *Ibid.*

Of incomes: Nonresidents: Situs of income or property.

4. Sub. 3, sec. 1087*m*—2, Stats. 1911, imposes a tax only upon such part of a nonresident's income as is derived from sources within the state or within its territorial jurisdiction. *Bayfield County v. Pishon,* 466
5. The language of said statute being unambiguous, it must be given its plain, ordinary meaning. *Ibid.*
6. The income of a trust estate—consisting of moneys, stocks, bonds, and other securities—created by a resident testator in favor of nonresident beneficiaries and being administered by a nonresident trustee appointed by and amenable to a county court of this state, is not taxable in this state where none of such income was derived from property actually located or business actually transacted within the state. *Ibid.*
7. The property, in such a case, is not constructively in this state, so as to make the income thereof taxable here, merely because a county court of this state is administering the trust. *Ibid.*

Sales of land for taxes: Affidavit of publication of notice: Filing.

8. Where the printer's affidavit of publication of notice of a tax sale was filed with the county clerk after the last publication but before the sale it will be presumed to have been so filed by the county treasurer. *Baker L. & T. Co. v. Bayfield Co. L. Co.* 471

TELEGRAPHS AND TELEPHONES.

TRADE-MARKS AND TRADE-NAMES.

Manufacture and sale of articles: Right to use of names.

1. A man may manufacture and sell unpatented articles and use his own name in doing so, but if another has previously and rightfully made that name valuable as a trade-name descriptive of the same kind of goods he has created a property right therein which may not be appropriated by a subsequent manufacturer, even though he bear the same name; and, if necessary to prevent that result, conditions and limitations upon the use of the name will be enforced by the courts, which will preserve to the first manufacturer the fruits of his industry and prevent the public from being misled. The extent of these conditions and limitations varies according to the circumstances of the case and is limited only by their sufficiency to accomplish the result named. *J. I. Case Plow Works v. J. I. Case T. M. Co.* 185
2. Plaintiff, the J. I. Case Plow Works (founded by J. I. Case), which for many years has manufactured plows and sold them under the trade-name "Case" or "J. I. Case," is *held* to be entitled to the exclusive use of that trade-name on plows and in advertisements thereof, as against defendant the J. I. Case Threshing Machine Company (also founded by J. I. Case), which for many years manufactured and sold threshing machines and only recently began the manufacture and sale of plows. *Ibid.*
3. The fact that some part of the public had no exact knowledge as to what company manufactured the "Case" plow, and many supposed it to be made by the same institution, or a branch thereof, which made the threshing machines, did not affect plaintiff's right to the exclusive use of that trade-name on plows. *Ibid.*
4. Neither the said trade-name nor the trade-mark of said defendant (which embodies the name "J. I. Case" prominently displayed) may be used upon plows made by defendant; and this applies equally to plows sold singly or in gangs or as part of an engine-drawn plowing outfit. *Ibid.*
5. A complete denial of the right of said defendant to affix its corporate name to its plows not being deemed necessary, however, there may be placed on the plow or beam a statement that it is made by or for said company, provided there shall also be placed thereon and conspicuously displayed the words "NOT the original Case plow," or "NOT the Case plow made by J. I. Case Plow Works." *Ibid.*
6. In its advertisements, catalogs, or other printed matter said defendant must not use in immediate connection with matter re-

TRIAL.

Course and conduct of trial: Experiments before jury.

Changing cause of action. See ACTION. MASTER AND SERVANT, 9–11.

Questions for jury. See CONTRACTS, 6. HIGHWAYS, 10. MASTER AND SERVANT, 7, 21. MUNICIPAL CORPORATIONS, 5, 11–13. NEGLIGENCE, 4. PRINCIPAL AND AGENT, 3. STREET RAILWAYS, 4, 7, 9, 10. TRIAL, 3.

Instructions to jury. See INSTRUCTIONS TO JURY.

Sealed verdict: Defects: New verdict. See BASTARDY, 2.

Special verdict: Answers by court.

Same: Form and sufficiency. See HIGHWAYS, 8, 9, 11, 12. MASTER AND SERVANT, 14, 21.

Same: Inconsistency. See MASTER AND SERVANT, 17.

Same: Omitted matters: Presumption on appeal. See CONTRACTS, 14.

When verdict not disturbed on appeal. See APPEAL, 4.

VENDOR AND PURCHASER OF LAND.

Requisites and validity of contract: Description.

1. A contract to convey an undivided one acre out of a designated tract containing a specified number of acres may be valid; but where the tract out of which the acre is to be sold is not capable of identification from the instrument evidencing the sale, nothing passes for want of description. *Hamley v. Till*, 533

Same: Lease with option to purchase. See LANDLORD AND TENANT, 7–9.

Construction of contract.

2. Where a contract to convey cut-over land provided that the vendors should "clear" a certain seven acres by the following first day of April, and it appeared that the land had been cleared once and was an old pine slashing grown up to poplars which could easily be plowed under, the word "clear" was so far ambiguous that parol evidence of the circumstances surrounding the transaction was admissible to show the sense in which the word was used; and such evidence is *held* to sustain a finding by the jury to the effect that the parties intended to require the removal of old stumps and down timber so that the seven acres would be ready for immediate plowing and planting. *Zielica v. Worzalla*, 603

Remedies of vendor: Action for purchase price: Reformation of contract. See ACTION, 1, 2.

Remedies of vendee: Recovery of money paid. See MONEY HAD AND RECEIVED.

Same: Breach of agreement to clear land: Damages.

3. For a breach of an agreement by the vendors of land to clear a part thereof the purchasers' damages should include the reasonable cost of completing the clearing as the contract required and the reasonable value of the use of the land for one season, if they lost such use as the direct result of the breach; but the "reasonable value of the use" should be understood to mean fair rental value, and an instruction that under certain circumstances the jury might find as damages the full value of the crops which it was reasonably certain could have been produced, was probably erroneous. *Zielica v. Worzalla*, 603

4. An error, in such case, in the instruction as to the measure of damages, was not prejudicial, where it appears that the sum found by the jury did not exceed the reasonable cost of clearing the land, together with its reasonable rental value. *Ibid.*

WILLS.

Undue influence.

1. To justify the setting aside of a will on the ground of undue influence there must be clear and satisfactory evidence establishing the susceptibility of the testator to such influence, an opportunity for the exercise thereof, a disposition to exercise it, and a result indicating its exercise; but the clear establishment of three of these essential elements may with slight additional evidence as to the fourth compel the inference of its existence, especially where the will is not a natural one such as relationship usually dictates. *Elliott v. Fisk*, 249

2. Thus, in this case, the finding of the trial court that a will executed four hours before the testator's death, when he was in an extremely feeble condition, was the result of undue influence exerted by the beneficiaries, who were not related to him and to whom he gave all his property to the exclusion of an aged father and other near relatives with whom he was on good terms, is *held* not clearly erroneous, three of the elements above mentioned being pretty clearly established, although as to the disposition of the beneficiaries to exercise undue influence the proof is meager. *Ibid.*

WITNESSES.

Competency: Husband and wife: Divorce.

1. Under sec. 2374, Stats., providing in substance that a judgment of divorce shall not affect the status of the parties until one year after its entry, a divorced wife is not a competent witness to testify for or against her husband until after the expiration of the year. *Hiller v. Johnson*, 19

Examination of parties, etc., before trial: Employees: Guardians. See APPEAL, 2. DIVORCE, 6. ELECTIONS, 3.

2. Whether it was error to permit a discharged employee of the defendant company to be examined as an adverse witness, is not determined, such error, if any, being harmless.] *Engen v. Chippewa Valley R., L. & P. Co.* 515

3. The guardian *ad litem* of an infant party is not subject to an examination under sec. 4096, Stats. 1915, at the instance of the adverse party. While technically a party to the action, such guardian is not "the party" nor is he an "agent" of the infant, within the meaning of that section; and the fact that he is also the father and general guardian of the infant does not bring him within the statute. *Rohleder v. Wright*, 580

4. "Party" in sec. 4096 means real party in interest. *Ibid.*

WORKMEN'S COMPENSATION.